

## **FRACKING AND THE NATIONAL PLANNING POLICY FRAMEWORK**

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1. Unconventional gas production is relatively new to the UK<sup>1</sup>, and is being welcomed with a predictable mix of apprehension, excitement and occasional hysteria. Given the immutable truth that the policy maker spends his life at least two steps behind the entrepreneur, the planning policy framework is still emerging. The purpose of this paper is to map out how the National Planning Policy Framework (“NPPF”) addresses fracking; but also to explore how the national and local policy framework is likely to develop; and to identify some of the challenges ahead.

#### Policy challenges for fracking

2. Fracking creates a number of problems in planning policy terms:
  - a. It is controversial, in terms of its economics and its environmental effects;
  - b. It is untested;
  - c. There are a range of different consent regimes, falling under three different government departments, several agencies, and mineral planning authorities, meaning that the risk for inconsistent policy on the subject is considerable;
  - d. The scale of fracking operations may be significant, and their impacts widespread;
  - e. There are typically several different project stages (exploration, testing, production, and remediation/aftercare) which may demand different policy responses;
  - f. As part of the immutable truth mentioned above, it is likely that the technology will move faster than the policy maker, so there will be a continuing challenge to catch up;
  - g. There is a risk of shooting first, and asking questions later: adopting policies without properly informed consideration and consultation.

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<sup>1</sup> Although old to the world, “fracking” first having been carried out in the US in 1947.

3. In that context the risk of creating a labyrinthine and internally contradictory policy regime is considerable.

#### Sources of policy and their influence

4. It is trite law that planning applications are to be determined in accordance with the development plan unless material planning considerations indicate otherwise. In the context of fracking, that directs the decision-maker to the Minerals Local Plan (or Core Strategy) for the area concerned. However, most such plans do not address unconventional gas exploration, due to its relative novelty. Some will have policies on hydrocarbon extraction which may be relevant (albeit they may sit uncomfortably with unconventional extraction); others will have general policies which may be of relevance, such as areas of search. The development of local plans to address fracking will be considered further below.
5. Other material policy considerations will include the NPPF, but also other statements of government policy such as the recent Planning Practice Guidance for Onshore Oil and Gas, which falls outside the scope of this paper. Further sources of policy, in the more general sense of the word, may include the statements of various government departments (including DECC and the Treasury), generally in support of the exploration and development of the UK's shale gas resources.

#### The NPPF

6. Planners will now by now be generally familiar with the NPPF, which is now 18 months old. However it is worth recalling it is stated aims and purposes:
  - a. It intends to set out the government's planning policies. The intention was assumed to be that this would form a compendious statement of policy, meaning that the plethora of PPSs and PPGs, and other policy documents, could be cancelled;
  - b. It must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions;
  - c. It seeks to explain the concept of "sustainable development". It states that the government's view of what amounts to sustainable development is set out in paragraphs 18 to 219 of the NPPF;

- d. It establishes a “presumption in favour” of sustainable development. This means that plan-makers should “positively seek opportunities to meet the development needs of their area” and should meet objectively assessed needs unless the adverse impacts of doing so would “significantly and demonstrably outweigh the benefits” when assessed against the NPPF’s policies or specific policies indicate that development should be restricted. For decision-taking it means that development which accords with the development plan should be approved without delay, and that where the development plan is “absent, silent or relevant policies are out-of-date”, granting planning permission unless the adverse impacts of doing so would “significantly and demonstrably outweigh the benefits” when assessed against the NPPF’s policies or specific policies indicate that development should be restricted;
  - e. It identifies 12 core planning principles which should underpin plan-making and decision-taking;
  - f. It sets out policies under 13 chapter headings, including “Facilitating the sustainable use of minerals”;
  - g. It goes on to address plan-making and decision-taking, and to explain how the NPPF should be implemented. Importantly it says (at 215): “due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)”.
7. Thus the NPPF seeks to establish itself as competing with the statutory presumption in favour of the development plan, particularly in cases where the development plan is treated as being out of date for lack of consistency with the NPPF.

#### NPPF minerals policy

8. Paragraphs 142 to 149 address minerals generally, and the following parts are of particular relevance to unconventional gas:
  - a. Paragraph 142 states that minerals “are essential to support sustainable economic growth and our quality of life”. It emphasises the need for a “sufficient supply of material to provide the... energy... that the country needs” and that best use should be made of minerals;

- b. Paragraph 143 addresses the preparation of local plans. They should:
- i. “identify and include policies for extraction of mineral resource of local and national importance in their area”;
  - ii. “set out environmental criteria, in line with the policies in this Framework, against which planning applications will be assessed so as to ensure that permitted operations do not have unacceptable adverse impacts on the natural and historic environment or human health, including from noise, dust, visual intrusion, traffic, tip- and quarry-slope stability, differential settlement of quarry backfill, mining subsidence, increased flood risk, impacts on the flow and quantity of surface and groundwater and migration of contamination from the site; and take into account the cumulative effects of multiple impacts from individual sites and/or a number of sites in a locality”;
  - iii. “when developing noise limits, recognise that some noisy short-term activities, which may otherwise be regarded as unacceptable, are unavoidable to facilitate minerals extraction”;
  - iv. “put in place policies to ensure worked land is reclaimed at the earliest opportunity, ...and that high quality restoration and aftercare of mineral sites takes place, including for agriculture (safeguarding the long term potential of best and most versatile agricultural land and conserving soil resources), geodiversity, biodiversity, native woodland, the historic environment and recreation”.
- c. Paragraph 144 addresses planning decision-making and states that local authorities should:
- i. “give great weight to the benefits of the mineral extraction, including to the economy”;

- ii. “as far as is practical, provide for the maintenance of landbanks of non-energy minerals from outside National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage sites, Scheduled Monuments and Conservation Areas” [note the silence on “energy minerals” in this regard];
  - iii. “ensure, in granting planning permission for mineral development, that there are no unacceptable adverse impacts on the natural and historic environment, human health or aviation safety, and take into account the cumulative effect of multiple impacts from individual sites and/or from a number of sites in a locality”;
  - iv. “ensure that any unavoidable noise, dust and particle emissions and any blasting vibrations are controlled, mitigated or removed at source, and establish appropriate noise limits for extraction in proximity to noise sensitive properties”;
  - v. “provide for restoration and aftercare at the earliest opportunity to be carried out to high environmental standards, through the application of appropriate conditions, where necessary. Bonds or other financial guarantees to underpin planning conditions should only be sought in exceptional circumstances”.
- d. Paragraph 147 addresses energy minerals and states that planning authorities should:
- i. “when planning for on-shore oil and gas development, including unconventional hydrocarbons, clearly distinguish between the three phases of development (exploration, appraisal and production) and address constraints on production and processing within areas that are licensed for oil and gas exploration or production”;
  - ii. “encourage underground gas and carbon storage and associated infrastructure if local geological circumstances indicate its feasibility”; and

- iii. “encourage capture and use of methane from coal mines in active and abandoned coalfield areas”.
9. A Technical Guidance document<sup>2</sup> was published with the NPPF in March 2012, addressing minerals issues. It notes in particular the issues relating to mineral extraction in close proximity to communities, and requires the developer to produce a programme of works which shows the impact on the community over the life of the development. It establishes a basis for the assessment of dust emissions. It imposes a specific noise limit for minerals extractions; a control which is absent from the NPPF for other forms of development. It addresses restoration and aftercare in some detail.
10. There are other policies of relevance to unconventional gas production in the NPPF. Firstly, paragraph 90 provides that mineral extraction is not inappropriate development in the Green Belt. In *Europa Oil and Gas Ltd v SSCLG* [2013] EWHC 2643 (Admin), Ouseley J held that a proposed development involving exploratory drilling for gas in Surrey was “mineral extraction” for the purposes of paragraph 90 and the Green Belt policies.
11. In terms of plan-making, paragraph 163 states that:
- “163. Minerals planning authorities should work with other relevant organisations to use the best available information to:
- develop and maintain an understanding of the extent and location of mineral resource in their areas; and
  - assess the projected demand for their use, taking full account of opportunities to use materials from secondary and other sources which could provide suitable alternatives to primary materials.”
12. The “mineral resource” referred to in that policy would seem to include unconventional gas.

#### Analysis of the NPPF and fracking

13. The starting point is that fracking which accords with the NPPF is sustainable development; it should be positively planned for by local authorities; and there is a presumption in favour

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<sup>2</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/6000/2115548.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6000/2115548.pdf)

of granting planning permission for it. However, that begs the question: what is “fracking which accords with the NPPF”?<sup>3</sup>

14. Firstly, fracking which produces minerals which address a recognised need for energy is supported: see paragraph 142. “Great weight” should be given to the benefits, including economic benefits, of mineral extraction. It should be noted that “great weight” is also given in the NPPF to (for example) the need to conserve National Parks and AONBs, and to the conservation of designated heritage assets. This is notable because the term “great weight” in those contexts reflects statutory protections for those designations: the economic benefits of mineral extraction are seemingly given the same weight.
15. Secondly, policy makers must plan for such mineral extraction, and set out their policies in accordance with paragraph 143. In doing so, they must understand the extent of the potential resource, and take account of the opportunities for its use (paragraph 163). In doing so, they must work with other relevant organisations, and immediately one would expect DECC to be consulted on minerals plans to assist in identifying the scope and location of the resource.
16. Thirdly, fracking (as with other mineral extraction) should be subject to detailed environmental criteria, set out in the relevant local plan with reference to the Technical Guidance. If the local plan is silent, individual applications must be assessed against the Technical Guidance and against the range of environmental issues identified in paragraph 144.
17. Fourthly, the NPPF makes clear that a distinction needs to be drawn between exploration, appraisal and production. It might be argued that given the great weight accorded to the economic benefits of unconventional gas extraction, and the national need for such minerals, the NPPF should be treated as firmly endorsing exploration. Without such exploration, the potential for future extraction cannot be properly understood.
18. Fifthly, mineral planning authorities should address constraints on production within licenced areas. That means that they should plan positively for the removal of such constraints (e.g. through improvements to the highways network). Again, this demonstrates

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<sup>3</sup> Note that the recent Planning Policy Guidance says nothing about whether or when unconventional gas is “sustainable development”.

the significant influence that DECC may have over planning for unconventional gas extraction, as it is DECC which will determine the licence areas.

19. Sixthly, and most importantly, local plans which fail to address unconventional gas or impose policies which appear to be purely ones of restraint will be treated as silent or out-of-date. Through the operation of paragraphs 14 and 215, they will be accorded little weight by the Secretary of State on appeal. Thus there is a real potential for a policy vacuum outside the general policies of the NPPF.

Where next?

20. A number of developments are likely to be forthcoming which will have a significant effect on the policy framework:
- a. Minerals planning authorities will have to develop their local plans to reflect the opportunities for fracking. The potential for such developments in their areas must be engaged with and planned for rather than simply resisted;
  - b. There will be a new round of petroleum licencing in 2014, together with a strategic environmental assessment which is likely to influence the planning policy framework in due course;
  - c. The Government is likely to establish new application procedures for fracking, which will alter the consultation requirements;
  - d. There is a potential for call-in and recovery to be used by the Secretary of State to determine such applications: note the recent changes to the criteria for renewables schemes, which were also subject to new guidance in July this year;
  - e. Similarly, certain authorities will lose the power to determine such applications over the coming months, and direct applications will be made to the Planning Inspectorate under s 62A TCPA 1990, where the authority is designated as failing;
  - f. The government has stated that it will keep under review the question of whether such schemes should be subject to the Planning Act 2008 regime. If it decides that they should, expect the early publication of a National Policy Statement recognising a national need for unconventional gas extraction.



21. Overall, there is pressing need for minerals planning authorities to plan positively for fracking, or face having the power to decide taken away from them.

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