

# UK Planning Policy on Shale Gas Found “Unlawful” by the High Court

---

March 2019

Author: [Tallat Hussain](#)

Climate change is an increasingly important concern for lawmakers and decision makers around the world. For companies and institutions looking to promote hydrocarbon projects in the future, climate change considerations may have a more frequent role to play through planning decisions.

Tallat Hussain discusses the recent High Court decision that the UK Government’s National Planning Policy Framework concerning shale gas is “unlawful”. It seems likely that the ruling will result in a review of the policy. Depending on the outcome of next steps at the High Court, UK planning policy could become less favourable to future development of shale gas projects in the UK.

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

This case was brought on behalf of a UK organisation, Talk Fracking, against the Secretary of State for Housing and Communities and Local Government, challenging a section of the National Planning Policy Framework (**NPPF**) concerning shale gas extraction (the “**Policy**”). On 6 March 2019, the High Court found that the section of the Government’s NPPF concerning shale gas failed to take into account new technical and scientific evidence and is therefore “unlawful”.

The Government’s policy on shale gas was originally adopted in a 2015 Written Ministerial Statement that relied heavily on a report produced in 2013, which was commissioned by the Department of Energy and Climate Change (2013 Report). The 2013 Report found that emissions from shale gas extraction were comparable to gas extracted from conventional sources and lower than those arising from the extraction of liquefied natural gas. On this basis, the 2015 Written Ministerial Statement assumed that shale gas could viably form part of the UK strategy to transition towards renewable energy sources.

Public consultation on the NPPF took place in March 2018. The section of the consultation draft relevant to shale gas stated that minerals planning authorities should: (1) recognise the benefits of unconventional hydrocarbons for the security of energy supplies and supporting the transition to a low-carbon economy; and (2) put policies in place to facilitate their exploration and extraction.

In May 2018, before the results of the public consultation were reviewed by the Government and published, the Government released a second Written Ministerial Statement. This affirmed the position of the 2015 Written Ministerial Statement, adding that the “revised National Planning Policy Framework will sit alongside the Written Ministerial Statement.”

---

Consequently, in July 2018, support for unconventional hydrocarbons was incorporated into the NPPF in the same terms used in the consultation draft.<sup>1</sup>

## The High Court's Approach

Critically, as part of the consultation process for the revised NPPF, Talk Fracking had submitted a report they commissioned in 2017, which used new techniques to measure emissions from shale gas extraction operations. Talk Fracking's report indicated that the Government's 2013 Report, which the Government had relied upon in their policy-making decisions, had significantly understated potential emissions from shale gas extraction. Despite this, the UK Government did not consider Talk Fracking's report during its review of the NPPF.

The High Court found that the Government's failure to consider scientific and technical evidence (such as Talk Fracking's report) released after adoption of the 2015 Written Ministerial Statement, rendered the Policy unlawful. The High Court also found that public consultation with respect to the Policy was both "unfair and unlawful".

## What's Next?

The UK Government and Talk Fracking must now consider the implications of the judgment. If the parties cannot come to an agreement, they must make further submissions to the High Court in order to determine next steps.

The High Court determination that the Policy is unlawful means that the Government may have to undertake a review of the Policy. As the public consultation in this respect was also declared unlawful, another consultation process may need to be undertaken before a new policy can be adopted. However, at this stage it is unclear when, or if, the government will undertake a review of the Policy or any public consultation.

Depending on the outcome of negotiations between the parties and whether further submissions must be made to the High Court, it is possible that energy policy in the UK will become much less favourable to shale gas projects in future.

## International Outlook

Outside of the UK, a [recent planning decision in Australia](#) has also taken climate change into account. In February 2019, the New South Wales Land and Environment Court dismissed an appeal regarding the refusal of planning permission for an open cut coalmine in the Gloucester Valley, on the basis that the benefits of the project would not outweigh the costs. One of the major negative impacts identified was that the project would be "a material source of GHG emissions and contribute to climate change", and would not assist the country to "achieve the generally agreed goal of limiting the increase in global average temperature to well below 2°C above pre-industrial levels."

Although the Australian case illustrates how climate change considerations may have impacts at the individual project level, successful court challenges to government policy could lead to negative impacts on the overall feasibility of hydrocarbon projects in a given jurisdiction.

It remains to be seen whether there will be similar rulings in other jurisdictions. Given these two significant cases in 2019 in respect of planning and climate change, this is an important space to watch over the coming months.

---

<sup>1</sup> Government response to the draft revised National Planning Policy Framework consultation: a summary of consultation responses and the Government's view on the way forward, Question 37; Paragraph 209(a) of the National Planning Policy Framework

---

White & Case LLP  
5 Old Broad Street  
London EC2N 1DW  
United Kingdom

**T** +44 20 7532 1000

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.