



New planning guidance for shale gas - what will it mean?

On 19 July the government published its new planning practice guidance for onshore oil and gas, covering unconventional gas sources. In this article Patrick Robinson looks at the implications of this guidance.

This briefing can also be accessed online at mineralplanning.co.uk from 5 August 2013.

It is only just over a year since the “bonfire of the planning guidance” in which the government replaced some 80% of its existing advisory and policy publications in favour of a single streamlined national policy. Why then has it chosen to release planning practice guidance for onshore oil and gas in a form that at first glance appears to mirror that old style of guidance note, long on technical description, short on policy?

One way to approach the question is to ask what different interest groups stand to get from the publication.

Government

This is a DCLG¹ not a DECC² document, suggesting it is not principally an energy policy document, explaining the lack of emphasis on whether we need shale gas and, if so, how much. The purpose instead is to advise only how the planning system should operate in response to onshore oil and gas development, particularly unconventional sources, such as shale gas.

Ask any planner what is involved in their decision making and you will be told it is fundamentally a balance, between adverse and beneficial impacts, the latter including need for the development. But as need can never be taken as absolute (because that would negate any sense of striking a balance) what guidance is being given on the need side of that balance?

We are told that hydrocarbons remain an important part of the energy mix (para 2) and that there is a pressing need to establish if there are sufficient reserves available to allow economically viable full scale production (para 5). A firm statement is made that decision makers should not consider demand for gas or alternatives to it (para 65) and that great weight should be given to the economic need for mineral extraction (para 66).

Is that enough to achieve the government’s aim with this guidance to avoid the planning process, especially public inquiries, being slowed by debate over whether unconventional gas is needed

in principle? Experience from other energy sectors shows that achieving this aim will come under pressure as opponents in particular try to introduce need evidence to argue the specific benefits of an individual proposal are less than claimed.

Developers

Developers will welcome the legitimacy and political endorsement the guidance offers to a national programme of exploratory drilling. Without this, they risk slow progress with applications as planners struggle to fit them with their existing planning policies.

What developers also get is a reminder that even at the exploratory phase, they are not being handed *carte blanche* by the government. Whilst they are told they can expect clear, timely and authoritative views on the merits of a proposal from the planners (para 37) they are reminded that MPAs will be striking a balance on the merits of every case, to ensure extraction does not have unacceptable effects on the environment or health (para 5).

Of certain interest to developers will be the advice on how much information is needed to be submitted with a planning application for drilling. This is always of concern in any subsurface development, as data collection is expensive and time consuming. By definition it will never present a full picture. Clarity on where the line can be drawn on demands for more information is important for developers, hence there may be some concern that the guidance points only to demands being limited to what is on “local lists” of required information (para 45) that will be published by each MPA. Otherwise it is not more prescriptive on what can be required, other than to say it should be relevant and necessary to the application (para 44).

Mineral Planning Authorities

MPAs will welcome the emphasis placed on their role in the planning process. References to the need for MPAs to adopt policy in this area (para 5) and to ensure that development is appropriate to its location (para 29) add up to more than just reciting what statute says about the role of any mineral planning authority. There appears to be a clear line being taken to recognise the important role that the MPA is to play both as an enabler of development and as a gatekeeper in doing so.

¹ Department of Communities and Local Government

² Department of Energy and Climate Change

Chief in this respect is the advice given on how MPAs should approach other regulatory regimes. This is a particularly sensitive area for MPAs, who in past development situations have found themselves at odds with developers over what role they should play, for example, in questioning the safety of underground gas infrastructure.

The guidance looks to set the boundaries by saying MPAs should not duplicate the assessment work of other regulators (para 32) but at the same time that they need to be satisfied those issues of safety can be adequately addressed by taking advice from those regulators (para 32). Against the background that it is for the MPA to decide if the development is appropriately located given potential effects of pollution (para 29) the MPA role will be no mere rubber stamping of information given to it. Instead it must have all that advisory material fully under its command, so that it can exercise its judgement on whether such impacts as there may be, even with all regulatory regimes operating effectively, are acceptable.

Environment Agency and Health and Safety Executive

These two agencies bear the bulk of the regulatory work on the safety of gas infrastructure and have long experience and specialist teams who deal nationwide with such matters. They will find less in the guidance of direct relevance to them, as they are already used to the framework they operate under, that is not changing as a result of this guidance.

One issue they will be taking seriously is the additional scrutiny they may come under through the Freedom of Information Act and Environmental Information Regulations. If onshore exploration does lead to the significant opposition some are predicting, opponents may well not leave their questions at the door of the planning authority, which has traditionally been as far as they have gone, but instead pursue campaigns into the EA and HSE recognising just how pivotal it will be when these bodies give their approval to a specific drilling proposal.

The Public

Above all, it is the public perspective that explains large parts of the guidance. Extensive explanations of the process of “fracking” and of the operation of things like Environmental Impact Assessment will not tell MPAs, developers and other regulators anything they do not already know. Drawn together into one document, however, they offer an official and independent publication that can be used as a common reference point when any of these parties engage with the public, as the anticipated nationwide exploration programme gathers pace.

Stress is laid on early engagement with the public, but the answer to a hard question is left for another day, when in respect of how much information should be included in public participation, the guidance is only that it is “proportionate” to this exploratory phase (para 33). For the majority of the public, a limited high level briefing will be more than enough, but for the smaller number of highly motivated, well informed residents, demands for data even at the pre-application consultation stage could well be as thorough as will be made by the MPA at application stage. Managing public expectation here will pose real challenges.

Notable by its absence is any reference to the part community benefits may play in the planning process. This is explained in part by this guidance being directed principally at exploration, whereas the recent government announcement of financial benefits from shale gas for communities was from operational wells. The question still hovers, as to whether the government will suggest to MPAs that in making their planning decisions, they should place weight on benefits of this type that developers offer communities. Experience from elsewhere in the energy sector with community benefit teaches us the real value of such benefit packages lies in how well they are researched and targeted to local need in an area, rather than simply directing MPAs to take account of future financial payments.

Initial verdict - A starting point, not an end in itself

Long on narrative and short on policy this guidance may be, but it is a document that is likely to be a foundation stone of dealings between MPAs, developers, agencies and the public for the next few years. Investigation of its nuances and subtleties will pay dividends for all involved in the process.

In a rare acknowledgement by the Government of the role lawyers play in the planning process, there is specific warning to those reading the guidance not to rely upon it in place of getting their own legal advice, recognition perhaps of the particularly complex and probably contentious issues that lay in the path of this new energy source.

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