

FAO: Rt. Hon James Brokenshire MP

Secretary of State for Housing, Communities and Local
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Date: 8 August 2018

First by email:

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Dear Secretary of State,

RE: REVISED NATIONAL PLANNING POLICY FRAMEWORK (“NPPF”)

INTRODUCTION

1. This letter is sent on behalf of our client, Talk Fracking, which is a campaigning organisation seeking to provide a forum for debate in order to inform public opinion on fracking.
2. We write this letter in order to comply with the pre-action protocol for judicial review under the Civil Procedure Rules. If we do not receive a satisfactory response to this letter, we propose to advise our client to make an application for judicial review without further reference to you.
3. We are aware that judicial review is a remedy of last resort and write in the hope that this matter can be resolved without recourse to legal proceedings. We therefore outline at the end of this letter the steps which we ask you to take in order to avoid recourse to the court.
4. This letter sets out the factual and legal basis on which any claim would be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.

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THE PROPOSED PARTIES

5. The proposed claimant in this case would be Talk Fracking.
6. The proposed defendant would be the Secretary of State for Housing, Communities and Local Government (the “SofS”).

AARHUS CLAIM

7. This would be an Aarhus Convention claim within the meaning of the CPR r. 45.41-44 on the basis that the grounds of claim concern the revised NPPF, which is an element of national policy relating to the environment within the meaning of Article 9(3) of the Aarhus Convention. In the event that a claim is issued, the claimant will apply for a default cost cap of £10,000 on its liability, and seek a reciprocal cost cap of £35,000 on the defendant’s liability. We would welcome as early an indication as practicable from the defendant as to whether it agrees with our characterisation of this as an Aarhus Convention claim and/or will seek to vary the default cap; and, if the intention is to dispute the characterisation or seek to vary the cap, the basis for that.

DETAILS OF PROSPECTIVE CHALLENGE

8. The proposed claimant considers that paragraph 204 of the revised NPPF (published on 24 July 2018) is unlawful, because the SofS has failed to:
 - 8.1. Take into account certain relevant considerations;
 - 8.2. Demonstrate and/or give reasons in respect of compatibility with existing obligations to reduce greenhouse gas emissions;
 - 8.3. Carry out a strategic environmental assessment; and
 - 8.4. Consult on a fair basis.

FACTUAL BACKGROUND

9. On 5 March 2018, the SofS launched a consultation on a revised National Planning Policy Framework (“NPPF”). The Consultation Document stated the following under the chapter dealing with “facilitating the sustainable use of minerals”:

The revised text proposes these policy changes:

Additional text on on-shore oil and gas development is included at paragraph 204, which builds on the Written Ministerial Statement of 16 September 2015 to provide clear policy on the issues to be taken into account in planning for and making decisions on this form of development.

10. The Written Ministerial Statement (“WMS”)¹ was made on 16 September 2015 by then Secretary of State for Energy and Climate Change, Amber Rudd. It replaced the Shale Gas and Oil Policy Statement issued by DECC and DCLG on 13 August 2015. It stated that the exploration of shale gas and oil resources is needed to support the UK’s climate change targets by reducing carbon emissions:

Exploring and developing our shale gas and oil resources could potentially bring substantial benefits and help meet our objectives for secure energy supplies, economic growth and lower carbon emissions.

Having access to clean, safe and secure supplies of natural gas for years to come is a key requirement if the UK is to successfully transition in the longer term to a low-carbon economy. The Government remains fully committed to the development and deployment of renewable technologies for heat and electricity generation and to driving up energy efficiency, but we need gas - the cleanest of all fossil fuels – to support our climate change target by providing flexibility while we do that and help us to reduce the use of high-carbon coal.

11. On 24 July 2018, the SofS published the revised NPPF. It now states, in effect simply carrying forward what the WMS statement said in 2015:

Oil, gas and coal exploration and extraction

209. 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

POTENTIAL GROUNDS OF CLAIM

Failure to take into account relevant considerations and/or act consistently

12. In revising the NPPF to incorporate the WMS on the bare assertion that shale gas exploration “plays a key role in ensuring energy security” and “is of national importance”, the SofS has failed to take account of, and/or act consistently with, the following relevant considerations (elaborated on below): scientific developments; potential negative impacts on air quality; and the Government’s own Clean Growth Strategy).

¹ Shale Oil and Gas Policy Written statement, HCWS202, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-09-16/HCWS202/>

13. These factors were obviously material to the SofS's decision. In doing so, the SofS has also breached the Tameside duty of sufficient inquiry, by not being equipped with adequate information to answer the questions the SofS is required to answer in formulating the revised NPPF.

Scientific developments

14. Scientific developments since 2015 suggest that the climate impact of fracking was underestimated at the time of the WMS. None of which appear to have been taken into account when the SofS adopted the revised NPPF.
15. There have, for example, been significant and material developments in the understanding of the GHG emissions arising from fracking (summarised in a report commissioned by Talk Fracking by Paul Mobbs, "How The Government Has Mised Parliament And The Public On The Climate Change Impacts Of Shale Oil And Gas Development In Britain", May 2017 "**Mobbs Report**").² For example:

- 15.1. Methodological improvements in measuring emissions: The ability to measure the emissions from oil and gas infrastructure has been limited by the accuracy and reliability of mobile gas monitoring equipment. As a result, two general forms of environmental sampling have arisen in order to produce an estimate of emissions from the industry: 'bottom-up' or 'inventory' analysis; and 'top-down' or 'instrumental' analysis. As set out in the Mobbs report, the debate on fugitive emissions "*has tended to be over the numerical results of individual studies, not the difference in numerical results which is the inevitable consequence of using two different analytical methods. Thus the 'quality' or 'accuracy' of each approach is ignored*" (Mobbs Report, p 9).³ The WMS is based upon a 2013 report by Professor David MacKay and Dr Tim Stone, commissioned by the Department of Energy and Climate Change (DECC) ("Mackay/Stone report").⁴ The Mackay/Stone report was based primarily on inventory analysis

² Available here: <https://drillordrop.com/2017/05/24/government-mised-public-and-parliament-over-shale-gas-carbon-emissions-new-research/>

³ See the debate between Howarth and Cathles: A commentary on "The greenhouse-gas footprint of natural gas in shale formations" by R.W. Howarth, R. Santoro, and Anthony Ingraffea, Lawrence M. Cathles III, Larry Brown, Milton Taam, Andrew Hunter, Geochemistry-Geophysics-Geosystems (G3), vol.13 no.6, 3rd January 2012 – <http://www.geo.cornell.edu/eas/PeoplePlaces/Faculty/cathles/Natural%20Gas/FINAL%20Short%20Version%2010-4-11.pdf>; Venting and Leaking of Methane from Shale Gas Development: Response to Cathles et al., Robert W. Howarth et al., Climatic Change, vol.113 no.2 pp.537-549, July 2012 – http://www.fraw.org.uk/library/ex-treme/howarth_2012.pdf

⁴ Potential Greenhouse Gas Emissions Associated with Shale Gas Extraction and Use, David Mackay and Timothy Stone, DECC, September 2013, <https://www.gov.uk/government/publications/potential-greenhouse-gas-emissions-associated-with-shale-gas-production-and-use>

and relied upon data from another report (“the Allen report”),⁵ which has since been shown to have been inaccurate, with growing concern about the accuracy of this method and its tendency to under-estimate emissions (see Mobbs Report, [49]).⁶

15.2. Global warming potential and methane: The Mackay/Stone report assumes that methane is 25 times more potent a greenhouse gas than carbon dioxide over a 100 year period (abbreviated, ‘GWP100’). This is not the approach taken within Howarth’s calculations, which considers both 20-year (‘GWP20’) and 100-year ‘global warming potentials’ (GWPs). Methane is more significant in the short term because it exacerbates the progress of climate change towards tipping points, meaning limiting the release of methane is essential. In 2014, Howarth later updated his earlier papers and outlined how the case for higher methane emissions had become more certain as a result of further ‘top- down’ environmental sampling and considered research released in the interim from the Intergovernmental Panel on Climate Change (IPCC) which had made the case that studies should use the GWP20 in assessments, as well as GWP100, to reflect the time-sensitive impact of emissions (Mobbs Report, [56]-[59]).⁷ Moreover, (as we understand it from a Freedom of Information Act response) the Royal Society and Royal Academy of Engineering informed the SofS’s department on 22 June 2018 that it intended to carry out a review in the light of developments since its 2012 report⁸, specifically in order to progress its recommendation that further research was needed into the extraction and use of shale gas in the context of climate change, energy and the wider economy. Bearing in mind that the Royal Society and Royal Academy of Engineering’s report cited academic articles to support concerns over methane emissions from shale gas extraction potentially offsetting the effects of lower carbon emissions and that development of shale gas could delay investment in low-carbon technologies (p. 11), further research into this area was obviously a material consideration to be taken into account before the NPPF was revised.

⁵ Measurements of methane emissions at natural gas production sites in the United States, Allen et al., PNAS, vol.110 no.44 pp.17768-17773, 29th October 2013.

⁶ See Reconciling divergent estimates of oil and gas methane emissions, Zavala-Araiza et al., PNAS, vol.112 no.51 pp.15597-15602, 22nd December 2015 – <http://www.pnas.org/content/112/51/15597>; Anthropogenic emissions of methane in the United States, Miller et al., PNAS, vol.110 no.50 pp.20018- 20022, 10th December 2013 – <http://www.pnas.org/content/110/50/20018.full.pdf?with-ds=yes>.

⁷ A bridge to nowhere: methane emissions and the greenhouse gas footprint of natural gas, Robert W. Howarth, Energy Science and Engineering, vol.2 no.2 pp.47-60, June 2014 – <http://onlinelibrary.wiley.com/doi/10.1002/ese3.35/pdf>. See also, for example, on methane: <https://thinkprogress.org/nasa-study-fracking-global-warming-0fa0c5b5f5c7/> and previous studies showing this here: <https://thinkprogress.org/methane-leaks-erase-climate-benefit-of-fracked-gas-countless-studies-find-8b060b2b395d/>

⁸ <https://www.raeng.org.uk/publications/reports/shale-gas-extraction-in-the-uk>

Potential negative impacts on air quality

16. A report by the Government's Air Quality Expert Group ("AQEG") given to Government officials in 2015⁹, but only first made public on 27 July 2018, predicted that (on available evidence) shale gas extraction in the UK could result in increased emissions of nitrogen oxides by 1-4% and methane by approx. 0.2% nationally. At a local and regional level, the report cautioned that impacts on air quality: "have the potential to be substantially higher than the national level impacts" (p. 10). Recognising gaps in the data, the report recommended that: "UK specific evidence base is improved before significant on-shore shale gas extraction activities begin" in respect of both improving projected emission estimates and evaluating the potential impacts on a local/national scale, as well as monitoring for a full range of pollutants (pp. 10-11). There is no evidence whatsoever that the SofS has ensured that those recommendations have been acted upon or that the report's findings have been taken into account in revising the NPPF. On the contrary, the report's recommendations appear to conflict with the underlying rationale of the WMS, as incorporated into the revised NPPF, that extraction of shale gas is clean and safe.

Government's Clean Growth Strategy

17. The revised NPPF's plan to promote fracking as "supporting the transition to a low-carbon economy" has not been reconciled with the UK's GHG reduction policies as published since 2015. By extension it appears that the SofS has failed to take this into account when incorporating into the NPPF what was previously in the 2015 WMS.

18. The Clean Growth Strategy ("CGS") was published on 12 October 2017 and is intended to fulfil the Government's statutory responsibility under ss. 13 and 14 of the 2008 Act, to lay before Parliament a report setting out proposals and policies for meeting the carbon budgets for the current and future budgetary periods up to and including that period.

19. There is no reference to fracking or shale gas in the CGS. The Government has conspicuously failed to reconcile its desire to promote fracking with its obligations under the 2008 Act to reduce GHG emissions.

20. The CCC's analysis of the CGS was published on 17 January 2018¹⁰. Like the CGS itself, it made no reference to fracking, but clearly stated that:

⁹ https://uk-air.defra.gov.uk/assets/documents/reports/cat09/1807251315_AQEG_Shale_Gas_Extraction_Advice_Note_vfinal_for_publishing.pdf

¹⁰ <https://www.theccc.org.uk/wp-content/uploads/2018/01/CCC-Independent-Assessment-of-UKs-Clean-Growth-Strategy-2018.pdf>

- 20.1. Gaps remain in the strategy to meet existing commitments (Executive Summary, p.9); and
- 20.2. The Paris agreement will require greater ambition and in all likelihood a tougher 2050 target than the UK has at present (Executive Summary, p.9, p.10, p.11)

Failure to demonstrate/give reasons that the revised NPPF is compatible with the Government's existing domestic obligations to reduce greenhouse gas emissions ("GHG") under the Climate Change Act 2008 ("the 2008 Act")

21. In the lead up to the WMS and the Infrastructure Act 2015, it was repeatedly stated in Parliament that fracking will not go ahead if it is not compatible with the UK's climate commitments. For example, Baroness Verma said "[o]f course, we would not proceed with shale development if it conflicted with our climate objectives" (17 March 2014). Amber Rudd, then Secretary of State for Energy and Climate Change, said in Parliament in relation to the amendment to require regular consideration of the climate impact of fracking, "we are making it absolutely clear that shale development will remain compatible with our goal to cut greenhouse gas emissions" (26 January 2015).

22. In July 2016, the CCC concluded that¹¹:

the implications of UK shale gas exploitation for greenhouse gas emissions are subject to considerable uncertainty – from the size of any future industry to the potential emissions footprint of shale gas production. It also finds that exploitation of shale gas on a significant scale is not compatible with UK carbon budgets, or the 2050 commitment to reduce emissions by at least 80%, unless three tests are satisfied.

23. Those three tests are:

- 23.1. Emissions must be strictly limited during shale gas development, production and well decommissioning. This requires tight regulation, close monitoring of emissions, and rapid action to address methane leaks.

¹¹ Under s. 49 of the Infrastructure Act requires the Secretary of State for Business, Energy and Industrial Strategy to regularly seek, and publish, advice from the CCC on the impact of emissions from the onshore oil and gas sector on the ability of the UK to meet the GHG targets and budgets set by the Climate Change Act

- 23.2. Overall gas consumption must remain in line with UK carbon budgets. The production of UK shale gas must displace imports, rather than increase gas consumption.
- 23.3. Emissions from shale gas production must be accommodated within UK carbon budgets. Emissions from shale exploitation will need to be offset by emissions reductions in other areas of the economy to ensure UK carbon budgets are met.
24. The CCC's report concludes that: *"[a]t this early stage, it is not possible to know whether the tests will be met easily or not"*.
25. The CCC said it would: *"closely monitor steps taken by Government and other relevant agencies to satisfy these tests"; "report publicly on performance against the tests"; and "will assess the Government's forthcoming Emissions Reduction Plan – which will set out how the Government will meet the fourth and fifth carbon budgets – in light of the possible development of a UK shale gas industry."*
26. In its response to the 2016 CCC report, the Government stated:
- 48. The Government believes that the three tests set by the CCC will be met for the production stage of shale development and as such is not bringing forward legislation that would provide for the right to use deep-level land to cease to have effect. This meets the Government's obligations under section 49 of the Infrastructure Act 2015.*
- 49. The Government is committed to meeting its carbon budgets and will continue to consider the impact of shale development on UK emissions as uncertainty reduces through the exploratory phase of development.*
- 50. Under the Infrastructure Act 2015, the Secretary of State must from time to time request the Committee on Climate Change to provide advice (in accordance with section 38 of the CCA 2008) on the impact which combustion of, and fugitive emissions from, petroleum gas through onshore activity.*
- 51. Each reporting period for advice is five years as set out by the Act. Given this, the CCC are required to provide a further report on the compatibility of UK onshore petroleum with carbon budgets in April 2021. The Department*

may also request updated advice in the meantime, should it deem it helpful or necessary.

52. More broadly, proposals for meeting forthcoming carbon budgets will be set out in the Government's new emissions reduction plan. The working assumption is that this will be published towards the end of 2016.¹²

27. The Government, however, has failed to provide any evidence of how the three tests set down by the CCC would be met, and yet has pressed on in the new NPPF with what was previously in the WMS. Instead, it is seemingly using the claimed “uncertainty” about emissions to plough ahead with exploratory fracking on the basis it will allow better assessments about future emissions.
28. Even if this logic is taken at face value, it cannot possibly justify a planning policy that gives a green light to fracking wherever it is applied for and for the foreseeable future. At the very most, it could only justify a policy that allowed for a strictly-limited programme of exploratory fracking, followed by a review of planning policy based on the evidence arising from the exploratory drilling.
29. In addition, on 17 April 2018, the Government asked the CCC to review whether the existing commitments under the 2008 Act are consistent with the level of ambition of the Paris Agreement: a process that is likely to lead to a tightening of the UK's current GHG reduction targets (as the CCC has already indicated). Furthermore, in a submission to the UNFCCC, the Government acknowledged that the UK would in future need to legislate for a net-zero carbon target.
30. These are significant and welcome indications that the UK intends to increase its level of climate change ambition. It is imperative, however, that the UK does not pursue other policies in tandem that will jeopardise its ability to make the necessary reductions in GHG emissions.
31. Meeting a tougher target will, of course, require deeper and faster decarbonisation of the UK economy than is currently envisaged. Since there is no evidence that fracking is compatible even with existing targets, it would be deeply irresponsible to pursue it at a time when targets are being tightened.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/535208/CCC_Response_new_template_FINAL.pdf

Breach of the Environmental Assessment of Plans and Programmes Regulations 2004/1633 (“the SEA Regulations”) and Directive EC/2001/42 (“the SEA Directive”) which they implement

32. The SEA Directive required the SofS to carry out a strategic environmental assessment for the revised NPPF, given it falls within the definition of Article 3(2)(a). It appears that the SofS has failed to do so in breach of the SEA Regulations.

Failure to consult on a fair basis

33. Having purported to consult, the SofS is under a duty to consult lawfully. This means that the consultation exercise must conform to the principles set out in R v Brent London Borough Council, ex p Gunning (1985) 84 LGR 168, elaborated in R v North and East Devon Health Authority, ex parte Coughlan [2001] QB 213, and affirmed by the Supreme Court in R (Moseley) v LB Haringey [2014 UKSC 56 at #25:

- 33.1. consultation must be at a time when proposals are still at a formative stage;
- 33.2. the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response (including explaining what was being proposed and why);
- 33.3. adequate time must be given for consideration and response; and
- 33.4. the product of consultation must be conscientiously taken into account in finalising any statutory proposals.

34. In any case, we consider that the SofS would plainly have been under a duty in any event to carry out public consultation by virtue of Article 7 of the Aarhus Convention, which requires signatories to make appropriate provision 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. As Article 7 makes clear, the obligations in Article 6 paragraphs 3, 4 and 8 apply for the purposes of Article 7. Article 6 paragraph 8 provides that:

“Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.” [underlining added]

You will be aware from the substantial case law relating to the Public Sector Equality Duty, that merely treating something as a material consideration to be taken into account (on an ordinary public law basis) does not discharge a duty to have “due regard”. The same must also be true of this obligation to take “due account”: what is plainly at least required is clear evidence of the consideration given by the decision-maker and a clear and cogent explanation for why the decision-maker has not adopted the course identified by consultees.

35. The NPPF consultation document and process cannot possibly be said to have discharged the SofS's common law or international treaty obligations to consult, given that:

35.1. The document covered 17 diverse and very broad topics¹³, making it difficult for the reader to comprehend the full scope of the issues it raises, let alone reply to them;

35.2. In relation to fracking, it proposed the adoption a pre-existing policy that had not itself been the product of public consultation. This means that there has been no consultation as to the content of the policy (which was decided in 2015), and the NPPF consultation is not taking place at a time when proposals are still at a formative stage.

35.3. The consultation document did not give sufficient (or indeed any) reasons for what is proposed (particularly in the light of the changes since the WMS was announced, without any consultation). Instead, it:

35.3.1. Failed to explain the significance of what is being done in terms of the planning process: the reader is not told what the practical effect of incorporating the WMS into the NPPF will be, and so is completely unequipped to respond on whether it is desirable or not;

35.3.2. Failed to set out any of the important environmental or social issues referred to above or give any meaningful context, again leaving the reader unequipped to respond on whether the proposal is desirable or not; or

35.3.3. Failed to indicate to the reader any alternative to the proposal that would enable him/her to give an intelligent response to what is being proposed.

36. To compound these errors, the SofS's response to the Consultation responses stated:

There was limited support for the inclusion in the Framework of policies for the exploration and extraction of oil, gas and unconventional hydrocarbons (which includes shale), with most responses objecting to potential shale development as a matter of principle.

However, shale gas, which plays a key role in ensuring energy security, is of national importance. The Government is committed to explore and develop our shale gas resources in a safe and sustainable way. We have therefore carried forward this

¹³ 'Achieving sustainable development', 'Building a strong, competitive economy', 'Making effective use of land, and so on.

policy in the Framework, which would apply having regard to the policies of the Framework as a whole.

37. In no way whatsoever can that response be said to have discharged or evidenced the SofS's duty to conscientiously take into account (let alone take "due account" of) the product of consultation in finalising the revised NPPF. Given the majority of Consultation responses objected to the inclusion of the proposed wording in relation to fracking, the SofS was required to set out the nature of those objections and explain why (in disagreeing with consultees) shale gas exploration is of national importance to the extent that those objections are outweighed. In the absence of such an explanation, it is clear that the SofS failed conscientiously to take into account (let alone give "due account" to) opposing viewpoints during the consultation.
38. Given the importance of the issues set out above, it is unacceptable that the Government is seeking to reinforce existing policy on fracking without carrying out any meaningful consultation. This failure is particularly stark given that – astonishingly – there has never been any public consultation in England about the benefits and dis-benefits of fracking. As noted above, the WMS was itself not the product of any form of consultation.
39. The elected bodies of the other nations of the UK have all imposed bans or presumptions against fracking. Most notably in Scotland, a detailed consultation exercise revealed that there was no social licence for fracking amongst the communities most affected by it. The situation in Wales, Northern Ireland and Scotland reflects deep public unease about both the local and global impacts of fracking. It is imperative that the English public should also be given a chance to set out their views on these issues.

STEPS YOU ARE REQUIRED TO TAKE

40. If you disagree with the characterisation of the legal or factual position set out above, please explain precisely how and why.
41. In order to resolve this matter without recourse to judicial review, Talk Fracking asks you to withdraw paragraph 204 of the revised NPPF.

TIME FOR RESPONSE

42. Please provide your response within 14 days using the contact details in our letterhead.

TIMING OF CLAIM

43. We are treating any potential claim as a 'Planning Court claim' as defined by CPR r. 54.21(2)(a)(viii) given that it would involve consideration of the lawfulness of a national planning policy document. However, we would welcome your confirmation that a six week deadline to issue a claim does not apply in this case, because the decision under challenge is not a decision made by the SofS under the 'planning acts' as defined by CPR r. 54.5(A1) and s. 336 of the Town and Country Planning Act 1990. Accordingly, we shall proceed on the basis that the usual rule that any claim for judicial review in this case must be filed promptly and in any event not later than 3 months after the grounds to make the claim first arose (i.e. by no later than 24 October 2018).

Yours faithfully,

A handwritten signature in black ink that reads "Leigh Day". The signature is written in a cursive, slightly slanted style.

Leigh Day