APPEAL BY ISLAND GAS LTD, PORTSIDE
ELLESMERE PORT

APPEAL REFERENCE APP/A0665/W/18/3207952

# CLOSING SUBMISSIONS

## ON BEHALF OF THE RULE 6 PARTY

## FRACK FREE ELLESMERE PORT & UPTON

## INTRODUCTION

1. IGas's proposed exploration for shale gas, on a site 320m from local residences and 50m from local businesses, is not sustainable. Its impact in terms of greenhouse gas emissions, its negative air quality impacts, negative public health impacts, the social and economic harm it will cause, the risks it poses to nearby residents and businesses and the way in which it undermines the regeneration vision for Ellesmere Port and its historic Waterfront mean that it is not sustainable development, and it is in breach of two key local strategic polices: STRAT 1 and STRAT 4. It is also in breach of policies SOC 5 on health and well-being; ENV 7 on alternative energy supplies; ENV 1 on water management; ENV 4 on biodiversity and ENV 9 on mineral development.

## PRELIMINARY MATTERS – THE SCHEME DESCRIPTION

2. The Rule 6 Party invites the Inspector to amend the description of the scheme. There is a firm legal basis for this. The Planning Encyclopaedia provides as follows [P72.06]:

> "As a general rule a planning permission is to be construed within the four corners of the consent itself, i.e. including the conditions in it and the express reasons for those conditions unless another document is incorporated by reference or it is necessary to resolve an ambiguity in the permission or condition: *R v Ashford DC* [1998] PLCR 12 at 19 (Keene J); *Carter Commercial Developments v Secretary of State* [2002] EWCA Civ 1994 at [13] and [27] (Buxton and Arden LJJ); *Sevenoaks DC v First Secretary of State* [2004] EWHC 771 (Admin) at [24] and [38] (Sullivan J); *R (Bleaklow Industries) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 206 at [27] (Keene LJ); *R (Midcounties Co-operative Limited) v Wyre Forest DC* [2010] EWCA Civ 841 at [10] (Laws LJ).
>
> The reason for the strict approach to the use of extrinsic material is that a planning permission is a public document which runs with the land. Save where it is clear on its face that it does not purport to be complete and self-contained, it should be capable of being relied on by later landowners and members of the public reading it who may not have access to extrinsic material: *Slough Estates v Slough Borough Council* [1971] AC 958 at 962 (Lord Reid); *Carter Commercial Developments v Secretary of State* at [28] (Arden LJ); *R (Bleaklow Industries) v Secretary of State for Communities and Local Government* [2009] EWCA Civ 206 at [27])

> (Keene LJ); *Barnett v Secretary of State* [2009] EWCA Civ 476 at [16]–[21] (Keene LJ, approving Sullivan J at first instance); *R (Midcounties Co-operative Limited) v Wyre Forest DC* [2010] EWCA Civ 841 at [10] (Laws LJ)."

3. The Rule 6 Party relies on this and the cases cited therein.

4. The Appellant's description of the proposed development in its planning application was: "Mobilise well test equipment, including a workover rig and associated equipment, to the existing wellsite to perform a workover, drill stem test and extended well test of the hydrocarbons encountered during the drilling of the EP-1 well, followed by well suspension"

5. This requires reference to be made to documents extrinsic to the planning permission in order to understand what hydrocarbons were "encountered during the drilling of EP1". It is unclear to any reader of the description what those hydrocarbons or where to find out that information. No explanatory document is incorporated by reference.

6. The description is also highly confusing. If a reader reasonably referred to the previous planning permission for "drilling of the EP-1 well", in order to understand what hydrocarbons may have been "encountered", the reader would find an explicit reference to EP1 having been drilled "for coal bed methane appraisal and production". A reasonable reader might then think the instant application for planning permission refers to that hydrocarbon (thus making the whole application entirely redundant).

7. In light of the very well-established line of authority decrying a planning permission requiring reference to extraneous material, and needing strictly to be construed within the four corners of the permission itself, the Appellant's submission in the document *Scheme Description: Proposed Amendment* (19/2/19) ("**Scheme Description Submissions**", document A5) that amendment of the proposed description is "entirely unnecessary" is wrong as a matter of law.

8. The Appellant suggests in the Scheme Description Submissions that the reference to "hydrocarbons" is an "industry position" (A5 pg1). That is not so– in the Appellant's own planning permission at Tinker Lane, the description is as follows:

> "The exploratory well would be a vertical multi-core well to target the Bowland Shale and Millstone Grit geological formations to assist with the assessment of the shale gas basin in the area. In addition, three sets (with each set containing up to 3 boreholes) of monitoring boreholes would be installed to sample and monitor groundwater and ground gas during the drilling of the exploration well. …."

9. The Rule 6 Party submits that there would be no difficulty with specifying "shale gas", given that is the hydrocarbon which, on the Appellant's evidence, its operation aims to test. That fluids would also flow as part of the testing does not change the fact that the Appellant's application is aimed at, and designed to, test for shale gas. Furthermore, the "fluids" referred to in the Scheme Description Submissions as a reason for the reference to "shale gas" being "imprecise" would also not be captured in the term "hydrocarbon" – demonstrating that the possibility of "fluids" flowing is a non-issue. Similarly, the possibility of other hydrocarbons flowing during the testing would not make a description specifying "shale gas" imprecise, given that is the gas at which the testing will at all times be aimed.

10. The Rule 6 Party's proposed description is:

> "Mobilise well test equipment, including a workover rig and associated equipment, to the existing wellsite and re-enter the existing well to perform a workover, drill stem test and extended well test for shale gas, followed by well suspension and site restoration."

11. The Appellant's suggested scheme description in A5 is:

> "Mobilise well test equipment, including a workover rig and associated equipment, to the existing wellsite and re-enter the

existing well to perform a workover, drill stem test and extended well test for hydrocarbons from within the Pentre Chert formation, followed by well suspension and site restoration."

12. The Rule 6 Party submits that its description is preferable, both for the reasons given above and because, as became clear from Mr Grayson's evidence, the extent of any rock formation described as "Pentre Chert" is disputed. On the evidence of the Lithology Log, as put to Mr Foster, it is not a feature of the geology. If the Appellant's formulation is preferred, then the reference to "Pentre Chert" should be replaced by "Middle Bowland Shale" – Mr Foster confirmed that is the description given in the independently produced Lithology Log for the relevant zone of interest – "from 1,795mMD to 1,849mMD, with the primary interval being between 1,846mMD and 1,849mMD." [CD 1.9a pg 18].

**The Nature of the Proposed Development**

13. The Rule 6 Party is content with the scheme description not referring to the extraction method because that can and should be dealt with by way of condition, if contrary to the Rule 6 Party's case, planning permission were granted (see §§117 below) .

14. The Rule 6 Party accepts in the light of the EA's clarification A2, provided at the start of the inquiry, that the extraction method will not amount to matrix acidisation if the extraction takes place under the extant permit. It has been content to proceed in the inquiry on the basis that the method is an acid wash **and** an acid squeeze, as described in Mr Foster's main proof at §5.24. This is despite the unedifying spectacle of the Appellant's planning witness, Mr Adams, apparently not being fully aware of the evidence of the operational witness, Mr Foster, and suggesting in his oral evidence that only an "acid wash" would take place.

**MAIN ISSUE (1) – SUSTAINABLE DEVELOPMENT AND LACK OF COMPLIANCE WITH STRAT 1 AND STRAT 4**

15. As with many planning matters, this issue boils down to location location location. The proposed development is simply in the wrong location. As a result is it not sustainable development and planning permission should be refused.

16. Prof Watterson in his oral evidence expressed surprise that the development is proposed for the site, given its location: he would not normally expect to see testing like this in a town area with a large population. He had good reason to do so. The comparative images on R9 make it clear how very different this site is in terms of proximity to neighbouring businesses and residences and its position on the cul de sac, compared to the development relied on by Mr Foster in his responses to the Inspector on this matter. The objection to Mr Foster's comparison is not a quibble with his suggested distances – he is allowed a margin in his top-of-the-head estimates. The objection is that the comparison was proffered at all as a reliable one, given the "comparator" well is surrounded by fields on three sides and is at the end of the cul de sac (rather than neighbouring businesses being at the end of the cul de sac, with the well hemming them in).

17. Mr Watson draws attention to the particularities of the location that make the development unsustainable. It is:

- within 100 metres of 9 industrial units;
- 150 metres from the M53, the major link from Birkenhead to the rest of the UK;
- 200 metres from an explosives store (exact location not known for security reasons);
- 250 metres from the epicentre of an earth tremor registering M1.6 in 1992;
- 250 metres from the Manchester Ship Canal which is used to carry petroleum and hazardous chemicals to the Stanlow petrochemical complex;
- 270 metres from one of the most important wildfowl overwintering sites in the UK which is classed as a SSSI / RAMSAR / SPA site, with cross national boundary implications;
- 320 metres from a high-density residential area, which could be developed to within 250m of the well;
- on the edge of the Rossmore Ward which is within the 5% most deprived

wards in the country (2015 HM Gov. Indices of Multiple Deprivation);
- 800 metres from a children's play centre;
- 860 metres from the closest of two large residential homes for the elderly, including highly vulnerable poor mobility people;
- 1 km from several schools.
- 1 km from a hotel / tourist attraction complex.
- 1 km from Rivacre Brook. This brook is addressed in the evidence of Mr Grayson.
- 1.2 km from an existing Air Quality Management Area running through the town centre.
- 1.7 km from the centre of Ellesmere Port. Ellesmere Port
- 5,000 residences within a 2km radius. A zone that many Australian states would class as a "buffer zone" between wells and residences / public buildings, and which the USA emergency services would evacuate in the event of a well blowout.
- 3.3 km from water extraction points identified as "for human consumption".
- 4.5 km from a nuclear site which has strict seismic criteria in its nuclear licence.
- Above the Sherwood Aquifer

18. Some of the elements that make this unsustainable are based on impacts discussed below, particularly the potential geological and groundwater impacts to which the precautionary principle must apply.

19. But others stand on their own – in particular the proximity to neighbouring businesses and residences. For a very long time, assessments in relation to the proposed development by the Appellant were carried out on the basis that it was 600m away from residential development – see the Planning Statement CD 2.4 pgs 8, 16, 18, 33, 35 and 40); sensitive receptor report CD 1.9(d); the air quality report CD 1.9f pg 5. The EA in its permitting decision states the nearest residences were "around 500m" away (CD 2.13 pg 9). The EA appears to have carried out at least some of its assessment on the basis that the nearest residences were around 745m away (EA 29). The very near neighbouring businesses are not referred to.

20. As Mr Foster accepted, the risk of an incident occurring on the site can never be zero, even if it is the best regulated site. This was vividly illustrated to the local community in August last year when an explosion occurred in a chemical plant on the same site at the Stanlow Oil Refinery – thankfully located much

further from sensitive receptors. There remains a residual risk of blowout or fire, which could affect neighbours or could, via a gas plume, impact on receptors up to 800m away, depending on wind direction (this would encompass the children's play area and a residential home for the elderly).

21. Section 1 of the CCA 2004 defines an "emergency" as an "event or situation which threatens serious damage to human welfare in a place in the United Kingdom". Schedule 1 of the CCA 2004 requires "Category 1" responders, including the Chief of Police and the Fire and Rescue Services, to liaise with the Council and the developer and form and maintain emergency plans for the purpose of reducing, controlling or mitigating the effects of the emergency or otherwise taking action in connection with it. Such plans would include evacuation of local residents from homes, schools and workplaces. These are not COMAH site-specific emergency plans of the type referred to in evidence by Mr Foster. They are looking more broadly to the wider impact on the nearest vulnerable receptors.

22. There is a clear difficulty in crafting such an emergency plan given the position of the site on the cul de sac. But in any event it appears from the FOI responses to the Rule 6 Party that neither the Police nor the Fire Services has been involved in the creation of an emergency plan for the site.

23. Appellant has not attempted to quantify the residual risk in its evidence; only to suggest it is very small. Mr Watson has provided clear evidence on risk and its consequences (his proof paras 6.6ff). It must be remembered that in terms of unconventional gas exploration, the UK industry is immature and a only handful of wells have been drilled.

24. Even if the risk is taken to be low, or very low, the other vector in the assessment is the potential significance of the impact. As Mr Foster's evidence shows, the harm that could potentially be caused could be serious.

25. The site was originally chosen by Nexen in 2009 based on a number of factors, one of which was that it was "remote from surrounding residential properties"

(CD 1.5 §10.4). That has changed irrevocably and the location is no longer sustainable.

26. The site was also chosen prior to the November 2011 Ellesmere Port Development Board Vision and Strategic Regeneration Framework (EP 19). This aims to change fundamentally the perception of Ellesmere Port. It envisages the site as part of the Waterfront development. This is in line with STRAT 4's ambitions for Ellesmere Port – which is a mixed use community, where substantial economic growth is delivered through industrial, manufacturing and distribution sites (not minerals extraction, as Mr Adams accepted).

27. The Local Plan Policy Part 1 (2015) endorsed the Vision document, stating that STRAT 4 "supports the ambitions of" the Vision document (§5.31) . It is not just another piece of evidence supporting the local plan. It is a document explicitly referenced in the first paragraph of reasoned justification under STRAT 4, with the wording carefully showing that **the policy** supports the ambitions of the Vision.

28. So too Local Plan Part 2 (2018) which refers to the Vision in the Ellesmere Port section §3.4 It too states that "**the policies** in this section … support the local regeneration initiatives" in the Vision document (emphasis added).

29. Development of the site for shale gas exploration does not sit with this vision, as Ms Copley and Mr Plunkett both made clear in evidence. In planning terms, it is ill suited to the regeneration vision, not only because it could prevent regeneration of the site and surrounds for a number of years (whether exploration is successful or not), but also because of the knock-on effect on surrounding sites – developers may not be wild about bringing forward their regeneration schemes in proximity to a shale gas well, particularly given the perceptions that surround such development.

30. The Appellant recognises the force of this argument because of how vehemently it has sought to undermine the 2011 Vision document. It

introduced during Mr Copley's evidence the Peel Holdings Supplementary Response from May 2014 (A6) to show that Peel, who owns the site, asked for it not to be allocated through the Local Plan Part 2 process. It was not, but as Mr Adams accepted, not all sites within a regeneration vision need to be allocated for that vision to carry planning weight or to be taken forward.

31. And the chronology is important – the Peel Supplementary Response (A6) did not prevent the Vision from explicitly being referenced in the Local Plan Part 2 (draft 2018) and that going through examination in 2018 and main modifications unamended in 2019. Contrary to the Appellant's suggestions through questioning, the Peel Supplementary Response is no reason to give less weight to the Vision Document. It is not Peel's views that take precedence, despite Mr Adams' reasoning back from the developer's position to what the regeneration vision should be. It is the democratically elected council and the examined development plan, Parts 1 and 2, which support the Vision, that take precedence.

32. The proposed development thus does not comply with STRAT 4. It would undermine the perceptual shift so desperately needed for Ellesmere Port and wanted by the community and the Council.

## MAIN ISSUES (1) AND (2) – CLIMATE CHANGE AND LACK OF COMPLIANCE WITH STRAT 1

### Legal Submission on Planning and Climate Change

33. Climate change is a material consideration in all planning decisions. The Appellant accepts that it is a material consideration in this decision and that nothing in the assessment by other regulators, such as the EA, has addressed the climate change impact of the GHG emissions that will be produced by the proposed development.

34. Decisions concerning exploration for hydrocarbons, such as for shale gas, are

not exempted. Indeed, the adverse effect of emissions of greenhouse gases ("**GHG**") caused by open cast coal mining have recently been accepted by the High Court to be a relevant material consideration in the grant of planning permission for such a minerals development: *HJ Banks & Co v SSHCLG* [2018] EWHC 3141 (Admin) ("***HJ Banks***"). While the High Court eventually concluded that the Secretary of State had not given sufficiently clear reasons for his decision refusing planning permission, neither the Court nor any of the parties suggested that GHG emission were not a relevant and material consideration.

35. The relevance of GHG emissions and climate change impact to every planning permission is in line with the statutory obligations on the government, under the Climate Change Act 2008 (legislation referred to in the NPPF), including to remain within the carbon budgets, and with the requirements articulated by the IPCC on 8 October 2018 in the Global Warming of 1.5˚C Report [EP10].

36. Paragraph 148 of the NPPF provides that the planning system – which obviously includes decision-making – should "shape places in ways that contribute to **a radical reduction in greenhouse gas emissions**" (emphasis added).

37. Recently, the group Talk Fracking challenged the revised NPPF, arguing that the Secretary of State should have reviewed and updated policies on shale gas (reflected in the Ministerial Statements on 16 September 2015 and 17 May 2018) in the light of later evidence. Judgment was reserved and is anticipated to be handed down in March 2019. The Secretary of State's submission to the court when the hearing took place on 20 December 2019 was that local decisions are the point at which the Secretary of State will consider developments since the last policy statements. The decision-maker must evaluate the up to date evidence, including any updated science that post-dates the NPPF, and make the decision accordingly – the NPPF "cannot dictate to the plan-maker and the decision-maker" (Secretary of State's submissions recorded on Drill or Drop, 20 December 2018).

38. The republication of the NPPF in 2019, with changes to housing, "deliverability" and habitats policies, does not represents the government's planning policy updated in light of the IPCC Report – Mr Adams accepted that.

39. It is therefore for the Inspector to take the latest climate position into account, as set out in the IPCC 1.5 degree report (which post-dates all the relevant policy statements on shale gas). This justifies greater weight being given to policies addressing climate change and GHG emissions than was previously the case.

40. So too does the Secretary of State's submission to the High Court in *HJ Banks* at §3 that he has begun to give greater weight to the impact of GHG emissions than had previously been the case. That submission was made on instruction from the Secretary of State and so represents the stated position of the Government. Although the Judge did not accept that change in position explained all of the Secretary of State's reasoning in refusing HJ Banks' appeal (§106), he did accept that the Secretary of State was entitled to adopt a deliberately different approach from previous decisions (§121), so long as his reasons are clear. What is indisputable is that the Secretary of State, openly and robustly through David Elvin QC and his submissions to the High Court, heralded his intention to give greater weight to the impact of GHG emissions than was previously the case. That is highly relevant to this decision.

41. In light of the case law, the proposed development does not get a "GHG pass" because GHG emissions are "inevitable".

**The Rule 6 Party's Case on Climate Change**

42. The Rule 6 Party's Case on Climate Change is simple. The proposed development will cause GHG emissions, from the flaring of the gas, from cold venting (Golders CD 1.9k pg 12), from tank venting (CD 2.12 pg 14) and from traffic emissions. While traffic emissions may be part of every development, the traffic impact of this development is significant (3,144 two-way traffic movements over the 104 proposed working days, 572 of which will be HGV

movements) [Hawkins rebuttal §2.3.27] and will sit alongside the direct release of methane emissions from fossil fuel being brought out of the ground and burned (or in some circumstances cold vented). This makes the proposed development very different from other forms of development and more impactful.

43. The GHG emissions caused by the proposed development will persist for a very long time in the atmosphere. They will impact on the ability of the UK to achieve the radical reductions needed to avoid the extremely serious impacts of warming above 1.5°C.

44. In planning terms, those GHG emission impacts mean that planning permission should be refused under STRAT 1. The proposed development is not sustainable development in climate change terms. It does not meet the environmental objective of Strat 1 and it does not mitigate and adapte to the effects of climate change. Mr Adams attempted the narrow the meaning of STRAT 1 so that a development which undertakes as much "mitigation" – ie reduction of GHG emissions as possible – must be taken to comply with STRAT 1. That is not so. Planning permission can be refused under STRAT 1 if the residual emissions, after all possible steps to reduce GHG emissions have been designed into a development, are unacceptably high. That is the meaning of mitigating the effects of climate change. The Development Plan makes this clear, albeit in a slightly unexpected place: §8.56. Mr Adams accepted this when it was put to him directly.

45. Furthermore, in planning terms the IPCC Report [EP 10] and the science that sits behind it means that more weight must be given by planning decision-makers to the policies requiring control or limiting of GHG emissions and the policies addressing climate change, in particular paragraph 148 of the NPPF – the requirement that planning decision taking should "help to shape places in ways that contribute to radical reductions in GHG emissions".

46. That impacts on the planning balance. While weight can and must still be given

to government policy on minerals extraction and on the need for shale gas (even though those policies all predate the IPCC Report), even greater weight must be given to the policies preventing climate change.

47. The Appellant's approach in policy terms in trying to narrow the meaning of paragraph 148 of the NPPF by reading it "in light of" paragraph 209(a), so that they sit together, is simply wrong. Planning policies often pull in different directions. The answer is not to read one set of policies down in light of the other. The answer has always been that the decision-maker must weigh the various policies in light of the evidence before him and come to a conclusion as to which bears the greater weight.

48. Given the existential threat of climate change, given the IPCC's warnings of the need for immediate action to stay within 1.5 degrees of warming (we have 11 years in which to act), it is the policies that seek to address climate change and limit GHG emissions that must be given the greatest weight.

49. Prof Anderson's evidence shows that the UK is not on track to meet either the fourth or the fifth carbon budgets (§2.3). The IPCC report (EP 10) shows that every release of GHG emissions is important and impactful. Prof Anderson explained in his evidence that we are currently at 1 to 1.1 degrees above pre-industrial levels. If we are to hold to 1.5 degrees we have a small carbon budget available; incredibly small. Every additional molecule will take away from that tight carbon budget. So there is little emissions space. The government recognises this – see Michael Gove's speech (Prof Anderson's Appendix).

50. Also relevant to the weight to be given to limiting GHG emissions if the CCC Report on *The Compatibility of Onshore Petroleum in Meeting the UK's Carbon Budget* (CD 8.1). The Rule 6 Party's case is that the CCC Report and its findings also justify significant weight being given to the planning policies preventing GHG emissions and to the harmful GHG impact of the proposed development (see Anderson §§2.5 and 3.2-3.5). The Appellant contends that the three tests in the CCC's Report have been met. Prof Anderson's evidence is the opposite.

At present, the third test is not met and, given the Government's request for a review of the carbon budgets in light of the Paris Agreement and the ICC Report, shows little prospect of being met.

51. The Appellant tried in two key ways to minimise the import of the CCC Report. First it contends that the three tests in the Report do not apply to exploration. Prof Anderson's view is that is not correct. The Report is not using "production" as some term of art. It uses "production" to mean "getting the gas out of the ground". Exploration is part of that and so is included within the three tests. The Appellant's approach "is taking the technical language too far." The CCC Report explicitly says it cannot be assumed that emissions from exploration will be low. It is unreasonable to assume the CCC is not interested in exploration emissions and intended to exclude them from the three tests.

52. Second the Appellant contends that the CCC's response to the "uncertainties" around the GHG impact of exploration is for that exploration to be carried out and monitored. This was based on a sentence on pg 69 in the conclusions and recommendations. Prof Anderson's response on this was clear. While some uncertainty will be overcome is through exploration, the other key part of the uncertainty – fugitive emissions – will not. The Appellant's approach is to take a single sentence out from a complex issue. Prof Anderson knows both the individuals on the CCC and the CCC's work well and his conclusion was that the Appellant's approach "is not a fair reflection of their view".

53. The Appellant tried a number of other avenues to deflect the climate change evidence and the import of the IPCC Report, including by reference to the factors in section 10(2) of the Climate Change Act 2008. Prof Anderson answered these, including in RXM setting out the very significant costs impacts of exceeding the carbon budget. The Inspector is asked to accept Prof Anderson's evidence.

54. It must be recalled that when Prof Anderson gave his evidence, it was at a time that the Appellant had not carried out any GHG emissions calculations. Based on Dr Balcombe's calculations, an estimate of 17000 tonnes CO2E, Prof

Anderson likened this to the equivalent to all of gas use over full year of all the houses in Chester. Or a typical saloon car being driven around the world 3.5 times or 170 times to the moon.

55. There is now before the inquiry a range of emissions, updated in light of the Appellant discovering that it had been mistaken in the information on emissions it provided to the EA. The range that the Rule 6 Party asks the Inspector particularly to consider is a minimum of 6,143.57 tonnes CO2E and a maximum of 21,345.69 tonnes. That is calculated in light of the IPCC Report on the bass of a global warming potential of 20 years. The urgency of the need to address climate change justifies this choice of GWP.

56. Every emission emitted by this development, as Prof Anderson commented, is one that cannot be emitted by a school or a hospital or any other development if we are to stay within our carbon budget.

**MAIN ISSUE (3) – UNACCEPTABLE IMPACTS**

**The Permit Solves All the Problems - "Other Regulators", Permits and the Planning System**

57. There is inevitable overlap between the planning regime and the various regimes concerned with environmental protection – the case law has recognised this, from *Gateshead MBC v SSE* [1995] Env LR 37 (CA) ("***Gateshead***") at 43 (recognising the overlap between the planning and environmental protection system under the Environmental Protection Act 1990) to *W E Black Ltd v SSE* [1997] Env LR 1 (QBD) ("***WE Black***") at 9 (recognising the overlap between planning and the regulatory system under the Water Industry Act) to *R(Frack Free Balcombe Residents Association) v West Sussex CC* [2014] EWHC 4108 (Admin) ("***Frack Free Balcombe***") at §100 (recognising the overlap between planning and the regulatory system under the EA and HSE relevant to well testing).

58. In none of those authorities is it suggested that the matters covered by the

other regulatory regimes are not also material planning considerations. In fact, the authorities say the opposite:

a. *Gateshead* at 44: "I agree that the extent to which discharges from a proposed plan will necessarily or probably pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission."
b. *WB Black* at 9, citing with approval the guidance at the time: "Where other controls are also available, a condition may however be needed when the considerations material to the exercise of the two systems of control are substantially different, since it might be unwise in these circumstances to rely on the alternative control being exercised in the manner or to the degree needed to secure planning objectives."
c. *Frack Free Balcombe* at §26: "[T]he effect of an activity on the environment is a material consideration".

59. This is also reflected in the PPG Minerals at §112, which Mr Adams agreed says in terms that "hydrocarbon issues" covered by other regulatory regimes – such as groundwater impact or seismicity impact – may be put before the planning decision-maker.

60. What the case law goes on to say, however, is that the existence of other regulatory regimes and the work of other regulators is also material, and that planning decision makers can take those regimes and the assessment of other regulators into account, where they have the requisite evidence to do so (*Gateshead* at 44; *WE Black* at 9; *Frack Free Balcombe* at §26). This too is reflected in the PPG Minerals at §112, which observes that planning decision-makers "**should not need** to carry out their own assessment as they can rely on the assessment of other regulatory bodies" (emphasis added). As Mr Adams accepted, this does not preclude occasions arising when the planning decision-maker is required to carry out his own assessment.

61. This is in line with the case law, because a decision made in one regime does not predetermine the outcome of any decision made in the other regime. This was the loud and clear message from the Court of Appeal in the *Gateshead* decision, where the Appellant specifically relied on the argument that a grant of planning permission for a development (there an incinerator), which took into account arguments about emissions impact, would necessarily mean that there was "almost no prospect" that the assessment of the emissions impact of the proposed incinerator by the EA's predecessor would result in anything other than an authorisation for operation of the plant (at 48). The Court of Appeal disagreed robustly: the grant of planning permission did not inhibit the EA's predecessor from refusing authorisation if they decided that was the proper course (at 50). The corollary also applies – the grant of a permit by the EA does not inhibit the planning decision-maker from refusing planning permission if that is the proper course in light if the evidence before that decision-maker.

62. The court has emphasised that a planning inspector "must not simply rely on the earlier grant of the environmental permit and abdicate responsibility for his decision making": *Norman v SSHCLG* [2018] EWHC 2910 (Admin) ("***Norman***") at §52.

63. Mr Adams accepted in cross-examination that the environmental permit is not determinative of the planning matters and the grant of the permit is not conclusive of whether the proposed development is acceptable in planning terms.

64. There are two relevant matters of discretion which apply to planning decision making which encompass material considerations that are also touched on by other regulatory regimes.

    a. First, a decision-maker may "assume" that separate pollution control regimes will operate effectively (NPPF §183; PPG Minerals §012; *Frack Free Balcombe* §§28-29; *Norman* §52). This is not, however, an

irrebuttable **presumption**. It is an assumption. There will be circumstances in which that assumption cannot properly be made and the case law recognises that there must be evidence to justify the assumption being made: *Frack Free Balcombe* §§100-101; *Norman* §§52-53. Mr Adams initially struggled to accept this and his written evidence wrongly stated that decision-makers "must assume" that the separate pollution control regimes will operate effectively (§2.16). In light of the case law and the PPG §112, that is manifestly incorrect – the PPG states that, before granting planning permission, the decision-maker **needs to be satisfied** that the issues can or will adequately be addressed. In other words, evidence is needed to justify reliance on the assumption. Mr Adams eventually accepted that. He accepted his use of the word "must" in §2.16 was incorrect.

b. Second, a planning decision-maker may, in the exercise of his "discretion consider that matters of regulatory control could be left to the statutory regulatory authorities to consider": *Frack Free Balcombe* §100. This is a particular aspect of the assumption in (a) above – that unresolved issues; or issues that have not yet arisen, can be left for other regulators to address. Again, there must be evidence to justify this assumption – the decision-maker cannot simply abdicate his responsibility to the other regulatory body.

65. Accordingly, where there is evidence that a regulatory decision is not based on up to date evidence or has not taken a relevant matter into account, the planning decision maker cannot make the assumption that has been dealt with by the other regulatory regime and is required to address the relevant material consideration through the planning regime. This is not improper, or a "duplication" of control, as the Appellant wrongly suggests. It would in fact be an error of law in those circumstances to assume that another regulatory regime has addressed a material consideration where there is positive evidence that is not the case.

66. The Appellant's case is, however, shot through with Mr Adams' mistaken approach to the assumption about the regulatory regime. Throughout the Appellant's answer to FFEP&U's evidence has been that it must be assumed the permit solves the problem. But it does not.

**Air Quality and Public Health Impacts**

67. Both Prof Watterson and Dr Saunders gave evidence in relation to air quality and public health impacts. Both have expertise in public health – they are the only such experts from whom the inquiry has heard. Ms Hawkins accepted she has no such expertise.

68. Mr Adams accepted that air quality impacts and public health impacts are material planning considerations. It is not the case that simply because the EA has undertaken an assessment and referred to health impacts, that dictates the outcome in planning terms. This is particularly so when the EA's assessment was carried out before various relevant changes, such as closer sensitive receptors being near the site. The EA's own guidance flags public health as a matter relevant to the planning process (Chpt 1 section 1.4).

69. Prof Watterson's approach was one of great care – to be cautious in assessing the impacts of any development, including shale gas extraction and to have as complete a dataset as possible, to know the risks and make the requisite assessment. That is consistent with government policy that supports shale gas but not at the cost of public health.

70. Prof Watterson analysed the information provided by the Appellant to the EA. His analysis drew out a number of flaws in the assessments. The EA in its permitting decision requested further information from the Appellant and concluded in the end the proposal low risk from an air quality perspective, with a number of caveats. Prof Watterson's view is that at the time the EA's approach to the proposal was reasonable, but with the changes to the location that have taken place – the residential and business receptors now closer to

the site – that has changed. Accordingly, the assumption that the regulator's assessment can be relied on to address air quality impact and thus public health impact cannot be made.

71. Ms Hawkins' evidence before the inquiry does not fill the gap to show that there will not be public health impacts based on air quality: see Prof Watterson's rebuttal §§5.1-7.2

72. Furthermore, Prof Watterson highlights lacunae in the assessment, including a failure to deal with the link between greenhouse gas emissions and air quality impact. The latest independent peer reviewed evidence indicates clearly that unconventional gas extraction does create poor air quality (Proof §6.8). Bodies such as the WHO have been unequivocal about the public health toll due to poor air quality from greenhouse gas emissions. Dr Saunders also speaks to the public health impact of climate change (§11). At the very least, Ms Hawkins should have considered the air quality impact from these greenhouse gas emissions. Furthermore, air quality impact from the diesel emissions have not

73. It is also the case that EA's permit variation decision was not a public health impact assessment nor did it consider a wider environmental health impact assessment of the proposal. As the Inspector pointed out, CD 2.13 shows that the Department for Public Health and Public Health England did not respond to the EA's consultation on the permit variation.

74. Prof Watterson and Dr Saunders both emphasise another aspect, specific to this site, which has not been taken into account by the Appellant: the Indices of Deprivation 2015 – Hotspots of Deprivation in Cheshire West and Chester show that two of the wards closest to this proposal, Rossmore and Ellesmere Port Town, include populations that are ranked amongst the 10% most deprived nationally. The proportion of Rossmore, Ellesmere Port and Netherpool wards populations in the most deprived quintile of deprivation nationally are 100%, c. 85% and c. 55% respectively. Standardised mortality ratios in these wards are 53%, 42% and 24% higher than England respectively.

There is evidence that deprived communities are disproportionately exposed and vulnerable to the effects of exposure to environmental pollution including traffic related impacts on air quality. Even small levels of exposure can impact negatively on such communities.

75. In light this expert evidence on public health, the Appellant simply cannot show that it complies with SOC 5 and ENV 7.

**Geology**

76. The Precautionary Principle was articulated by the CJEU in *Afton Chemical Ltd v Secretary of State for Transport* [2011] 1 CMLR 16 at §61:

> "*Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the real likelihood of harm to public health persists should the risks materialise, the precautionary principle justifies the adoption of restrictive measures, provided they are non-discriminatory and objective.*"

77. The Rule 6 Party has provided evidence from two geologists: Prof Smythe and Mr Grayson. The Appellant has not provided any evidence from an expert geologist.

78. Prof Smythe's evidence can essentially be summarised in two key points. First, the geological information provided by the Appellant to the EA does not correspond to geology at the wellsite. It was taken from an area 8km to the east near Ince Marshes. The Appellant accepts that the geology reflects the position 8km to the east. Mr Foster tried to justify this because the geological information produced in relation to the site itself is of poor quality – the poor quality of the information concerning the seismic lines near the site was something Prof Smythe also highlighted. Mr Foster contended that it was acceptable in the circumstances to use the information from 8km away. However it should be emphasised that nowhere in the documents provided to the EA was it made clear that was what was being done, nor is any explanation proffered.

79. Instead, Prof Smythe's view of the information provided to the EA was that it removed relevant scales, cut off most of the aquifer and put in what purported to be EP1 at the right hand side of the diagram. His view was that the provision of information from 8km away, and the way it was presented, was unacceptable. He in fact used a much stronger word.

80. The second key point is that Prof Smythe was able to study of the geological survey maps which he obtained from a number of sources, as well as looking at the Appellant's geological information from the seismic lines near the well. Prof Smythe's view is the that geology is "littered with faults". He made best of he could of the Appellant's information and although it was poor, it is clear that the geology around the wellsite cut up by dozens of faults, a number of which were shown at depth (Proof §§4.7.1-4.7.8; 4.8.1-4.9.8 and XIC). In his view, the well intersected at least one fault.

81. The upshot of Prof Smythe's evidence is that it cannot be assumed that there is no risk of seismicity and no risk to groundwater, because the EA considered the geological data. At present, the expert evidence before the inquiry is that it is impossible to determine with certainty the existence or extent of the alleged risk to seismicity and groundwater because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted.

82. There is also a real likelihood of harm to public health which persists should the risks materialise. Prof Smythe's gives very detailed evidence on the potential conduits for contamination (proof §3.1.1-3.6.3). He was not seriously challenged on that evidence. His evidence shows that risks to air and groundwater from hydrocarbon seepages are real. Accordingly, based on the precautionary principle, planning permission should not be granted.

83. This evidence on seismic risk is supported by Mr Grayson's analysis, which commented on the fact of seismic activity being present in "remarkably close proximity to EP-1 well". Mr Grayson also explained why "Pentre Chert" is not actually a sensible description of the relevant resource – "Middle Bowland

Shale" is correct and is in fact the description used by the independent experts who produced the Lithology Logs for the Appellant.

84. Mr Grayson's particular expertise is, however, in relation to hydrogen sulphide. He gave us the abstract of his 2019 article on the Deep Evaporites and H2S springs in the Bowland Megabasin of North-West England (Appendix 1) and explained in detail why is concerned about the presence of H2S on the site, despite none having yet been detected. This too is a basis for exercising the precautionary principle.

85. In light of ENV 1 and the requirement to protect and enhance water quality, and against the background of the precautionary principle, the potential for impact on the aquifer also provides a reason to dismiss the appeal.

**Public Perception and Social Harm**

86. There are two distinct elements to this area of impact – neither of which have adequately been considered by the Appellant, and neither of which fall within the purview of the EA. The first is the public concern about the development, which is a material consideration in light of the case law. The second, which is quite distinct in terms of evidence and which goes to public health impact and to sustainability, is the social harm that would be caused by a grant of planning permission.

<u>Public Concern</u>

87. Although you would not discern so from the Appellant's case, the Court of Appeal has spoken clearly on this topic. In *Newport County Borough Council v Secretary of State for Wales and Browning Ferries Environmental Services* [1998] Env LR 174**,** the Court of Appeal held that:
    a. Public concern, in particular the public's perception of risk to their health and their safety inherent in a proposed development, is a material planning consideration (at 179-180);
    b. It is a "material error of law" that "genuine fears on the part of the public, unless objectively justified, could never amount to a valid ground for

refusal" (at 183 per Hutchison LJ).

This has been followed in a number of subsequent cases, including *Trevett v SST* [2002] EWHC 2696 Admin.

88. So the Appellant's repeated mantra – that the public concern in relation to the proposed development is objectively unjustified and so cannot for the basis for refusal of planning permission – is in fact legally unfounded and plainly, blatantly, wrong. Mr Adams' evidence in §5.11-13 of his main proof; §3.5 of his rebuttal, and his whole approach in his oral evidence, is erroneous. His reliance on an Inspector's decision which played down the true finding of *Newport*, did him a disservice.

89. There is clear evidence before the Inspector that there are widespread, genuinely held fears on the part of the local community that the development represents a risk to their health and to their safety. The Rule 6 Party says that these fear are objectively justified. Dr Szolucha's evidence on this in XIC was: "The assertion of Appellant that residents' fears are based on misinformation or irrational fears rather than scientific uncertainty is just factually incorrect. It contradicts the social science literature. That shows clearly and repeatedly that opposition cannot be explained by a lack of awareness on the part of local residents. Research consistently found residents well informed and with a good lay understanding. The objective basis for residents' concerns are the prevailing scientific uncertainties."

90. This is not an ignorant or an ill-informed community. They have long experience of the impacts of industry. They have access to, and have accessed, information on the impacts of shale gas exploration within a residential community, even when regulated. They have read the science. They have a wealth of information about the public health impacts of climate change, to which this development unquestionably will contribute – again, they have read the science. So these genuinely held and entirely justified concerns, in and of themselves, are a reason to refuse planning permission. The Rule 6 Party invites the Inspector to give significant weight to this.

91. However, if the Inspector considers that some of the fear are not "objectively justified" in that, for example, they are based on concerns about fracking, that does not mean the fears are irrelevant. It does not even mean that they are deserving of less weight. In light of *Newport* these fears too provide a reason for refusing planning permission.

Social Harm

92. The second strand to the Rule 6 Party's, based on the expert sociological evidence of Dr Szolucha, is that the grant of planning permission for the proposed development would cause social harm. This harm would amount to a "collective trauma", which would negatively impact on the community, its social cohesion and its health. It can be classed as "a local stressor that causes anxiety, fear, stress and fatigue." [Dr Szolucha §5.5]

93. In her oral evidence Dr Szolucha explained her research methodology, including that the sample size and sampling method through referrals are recognised in social science as the proper way to investigate the potential social harm of the proposed development when no previous data exists. So she was not improperly fishing in a self-selected pool – in terms of the social science, her fishing method was impeccable.

94. Her evidence, which the Inspector is invited to accept, is that Ellesmere Port is already a socially vulnerable area. The town consistently ranks among the most deprived areas in Cheshire West and Chester across a number of deprivation factors. Over 80% of Ellesmere Port Town (ward) residents live in areas of multiple deprivation (compared to approximately 20% for England and less than 20% for the borough of Cheshire West and Chester). Residents who are poorer, suffering from health problems, unhappy and opposed to the proposed development may experience its impacts more intensely than others. Labelling those experiences as non-significant may lead to the deepening of unequal distribution of impacts among different groups in society. [Dr Szolucha §5.2] Accordingly, the specific characteristic of the local community make the social

harm caused by grant planning permission more acute.

95. Dr Szolucha's evidence on the significance of the social harm was that it would be "present at both individual and collective level" and has "the potential to be irreversible in social terms", at least for a significant period of time – for example, in the damage done to the relationship between the local community and police force.

96. In planning terms this social harm is relevant in two ways. First, it goes to sustainability. The NPPF in terms recognises the social objective of sustainable development and that proposals should support strong, vibrant and healthy communities (§8). On Dr Szolucha's evidence this proposed development will do the antithesis.

97. Second, it goes to the public health impact of the proposed development and compliance with SOC5 and ENV7 of the development plan.

98. The Appellant objects to social harm as a basis for refusing planning permission – without any of its own expert sociological evidence – primarily because it sees the harms as flowing from the development being for fossil fuel or concerned with shale gas, and the Appellant cannot help that. But it could have. In the way it interacted with the community (right from 2014), in the information it provided, in its high-handed approach, in its resort to injunctions, the Appellant made a series of decisions that caused and then exacerbated the community's lack of trust. This contributed significantly to the social harm which the development will cause.

99. This pattern has continued by the Appellant stating a number of times at the inquiry that it drilled the well in 2014 "responsibly" in light of the information it provided to the Council and the EA and the "community information" in CD 1.8. It is plain on the face of that the "Community Information Ellesmere Port Exploration Well" was designed to give the impression that the Appellant's primary objective to drilling a CBM well and for CBM. This was in July 2014,

well after the Appellant had articulated a very different objective to the Council (Jan 2014 CD 1.7) and the EA (CD 1.6 pg 6).

100. Mr Foster doggedly insisted that a thin line on one schematic (titled "**Schematic Coal Bed Methane Well**" would have informed the public of the intention to drill into and test the shale for shale gas. But he did finally accept that a reasonable member of the public looking at the brochure would have come away with the impression that the Appellant was going to drill for CBM. Is it any wonder that public trust in the Appellant plummeted when it emerged that the well had been drilled into the shale with the express purpose of testing for shale gas?

101. Incidentally the Appellant told the EA when it applied for the permit variation that it had permission "to drill a borehole for **hydrocarbon** exploration" (CD 1.6 pg 3 section 2.1, emphasis added) – which Mr Foster just about accepted was not the full story, and it certainly was not the actual wording of the planning permission.

102. Stepping back, what makes this proposal different from other proposals is that it is planned to be situated in the heart of an already vulnerable community, in the context of a complete breakdown in trust between that community and the developer, based on the developer's behaviour, and where the expert evidence shows a grant of planning permission would lead to social harm and a public health impact.

103. It is lawful for the Inspector to take this into account in assessing compliance with SOC 5 and ENV 7.

104. It is also the right time for social harm properly to be dealt with as a material planning consideration – especially as the Appellant accepts it can be such a consideration. The planning process is not just about allowing the community to come and air its views at inquiry, important though that is. It is not about recording those views, important though that is too. It is about actually addressing in the decision on sustainability and health impacts, the social

harm that underlies and animates those views and the future social harm that would, on expert evidence, flow from the grant of planning permission.

**THE PLANNING BALANCE**

105. The proposed development does not comply with the development plan so planning permission should be refused unless material considerations indicate otherwise.

106. They do not. The Rule 6 Party acknowledges that there is support in national policy both for minerals development and for shale gas exploration, including the "national need" for such exploration. The Inspector must apply these policies and give them weight. But, as stated earlier, in light of the IPCC Report, even greater weight must be given to the adverse climate change impact of the proposed development and to paragraph 148 of the NPPF.

107. The harms in terms of air quality impacts, uncertainty around the geology and the groundwater position, social harm and public concern weigh heavily in the balance. The Appellant attempts to avoid this through Mr Adams' evidence, suggesting in §3.55 of his main proof that because exploration for domestic gas supplies is of national importance and great weight, the inevitable land use consequences of the development are acceptable. Mr Adams accepted that is a non-sequitur. He accepted it is for the Inspector to make his own judgment on the actual impacts of the proposed development and to give them such weight as is appropriate. In the Rule 6 Party's submissions, they properly attract significant weight.

108. As against this, the benefits are minimal. All benefits linked to production must be ignored – the Appellant accepts this. Mr Adams sought to smuggle something of those benefits back in by relying on the "intangible economic benefit" of the data obtained via exploration. Being "intangible", the benefit is unquantifiable. But more importantly, this is primarily an economic benefit to the Appellant; to IGas, and as such should carry minimal, weight.

109. Mr Adams attempted in his evidence to widen out the "intangible economic benefit" by suggesting that it is the financial benefit to "UK Plc" from the data obtained by IGas and from knowing about whether the site can be exploited. But in truth that is simply the policy benefit inherent in the "national need" for shale, which already takes into account that type of economic argument. There should not be double counting of benefit by giving Mr Adams' "intangible economic benefit" weight in the planning balance separately from that given by the 2016 WMS.

110. Material considerations therefore firmly weigh against the proposed development.

**CONDITIONS**

111. The Rule 6 Party's primary case is that planning permission should be refused because the development cannot be made acceptable through the imposition of planning conditions. However, if permission is granted then the Rule 6 Party asks that the conditions it puts forward in document R3 are imposed.

**Legal Basis – The Necessity and Reasonableness of Planning Conditions**

112. The Planning Encyclopaedia states at § 72.10:

> "[A] condition may scale down the applicant's proposals, and permission may be granted in a suitable case for part only of the development for which approval is sought…: see, eg *Kent CC v Secretary of State for the Environment* (1976) 33 P & CR 70; *Wheatcroft v Secretary of State for the Environment* [1982] JPL 37."

113. The Rule 6 Party relies on this and on the cases cited therein.

114. The Appellant contests a number of conditions on the basis that they "duplicate" other regulatory requirements. First, in and of itself this does not make a condition unlawful. The High Court specifically held this in the *W E Black* case at pg 9. Second, there are a number of areas where planning conditions are commonplace, despite other regulatory regimes also dealing

with the matter: air quality is one; flooding is another. It should be remembered that the *W E Black* case concerned a legal challenge to a condition requiring surface water attenuation and storage works to be carried out because that was said to be "duplication" of the controls under water industry legislation. The overlap of control was acknowledged, but so too was the planning sense of imposing such a condition (now a common condition).

115. The Appeal Decision APP/X4725/W/17/3190207 Fell House, George Street, Wakefield (21 March 2018) ("***Fell House***") addressed squarely the question of alleged "duplication" of control. It concerned a planning condition requiring a risk assessment incorporating details of associated monitoring at the site for the presence of radon gas. The reason given for the condition was the need to ensure the development could be carried out safely, without unacceptable risk to workers, neighbours and other offsite receptors, in accordance with the relevant policies in the Development Plan protecting public health. The developer objected on the basis that protective measures concerning radon gas are provided by Building Regulations, and so the condition "merely duplicates existing controls and as such is unnecessary and unreasonable." (§7).

116. This argument failed. The Inspector observed that the PPG on conditions and the NPPF "allow for" planning controls "alongside other legislation where they are considered to be appropriate, necessary and justified by the local planning authority to make the development acceptable in planning terms." (§12). While the Inspector acknowledged that the planning regime and the building control regime would work closely together in controlling radon gas, the fact of building control regulation was not found to prevent planning control where that was considered necessary to address environmental risk and protect public health (§§12-14). This is not "overlap" or "doubling-up" or "duplication" on the relevant material consideration, but controls working together to protect public health.

**Proposed Conditions**

117. Turning first to the matrix acidisation condition 2. The description of the

development does not specify the proposed extraction method (unlike both the PNR permission and the Roseacre Wood application, which specified hydraulic fracturing of the wells).

118. As Mr Foster was compelled to accept, the nature of the proposed development is not clear from the planning documents. The Planning Statement [CD 2.4] mentions "acid" once. It does not use the term "acid wash" or "acid squeeze" at all. So too IGas's Statement of Case. It was only through the Rule 6 Party's correspondence with IGas that the possibility of undertaking an acid squeeze emerged in the planning documents. It should be remembered that the Waste Management Plan provided to the EA was not was not provided as part of the planning application.

119. It was only in IGas's evidence, in response to the Rule 6 Party, that the intention to carry out an acid squeeze was confirmed. While the environmental permit does not allow fracking, it does not prevent acid stimulation via the "acid squeeze", so it does not prevent matrix acidisation – as Mr Foster accepted, as a matter of language, what is said in the permit via the Waste Management Plan at §7.1.3, and the EA's definition of "matrix acidisaiton" in its definition document (EP20) are "similar". The Appellant repeatedly claimed the permit does prevent matrix acidisaiton, but failed to show how in its evidence and felt the situation was sufficiently unclear to take the extraordinary step of writing to the EA on the cusp of the inquiry and asking it to provide clarification.

120. There is, as Mr Foster accepted, nothing preventing the Appellant from obtaining a variation of the environmental permit, if its "primary objective" changes and extraction via acid fracturing or matrix adicisation (as has already happened with the change in objective for EP-1 from drilling for coal bed methane to drilling to obtain information on the hydrocarbon potential of the shale).

121. Given the description of the proposed development will not limit the extraction method to acid wash and acid squeeze and given the planning documents fail to do so, a condition is required. This is not improper "duplication" – see the

case law above. Sole reliance on the permit to prevent matrix acidisaiton for the purpose of the planning permission is not justified, would abdicate the planning responsibility, contrary to the case of *Norman*.

122. Turning to condition 6 requiring the use of Protekt-7HCL, it became crystal clear during Mr Foster's evidence why it is necessary to impose this condition. One of the pillars of the Appellant's case, on which it stood a number of times in oral evidence, it that it is required by the permit to use only Protekt-7HCL and hydrochloric acid at 7% concentration is what will be used, meaning that impacts from the far more dangerous hydrofluoric acid, or the stimulation for which 15% concentration HCL is usually used, are not relevant.

123. But during Mr Foster's evidence it became clear this pillar is built on sand. The documents repeatedly refer to 15% concentration and to HCL "usual". The EA's own clarification of the Permit in document A2 refers to HCL at 15%. Mr Foster was forced to admit that the EA may have considered matters on that basis.

124. The planning permission should properly reflect that the Appellant has based its case on the use of HCL at 7% concentration. In line with the case of *Norman*, the Inspector should not abdicate his responsibility to ensure that any grant of planning permission is based on the evidence and the application as proposed by the Appellant.

125. Finally in relation to condition 6, the Appellant contends that the Council may not have the expertise to monitor or enforce the condition requiring the use of Protekt-7HCL. The Planning Encyclopaedia addresses the "difficult to enforce" argument as a type of uncertainty, at paragraph 72.17:

> "A planning condition may be so uncertain as to be invalid, but only in extreme cases of unintelligibility should it be struck down under this head: … *R v Bristol City Council Ex p Anderson (*1999) 79 P & CR 358, CA (potential difficulties in enforcement not sufficient to strike down for uncertainty) … In *Bromsgrove DC v Secretary of State for the Environment* [1988] JPL 257 (followed in *Chichester DC v Secretary of State for the* Environment [1992] 3 PLR 49) the

> court held that the fact that a condition might be difficult to enforce would not invalidate it, unless it was impossible to enforce and thus absurd."

We are plainly not in this territory. There is no evidence that the Council would not be able to enforce the condition and the Appellant is not contending that the proposed condition would be impossible to enforce.

**Habitats – *People Over Wind***

126. In *People over Wind & Sweetman v Coillte Teoranta* (C-323/17) [2018] Env LR 31 (***People Over Wind***"), the Court of Justice of the European Union ("**CJEU**") found that the requirements of Article 6(3) of the Habitats Directive (reflected in regulation 63 of the Conservation of Habitats and Species Regulations 2017) are such that measures to avoid or reduce harmful effects on a European site must not be considered at the screening stage of a habitats assessment. The existence of mitigation measures therefore does not avoid the need for an appropriate assessment to be carried out, although such measures can be taken into account as part of the appropriate assessment.

127. The Appeal Decision APP/A2280/W/17/3175461 concerning Land at Town Road, Cliffe Woods, Kent (8 November 2018) ("**the Cliffe Woods Decision**") applies the guidance in PINS Note 05/2018, and addresses the effect of *People Over Wind* in an appeal under section 78 of the Town and County Planning Act 1990 (as opposed to a local plan examination).

128. In the Cliffe Woods Decision, the Secretary of State, as competent authority for the purposes of the Habitats Regulations, determined that a screening assessment which relied on mitigation was no longer legally sound and the Secretary of State carried out both a new screening assessment and an appropriate assessment, consulting Natural England as the appropriate nature conservation body.

129. In the instant appeal, the Council provided a screening opinion on 21 July 2017,

which concluded: "The development has the potential to have some impact on protected species if noise impacts are not sufficiently controlled however given the scale and ability to control these impacts by condition the impact would not be significant. It is not considered that the development would lead to an increased contamination subject to appropriate controls."

130. In light of *People Over Wind*, that opinion is no longer legally sound, as it relied on mitigation both in relation to impact on protected species and in relation to likely significant effect on the designated site.

131. Accordingly, following the Cliffe Woods decision, the Inspector will not only have to determine if the Council's screening assessment is legally sound, but, if he determines that is it not legally sound, he will have to carry out an appropriate assessment, with the requisite consultation.

132. The Appellant has addressed the effect of the *People Over Wind* case in Appendix 4 to its Statement of Case at §§5.1-5.8. Mr Honour of Argus Ecology suggests that the measures which AECOM, on behalf of the Appellant in the Report to Inform Habitats Regulations Assessment Screening (October 2017) described as "embedded mitigation" in relation to changes in hydrology (pg 10), should be treated instead as integral to the design of the project. This, Mr Honour suggests, may permit the Competent Authority to conclude that there would be no likely significant effect and no requirement to proceed to Appropriate Assessment.

133. This appears to accept that the Inspector, as Competent Authority, will have to decide whether the screening assessment is lawful, and that the Appellant will invite the Inspector to decide that it is lawful on the basis that it did not rely on embedded mitigation in respect of the likely significant effect on the designated site.

134. It is notable that Mr Honour does not address the potential impact on protected

species, which the Council also considered was likely to be significant unless subject to mitigation.

135. The Court has recently considered the effect of *People Over Wind* in *R(Langton) v Secretary of State for Environment, Food and Rural Affairs & Natural England* [2018] EWHC 2190 (Admin). That case concerned the Secretary of State's decision to issue guidance on licensing of supplementary badger culling and also several Natural England decisions to grant badger culling licenses. These were challenged on the basis that they were granted in breach of the Habitats Regulations. The culling areas encompassed or were near SPAs for birds. The effects were that the decrease in the badger population would increase fox population and therefore negatively affect the bird populations at the SPAs, and that the culling would have a directly disturbing effect on the birds themselves.

136. The claimant argued that license conditions preventing culling activity at certain times should not have been taken into account at the HRA screening stage. The High Court rejected this approach, holding that these were not mitigating or protective measures of the kind featured in *People Over Wind* but were "properly characterised as integral features of the Project Natural England Needed to assess under the Habitat Regulations" [157].

137. Following *Langton* the question is whether the relevant measures are integral aspects of the development or whether they are a deliberate and additional mitigating or protective measure. In the Rule 6 Party's view, not all the mitigation measures identified by AECOM can be classified as integral aspects of the development. Many are traditional mitigation measures designed to address the likely significant impact of the proposed development. Accordingly, the Inspector is obliged to carry out an appropriate assessment, with the requisite consultation.

**Conclusion**

138. The local community has said a resounding no to the proposed development. Its opposition is not ill-informed or ignorant or knee-jerk, as some have

attempted to characterise it. The Rule 6 Party's expert witnesses have shown that the proposed development is simply in the wrong place and, in light of its adverse impacts, is not acceptable in planning terms. It is in breach of two key local strategic polices: STRAT 1 and STRAT 4. It is also in breach of policies SOC 5 on health and well-being; ENV 7 on alternative energy supplies; ENV 1 on water management; ENV 4 on biodiversity (until a lawful appropriate assessment says otherwise) and ENV 9 on mineral development (as the proposed development is not sustainable). Material considerations do not require planning permission to be granted despite lack of compliance with the development plan.

139. The Inspector is invited to dismiss the appeal.

28 February 2019

ESTELLE DEHON
CORNERSTONE BARRISTERS
2-3 GRAY'S INN
SQUARE
LONDON
WC1R 5JH
estelled@cornerstonebarristers.com