

NEW PLANNING GUIDANCE AND RELATIONSHIP WITH OTHER REGULATORY REGIMES

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INTRODUCTION

1. On 19th July 2013 the Department of Communities and Local Government published its Planning Practice Guidance for Onshore Oil and Gas¹ In doing so the Minister, Baroness Hanham, explained that the coalition government “believes shale gas has the potential to provide the UK with greater energy security, growth and jobs.” Although we are at the very early stages of development, it appears that the resources of shale gas are likely to be very substantial indeed.
2. Earlier estimates that the UK’s shale gas deposits were 309 trillion cu ft, have now been superseded by the British Geological Survey’s conclusion that the north of England alone holds an estimated 1,300 trillion cu ft. Earlier claims that “a shale gas boom in the UK would create more than a 100,000 jobs”, albeit over a ten year period have recently been downplayed. However the Coalition Government remains

¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224238/Planning_practice_guidance_for_onshore_oil_and_gas.pdf

committed to the development of the industry which they claim will not only create many new jobs, but also enable the delivery of cheaper fuel.

THE FRACKING PROCESS

3. Notwithstanding the prospect of these major benefits in energy and jobs, the process of exploration and extraction of the shale gas known as hydraulic fracturing (fracking) is proving very controversial indeed.
4. The process of shale fracking involves injecting very large volumes of water mixed with sand and chemicals at high pressure into boreholes in rocks which are thought to contain the shale gas. This pressurised mixture causes the shale to crack and liberates the methane and hydrocarbons trapped in the rock which then flow up the borehole where it is captured and either used to generate electricity or is fed into the gas grid.
5. CPRE, who perhaps not unexpectedly have strong reservations, state in their guidance: “the interaction between the artificial fissures and pre-existing natural faults (some of them highly stressed), flow back to the surface of large volumes of contaminated fracking fluid, and the handling of large amounts of gaseous and possibly liquid hydrocarbons, in combination, constitute a substantial environmental hazard”.
6. Greenpeace have also been active, conducting a campaign to persuade anti-fracking landowners to join action to prevent shale gas companies from drilling under their land.
7. Minor earthquakes in the area around the Preese Hall site in Fylde, Lancashire led to the stoppage of exploration works by Cuadrilla in 2011; and the attempt by the same company to carry out exploratory work in Sussex led to the recent, well publicised battle of Balcombe.

PUBLIC CONCERNS

8. Key issues of public concern include:

- The volume of water used, particularly in water stressed areas;
- The treatment of the recovered fracking fluid which can contain pollutants and may affect existing groundwater regimes;
- Impacts on the local area due to the size of the site area, the traffic that results and associated dust and noise;
- Scepticism as to the prospects of achieving good restoration, particularly in environmentally sensitive areas;

Objections are likely to intensify as a result of the cumulative effect of several sites in the same area. Moreover, despite assurances to the contrary, eg in the Guidance at para 59, local residents are unlikely to accept that permission for exploration won't inevitably lead on to the grant of permission for extraction. They will see the permission for exploration as the "thin end of the wedge" and further consents for exploitation of the resource as difficult to resist.

THE PURPOSE OF THE GUIDANCE

9. Against this background DCLG have issued their Planning Practice Guidance. The purpose is to provide advice on the planning issues associated with what are referred to as the three phases of extraction of hydrocarbons. Its publication was foreshadowed in the 2013 Budget which announced that the Government was intending to encourage the exploitation of shale gas by the introduction of a new shale gas field allowance, and that technical planning guidance on shale gas would be produced in July "to provide clarity around planning for shale gas during the important exploration phase

for the industry”.² Its publication is clearly one of a number of steps the Government is taking to facilitate the development of the shale gas industry.

10. The Guidance explains it is to be read alongside other planning guidance, including the National Planning Policy Framework (NPPF), which is to be covered by another speaker.

THE THREE PHASES

11. The Guidance identifies three phases of onshore hydrocarbon extraction:

- Exploration
- Appraisal (testing)
- Production

Each phase requires planning permission, as well as other permits or approvals. The relevant minerals planning authority is the County Council, in a two tier area, the Unitary Authority or the National Park Authority

12. The exploratory phase is likely to include seismic surveys as well as exploratory drilling. Although exploratory drilling for conventional hydrocarbons may take 12 to 25 weeks, this “may take considerably longer, especially if there is going to be hydraulic fracturing”.
13. The appraisal phase occurs where further information is required about the extent of the deposit or its characteristics. For shale gas it may involve further fracking.

² DCLG consultation closed on 14th October in respect of proposals to amend the requirements for notification of planning applications, so that only landowners of the above ground area would need to be notified, and also the fees for onshore oil and gas development. There may well be further consideration of proposals to amend the law of trespass and compulsory purchase to avoid the effect of campaigns such as that being conducted by Greenpeace.

14. The production phase “normally involves the drilling of a number of wells”, and the production life can be up to 20 years, “possibly more”.

THE KEY REGULATORS

15. The guidance identifies the “key regulators” for hydrocarbon extraction. These are:

- Department of Energy and Climate Change – issues Petroleum Licences and gives consent to drill under the licence once other permissions and approvals are in place, it also has responsibility for assessing and monitoring the risk of seismic activity, and consenting flaring or venting;
- Minerals Planning Authorities – grant planning permission and impose conditions to ensure the impact on the use of the land is acceptable;
- Environment Agency - protects water resources (including groundwater aquifers), ensures treatment and disposal of mining waste, emissions to air, and suitable management and treatment of naturally occurring radioactive materials; and
- Health and Safety Executive – regulates the safety aspects of all phases of extraction, responsible for ensuring appropriate design and construction of a well casing for any borehole.

Other bodies that may become involved include: the Coal Authority; Natural England; the British Geological Survey and Hazardous Substances Authorities.

ENVIRONMENTAL CONSIDERATIONS

16. At paragraph 30 of the Guidance a list of the principal environmental issues of hydrocarbon extraction that should be addressed by minerals planning authorities are set out, with the caveat that they may not all be relevant in every case

- Noise associated with the operation
- Dust
- Air quality
- Lighting
- Visual intrusion into the local setting and the wider landscape by the placement of any building or structure within the application site area
- Landscape character
- Archaeological and heritage features
- Traffic
- Risk of contamination to land
- Soil resources
- Impact on the best and most versatile agricultural land
- Flood risk
- Land stability/subsidence
- Internationally, nationally or locally designated wildlife sites, protected habitats and species, ecological networks
- Nationally protected geological and geomorphological sites and features
- Site restoration and aftercare.

RELATIONSHIP BETWEEN PLANNING AND OTHER REGULATORY REGIMES

17. It can be seen from this list that there is considerable scope for overlap between planning and other regulatory regimes, which are described in the Guidance as “separate but complementary”. The relationship between planning and other regimes is an issue which often arises in certain planning contexts, eg applications for incinerators or waste to energy plants, and can cause difficulty. It is not uncommon for developers to warn off planning authorities with the threat of costs should they refuse an application for a proposal in respect of which the Environment Agency are prepared to grant a permit subject to appropriate conditions.
18. The proper approach was explained by Jeremy Sullivan QC (as he then was), sitting as a deputy High Court Judge in *Gateshead MBC v Secretary of State for the Environment and another* (1994) 67 P &CR 179, a case which concerned a clinical waste incinerator in a semi-rural location. The appropriate starting point is the obligation to have regard to the development plan and other material considerations. The environmental impact of emissions to atmosphere is a material consideration at the planning stage, but so also is the existence of a stringent regime under the EPA for preventing or mitigating that impact. The decision maker is entitled to be satisfied, having regard to the EPA controls that the difficulty is capable of being overcome, so there is no reason for refusing planning permission. Whether that point has been reached is a question for the decision maker on the facts of each individual case.
19. At page 190 Mr Sullivan QC said this;
- “Lest this judgement be misinterpreted, I stress that this decision is not *carte blanche* for applications for planning permission to seek to ignore the pollution implications of their proposed development and say “leave it all to the EPA”, This decision simply recognises that whilst environmental pollution is a material consideration, so too is the system of authorisation under the EPA. So that in appropriate cases the planning authority or the Secretary of State may decide that they are satisfied that any

remaining pollution concerns are capable of being dealt with by the EPA. It is for them to decide which cases are appropriate and which are not.”

20. This decision was upheld in the Court of Appeal and has been followed in a number of cases, including *Hopkins Developments Ltd v First Secretary of State and another* [2006] EWHC 2823 (Admin), George Bartlett QC, sitting as deputy High Court Judge, which concerned a concrete batching plant. At paragraph 11 of his judgment Mr Bartlett said that the proposition that it was established that the impact of air emissions from a proposed development is capable of being a material consideration but in considering that issue the planning authority is entitled to take into account the pollution control regime. Thus in appropriate cases planning authorities can leave pollution control to the pollution control authorities, but they are not obliged as a matter of law to do so. He went on to say that the Inspector in that case

“focussed on whether the development itself was an acceptable use of the land and the impacts it would have, rather than on the control of the processes or emissions themselves. In approaching the matter in this way, in my judgment, he acted in accordance with the law.”

And in paragraph 15 he said

“planning authorities should focus on the impacts rather than the control of emissions, not that they must subordinate their judgment on the impacts to those of the pollution control authority.”

21. This was followed by HH Judge McKenna, sitting as a deputy High Court Judge in *Harrison v Secretary of State for Communities and Local Government and another* [2009] EWHC 3382, who said at paragraph 21

“The thrust of the decision in Hopkins ... is that the planning decision maker was entitled to reach his own conclusions as to the impact of the proposed development on amenity and whether the site under consideration was the appropriate location for the proposed development. The fact that the impact might be capable of being regulated under a pollution control regime did not necessarily mean that the only possible option available to an Inspector was to leave everything to that regime. If the planning decision maker considered that there might be adverse consequences because of the effects of the proposed development on amenity and /or issues as to the appropriateness of locating the development on the site in question, he was entitled to

have regard to such matters as material considerations in making his decision on the planning merits of the proposed development.”

22. This is reflected in paragraph 29 of the Guidance which states that the focus of the planning system should be on whether the development itself is an acceptable use of the land, and the impacts of those uses, rather than any control processes, health and safety issues or emissions where these are subject to approvals under other regimes. It is to be assumed the non-planning regimes will operate effectively.
23. However even though this assumption is to be made, and all other consents and permits are in place, it is still open to the planning authority to conclude that the proposed development would have such an adverse impact on local amenity that it should be refused planning permission.
24. Although, as mentioned, the planning authority should not duplicate the function of other regulatory bodies, it should ensure that they have been consulted and ensure before reaching a decision that they are satisfied with the proposal.

THE ROLE OF OPERATORS

25. So far as operators are concerned, the Guidance encourages them to engage as early as possible with the planning authority, and other relevant bodies as well as with members of the local community.
26. Through a process of active pre-application engagement, operators can demonstrate:
 - They understand the policy regime in which they wish to operate;
 - They are aware of, and utilise, the latest techniques; and
 - They will discuss and introduce measures to mitigate the impacts including a scheme to provide for the site’s restoration and aftercare.

Effective pre-application engagement should also maximise the chances of success in obtaining planning permission, and although proposals for oil and gas exploration are often very controversial, as discussed above, operators may be able to take some of the heat out of the opposition by showing they are prepared to be open and collaborative, and willing to respond to the advice and guidance from planning and other authorities.

27. The need for, and scope of, an Environmental Impact Assessment is dealt with in Part B of the Guidance, and is discussed by another speaker.

SHOULD ACCOUNT BE TAKEN OF THE EFFECTS OF THE PRODUCTION PHASE AT THE EXPLORATION PHASE?

28. As I have mentioned, each of the three phases requires a separate planning application and assessment. When considering whether to grant planning permission for the exploratory phase, the Guidance provides (paragraph 58) that the authority should not take account of the likely impacts of future phases, as these will be separately assessed. Moreover, when the subsequent phases come forward for approval, the fact that exploratory drilling has already taken place is only relevant to the extent that it establishes the presence of hydrocarbon resources. It does not mean that the site is otherwise suitable for approval (paragraph 59).

HOW CAN THE ENVIRONMENTAL EFFECTS OF DEVELOPMENT BE MITIGATED?

29. Assuming planning permission is to be granted, the Guidance indicates three ways of ensuring the mitigation of the effects of development:

- *Agreed programme*

The operator and the planning authority, in consultation with the local community and other relevant bodies, should agree a programme for carrying out the work. This should take account of the potential impact on the local community and wildlife over the expected duration of the project.

- *Planning conditions*

The planning authority should impose appropriate conditions, controlling the scope of activities associated with the development. Annex D to the Guidance contains a number of model planning conditions, including a condition preventing the discharge of contaminated water, and also conditions requiring the approval of a landscape scheme, a noise monitoring scheme and a dust management scheme.

- *Restoration*

The effects can be further mitigated by the planning authority requiring, as part of the application, proposals for the restoration and aftercare of the land. A model condition for this is included in Annex D.

As the Guidance explains there are a number of forms of land use that may be appropriate once the mineral extraction process is completed. These included the creation of new habitats and biodiversity, use for agriculture or forestry and recreational activities.

In exceptional cases it may be appropriate to require a financial guarantee or bond eg when the viability of the project is questionable but not so uncertain as to justify the refusal of permission.

CONCLUSION

30. Although the subject of shale gas may be very topical, its effects were experienced in antiquity. It has recently been discovered that two seismic faults riddled with fissures through which gas could escape ran under the Temple of Apollo in Delphi. In these fissures signs of methane and other gases have been discovered. The Priestess who sat on her tripod in the Temple to prophesy was seated above a chasm in the earth through which vapours rose. Although some ancient accounts mention that the Priestess seemed intoxicated, the more likely explanation for her delirious state was because she was high on shale gas.
31. The ancient Greeks may have missed a fracking opportunity but the coalition government is keen to encourage the development of the shale gas industry and to provide clarity in the role of the planning system in taking forward applications for oil and gas development. We shall have to see if the system not only operates effectively in enabling the development of the industry, and unlocking the forecast economic benefits, but also in a manner which is publicly acceptable within a “local-led planning system”.

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