

## Summary

Fracking is back in the news again, with former BP boss – and ex-Chief Executive of fracking giants Cuadrilla – Lord Browne, telling journalists that fracking in the UK “doesn’t make much sense” and Labour reiterating its intention to ban the practice altogether should it win the next General Election.

A lesser reported story however is the government quashing part of the National Planning Policy Framework relating to fracking following a defeat in the courts.

This briefing outlines the implications of this change for planners and other local government professionals of this ruling.

## Briefing in Full

### Back in the news

Fracking – hydraulic fracturing – is arguably the highest profile of all aspects of energy policy.

The process has been back among the headlines lately, with former boss of BP and the ex-chief executive of fracking firm Cuadrilla, Lord John Browne, telling the [Guardian](#)

*“Fracking in the UK doesn’t make much sense. I think it was a test to see if it worked. We probably don’t need to do it”.*

The suggestion from such a leading figure in fracking was followed by [the appointment](#) of Danielle Rowley MP as Labour’s first Shadow Minister for Climate Justice.

In her first statement, Rowley reiterated [Labour’s 2017 manifesto commitment](#) to banning fracking, stating.

*“As a priority, I will be using my position to push them (the government) to immediately ban fracking”*

A less reported, by arguably more significant headline read as follows:

[“Government axes ‘pro-fracking’ paragraph from NPPF following court defeat”.](#)

Does this ruling mean the ditching of the National Planning Policy Framework’s explicit support for fracking, and what implications does it have for planners?

### What is fracking?

Hydraulic fracturing, more commonly known as fracking, sees the high-pressure injection of 'fracking fluid' (primarily water) into underground shafts, creating cracks in the rock to release natural gas, which can then be processed for energy.

Alongside local job creation, supporters point to the potential benefits of cheaper energy bills, and the diminished reliance on foreign sources of fuel.

Opponents cite concerns that the intensity and depth of fracking risks potential gas leaks, contamination of underground water reserves, air pollution and even earthquakes.

### **What did the NPPF use to say?**

The [National Planning Policy Framework](#) sets out the government's policies for planning and how it expects them to be applied.

Paragraph 209(a) of the National Planning Policy Statement previously read:

*"Mineral 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"*

### **The court ruling**

A legal challenge to this clause was brought by a group called Talk Fracking.

On March 6 2019, ruling in the case of Stephenson vs Secretary of State for Housing and Communities and Local Government (EWHC 519), the High Court ruled that paragraph 209 (a) of the Framework failed to take into account sufficient technical and scientific evidence – relying on a 2013 report by the Department of Energy and Climate Change and not giving fair weighting to alternative evidence received during the NPPF's consultation process suggesting that potential harmful emissions resulting from shale gas extraction had been underestimated.

As a result the clause was ruled "unlawful", with the court stating

*"Having embarked on what looked like an open-minded consultation the defendant had acted unlawfully in not taking into account consultee responses"*

Rowan Smith, solicitor from Leigh Day representing Talk Fracking, said:

*"The Judge was critical of the way the Government, during last year's consultation exercise, tried to shoehorn that statement into national policy whilst brushing off public objections to the basis for doing so. It is clear what the Government must now do, namely hold a full review of its policy support for fracking, after a meaningful public consultation and properly considering the scientific developments".*

## **What did the government do?**

On 23 of May 2019 James Brokenshire, the then Secretary of State for Housing, Communities and Local Government issued a Written Ministerial Statement removing paragraph 209a from the National Planning Policy Framework in its entirety, stating:

*“In accordance with the terms of the Court of Order, paragraph 209(a) of the National Planning Policy Framework has been quashed”.*

As a result, there is no longer a paragraph 209(a) of the Policy, with paragraph 209 now beginning at (b).

The statement continued:

*“We remain committed to the safe and sustainable exploration and development of our onshore shale gas resources”.*

## **What guidance remains for planning authorities?**

In addition to the removed clause, the revised National Planning Policy Framework continues to state that:

- Planning policies should “provide for the extraction of mineral resources of local and national importance” (paragraph 204)
- “When determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy” (paragraph 205)

As the May 23 Ministerial Statement states:

“For the purposes of the National Planning Policy Framework, hydrocarbon development (including unconventional oil and gas) are considered to be a mineral resource”

Other guidance on planning policy relating to fracking can be found in two further written ministerial statements.

- [Written Statement on Shale and Gas Policy \(September 2015\)](#)
- [Written Statement on Energy Policy \(May 2018\)](#)

## **So has anything changed?**

Mary Campbell, Planning Director for solicitors Halliday Stephenson, who specialise in planning law relating to fracking believes that the effect of the removal of paragraph 209(a) is limited.

Speaking to LGIU she said:

*“On the face of it, this amendment removes, and therefore downgrades, the statement of government support for on-shore oil and gas development, including unconventional hydrocarbons from NPPF.*

*“However, it is important to note that the reason for the Court decision leading to this amendment relates to a flawed procedure i.e. the consultation process leading to the adoption of para 209(a) was unlawful. The ruling did not discuss the substantive issue of whether or not the government is supportive of exploration / extraction of shale gas.*

*“In fact the government has made it clear that NPPF states it to be essential that there is a sufficient supply of minerals to provide the infrastructure, buildings, energy and goods that the country needs; and also that the Written Ministerial Statements (WMS) of 2015 and 2018, which are supportive of shale gas development, still stand as expressions of government policy.*

*“Even with the deletion of para 209(a), it is clear that the government remains committed to the exploration and development of shale gas resources.*

*“I would say that the effect of the amendment is limited, in the sense that local authorities will continue to identify and if necessary, balance, the benefits and harm of each application on its merits, in the context of both local and national policy.”*

One senior planner contacted by the LGIU however described the ruling as a “significant blow” to fracking in the UK

They said:

*“If a planning system is fair and just, then decisions should be made in accordance with the NPPF with material weight given to national guidance. Taking that paragraph out is a big deal in my opinion when it comes to getting planning approval for fracking.*

*“There is nothing in the remaining 209 that gives fracking an advantage that it had when 209a was in”.*

In addition to this, in August 2019 the government re-stated it’s broad support for Fracking, [stating](#):

*“Shale gas could be an important new domestic energy source reducing the level of gas imports while delivering broad economic benefits, including through the creation of well-paid, quality jobs. It could also support our transition to net zero emissions by 2050.*

*“We have world-leading regulations that ensure shale gas exploration happens in a safe and environmentally responsible way. The Oil and Gas Authority is currently undertaking a scientific assessment of recent industry data which we will consider once completed.”*

## Comment

Opinion is divided as to whether or not the removal of paragraph 209(a) from the National Policy Planning Framework is a “significant blow” to those seeking to frack in the UK and those who believe or that the effect of the change is “limited”.

Irrespective of this debate, mineral extraction is not the only consideration for assessing planning applications relating to hydraulic fracturing and each application will have to be assessed by planners on its own merits.

In February for example, an application from Cuadrilla for exploratory fracking in Roseacre Woods in Lancashire, was denied by the same Secretary of State, who declared that:

*“The proposed development would have a serious and very significant adverse impact on the safety of people using the public highway”.*

The widest implications for the Stephenson ruling could be perceived to relate to the process of consultation authorities give to applications relation to hydraulic fracturing and how they treat the evidence-based submissions they receive.

The planning inspector dealing with the [North Yorkshire Minerals and Waste Joint Plan](#) has already re-opened a consultation on the plan which closed in January to allow further evidence to be submitted, despite the consultation on the plan initially commencing in 2013.

Of course, in the longer term with a former Cuadrilla expert apparently signalling a potential end to the practice in the UK, and a new General Election in which one of the major parties is publically committed to banning fracking altogether, such implications could rapidly become something of a moot point.

*John Hart is employed by a Combined Authority. He writes in a personal capacity and any comment is personal and not that of his employer.*