

North Yorkshire Joint Waste and Minerals Plan Examination in Public

Comments on report of House of Commons Housing, Communities and Local Government Committee on Planning Guidance on Fracking 2018

Submission of Councillor Paul Andrews

The inspector has requested comments on the above report.

In my view, the Committee Report broadly supports the inspector's provisional findings in the verbal sessions of the Examination in Public. Para. 84 of the Committee Report (below) even suggests the fracking sections of the Joint Waste and Minerals Plan should be treated as a template for planning guidance.

The Committee was tasked with considering a number of matters which included matters which were included in the Minister's Written Statement of May 17th 2018 (MW18). So, although the Committee started work before MW18 was tabled, the Committee's Report contains strong objections to the issue of MW18 before their deliberations had concluded and disputes many of the requirements, policies and proposals in MW18. This suggests that MW18 is fundamentally flawed and should therefore be given very little weight. I quote the following examples (which should not be taken to be exclusive):

1. Whereas the statement in MWS 18 that shale gas extraction is of national importance, and suggests that Mineral Planning Authorities are not giving it sufficient weight, para. 52 of the committee report states: ***"we are content that Mineral Planning Authorities are currently finding an appropriate balance between national and local policy guidance in the determination of fracking applications."***
2. MW18 states: *"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"*

The Committee do not agree. Para. 19 of their report states: ***"The Infrastructure Act 2015 definition of fracking does not reflect the technologies 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 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 2015 definition will replace the current definition in a revised National Planning 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."

In the same vein, although in regard to a different context para. 82 of the Committee's Report states: "***Furthermore , we note that the Government has not provided any justification or evidence for why fracking has been singled out to be included in a national planning regime in contrast to general mineral applications."***

3. MW 18 states: "*.....applications must be assessed on a site by site basis and having regard to their context. Plans should not set restrictions or thresholds across their plan area that limit shale development without proper justification."*

Paras. 58 and 59 of the Committee's report disputes this statement as follows:
"58. When we asked the government to clarify the meaning of the WMS section.....particularly in regard to what was meant by "proper justification", we were told "we cannot legally-certainly not as a planning-minister comment on any actual case.....I am sorry we cannot give you more detail.....again I am not going to set generalisations." **We were disappointed with the minister's refusal to answer questions. Claiming that the Minister cannot respond to our questions because he cannot answer hypothetical cases or comment on specific cases is incongruous given that the questions referred directly to a Government statement on fracking planning policy.**

59. There is a contradiction between the spirit of the Localism Act 2011 and the 2018 MWS 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 the circumstances."*

This suggests a much lower "bar" than seems to be required by MWS 18. The fact that the minister could not suggest an example of a "proper justification" suggests that the "bar" the Secretary of State intends to apply in regard to MWS 18 is so high as to be virtually insurmountable.

4. MW 18 also gives notice of forthcoming consultations on making fracking exploration permitted development and on "the criteria required to trigger the inclusion of shale production projects into NSIP". It should be noted that the

text in regard to consultation on referrals to NSIP assumes that this will happen, whereas the text concerning consultation in regard to Permitted Development makes no such assumptions. This completely undercuts the work of the Committee which was originally tasked to consider both these issues.

5. The Committee recommends that fracking exploration should not be given permitted development rights. In regard to referrals to NSIP, the Committee's report states:

“82. There is little to be gained from bringing fracking planning applications at any stage under the NSIP regime; there is limited evidence that it would expedite the application process and such a move is likely to exacerbate existing mistrust between local communities and the fracking industry. We are particularly concerned that, if the NSIP regime were adopted, there would be no relationship between fracking applications and Local Plans in communities. Furthermore, we note that the Government has not provided any justification or evidence for why fracking has been singled out to be included in a national planning regime in contrast to general mineral applications.

83. Fracking applications should not be brought under the NSIP regime. While we note that the NSIP regime does provide opportunities for consultation with Mineral Planning Authorities and local communities, such a move could be perceived as a significant loss to local decision-making. Mineral Planning Authorities are best placed to understand their local area and consider how fracking can best take place in their local communities.

84. Despite our recommendation above and the overwhelming evidence we received, if NSIP were to be used for fracking applications, 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 JWMP offers an appropriate template for such guidance. While we note that the Government stated that the issue of cumulative impact would be addressed on a case by case basis as part of the NSIP examination process, the National Policy Statement should ensure that it is considered automatically as part of every determination. Every decision should also be consistent with Local Plans”

Following the issue of the Report on the Committee's findings, I wrote to the Secretary of State requesting him to withdraw MWS 18. The inspector already has a copy of this letter. I append a copy of subsequent unsatisfactory correspondence with his department. As will be seen, to date I have received no answer to the issues raised in the letter.

The Committee Report should be given greater weight than MWS 18, as the Report was written following the presentation of evidence to the Committee both verbally and in document form and after the questioning of witnesses. The opinions in MWS 18 does not seem to have undergone any rigorous scrutiny of this kind. It follows that, if the Secretary of State does not withdraw MWS 18, then MWS 18 must be read in

the light of the Committee Report and the JWMP should therefore be approved as provisionally agreed by the inspector at the EIP hearing.

COUNCILLOR PAUL ANDREWS

18th July 2018

Paul Andrews
Reply |
Fri 13/07/2018 13:42

[REDACTED]
[REDACTED]
You forwarded this message on 16/07/2018 20:23

Thanks.

Please do not send me your department's standard letter justifying the government's indefensible policies. I've seen enough of these already, and I don't need to see another. I am sick of reading lies and platitudes.

My letter is about the legalities of the policy - not about the policy itself.

So would you please refer this correspondence to your department's legal advisers and let me have replies to the legal issues I have addressed.

Yours faithfully

Councillor Paul Andrews

From: [REDACTED]
Sent: 1 [REDACTED]
To: Paul Andrews
Subject: E-mail Acknowledgement

Dear Paul

Thank you for your e-mails and attachments which have been received. They are now with policy officials and you will receive a reply in due course.

Kind regards.

[REDACTED]
Enquiry Unit Assistant

[REDACTED]
1 Victoria Street, London SW1H 0ET
www.gov.uk/beis | <https://twitter.com/beisgovuk>

Dear sir,

This is the second time your department has misplaced my email.

My email was NOT a request for information. It requires an IMMEDIATE answer and should NOT be put through the FOI procedure with all its attendant delays.

The email is a LEGAL communication which I expect to be dealt with by your department's LAWYERS.

The way you are dealing with this matter is appalling.

Would you please confirm that you are passing this email on to them immediately?

Regards

Paul Andrews
Solicitor.

From: BEIScorrespondence@beis.gov.uk on behalf of FOI Requests <foi.requests@bis.gsi.gov.uk>
Sent: 16 July 2018 16:11
To: paul.p.andrews@live.co.uk
Subject: Request for information - ref FOI2018/16452

BEIS ref: FOI2018/16452

Dear Cllr Andrews

Thank you for your request for information which was received on 11th July. Your request has been passed on to the appropriate official at the Department for Business, Energy and Industrial Strategy (BEIS) to deal with.

Your request is being considered under the terms of the Freedom of Information Act 2000 and we will reply at the latest by 8th August.

If you have any queries about this email, please contact the Information Rights Unit at BEIS. Please remember to quote the reference number above in any future communications.

Kind regards,

Information Rights Unit

Information Rights Unit | Department for Business, Energy and Industrial Strategy | 1 Victoria Street,
London, SW1H 0ET | www.gov.uk/beis | FOI.Requests@bis.gsi.gov.uk |

The Department for Business, Energy and Industrial Strategy (BEIS) is making a difference by supporting sustained growth and higher skills across the economy. **BEIS: working together for growth**

From Councillor Paul Andrews, Malton Ward

10th July 2018

Dear sir,

**Minister's Written Statement to Parliament dated 17th May 2018 – Ref:
HCWS689**

I am a retired solicitor, and currently Mayor of Malton and Chair of Habton PC. Both these councils have participated and made representations on the draft North Yorkshire Joint Waste and Minerals Plan (JWMP). I have given evidence on behalf of both councils at the Examination in Public (EIP) into that plan.

This letter is written only in my capacity as RDC ward councillor, Malton Town Councillor and Habton Parish Councillor.

I am not sure when the deadline for challenging the Minister's Written Statement of 17th May 2018 (MWS 18) expires. However, if the deadline is 16th August and a legal challenge has to commence promptly before then, it is my intention that this letter can be relied upon by anybody who wishes to take legal proceedings against the Secretary of State.

A copy of this letter is being forwarded to the JWMP EIP inspector and also to the members of the House of Commons Select Committee (the Committee) which published a report on Planning Guidance on Fracking on 5th July 2018 under reference no. HC 767.

The purpose of this letter is to invite the Secretary of State to withdraw MWS 18 for the following reasons:

- In the light of the Committee's findings, MW18 is fundamentally flawed; and/or
- MW 18 is irrational as it is not evidence-based and conflicts with and/or fails to take into account relevant documents available at the time of publication of MWS 18, particularly the report entitled "Gas Security of Supply" published by the Department of Business, Energy and Industrial Strategy in October 2017, and a Report of Professor Peter Styles dated 2nd May 2018 entitled "Fracking and Historic Coal Mining: Their relationship and should they coincide?" and/or
- The issue of MWS 18 was an arbitrary abuse of power intended to undermine the EIP inspector's provisional decisions in regard to the JWMP and the deliberations of the Committee – contrary to Natural Justice.

- MW18 is ultra vires the Secretary of State because there is no clear statutory authority under which an MWS which changes national policy can be made, and the Secretary of State therefore has no legal authority to use MWS as a means of changing national policy. An MWS which purports to do so is therefore an edict or proclamation which is ultra vires as being contrary to the decision in the Case of Proclamations (1610) as reaffirmed in Miller –v- Secretary of State for Exiting the EU (2017)

MWS 18

MWS II purports to have two functions: the first is to give planning advice which should take immediate effect and the second is to give notice on forthcoming consultations in regard to proposed new guidance on fracking, referral of applications to NSIP, proposed alterations to Permitted Development rights and proposed amendments of the NPPF in regard to hydrocarbon development.

This Guidance is to be found on the second page of MWS 18 under the heading: “Planning – planning policy and guidance”. The wording of the second para of this section seems to address and undermine the EIP inspector’s findings. The words are as follow:

“ Shale gas development is of national importance. The government expects Mineral Planning Authorities to give great weight to the benefits of mineral extraction, including the economy. This includes shale gas exploration and extraction. Mineral Plans should reflect that mineral resources can only be worked where they are found, and applications must be assessed on a site by site basis and having regard to their context. Plans should not set restrictions or thresholds across their plan area that limit shale development without proper justification. 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. Consistent with this Planning Practice Guidance , policies should avoid undue sterilisation of mineral resources (including shale gas)”

It can be argued that the qualifications “proper justification” and “due regard to” do not undermine the discretion of Mineral Planning Authorities. However, the emphasis in MWS 18 of the importance for fracking, the great weight to be attached to mineral extraction including shale gas extraction, the circumstances of the issue of MWS II as indicated in the attached statement of Chris Stratton OBE and Peter Fox QC suggest that inspectors and planning authorities will be required to set “the bar” for determining what is “proper justification” etc at a very high level so as to facilitate development. If this is correct, and if Mineral Planning Authorities and inspectors fail to do this, MWS 18 will give the Secretary of State the power to intervene under Section 21a of the Planning and Compulsory Purchase Act 2004 (See also para. 56 of the Committee’s report).

MWS 18 is fundamentally flawed in the light of the Committee's findings

The Committee was tasked with considering a number of matters which included matters which were included in MWS18 before the Committee had concluded its deliberations. So, although the Committee started work before MW18 was tabled, the Committee's Report disputes many of the requirements, policies and proposals in MW18. This suggests that MW18 is fundamentally flawed and cannot therefore legally stand. For example:

1. Whereas the statement in MWS 18 that shale gas extraction is of national importance, and suggests that Mineral Planning Authorities are not giving it sufficient weight, para. 52 of the committee report states: ***"we are content that Mineral Planning Authorities are currently finding an appropriate balance between national and local policy guidance in the determination of fracking applications."***
2. MW18 states: *"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"*

The Committee do not agree. Para. 19 of their report states: ***"The Infrastructure Act 2015 definition of fracking does not reflect the technologies 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 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 2015 definition will replace the current definition in a revised National Planning 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."***

In the same vein, although in regard to a different context para. 82 of the Committee's Report states: ***"Furthermore , we note that the Government has not provided any justification or evidence for why fracking has been singled out to be included in a national planning regime in contrast to general mineral applications."***

3. MW 18 states: “.....*applications must be assessed on a site by site basis and having regard to their context. Plans should not set restrictions or thresholds across their plan area that limit shale development without proper justification.*”

Paras. 58 and 59 of the Committee’s report disputes this statement as follows:

“58. When we asked the government to clarify the meaning of the WMS section.....particularly in regard to what was meant by “proper justification”, we were told “we cannot legally-certainly not as a planning-minister comment on any actual case.....I am sorry we cannot give you more detail.....again I am not going to set generalisations.” **We were disappointed with the minister’s refusal to answer questions. Claiming that the Minister cannot respond to our questions because he cannot answer hypothetical cases or comment on specific cases is incongruous given that the questions referred directly to a Government statement on fracking planning policy.**

59. There is a contradiction between the spirit of the Localism Act 2011 and the 2018 MWS 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 the circumstances.*

This suggests a much lower “bar” than seems to be required by MWS 18. The fact that the minister could not suggest an example of a “proper justification” suggests that the “bar” the Secretary of State intends to apply in regard to MWS 18 is so high as to be virtually insurmountable.

4. MW 18 also gives notice of forthcoming consultations on making fracking exploration permitted development and on “the criteria required to trigger the inclusion of shale production projects into NSIP”. It should be noted that the text in regard to consultation on referrals to NSIP assumes that this will happen, whereas the text concerning consultation in regard to Permitted Development makes no such assumptions. This completely undercuts the work of the Committee which was originally tasked to consider both these issues.
5. The Committee recommends that fracking exploration should not be given permitted development rights. In regard to referrals to NSIP, the Committee’s report states:

“82. There is little to be gained from bringing fracking planning applications at any stage under the NSIP regime; there is limited evidence that it would expedite the application process and such a move is likely to exacerbate existing mistrust between local communities and the fracking industry. We are particularly concerned that, if the NSIP regime were adopted, there would be no relationship between fracking applications and Local Plans in communities. Furthermore, we note that the Government has not provided any justification or evidence for why fracking has been singled out to be included in a national planning regime in contrast to general mineral applications.

83. Fracking applications should not be brought under the NSIP regime. While we note that the NSIP regime does provide opportunities for consultation with Mineral Planning Authorities and local communities, such a move could be perceived as a significant loss to local decision-making. Mineral Planning Authorities are best placed to understand their local area and consider how fracking can best take place in their local communities.

84. Despite our recommendation above and the overwhelming evidence we received, if NSIP were to be used for fracking applications, 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 JWMP offers an appropriate template for such guidance. While we note that the Government stated that the issue of cumulative impact would be addressed on a case by case basis as part of the NSIP examination process, the National Policy Statement should ensure that it is considered automatically as part of every determination. Every decision should also be consistent with Local Plans”

MWS 18 is irrational

1. Professor Styles’ report

MWS II does not seem to be evidence based and does not seem to have taken the available up to date evidence into account, such as a, a Report by Professor Peter Styles on “Fracking and Coal Mining: their relationship and should they coincide?” dated May 2nd 2018.

The views of Professor Styles do seem to have particular importance as he is the man who recommended the “Traffic Light” system in regard to seismicity which has been adopted by the government and the industry. His recommendations on this were accepted by government. So his opinion should carry some weight. It will be seen that his latest report refines his previous views and questions the ability of Fracking Companies to properly investigate faulting.

Para. 33 of the Committee’s report refers to Professor Styles’ report as follows:

“However, as we note below, there would seem to be merit in ensuring that there is flexibility in the Government’s approach to take account of such scientific and other developments, where appropriate. We also believe the Government should assess the implications for existing fracking guidance of Professor Peter Styles’ report.....”

The outcome of Prof Styles paper can be summarised below:

- *Fracking companies and regulators have failed to use all available geological data, as they are required to do, for planning application purposes.*
- *Professor Styles’ report shows that historic coal mining data has been overlooked or ignored.*
- *The historic mining data shows accurate locations of fault lines capable of triggering earthquakes over a 0.5 magnitude that would shut down fracking operations under current regulations. Further, a fracking operation registering a seismic shock of 0.5 magnitude could trigger a seismic event of 1.5 magnitude or greater.*
- *The seismic surveying equipment used by the fracking industry is not capable of detecting these faults. They need equipment with 5X greater magnification capabilities.*
- *Professor Styles’ report includes a small sample of the available historic data converted to digital format that can be overlaid onto British Geological Survey maps, which only show major fault lines.*
- *The data shows that former coal mining areas are riddled with potentially dangerous faults capable of producing seismic activity greater than a 0.5 magnitude which is the level at which fracking operations must be shut down under the current traffic light system.*
- *Considerable further work and investigation is required on the historic mining data to reveal the full picture. However, it is highly likely to show a similar picture across all previously mined areas. This would render the majority of the current PEDL licences for fracking over the North of England useless and demonstrate that Government and industry estimates for recoverable fracked gas should be halved.*

2. The Gas Security of Supply Document published by your own department in October last year.

Firstly, MWS 18 makes a number of statements which are plainly wrong, unsupported by evidence or unproved. These include statements regarding employment and other

matters which do not accord with the evidence gathered by Frackfree Ryedale and exhibited as “Fracking Myths” on the Frackfree Ryedale website.

Secondly, as will be seen below, the figures quoted in MWS 18 do not seem to add up so as to match the figure in the most recent government published document on the security of gas supply.

Further, MWS 18 suggests that shale gas is necessary to give the UK gas security of supply. This does not recognise the most recent official evidence.

In October 2017, your department, the Department of Business, Energy and Industrial Strategy published the report with the title “Gas Security of Supply” Looking ahead over the next twenty years, it says (Page 14): *“Whilst the government is optimistic about the potential for shale gas in the UK, given the industry is currently in an exploratory stage, it is not yet known how much of the UK shale gas resource will ultimately be recoverable. In order to provide a conservative estimate of supply, supply forecasts used in CEPA (2017), assume no shale contributions in the forecast period.”* The document goes on to say that there will be security of gas supply without shale gas during the forecast period – ie up until 2035.

Further MWS18 states: *the UK has gone from being a net exporter of gas in 2003 to importing over half (53%) of gas supplies in 2017 and estimates suggest we could be importing 72% of our gas by 2030.”*

This statement takes no account of the 30% of gas produced by UK which is exported. It is also misleading because it fails to state the quantities of the required gas imports.

In her MWS of 16th September 2015 Amber Rudd MP says: *“Last year 45% of UK gas supply was made up of net imports. Our projections suggest that domestic production will continue to decline and, without any contribution from shale, gas net imports could increase to 75% of the gas we consume by 2030.”*

The Gas Security of Supply document (page 11 para. 6) gives a different picture. This states:

“Current GB gas demand is around 923 TWh per annum, having fallen from around 1,000TWh a decade ago and a peak of around 1,100TWh in 2010. National Grid (2017) forecast gas demand of between 604 TWh and 891 TWh in 2035.”

The second para of MWS 18 states that the UK must have safe, secure and affordable supplies of energy that are consistent with the carbon budgets defined in our Climate Change Act and our international obligations. This can only be consistent with a policy aim for climate change which is to meet its part of climate change targets, so that, together with other countries, the “two degree scenario” can be achieved. The 604TWh figure would seem to relate to the 2 degrees scenario, and as this is government policy, this is the figure which should be relevant to forward planning of infrastructure – not the 891 TWh figure. It follows that if the 891 TWh figure is relied

on, the second para. of MWSII is wrong and MWS II is discredited. The Secretary of State cannot have his cake and eat it.

Taking then the 923TWh figure, 53% of this is 489.19 TWh, which is the quantity of gas imported in October 2017.

Taking the 604TWh figure, 72% of this is 434.88 TWh which is the quantity of imported gas which National Grid estimates will be required in 2035 – a **decrease** of 54.31TWh. **So the UK will actually need less gas in 2035 than is being used now.**

This would seem to completely discredit both MWS of September 16th 2015 (MWS 15) and MWS 18. However, whereas the Gas Security of Supply Report was not available before the issue of MWS 15, it was certainly available before the issue of MWS 18, but there seems to be no evidence to suggest that MWS 18 takes its findings into account.

The issue of MWS 18 is a flagrant and unlawful abuse of the exercise of arbitrary power.

The circumstances of the issue of MW18 are set out in the attached statement of Chris Stratton OBE and Peter Fox QC. The following quotation from the statement is relevant:

At the hearing of the EIP on Friday 13th April 2018 the Inspector made it plain she was inclined to revise her earlier expressed view with regard to the weight to be given to safeguard local communities and in particular residential dwellings and other sensitive receptors from drilling within 500 m. At that the solicitor representing UKOOG raised serious objection to the Inspector's revised view, informing her that unless she reverted to her formerly expressed view in favour of the industry, Judicial Review of her decision would be sought. The Inspector was unmoved by this threat. Shortly after that hearing we understand Mr. Ken Cronin, Chief Executive of UKOOG, sought a meeting with and subsequently met officials of the Department of Housing, Communities and Local Government. His clear purpose appears to have been to circumvent that which the Inspector had indicated. Within days the Department's Chief Planning Officer requested the LPAs send him the policies in the Minerals & Waste Joint Plan particularly in issue, which they did. Within a further week or so the Joint Ministerial Statement was issued. The Statement is, inter alia, directed specifically at these policies and its thrust is to obviate the indication which the Inspector gave on 13th April were she to implement it, alternatively to change the Inspector's mind. By the close sequence of these events and the Government's obvious desire for the shale gas industry to succeed, the Statement appears transparently related to the meeting between UKOOG and the Department's officials. Furthermore, while it would be irrelevant to the Inspector's present task if UKOOG's lobbying of a Government official had not been at this particular time and for this particular purpose, **the fact that it has occurred at this juncture and in the context of a quasi-judicial procedure could be an attempt to pervert the course of justice.** It appears to cross the line between

As mentioned above, the short time gap between the end of the last session of the EIP and the publication of MWS 18 suggests MWS 18 was produced by the Secretary of State at the behest of industry lobbying. It was also published at a time when the Committee was specifically considering planning guidance on fracking. In the circumstances it suggests a cynical political manipulation of the democratic process of plan preparation and shows complete contempt for the members of the select committee and the participants of the EIP who have taken hours of their time and spent thousands of pounds on preparing the draft plan, comments on it and representation at the EIP.

This is clearly contrary to the established "audi alteram partem" rule which requires "the other party to be heard." It is also a case of the Secretary of State being judge in his own cause.

As regards hearing the other side, the officials listened to Mr. Cronin and were so impatient to help him that they did not give the other participants any opportunity to reply to the matters raised by Mr. Cronin, nor did they give them an opportunity to respond. Instead they gave a knee-jerk reaction and issued MWS 18 with the deliberate intention of forcing the inspector to change her provisional decisions. They could not even be bothered to wait and see the inspector's decision notice.

Further the Government is so clearly intent on ensuring that the shale gas industry succeeds that the Secretary of State had a vested interest in the outcome; the issue of

MWS 18 was deliberate interference in a quasi-judicial process to which the principles of Natural Justice apply and the Secretary of State therefore put himself in the position of being judge in his own cause.

MWS 18 cannot therefore stand and is void.

MW18 is ultra vires the Secretary of State in accordance with the decision of the Case of Proclamations (1610) as re-affirmed by the Supreme Court in Miller –v- Secretary of State for Exiting the EU (2017).

This is an issue of profound constitutional importance. The unwritten UK constitution is based on a delicate balance between the executive arms of government and Parliament and the judiciary. It is this balance which preserves our liberties and democracy and prevents us from being overwhelmed by dictatorial or authoritarian rule. If weight is given to controversial ministerial statements which have not gone through due process (ie. embodied in draft circulars and then consulted upon), it opens the door to an over-mighty executive and to ministers becoming susceptible to persuasion by lobbyists from any industry (perhaps with the prospect of contributions towards party funds), without full public scrutiny of any policy pronouncements which might emerge from this. This could lead to wrecking balls being driven through the planning system and the result could be to make the planning system look rotten to the core. It is clearly in the public interest that all ministerial policy decisions which affect property or rights of residents should go through an appropriate form of due process before they can be acted upon and not be issued just at the whim and fancy of the moment. Government policy on matters which affect property or rights (such as planning policy does) should not only be properly made, but also seen to be properly made and fully transparent.

I set out below Section 19 of the Planning and Compulsory Purchase Act 2004:

(1) Local development documents must be prepared in accordance with the local development scheme.

(2) In preparing a local development document the local planning authority must have regard to—

(a) national policies and advice contained in guidance issued by the Secretary of State;

(b) the RSS for the region in which the area of the authority is situated, if the area is outside Greater London;

(c) the spatial development strategy if the authority are a London borough or if any part of the authority's area adjoins Greater London;

(d) the RSS for any region which adjoins the area of the authority;

(e) the Wales Spatial Plan if any part of the authority's area adjoins Wales;

(f) the [F14] sustainable community strategy prepared by the authority;

(g) the [F15] sustainable community strategy for any other authority whose area comprises any part of the area of the local planning authority;

(h) any other local development document which has been adopted by the authority;
(i) the resources likely to be available for implementing the proposals in the document;

(j) such other matters as the Secretary of State prescribes.

(3) In preparing the other local development documents the authority must also comply with their statement of community involvement.

(4) But subsection (3) does not apply at any time before the authority have adopted their statement of community involvement.

(5) The local planning authority must also—

(a) carry out an appraisal of the sustainability of the proposals in each document;

(b) prepare a report of the findings of the appraisal.

(6) The Secretary of State may by regulations make provision—

(a) as to any further documents which must be prepared by the authority in connection with the preparation of a local development document;

(b) as to the form and content of such documents.

(7) The [F16 sustainable community strategy] is the strategy prepared by an authority under section 4 of the Local Government Act 2000 (c. 22).

Subsection 2 (a-j) lists the matters to which an authority must have regard in the preparation of local development documents. At the top of the list (a) are national advice contained in guidance issue by the Secretary of State. At the bottom (j) is the “wash-up” clause: “such other matters as the Secretary of State prescribes” The Planning Guidance issued in 2014 comes within category (a), whereas the two ministerial statements come within para (j). My understanding of due process is that ministerial statements are followed by the issue of draft circulars which are consulted on and then by the circular itself.

The question is: how should the wash-up sub-clause (j) be interpreted. I would have thought the interpretation should be “eiusdem generis” sub-paras (a) – (i). In other words, I could understand a minister issuing a statement in the House to clarify the meaning and intent of any wording or concept in a document issued under (a) – (i) above, but I can’t believe it was the intention of the legislature to empower the minister to introduced new National planning policies or make substantial changes to national policies at the whim and fancy of the moment without going through a proper process such as would be required in (a) above. If this is correct, MWS 15 and MWS 18 would both seem to be ultra vires, unless the Secretary of State has some other powers.

The unwritten UK constitution is based on a system of legally enforceable checks and balances, mainly set by legal case-law, which limit the powers of the executive arm of government, and this has become the bedrock of our liberties and democracy.

The decision in the Case of Proclamations (1610), as I understand, limits the powers of the Executive (ie ministers and the cabinet) to those exercisable under “The Royal

Prerogative” (eg the right to declare war or peace, make and unmake treaties etc.), and those specifically granted to ministers by statute. In other words, the government does not have the unfettered right to issue edicts, decrees, proclamations or (dare I say it) statements in parliament which could adversely affect the rights or property of the Queen’s subjects unless it goes through due process (ie through parliament as a statute or statutory order or as a document which is specifically authorised under statute).

As far as I can see the only statutory authorisation for MWS 15 and MWS 18 is para (j) of the aforesaid S. 19(2) Planning and Compulsory Purchase Act 2004. If so, they could both be ultra vires for the reasons stated above.

This outcome of the Case against Proclamations (1610) was reaffirmed in the judgement of the Supreme Court in *Miller v Secretary of State for Exiting the EU* (January 2017)(The Brexit Case). This applies to matters which relate to property or the rights of the queen’s subjects, as all planning law and policies do.

Further, para. 51 of the Brexit Case establishes that “*ministers cannot frustrate the purpose of a statutory provision, for example by emptying it of content or preventing its effectual operation*”.

So, if the words of MWS 18 “*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*” is interpreted as intended to allow hydraulic fracturing all over the National Parks and AONBs so as to industrialise them, (provided the hydraulic fracturing which takes place does not fall into the precise statutory definition), one has to ask if this is undermining the fundamental purposes of legislation such as the Countryside Acts. If it does, this would seem to be another reason for arguing that MWS 15 and 18 are both ultra vires.

The point here relates not just to underground lateral bores entering a national park from outside its boundaries, but to direct drilling in the national park itself. As I understand, the statutory definition of hydraulic fracturing in the 2015 Infrastructure Act depends on the volume of fluid used and the depth of the bore. It has been pointed out that this definition would exclude half the fracking bores which have taken place in the USA and all but a couple of the five test bores which have planning permission at KM8. National policy is to prohibit hydraulic fracturing in the national parks. It will be seen that if this prohibition is restricted only to hydraulic fracturing which complies with the statutory definition, it may still be possible to seek and obtain planning permission to frack all over National Parks, including for surface drill pads at intervals of one and a half to two miles – albeit subject to the restrictions in regard to depth of drilling and volumes of fracking fluid.

Another aspect of this is the status of adopted local plans. The Ryedale Plan, for example, has been adopted under the Planning and Compulsory Purchase Act 2004, and as such enjoys the protection of that statute as if it was itself part of the statute. So again, if the effect of MWS 18 is to compel MPA to frustrate the purpose of the

adopted Ryedale Plan, for example by emptying it of content or preventing its effectual operation through in effect requiring the industrialisation of the areas specified in the Ryedale Plan as being of significant local landscape value (eg the Vale of Pickering and the Yorkshire Wolds), then again MWS 18 would seem to be ultra vires. See Policy SP13 of the Ryedale Plan, which is exhibited on the Ryedale District Council website.

In the circumstances outlined above, the Secretary of State is required:

1. To withdraw and cancel MW15 with immediate effect;
2. To withdraw and cancel MW18 with immediate effect;
3. To provide full particulars, together with dates and times, of all relevant communications between 13th April 2018 and 17th May 2018 between UKOOG, its servants, agents and representatives and Government officials, together with copies of all e-mails, records of telephone conversations and minutes and records of all meetings relating to the issue of MW18.

I look forward to hearing from you in the next fourteen days

Yours faithfully

Councillor Paul J. Andrews

.To: The Rt. Hon. Greg Clark,
Secretary of State for Business, Energy and Industrial Strategy
House of Commons
London

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