

Additional Hearings 24 and 25 January 2019

Matter: Unconventional Oil and Gas

Questions 16 and 17

Definition of Hydraulic Fracturing – Case of *R (OAO Andrews) v SSBEIS & SSHCLG [CO/3256/2018]*

16. I understand from the note of Marc Willers QC, who represented Mr Andrews at the permission hearing, that clarification has been given by Mr Justice Holgate on the definition of hydraulic fracturing. My understanding is that once the MPAs have recognised the statutory definition, they are free to adopt the wider Planning Practice Guidance definition (ID:27-129-20140306) in their local plan provided they explain their reasons for doing so.

17. Would the MPAs please provide the text of a main modification to reflect this requirement so that it may be discussed at the forthcoming hearing sessions?

At the time of writing the Authorities have not seen the final judgment in the case of *R (OAO Andrews) v SSBEIS & SSHCLG (co/3256/2018)* dated 5 November 2018 and the comments set out below are based on the note of Marc Willers QC, which includes notes of the judgment taken by Mr Andrews' instructing solicitors. When the judgment becomes available in its final form, it will be placed on the examination website and the Authorities will update this response as necessary, most likely at the forthcoming hearings. Even taking the notes as they stand, however, the judgment is highly relevant to a key area of debate, during the EiP, about selection of an appropriate definition of hydraulic fracturing for the purposes of the Plan. It is also relevant to the question of the extent to which WMS2018 has any implications for the choice of definition taken in the draft Plan.

In summary, the November 2018 judgement confirms that WMS2018 does not require the Authorities to apply the Petroleum Act 1998 definition of associated hydraulic fracturing, for the purposes of the Plan, or indeed apply the Planning Practice Guidance definition of hydraulic fracturing. The judgement indicates that the effect of WMS2018 is to confirm that the requirement is for the Authorities to have regard to those definitions, but that the choice of definition is for the Authorities to make, provided that appropriate justification and explanation is given.

This is exactly the approach followed by the Authorities in producing the Plan. The justification for applying a more comprehensive definition of fracking in

the Plan, compared with that contained in the Petroleum Act 1998, is explained in the text of the Plan itself (eg para. 5.124 as proposed to be modified) and, in more detail, in the Authorities' note on the distinction between conventional and unconventional hydrocarbons (LPA87), with further contextual evidence subsequently presented by the Authorities in LPA97 in response to the publication of WMS2018.

During the EiP hearing session on 13 April 2018, discussion took place on whether the definition of hydraulic fracturing used in the Plan (ie as set out in para. 5.119 f), should be revised to be directly in line with the PPG wording (the Authorities having suggested in LPA87 that they would be willing to propose a modification to that effect). The Authorities' understanding of the outcome of the discussion is that, whilst industry would continue to seek adoption of the Petroleum Act definition, industry considered that the original definition contained in the Plan was preferable to the PPG definition. The Authorities further understood that retention of the original plan definition was acceptable in principle to the Inspector.

In light of the above, the Authorities do not consider it necessary to propose any further modifications to the definition of hydraulic fracturing contained in the Plan. The Authorities continue to rely on the supporting justification, set out in existing EiP documents (particularly LPAs 87 and 97), for this definition.

However, the Authorities acknowledge that it would be helpful to make reference, in the supporting text of the Plan, to the publication of WMS2018 in a form which reflects the November 2018 Court judgment. Proposed main modifications to achieve this are therefore included in the Appendix to this response.

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Appendix

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Main Modifications

The modifications below are expressed either in the conventional form of ~~strikethrough~~ for deletions and underlining for additions of text.

The page numbers and paragraph numbering below refer to the submission local plan, and do not take account of the deletion or addition of text.

Ref	Page	Policy/ Paragraph	Main Modification
Q17	78	5.106	<p>Add new final sentence:</p> <p>More recently, in September 2015, a Ministerial Written Statement by Government indicated that there is a national need to explore and develop shale gas in a safe, sustainable and timely way. <u>A further Ministerial Statement on Energy Policy, published in May 2018, reaffirmed Government's view on the national importance of shale gas and their support for the principle of shale gas development, and signalled an intention that Government will work with industry to create the world's most environmentally robust onshore shale gas sector.</u></p>
Q17	86	5.124	<p>Insert new text:</p> <p>An additional consideration is that the new Regulations and surface restrictions will only apply to high-volume hydraulic fracturing<u>associated hydraulic fracturing</u>". <u>The Authorities have taken into account the WMS of May 2018 and recognise this statutory definition, and have paid due regard to Planning Practice Guidance. It is considered that whereas the definition in the Regulations applies to high volume hydraulic fracturing as defined, in terms of land use and the potential for impacts on the environment, local amenity and other relevant planning matters, impacts could occur at lower levels of activity. It is not</u></p>

Ref	Page	Policy/ Paragraph	Main Modification
			<p>therefore considered appropriate to distinguish in the Policy between high-volume hydraulic fracturing and fracking involving lower volumes of fracture fluid. <u>This approach is reflected in the broader definition of hydraulic fracturing contained in paragraph 5.119 f) of the Plan. The definition of hydraulic fracturing used in the Plan is related to the PPG definition in that it does not rely on a minimum volumetric threshold. Similarly, it is considered that where hydraulic fracturing</u></p>