IN THE HIGH COURT OF JUSTICE **CO/3256/2018**
QUEEN'S BENCH DIVISION
PLANNING COURT

BETWEEN:

THE QUEEN
(on the application of PAUL JOHN ANDREWS)
Claimant

and

1) THE SECRETARY OF STATE FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY
2) THE SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT
Defendants

AMENDED STATEMENT OF FACTS AND GROUNDS

In this Statement of Facts and Grounds
references to the Claim Bundle are in the format "[CB/x/y]"
where "x" refers to the tab number and "y" refers to the page number.

Introduction

1. The Claimant seeks permission in his personal capacity to challenge by way of judicial review the Defendants' decision to issue a written ministerial statement entitled 'Energy Policy: Written Statement – HCWS690' on 17 May 2018 ('**the 2018 WMS**') which concerned onshore shale gas resources. [CB/3]

Aarhus Convention claim

2. This application for judicial review raises matters that fall within the scope of the Aarhus Convention 1998 and it should be treated as an Aarhus Convention claim for the purpose of the Civil Procedure Rules ('**CPR**') 45. In the circumstances the Claimant will seek an order under CPR 45.41-44 that the adverse costs liability of the parties to the proceedings will be subject to the default limitations set out in the CPR.

Factual background and chronology

3. The Claimant is a retired solicitor, and the Mayor of Malton and Chair of Habton Parish Council, in North Yorkshire.

4. The North Yorkshire County Council, City of York and North York Moors National Park Authority minerals and waste joint plan ('**the Draft NYMWJP**') is currently the subject of an examination in public conducted by an Inspector appointed by the Second Defendant, Elizabeth Ord.

5. The Claimant has actively participated in the examination in public of the Draft NYMWJP and he is particularly concerned about the impact that the 2018 WMS will have on that process and the policies within the Draft NYMWJP which concern the hydraulic fracturing (commonly known as 'fracking') of shale rock in the Plan area.

6. The most recent version of the Draft NYMWJP was published in November 2016 and it currently contains a section headed 'Hydrocarbons (oil and gas)' which includes draft policies M16, M17 and M18 and supporting text. [CB/12] This publication draft is subject to amendments proposed by the three authorities which were published in July 2017. [CB/13]

7. The Draft NYMWJP provides the following definitions in paragraph 5.119 of the supporting text [CB/12/188]:

….'a) 'Hydrocarbon development' includes all development activity associated with exploring, appraising and/or producing hydrocarbons (oil and gas), including both surface and underground development.
b) 'Surface hydrocarbon development' and 'surface proposals' includes use and/or development of the land surface for the purposes of the exploring, appraising and/or producing hydrocarbons.
c) 'Sub-surface hydrocarbon development' and 'sub-surface proposals' includes development taking place below the ground surface for the purposes of exploring, appraising and/or producing hydrocarbons.
d) 'Conventional hydrocarbons' include oil and gas found within geological 'reservoirs' with relatively high porosity/permeability, extracted using conventional drilling and production techniques.
e) 'Unconventional hydrocarbons' include hydrocarbons such as coal bed and coal mine methane and shale gas, extracted using unconventional techniques, including hydraulic fracturing in the case of shale gas, as well as the exploitation of in situ coal seams through underground coal gasification.
f) For the purposes of the Plan 'hydraulic fracturing' includes the fracturing of rock under hydraulic pressure regardless of the volume of fracture fluid used.
…'

8. The key draft policy relating to fracking of shale rock is policy M16 [CB/12/188-189]:

'Policy M16: Key spatial principles for hydrocarbon development
Hydrocarbon development of the types identified below should be located in accordance with the following principles:
a)
- *exploration, appraisal and production of conventional hydrocarbons, without hydraulic fracturing;*
- *exploration for unconventional hydrocarbons, without hydraulic fracturing:*

Proposals for these forms of hydrocarbon development will be permitted in locations where they would be in accordance with Policies M17 and M18 and, where relevant, part d) of this Policy.
b)
- *Exploration, appraisal and production of conventional hydrocarbons, involving hydraulic fracturing;*
- *Exploration for unconventional hydrocarbons, involving hydraulic fracturing;*
- *Appraisal and/or production of unconventional hydrocarbons (other than coal mine methane):*

i) Surface proposals for these forms of hydrocarbon development will only be permitted where they would be outside the following designated areas: National Park, AONBs, Protected Groundwater Source Areas, the Fountains Abbey/Studley Royal World Heritage Site and accompanying buffer zone, Scheduled Monuments, Registered Historic Battlefields, Grade I and II Registered Parks and Gardens, Areas which Protect the Historic Character and Setting of York, Special Protection Areas, Special Areas of Conservation, Ramsar sites and Sites of Special Scientific Interest.*

ii) Sub-surface proposals for these forms of hydrocarbon development, including lateral drilling, underneath the designations referred to in i) above, will only be permitted where it can be demonstrated that significant harm to the designated asset will not occur. Where lateral drilling beneath a National Park or AONBs is proposed for the purposes of appraisal or production, this will be considered to comprise major development and will be subject to the requirements of Policy D04.

iii) Surface and sub-surface proposals for these forms of hydrocarbon development will also be required to be in accordance with Policies M17 and M18. Surface proposals will also, where relevant, need to comply with Part d) of this Policy. … '

9. The policy justification for draft policy M16 is set out in paragraphs 5.120-130 of the Draft NYMWJP [CB/12/191-193]. Of particular significance in the context of this claim is the following passages:

   '5.122 While the Infrastructure Act 2015 and secondary legislation address hydraulic fracturing which occurs underground, the Government has also consulted on further restrictions, in the form of a prohibition on high-volume hydraulic fracturing operations from being carried out from new or existing wells drilled at the surface in certain specified areas, although they are not yet in force. As proposed, the restrictions would apply to surface development for unconventional hydrocarbons involving high volume hydraulic fracturing but not to conventional hydrocarbons development, or development for unconventional hydrocarbons which do not require high volume hydraulic fracturing. The areas proposed for protection through this means are National Parks, AONBs, World Heritage Sites, Groundwater Source Protection Zone 1, SSSIs, Natura 2000 sites (SPAs and SACs) and Ramsar sites. Although these areas all benefit from strong national planning policy protection in their own right, the proposed restrictions would not, in themselves, constitute planning policy as they are proposed to be implemented through the oil and gas licensing regime.

   5.123 The net effect of the existing restrictions would be to prevent subsurface development involving high-volume hydraulic fracturing at a depth of less than 1,000m below the surface anywhere in the Plan area, and at a depth of less than 1,200m below the surface in some highly protected areas (as indicated in para. 5.121). However, a range of other important types of designation would not be subject to similar legislative protection. Furthermore, whilst the proposed surface restrictions would provide protection to a range of important designations, albeit not as a matter of planning policy, there are other types of sensitive areas that would not receive equivalent protection.

   5.124 An additional consideration is that the new Regulations and proposed surface protections would only apply to high volume hydraulic fracturing whereas in terms of land use and the potential for impacts on the environment, local amenity and other relevant matters, impacts could occur at lower levels of activity.15 It is therefore not considered appropriate to distinguish in the Policy between high-volume hydraulic fracturing and fracking involving lower volumes of fracture fluid. Similarly, it is considered that where hydraulic fracturing is proposed for the purposes of supporting the production of conventional gas resources, this should be subject to the same policy approach that is

applied to hydraulic fracturing for unconventional gas, as the range of issues and potential impacts are likely to be similar.'[1]

10. On 17 May 2018 the 2018 WMS was issued by Greg Clark MP, the Secretary of State for Business, Energy and Industrial Strategy ('**SSBEIS**') and James Brokenshire MP, the Secretary of State for Housing, Communities and Local Government ('**SSHCLG**').

11. Thereafter, Inspector Ord invited submissions on the question whether the 2018 WMS affected the Draft NYMWJP and if so whether it should be modified to reflect the WMS. The Claimant responded to that invitation and sent his detailed submissions to the Inspector on 19 June 2018. [CB/14]

12. On 10 July 2018 the Claimant wrote to the SSBEIS to indicate that he intended to challenge the decision to issue the 2018 WMS on a number of grounds and to invite the Secretary of State to withdraw and cancel the WMS. Rather than provide a substantive response, officers within the Department of BEIS initially treated Mr Andrews' letter as raising a matter which should be considered under the Freedom of Information Act 2000, before indicating on 27 July that the 2018 WMS would not be withdrawn. [CB/15]

13. On 3 August 2018 the Claimant's solicitors sent the Defendants a pre-action protocol letter. [CB/4]

14. On 16 August 2018 the Claimant filed the present application for judicial review.

15. On 23 August 2018 Carin Coombe made an Order on the direction of Mr Justice Holgate that, inter alia, the Defendants respond to the Claimant's pre-action protocol letter by 31 August 2018 and the Claimant file and serve any Amended Statement of Facts and Grounds by 7 September 2018.

[1] Note that footnote 15 in the Draft NYMWJP read as follows: '*15 As an example, the recently permitted hydraulic fracturing activity at the KM8 well site in North Yorkshire involves 5 separate fracks, only one of which would exceed the 1,000m3 threshold.'* Also note that the reference in these paragraphs to *'proposed surface protections'* pre-dated the issue of the *Onshore Hydraulic Fracturing (Protected Areas) Regulations 2016.*

16. By letter dated 31 August 2018, the Defendants responded to the Claimant's pre-action protocol letter.

Relevant domestic legal and policy framework

2012 NPPF

17. On 25 March 2012 the then Secretary of State for Communities and Local Government ('**SSCLG**') issued the National Planning Policy Framework (the '**2012 NPPF**'). Paragraph 144 of the 2012 NPPF stated that when determining planning applications, local planning authorities should give *'great weight to the benefits of mineral extraction, including to the economy'*.[2] [CB/8/82]

PPGM

18. On 17 October 2014 SSCLG issued the online *'Planning Practice Guidance on Minerals'* ('**PPGM**').[3] [CB/9] PPGM encourages Minerals Planning Authorities ('**MPA**') to make appropriate provision for hydrocarbons in local minerals plans;[4] and gives MPA guidance on the determination of applications for planning permission for shale gas exploration and production.[5] PPGM also explains that *'hydraulic fracturing'* means:

> *'… the process of opening and/or extending existing narrow fractures or creating new ones (fractures are typically hairline in width) in gas or oil-bearing rock, which allows gas or oil to flow through wellbores to be captured.'*[6]

Infrastructure Act 2015

19. Section 50 of the Infrastructure Act ('IA') 2015 amended the Petroleum Act ('PA') 1998 by inserting the following provisions:

---

[2] The NPPF was revised in July 2018 and the requirement that local planning authorities should give *'great weight to the benefits of mineral extraction, including to the economy'* when determining applications is now to be found in paragraph 205 of the 2018 NPPF.

[3] Elements of the guidance in PPGM have been updated on line since that date. The most up to date version is included at [CB/9].

[4] See paragraphs 105-106 of PPGM at [CB/9/86].

[5] See paragraphs 109-127 of PPGM at [CB/9/87-93].

[6] See paragraph 129, Annex A of PPGM at [CB/9/94].

'4A Onshore hydraulic fracturing: safeguards
(1) The Secretary of State must not issue a well consent that is required by an onshore licence for England and Wales unless the well consent imposes –
(a) a condition which prohibits associated hydraulic fracturing from taking place in land at a depth of less than 1000 metres; and
(b) a condition which prohibits associated hydraulic fracturing from taking place in land at a depth of 1000 metres or more unless the licensee has the Secretary of State's consent for it to take place (a "hydraulic fracturing consent").
…
4B Section 4A: supplementary provision
(1) "Associated hydraulic fracturing" means hydraulic fracturing of shale or strata encased in shale which—
(a) is carried out in connection with the use of the relevant well to search or bore for or get petroleum, and
(b) involves, or is expected to involve, the injection of—
(i) more than 1,000 cubic metres of fluid at each stage, or expected stage, of the hydraulic fracturing, or
(ii) more than 10,000 cubic metres of fluid in total. …'

The 2015 WMS

20. On 16 September 2015 the Secretary of State for Energy and Climate Change and the then SSCLG issued a Written Ministerial Statement ('**the 2015 WMS**') on *'Shale gas and oil Policy'*. It replaced an earlier document entitled the *'Shale Gas and Oil Policy Statement'* which had been issued on 13 August 2015.

21. The 2015 WMS informed the public that it was the Government's view that *'there is a national need to explore and develop our shale gas and oil resources in a safe and sustainable and timely way*' and set out the Government's case for having formed that view, making reference to: the importation of gas; security of supplies; the economic advantages of a *'thriving shale industry'*; and the assertion that shale gas can *'create a bridge whilst we develop renewable energy, improve energy efficiency and build new nuclear generating capacity.'*

Onshore Hydraulic Fracturing (Protected Areas) Regulations 2016

22. S4A PA 1998 also states that the Secretary of State may not grant a hydraulic fracturing consent for *'associated hydraulic fracturing'* in *'protected groundwater source areas'* and '*other protected areas'.* The *Onshore Hydraulic Fracturing (Protected Areas) Regulations 2016* identify *'other protected areas'* as National Parks, Areas of Outstanding Natural Beauty and World Heritage Sites and prohibits fracking at a depth of less than 1200 metres below such an area.

The 2018 WMS

23. The 2018 WMS [CB/3] begins by reiterating the Government's view that there are potentially substantial benefits to be had from the exploitation of onshore gas resources in much the same way as the 2015 WMS had done.

24. Under the heading '*Planning policy and guidance*', the 2018 WMS states that it is a *'material consideration'* to be taken into account by those plan-making and decision-taking and that it should be considered in conjunction with the National Planning Policy Framework ('**NPPF**'). The 2018 WMS reiterates advice contained in the (then extant) 2012 NPPF to the effect that the Government expects MPA to give *'great weight to the benefits of mineral extraction'*. The 2018 WMS goes on to state that:

    '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….'

25. In addition, and importantly for the purposes of this claim, the 2018 WMS refers MPA to the definitions of fracking in both s4A PA 1998 and PPGM in the following terms:

    '… We expect Mineral Planning Authorities to recognise the fact that Parliament has set out in statute [i.e. the PA 1998 as amended by the IA 2015] the relevant definitions of hydrocarbons, natural gas and associated hydraulic fracturing. In addition, these matters are described in the Planning Practice Guidance [i.e. the PPGM], which Plans must have due regard to. Consistent with this Planning Practice Guidance, policies should avoid undue sterilisation of mineral resources (including shale gas).'

The Select Committee report

26. On 5 July 2018 the Housing Communities and Local Government Select Committee published a report on its inquiry on *'…whether the guidance on fracking and the existing planning regime are fit for purpose'*. [CB/7] When doing so the Select Committee expressed its disappointment that the SSHCLG had issued the 2018 WMS before the report had been published and without taking account of its findings. [CB/7/37]

27. The Select Committee considered the 2018 WMS in its report and noted with concern that:
    - there was a conflict between the statutory definition of *'associated hydraulic fracturing'* inserted into the PA 1998 by the IA 2015 and the definition contained within PPGM [CB/7/39, 42, 43]; and
    - the advice that plan-makers and decision-takers were expected to *'recognise'* the statutory definition gave rise to a lack of clarity and to uncertainty [CB/7/39, 42, 43].

28. Further, the Select Committee recommended that the Government amend the statutory definition *'… to ensure public confidence that every development which artificially fractures rock is subject to the appropriate permitting and regulatory regime'*. [CB/7/43]

The Aarhus Convention

29. The United Kingdom is a party to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 ('**Aarhus Convention**'). The Aarhus Convention is an unincorporated International Convention which has no direct effect in domestic law (*R (on the application of Royal Society for the Protection of Birds) v Secretary of State for Justice* [2017] EWHC 2309 (Admin), paragraph 8). Legal effect is conferred upon the treaty to the extent that it has found expression in EU environmental legislation (including domestic regulations implementing EU Directives: see *R (CPRE Kent*) *v Dover District Council* [2018] 1 WLR 108, especially at paragraphs 33, 34 and 48). The Aarhus Convention may also inform the existence, extent and content of common law duties (see, for instance *R (Oakley) v South Cambridgeshire District Council* [2017] 1 WLR 3765, per Elias LJ at paragraph 62, and *CPRE Kent*, especially at paragraphs 52 and 55).

30. Articles 6, 7 and 8 of the Aarhus Convention concern public participation regarding, respectively: decisions on specific activities; plans, programmes and policies; and the preparation of executive regulations and/or generally applicable legally binding normative instruments. Article 7 states:

'Each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public. Within this framework, article 6, paragraphs 3, 4 and 8, shall be applied. The public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention. To the extent appropriate, each Party shall endeavour to provide opportunities for public participation in the preparation of policies relating to the environment.'

The SEA Directive

31. On 27 June 2001 the European Union adopted European Directive 2001/42/EC *'on the assessment of the effects of certain plans and programmes on the environment'* (known as the Strategic Environmental Assessment (or '**SEA**') Directive).

32. Put shortly, the SEA Directive requires that responsible authorities consider the *'likely significant effects'* on the environment of implementing a *'plan'* or *'programme'*, and that reasonable alternatives taking into account the objectives and geographical scope of the plan or programme, are identified, described and evaluated.

33. In the case of *Walton v The Scottish Ministers (Scotland)* [2012] UKSC 44 Lord Reed explained the evolution and general application of the SEA Directive in paragraphs 10-26 of his Speech:

'10 The SEA Directive forms part of a body of EU legislation designed to provide a high level of protection for the environment, in accordance with article 191 of the Treaty on the Functioning of the European Union and article 37 of the Charter of Fundamental Rights of the European Union . It is complementary, in particular, to the EIA Directive . Both directives impose a requirement to carry out an environmental assessment, but they are different in scope.
11 The EIA Directive was adopted in 1985 and required to be implemented by July 1988. It has been amended significantly by further directives, including the Public Participation Directive (Directive 2003/35/EC , OJ 2003 L156/17) ("the PPD Directive"), which gave effect to the public participation requirements of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The EIA Directive is concerned with the assessment of the effects of "projects" on the environment. The SEA Directive , which was adopted 16 years later, is concerned with

the environmental assessment of "plans and programmes". Taken together, the directives ensure that the competent authorities take significant environmental effects into account both when preparing and adopting plans or programmes, and when deciding whether to give consent for individual projects.

12 The background to the SEA Directive , and the problem which it was designed to address, were explained by Advocate General Kokott in her opinion in Terre Wallone ASBL v Région Wallone and Inter-Environnement Wallonie ASBL v Région Wallone ((Joined Cases C-105/09 and C-110/09) [2010] I-ECR 5611 , points 31–32:

"The specific objective pursued by the assessment of plans and programmes is evident from the legislative background: the SEA Directive complements the EIA Directive, which is more than ten years older and concerns the consideration of effects on the environment when development consent is granted for projects.

The application of the EIA Directive revealed that, at the time of the assessment of projects, major effects on the environment are already established on the basis of earlier planning measures (Proposal for a Council directive on the assessment of the effects of certain plans and programmes on the environment, COM (96) 511 final, p 6). Whilst it is true that those effects can thus be examined during the environmental impact assessment, they cannot be taken fully into account when development consent is given for the project. It is therefore appropriate for such effects on the environment to be examined at the time of preparatory measures and taken into account in that context."

13 The Advocate General provided an example (point 33):

"An abstract routing plan, for example, may stipulate that a road is to be built in a certain corridor. The question whether alternatives outside that corridor would have less impact on the environment is therefore possibly not assessed when development consent is subsequently granted for a specific road-construction project. For this reason, it should be considered, even as the corridor is being specified, what effects the restriction of the route will have on the environment and whether alternatives should be included."

14 The relationship between the two forms of assessment was also described by the Commission in its first report on the application of the SEA Directive under article 12(3) (COM (2009) 469 final, para 4.1):

"The two Directives are to a large extent complementary: the SEA is 'up-stream' and identifies the best options at an early planning stage, and the EIA is 'down-stream' and refers to the projects that are coming through at a later stage. In theory, an overlap of the two processes is unlikely to occur. However, different areas of potential overlaps in the application of the two Directives have been identified.

In particular, the boundaries between what constitutes a plan, a programme or a project are not always clear, and there may be some doubts as to whether the 'subject' of the assessment meets the criteria of either or both of the Directives."

In relation to that passage, it should be noted that a project need not necessarily be a "downstream" development of an option identified at an earlier "upstream" planning stage.

15 The scope of the SEA Directive is defined by article 3 . Paragraphs (1) and (2) provide:

"1. An environmental assessment, in accordance with articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to [the EIA Directive] …"

16 The obligation to carry out an SEA arises under [article 3(1)] in relation to plans and programmes referred to in [article 3(2) to (4)] . Those provisions are concerned with plans and programmes "which set the framework for future development consent of projects"….

17 When member states require to determine whether plans or programmes are likely to have significant environmental effects, they are directed by [article 3(5)] to apply the criteria set out in [Annex II], the first of which is "the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources". It is implicit in that criterion that a framework can be set without the location, nature or size of projects being determined. As Advocate General Kokott explained in Terre Wallone (points 64–65):

"Plans and programmes may, however, influence the development consent of individual projects in very different ways and, in so doing, prevent appropriate account from being taken of environmental effects. Consequently, the SEA Directive is based on a very broad concept of 'framework'.

This becomes particularly clear in a criterion taken into account by the member states when they appraise the likely significance of the environmental effects of plans or programmes in accordance with article 3(5): they are to take account of the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources (first indent of point 1 of Annex II). The term 'framework' must therefore be construed flexibly. It does not require any conclusive determinations, but also covers forms of influence that leave room for some discretion."

18 [Article 2] of the directive is headed "Definitions", and provides:

"For the purposes of this Directive:

(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

– which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

– which are required by legislative, regulatory or administrative provisions."

19 Although [article 2(a)] is headed "Definitions", it does not in fact define the terms "plan" or "programme", but qualifies them. For the purposes of the directive, "plans and programmes" means plans and programmes which fulfil the requirements set out in the two indents: that is to say, they must be "subject to preparation and/or adoption by an authority at national, regional or local level or … prepared by an authority for adoption, through a legislative procedure by Parliament or Government", and they must also be "required by legislative, regulatory or administrative provisions".

20 The terms "plan" and "programme" are not further defined. It is however clear from the case law of the Court of Justice that they are not to be narrowly construed. As the court stated in Inter-Environnement Bruxelles ASBL, Pétitions- Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale (Case C-567/10) [2012] CMLR 909 , para 37, "the provisions which delimit the directive's scope, in particular those setting out the definitions of the measures envisaged by the directive, must be interpreted broadly". The interpretation of the directive, in this respect as in others, has been based

primarily upon its objective rather than upon its literal wording.
21 Adopting therefore a purposive approach, the complementary nature of the objectives of the [SEA](#) and [EIA Directives](#) has to be borne in mind. As Advocate General Kokott said in Terre Wallone (points 29- 30):
"According to Article 1, the objective of the SEA Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes by ensuring that an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.
The interpretation of the pair of terms 'plans' and 'projects' should consequently ensure that measures likely to have significant effects on the environment undergo an environmental assessment."
It is also necessary to bear in mind that the directive is intended to be applied in member states with widely differing arrangements for the organisation of developments affecting the environment. Its provisions, including terms such as "plan" and "programme", have therefore to be interpreted and applied in a manner which will secure the objective of the directive throughout the EU.
22 In relation to the stipulation in the second indent that plans and programmes must be required by legislative, regulatory or administrative provisions, it appears from the judgment of the Court of Justice in Inter-Environnement Bruxelles that that requirement is not to be understood as excluding from the scope of the directive plans or programmes whose adoption is not compulsory. The court noted at para 29 that such an interpretation would exclude from the scope of the directive the plans and programmes concerning the development of land which were adopted in a number of member states. Accordingly, as the court stated at para 31, "plans and programmes whose adoption is regulated by national legislative or regulatory provisions, which determine the competent authorities for adopting them and the procedure for preparing them, must be regarded as 'required'".
23 The concept of "modification" was also considered in Inter-Environnement Bruxelles, where one of the issues was whether the repeal of a plan or programme fell within that concept. In holding that in principle it did, the court noted that such a measure necessarily entailed a change in the legal reference framework — that is to say, the framework for development consent of projects — and might therefore be likely to have significant effects on the environment (paras 38-40).
24 A passage in the Commission's guidance document, Implementation of [Directive 2001/42](#) on the Assessment of the Effects of Certain Plans and Programmes on the Environment (2003) (para 3.9) is also helpful:
"It is important to distinguish between modifications to plans and programmes, and modifications to individual projects, envisaged under the plan or programme. In the second case, (where individual projects are modified after the adoption of the plan or programme), it is not [the SEA Directive] but other appropriate legislation which would apply. An example could be a plan for road and rail development, including a long list of projects, adopted after SEA. If, in implementing the plan or programme, a modification were proposed to one of its constituent projects and the modification was likely to have significant environmental effects, an environmental assessment should be made in accordance with the appropriate legal provisions (for example, the Habitats Directive, and/or EIA Directive)."
25 In terms of [paragraph 1 of article 4](#) of the directive, the environmental assessment referred to in [article 3](#) "shall be carried out during the preparation of a plan or programme

and before its adoption or submission to the legislative procedure." Paragraph 3 is designed to avoid the duplication of assessments, and provides:
"Where plans and programmes form part of a hierarchy, member states shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this directive, at different levels of the hierarchy. For the purpose of, inter alia, avoiding duplication of assessment, member states shall apply article 5(2) and (3)."
26 Article 5 requires the preparation of an environmental report. Article 6 requires that the draft plan or programme and the environmental report must be the subject of public consultation. For this purpose, member states have to identify the public, "including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this directive, including relevant non- governmental organisations, such as those promoting environmental protection and other organisations concerned" (article 5(4)). Article 8 requires that "the environmental report prepared pursuant to article 5 [and] the opinions expressed pursuant to article 6 … shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure."'

34. The European Commission's guidance document '*Implementation of Directive 2001/42 on the Assessment of the Effects of Certain Plans and Programmes on the Environment (2003)*' [CB/11/120-122] also states that:

'3.3 Plans and programmes are not further defined. The words are not synonymous but they are both capable of a broad range of meanings which at some points overlap. So far as the Directive's requirements are concerned, they are treated in an identical way. It is therefore neither necessary nor possible to provide a rigorous distinction between the two. In identifying whether a document is a plan or programme for the purposes of the Directive, it is necessary to decide whether it has the main characteristics of such a plan or programme. The name alone ('plan', 'programme', 'strategy', 'guidelines', etc) will not be a sufficiently reliable guide: documents having all the characteristics of a plan or programme as defined in the Directive may be found under a variety of names…
3.5 The kind of document which in some Member States is thought of as a plan is one which sets out how it is proposed to carry out or implement a scheme or a policy. This could include, for example, land use plans setting out how land is to be developed, or laying down rules or guidance as to the kind of development which might be appropriate or permissible in particular areas, or giving criteria which should be taken into account in designing new development. Waste management plans, water resources plans, etc, would also count as plans for the purposes of the Directive if they fall within the definition in Article 2(a) and meet the criteria in Article 3.
3.6 In some Member States, programme is usually thought of as the plan covering a set of projects in a given area, for example a scheme for regeneration of an urban area, comprising a number of separate construction projects, might be classed as a programme. In this sense, 'programme' would be quite detailed and concrete. One good example of such a programme could be the Icelandic Integrated Transportation Programme which is planned to take the place of independent programmes for road, airport, harbour and coastal defence projects. The transport infrastructure is defined and policy on transport

infrastructure is laid out for a period of 12 years (identifying projects by name, location and cost). But these distinctions are not clear cut and need to be considered case by case. Other Member States use the word 'programme' to mean 'the way it is proposed to carry out a policy' – the sense in which 'plan' was used in the previous paragraph. In town and country planning in Sweden, for instance, the programme is thought of as preceding a plan and as being an inquiry into the need for, and appropriateness and feasibility of, a plan…
3.9 The definition of plans and programmes includes modifications to them. Many plans, especially land use plans, are modified when they eventually become outdated rather than being prepared afresh. Such modifications are treated in the same way as plans and programmes themselves and require environmental assessment provided the criteria laid down in the Directive are met. If such modifications were not given the same importance as the plans and programmes themselves, the field of application of the Directive would be more restricted. The adoption of such modifications will be subject to an appropriate procedure. …'[7]

35. More recently in *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3, the Supreme Court considered whether a command paper ought to have been subject to a SEA. In paragraph 36 of his Speech, Lord Carnwath noted Lord Reed's Judgment in *Walton* and then addressed the reference to '*plans and programmes … which set the framework for future development consent of projects …'* in article 3(2) of the SEA Directive in the following terms:

    '…I would have regarded the concept embodied in article 3(2) as reasonably clear. One is looking for something which does not simply define the project, or describe its merits, but which sets the criteria by which it is to be determined by the authority responsible for approving it. The purpose is to ensure that the decision on development consent is not constrained by earlier plans which have not themselves been assessed for likely significant environmental effects. That approach is to my mind strongly supported by the approach of the Advocate General and the court to the facts of the Terre Wallonne case [2010] ECR I-5611 and by the formula enunciated in Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale [2012] 2 CMLR 909 and adopted by the Grand Chamber in the Nomarchiaki case [2013] Env LR 453'.

36. At paragraphs 122 and 123 Lord Sumption stated:

    '… The effect of the SEA Directive is that where the grant or refusal of development consent for a specific project is governed by a policy framework regulated by legislative, regulatory or administrative provisions, the policy framework must itself be subject to an environmental assessment. The object is to deal with cases where the environmental impact assessment prepared under the EIA Directive at the stage when development consent is granted is wholly or partly pre-empted, because some relevant factor is governed by a framework of planning policy adopted at an earlier stage.

[7] The passage continues in accordance with the quote from the Commission's guidance set out in paragraph 24 of Lord Reed's Speech in *Walton.*

123 None of this means that the only policy framework which counts is one which is determinative of the application for development consent, or of some question relevant to the application for development consent. What it means is that the policy framework must operate as a constraint on the discretion of the authority charged with making the subsequent decision about development consent. It must at least limit the range of discretionary factors which can be taken into account in making that decision, or affect the weight to be attached to them. Thus a development plan may set the framework for future development consent although the only obligation of the planning authority in dealing with development consent is to take account of it. In that sense the development plan may be described as influential rather than determinative. But it cannot be enough that a statement or rule is influential in some broader sense, for example because it presents a highly persuasive view of the merits of the project which the decision maker is perfectly free to ignore but likely in practice to accept. Nor can it be enough that it comes from a source such as a governmental proposal or a ministerial press statement, or a resolution at a party conference, or an editorial in a mass circulation newspaper which the decision-maker is at liberty to ignore but may in practice be reluctant to offend.'

The SEA Regulations

37. The SEA Directive was implemented domestically by the Environmental Assessment of Plans and Programmes Regulations 2004 ('**the SEA Regulations**').

38. SEA Regulation 9 provides that the responsible authority shall determine whether a *'plan'* or *'programme'* is *'likely to have significant environmental effects'* and that in the event of a negative determination the responsible authority *'shall prepare a statement of its reasons for the determination'*.

39. Further, SEA Regulation 8(1) provides that:

'(1) A plan, programme or modification in respect of which a determination under regulation 9(1) is required shall not be adopted or submitted to the legislative procedure for the purpose of its adoption–
(a) where an environmental assessment is required in consequence of the determination or of a direction under regulation 10(3), before the requirements of paragraph (3) below have been met;
(b) in any other case, before the determination has been made under regulation 9(1).'[8]

[8] Note that Regulation 10(3) states that the Secretary of State may direct that a 'plan' or 'programme' is likely to have significant environmental effects.

Grounds of challenge

40. The Defendants' decision to issue the 2018 WMS was unlawful on 3 grounds:
    1. The Defendants failed to comply with the SEA Directive in that they failed to prepare and consider a SEA report before issuing the 2018 WMS.
    2. The Defendants failed to consult before issuing the 2018 WMS and advising MPA that plan-makers and decision-takers were expected to recognise the statutory definition of fracking.
    3. The policy in the 2018 WMS and, specifically, its advice to MPA on the definitions of fracking to be applied in plan-making and decision-taking lacks clarity and is irrational.

Ground 1. Failure to conduct a SEA

41. When originally enacted the statutory definition of *'associated hydraulic fracturing'* in s4B PA 1998 was clearly intended to relate to the environmental permitting regime rather than to planning. Thus, it was a definition to be applied by the Secretary of State when determining whether to grant a *'well consent'* or a *'hydraulic fracturing consent'.*

42. The definition of hydraulic fracturing used for the purposes of plan-making and decision taking by MPAs had been that contained in PPGM. The fact that the 2018 WMS advises MPA that the Defendants' now expect them to *'recognise'* the statutory definition when plan-making and decision-taking amounts to a material change in planning policy which will *'set the framework for future development consents of projects'*.

43. The point can perhaps best be made with reference to the Draft NYMWJP which adopts the following broad definition of the term *'hydraulic fracturing'*:

    '…f) For the purposes of the Plan 'hydraulic fracturing' includes the fracturing of rock under hydraulic pressure regardless of the volume of fracture fluid used.'

44. The rationale for the adoption of a broad definition was explained in the supporting text; hydraulic fracturing projects using levels of fluid below the thresholds set in s4B PA 1998 are as likely to give rise to similar effects in terms of land use and the potential for impacts on the environment, local amenity and other relevant matters as those which use a higher volume of fluid.

45. Applying a broad definition, draft NYMWJP policy M16 provides that hydraulic fracturing cannot occur within the following designated areas:

'i) … National Park, AONBs, Protected Groundwater Source Areas, the Fountains Abbey/Studley Royal World Heritage Site and accompanying buffer zone, Scheduled Monuments, Registered Historic Battlefields, Grade I and ll Registered Parks and Gardens, Areas which Protect the Historic Character and Setting of York, Special Protection Areas, Special Areas of Conservation, Ramsar sites and Sites of Special Scientific Interest.'*
and that
'ii) Sub-surface proposals for these forms of hydrocarbon development, including lateral drilling, underneath the designations referred to in i) above, will only be permitted where it can be demonstrated that significant harm to the designated asset will not occur. Where lateral drilling beneath a National Park or AONBs is proposed for the purposes of appraisal or production, this will be considered to comprise major development and will be subject to the requirements of Policy D04.'

46. However, the stipulation in the 2018 WMS that MPA *'recognise'* the statutory definition (which is based upon volume or fluid used in the process) could well lead the Inspector conducting the NYMWJP examination in public to conclude that: the application of a broad definition of *'hydraulic fracturing'* is no longer tenable; that shale gas projects which do not meet the volumetric thresholds laid down in the statutory definition should no longer to be considered to amount to *'hydraulic fracturing'*; and that draft policies M16, 17 and 18 should be revised accordingly so as to permit shale gas projects within protected areas, such as the North Yorkshire Moors National Park and AONBs.

47. With reference to the SEA Directive, the Claimant contends that the policy in the 2018 WMS constitutes a 'plan' or 'programme' for the purposes of Article 2. These terms must be interpreted broadly in accordance with the objective of the SEA Directive (Lord Reed in *Walton*, above, at paragraphs 20 and 21, citing both *Inter-Environnement Bruxelles ASBL, Pétitions Patrimoine ASBL and Atelier de Recherche et d'Action Urbaines ASBL v Région de Bruxelles-Capitale* (Case C-567/10) [2012] CMLR 909, at paragraph 37, and Advocate General Kokott in her opinion in *Terre Wallone ASBL v Région Wallone and Inter-Environnement Wallonie ASBL v Région Wallone* (Joined Cases C-105/09 and C-110/09) [2010] I-ECR 5611, points 29-30). That objective is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes. The interpretation of the

terms ‘plan’ and ‘programme’ should consequently ensure that measures likely to have significant effects on the environment undergo an environmental assessment.

48. In addition the Claimant contends that the 2018 WMS was ‘required by legislative, regulatory or administrative provisions’ within the meaning of Art 2(a) of the SEA Directive. ‘Required’ in this context means no more than ‘regulated’ and does not exclude plans or programmes whose adoption is not compulsory (*Inter-Environnement Bruxelles*, especially at paragraphs 28 and 31). In this regard it is noted that that s.19(2) of the Planning and Compulsory Purchase Act 2004 states that: *‘In preparing a development plan document or any other 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’.*

49. Further, the 2018 WMS sets ‘the framework for future development consent of projects’ for the purposes of Article 3(2) and (4) of the SEA Directive; this concept of ‘framework’ being a very broad one (see AG Kokott in *Terre Wallone*, points 64-65, cited with approval by Lord Reed in *Walton* at paragraph 17). The 2018 WMS sets such a framework because the 2018 WMS constrains the decision-making process of the responsible authorities (see *Buckinghamshire County Council*, above, per Lord Carnwath at paragraph 38, and Lord Sumption at paragraph 123 where he made the following point: ‘*Thus a development plan may set the framework for future development consent although the only obligation of the planning authority in dealing with development consent is to take account of it.*’) and the 2018 WMS expresses itself to be a ‘material consideration in plan-making and decision-taking’.

50. In the circumstances, Article 3(1) of the SEA Directive required the Defendants to consider whether the 2018 WMS would be *‘likely to have significant environmental effects’*. The Defendants’ failure to apply their minds to the question rendered their decision to issue the 2018 WMS unlawful.

51. Had the question had been asked then it would inevitably have resulted in an affirmative answer. Accordingly the Defendants would have been obliged to carry out an environmental assessment in compliance with Article 3(2) of the SEA Directive *before* the decision was taken to issue the 2018 WMS; and their failure constituted a breach of the Directive.

Ground 2. Failure to consult

52. The fact that the 2018 WMS expects MPA to *'recognise'* the statutory definition of *'associated hydraulic fracturing'* amounts to a material change in planning policy and one which ought to have led the Defendants to conduct a SEA for the reasons set out above.

53. Article 6 of the SEA Directive also required the Defendants to consult with the public on the draft 'plan' or 'programme' and the environmental report prepared in accordance with article 5 of the Directive. Of course, no such report was prepared and no such consultation took place in breach of the SEA Directive.

54. Putting aside the SEA Directive, the Claimant contends that fairness and compliance with both the spirit and the letter of the Aarhus Convention required that such a change in planning advice be subject to public consultation before it was promulgated as Government policy. It is a change in planning policy that is *'likely to have significant effects on the environment'* (as set out above) and in the circumstances the Defendants had a duty to ensure that the public had the opportunity to comment on the proposed adoption of the policy before it was issued to MPA in its final form.

55. The 2018 WMS announced the Defendants' intention to consult on other proposed changes to planning policy on shale gas developments. The Defendants have failed properly to explain why they considered that those matters warranted consultation when the advice given to MPA on the application of the statutory definition did not.

Ground 3. The policy in 2018 WMS lacks clarity and is irrational

56. The concerns raised by the Select Committee in its report regarding the 2018 WMS and its reference to the statutory definition of 'hydraulic fracturing' are sound.

57. The advice in the 2018 WMS to MPA plan-makers and decision-takers on the application of the two definitions of fracking lacks clarity. It is confused and therefore bound to give rise to confusion and result in there being inconsistencies in development plans and decisions taken in respect of planning applications, to the detriment of good administration. Lack of clarity or uncertainty is capable of amounting to an error of law (see, for instance, *R (Limbu) v Secretary of State for the Home Department* [2008] EWHC 2261 (Admin) at paragraph 69, and compare the Defendants' letter of response at paragraph 36).

58. These points demonstrate that the advice in the 2018 WMS on the definition is irrational. In the circumstances that advice should be quashed.

Relief sought

59. Thus, the Claimant seeks the following relief:
    - i) directions in the terms proposed in the draft consent order signed by the parties;
    - ii) permission to proceed to a substantive review of the Defendants' decision to issue the 2018 WMS;
    - iii) an order providing costs protection limiting the Claimant's adverse costs liability for the Defendants' costs;
    - iv) on substantive review, an order quashing the 2018 WMS;
    - v) an order that the Defendants pay the Claimant's costs; and
    - vi) further or other relief.

Marc Willers QC

Garden Court Chambers

6 September 2018