

Response from Nottingham Friends of the Earth to Nottinghamshire Minerals Local Plan Examination – Matter 3 Q42: “Please comment on any implications for Policy MP12 arising from the judgement that quashes paragraph 209(a) of the Framework.”

- 1) The National Planning Policy Framework was originally published in 2012. A revised version was produced in 2018 following consultation. One of the changes was to add para 209(a) which required Minerals Planning Authorities to “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.”
- 2) This was based on a Written Ministerial Statement issued in 2015 which claimed that “the carbon footprint of electricity from UK shale gas would be likely to be significantly less than unabated coal and also lower than imported Liquefied Natural Gas.” This claim was supported by a report by MacKay and Stone dated September 2013.
- 3) The drafting of what became para 209(a) arguably failed to take account of evidence after 2013 and, in particular, the Paris Agreement on Climate Change of December 2015 and a report by the Committee on Climate Change (CCC) required by the Infrastructure Act 2015 which concluded that “exploiting shale gas by fracking on a significant scale is not compatible with UK climate targets unless three tests are met ...”
- 4) Consultation on the revised Framework then failed to properly consider new evidence, in particular evidence from Talk Fracking (“the Mobbs Report”), which questioned the evidence base used by the MacKay and Stone report.
- 5) The Judgment by Mr Justice Dove considered four grounds of challenge.¹ The two grounds which resulted in para 209(a) being quashed were:

Ground 4: “the consultation ... was so flawed in its design and processes as to be unlawful.” (para 62)

Ground 1: “having conducted a consultation exercise in which the Talk Fracking material was clearly relevant ... it was unlawful to leave that material out of account.” (para 68)

The two other grounds were:

Ground 2: in relation to the Climate Change Act 2008, it is the decision-maker on plans or applications who will have to resolve conflicting issues such as in principle support for fracking versus climate change impacts. (para 73)

Ground 3 (considered in a separate judgment): the Framework is “not a plan or programme ... within the definition provided by the [EU Environmental Assessment] Directive”, so it does not require a Strategic Environmental Assessment.²

¹ Stephenson v Secretary of State for Housing And Communities And Local Government (Rev 1) [2019] EWHC 519 (Admin) (06 March 2019).

² Friends of the Earth Ltd v Secretary of State for Housing, Communities And Local Government [2019] EWHC 518 (Admin) (06 March 2019) para 60.

- 6) It is perhaps the decision on Ground 2 which is most relevant to current consideration on the Nottinghamshire Minerals Local Plan. In more detail it states (paras 72-73):
- “... the revisions to the Framework have no bearing at all on the Government’s commitment to satisfying the CCC’s three tests. Those tests remain in place and will have to be passed in order for shale gas extraction to be consistent with the requirements of the 2008 Act ...
- ... in individual decisions on plans or applications the in principle support for unconventional hydrocarbon extraction ... will have to be considered alongside any objections and evidence produced relating to the impact of shale gas extraction on climate change. These are conflicting issues which the decision-maker will have to resolve.”
- 7) This suggests that up-to-date evidence such as that produced by Talk Fracking should be considered in decisions on plans or applications. It will therefore be appropriate to ensure that the Plan includes in Policy MP12 a requirement that, in decisions on proposed developments relating to shale gas extraction, evidence relating to the impact on climate change will be considered.
- 8) That would also require deletion of the statement in the Draft Plan (section 4.108) that “It is considered that there is no justifiable reason in planning policy terms to separate shale gas from other hydrocarbon development”.
- 9) It is also relevant that in June 2019 the Climate Change Act 2008 (2050 Target Amendment) Order 2019 enshrined a net-zero emissions target for 2050 into UK law. It would therefore be appropriate for Strategic Objective SO3 and Strategic Policy SP3 to be amended to include reference to the government’s 2050 net-zero target, replacing references to “low-carbon economy” in para 3.6 and Policy SP3.
- 10) It would also support inclusion of a policy similar to the Kirklees Local Plan adopted in February 2019³ requiring that proposals “will be considered against the following criteria: ... h. Where a proposal demonstrates that it will have a net zero impact on climate change.”
- 11) It should also be noted that the recent Appeal Court judgment on Heathrow⁴ ruled that the Secretary of State had a legal obligation to take the Paris agreement into account in carrying out his duty to make decisions under section 10(3) of the Planning Act 2008 (which requires that in making National Policy Statements the SoS “must (in particular) have regard to the desirability of – (a) mitigating and adapting to climate change ...”).
- 12) If it is considered necessary to include specific policy to address the climate change impacts relating to unconventional hydrocarbons, possible policy amendments are included in previous representations from ourselves and others.

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³ www.kirklees.gov.uk/localplan Policy LP42 (Proposals for production of hydrocarbons)

⁴ Plan B Earth v Secretary of State for Transport [2020] EWCA Civ 214 (27 February 2020) paras 237-238.