Fracking, Government planning policy and the North Yorkshire County Council, City of York and North York Moors National Park Authority Draft Minerals and Waste Joint Plan

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OPINION

Introduction

1. I have been instructed by Mr Paul Andrews, the Mayor of Malton and Chair of Habton Parish Council in North Yorkshire, to provide an opinion which explains to the reader the rationale underlying the judgment of Mr Justice Holgate in the recent case of *Andrews v Secretary of State for Business, Energy and Industrial Strategy ('SSBEIS') and the Secretary of State for Housing, Communities and Local Government ('SSHCLG')* [2018] 3775 (Admin); and its implications for the examination in public ('EiP') of the North Yorkshire County Council, City of York and North York Moors National Park Authority Draft Minerals and Waste Joint Plan ('Draft NYMWJP').

2. The case concerned Mr Andrews' challenge by way of judicial review of a Government policy statement on hydraulic fracturing (commonly known as 'fracking') which was issued by the Secretaries of State on 17 May 2018 in the form of a written ministerial statement (the '2018 WMS').

3. Mr Andrews had actively participated in the EiP of the Draft NYMWJP and he issued his judicial review claim primarily because he was concerned that: the 2018 WMS might be construed as requiring Mineral Planning Authorities ('MPAs') to apply the statutory definition of fracking when plan-making and decision-taking; and that such an interpretation might lead to the amendment of the policies within the Draft NYMWJP which concerned the fracking of shale rock in North Yorkshire.

4. In order to understand both the nature of Mr Andrews' challenge to the 2018 WMS and the rationale underlying the Judge's decision it will be necessary first to remind the reader of the statutory and policy definitions of fracking and the advice given to MPAs in the 2018 WMS.

Legislative and policy definitions of fracking

Planning Practice Guidance on Minerals

5. The online *'Planning Practice Guidance on Minerals'* ('PPGM') was issued on 17 October 2014. PPGM encourages MPAs to make appropriate provision for hydrocarbons in local minerals plans;[1] and gives MPAs guidance on the determination of applications for planning permission for shale gas exploration and production.[2] 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.'*[3]

Infrastructure Act 2015

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

> *'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*

[1] See paragraphs 105-106 of PPGM.
[2] See paragraphs 109-127 of PPGM.
[3] See paragraph 129, Annex A of PPGM.

hydraulic fracturing, or
(ii) more than 10,000 cubic metres of fluid in total. …'

7. Thus, one can see that 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; and 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'.*

The 2018 WMS

8. The 2018 WMS begins by stating the Government's view that there are potentially substantial benefits to be had from the exploitation of onshore gas resources.

9. 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 MPAs to give *'great weight to the benefits of mineral extraction'*. The 2018 WMS goes on to state that:

   '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….'

10. In addition and importantly, the 2018 WMS refers MPAs 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 Housing Communities and Local Government Select Committee report

11. 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'*. 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.

12. 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; 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.

13. 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'*.

The judicial review challenge to the 2018 WMS

14. Mr Andrews challenged the Secretaries of State's decision to issue the 2018 WMS on 3 grounds:
    a. they had failed to comply with the Strategic Environmental Assessment ('SEA') Directive in that they failed to prepare and consider a SEA report before issuing the 2018 WMS;
    b. they had 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; and

c. 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 lacked clarity and was irrational (a ground bolstered by the Select Committee report).

15. Put shortly, Mr Andrews argued that the indication in the 2018 WMS that the Secretaries of State expected MPAs to *'recognise'* the statutory definition when plan-making and decision-taking: amounted to a material change in planning policy which would *'set the framework for future development consents of projects'* and necessitated a SEA; ought to have been the subject of consultation; and was bound to cause confusion and inconsistency.

16. Mr Justice Holgate rejected those arguments. Significantly, before doing so the Judge obtained confirmation from Counsel for the Secretaries of State that the words in the 2018 WMS were not intended to constrain the way in which MPAs exercise their plan-making powers or to direct MPAs to adopt a particular definition of fracking.

17. Having obtained that confirmation Holgate J noted that planning authorities are not bound by national policy and held as follows:

'… the passage in the WMS the subject of this claim cannot be construed as mandating that the planning authorities in North Yorkshire must apply, for example, the definition of "associated hydraulic fracturing" in the 1998 Act or the definition of fracking contained in the NPPG, when they formulate their local plan policies and the developments to which they apply. All the WMS does is to say that those are matters to which it is expected that mineral planning authorities will have due regard.

…

In my judgment the policy statement in question 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. That being the position, I cannot see how it is arguable in any way at all that the passage to which objection is taken gives rise to any grounds of challenge based on the SEA Directive …'

The implications of the judgment for the EiP of the Draft NYMWJP

18. In light of the decision in *Andrews v SSBEIS and SSHCLG*, it could not now properly be argued that a reasoned decision by a MPA to adopt the PPGM definition was unlawful.

19. Turning to the Draft NYMWJP, I understand that the most recent version was published in November 2016 and that it currently contains a section headed *'Hydrocarbons (oil and gas)'* which includes draft policies M16, M17 and M18 and supporting text.

20. Significantly, paragraph 5.119(f) of the supporting text states that:

    '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.'

21. The MPAs' justification for the adoption of this broad definition rather than the statutory definition was clearly explained in the supporting text; put shortly, hydraulic fracturing projects using levels of fluid below the thresholds set in s4B PA 1998 are just 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.

22. In my opinion the MPAs' reasoning is perfectly rational (particularly, given the fact that the adoption of a broad definition will assist in the preservation of the National Park and AONB within the Draft NYMWJP area) and could not, properly, be subject to legal challenge.

Conclusion

23. If Mr Justice Holgate had concluded that the 2018 WMS required that MPAs adopt the statutory definition of fracking then he might well have accepted that the WMS

should have been subject to a SEA. However, the Judge held that the advice in the 2018 WMS was not binding and required no more than that MPAs noted the existence of both the policy and statutory definitions and provide reasoned justification for the adoption of one or other of the two definitions.

24. In my opinion the Draft NYMWJP clearly satisfies that requirement and there is no need for the MPAs to revisit their decision to adopt the broad definition of fracking set out in paragraph 5.119(f) of the supporting text.

Marc Willers QC

Garden Court Chambers
8 February 2019