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**FAO: Secretary of State for Business, Energy and
Industrial Strategy**

Department for Business, Energy and Industrial Strategy
1 Victoria Street
London SW1H 0ET
United Kingdom

By email only: enquiries@beis.gov.uk

Copied to:

Oil and Gas Authority

AB1 Building, 48 Huntly Street
Aberdeen AB10 1SH

oga.correspondence@ogauthority.co.uk

Siccar Point Energy

3rd Floor, H1
Hill of Rubislaw, Anderson Drive
Aberdeen AB15 6BL

info@siccarpointenergy.co.uk

Shell UK Limited:

1 Altens Farm Road, Nigg

Aberdeen AB12 3FY

generalpublicenquiries-uk@shell.com

26 August 2021

Dear Secretary of State for Business, Energy and Industrial Strategy,

URGENT PRE-ACTION PROTOCOL LETTER FOR JUDICIAL REVIEW

Re: Cambo

We write in accordance with the Judicial Review Pre-Action protocol to advise you of a potential claim for judicial review.

We write in the light of advice received from David Wolfe QC.

However, in the hope that this matter can be resolved without the need for legal proceedings, we have not yet instructed solicitors. Accordingly, please reply to this letter direct to us at the address above. We will let you know if we instruct solicitors and their contact details.

If you disagree with our understanding or characterisation of the factual or legal position, as set out below, please make that clear in your reply, and explain the basis for your disagreement.

The potential claimant

Uplift is a not-for-profit initiative with a mission to support and energise the movement for a just and fossil fuel-free UK.

Friends of the Earth Scotland is Scotland's leading environmental campaigning organisation and an independent Scottish charity, campaigning for an end to environmental degradation and a just transition to a sustainable society.

The potential defendant's reference details

We do not know of any specific reference. The letter concerns the Cambo Oil Field and licences P.1028 and P.1189.

The details of the claimants' legal advisers, if any, dealing with this claim

As above, we have not yet instructed solicitors so, for now, please correspond directly with us at the address above.

Interested Parties

(1) The Oil and Gas Authority (OGA Headquarters, AB1 Building, 48 Huntly Street, Aberdeen AB10 1SH).

(2) Siccar Point Energy (3rd Floor, H1, Hill of Rubislaw, Anderson Drive, Aberdeen AB15 6BL) and Shell UK Limited (1 Altens Farm Road, Nigg, Aberdeen, AB12 3FY) (“the licencees”)

The details of the matter being challenged and the issue

The Cambo field is an oil field that lies within UKCS Blocks 204/4a, 204/5a, 204/9a and 204/10a, in the West of Shetland region of the UK Continental Shelf.

The Secretary of State granted two licencees pursuant to section 3 of the Petroleum Act 1998 in relation to the Cambo field: P.1028 and P.1129.

We understand that the licencees are the current beneficiaries of those licencees.

Each licence contemplates “terms”. We understand that the current terms for both licencees will end on 31/03/2022. The licencees have applied to continue the licencees after the second term (for P.1189) and (it seems¹) the third term (for P.1028) with a view to terms of “production” lasting to 2050.

In a series of public statements, the Secretary of State appears to have taken the position that he (and/or the Government generally) is not involved in the decision to grant consent for the Cambo production phase, and/or has no power to intervene and/or could not take any action to stop that phase proceeding at all or in the proposed form.

For example, on 22 July 2021, the Evening Standard reported this (copy attached)

“A spokeswoman for the UK Government’s Department for Business, Energy & Industrial Strategy said: “The original licensing approval for the Cambo oil field dates back to 2001.

“The Secretary of State [Kwasi Kwarteng] is not involved in the decision whether to grant consent for the Cambo oil field.

On 22 July 2021, Channel 4’s web site reported the following (copy attached):

A BEIS spokesperson said the Secretary of State Kwasi Kwarteng is “not involved” in deciding whether to grant consent for the Cambo oil field.

On 5 August 2021, Sky News’ web site reported (copy attached) that:

Ministers and advisers insist that the approval of Cambo is entirely in the hands of the oil and gas regulator and that there are no plans to find a way to stop it.

Any attempts to do so, they point out, would likely result in the government being taken to court by Shell and Siccar Point.

A government source told Sky News: “Cambo is not a new oil field, it was licensed in 2001.

“We cannot intervene.

¹ The OGA website identifies both licencees as being in their second term with one potential further term. It is not obvious how that fits with the provisions of P.1028

"The ongoing approval process is not within our control."

If those media outlets have not fully or correctly reported the Secretary of State's position or legal understanding, please let us know.

We also note that, in the last few days, the Parliamentary authorities (so we assume) have rejected a petition relating the Cambo field on the basis that:

"It's about something that the UK Government or Parliament is not responsible for.

Consent to proceed to production at Cambo filed will be a matter for the UK's regulators, the Oil and Gas Authority (OGA), and the Offshore Petroleum Regulator for Environment and Decommissioning (OPRED), following their standard regulatory processes."

It seems unlikely that they would have reached that view without some input from the Secretary of State. That input presumably states the Secretary of State's position.

In any event, assuming that the Government's position has been correctly reported, then it appears that the Secretary of State has misdirected himself in law in two different ways.

Before we summarise those matters, we would stress that this letter 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.

Rather, this letter is simply concerned with the correctness or not of the contention that the Secretary of State (and Government generally) is not involved in, and/or are powerless in relation to, the matters in question.

Turning then to the two different ways in which the stance taken appears to misunderstand the legal position:

(1) Applications under the licences

The extension applications would appear to take effect under clause 5(1) of P.1189 and incorporated clause 5(1) of P.1028.

Clause 5(3) in each case provides that the licence would continue beyond the second (or third) term if (among other cases) the Minister has approved a programme of works in pursuance of clause 13(4) for P.1189 (or clause 17(4) for P.1028) as submitted under clause 13(2) (or 17(2)). We assume that such a programme has either been submitted or will be submitted with a view to securing approval under clause 13(4) (and 17(4)). If our understanding is not correct, please identify the basis on which each licence is intended to continue beyond its present term and into the proposed production phase.

In any event, by clause 13(4)(c)(ii) (and clause 17(4)(c)(ii)) the Minister can reject the proposed programme of works if the proposals are "in the opinion of the Minister, not in the national interest." If the Minister does so then, by clause 13(5)(b) (and

17(5)(b)), the notice of rejection must specify “the rates at which he considers that, in the national interest, Petroleum should be got from the area to which the programme relates”. It follows that the rejection of the programme can be on the basis that the proposal is for getting more petroleum than is in the national interest.

Given that, in practice, such licences are now operated by the OGA, we assume that a transfer scheme has been made under section 3 of the Energy Act 2016 which has the effect that references to the Minister in P.1028 and P.1129 are to be read as references to the OGA. It follows that it is for the OGA to approve, or not, the programmes of work described above.

However, section 9(1) of the Energy Act 2016 allows the Secretary of State to give directions to the OGA as to the exercise of any of its functions if the Secretary of State considers that the directions are “in the public interest”. By section 9(2), such directions can be given in relation to a “particular case” if the Secretary of State consider the circumstances are exceptional.

It follows that it would be entirely open to the Secretary of State to give a general direction to the OGA in relation to its consideration of programmes of works as above including, in particular, as to what it should consider is, or is not, in the national interest (for clause 13(4)(c)(ii) (or clause 17(4)(c)(ii)) purposes); likewise a specific direction to the same effect in relation to these applications.

The “climate emergency” and related matters, particularly in the run up to COP26 later this year, could plainly provide a basis for such a direction. Such a direction, whether general or specific, could include a direction to the OGA as to the level of getting of Petroleum that is in the national interest for clause 13(4) (and clause 17(4)) purposes.

(2) Environmental Impact Assessment

Siccar Point Energy has submitted an Environmental Statement (ES) for the purposes of the Offshore Oil and Gas Exploration, Production, Unloading and Storage (Environmental Impact Assessment) Regulations 2020.

As part of a joint response, we responded to the public consultation on that ES pointing out, among other things, that it was flawed by virtue of the failure to assess downstream emissions and the cumulative, medium and long term, permanent, negative effects of significant climate-related environmental effects of the Cambo Project both in the UK and in other countries. However, this letter is not directly concerned with that matter.

It relates to the process of consent to which the ES relates. In particular, regulation 4(1) of the 2020 Regulations provides that a developer must not commence a project without the Secretary of State’s agreement to the OGA’s grant of consent and the consent of the OGA. Regulation 4(2) provides that the OGA must not grant consent without the agreement of the Secretary of State.

Regulation 14(1) provides that the Secretary of State must reach a conclusion on the significant effects of the project as part of deciding whether to agree the grant of consent. That conclusion must take into account (among other things) the ES and consultation responses.

Schedules 5 and 6 of the Regulations specify the matters to be provided in the ES and to be taken into account for that purpose. That includes matters relating to the impact of the proposal on climate change.

Consistent with all that, the ES as submitted itself explains (at #1.2.1) that:

“No consent in respect of an activity will be granted until the SoS is satisfied with the environmental information provided and that there will be no significant effect on the environment.”

Overall

Overall, it follows that, contrary to the position set out on behalf of the Secretary of State and Government, including as above, the Secretary of State (and thus the Government) is necessarily involved in, and anyway has the power to intervene in relation to, the proposals here (and indeed other similar proposals).

It follows that the Secretary of State’s public statements, assuming them to have correctly reported as above, are based on errors of law (and, as a result, that the Secretary of State is unlawfully failing to consider the exercise of the powers in question, as above).

The details of the action that the defendant is expected to take

In accordance with the pre-action protocol, please reply to this letter by 9 September (being 14 days’ time). In your response please be clear in setting out the Secretary of State’s response to our contention that statements such as those above are based on errors of law as above.

If the Secretary of State has been incorrectly reported, or no longer maintains the position as reported, please be clear about that, and make clear the Secretary of State’s correct understanding of the law and intention properly to exercise the powers described above.

If, on the other hand, the Secretary of State maintains the correctness of the position as reported (or a similar legal position), then please explain the basis of your disagreement with the legal position we have set out above. In that event, and dependent on your answer, we are likely to commence judicial review proceedings seeking declarations as the Secretary of State’s legal error(s).

ADR proposals

We do not at present see how our concerns could be dealt with by ADR but, if you have any suggestions, we would be happy to consider them.

Aarhus Convention

If we do commence proceedings, they would be an Aarhus Convention claim within the meaning of the CPR. If you disagree, please make clear the basis for any disagreement.

The details of any information/documents sought

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.

Please clarify the dates for each of the existing terms of the licences and their potential future terms.

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.

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.

The address for reply and service of court documents

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

Friends of the Earth Scotland
2nd floor, Thorn House
5 Rose Street
Edinburgh EH2 2PR

We are willing to receive correspondence and accept service of documents by email at tessa@upliftuk.org and rdixon@foe.scot. Please confirm if you are also willing to receive correspondence and accept service by email.

Proposed reply date

Please reply by 9 September (being 14 days' from this letter).

Yours sincerely



Tessa Khan, Director, Uplift



Dr. Richard Dixon, Director, Friends of the Earth Scotland