Written submissions on behalf of Cllr Paul Andrews in respect of the definition of 'hydraulic fracturing' as raised in paragraphs 16 – 17 of the Inspector's Questions dated 17th December 2018

1. The issue here is whether the definition of 'hydraulic fracturing' in the submission version of the Plan[1] is sound or whether it requires modification in light of the Government's Written Ministerial Statement ("WMS") of 17 May 2018.

2. As set out in the Judgment **[Doc 3699]** and in the opinion of Marc Willers QC **(attached to these submissions)**, the Court in (R(Andrews) v SSCLG [2018] EWHC 3775 (Admin) found and approved the Government's position that the WMS did not mandate local planning authorities to adopt the definition of "associated hydraulic fracturing" in s.4B of the Petroleum Act 1998 (as amended by the Infrastructure Act 2015) for the purpose of their planning policies.

3. In particular, the Court held as follows (at para 16):

   In my judgment the [WMS] simply refers to two definitions of fracking-type development which should be considered by planning authorities when drawing up their development plans without, as I have indicated already, requiring adherence to either one or indeed both of those definitions. Planning authorities drawing up relevant plans are entitled as a matter of law to disagree with the advice of central government on this point, for example, as regards the use of the definitions in the 2015 Act or the 1998 Act. The question of what appropriate definition should be applied within a particular planning-making authority's area is a matter to be considered on the merits through the process under the 2004 [Planning and Compulsory Purchase] Act, having regard to all material considerations.

4. As such, so long as an authority has regard to the IA 2015 definition, it is open to it to adopt the PPG definition, so long as that definition is appropriate in planning terms having regard to all material considerations.

5. So far as the justification for the definition adopted by the MPAs in the Plan is concerned, I and the local community entirely adopt and endorse the reasoning provided by the MPAs. For local people, it would be wholly artificial to exclude certain developments from the control of policies which would otherwise be applicable to hydraulic fracturing on the basis of an arbitrary threshold of fracture fluid when the planning and amenity impacts about which we are concerned could

[1] Which provides at paragraph 5.119(f) that it "includes the fracturing of rock under hydraulic pressure regardless of the volume of fracture fluid used."

still occur at lower levels of activity. As set out in the opinion of Marc Willers QC, the position adopted by the MPAs is entirely rational.

6. In addition to the Judgment in Andrews, it is also important to take into account the Government's position in the Andrews judicial review as regards the distinction between the IA 2015 definition and the PPG. As set out at paragraph 8 of the Government's *Summary grounds of Resistance on behalf of the Defendants* **[Doc 3699 P Andrews Exhibit 3 (b) to the response by Cllr Andrews to the questions for the hearings on 24 and 25th January 2019]**, the Government's position is that the two definitions serve different purposes. Significantly, the PA 1998 does not define 'hydraulic fracturing' as such but rather the defines the circumstances in which a well consent cannot be issued without a hydraulic fracturing consent whereas the PPGM *"provides a description of the hydraulic fracturing process, to assist mineral planning authorities ("MPAs") in understanding how the process works."*

7. For convenience, the Government's position as set out in its *Summary Grounds of Resistance* is as follows:

8. It is apparent that the legislation and the guidance set out above serve different purposes:

> *8.1 The PA 1998 does not define "hydraulic fracturing". Rather, s. 4B of the PA 1998 defines the circumstances in which hydraulic fracturing will be "associated hydraulic fracturing" for the purposes of s. 4A of the PA 1998 (such that the Oil and Gas Authority ("OGA") may only issue a well consent if the latter imposes conditions that (in effect) prohibit associated hydraulic fracturing from taking place without a hydraulic fracturing consent from the Secretary of State).*
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> *8.2. In contrast, the PPGM provides a description of the hydraulic fracturing process, to assist mineral planning authorities ("MPAs") in understanding how the process works. That this is the purpose of this part of the PPGM is particularly apparent from (i) para. 130 of Annex A, which follows on from para. 129 (above) by providing a more detailed explanation of how the hydraulic fracturing process works; and (ii) Figure 1 at para. 131 of Annex A, which is an illustration of shale gas extraction taken from the British Geological Survey.*

9. Importantly, the 2018 WMS does not require MPAs to apply the definition of "associated hydraulic fracturing" provided in the PA 1998. The 2018 WMS merely sets out an expectation that MPAs will "recognise" that Parliament has provided statutory definitions. Similarly, the 2018 WMS simply explains that mineral plans must have due regard to the PPGM and that the latter contains relevant descriptions.

10. If the Defendants had wished to impose an obligation upon MPAs to apply the definition of "associated hydraulic fracturing" that is set out in the PA 1998 and/or the description of "hydraulic fracturing" that is given in the PPGM, the 2018 WMS could easily have been worded to that effect. It is not so worded.

11. The Claimant is, therefore, wrong to assert that the 2018 WMS effects "a material change in planning policy". The 2018 WMS simply reminds MPAs of the existence of the PA 1998 statutory definition and of the description given in the PPGM.

8. In its responses to the questions for the hearings on 24 and 25th January 2019 **[Doc 3997]**, UKOOG argued (pages 45-46) that the PPGM definition had been "superseded" by the IA 2015 definition. That is clearly wrong as made clear by the Government's stated position in respect of the Andrews litigation. The two definitions serve different purposes and it is not the case that one has superseded the other.

9. UKOOG also refer to the statements made by a Government Minister Claire Perry in her evidence to the Housing, Communities and Local Government select committee, in which she suggested that it was the intention of Government to update the definitions *"so that there is no discrepancy between planning guidance and the Infrastructure Act."* It is clear that the view of the Minister at that time does not reflect the Government's considered and most recent publicly stated position, clearly set out in its *Summary Grounds of Resistance* (which postdate by a considerable period the Minister's evidence to the select committee), that the two definitions serve different purposes. Indeed and in any event, given the select committee's criticism of the Government's position and their finding **[INS 10; paragraph 19]** that the Government should *"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",* it may well be that, if anything, Claire Perry's position has changed since the time of her evidence and in light of the committee's position.

10. Ultimately, there is no legal basis for any modification of the definition. In light of (a) the Court's finding (and the Government's acceptance) that the WMS was not mandatory in its effect; (b) the Government's position that the relevance of the IA Act 2015 definition of hydraulic fracturing is limited to the consent process; (c) the Government's position that the PPGM definition provides a *"description of the hydraulic fracturing process to assist MPAs"*; (d) the select committee's view that the Government should adopt a single definition of hydraulic fracturing which includes

"every development which artificially fractures rock"; and (e) the justification for the adoption of the definition in the Plan provided by the MPAs, there cannot be any sensible suggestion that it would be unsound for the Plan to maintain the current definition of hydraulic fracturing (whether in the form set out in the submission draft text of the plan or as subsequently amended by the MPAs **[LPA/101]**).