Planning and Unconventional oil and gas

Fighting off fracking in Cymru/Wales

Introduction

Legislation covering permitting, licensing and consenting for onshore oil and gas is reserved to Westminster. Certain permissions are therefore exercised at a UK level, including by the Department for Energy and Climate Change and the Coal Authority through issuing licences for exploitation of hydrocarbons, and by the Health and Safety Executive, who oversee the design and construction of wells.

However, planning is largely a devolved matter¹, and environmental permits are also devolved. This means that the Welsh Government (through planning), and Natural Resources Wales (through environmental permitting) have a major influence on the unconventional oil and gas industry in Wales. For example, pollution permits given out by Natural Resources Wales will cover issues such as mining waste, radioactivity, emissions and groundwater protection.

What are your rights?

You have a right to object to a planning application within a set timeframe, and if you object to a draft local development plan, to be heard (to give your evidence in person) at the inquiry into that plan. Make sure you reference the local minerals policy, the key policies in the local plan and national planning policy and technical advice notes where this supports your case. Look for key issues such as climate change and the precautionary principle, as well as ‘unacceptable adverse impacts’. Transport impacts and air/water quality are powerful local reasons to object.

If an Environmental Impact Assessment has been prepared there will be a consultation on the Environmental Statement. A permit for pollution (mining waste) will also normally be issued for consultation.

Local authorities can also produce supplementary planning guidance. For this to have weight, it must be consulted on. This is an opportunity to persuade your local planning authority to put together some policy guidance that implements the precautionary principle in relation to unconventional oil and gas proposals.

What Government guidance is there?

Planning Policy Wales 2014 (PPW 2014) refers to Minerals Planning Policy Wales 2000. There has been no updating of this guidance in relation to unconventional hydrocarbon extraction.

¹ The exception, which is reserved, is “Functions of the Infrastructure Planning Commission or any of its members under the Planning Act 2008” http://wales.gov.uk/legislation/govwalesact2006/schedule7/?lang=en
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Please see our campaign briefing ‘Shale gas: energy solution or fracking hell?’
http://www.foe.co.uk/resource/briefings/shale_gas.pdf for further information about the key issues concerning fracking.

What are the main objections to unconventional oil and gas developments?

Friends of the Earth recommends basing the objection on the following issues:

- Climate change impacts
- Precautionary principle (particularly in application to groundwater contamination)
- Unacceptable adverse impacts (air quality, transport, biodiversity, water, soils)

What needs to be taken into account by the decision-makers?

Local planning decisions must have regard to local minerals plans and must take national planning policy into account, alongside other material considerations. Minerals applications are decided by the local planning authority.

Consent for land use development must include the under land activities (Section 55, TCPA 1990).

There is also a serious lack of information in the applications that are coming forward and therefore local authorities should be strongly encouraged to demand an Environmental Impact Assessment (EIA). Or failing that, the equivalent amount of information covering the same issues as an Environmental Impact Assessment e.g. on air, water, soil impacts. The regulations governing Environmental Impact Assessments can be found on www.legislation.gov.uk, entitled ‘The Town and Country Planning (Environmental Impact Assessment) Regulations 1999 (as amended). EIAs are required for mineral workings above 1 ha in size (thresholds are set out in Schedule 2 of the regulations), and the issues that must be covered in an EIA are set out in Schedule 4.

Climate Change

Climate change is an important issue in both plan-making and decision-taking in Wales.

Section 1(1) of the Climate Change Act 2008 provides that it is the duty of the Secretary of State to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline. Planning Policy Wales (PPW) 2014 reiterates the Government’s commitment: “The Welsh Government has set out to achieve annual carbon reduction-equivalent emissions reductions of 3 per cent per year from 2011 in areas of devolved competence, which include land use planning.”

PPW 2014 in paragraph 4.3 states that: “tackling climate change by reducing the greenhouse gas emissions that cause climate change and ensuring that places are resilient to the consequences of climate change,” is a key planning principle. This is therefore a material consideration in planning decision-making.

Section 39(2) of the Planning and Compulsory Purchase Act 2004 makes it a statutory duty for planning authorities to act with the objective of achieving sustainable development in relation to plan-making. In addition Section 19(1A) of the Planning and Compulsory Purchase Act 2004 states: “Development plan documents must (taken as a whole) include policies designed to secure that the development and use of land in the local planning authority’s area contribute to the mitigation of, and adaptation to, climate change.”

Local planning decisions must also have regard to the following key policies on climate change from PPW 2014:

Paragraph 4.4.3: “Support the need to tackle the causes of climate change by moving towards a low carbon economy. This includes facilitating development that reduces emissions of greenhouse gases in a sustainable manner, provides for renewable and low carbon energy sources at all scales and facilitates low and zero carbon developments” and “Contribute to the protection and, where possible, the improvement of
people’s health and well-being as a core component of sustainable development and responding to climate change. Consideration of the possible impacts of developments – positive and/or negative – on people’s health at an early stage will help to clarify the relevance of health and the extent to which it needs to be taken into account.

Paragraph 4.5.7: “Planning to minimise the causes of climate change means taking decisive action to move towards a low carbon economy (see Section 12.8) by proactively reducing the demand for energy (see Chapter 8 and Section 12.8), facilitating the delivery of new and more sustainable forms of energy provision at all scales (see Section 12.8) and minimising the emissions of greenhouse gases to the atmosphere.”

Paragraph 4.5.9: “Consideration of the impacts of climate change should use the latest set of UK Climate Projections (and the latest Climate Change Risk Assessment) to ensure that they have identified appropriate policies and measures to adapt to these impacts, including the consequential impacts of such measures.”

Paragraph 12.8.9: “Local planning authorities should facilitate the development of all forms of renewable and low carbon energy to move towards a low carbon economy (see 4.4.3) to help to tackle the causes of climate change (see 4.7.3). Specifically, they should make positive provision by: - ensuring that development management decisions are consistent with national and international climate change obligations, including contributions to renewable energy targets and aspirations;”

A model policy is outlined below which links together the need to tackle climate change and the precautionary principle which can be recommended to minerals planning authorities for inclusion in the minerals plan.

In terms of decision-making, an Environmental Impact Assessment should cover the carbon emissions aspect, so that the authority has the requisite information at its disposal when making a decision. This is particularly important when making a decision on the production stage.

Evidence to support the decision to refuse a development on climate change grounds could draw upon the Tyndall Centre’s research into the climate impacts of shale gas exploitation that says “while being promoted as a transition route to a low carbon future, none of the available evidence indicates that this is likely to be the case.” (January 2011, Shale gas: a provisional assessment of climate change and environmental impacts). In addition UNEP’s 2012 report said: “increased extraction and use of unconventional gas is likely to be detrimental to efforts to curb climate change”.

You could also refer to any local targets or ambitions to reduce greenhouse gas emissions when objecting to an onshore unconventional oil and gas planning application, as well as the national ambitions set out in the Climate Change Act 2008.

**Precautionary principle and unacceptable adverse impacts**

Minerals development frameworks should include a specific policy on the application of the precautionary principle to all applications for unconventional oil and gas development – which means that unless it can be proven that there will be no adverse impacts, particularly on groundwater, that the development should not go ahead.

The EU Water Framework Directive and environmental law do provide for the precautionary principle to be considered in planning.

A summary of the Water Framework Directive is as follows:

> The case of groundwater is somewhat different. The presumption in relation to groundwater should broadly be that it should not be polluted at all. For this reason, setting chemical quality standards

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2 UNEP (2012) ‘Gas fracking: can we safely squeeze the rocks?’
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may not be the best approach, as it gives the impression of an allowed level of pollution to which Member States can fill up. A very few such standards have been established at European level for particular issues (nitrates, pesticides and biocides), and these must always be adhered to. But for general protection, we have taken another approach. It is essentially a precautionary one. It comprises a prohibition on direct discharges to groundwater, and (to cover indirect discharges) a requirement to monitor groundwater bodies so as to detect changes in chemical composition, and to reverse any anthropogenically induced upward pollution trend. Taken together, these should ensure the protection of groundwater from all contamination, according to the principle of minimum anthropogenic impact.


On the precautionary principle PPW 2014 includes the following policy for reference:

Paragraph 4.3.1: “applying the precautionary principle. Cost-effective measures to prevent possibly serious environmental damage should not be postponed just because of scientific uncertainty about how serious the risk is;”

In addition the key principles that support a precautionary approach are as follows:

Paragraph 4.3.1: “using scientific knowledge to aid decision-making, and trying to work out in advance what knowledge will be needed so that appropriate research can be undertaken; while preventing pollution as far as possible, ensuring that the polluter pays for damage resulting from pollution. In general the Welsh Government will seek to ensure that costs are met by those whose actions incur them; applying the proximity principle, especially in managing waste and pollution. This means solving problems locally rather than passing them on to other places or to future generations;”

Precautionary action requires assessment of the costs and benefits of action, and transparency in decision-making.

On minerals planning policy (MPPW 2001) the Welsh Government has the following guidance:

Paragraph 65: “There are additional environmental considerations associated with coalbed methane extraction: - the environmental impacts of exploration, development, operation and restoration of coalbed methane wells which may have a relatively long productive life of 30 years or more; - coalbed methane extraction usually entails many more wells than conventional gas; - the disposal of water produced during well stimulation and gas production which may vary in contamination; and - adverse effects on subsurface resources such as groundwater.”

Unfortunately its guidance on exploration fails to be consistent with its PPW 2014 policies on climate change:

Paragraph 64: “Where oil and gas operations can be carried out in an environmentally acceptable way and consistent with the principles of sustainable development, there is no case in land use planning terms for placing more restrictions on the development than are necessary to ensure the protection of the environment.”

Friends of the Earth would argue that the precautionary principle also applies, because the impacts of unconventional oil and gas exploration are unknown in this country, and that the evidence from the US and Australia with around 10 years’ extraction experience is that there are severe pollution impacts, with research in Australia just starting to come forward on the health impacts. This is supported by MPPW 2001

Paragraph 30: “Mineral planning authorities must consult the Environment Agency on these complex issues and, where doubt exists, should adopt the precautionary principle in taking planning decisions on mineral development.”

Particular impacts that may result from fracking exploration and extraction activities include:

- Transport movement (for transporting water on and off site)
- Water use (the amount used in the activity, particularly in areas of water shortage)
- Air pollution (leakages of methane)
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- Migration of contamination from the site (leakages of polluted water).

Evidence base

Making a strong case against unconventional oil and gas development will need a comprehensive evidence base. The Tyndall Centre has put together evidence on the climate change impacts from fracking (http://www.co-operative.coop/Corporate/Fracking/Shale%20gas%20update%20-%20full%20report.pdf).

There is evidence to support the proposition that shale gas extraction carries with it significant risks of groundwater contamination as for instance covered by the British Geological Society’s paper on this (Potential groundwater impact from exploitation of shale gas in the UK”, Stuart, 2012). This report concludes that “Groundwater may be potentially contaminated by extraction of shale gas both from the constituents of shale gas itself, from the formulation and deep injection of water containing a cocktail of additives used for hydraulic fracturing and from flowback water which may have a high content of saline formation water” (page 19). The BGS report further states that “There are examples of surface water contamination from releases of fracturing water or flowback water. Documented instances of groundwater contamination from the U.S. are all related to the leakage of methane into groundwater.” (page 20). It is therefore essential this is properly recognised in planning and development decisions.

Independent legal advice obtained by Friends of the Earth has pointed out that the quantities of water which are required to facilities shale gas extraction are significant, and engage the statutory duties of the Welsh Government as well as local planning authorities to conserve and improve the water supply.

Local evidence from communities and evidence from the environmental impact assessment is key here to informing the local planning authorities’ assessment of the application, including cumulative impacts.

Impacts arising from the development must be strictly mitigated and controlled by specific conditions attached to the decision notice. For instance the depth of the well, the casing, the direction of the drilling, the amount of water used (as with shale gas this can imply significant transport movements and contaminated water), the management, storage, transport of contaminated drilling muds, baseline monitoring of the environment must all be clearly specified and controlled so that the local authority is able to enforce clear conditions.

Further information on the impacts of unconventional oil and gas is available on Friends of the Earth’s web site.

Liabilities

Minerals Planning Policy Wales 2001 references the need for financial guarantees. This is very important to secure as part of a planning condition. Paragraph 53 states: “Properly worded and relevant planning conditions should be able to secure the restoration, aftercare and after-use of mineral sites”. Paragraph 54 in addition states: “To address the uncertainty of local communities about the completion of restoration proposals and having regard to the polluter pays principle, wherever it is reasonable to do so, authorities may require financial guarantees as a means of ensuring that sites will be restored properly and in a reasonable time period. An authority may require financial guarantees by way of a Section 106 planning obligation/agreement, as part of the approval of planning permission to ensure that restoration will be fully achieved. Some authorities have local legislation to enable them to impose this provision by way of a condition attached to the planning permission.”
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Model: starting point for your Minerals Plan objection
This policy covers the precautionary principle in relation to water and includes climate change and air quality as the other two principle objections.

You may also wish to push for a presumption against unconventional oil and gas operations, although this will be harder to justify in view of existing national guidance in Wales.

### Proposed Planning Policy

**Policy 1**

An applicant for planning permission for unconventional oil and gas operations (including test drilling and extraction) must demonstrate by appropriate evidence and assessment that reasonable scientific doubt can be excluded as to adverse impacts of the proposed development alone or in combination with other developments:

- On the quality and quantity of water resources, including groundwater and water courses;
- On air quality (including through emissions of methane and sulphur);
- On seismic activity;
- On local communities;
- On greenhouse gas emissions and climate change.

**Policy 2**

Planning permission for unconventional oil and gas operations (including test drilling and extraction) will not be granted unless:

(a) the Council is satisfied that all reasonable scientific doubt that there is any risk of adverse impacts has been eliminated;

(b) the proposal will not compromise the Council's duties in relation to climate change mitigation; and

(c) the proposal is environmentally acceptable, or it can be made so by planning conditions or obligations.
Model: starting point for your council motion

Politically it is important that councils pass a motion, and Friends of the Earth recommends the following motion. This will lay the ground for being able to include the policy within the local plan or as a supplementary planning document, and will help when the local authority is making a decision on a planning application.

**Suggested motion** (in area where there are possibilities for unconventional oil and gas exploration)

*This Council notes that it has a responsibility to tackle climate change.*

*This Council acknowledges that exploration of unconventional fossil fuel undermines action on climate change and diverts resources away from investment in a safe and secure renewable energy future.*

*This Council notes that there are possible significant adverse impacts from unconventional oil and gas exploration and exploitation, including water contamination and air pollution, and that, in line with the precautionary principle, applications for shale gas development should be refused.*

*This Council calls for a moratorium on unconventional oil and gas exploration, appraisal and production within Wales/the UK.*

**Suggested motion** (in area where unconventional oil and gas exploration is unlikely)

*This Council notes that it has a responsibility to tackle climate change.*

*This Council acknowledges that exploration of unconventional fossil fuel undermines action on climate change and diverts resources away from investment in a safe and secure renewable energy future.*

*This Council notes that there are possible significant adverse impacts from shale gas exploration and exploitation, including water contamination and air pollution, and supports a ‘frack-free’ declaration for this area.*

*This Council calls for a moratorium on unconventional oil and gas exploration within Wales/the UK.*

For further information please contact at Friends of the Earth:
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