

North Yorkshire Minerals and Waste Joint Local Plan

Friends of the Earth

Response to Inspector's request for comments on the materiality of MHCLG Select Committee

Report: Planning Guidance and Fracking (HC767) dated 5 July 2018

19th July 2018

1. Friends of the Earth England, Wales and Northern Ireland (FOEWNI) have been asked to respond to a request from the Inspector as to the MHCLG Select Committee Report: *Planning Guidance and Fracking (HC767)* dated 5th July 2018. Following Examination in Public that finished in April 2018, the Inspector has asked all parties to comment on the relevance of the Select Committee statement to the North Yorkshire Minerals and Waste Joint Plan (NYMWJP), in particular: **i) whether the Report affects the Plan, and if so how; and ii) whether the Plan should be modified and if so how to reflect the Report.**

2. It is worth noting that FOEWNI responded to the Select Committee's call for evidence in March, submitting written evidence and subsequently presented evidence in person to the Select Committee at the oral evidence session held on 30th April 2018. We set out our comments with regard to those aspects and recommendations relevant to plan-making and the soundness of the draft policies of the NYMWJP linked to energy minerals.

Fracking Definition

3. One of the Select Committee's key aims was to get to the heart of the issue of current fracking definitions. Their report concludes that the current legislative definition (principally the Infrastructure Act 2015) is unsuitable in a planning context and recommends it should not be liquid or volume based. The committee also voiced strong concerns over the use of this definition within Planning Practice Guidance (PPG) going forward, as it paves the way for loopholes, such as "non-associated hydraulic fracturing" schemes being allowed within or adjacent to protected areas¹; which would **not** require Hydraulic Fracturing Consent from

¹ Notwithstanding additional safeguards provided by additional government policy discussed at EiP, namely: Surface Restrictions for Hydraulic Fracturing (see Annex A – Para 2.4) and the exceptions test within the NPPF. assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/532428/Government_Response_Surface_Restrictions_for_Hydraulic_Fracturing.pdf

the Secretary of State **nor** any visit from the Health and Safety Executive (HSE) - as is currently required for AHF using 1000m³ of liquid at any stage, or 10,000m³ of fluid overall.

4. The Select Committee's reasoning echoes that put forward by a range of stakeholders and the Joint Councils at the EiP hydrocarbon sessions, as a principal reason for **not** including this legislative definition within the plan, but instead endorsing Online Planning Practice Guidance (OPPG) version. This OPPG definition is **not** volume based and ensures the more stringent but sound local policy tests apply to **all forms of fracking**, whatever the strata or fluid volume proposed.
5. Our view is the report's recommendations would **not affect** the draft plan in its current form, other than endorse its approach and subsequently the draft policies do **not need updating**. Any change to the legislative definition of fracking (as proposed by government) would unlikely have any bearing on the draft plan as it was 'justified'² in using the PPG definition; considering the precautionary principle and the novel methods and potential for greater impacts resulting from hydraulic fracturing on adjacent communities and the environment. At present, no changes have been made to either definition and the plan must be allowed to proceed to adoption based on the EiP framework of justification in mind. A 5-year review would provide a means to update the definitions **if** the government did update or replace either the PPG or legislative definitions.

NPPF Changes

6. The Select Committee report raises justified concerns linked to the revised NPPF due for adoption later this year. Despite our own concerns raised to that separate national consultation we feel that the draft plan cannot consider the implications of a draft policy document that could be subject to further change before it is finalised. We do however welcome the report's probing questions on how NPPF policies would fit within the context of UK climate change commitments.
7. Para 209 of the draft NPPF also provides an allowance for Local Plans submitted for EiP, before its publication stating:

"The policies in the previous Framework will apply for the purposes of examining plans, where those plans were submitted on or before [] [this will be the date which is six

² Re tests of soundness from the NPPF

months after the date of the final Framework's publication]. In these cases the examination will take no account of the new Framework.

8. Considering the above, we feel that as the plan is likely to fall within the remit of the above transition date, meaning further examination of the plan's soundness should consider the existing NPPF (2012) only. Further amendments are not required as the report's recommendations do not affect the plan.
9. If, however, the Inspector feels the forthcoming version of the NPPF is relevant, we would be happy to provide further response to a separate consultation, but feel at this point the transition arrangements negate the need for further comment.

Accuracy of Guidance

10. The report echoes concerns raised by FOEWNI, other NGOs and minerals authorities as to the accuracy and adequacy of current guidance, mainly linked to its various aspects being out of date. The Public Health England report (2014) and Annual Energy Statement (2013) are a case in point, however we feel the existing draft hydrocarbon policies provide adequate safeguards in light of the inadequacies within existing guidance. We welcome the report's findings and recommendations as to a "*clear process for incorporating scientific and technical developments*" and the need for consultation before new guidance is adopted, instead of the piecemeal updates that can be applied to OPPG. That said, any amendments to national guidance or the evidence base are **still to be made** and considering the draft local plan policies already require more detailed consideration of amenity, health and other possible impacts (and with the plan subject to a 5-year review) the Select Committee report's recommendations do not affect the plan and no amendments are necessary.

Weight of Guidance

11. Part of the inquiry focused on the status of the various guidance documents. Paragraph 53 of the report notes that "Local Plans must be the primary consideration" and that "Mineral Planning Authorities are currently finding an appropriate balance between national and local policy and guidance in the determination of fracking planning applications." With regard to the draft Plan, Friends of the Earth's view is that the Inspector has already dealt with the weighting of these different documents at EiP, and will do so again in more detail in her final report. No changes to the policies are needed in this regard.

Local Plans

12. We have already made clear our view³ that the draft policies of the plan do not arbitrarily restrict hydrocarbon development in any way, shape or form. As collective minerals planning authorities fulfilling a statutory duty to plan for their area (as per the Planning and Compulsory Purchase Act 2004), the joint councils are allowed to set local policy requirements so long as they meet the soundness tests. As the more contentious of the draft policies were found sound based on appropriate evidence and justification at EiP (including the fact they provide flexibility as to set-back distances, endorse the precautionary principle and with Local Plan review available down the line) we maintain the view the NYMWJP does not hinder or sterilise hydrocarbon development in any way. The MHCLG report echoes such views in its findings, providing wider context as to why the NYMWJP is justified, referencing the Localism Act (2011), and based on its understanding from the select committee hearings that *“minerals planning authorities have significant local knowledge and expertise, making them best placed to determine planning applications and local plans” (para 57).*

13. The report concludes that it is essential that MPAs have the right to put conditions within their Local Plans that can be justified and have proper regard to local circumstances. This is precisely what we consider the Joint Councils have done. Both the main parties, other interested parties and the Planning Inspector spent three separate EiP sessions debating specific minutiae of the policies, with relevant amendments to wording and allowances made where these were needed. As stated above, MPAs should be free to adapt Local Plan policies to local circumstances rather than simply reiterate the wording of the NPPF and PPG. If this were not allowed then it would make the purpose of preparing a Local Plan redundant. The report explicitly endorses the draft NYMWJP approach, and echoes our previous comments. No changes are required to the draft policies.

Changes to the Planning Regime

³ in the previous consultation response re WMS to the NYMWJP.

14. As voiced in our previous comments to the Inspector’s consultation to the 2018 Fracking WMS last month, we feel fracking drilling activity and infrastructure has no place as a NSIP and should not be considered within the Development Consent Order (DOC) regime. The committee’s recommendations again support this view, which is echoed by members of the public, other NGOs, anti-fracking groups and many minerals authorities. We endorse Cornerstone Barristers’ comments, who stated that even for fracking production wells, “it’s unlikely there would be any element of national significance” (para 79). While possible amendments could be made by government to legislation, we feel that in not yet knowing what will happen with fracking and the DCO regime means, at this time, it is not an issue for the soundness of **this draft plan**, but may need to be considered in the context of a Local Plan review in 5 years’ time.

15. The current draft policies – if adopted – would still be considered (to an extent) within a DCO Inquiry context, and are therefore fit for purpose, however as the final decision for any such scheme⁴ undoubtedly lies with the Secretary of State, any policy amendments that might be made to the draft local policies in this light would have little bearing to what would be a government decision. No amendments are necessary, but we note and support the committee’s recommendation at para 83.

Possible Fracking NPS

16. The committee strongly oppose the government’s suggestion that shale production might move to the NSIP regime, as we do also. They consider the power to determine schemes should remain the responsibility of mineral planning authorities. The report suggests that if fracking were to move to the NSIP regime then a National Policy Statement would need to be produced. We support the report’s endorsement of the NYMWJP as an ‘appropriate template’ for guidance within a possible NPS methodology to ensure no unacceptable impacts on landscapes, restricting inappropriate proliferations of well pads etc. Rather than require any amendment, the report’s recommendation suggests a resounding endorsement from the MHCLG committee that the current draft policies of the local plan are objectively ‘sound’. No changes are therefore required.

Permitted Development

⁴ Should fracking be recognised as nationally significant infrastructure

17. We have serious reservations about the potential for fracking to be considered a form of permitted development, not only linked to the scale and extent of possibly unacceptable impacts that could arise out the need for planning consent, but also to resource issues for planning departments in processing prior approval applications. Notwithstanding the range of possible environmental implications, there are also practical issues, including a potentially exhaustive list of exclusions and caveats that would need to be incorporated in the Order and which developers would need to ensure they'd met⁵. The scale of operation being considered compared to other forms of PD (e.g. fences, small scale extensions, statutory undertaker works) strongly infers the wholly inappropriate nature of the GPDO as a mechanism to sanction exploratory non-fracking drilling going forward.
18. Our view echoes the report's recommendations that mineral authorities are best placed to consider potential impacts of exploratory drilling. Such operational development has always required planning consent, especially for conventional extraction. We support the Committee's recommendation that non-fracking drilling **should not be considered PD**, with the town and country planning regime (which includes a statutory requirement for local community consultation) being the favoured mechanism to assess such a development's range of impacts. We feel that this aspect of the report's findings on this contentious issue however has limited bearing on the soundness of the policies. No changes to the wording of the policy is needed.

Shale Support Fund and Planning Brokerage Service

19. Overall, we agree with the recommendation for further mineral authority funding via the Shale Support Fund being made available. We also **support** any proposed brokerage service being opened- up for members of the public, as per the report's recommendations, although accept this would have limited bearing on the soundness of the draft NYMWJP policies and no further changes are necessary.
20. We trust you will take our comments on board and we are able to provide answers to any further queries if required.

Magnus Gallie MSc MRTPI (Friends of the Earth)

⁵ Such as have they submitted a formal EIA Screening Opinion Request to the MPA; do the proposals keep to yet to be agreed minimum distances from protected areas and European sites; are there suitable caveats for restoration and how will these be enforced?