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FRIENDS OF THE EARTH

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By email only:  
cc.

Our Reference: JW/

3 November 2015

Dear :

**Application by Third Energy to hydraulically stimulate and test the various geological formations previously identified during the 2013 KM8 drilling operation - NY/2015/0233/ENV**

1. Friends of the Earth, acting through its Rights & Justice Centre, acts as legal adviser to Frack Free Ryedale in relation to the above planning application. Our clients are a group of local people concerned about oil and gas extraction in the Ryedale area.
2. We refer to the above application by Third Energy to carry out high volume hydraulic fracturing at the KM8 site at Kirby Misperton, Alma Farm, Off Habton Road, Kirby Misperton, North Yorkshire (the "application").
3. Our clients believe that the Environmental Statement is flawed in a number of respects as set out in their objection and consultation response. Whilst our client's objection clearly sets out the flaws in the Environmental Statement, we have instructions to draw to the Council's attention the legal aspects of certain of the more significant flaws in the assessment of ecological impacts so that the Council and the applicant may take such further action as necessary to address them.

**Summary**

4. First, our clients believe that the assessment of the impact on a number of European protected species<sup>1</sup> is inadequate, in particular:
  - otter
  - bats
  - newts

<sup>1</sup> Conservation of Habitats and Species Regulations 2010, Schedule 2.

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habitats impacts - draft letter to NYCC - v2\_LT.doc Printed on paper made from 100% post-consumer waste

They believe that impacts from fracking and gas production on these species cannot be ruled out. Whilst they note that a Phase 1 habitat survey has been undertaken, they regard this as inadequate and believe that a more comprehensive assessment is required.

5. Second, our clients believe that the evaluation of potential impacts on the River Derwent SAC is flawed, since the Environmental Statement overlooks the functional connection between the well site and the SAC, as well as the use by designated species of other waterways close to the site.
6. Finally, our clients believe there is a real risk of impacts on barn owls which are protected under domestic legislation (Wildlife & Countryside Act 1981).

(i) European protected species

7. The JBA report which forms part of our client's objection makes clear that Alma Farm near the KMA site contains a number of outbuildings (including a derelict cottage) which have the potential to support bats and nesting birds. Our clients have (video) evidence that bats are in fact roosting in the derelict Sugar Hill bungalow at the Farm. Our clients' experience, as local people, is that bats are found in significant numbers in the local area. They note that local planning policy also recognises this fact<sup>2</sup>.
8. Far from undertaking the necessary survey work to determine whether bats are in fact roosting at the Farm before the application is determined, the applicant appears to propose to use the monitoring strategy, implemented after planning permission has been granted, to determine this fact<sup>3</sup>. This approach is back to front and, our clients consider, potentially unlawful (see further below).
9. Otter have been sighted in the River Seven and the River Rye as well as in tributaries (becks) not more than 1 mile from the site. Otter are sensitive to vibration and noise and may therefore be impacted by activities at the Site. In addition, as highlighted in the JBA report, otter are also a qualifying feature of the River Derwent SAC which is functionally connected to the Site (via a drain and tributaries) and may be impacted by any pollution of the SAC from the Site. No assessment of these impacts is contained in the Environmental Statement.
10. So far as newts are concerned, the JBA report makes clear that the pond adjacent to the track leading to Alma Farm should be considered with regards to its potential to support Great Crested Newts. The pond is located just 245 metres from the Site but does not appear to have been assessed for impacts in the Environmental Statement. Our clients advise that Yorkshire Wildlife Trust have also commented that there may be great crested newts in the ponds near to the site<sup>4</sup>.

Legal analysis

11. As you know, these species are protected in EU<sup>5</sup> and English law<sup>6</sup>. Case law (see the leading

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<sup>2</sup> Ryedale Biodiversity Action Plan – page 7.

<sup>3</sup> See Environmental Statement – Chapter 11, para 8.1.2

<sup>4</sup> Comment/observation made to the planning application for the new security fence for the KM8 site.

<sup>5</sup> Habitats Directive (1992/43) – see Annex II as regards designation of areas of protection and Annex IV re. animal species in need of strict protection.

<sup>6</sup> Conservation of Habitats and Species Regulations 2010 – Schedule 2.

case of Morge<sup>7</sup>), makes clear the need for effective assessment of impacts on protected species before a planning authority decides to grant planning permission<sup>8</sup>. Thus in Morge, Baroness Hale made clear that planning officers' reports

“obviously have to be clear and full enough to enable them (i.e. the planning authority) to understand the issues and make up their minds within the limits that the law allows them.”<sup>9</sup>

12. Similarly in Woolley<sup>10</sup>, the court found that the licensing process undertaken by Natural England (in relation to bats) was no substitute for the proper consideration of impacts on protected species by the planning authority<sup>11</sup>. The approach set out in Morge was endorsed by the court in Bagshaw<sup>12</sup>.
13. Our clients believe that the assessment of impacts on these species fails to comply with the standards laid down in case law, in particular because it overlooks a number of important examples of protected species in the vicinity of the site, or a real possibility that such species are present which have not been considered. If these gaps are not addressed, they would render any decision to grant planning permission on the basis of the Environmental Statement potentially unsafe.
14. The applicant's proposals to assess impacts on bats after planning permission is granted is particularly troubling. Either the impacts on bats are minimal and the post-permission measures are unnecessary, or the data provided to the Council to date is inadequate and the applicant is seeking to address the deficiency after the event. The latter approach is clearly unlawful (contrary to Morge and subsequent case law) and would render the grant of planning permission unsafe.
15. JBA make clear that the fact that the ecology survey was undertaken (on one day) in the midst of winter is unsatisfactory and the limitation on findings re. bats (as a result) is not identified in the Statement, contrary to the requirement in Annex IV(8) of the EIA Directive (2011/92). JBA argue that the 2012 assessment of bats on which the applicant relies is relatively outdated. Finally, our clients remind you of the precautionary approach required to be adopted to the assessment of impacts on nature under the Habitats Directive<sup>13</sup>.
16. In the circumstances, our clients believe that full assessment of the impacts on such species is required and at a time of the year when it will be possible to determine the true extent of the relevant species present and the likely degree of impacts from the proposed activities.

(ii) Species protected under domestic law

17. Our clients have evidence that that barn owls nest (and have done so for a number of years) in the barns at Alma Farm, near the KMA site. The suitability of the habitat for barn owls is

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<sup>7</sup> [2010] EWCA Civ 608

<sup>8</sup> “Thirdly, whilst it is true that the word “significant” is omitted from article 12(1)(b) – in contrast to article 6(2) and, indeed, article 12(4) which envisages accidental capture and killing having “a significant negative impact on the protected species” – that cannot preclude an assessment of the nature and extent of the negative impact of the activity in question upon the species and, ultimately, a judgment as to whether that is sufficient to constitute a “disturbance” of the species.” Ibid.

<sup>9</sup> Ibid, para 36.

<sup>10</sup> R (Woolley) v Cheshire East Borough Council and Millennium Estates Limited [2009] EWHC 1227 (Admin)

<sup>11</sup> Per HHJ Waksman, at 26.

<sup>12</sup> Bagshaw v Wyre District Council [2014] EWHC 508

<sup>13</sup> See Waddenzee case law – infra note 16.

also highlighted in the JBA report. The assessment is flawed since it seems to overlook this fact and potential impacts on this species almost entirely. Barn owls are designated under Schedule 1 of the Wildlife & Countryside Act 1981. Further assessment is therefore required.

18. Our clients argue that the assessment is defective as regards the assessment of impacts on these species for the reasons stated and the Council cannot have regard to all material considerations (in accordance with section 70 of the 1990 Act) in these circumstances. Further assessment is therefore required.

### (iii) Impacts on River Derwent SAC

19. Our clients are concerned that the Environmental Statement fails adequately to address impacts on the River Derwent SAC. The JBA report sets out these concerns in full. However, in summary:

- a. there is a pathway for pollution from the site to the Derwent SAC - namely the Sugar Hill Drain which is adjacent to the site, which flows into the Costa Beck which flows, in turn, into the Derwent;
- b. there is a risk of pollution from the site flowing into the Drain given the site is small, a large amount of equipment will be required to be present (given the nature of fracking) and measures to avoid pollution are considered inadequate;
- c. assessment of impacts on species for which the SAC is designated (lamprey and Otter) is insufficient since pollution could affect fish stocks, which in turn would affect otter;
- d. assessment of water bodies outside the SAC is inadequate insofar as these are used by designated species.

### Legal analysis

20. As you know SACs are protected under EU<sup>14</sup> and English law<sup>15</sup> and EUCJ case law makes clear that Member States must adopt a precautionary approach to assessment – that is, assessment is required save where all reasonable doubt about impacts may be ruled out<sup>16</sup>. Further, in Sweetman, the Court made clear that:

“Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site” (our emphasis)<sup>17</sup>.

21. Given the clear the presence of a sensitive receptor (the SAC), a clear pathway to the receptor and the risk of pollution being generated at the KMA site, it seems clear that impacts on the protected area cannot be ruled out and that a Habitats Regulations Assessment is therefore required. Grant of planning permission without a Habitats Regulations Assessment on the impacts of this new and (in this country) largely untested technology at a site connected to a

<sup>14</sup> Council Directive on the conservation of natural habitats and of wild fauna and flora (92/43/EEC) – the “Habitats Directive”).

<sup>15</sup> Conservation of Habitats and Species Regulations 2010

<sup>16</sup> Case C-127/02: Waddenzee

<sup>17</sup> Case C-258/11 Sweetman and Others - para 40.

European site would be potentially unsafe and at risk of challenge.

**Conclusion**

22. Please confirm as soon as possible that full assessment of impacts on all the European protected species referred to as well as the species protected in English law will be undertaken in full before the application is determined. Kindly also confirm that a Habitats Regulations Assessment of impacts on the River Derwent SAC will be undertaken and carefully taken into account before the application is determined.

We look forward to hearing from you by return.

Yours sincerely

Legal adviser  
**Friends of the Earth**

