FelshamPD Felsham Planning & Development

1 Western Terrace Edinburgh EH12 5QF
T +44 (0) 131 337 9640

Philip Neaves
Mobile: 07446 897144
Philip@felshampd.co.uk

Carmel Edwards
North Yorkshire Minerals Plan Programme Officer
North Yorkshire County Council
County Hall
Northallerton
North Yorkshire
DL7 8AD

10 July 2019

Dear Carmel,

NORTH YORKSHIRE COUNTY COUNCIL, CITY OF YORK COUNCIL AND NORTH YORK MOORS NATIONAL PARK - MINERALS AND WASTE JOINT PLAN (MWJLP)

EXAMINATION IN PUBLIC

MWJP Examination. Consultation on High Court Judgement

We are instructed by INEOS Upstream Limited to respond to your email dated 19 June 2019, which stated that the Inspector has requested that a consultation on the High Court Judgement of 6 March 2019, which quashed National Planning Policy Framework (NPPF) July 2018, paragraph 209 (a).

Paragraph 209(a) stated that minerals planning authorities should:

> a) *recognise the benefits of on-shore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction;*

The paragraph was challenged on 4 grounds, two of which succeeded:

- Ground 1 – that the Secretary of State unlawfully failed to take into account material considerations, namely scientific and technical evidence which was produced following the Written Ministerial Statement (WMS) of 16 September 2015
- Ground 4 – that the Secretary of State failed to carry out a lawful consultation exercise in relation to revisions to the framework which were published on 24 July 2018

The Inspector has asked the following questions:

1. The weight to be given to the WMS
2. Whether the judgement highlighted uncertainties in the scientific evidence on emissions or other matters which would justify a precautionary approach being reflected in plan policies e.g. 500m buffer zone
3. If so, should there be a commitment to specifically review any relevant precautionary plan provisions within 5 years of adoption to allow experience of operations to be taken into account

1 Western Terrace Edinburgh EH12 5QF
T +44 (0) 131 337 9640

The Inspector has also stated that if any parties submit that she should consider scientific or other evidence as a consequence of this judgement that evidence should be included with their representation. We have addressed this point first because it is fundamental to an understanding of the conclusion of the Court.

Whether scientific evidence should be considered by the Inspector

The Court focused on Ground 4 and the question of what the public thought it was engaging and whether that would allow assessment of technical evidence (paragraph 51) and accepted that the public could reach this conclusion (paragraph 52). It concluded that Ground 1 was closely related to Ground 4 (paragraph 66) and that the nature and scope of the NPPF consultation that was carried out was not what the public might have expected was being carried out and the public could have expected that scientific matters might be considered.

The Court passed no judgement on what the outcome of any assessment of scientific matters might be and it did not conclude that such evidence would have led to a different Government policy than that stated in NPPF paragraph 209(a). Therefore, there is no basis to argue that the Court's decision challenges the Government's stated policy position.

The Secretary of State on 23 May 2019 reiterated support for the onshore oil and gas industry in planning terms:

> *On the 6th of March 2019, Mr Justice Dove handed down his judgment in the case of Stephenson vs SoS MHCLG [2019] EWHC 519 (Admin). In accordance with the terms of the Court Order, paragraph 209(a) of the National Planning Policy Framework has been quashed.*
>
> *For the avoidance of doubt the remainder of the National Planning Policy Framework policies and, in particular, Chapter 17 on 'Facilitating the Sustainable Use of Minerals' remain unchanged and extant.*
>
> *For the purposes of the National Planning Policy Framework, hydrocarbon development (including unconventional oil and gas) are considered to be a mineral resource. Specific policy on the planning considerations associated with their development is set out at paragraphs 203-205 and the remainder of 209 of the National Planning Policy Framework. In particular, paragraph 204(a) of the National Planning Policy Framework states that planning policies should "provide for the extraction of mineral resources of local and national importance" with paragraph 205 stating that "[w]hen determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy".*
>
> *In addition, the Written Ministerial Statements of 16th September 2015 on 'Shale Gas and Oil Policy' and 17th May 2018 on 'Planning and Energy Policy' also remain unchanged and extant. The Written Ministerial Statements sit alongside the National Planning Policy Framework. Planning Practice Guidance is also unaffected by the ruling.*
>
> *This suite of policies and guidance remain material considerations in plan making and decision taking for hydrocarbon development and they should be afforded appropriate weighting as determined by the decision maker.*
>
> *We remain committed to the safe and sustainable exploration and development of our onshore shale gas resources.*

1 Western Terrace Edinburgh EH12 5QF
T +44 (0) 131 337 9640

The Court quashed paragraph 209(a) of the NPPF due to a lack of proper consultation. This has nothing to do with the merits of that paragraph. However the rest of the NPPF and in particular the parts that are supportive of development of this type are unaffected.

Given the nature of the Judicial Review challenge, it was a flaw in the consultation process that was carried out rather than any express or implied admission on the part of the UK Government that its position as set out in paragraph 209(a) was wrong, that led to the revisal. As the most recent WMS of 23 May 2019 pointed out, the remainder of the previous supportive suite of WMSs and the remainder of paragraph 209 which urges mineral planning authorities to plan "positively" for each of the stages of onshore unconventional oil and gas development, remain in place. Nowhere is reference made to the need to review scientific evidence or to adopt a precautionary approach.

The Court made no comment about the validity or quality of scientific evidence it simply concluded that the public were right to assume that it would form part of the assessment. The issue that the Court has ruled on is the validity of the consultation process. No conclusion about scientific evidence can be drawn from the Courts judgement. There has been no change in circumstance about the scientific basis for the policies that support unconventional gas and the MWJLP does not need to be altered to take account of these matters.

Weight to be given to WMS

Parliament is where the law is made and where Government policy is formed. The Minister is responsible for enacting policy having been given authority by Parliament to make that statement. A ministerial statement is a statement of how policy under the relevant Act is to be applied. Therefore, the Ministerial Statement must carry weight and must be incorporated into the Minerals Plan Policy.

The WMS expressly states that the national planning policy advice which it sets out is a material consideration in plan-making. It makes it clear that shale gas development is of national importance and that it is expected by the UK Government that mineral planning authorities in England will attach great weight when drafting local plan policies on shale gas development to its potential economic benefit.

The WMS of 23 May 2019 restated the Government's position following the High Court judgement of 6 March 2019. It is a new material consideration and should be given great weight as a statement of national policy, especially given that the announcement is so recent. Many of its themes are already included in the earlier WMS, which has been addressed in the Examination submissions previously made by INEOS. However, this most recent expression of Government policy adds further weight to those strategic factors that weigh in favour of INEOS' Examination submissions.

The WMS of 23 May 2019 reiterated the position set out in the WMS of 17 May 2018. That earlier WMS confirmed its status by noting that *"This Statement is a material consideration in … decision-taking, alongside relevant policies of the existing National Planning Policy Framework (2012), in particular those on mineral planning (including conventional and unconventional hydrocarbons)."* The statement is also clear that *"Shale gas development is of national importance. The Government expects Mineral Planning Authorities to give great weight to the benefits of mineral extraction, including to the economy. This includes shale gas exploration and extraction."*. It therefore directly applies to the draft Minerals and Waste

1 Western Terrace Edinburgh EH12 5QF
T +44 (0) 131 337 9640

Plan and confirms the importance to the country of undertaking the activity proposed by the development. This is clearly a highly relevant factor which we anticipate the Inspector will wish to take into account in concluding the Examination.

It is *"Government's view that there are potentially substantial benefits from the safe and sustainable exploration and development of our onshore shale gas resources".* The Statement notes that *"This joint statement should be considered in planning decisions and plan-making in England."* This confirms that Government considers there are potentially benefits arising from shale exploration.

It also states that *"The UK must have safe, secure and affordable supplies of energy with carbon emissions levels that are consistent with the carbon budgets defined in our Climate Change Act and our international obligations. We believe that gas has a key part to play in meeting these objectives both currently and in the future.".* It also observes that *"Gas still makes up around a third of our current energy usage and every scenario proposed by the Committee on Climate Change setting out how the UK could meet its legally-binding 2050 emissions reduction target includes demand for natural gas."*. Furthermore it states that *"The UK must have safe secure and affordable supplies of energy"* and estimates that we could be importing up to 72% of our gas by 2030. This confirms the INEOS's position in its Examination submission that unconventional hydrocarbons does not conflict with climate change objectives, and that it is necessary to continue to explore for and ultimately extract gas in the UK in order to provide a local and secure source of gas.

On this basis, Government *"believe[s] that it is right to utilise our domestic gas resources to the maximum extent and exploring further the potential for onshore gas production from shale rock formations in the UK, where it is economically efficient, and where environment impacts are robustly regulated."* INEOS considers that unconventional hydrocarbons have a material benefit to the Country and exploration and development helps to assess the future potential for shale gas extraction in this area of the country, and that it accords with the requirement to assess environmental effects robustly.

The WMS notes that a new shale gas exploration and production sector could provide a new economic driver and that the sector could create a "new model" of the most environmentally robust onshore shale gas sector. Without developments progressing, these opportunities will not be realised.

It also sets out proposals to consult on whether certain unconventional hydrocarbons development should in fact be considered to be permitted development. This indicates that Government's view is that this type of development is not likely to have significant enough effects to warrant express planning control.

INEOS therefore considers that the WMS is a material consideration that should be given great weight in concluding the Examination. The WMS has not directed that further examination or review of technical evidence is required

Therefore, it remains INEOS' view that the MWJLP should take account of the following points made in the WMS of 18 May 2018 and 19 May 2019:

> *Shale gas development is of national importance. The Government expects Mineral Planning Authorities to give great weight to the benefits of mineral extraction, including to the economy. This includes shale gas exploration and extraction.*

1 Western Terrace Edinburgh EH12 5QF
T +44 (0) 131 337 9640

Mineral Plans should reflect that minerals 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).

Whether a precautionary approach should be applied

The High Court Judgement and WMSs do not require a precautionary approach to be reflected in the MWJLP. The Inspector has made specific reference to buffer zones in her latest questions. We responded on this point on 13 June 2018 in response to the Inspector's questions about the May 2018 WMS. We do not consider that any change to that response is required and our conclusions remain unchanged:

Contrary to the WMS the JPA specifically acknowledge in the concluding section of the Supplementary Note that the imposition of the 500m Buffer "has been established more widely than a site-specific basis".

This significant departure from the "site by site assessment" advice set out in PPG as reinforced in the WMS is justified on three main but flawed propositions. The first is that the process of shale gas development is "relatively new" to the Plan area. The second is that specific site examples where the scientific evidence has resulted in permissions being granted in circumstances where residencies were located within 500 metres of the proposed well site might not "necessarily reflect the nature of the potential further applications in the future". And the third is that sound and visual impacts "are likely to be higher than predicted" if multiple rigs on multiple well sites are "potentially operating at the same time (see paragraphs 13, 14 and 22 of the Supplementary Note).

Dealing with each point in turn. The JPA has no evidence before them which suggests that the process involved in developing shale gas is in anyway "new" in the sense of being untried or untested or that its environmental effects are unknown. It, therefore, makes no sense to impose the 500m Buffer simply because the development is "relatively new" to the Plan area.

So far as the second point is concerned again it makes no sense to impose the 500m Buffer on the grounds that, while all the current scientific and regulatory evidence demonstrates that shale gas drilling operations can be carried out safely with acceptable noise and visual impacts at separation distances from sensitive receptors that are less than 500 metres, that might not prove to be the case in the case of future applications. There is simply no evidence before the Examination to support that proposition.

1 Western Terrace Edinburgh EH12 5QF
T +44 (0) 131 337 9640

Thirdly, it is trite EIA law that the issue of cumulative impact requires to be assessed on a site by site basis at the point in time when a specific application for planning permission comes forward. That is the appropriate time at which the potential impact of a well site becoming operational at the same time as an existing well or wells are being drilled in an area should be assessed for cumulative impact. Again, it simply makes no sense to impose a fixed separation distance between a well site and residential properties in order to address the future unknown cumulative noise and visual impacts of multiple wells potentially operating in an area.

Finally, the JPA has sought to redefine hydraulic fracturing. The definition of hydraulic fracturing should reflect that given in the Infrastructure Act and should not seek to impose its own definition or restrictions because the WMS has given clear guidance that there must be a positive approach to the development of the industry.

In summary, therefore, the Plan is affected by the advice in the WMS that the proposed imposition of a constraint such as the 500m Buffer must be shown to be properly justified. For the reasons outlined above it is clear that the JPA have failed to provide proper justification for their proposed imposition of the 500m Buffer. If that point is accepted then the Plan will require to be modified so that the wording in Policy M17(4) relating to the 500m Buffer is removed.

Therefore, it remains INEOS' view that a precautionary approach is not required and there is no requirement to provide a buffer zone.

Whether there should be provisions to review any relevant precautionary plan provisions within 5 years of adoption

The WMSs are clear in the Government's commitment to unconventional hydrocarbons and the need for an indigenous U.K. energy supply. The scientific evidence has been rigorously tested and there are a number of regulatory bodies all providing over sight, regulation and with powers to step in and order activities to cease. There is no requirement for planning to adopt a precautionary approach. Instead each development should be judged on its merits and when consented overseen by the appropriate regulatory bodies.

Following the Court decision what remains clear, as evidenced by the terms of the most recent WMS issued on 23 May 2019, is that the UK Government remains committed to "the safe and sustainable exploration and development of [the country's] onshore shale gas resources." This together with the provisions of paragraph 209b of the revised NPPF, "plan positively for, the three phases of development (exploration, appraisal and production), whilst ensuring appropriate monitoring and site restoration is provided for" makes it clear that the Joint Plan must continue to make provision for onshore petroleum development. A failure to do so would render the MWJLP inconsistent with the NPPF and the WMS and thus unsound

The judgement did not give any opinion on technical and scientific matters but merely stated given that the consultation could be viewed by a member of the public to encompass the subject matter of the proposed paragraph 209a as opposed to the view taken by MHCLG that it was a mere cut and paste of the WMS of 2015 and therefore the subsequent ignoring of the Talk Fracking submission was not lawful.

1 Western Terrace Edinburgh EH12 5QF
T +44 (0) 131 337 9640

The issue for the Inspector and the Joint Minerals Planning Authorities arising out of Mr Justice Dove's Judgement, therefore, is to what extent and in what circumstances the issue of climate change impact is properly addressed in terms of its current proposed development plan policies and supporting wording.

The response to climate change and in particular the relevance of research and actions required under the Climate Change Act 2008 as amended should be left to central government as is very clearly stated within the Act. There is still a strong and material case for shale gas development as the recent WMS (23 May 2019) states "We remain committed to the safe and sustainable exploration and development of our onshore shale gas resources".

We should be grateful if you would please acknowledge safe receipt of this letter and confirm that it will be passed to the Inspector for her information and attention.

Philip Neaves
Director