Igas Energy plc (for the attention of
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FRIENDS OF THE EARTH

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Our ref: JW

3 October 2016

Dear Madam

PLANNING APPLICATION TO DEVELOP A HYDROCARBON WELLSITE AND DRILL UP TO TWO EXPLORATORY HYDROCARBON WELLS - LAND OFF SPRINGS ROAD, MISSON, NOTTINGHAMSHIRE DN10 6ET: ES/3379

Friends of the Earth's Rights & Justice Centre acts for Nottinghamshire Wildlife Trust in relation to certain property law issues arising out of your company's proposals to undertake drilling and exploration for shale gas at the above site (the "Rocket Site") in the event that the above planning application is granted.

As you may be aware, our client is the owner and occupier of Misson Training Ground (Carr) SSSI Reserve (the "Reserve"), located approximately 125 metres from the Rocket Site.

The Reserve is designated as a Site of Special Scientific Interest. The Reserve was notified by Natural England for its rare fen and other associated habitats and also for its diverse assemblage of breeding birds, including the scarce Long Eared Owl, which, we are informed, nests in only a handful of sites in Nottinghamshire, with one quarter of the population being in the Reserve.

Natural England states that "SSSIs represent the very best of the rich variety of wildlife and geology that makes England's nature special and distinct from any other country in the world". It describes SSSIs as "nationally important nature conservation sites" [1].

We have obtained counsel's advice concerning the property law obligations to which the Rocket Site is subject and the legal rights which our client's enjoy over the Rocket Site. In summary, counsel has advised us (and we have shared his advice with our clients) that:

(a) the Rocket Site is subject to a restrictive covenant (pursuant to a conveyance dated 2 October 1969) which prevents the carrying out of "noisy, noxious, or offensive trade or business or for any purpose which may be or become a nuisance, damage or annoyance to the Vendor or

[1] http://www.sssi.naturalengland.org.uk/Special/sssi/images/EnforcementPolicyNotice.pdf

other the owners or occupiers for the time being of the retained land";

(b) the covenant is valid;
(c) the covenant remains binding on the owners and occupiers of the Rocket Site (having been originally protected as a land charge, and subsequently by registration against the registered title of the Rocket Site);
(d) our client is the owner of part of the benefitting land identified by the covenant;
(e) our client is therefore entitled to enforce the covenant so as to restrain any activity carried on at the Rocket Site (whether by your company or otherwise) which breaches, or will breach the covenant.

It is well established that a covenant preventing acts amounting to a 'nuisance' prohibits a wider range of activities than the common law of nuisance. It is trite law that the grant of planning permission (whether or not the impacts of the authorised development have been considered by the planning authority) affords no defence to a claim in nuisance (Hunter v Canary Wharf[2]) and, *a fortiori*, a claim for breach of a covenant by causing a 'nuisance'. Neither does the grant of planning permission override (or even take into account) private law rights with which the authorised development would interfere.

A covenant prohibiting 'annoyance' is wider still. The relevant test is whether the activity complained of would 'reasonably trouble the mind and pleasure' or 'raise an objection in the minds of' owners of the benefitting land, or whether a reasonable person would be "annoyed and aggrieved" by the activity complained of (Todd-Heatley v. Benham[3]).

Our client considers that the proposed activities at the Rocket Site are likely to cause both nuisance and annoyance, within the meaning of the covenant. For example (and only that), and as our clients have pointed out in the course of the planning process, the impact of the proposals to drill and explore for shale gas at the Rocket Site, which your company predicts and upon which the planning authority relies, are based on assumptions, rather than measurement, which are either incomplete or not robust and may therefore turn out to be wrong.

In particular, no measurement of baseline noise levels has been undertaken at the Reserve despite its being situated in a particularly quiet location and where the 42dB noise contour falls a matter of metres from the Reserve boundary. The part of the Reserve closest to the Rocket Site is known for its nest sites for protected species. Just one of the four possible drilling rigs under consideration by Igas is thought capable of adhering to the noise level prescribed by Natural England in relation to this SSSI and Igas has failed to guarantee that it would use that rig.

Further, our client contends that modelling of impacts on water levels is based largely on hypothetical data. This is important because the habitats in the Reserve are dependent on complex water regimes for their conservation. Yet no water monitoring is proposed to be required by the planning authority at the Reserve. It is also unclear what, if any, measurement of nitrogen impacts has been undertaken which are capable of a significant detrimental effect as Igas' consultants concede[4]. Accordingly our clients are entirely reasonable in being 'troubled' or "annoyed" by the prospect of your company's activities on land very near to theirs.

For the reasons set out above, our client is concerned that the activities at the Site will be "noisy"

[2] [1998] 1 WLR 434
[3] (1888) 40 ChD 80 – re-considered and approved more recently by the Court of Appeal in Dennis v Davies [2010] 1 EWCA Civ 1081.
[4] IGas regulation 22 response – April 2016: para 6.2.2

within the meaning of the covenant also. Further, you will be aware that at other unconventional oil and gas exploration sites such activities have, inspite of consideration by the planning authority, led to justified complaints of noise pollution when the activity has commenced on the ground[5]. The covenant in this case has the effect that our client is not required simply to hope that your clients are more effective at the Rocket Site in limiting the inevitable noise caused by this activity than others have been in the past.

In the circumstances and so as to avoid recourse to any further action to resolve this matter, kindly confirm by return that none of the proposed activities will be carried out at the Rocket Site by or on behalf of your clients at any stage in future so far as the activities breach or are likely to breach the covenant, including but not limited to the reasons set out above.

Yours faithfully,

Friends of the Earth, Rights & Justice Centre

cc. Oliver Meek, Nottinghamshire County Council

[5] See for example concerns expressed about noise levels at Balcombe, West Sussex in 2013 in relation to the oil testing site operated by Cuadrilla.