

North York Moors National Park Authority

1 October 2018

Government Consultations on:

- i) Permitted Development rights for Shale Gas Exploration;
- ii) Inclusion of Shale Gas Production Projects in the Nationally Significant Infrastructure Project Regime

1. Purpose of the Report

- 1.1 To inform Members of two separate but parallel Government consultations relating to the regulation of shale gas development through planning processes.
- 1.2 To set out a possible response to each of the consultations.

2 Introduction

- 2.1 On 17 May 2018 the Government published a Written Ministerial Statement on Energy Policy (WMS2018). That Statement reaffirmed the Government's position that there are substantial benefits to be gained from the safe and sustainable exploration and development of our onshore shale gas resources; that shale gas is of national importance, and; that further measures were under consideration to support a planning decision-making regime that facilitates timely decisions on proposals for such development, in line with previous manifesto commitments. WMS2018 also reiterated a commitment to ensuring that such development is robustly regulated and that local communities are fully involved in decisions which affect them.
- 2.2 Specifically, WMS2018 trailed an intention by Government to consult on whether:
 - a) non-hydraulic fracturing shale gas exploration development should be treated as permitted development, and the circumstances in which this might be appropriate;
 - b) the criteria required to trigger the inclusion of shale gas production projects into the Nationally Significant Infrastructure Projects regime.
- 2.3 Separate consultations addressing these matters were published by the Ministry of Housing, Communities and Local Government and the Department for Business, Energy and Industrial Strategy respectively on 19 July 2018. The closing date for responses to each consultation is 25 October 2018.
- 2.4 The main implication of both measures is that proposals for these forms of development, currently involving submission of a planning application for determination by the relevant minerals planning authority, would no longer require this.
- 2.5 Sections 3 and 4 of this report contain more information about the consultations, as well as a proposed response to the specific matters on which views are sought
- 2.6 Members will be aware that these consultations are running in parallel with finalisation of the Minerals and Waste Joint Plan (MWJP) for North Yorkshire, York and the National Park, which will set out a new local planning policy framework for hydrocarbons development, including shale gas.

Although the Government consultations overlap with the concluding stages of MWJP preparation, they relate to matters of development management process rather than policy and therefore are not considered to give rise to any significant direct implications for the content of the MWJP policies. However, it should be noted that the overall scope of influence of the policies on development decisions would be reduced if the proposals set out in the consultations are implemented, as the policies could no longer be directly applied to some forms of shale gas development.

3. Consultation on Permitted Development Rights for Shale Gas Exploration

- 3.1 *Permitted development rights* are in effect a national grant of planning permission in principle, the scope of which are set out in the Town and Country Planning (General Permitted Development) (England) Order 2015.
- 3.2 Permitted development rights are already established for the temporary use of land for certain forms of minerals exploration development. This includes the making of excavations, the carrying out of seismic surveys and, in some cases, where the scale and duration of development would be limited, the drilling of exploratory boreholes. The existing permitted development rights apply within the National Park, subject to limitations including the developer providing prior written notification to the planning authority. However, the drilling of boreholes for petroleum exploration purposes is specifically excluded from the scope of the existing rights applying in all areas. The introduction of a permitted development right for non-hydraulic fracturing shale exploration development, outside the scope of the existing rights, would require new secondary legislation.
- 3.3 The consultation seeks views on a number of specific matters:
 - a) *Whether to introduce a permitted development right for non-hydraulic fracturing shale gas exploration development*
- 3.4 The consultation emphasises that the purpose of such a right would be to speed up decision making and to help avoid the uncertainty caused by delay. It also clarifies that any development permitted in this way would still be required to receive the appropriate consents from the three oil and gas regulators (Environment Agency, Health and Safety Executive and Oil and Gas Authority). Whilst Public Health England is not a regulator for oil and gas development, it is envisaged that the relevant regulators (including planning authorities) would also have due regard to the advice of that organisation.
- 3.5 Government is proposing through the consultation that a new permitted development right **would not apply in National Parks** or in other sensitive designations including AONBs, Sites of Special Scientific Interest, Scheduled Monuments, Conservation areas and Protected groundwater source areas.
- 3.6 **Suggested Authority response** – a balance needs to be struck between timely decision making and the need for appropriate scrutiny of development proposals at a local level. This is particularly the case for forms of development which have the potential to give rise to adverse impact on local communities, or be proposed in environmentally sensitive locations. A view on the principle of introducing the proposed new permitted development right can only be given in the context of the specific scope and limitations that would be applied, which are considered in more detail in the following sections.
- 3.7 Whilst Government's intention not to apply a new permitted development right in National Parks and other sensitive designations is welcomed and supported, it is necessary to consider the wider implications of the measures proposed through the consultation in the event that that position is not maintained.

It is also important to consider the wider implications of the proposal, as development under a new permitted development right applying outside the National Park boundary could give rise to potential impacts within the National Park. This is considered further in the response to part c) of the consultation, below.

b) *Definition of non-hydraulic fracturing shale gas exploration*

- 3.8 The consultation indicates that it would be necessary to tightly define in legislation what development is permitted, but that it is intended that rights would only apply to ‘...*shale gas exploration, and for non-hydraulic fracturing operations to take core samples for testing purposes. We consider that it would not be appropriate for it to allow for the injection of any fluids for the purposes of hydraulic fracturing. The right would not apply to all onshore oil and gas exploration and/or extraction operations.*’ The consultation therefore proposes the following definition of development that would be regarded as permitted development:

Boring for natural gas in shale or other strata encased in shale for the purposes of searching for natural gas and associated liquids, with a testing period not exceeding 96 hours per section test.

- 3.9 **Suggested Authority response** – the rationale for introducing a permitted development right for exploratory drilling for shale gas but not other forms of hydrocarbons is not clear, other than to address Government’s perceived concern about the speed of decision making on shale gas proposals.

In terms of the potential for impacts on the environment and local amenity, there is no expectation that exploratory drilling for shale gas would give rise to lesser potential for impacts than exploratory drilling for other forms of hydrocarbons. It is correspondingly unclear why the former form of development should benefit from additional flexibility through a permitted development right.

- 3.10 Furthermore, drilling to explore for shale gas in North Yorkshire is likely to require drilling to a greater depth than for conventional gas resources and therefore may be expected to take longer, with correspondingly greater potential for longer duration impacts as a result of factors such as visual intrusion, noise and traffic movements. A related concern is the potential for harmful impacts to arise, through the use of permitted development rights to bring forward incrementally more development in a given area, but without the ability for proper consideration to be given to the cumulative impacts of such development through the full planning process.

- 3.11 It is considered that these factors undermine the rationale for introducing the proposed new permitted development right. The essential role of permitted development rights is to give deemed consent for forms of development which are not likely to give rise to significant land use planning concerns and therefore require a lesser degree of scrutiny and public involvement. Extending permitted development rights to exploratory drilling activity, potentially taking many months, typically involving 24 hour operations and requiring use of substantial items of plant and equipment and associated vehicle movements, would not be in the best interests of ensuring delivery of sustainable development through the planning system, in line with established national planning policy, or help with the Government’s stated intention of ensuring that there is public confidence in the development of the shale gas industry.

- 3.12 This view is consistent with the recent findings of the Housing, Communities and Local Government Committee Inquiry on Planning guidance which recommended, in its July 2018 report, that: *Shale gas development of any type should not be classed as permitted development.*

Given the contentious nature of fracking, local communities should be able to have a say in whether this type of development takes place, particularly as concerns about the construction, location and cumulative impact of drill pads are yet to be assuaged by the Government.

- 3.13 It is therefore considered that Government should not introduce a permitted development right for non-hydraulic fracturing shale gas exploration. Notwithstanding this view, the following comments address matters relevant to other aspects of the consultation, in the event that Government does proceed to introduce a new permitted development right.
- 3.14 A specific concern is that the definition proposed to apply for the purposes of a new permitted development right (see paragraph 3.8) does not directly state that hydraulic fracturing is excluded from the scope of the right. Whilst it is clear from the text of the consultation that this is the intention, it is considered that, if a new right is introduced, this exclusion should be specifically stated in the definition itself for the avoidance of doubt.
- 3.15 Related to this concern is the potential for different interpretation of the term 'hydraulic fracturing' and how this could impact on the scope of any new permitted development right. Specifically, it is not clear whether the Government intends that only exploratory drilling involving 'associated hydraulic fracturing' as defined through the Infrastructure Act 2015 would be excluded from the scope of a new right. The Infrastructure Act, as subsequently clarified by Government, defines associated hydraulic fracturing as fracturing which involves the injection of more than 1,000 cubic metres of fluid at any fracturing stage or more than 10,000 cubic metres of fluid in total.

However, at this very early stage in the development of any shale gas industry in England, it is not yet known whether fluid injection volumes in excess of this threshold are likely to be typical.

- 3.16 The draft Minerals and Waste Joint Plan for North Yorkshire, York and the National Park sets out a wider definition of hydraulic fracturing which does not utilise a minimum volume threshold, with such an approach being in line with current national Planning Practice Guidance. This latter approach reflects the view of the Joint Plan authorities that significant land use planning impacts can arise where volumes of fracture fluid below the Infrastructure Act definition are used. This approach has been subject of initial support by the Inspector undertaking the Examination in Public of the Joint Plan, which has not yet concluded. It is considered essential that any new permitted development right for non-hydraulic fracturing shale gas exploration should clearly state that hydraulic fracturing at any volume is excluded.

c) Development not permitted

- 3.17 The consultation indicates an intention that a new permitted development right would not apply in the following areas but seeks views on this restriction and whether there are any other areas which should be excluded:

- National Parks
- The Broads
- AONBs
- World Heritage Sites
- Sites of Special Scientific Interest
- Scheduled monuments
- Conservation Areas
- Sites of archaeological interest
- Safety hazard areas
- Military explosive areas

Land safeguarded for aviation or defence purposes
Protected groundwater source areas

- 3.18 **Suggested Authority response** – the intention to exclude National Parks and certain other designated areas from the scope of a new permitted development right is welcomed. However, as noted earlier, there is concern that permitted development outside but close to the boundary of these areas could nevertheless give rise to potential for significant adverse impacts on the excluded area, for example as a result of visual and landscape impact, noise and loss of tranquillity, and as a result of increased traffic movements. There is a risk that appropriate opportunity for proper scrutiny of the potential for such impacts would be missed should a new permitted development right be introduced.
- 3.19 On the other hand, the necessary standard development conditions and restrictions that may be required as part of a new right in order to prevent unacceptable harm, including to adjacent protected areas, would be likely to be complex whilst also lacking the flexibility that can result from consideration of a planning application via a comprehensive process of consultation and scrutiny. It is not at all clear, therefore, that the proposed measures would be successful in either facilitating early stage shale gas exploration development, or in protecting the environment from the effects of such development.
- d) *Development conditions and restrictions*
e) *Prior approval*
- 3.20 The consultation document acknowledges that, despite being a temporary form of development, the scale of shale gas exploration development means that any permitted development right would require specific conditions and restrictions to mitigate potential adverse impacts. Views are sought on what conditions or restrictions would be appropriate. Views are also sought on whether a requirement should be imposed to ensure that the developer seeks prior approval from the local planning authority for specified elements of the development before the work can proceed, including potentially, a requirement for public engagement. The consultation notes that this is intended to be a much less prescriptive process than that required for planning applications, as prior approval is intended to be a 'light touch' process which applies where the principle of the development is already established.
- 3.21 **Suggested Authority response** – the questions of standard development conditions and restrictions and the need for prior approval of certain matters before permitted development rights can be exercised are inter-related. There is concern that the imposition of standard conditions for relatively substantial and complex forms of development such as that being contemplated would not be an effective means of preventing unacceptable impacts in all circumstances, owing to the wide range of site-specific circumstances that could arise.
- 3.22 There is also a risk that they could, in certain circumstances, result in unnecessary burdens on developers. It is considered that such matters are most effectively assessed and resolved through a full planning application process rather than a 'light touch' prior approval system.
- 3.23 Nevertheless, without prejudice to the view that introduction of a permitted development right for shale gas exploration would not be appropriate, it is considered that, if such a right were introduced, it should be accompanied by a requirement for prior approval of matters including:

- Size of well pad
- Height of any plant and equipment
- Duration of permitted development
- Means of access and volume of HGV movements
- Mitigation measures for noise, vibration and light intrusion
- Maintenance of a minimum separation distance from sensitive locations such as residential property
- Details of measures to be taken to screen the site and mitigate any potential impacts on ground and surface water resources, ecology, heritage assets and the landscape
- Management of waste
- Restoration of the site including confirmation of compliance with associated Environmental Permitting and Pipeline Regulations.
- Confirmation of Community payment under UKOOG Shale Community Engagement Charter, where relevant.

3.24 It is also considered that a standard requirement for prior notification of local residents and other relevant parties should be included, and in a way which allows a reasonable period for the receipt of representations. Such an approach could help ensure more effective public engagement in shale gas development proposals, in line with previous Government commitments to facilitate this. In the absence of adequate opportunity for public engagement in shale gas development proposals being brought forward under any new permitted development right, there is concern that public confidence in the overall planning and regulation of this form of development will be further weakened.

3.25 Additionally, where permitted development outside but within 3.5km of a National Park boundary is proposed, there should be a requirement for prior notification of the National Park Authority. This latter element would be generally consistent with the approach in the draft MWJP towards ensuring that, where hydrocarbons development is proposed in proximity to the National Park, consideration of visual sensitivity and setting is taken into account. Such a notification requirement should also apply in other circumstances where the adjacent authority considers that adverse impact on the National Park could arise.

3.26 Finally in relation to this particular matter, it is considered important that any new permitted development right is supported by effective and comprehensive standard conditions and prior notification and engagement requirements, in order to reduce the extent to which mineral planning authorities may need to rely on their powers to use 'article 4 directions'. Such directions can be used to remove permitted development rights in instances where there is concern about the potential impacts of development which could otherwise be carried out under such rights.

f) *Time-limited or permanent permitted development right*

3.27 The consultation states that, at this stage, it is unclear the impact a permitted development right for non-hydraulic fracturing shale gas development would have or even whether such a right would be effective given the exclusions, limitations and restrictions that it may be subject to. Views are therefore sought on whether a new permitted development right should be permanent or only apply for a period of two years, to allow monitoring by Government of its success.

3.28 **Suggested Authority response** – the acknowledgement by Government that there is uncertainty over the potential effectiveness of a permitted development right for non-hydraulic fracturing shale exploration development is noted and reinforces concern that the potential scale, nature and sensitivity of such development is not compatible with the use of such rights.

If Government is nevertheless minded to introduce a new right, then it should be for a temporary period of two years only and Government should seek further views from interested parties at the expiry of that period before determining whether it should be carried forward or revised.

4. **Consultation on Inclusion of Shale Gas Production Projects in the Nationally Significant Infrastructure Project Regime**

- 4.1 The Planning Act 2008 created a planning process for *Nationally Significant Infrastructure Projects* (NSIP) in fields of development including energy, waste, water, road and rail transport. The Act defines the type and scale of infrastructure development considered to be nationally significant. Proposals falling within the regime are dealt with by the Planning Inspectorate, rather than via a planning application to the local planning authority, with the final decision to grant development consent resting with the Secretary of State.
- 4.2 The main objective of the NSIP regime is to streamline decision making on nationally significant infrastructure projects, including those which span local authority areas and involve multiple consenting regimes. Key aspects of the regime include a presumption that there is a need for the development, if it is compatible with national policy statements and the national evidence base relevant to the infrastructure in question; a fixed timescale for decision of 12 months, and; the ability to incorporate other powers within the decision making process, for example in relation to the compulsory acquisition of land. Changes to the scope of the NSIP regime would require new secondary legislation.
- 4.3 This consultation seeks views on the following matters:
- a) *Whether major shale gas production projects should be brought into the Nationally Significant Infrastructure Project regime (NSIP)*
- 4.4 The consultation indicates that inclusion of major shale gas production projects within the scope of the NSIP regime would bring such projects in line with other energy projects of national significance, such as major wind farms and gas fired generating stations. The consultation emphasises that it is only intended that production phase projects would be brought within the scope of the regime, not exploration or appraisal stage developments (which typically are of shorter duration).
- 4.5 **Suggested Authority response** – it is not considered that there is adequate justification to bring major shale gas production projects within the scope of the NSIP regime. There is no evidence at this very early stage in the development of a shale gas industry in the UK to indicate with any clarity the scale and distribution of viable resources that may exist, or the scale or specific mode of operation of any industry that may arise, particularly at production stage, if initial results of exploration activity are positive. Furthermore, it is less than clear at this stage whether there is any potential for development to come forward at a scale, or with a degree of importance, that is genuinely of national significance, particularly when compared with other minerals and mining projects not falling within the scope of the NSIP regime, despite involving production of minerals resources considered by Government to be of national and local importance.
- 4.6 It is therefore considered premature to bring such development within the scope of the NSIP regime. There is also concern that to bring such proposals within the regime would further undermine fragile public confidence in the regulatory processes applied to shale gas development, by reducing the opportunities available for local involvement in decision making and the extent to which local knowledge can inform the decision making process.

4.7 In this respect it is noted that the Housing, Communities and Local Government Committee Inquiry on planning guidance recommended, in its July 2018 report, that fracking planning applications at any stage should not be brought within the NSIP regime. The report notes that there is little to be gained from bringing fracking applications under the regime; limited evidence that it would expedite the application process, and; that such a move is likely to exacerbate existing mistrust between local communities and the fracking industry. The Committee also noted that there would be no relationship between applications brought under the regime and local plans in communities.

b) *The criteria to be used to determine whether a project falls within the scope of the NSIP regime*

4.8 The consultation seeks views on a number of possible criteria that could be used to indicate a nationally significant project for the purposes of the NSIP regime. These are:

- The number of individual wells per well-site (or 'pad');
- The total number of well-sites within the development;
- The estimated volume of recoverable gas from the site(s);
- The estimated production rate from the site(s), and how frequently (e.g. daily, monthly, annually or well lifetime);
- Whether the well-site has/will require a connection to the local and/or national gas distribution grid;
- Requirement for associated equipment on-site, such as (but not limited to) water treatment facilities and micro-generation plants;
- Whether multiple well-sites will be linked via shared infrastructure, such as gas pipelines, water pipelines, transport links, communications, etc;
- A combination of the above criteria;
- Other.

4.9 **Suggested Authority response** – it is considered that none of the suggested specific criteria would provide a satisfactory basis for including projects within the NSIP regime. Significantly, in most cases the criteria do not reflect the substantial variability and/or incremental change in key development parameters that may be expected during the life of a shale gas production project. Examples include the likelihood of progressive development of additional well pads and individual wells during the production stage of a licence area; variability in production rate over time, and; change in the nature of processing infrastructure that may be required during the production life of an area. It is difficult to see how such variability could adequately be accommodated within a relatively inflexible consenting process such as the NSIP regime, which is more appropriately applied for consenting large scale, permanent, fixed infrastructure. Conversely, the development management processes available through Town and Country Planning legislation are designed to provide a range of flexible options for consideration of planning proposals, including where necessary in response to proposed changes during the life of a project.

4.10 The only scenario under which it is considered there could be some merit in dealing with major shale gas production proposals through the NSIP regime is in circumstances where there is a need for provision of large scale, long duration, fixed processing infrastructure across multiple licence areas and/or operators. Such an approach could assist in delivering more efficient coordination of planning process and issues in a way which helps to ensure that overall adverse impacts are minimised. This specific scenario is not suggested in the criteria included in the consultation but could form the basis for an appropriate criterion if, notwithstanding the view that major shale gas production proposals should not be brought within the NSIP regime, Government nevertheless decides to implement such a change.

c) *The stage in development of a shale gas industry that such a change should be introduced*

- 4.11 The consultation seeks views on the most appropriate stage in the industry's development for major shale gas production projects to be included under the NSIP regime. It notes that large scale production sites may still be many years away, but that it is feasible that applications for the first production sites could be ready in the coming years. The consultation suggests as potential options that implementation of NSIP procedures could be as soon as possible, or that it be timed to come into effect ahead of the first anticipated production site, or when a critical mass of exploration and appraisal sites has been reached.
- 4.12 **Suggested Authority response** – for the reasons expressed in relation to consultation matters a) and b) above, it is not considered that the NSIP regime should be applied to major shale gas production projects. However, if such a change is introduced, it would be preferable for this to be as soon as possible in order to provide the greatest certainty to the public, developers and other interested parties on how such matters are to be determined, and to facilitate early consideration of the need for coordination of major infrastructure provision at a point in the development process where meaningful benefits from such an approach can still be achieved.

5. **Legal Implications**

- 5.1 Implementation of changes to permitted development rights and the criteria for inclusion of projects within the NSIP regime would both require new secondary legislation.

6. **Conclusion**

- 6.1 In summary, officers do not consider that there is sufficient public interest justification for introducing the proposed new permitted development right, or to bring shale gas production projects within the scope of the Nationally Significant Infrastructure Projects regime.
- 6.2 In both cases, a balance needs to be struck between the benefits of timely decision making and the need for appropriate scrutiny of proposals at a local level. This is particularly so in the case of forms of development such as this, where there is a high level of national and local community interest and public concern, and where the industry is at a very early stage of establishment.
- 6.3 Previous Government statements have referred to the existence of a robust regulatory regime for on-shore shale gas as part of the justification for a positive national policy stance towards this form of development, as well as to the need for the public to be fully involved in decisions which affect them. The submission and determination of planning applications provides a well-established regulatory mechanism for giving proper and public consideration to planning issues associated with such development, whilst providing appropriate flexibility for developers to deal with changing circumstances.
- 6.4 Officers therefore have concerns about both the principle of the proposed new measures, as well as concerns about some of the detailed matters contained in the consultations, including definitions and criteria proposed to be used in association with the new measures under consideration.

7. Recommendation

- 7.1 That Members note the Government consultations on:
- i) Permitted development rights for shale gas exploration;
 - ii) Inclusion of shale gas production projects in the NSIP regime.
- 7.2 That Members endorse the views set out in the 'Suggested Authority response' sections of the report and agree to their submission to the Ministry of Housing, Communities and Local Government and Department for Business, Energy and Industrial Strategy as relevant.

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Background Papers to this Report

1. Permitted development for shale gas exploration (Ministry of Housing, Communities and Local Government consultation, July 2018);
2. Inclusion of Shale Gas Production Projects in the Nationally Significant Infrastructure Project Regime (Department for Business, Energy and Industrial Strategy, July 2018).