

**April 2019**



## **Court order quashes fracking policy**

A recent ruling by a High Court judge has huge significance both for those fighting fracking applications and for planning authorities and communities looking to prepare climate-friendly, resilient plans and policies.

A key pro-fracking aspect of the revised National Planning Policy Framework (NPPF) has been quashed. Paragraph 209a (ruling on relief 14 May 2019) required 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”.

The case was brought on behalf of Talk Fracking<sup>1</sup>. Following the trial in the High Court, the judge found the government’s consultation on paragraph 209a of the revised NPPF, carried out last year, to be unlawful.

The quashing of this paragraph means the explicit, in-principle support for oil and gas development set out within the NPPF (February 2019) para. 209a no longer applies. The loss of this paragraph does not mean that onshore oil and gas development and extraction is now prohibited by the NPPF. But it does mean that the NPPF’s unequivocal, positive endorsement has been revoked, along with a statement that these activities support the transition to a low carbon economy.

Those fighting fracking proposals now - responding to planning applications, planning appeals and local plan/mineral plan consultations - can rely on this judgment to urge decision-takers to refuse fracking proposals owing to the quashing of para. 209a.

The judgment also makes clear that they can present evidence-based climate arguments to decision takers and plan-makers.

This briefing provides further analysis of what this judgment means and how it can be used by activists to resist fracking proposals.

## NPPF High Court challenges

In March 2019, the High Court ruled on two separate challenges to the NPPF, one brought by Friends of the Earth and the other by Talk Fracking. We consider the implications of the Talk Fracking judgment for those fighting fracking proposals currently.

**Friends of the Earth's case** was about a failure by the government to carry out a Strategic Environmental Assessment of the environmental effects of the NPPF and to consult on alternatives. Unfortunately, the government got off on a technicality. While ruling that the NPPF has a determinative impact on the planning system and a significant effect on the environment, the judge held that because its production was not formally and expressly "required by legislative, regulatory or administrative provisions" then an environmental assessment was not mandatory.

**Talk Fracking's case** focused on a specific policy in the NPPF: its approach to planning for shale gas and oil extraction by mineral planning authorities.

In Talk Fracking's case the judge found the consultation to be unlawful on two grounds. The in-principle support for oil and gas development in para. 209a of the NPPF has been quashed, and the judgment has confirmed that activists resisting onshore oil and gas extraction can present evidence-based climate arguments.

### Talk Fracking case

Claire Stephenson v Secretary of State for Housing, Communities and Local Government [2019] EWHC 519 (Admin)[2](#)

The Claimant (Talk Fracking) challenged the adoption of para. 209a in the NPPF, which reads as follows:

"Minerals planning authorities should: 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."

This created in-principle support for oil and gas development.

Its claim succeeded on two grounds:

- The consultation on the draft policy was flawed because it did not conform with fundamental legal principles of fairness and lawfulness. The government had carried out the consultation with a closed mind on its shale gas policy, but had given no indication to the public that this policy was not open to change.
- The government should also have considered the new scientific evidence from Talk Fracking (ie, the Mobbs report[3](#)), which showed that climate change impacts of shale gas development had previously been underestimated. This evidence was an "obviously material consideration" for assessing the merits of the proposed policy and the decision to include that para. in the final NPPF. Failing to do so was unlawful.

## Implications of the Talk Fracking judgment

This case is of great significance for those resisting fracking proposals.

Subsequent to the judgment, the court quashed para. 209a in its ruling on relief on 14 May 2019. That means that the explicit, in-principle support for shale gas development has been removed from the NPPF. The 19 February 2019 version of the NPPF is therefore no longer correct. On 23 May local government minister James Brokenshire issued a statement acknowledging the quashing of para. 209a, highlighting that the remainder of the NPPF remains extant and that the government “remains committed to the safe and sustainable exploration and development of our onshore shale gas resources”[4](#).

Quashing para. 209a does not mean that shale oil and gas development is now prohibited by the NPPF. But it does mean that the NPPF’s unequivocal, positive endorsement for shale oil and gas development has been revoked along with a statement that these activities support the transition to a low carbon economy. This is a hugely important and positive development for those fighting fracking applications and also for planning authorities who are looking to prepare climate-friendly and resilient plans and policies.

Para. 209a was based on a Shale Gas and Oil Policy Written Ministerial Statement (WMS) dated 16 September 2015, which promoted shale gas and oil development[5](#). The Talk Fracking case has not quashed the WMS, which still stands, and remains a material consideration to be taken into account in plan-making and decision-making (see para. 1 of the WMS). However, this judgment (helpfully) undermines it and makes clear that it is not the final say on fracking policy (see below).

Paras. 209b, 204 and 205 of the NPPF, which remain, are also relevant to those fighting fracking proposals.

Para. 209b says “when planning for on-shore oil and gas development, clearly distinguish between, and plan positively for, the three phases of development (exploration, appraisal and production), whilst ensuring appropriate monitoring and site restoration is provided for”. But importantly, the requirement to plan positively applies only when local authorities have chosen to plan for on-shore oil and gas development. It does not say that they **should** do this, unlike para. 209a.

Para. 204a states that planning policies “should provide for the extraction of mineral resources of local and national importance.” A counterweight is provided by para 204f which states that policies should “set out criteria or requirements to ensure that permitted and proposed operations do not have unacceptable adverse impacts on the natural and historic environment or human health, taking into account the cumulative effects of multiple impacts from individual sites and/or a number of sites in a locality.”

Para. 205 says “When determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy”. While this does not reference shale gas or oil extraction, neither does it exclude it. It should be borne in mind that a joint Energy and Planning Policy WMS published in 2018 reiterates the government’s view that “there are potentially substantial benefits from the safe and sustainable exploration and development of our onshore shale gas”, explicitly references para. 205, and states that “plans should not set restrictions or thresholds across their plan area that limit shale development without proper justification.”[6](#)

The judgment also makes clear that climate evidence can be taken into account in local planning decisions related to it.

Talk Fracking lost their argument that the government unlawfully failed to revisit the Climate Change Committee's three Tests and assess them against this new pro-shale policy (to assess compliance with UK climate obligations under the Climate Change Act 2008). However, as recorded in the judgment, it was made clear by the government's barrister, Mr Warren QC, that:

"The Defendant remains committed to meeting those three tests and nothing in the revision to the Framework alters the commitment to the tests being met. Prior to large scale extraction proceeding, he submitted, it would be necessary for those three tests to be passed. He further submitted that **in the context of individual decisions by plan makers or decision takers it would be open to depart from the in principle support for fracking provided by paragraph 209(a) on the basis of the requirement, for instance in paragraphs 148 and 149 of the Framework in particular, for the planning system to take decisions which support reductions in greenhouse gas emissions and plan proactively for climate change.** Thus, he submitted that **in the context of individual decisions it would be open for the Claimant and other participants to place before the decision maker material like the Mobbs Report which supported the contention that shale gas extraction would have a deleterious impact** on greenhouse gas emissions, and these could be weighed against the in principle support contained in paragraph 209(a) of the Framework." (Para. 71 of the judgment), our emphasis.

The Judge accepted this proposition as good law in rejecting the claim on this ground, and that: "... the in-principle support...provided by paragraph 209(a) of the Framework, will have to be considered alongside any objections and evidence produced relating to the impact of shale gas extraction on climate change." (para. 73)

Talk Fracking succeeded on two of their other grounds and the court subsequently decided to quash para. 209a. However, this judicial clarification remains helpful for those fighting fracking proposals currently, ie engaged in responding to planning applications, decisions and local plan and minerals plan consultations.

While it has always been possible to depart from national planning policy, in practice this is rare. The views expressed by the government in this case re-confirm a more open or flexible approach, which can better support reductions in greenhouse gas emissions and proactive plans to address climate change. Two key paragraphs in the NPPF, quoted in the case, also support this. They are:

148. The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure.

#### Planning for climate change

149. Plans should take a proactive approach to mitigating and adapting to climate change, taking into account the long-term implications for flood risk, coastal change, water supply, biodiversity and landscapes, and the risk of overheating from rising temperatures. Policies should support appropriate

measures to ensure the future resilience of communities and infrastructure to climate change impacts, such as providing space for physical protection measures, or making provision for the possible future relocation of vulnerable development and infrastructure.

## What the Talk Fracking judgment means for those fighting fracking proposals now

Those fighting fracking proposals now (responding to planning applications, planning appeals and local plan/mineral plan consultations) can rely on this judgment to urge decision-takers to refuse fracking proposals, owing to the quashing of para. 209a.

Also, they can urge decision-takers to consider climate evidence when making planning decisions. It will be essential to deploy robust, up-to-date evidence and arguments to back up representations to resist any proposals. If done, and provided clear justification is given, the decision-taker could then depart from other policies which could be interpreted as endorsing shale gas and oil development (e.g. para. 205 in the NPPF or the 2015 and 2018 WMSs) on climate grounds and as a reason for refusal.

While the 2015 and 2018 WMSs continue to have some weight, they are not the last word. It is vital that decisions factor in evidence, such as that contained within the Mobbs report, since this clearly demonstrates that shale oil and gas development or extraction will not provide a transition to a low carbon future.

- Representations, based on evidence, should make clear that shale gas or oil extraction at any stage (exploration, testing or production) does not reduce greenhouse gas emissions **and therefore conflicts with the NPPF paras. 148 and 149.**
- Policies and proposals which support renewables and energy-efficiency improvements may also potentially assist in demonstrating the "proactive approach" which the NPPF (para. 149) requires.

## Next steps

The Court did not order the government to reconsult on para. 209a. It is therefore up to the government whether it does so or not. If it does, then it will need to take into account the evidence which it ignored (and anything new that may be presented). Either way, this case represents a huge victory for the anti-fracking movement. The policy in the NPPF which gave the clearest and most unequivocal green light to fracking has been removed.

Friends of the Earth Planning & Legal Team



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## Notes

[1.](#) Claire Stephenson v Secretary of State for Housing, Communities and Local Government [2019] EWHC 519 (Admin)

[2.](https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2019/519.html&query=(CO/3511/2018))

[3.](http://www.talkfracking.org/wp-content/uploads/2018/12/Whitehalls-Fracking-Science-Failure.pdf)

[4.](https://www.theyworkforyou.com/wms/?id=2019-05-23.HCWS1586.h&s=shale+gas#gHCWS1586.0)

[5.](https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-09-16/HCWS202/)

[6.](https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-05-17/HCWS689/) <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-05-17/HCWS690>