



Can Scotland Ban Fracking?

Friends of the Earth Scotland Supporter Briefing

November 2016

There's been a lot of discussion in anti-fracking circles about some of the legal and constitutional issues around the moratoriums on shale gas, coalbed methane and underground coal gasification. Common questions centre around:

- the difference between a moratorium and a ban
- the legal status of the current moratoriums in Scotland
- whether the Scottish Government currently has the powers to implement a ban on unconventional fossil fuels
- if the Scottish Government did put a ban in place, the risks of being taken to court by a fracking company or even the UK Government

The bad news is that there are no straightforward answers to these questions; but the good news is that Ian Cowan, an environmental law expert (and FoES board member), has given his take on them, without too much legal jargon, in this great blog post:

<https://talkingmince.wordpress.com/2016/02/17/its-not-easy-being-green-part-two-along-came-a-lawyer/>

We highly recommend you read the whole thing, because these are important and complex issues that take some understanding.

However, in answer to the questions above, the key points are:

1. Most people probably think of a ban as permanent, and of a moratorium as a temporary ban. A ban, whether permanent or temporary, has no real teeth unless legal steps are taken to enforce it. For instance, the Scottish Parliament passed legislation to make it an offence to smoke in public places. This is the most effective way to ban something 'permanently'. However, what one Government legislates for another Government can later undo, so not even a legislative ban can really be described as permanent. But creating a new law, rather than simply a strong policy position, sends a powerful message about the importance of an issue, and if the law is widely supported by voters it can be much harder for future Governments to change.
2. The legal status of the current moratoriums on shale gas and oil, coalbed methane and underground coal gasification is based on steps taken using existing powers under planning and environmental regulation that are devolved to the Scottish Parliament under the 1998 Scotland Act.
3. The Scottish Government could use the same powers to effectively ban unconventional oil and gas: the existing ban on new nuclear power plants in Scotland is delivered through the use of planning powers, and has never been challenged. When the Scottish Government recently announced that underground coal gasification would have 'no future in Scotland's energy mix', it steered clear of using the word ban, but confirmed it would use planning powers to ensure that UCG could not go ahead in Scotland. Effectively therefore, Scotland has a 'policy ban' on UCG and nuclear.

However, FoES thinks there is a strong case for introducing new legislation to ban shale gas fracking and coalbed methane in the context of climate change. Following the independence

