



Government Legal Department

Uplift

By email only to: [REDACTED]

Friends of the Earth Scotland

By email only to: [REDACTED]

Litigation Group
102 Petty France
Westminster
London
SW1H 9GL

DX 123243, Westminster 12 www.gov.uk/gld

Your ref:
Our ref: Z2111036/GDF/JD3

16 September 2021

Dear Sirs

(1) Uplift (2) Friends of the Earth Scotland v Secretary of State for Business, Energy and Industrial Strategy Response to Pre-Action Letter Regarding Proposed Judicial Review: Your letter dated 26 August 2021

1. The proposed claimants

(1) Uplift

c/o Social Change Nest, 237 Pentonville Road, London N1 9NJ

(2) Friends of the Earth Scotland

2nd Floor, Thorn House, 5 Rose Street, Edinburgh EH2 2PR

2. The proposed defendant

Secretary of State for Business, Energy and Industrial Strategy

c/o Government Legal Department, 102 Petty France, Westminster, London SW1H 9GL

3. Reference details

I act for the proposed defendant in this matter. My contact details are set out at the top of this letter. Please quote reference number Z2111036/GDF/JD3 in any further correspondence.

4. The details of the matter being challenged

Your letter of 26 August 2021 does not identify any decision, act or omission of the Secretary of State that is amenable to challenge.

Your letter states that it is “*not directly concerned with the particular action we consider that the Secretary of State (or Government more generally) could or should take in relation to the Cambo field and these licences – those are separate matters dealt with elsewhere*”. Nor could there be such a challenge given, as set out below, no decision has yet been taken in connection with the application for Field Development Consent in relation to licences P1028 and P1189.

Gilad Segal - Head of Division

Gary Howard - Deputy Director, Team Leader Planning, Infrastructure & Environment



Your letter concerns the accuracy of statements reported in the press. It is not accepted that this is the proper subject of a claim for judicial review. This letter nonetheless responds to the issues raised by your letter, to ensure that you have a correct understanding of the legal and regulatory regime, as well as the factual position. This response is not intended to provide a comprehensive explanation of the entire legislative framework and the fact that legislation is not expressly referred to in this letter should not be taken as an indication that the Secretary of State, or any other regulatory body, is unaware of, has failed to take into account or has made any error in respect of any other relevant aspect of that framework.

5. Factual background and regulatory framework

Relevant Licences

Two licences in respect of the Cambo field were granted by the Secretary of State for Trade and Industry¹ under section 3 of the Petroleum Act 1998: P.1028 (granted as part of the 19th Offshore Licensing Round carried out in 2001) and P.1189 (granted as part of the 22nd Offshore Licensing Round carried out in 2004). The current beneficiaries of the licences are Siccar Point Energy E&P Limited and Shell U.K. Limited.

The terms of licence P.1028 incorporate the model clauses for production licences in seaward areas set out in Schedule 4 to the Petroleum (Production) (Seaward Areas) Regulations 1988, with subsequent amendments.² The terms of licence P.1189 are set out in full in the licence itself. The terms of both licences have subsequently been amended by, *inter alia*, section 77 and Schedule 3 to the Energy Act 2008. Copies of the relevant licences as originally granted³ and the current status of each licence⁴ are available from the Oil and Gas Authority's ("OGA") website.

Role of the OGA

The OGA was established as independent executive agency in 2015, creating operational independence from the Department for Business, Energy and Industrial Strategy ("**the Department**").

On 1 October 2016, the OGA became a company limited by shares, with the Secretary of State as the sole shareholder. It is largely funded by an industry levy introduced on 1 October 2015. The OGA and its functions are set out in Part 1 of the Energy Act 2016.

At the time that licences P.1028 and P.1189 were granted, the function of petroleum licensing was carried out by the relevant Secretary of State under section 3 of the Petroleum Act 1998. Those licensing functions were transferred to the OGA with effect from 1 October 2016 by Regulations 2 and 3 of the Petroleum (Transfer of Functions) Regulations 2016.⁵ From the same date, Regulation 2(3) of the Energy (Transfer of Functions, Consequential Amendments and Revocation) Regulations 2016⁶ provided that:

"any instrument made, granted or given before the relevant date has effect, so far as is appropriate in connection with a transferred function, as if references to the Secretary of State (and references which are to be read as references to the Secretary of State), were or included references to the OGA".

¹ There have been a number of Machinery of Government changes since 2001, with relevant functions being exercised from time to time by the Secretaries of State for Trade and Industry (to 2007), Business, Enterprise and Regulatory Reform (2007-09), Business, Innovation and Skills (2009-16) and Energy and Climate Change (2008-16). The functions of the last two of these passed to the Secretary of State for Business, Energy and Industrial Strategy in 2016.

² A consolidated version of the current model clauses as in effect immediately before the commencement of the Petroleum Act 1998 is set out in the Petroleum (Current Model Clauses) Order 1999.

³ P1028:

https://dataogauthority.blob.core.windows.net/external/Redacted_Licence_Docs/P1028_LICENCE_Redacted.pdf

P1189: https://dataogauthority.blob.core.windows.net/external/Redacted_Licence_Docs/P1189_LICENCE_Redacted.pdf

⁴ https://itportal.ogauthority.co.uk/information/licence_reports/offshorebylicence.html

⁵ <https://www.legislation.gov.uk/uksi/2016/898/contents/made>

⁶ <https://www.legislation.gov.uk/uksi/2016/912/contents/made>

Accordingly, with effect since 1 October 2016 the OGA has been responsible for administering all extant and future petroleum licences, including licences P1028 and P1189 and any consents to be granted under those licences. All references to the Secretary of State in licences issued under the Petroleum Act 1998, including licences P1028 and P1189, are to be read as references to the OGA.

Field Development Consent

It is a condition of licences P1028 and P1189 that the licensees cannot erect or carry out “*relevant works*” or get petroleum from the licensed area without the written consent of the OGA or in accordance with a programme which the OGA has approved. In practice, that condition is implemented by requiring licensees to obtain a development and production consent from the OGA. The decision as to whether or not to grant that consent is a matter for the OGA.

In the present case, Siccar Point Energy E&P Limited has made an application to the OGA for development and production consent in relation to the Cambo field. The OGA has not yet determined the outcome of that application, which is currently also subject to the Environmental Impact Assessment process pursuant to the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020 (the “**EIA Regulations 2020**”).

Continuation of Licences

Any notice to continue either licence (P1028 or P1189) beyond the current term (into the final production term) in respect of ‘the producing part’ of the licensed area has to be given not less than three months before the expiry of the current term (31 March 2022) and is subject to Development and Production Consent being granted. The OGA has confirmed that no such notice has yet been given for either licence.

Environmental Impact Assessment (EIA)

The EIA Regulations 2020 provide a scheme for assessing the environmental impacts of projects related to offshore oil and gas exploration and production, offshore gas unloading and storage and offshore capture and storage of carbon dioxide. Regulation 4 of the EIA Regulations 2020 provides that projects falling within Schedules 1, 2 or 3 of the Regulations cannot commence without the consent of the OGA and that the OGA cannot grant consent without the Secretary of State’s agreement.

Pursuant to Regulation 4(3), the Secretary of State must not agree to the OGA granting consent for a project unless an EIA has been carried out or an EIA is not required, pursuant to regulations 5, 6 or 7.

All projects that fall under Schedule 1 require an EIA. For projects that fall under Schedule 2, an application must be made to the Secretary of State for a screening direction to decide if an EIA is required, or the developer can opt for the project to undergo an EIA. For projects that fall under Schedule 3, an application for a screening direction is not required and the Secretary of State decides whether an EIA is required without making a screening direction.

The Secretary of State’s functions under the EIA Regulations 2020 are exercised by officials at the Offshore Petroleum Regulator for the Environment and Decommissioning (“**OPRED**”), which is part of the Department, in accordance with the principle set out in *Carltona v Commissioners of Works* [1943] 2 All ER 560.

In the present case, an Environmental Statement in connection with the proposed development of the Cambo field has been submitted to OPRED. A public consultation has been carried out in accordance with Regulation 11 and further information has been requested from the developer in accordance with Regulation 12. The EIA process is still ongoing and no decision has been made. Details of the ongoing process have been published on OPRED’s website,⁷ and information will continue to be published in accordance with the EIA Regulations 2020.

⁷ <https://www.gov.uk/government/publications/cambo-phase-1-field-development>

Power of Direction

Under section 9 of the Energy Act 2016, the Secretary of State may give directions to the OGA as to the exercise of its functions if the Secretary of State considers that the directions (a) are necessary in the interests of national security or (b) are otherwise in the public interest. Unless directions are given in the interests of national security, the Secretary of State may give a direction on public interest grounds that relates to a particular case only if the Secretary of State considers that the circumstances are exceptional.

As at the date of this letter no specific or general direction has been given in respect of development of the Cambo field.

Parliamentary Petitions

You have not identified the specific petition or petitions to which your letter refers. We assume that you are referring to a petition submitted to Parliament either via the website petition.parliament.uk or in hard copy. From the information available on that website, we understand that two petitions referring to the Cambo field have been rejected for the reason quoted in your letter.⁸

Petitions to Parliament are a matter for the Petitions Committee, a Select Committee of the House of Commons. The rejection of petitions is therefore a matter for the relevant Parliamentary authorities, not the Secretary of State. Statements made by or on behalf of the Petitions Committee are not statements by or on behalf of the Secretary of State.

The decisions in respect of the two petitions identified above were made by the Petitions Committee without any reference to the Department.

6. Response to the Proposed Claim

For the reasons set out at the outset of this letter, it is not accepted that the issues raised by your PAP letter are amenable to a claim for judicial review.

In respect of the media articles cited in your letter, it is important to note that quotes referred to in your letter contain only extracts of the statements provided. We have identified a copy of a press statement provided by the Department's spokesperson in response to enquiries about the Cambo field, which appears to be the statement referred to in the media reports of 22 July 2021 quoted in your letter. This statement, read in its entirety, provides an accurate high level summary of the decision-making process relating to petroleum licences. The statement reflects the fact that decisions whether to grant licences or for activities relating to licences issued under the Petroleum Act 1998 are now taken by the OGA, and that the granting of consent requires the agreement of the Secretary of State under the EIA Regulations 2020, a decision which is delegated to responsible officials in OPRED.

In respect of the statement from an unidentified "*Government source*" reported by Sky News on 5 August 2021, this does not appear to be an official statement made by the Department and as such we are not in a position to comment on it.

Finally, the rejection of Parliamentary petitions, and the reasons for those decisions, are not a matter for the Secretary of State. In the two instances we have identified where petitions were rejected for the reasons quoted in your letter, those decisions were made without any reference to or input from the Department or Secretary of State. In the circumstances, even if those decisions gave rise to arguable grounds for judicial review (which is not accepted), the Secretary of State would not be the appropriate defendant to such proceedings.

7. ADR proposals

We agree that the proposed claim is not amenable to ADR.

⁸ <https://petition.parliament.uk/petitions/594617> and <https://petition.parliament.uk/petitions/594529>

8. Aarhus Convention

Pursuant to rule 45.41(2) of the Civil Procedure Rules (“CPR”), an Aarhus Convention claim means a claim brought by one or more members of the public by judicial review or review under statute which challenges the legality of any decision, act or omission of a body exercising public functions, and which is within the scope of Article 9(1), 9(2) or 9(3) of the Aarhus Convention. For the reasons set out above, it is not accepted that the issues raised by your letter are amenable to a claim for judicial review. It is therefore not accepted that this proposed proceedings would be an Aarhus Convention claim within the meaning of the CPR.

9. Response to Requests for Information and Documents

For the reasons set out above, it is not accepted that the issues raised by your PAP letter are amenable to a claim for judicial review. There is therefore no basis to provide the documents that you seek in your PAP letter. We have nonetheless provided the information sought in your letter in order to ensure your correct understanding of the legal and factual position.

Addressing your specific requests in turn:

- (1) *Please provide a copy of the document setting out the transfer scheme (or any other legal instrument) by which the OGA exercises powers under these licences.*

We have identified above the Regulations transferring the relevant licensing functions to the OGA.

- (2) *Please clarify the dates for each of the existing terms of the licences and their potential future terms*

As noted above, copies of both licences are available on the website of the OGA, which is the regulatory authority responsible for licensing.

- (3) *Please provide copies of all and any press or similar statements relating to the Secretary of State’s involvement in and/or powers in relation to, the extension of the Cambo production process as above, as provided to media outlets such as those reported above.*

As stated above, we have identified the press statement issued by the Department which appears to have been cited in media articles referred to in your letter. We will provide a copy of this statement on the basis that it will only be used for the purpose of the proposed proceedings and will not be released to the public or to any other organisation, in line with CPR 31.22(1).
Please confirm this by return and we will provide a copy of the relevant statement.

There is no basis for your request for copies of all press statements related to the Secretary of State’s involvement in licensing relating to Cambo fields. Identifying all such statements would be highly time-consuming and disproportionate in the circumstances.

- (4) *Please identify and provide copies of any documents evidencing any advice, decision or similar, as communicated by the Secretary of State or his or any other Government department relating to the decision-making described here to the people or organisation responsible for the decision as above to reject the Cambo petition.*

As set out above, no such advice or decision was communicated from the Secretary of State or the Department to the Petitions Committee responsible for the decision to reject the petitions identified above.

10. Details of any other interested parties

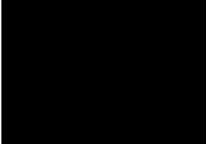
Save for the two licensees already identified in your letter, we do not consider there are any other interested parties.

11. Address for further correspondence and service of court documents

Government Legal Department
102 Petty France, London SW1H 9GL
DX 123243, Westminster 12

The Government Legal Department accepts service of originating process by email. Please send any claim, should it be brought, to newproceedings@governmentlegal.gov.uk and copy to gemma.file@governmentlegal.gov.uk.

Yours faithfully



For the Treasury Solicitor

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