

## Minerals and Waste Joint Plan

### **Response by the Joint Plan Authorities to the publication of the Written Ministerial Statement on Energy Policy (17 May 2018)**

The Inspector has sought views on two main matters:

- Whether the Written Ministerial Statement, relating to Energy Policy and made on 17 May 2018 (WMS2018), affects the Minerals and Waste Plan (MWJP), and if so how;
- Whether the MWJP should be modified to reflect WMS2018, and if so how.

The response of the MWJP Authorities to these matters is provided below and the Authorities would not wish for publication of WMS2018 to deflect from the progress made on the examination of the Minerals and Waste Joint Plan through the Examination in Public.

It should be noted that references in this response to the National Planning Policy Framework are to that published in 2012, rather than the revised version published in July 2018. This reflects the Government's approach to transitional arrangements for the examination of plans already submitted for examination at the time of publication of NPPF2018.

#### **1) Whether the Written Ministerial Statement, relating to Energy Policy and made on 17 May 2018 (WMS2018), affects the Minerals and Waste Plan (MWJP), and if so how.**

##### *a) WMS2018 theme – The importance of shale gas and overall planning context*

- i) In general terms, the Authorities do not consider that WMS2018 contains any substantive new planning policy content that has any material effect on, or requires any further modifications to, the MWJP. It mainly re-states or re-emphasises matters already covered elsewhere in existing national policy and guidance, including the Written Ministerial Statement on Shale Gas and Oil Policy dated 16 September 2015 (WMS2015) and the National Planning Policy Framework (NPPF).
- ii) The local and national importance of on-shore gas is already recognised in the NPPF (Annex 2) and NPPF (para. 144) states the need for planning authorities to give great weight to the benefits of all forms of minerals extraction. The MWJP gives appropriate recognition to these matters, as set out in more detail below. WMS2018 should not be taken in isolation, but must be read alongside other relevant elements of national policy, including national policy requiring development of resources of shale gas in a safe, sustainable and timely way whilst maintaining the very highest safety and environmental standards (WMS2015).
- iii) The MWJP (paras. 5.97 and 5.106) acknowledges the national significance of oil and gas, including the national need to explore and develop shale gas. An Energy Policy Written Statement HCWS428 by the Secretary of State for Business, Energy and Industrial Strategy made on 25<sup>th</sup> January 2018 stated that 'Exploring and developing the UK's shale gas resources could bring substantial benefits and the Government's view is that there is a national need to

develop these resources in a safe, sustainable and timely way'. The MWJP does not seek to prevent, in principle, development of unconventional hydrocarbons, including shale gas, for climate change (or any other) reasons and acknowledges the Government position on this matter (e.g. at para. 5.106).

b) *WMS2018 theme – Plans should not set restrictions or thresholds across their area without proper justification and applications should be assessed on a site by site basis and having regard to their context*

- i) Having regard to the requirements of other relevant elements of national policy and guidance the MWJP allows shale gas development in appropriate locations (eg where it would be outside the areas subject of spatial restrictions referred to in Policy M16 b) i)) and therefore does not seek to set spatial restrictions across all those parts of the Plan area containing potential resources of hydrocarbon. Any spatially limited restrictions, contained in M16 b) i), are the subject of appropriate justification as set out in previous submissions by the Authorities (eg LPA87, LPA88 and LPA89).
- ii) No prescriptive thresholds or plan-wide restrictions are contained in the policies. To the extent that policies refer to distances which either trigger further assessment (see M16(d)(i)), or indicate that development will only be approved in identified conditions (see M17(4)), these do not prohibit development and require assessment on a site-by-site basis as the WMS2018 envisages. Primary legislation (Town and Country Planning Act 1990) already requires that planning applications are determined on a case by case basis in accordance with the development plan and other material considerations. Nothing in the MWJP, which provides a clear and comprehensive policy for determining shale gas applications on a site by site basis, is inconsistent with this requirement. The approach taken by these policies has in any event been properly justified, as is required by existing planning policy.
- iii) A wide range of established national policy (set out in the NPPF), which is not overridden by the WMS2018, requires prevention of unacceptable harm to important receptors, as well as a balanced approach to ensure that development is sustainable in overall terms across the areas of economy society and environment including with regard to cumulative impact. Specifically, NPPF para. 143 relating to the sustainable use of minerals requires that, in preparing local plans, planning authorities should '*.. set out environmental criteria, in line with the policies in the 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 the locality*'. Established policy also requires policy to be properly justified as part of the soundness test.
- iv) Existing national policy acknowledges the national significance of, and need to give great weight to, the protection of National Parks and AONBs (e.g. NPPF para. 115), as well as the national significance and status of a number of other categories of designation. The spatial overlap between potential resources of shale gas and such assets and designations is an

important contextual feature of the Plan area and is justifiably reflected in the approach in the MWJP, for example through Policy M16 b). The NPPF confirms, via para. 14 and footnote 9, that a more restrictive approach should be followed in these areas, such that the national policy presumption in favour of sustainable development does not apply. Examples of such areas referred to in the NPPF include internationally important nature conservation designations, SSSIs, National Parks, AONBs, Heritage Coast, designated heritage assets and land designated as Green Belt. The Plan is consistent with this approach. In addition, at the hearings, the Inspector accepted the reasoning provided in the supplementary note about the Historic Character and Setting of York (LPA88), which justifies the inclusion of “Areas which Protect the Historic Character and Setting of York” within the protection afforded by Policy M16 (b) i) alongside National Parks, AONBs, SSSIs and other statutory designations.

- v) Text references in the MWJP to well pad density are understood to be similar to industry expectations<sup>1</sup> and specific references in the Plan to well pad density are contained in supporting text rather than directly in policy and do not represent an express limit. Case by case assessment will be required under Policy M17 2), which contains appropriate flexibility within the overarching objective of addressing the potential for cumulative impact, which is itself a relevant consideration under national policy (e.g. NPPF para. 143).
  - vi) The MWJP does not seek to impose a fixed separation distance from sensitive receptors, or seek a ban on development within a specific set-back distance. It contains appropriate flexibility to allow development proposals to come forward in a range of locations where site-specific circumstances indicate that development can take place in a way which gives protection to local amenity, whilst at the same time reflecting a precautionary approach acknowledging the very early stage of development of the shale gas industry in the Plan area and the UK generally. More explanation of the approach to this matter is contained in the *Authorities’ Supplementary note for 500m distance for hydrocarbon development* (LPA89). The Authorities remain of the view that the approach remains both reasonable and proportionate and is consistent with WMS2018 and other relevant elements of national policy and guidance.
- c) *WMS2018 theme – We expect Mineral Planning Authorities to recognise the fact that Parliament has set out in statute the relevant definitions of hydrocarbon, natural gas and associated hydraulic fracturing. In addition, these matters are described in Planning Practice Guidance which Plans must have due regard to.*
- i) The MWJP recognises the definition of associated hydraulic fracturing (e.g. at paras. 5.121 and 5.124) and does not seek to redefine this. The Authorities have explained that this definition does not fully reflect the local experience of the potential for similar land use issues and environmental effects to arise in cases which fall outside the statutory threshold which defines associated hydraulic fracturing – see the supplementary note addressing the distinction between conventional and unconventional hydrocarbons (LPA87). The Authorities consider that the scope for analogous land use planning impacts to arise both above and

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[http://www.ukoog.org.uk/images/ukoog/pdfs/Developing\\_Shale\\_Gas\\_and\\_Maintaining\\_the\\_Beauty\\_of\\_the\\_British\\_Countryside.pdf](http://www.ukoog.org.uk/images/ukoog/pdfs/Developing_Shale_Gas_and_Maintaining_the_Beauty_of_the_British_Countryside.pdf)

below that threshold should be properly covered in local planning policy, in particular policy M16. Subject to a qualification that we explain below, we have seen no cogent evidence to demonstrate that hydraulic fracturing taking place below the threshold would create substantially different land use effects, or that there is a direct link between the threshold and the creation of land use impacts which justifies applying only the more restricted definition to planning policy. In these circumstances, it appears to the Authorities that the concerns relating to environmental protection and public reassurance about nascent hydraulic fracturing, that led to the Infrastructure Act 2015, the Surface Restrictions Regulations and associated government policy are also relevant to the preparation of planning policy which anticipates, on a precautionary basis, the potential for hydraulic fracturing to be proposed below the threshold (see NEB07, where Government recognised the need for measures “to provide the public with confidence” in how the industry would be taken forward (Introduction, November 2015 consultation document), and the emphasis not only on maintaining “the very highest safety and environmental standards” but on the need to “reassure the public,” and adopt a “cautious approach” whilst “the new industry gets underway during the early stages of exploration” (June 2016 response to consultation, paragraphs 1.1 and paragraph 3.20).

- ii) The Authorities have acknowledged, however, that exceptions may arise in the case of hydraulic fracturing in cases of conventional hydrocarbons development, where (in contrast to unconventional hydrocarbons) there is relatively greater experience of such activity in the Plan area and the impacts may not be as significant. Other exceptions could arise in the normal operation of the Authorities’ development management functions under planning legislation and the policy does not alter that. However on the evidence available at this early stage of hydraulic fracturing, the Authorities take the view that planning policy should be prepared on the basis of recognising the threshold for associated hydraulic fracturing in the legislation, and considering its implications for land use planning in the plan area, in a context where national guidance including the PPG does not itself draw the same distinction.
- iii) The Authorities also note that the statutory definition of associated hydraulic fracturing has been wholly or substantially drawn from the Commission Recommendation of 22<sup>nd</sup> January 2014 (2014/70/EU) (LPA/96) on “minimum principles for the exploration and production of hydrocarbons (such as shale gas) using high-volume hydraulic fracturing”. The recitals record that “in the current stage of technological development, the exploration and production of hydrocarbons, such as shale gas, requires the combined use of high-volume hydraulic fracturing and directional (especially horizontal) drilling at a scale and intensity for which there is very limited experience in the Union”. The concept of minimal principles is repeated throughout the different elements of the recommendation, which also anticipates that Member States may wish to introduce “more detailed measures matching the national, regional or local conditions”. There is nothing in the recommendation to suggest that the definition of high-volume hydraulic fracturing (as reflected in the definition of “associated hydraulic fracturing” is necessarily regarded as a fixed point below which potentially similar environmental effects will not arise. The background to the preparation of the Recommendation includes a Transmission Note on the EU Environmental Legal Framework Applicable to Shale Gas Projects which suggests (section 2) that the approach to high-volume hydraulic fracturing was based mainly on practical experience of how hydraulic fracturing had

thus far taken place, rather than any defined threshold of activity below which impacts would necessarily be different [see the link at [http://ec.europa.eu/environment/integration/energy/unconventional\\_en.htm](http://ec.europa.eu/environment/integration/energy/unconventional_en.htm)]. A report by the European Commission in December 2016 recommended (see sections 3.4 and 5.3) that the relevant principles of the Recommendation should be applied to forms of hydrocarbon exploration and production other than high-volume hydraulic fracturing [see the link at <https://publications.europa.eu/en/publication-detail/-/publication/1f8c46c5-c2b3-11e6-a6db-01aa75ed71a1/language-en> ].

- iv) This material is contextual, but it tends to support the view of the Authorities that the policy safeguards relating to protected areas under policy M16 should not as a matter of precaution be restricted to associated hydraulic fracturing. The threshold does not appear to be derived from an association with land use impacts that are generally distinguished below and above the threshold. There is nothing in this material which negates the potential for similar concerns to be generated by other fracking activity, taking place below the threshold.
- v) The Authorities also note that the Housing, Communities and Local Government Committee has now reported on the findings of its' Inquiry<sup>2</sup>. With reference to the definition of fracking, the Committee concluded that: *The Infrastructure Act 2015 definition of fracking does not reflect the technologies used on the ground nor the public understanding of fracking, leading to a lack of understanding among key stakeholders and significant concerns about loopholes in the current regulatory regime. We therefore believe that the Infrastructure Act 2015 definition is unsuitable in the planning context and recommend that it should not be liquid or volume-based. While we welcome the Government's intention to unify the definitions of fracking used in the Infrastructure Act 2015 and the National Planning Practice Guidance due to the resultant lack of clarity and uncertainty in using multiple definitions, we are highly concerned at the Government's suggestion that the Infrastructure Act definition will replace the current definition in a revised National Planning Practice Guidance. We call on the Government to amend the Infrastructure Act definition to ensure public confidence that every development which artificially fractures rock is subject to the appropriate permitting and regulatory regime<sup>3</sup>.*
- vi) The Authorities consider that the views of the Committee support the broader approach in the Minerals and Waste Joint Plan towards the definition of fracking, as well as the justification previously put forward by the Authorities for this (e.g. via LPA87). Whilst there is a suggestion that government intends to amend the definition of hydraulic fracturing in planning guidance, no changes have yet been issued and as matters stand the Authorities consider it is appropriate to adopt the course taken in the draft plan, which is based on the application of known extant guidance.
- vii) With regard to the approach to conventional and unconventional hydrocarbons, PPG does identify distinctions in the nature of these forms of development, which could in turn have land use implications – see the previous supplementary note by the Authorities on this matter

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<sup>2</sup> <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/housing-communities-and-local-government-committee/planning-guidance-on-fracking/written/85190.html>

<sup>3</sup> Planning guidance on fracking. Eighth Report of Session 2017-19 (House of Commons Housing, Communities and Local Government Committee, 5 July 2018)

(LPA87). The MWJP does not seek to introduce a different definition of hydrocarbon or natural gas and the Authorities are not aware of any statutory definition of conventional and unconventional hydrocarbons.

d) *WMS2018 theme – Consistent with Planning Practice Guidance, policies should avoid undue sterilisation of minerals resources (including shale gas)*

- i) The MWJP sets out a balanced approach to safeguarding of the range of minerals resources that exist in the Plan area, reflecting the fact that a range of locally and nationally important minerals occur within it. A proposed main modification has been agreed in principle between the relevant parties in relation to safeguarding resources of potash, to minimise the potential for overlap in safeguarded interests where PEDL areas occur in proximity to potash resources.

e) *WMS2018 theme – Planning decision making*

- i) A significant emphasis in WMS2018 is on improving the speed and efficiency of decisions on planning applications relating to shale gas development. The Authorities consider that this objective will be supported through development of a comprehensive local policy approach, as set out in the MWJP, which gives a clear steer to developers and other interested parties on the circumstances and locations in which proposals are, or are not, likely to be considered acceptable (see NPPF para. 154). Such an objective is not likely to be facilitated by generic policies which simply paraphrase national policy statements.
- ii) The Housing, Communities and Local Government Committee Inquiry on Planning guidance on fracking addressed the relationship between WMS2018 (specifically the section of the WMS dealing with planning policy and guidance) and the role of local minerals plans. In their report the Committee concluded that: *There is a contradiction between the spirit of the Localism Act 2011 and the 2018 Written Ministerial Statement on fracking planning policy which could unreasonably restrict Local Plans. Mineral Planning Authorities are best placed to understand their local area and weigh up what requirements should be in place for fracking developments. We note that Local Plans are already subject to scrutiny at national level from the Planning Inspectorate. Given that the English planning system is plan-led, Mineral Planning Authorities should be free to adapt their Local Plans as they see fit as long as they do not arbitrarily restrict fracking developments. It is essential that Mineral Planning Authorities have the right to put conditions in their Local Plans which can be justified having proper regard to local circumstances*<sup>4</sup>. The Authorities do not consider that the WMS introduced any changes to guidance which require any modifications to the approach taken in the Minerals and Waste Joint Plan, but acknowledge that the report provides endorsement of the balanced and sustainable approach in the Plan, reflecting the full range of national planning policy and guidance relevant to the issue whilst also taking account of the local site by site spatial context and constraints.

- iii) The Authorities note the further endorsement of the approach followed in the Plan in relation to matters such as cumulative impact and impact on landscapes is provided elsewhere in the

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<sup>4</sup> Para. 59 of the Committee's report

Committee's report, in the context of the potential for certain forms of development involving fracking to be brought within the Nationally Significant Infrastructure Project regime (NSIP). Whilst the Committee's recommendation is that such development not be brought within the NSIP regime, the Committee also recommended that: '*... if it were to be, it is essential that a National Policy Statement is prepared as a matter of urgency that would include suitable measures to restrict inappropriate proliferation of well-pads and unacceptable impacts on landscapes. We consider that the North Yorkshire Draft Joint Minerals and Waste Plan offers an appropriate template for such guidance*<sup>5</sup>.

- iv) The Authorities consider, in the light of WMS2018, that the MWJP continues to reflect an appropriate local expression of the national policy requirement to ensure that development is sustainable, necessitating a balanced approach having regard to the full range of national policy and guidance and reflecting the context that a wide range of sensitive designations (including National Parks and AONBs) and other receptors overlap with PEDL areas. This is the fundamental role of a local plan and there is a legal obligation for such plans to be prepared with the objective of contributing to the achievement of sustainable development (as acknowledged in NPPF para. 151 and footnote 33). As part of this balance, the potential for local economic benefits to arise through hydrocarbon development is already acknowledged in para. 5.143 of the MWJP.
- v) Shale gas development is new to the Plan area and is at a very early stage of progression within the UK generally. This is a matter of fact. We do not yet know in any detail what a UK model of shale gas development might involve and meaningful clarification of what this is likely to entail within the Plan area has not been provided by industry during the course of the EiP, although all indications are that there would be a need for multiple well pads, each with multiple wells, and in a denser configuration than would typically be expected with development of conventional on-shore gas. There is, at this stage, very limited direct evidence about the actual effects of such development in the UK, or direct experience of the effectiveness of the various regulatory regimes, for this particular form of development, in a UK on-shore context. In these circumstances it is right that the Authorities adopt a cautious approach, with early review as necessary. The MWJP (para. 4.11) acknowledges the need to keep the approach to hydrocarbons policy under review.
- vi) With regard to a potential extension of permitted development rights for non-fracking shale gas exploration development, it is not appropriate to pre-judge the outcome of any consultation or Government's conclusion on this point. Treating unconventional hydrocarbons development (other than very minor development) as permitted development is unlikely to be appropriate in sensitive areas such as National Parks and AONBs and this is reflected in the Government's proposed approach, as set out in the MHCLG consultation document *Permitted development for shale gas exploration* (July 2018). The Authorities have each responded to that Government consultation on the basis that non-fracturing shale gas exploration drilling should not be subject of permitted development rights.

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<sup>5</sup> Para. 84 of the Committee's report

## **2) Whether the MWJP should be modified to reflect WMS2018, and if so how.**

Taking into account the views expressed by the Authorities above in relation to Matter 1), the Authorities do not consider that there is a need for further modifications to the MWJP specifically in response to the publication of WMS2018, other than to insert additional supporting text at the end of para. 5.106 to refer to publication of WMS2018 and comment that it reiterates the Government's policy support for the principle of shale gas development. Matters raised in WMS2018 and other relevant elements of national policy, which are also important material considerations in preparing the MWJP, are already addressed in the Plan in a balanced way, incorporating flexibility where necessary whilst at the same time giving a clear indication to developers and other interested parties as to what will or will not be permitted and where. The modifications already discussed at the examination are therefore unaffected by the WMS. The MWJP is consistent with Government's overarching objective for the planning system generally, and for on-shore oil and gas development specifically, of ensuring that development is sustainable. This principle is not altered by the publication of WMS2018.

Joint Plan Authorities November 2018