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Material Planning Considerations and Decision Making

Topic Training Module



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Purpose of the training module

- Aims to increase your understanding of the environmental and other factors relevant in deciding planning applications for shale developments
- One of a series of training modules.



The facilitators and regulators

- This slide will contain information about the facilitators and their experience in respect of planning for shale developments
 - It will also contain information about other attendees that will be making presentations or assisting with the facilitation of the event such as the other regulators, CLG etc
-

Housekeeping



What is Planning Advisory Service for?

- Funded to support English planning authorities
“[PAS] exists to support local planning authorities in providing effective and efficient planning services, to drive improvement in those services and to support the implementation of changes in the planning system”
 - Also work directly with councils
 - Part of the Local Government family (LGA)
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Contents

- The Committee decision and decision making
 - Principal Issues
 - Other material considerations - Development Plan, economic issues, environmental considerations, climate change, public health, public concern, regulation of seismicity
 - Weight
 - Non-material considerations
 - Break out session – does exploration for shale gas represent sustainable development?
 - Break out session – the planning merits of a case study for an exploratory well and fracking site
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Material Considerations



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Material Considerations (1)

- **In accordance with the Development Plan unless material considerations indicate otherwise**
 - **No exhaustive list** of what constitutes a ‘material planning consideration
 - **Court view** - planning is concerned with **land use in the public interest**, not private interests (e.g. impact on neighbouring property value, rights to light etc.)
 - NPPF 2018 paragraph 11 – ‘presumption in favour of sustainable development’
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Material Considerations (2)

- Case law has established that decision makers are not required to address every material consideration, however insignificant, in their decision. They are only required to deal with the 'main' or 'principal important controversial issues.' If a material consideration is not mentioned it cannot be assumed that it has been overlooked.
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Principal Issues (1)

Planning Practice Guidance on minerals provides a list of 'principal issues' for consideration in assessing planning applications for mineral development, including:

- noise, dust, air quality, traffic, lighting
 - visual impact and landscape character
 - archaeological and heritage feature
 - risk of contamination to land
 - land stability/subsidence
 - designated wildlife sites and landscapes
 - water abstraction
 - surface and in some cases groundwater issues
 - restoration and aftercare
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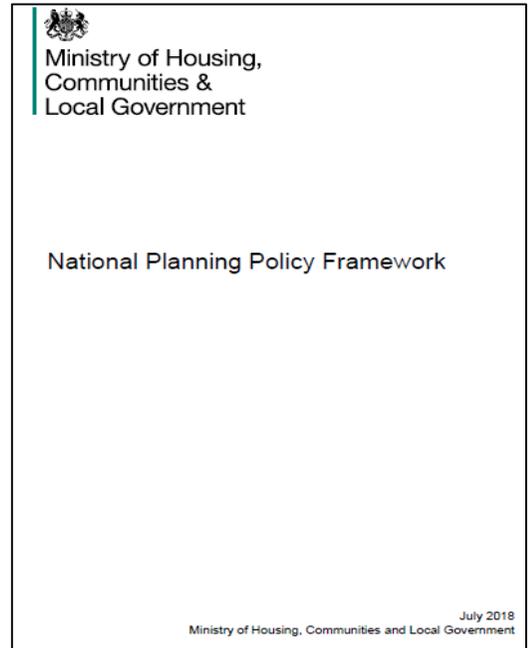
Principal Issues (2)

- Almost all of these principal issues are capable of being relevant material considerations in respect of shale applications
 - But shale applications raise other issues that may be material considerations
 - These are dealt with in following slides.
 - Important to remember that what are material considerations, the balance between them and the weight they should be given will depend on the circumstances of the case.
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Other material planning considerations

- The NPPF, PPG and Ministerial Statements
- Previous appeal decisions, case law
- Need – Preston New Road and Roseacre Wood appeal decision:

“the need for shale gas exploration is a material consideration of great weight in these appeals, but ... there is no such Government support for shale gas development that would be unsafe and unsustainable. The Secretary of State also considers that the need for shale gas exploration ...could help achieve secure energy supplies”.



Development plan

- How old is your adopted local plan?
 - Only a relatively few recently adopted local plans have policies specific to shale gas developments because these are fairly recent phenomena.
 - If your adopted plan does not have specific shale gas policies, it is necessary to consider whether the development plan contains relevant general development control policies sufficient to enable a judgment to be made as to whether the proposed development would be acceptable or unacceptable in principle.
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Emerging Development Plans

- NPPF paragraph 48: - local planning authorities may give weight to relevant policies in emerging plans according to:
 - a) the stage of preparation (the more advanced its preparation, the greater the weight);
 - b) the extent to which there are unresolved objections;
 - c) the degree of consistency of the relevant policies in the emerging plan to the NPPF
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Economic Issues (1)

- **NPPF Para 205:** *When determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy. Clearly stated as the first consideration to be applied and demonstrated by case law decisions.*
 - **Ministerial Statement 17 May 2018:** *Further development of on-shore gas resources has the potential to deliver substantial economic benefits to the UK economy and for local communities where supplies are located by creating thousands of new jobs directly in extraction, local support services, and the rest of the supply chain.*
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Economic Issues (2)

- The Task Force on Shale Gas concluded in 2015 that the development of a shale gas industry would provide substantial employment in the UK.
 - The Prime Minister in October 2017: “... *shale gas has the potential to power economic growth ...and to support thousands of jobs in the oil and gas industries and in other sectors.... The shale wealth fund ... provide up to £1 billion of additional resources to local communities, and local councils ... retain 100% of the business rates they collect from shale gas developments*”.
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Economic Issues (3)

- Exploration to find out how much shale gas can be recovered is needed to accurately estimate the number of jobs that the shale industry could create.
 - Recent estimates vary widely - between 15,900 and 74,000
 - Local employment likely to be greater in exploration and appraisal stages compared to production stage
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Economic Issues (4)

- Preston New Road and Roseacre Wood appeal decision: “SoS agrees with the inspector ... that the local economic benefits of the exploration stage would be modest. He therefore attributes little positive weight to these benefits....As the NPPF makes clear that each stage should be considered separately, the SoS considers that...no weight should be attributed to the national economic benefits which could flow from commercial production in relation to these sites at some point in the future”.
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Environmental Considerations (1)

- **Strain on water resources.** Hydraulic fracturing a well may use 10 - 30 million litres but even if the industry scales up usage will be only a very small proportion of total water usage.
 - Transport by tanker of large volumes of water to the site has the potential for road safety, diesel emissions and noise impacts.
 - **Water contamination risks**
 - **Groundwater contamination is** very unlikely due to depth of fracking operations (2-3 km). Controlled by well design and construction regulated by HSE with any contamination regulated by the EA.
 - **Surface contamination** to water and soils is possible. Controlled by impermeable banded well pads, flowback water containment and good working practices
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Environmental Considerations (2)

- **Aerial emissions and air quality** –dust, particulates from vehicles and generators, fugitive gas from flowback / flaring.
 - **Waste management** – drill cuttings are disposed to landfill and flowback fluid requires specialist water treatment off site.
 - **Traffic** – exploration stage will involve increased heavy goods traffic for site assembly and removal and removal of waste.
 - **Noise** – 24 hour drilling during exploration and appraisal
 - **Landscape and Visual Amenity** – including illumination at night, drilling rigs, site cabins, fencing etc
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Climate Change

- **NPPF:**” The planning system should support the transition to a low carbon future in a changing climate....(and) shape places in ways that contribute to radical reductions in greenhouse gas emissions....”
 - **Shale gas is a fossil fuel.** IPCC - average full lifecycle emissions of natural gas below oil and coal, but higher than nuclear and renewable resources.
 - The Preston New Road and Roseacre Wood appeal decision is illustrative of how the planning system might deal with the climate change implications of a shale gas proposal (see handout)
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Public Health (1)

- NPPF: “In considering proposals for mineral extraction, ...ensure that there are no unacceptable adverse impacts on ...human health”
 - Public Health England (PHE) concluded that the potential risks to public health from exposure to the emissions associated with shale gas extraction will be low if the operations are properly run and regulated.
 - Shale gas developers and operators are required to satisfy the relevant regulators that their proposals and operations will minimise the potential for pollution and risks to public health.
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Public Health (2)

- PHE concluded impact from single wells likely to be very small, but the cumulative impacts of multiple wells in small areas are potentially greater and need careful scrutiny,
 - PHE continues to review evidence on the potential public health impacts of emissions associated with shale gas extraction
 - PHE responds to requests from MPAs and others to assess the potential impact on health in specific circumstances
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Public Concern

- Case law has established that fear of crime can be a material consideration and this has been broadened to include public concern. Therefore genuine but unsubstantiated fears may be material considerations but they are likely to be given little weight if there is no objective supporting evidence.
 - The Inspector's Report for the Cuadrilla appeal stated: "The Appellants accept that public concern is capable of being a material planning consideration and refer to the case of *West Midlands Probation Committee v SSE and Walsall MBC*".
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Regulation of Seismicity

- Before fracking can take place a Hydraulic Fracture Plan must be approved by:
 - Oil and Gas Authority (OGA)
 - Environment Agency (EA)
 - Health and Safety Executive.
 - OGA is the independent regulator responsible for ensuring operators mitigate the effects of induced seismicity
 - Risk of earth tremors is a material consideration and MPAs are advised **they should rely on the assessment of the OGA.**
 - Well integrity is checked before fracking can recommence
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Managing seismicity

Managing onshore induced seismicity

Hydraulic Fracture Plan (HFP)



Operator sets out how it will control and monitor the fracturing process

Identifies and assesses the locations of existing faults to prevent hydraulic fracturing from taking place near them

HFP must be agreed with OGA and Environment Agency

OGA must be satisfied controls are in place to minimise disturbance

Monitoring



Before and during operations, the operator must carry out seismic monitoring as agreed in HFP

May include additional recording to measure levels of ground motion close to nearby dwellings and other structures

Where magnitude/ground motion are in line with the HFP, this confirms geological understanding and injection can resume, subject to any mitigation as part of the agreed HFP

Management – “traffic light system”



M ≥ 0.5

Operator must suspend injection, reduce pressure and monitor seismicity and ground motion for any further events before potentially resuming



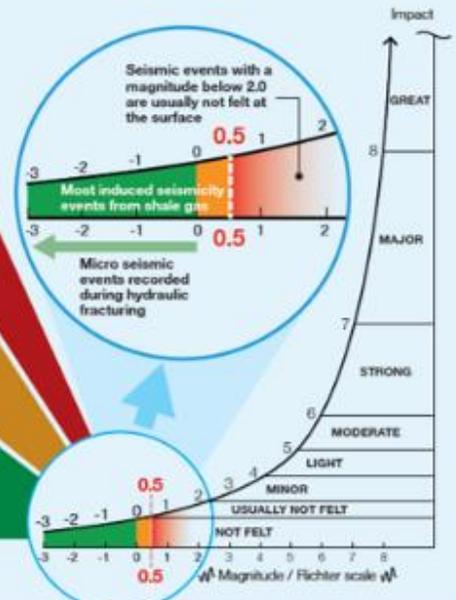
M ≥ 0.0 to < 0.5

Injection proceeds with caution, possibly at reduced rates. Monitoring is intensified



M < 0.0

Injection proceeds as planned



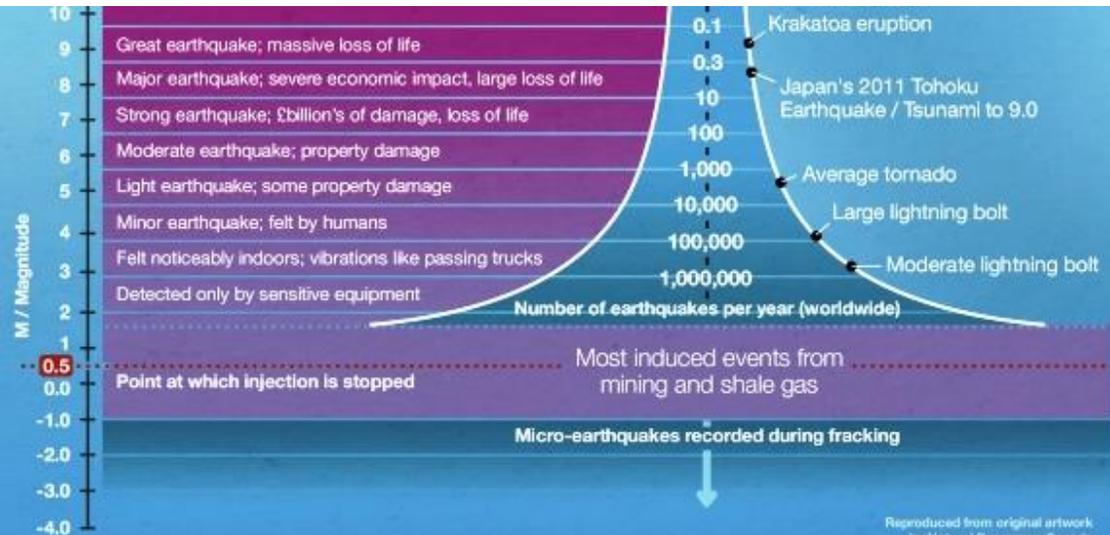
Traffic Light System

Traffic light monitoring system

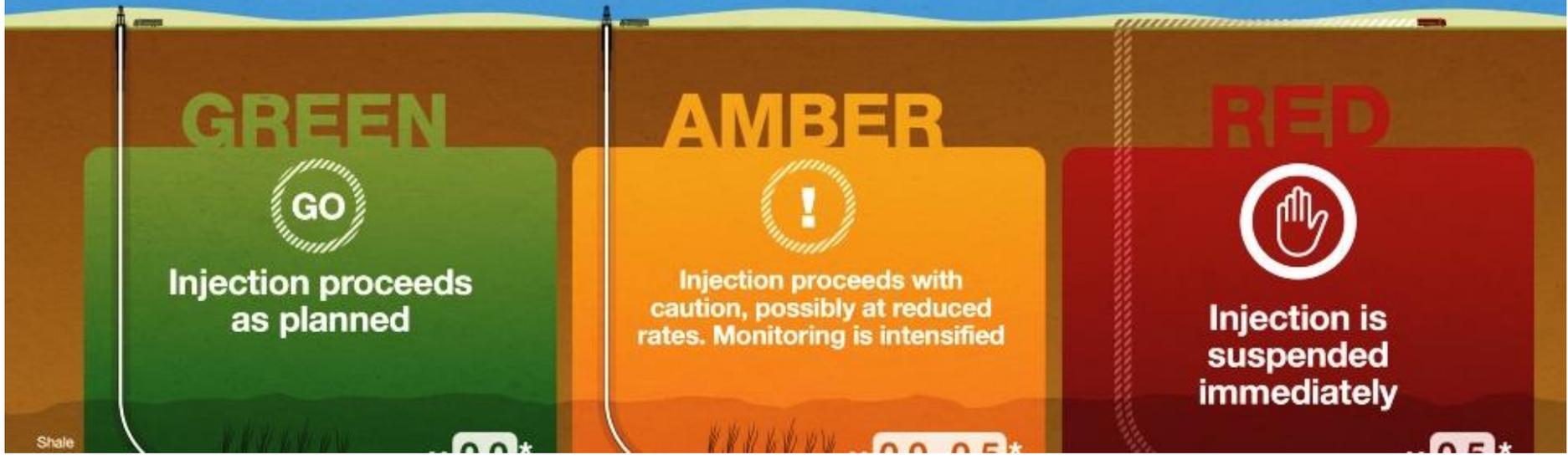
Controls are in place so that operators will have to assess the location of faults before fracking, monitor seismic activity in real time and stop if even minor earth tremors occur.

If a magnitude greater than M **0.5*** (0.5 on the Richter scale) is detected operations will stop and the pressure of the fluid will be reduced. This level should limit further earthquakes, known as 'induced seismicity', which may happen after the pumping is completed.

*subject to review and may change.



Reproduced from original artwork by Natural Resource Canada



Weight (1)

- There is law a clear distinction in law between whether something is a material consideration and the weight which it is to be given.
 - Materiality will depend on the circumstances of the case and ultimately a decision for the courts.
 - It is for the decision maker to decide what weight is to be given to the material consideration in each case.
 - Subject to the 'test of reasonableness' the courts will not get involved in the question of weight.
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Weight (2)

- NPPF paragraph 205: “...*great weight should be given to the benefits of mineral extraction, including to the economy....*”
 - Harthill Appeal Inspector’s report: “*The Government expects Mineral Planning Authorities to give great weight to the benefits of mineral extraction, and this includes shale gas exploration. The national importance of the development proposed is therefore a matter to which I attach great weight and it represents a benefit against which any harm from the development should be balanced*”.
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Non-material Considerations (1)

Various issues may cause public concern but are not likely to be material planning considerations. These include:

- **house prices and house insurance**
 - **personal circumstances**
 - **the applicant** – although the OGA needs to be satisfied about operator competence, financial viability and competence
 - **the strength or volume of opposition/objection** - it is not the number of objections, but the evidence in support of the planning reasons for objection, that is the material consideration.
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Non-material considerations (2)

- **Revised NPPF Para 183** - is the proposed development an acceptable use of land
 - **PPG Para 110** – for issues which are covered by other regulatory regimes (seismic monitoring, flaring, operation of surface equipment, treatment of waste, chemical content of fluid, well design, construction and integrity and decommissioning) MPAs should rely on the assessment of the regulatory bodies
 - **PPG Para 112** - MPAs will need to be satisfied that these issues can or will be satisfactorily addressed by taking advice from the regulatory body
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Decision Making



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Making planning decisions

- Planning decisions involve balancing many competing interests. In doing this decision makers need an ethos of decision-making in the wider public interest on what can be controversial proposals.
 - The risk of controversy and conflict are heightened by the openness of a system which invites public opinion before taking a decision.
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The Committee Decision

- You are not expected to be experts.
 - You are expected to listen to the experts and then apply judgement (within the parameters).
 - You then either accept the officer recommendation.
 - Or explain your 'rebalancing' (the weight) of policies and material considerations to reach a different decision
 - The officer report and the full minute of any decision not to accept the recommendation then provides a transparent audit of how the decision was arrived at.
-

Decision contrary to officer recommendation (1)

- Councillors can come to a decision that differs from the recommendation
 - But it must be justified on planning grounds (based on the plan and material considerations)
 - Committee must give justified planning reasons for decision (it cannot be left to officers)
 - May be subject to appeal (or other challenge) so reasons must be defensible
-

Decisions contrary to officer recommendation (2)

- Is there a sufficient evidential basis for the decision?
 - Would anyone reading the decision, especially the applicant, understand why permission was refused?
 - Can you describe the harm that would result if the development did not go ahead? And why conditions would not be sufficient to mitigate that harm.
 - Is it clear what the policy support is for the decision?
 - Have all the other material considerations been given the appropriate weight?
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Managing the Committee meeting (1)

- It is important for members to be able to take advice on precedents and reasonableness of reasons / conditions, if moving a proposal contrary to officer recommendations.
 - Some authorities decide they are minded to reach a decision with the broad reasons with the officers to report back working up these putative reasons / conditions or explaining any risks of costs when full consideration given.
 - Better if trust to seek advice before the meeting.
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Managing the Committee meeting (2)

- During the debate where the Committee has reached a different balance of material considerations to the officer recommendation, officers could be asked to explain to the Committee before a decision is made:
 - Which issues raised by the members / public can be given weight and why others cannot
 - What conditions / reasons are likely to be found reasonable if challenged
 - However, as public sessions and appeal rights, officers inhibited and advice before the event is better
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Shale gas/Fracking is controversial



Predetermination or predisposition

- Decision makers are entitled to be ***predisposed*** to particular views – provided they remain open to listening to all the arguments and changing their mind in the light of all the information presented at the Committee meeting
 - ***Predetermination*** is when a decision maker has a closed mind to any other possibility beyond their predisposition such that they are unable to properly assess an issue
 - Committee members must take great care when making statements in advance of the determination of planning applications as there is a risk that they can be misinterpreted or taken out of context
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Guidance on predetermination

- As a councillor working in a political environment do not be afraid to express your views on an issue BUT
 - Avoid giving the impression that you have made up your mind before hearing the officer report and any representations at the Committee meeting
 - If you comment in advance use words that make it clear you have yet to make up your mind
 - Be particularly careful in any discussion with developers or objectors or meetings at which minutes are not recorded, as there is a risk that you will be misrepresented or your comments will taken out of context
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Summary

- Shale gas applications are controversial
 - Decisions must balance competing interests and be based on national and local planning policies and other material considerations
 - You **can be predisposed** on a matter but you must have an open mind and **cannot predetermine**
 - Aggrieved parties may legally challenge a decision - experience is that such challenges may come from an applicant or an affected interested party
 - Risk of successful appeal - especially when officer recommends approval and reasons for refusal are not supported by clear evidence
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Break-out Session 1: Does exploration for shale gas represent sustainable development?



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Discussion Points

- Consider whether the definition of sustainable development in the NPPF “the objective of sustainable development can be summarised as meeting the needs of the present without compromising the needs of future generations to meet their own needs” can apply to shale developments.
 - Consider how the three strands of sustainable development economic, social, environmental, can apply to shale developments.
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Breakout session 2 – the planning merits of a case study for an exploratory well and fracking site



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Task

Read through the fictitious decision notice for the development of the Hawthorn shale gas exploration and appraisal site.

Discuss each of the 10 reasons for refusal and identify which reasons Roseworth MBC would be on doubtful grounds and why and which reasons could be capable of being evidenced at a public inquiry.



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Final Questions, concluding remarks and evaluation



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PAS needs your feedback

- PAS need to know what you think. On reflection, was today actually useful ?
 - 10 minutes of feedback in return for £100s of support
 - We read all comments and use your ideas to change what we do and how we do it
 - Please complete the feedback/evaluation form
-

How can you help us?

- Subscribe to our bulletin.
 - It's not another newsletter – our events and materials
 - Talk to us. We are friendly. pas@local.gov.uk
 - Tell us what we can do to help
 - Invite us to your local POG
 - Show off if you are doing great things
 - Remember the Khub practitioner network
 - We hang out there too
-

We are at local.gov.uk/pas

PAS

We provide high quality help, advice, support and training on planning and service delivery to councils. We help local government officers and councillors stay effective and up to date. We have a 'sector led' improvement approach, where local authorities help each other to continuously improve.



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councillors and officers

(.gov email only)

Knowledge sharing, updates
and information

What's happening elsewhere?

Ask questions of your peers

Sign up: <https://khub.net>



The screenshot shows the Knowledge Hub interface. At the top, there is a purple navigation bar with the following menu items: GROUPS, PEOPLE, NETWORKS, and HELP. On the right side of the navigation bar, there is a user profile for 'Martin', an email icon, a notification bell icon with a red '3' badge, and a search icon. Below the navigation bar, the main content area is divided into two columns. The left column features a green rounded square icon with the text 'Effective Planning for Shale Gas'. Below the icon, it says 'Last activity - Today'. Underneath, there is a section titled 'You joined' with four options: 'Add to favourites' (with a bookmark icon), 'Subscribe' (with a checkmark icon), 'Leave the group' (with a minus icon), and 'This is a restricted group' (with a red lock icon). The right column displays the group title 'Effective Planning for Shale Gas - forum for planning authorities'. Below the title, there is a light blue dashed box containing the group's purpose: 'This group's purpose is to equip planning authorities to deal quickly and effectively with all aspects of planning applications for shale gas.' Below this, it states: 'Our aim as a group is help you to navigate and understand the latest national policy developments; plug you into help & advice from the regulators and signpost useful training, guidance and funding.' Finally, it mentions: 'The group is moderated by the LGA & PAS and is for local government planning professionals and councillors. We are also extending membership to key people working for the regulatory authorities.'



Questions?

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