The questions and draft responses to the Consultation paper "Permitted development for shale gas exploration".

Question 1

a) Do you agree with the following definition ('Boring for natural gas in shale or other strata encased in shale for the purposes of searching for natural gas and associated liquids, with a testing period not exceeding 96 hours per section test') to limit a permitted development right to non-hydraulic fracturing shale gas exploration?

This is quite a technical question. Paragraph 20 of the Consultation document indicates that the purpose would be to allow "*operations to take core samples for testing purposes*" (i.e. the core samples would be tested). However, the suggested definition indicates there would be a testing period not exceeding 96 hours, with the OGA Consolidated Onshore Guidance explaining that "*when testing a discrete section of the well, each section can be produced for a maximum of 96 hours but the total quantity of oil produced from all sections should not exceed 2,000 tonnes per section*".

This means the suggested definition would allow for a degree of production, which seems to contradict the approach that is being taken in paragraph 20.

As such, officers do not agree with the proposed definition

b) If 'No', what definition would be appropriate?

Officers recommend the following, more appropriate, definition:

"*Boring for natural gas in shale or other strata encased in shale for the purposes of searching for natural gas and associated liquids by obtaining borehole logs and taking core samples for testing purposes*"

This suggested definition is based upon officers' experience of dealing with a planning application for a monitoring borehole at the Tinker Lane site where the Environmental Statement stated:

> *"The well has been designed to obtain logs and core. This would enable an understanding of the geological sequence beneath the site to be obtained. Logging is the physical measurement of subsurface properties by lowering specialist tools down the wellbore. Coring is the collection of rock samples from the wellbore. These would then be analysed at the surface in order to understand the small scale properties of the rocks".*

There is a fundamental difference between collecting geological information in the form of borehole logs and core samples and testing the in situ rock (either with or without fracturing). Officers are of the view that there would not be an issue with putting gas monitoring equipment on top of the borehole for 96 hours to record any 'natural' flows of gas due to the pressure release. To not do so would be a missed opportunity in terms of data collection.

Question 2

Should non-hydraulic fracturing shale gas exploration development be granted planning permission through a permitted development right? Yes/No

No, officers do not consider that it would be appropriate for exploration to be granted planning permission through a permitted development right, for the reasons stated below.

Local involvement

The effect of the proposed legislation would be to make a national grant of planning permission for shale gas exploration and thereby removing the local level of decision making and local accountability that communities expect. Although the Government has stated that it remains fully committed to ensuring that local communities are fully involved in planning decisions that affect them, it remains to be seen how the permitted development process would enable full public involvement as the purpose of the consultation is to take shale gas exploration out of the current planning process.

Permitted development legislation

The GPDO legislation has been subject to significant levels of amendment in recent years, each time increasing the scope of permitted development with varying degrees of effectiveness. In some instances the new or amended rights have been particularly high profile with a large uptake from developers. For example research from the Local Government Association (LGA) found that 1 in 10 new homes across England in the last two years had come about through the new office to residential conversion permitted development rights, with some cities recording a majority of new homes being created this way. The LGA though highlighted that this has impacted on the inability of local authorities to secure any developer contributions towards local infrastructure or affordable housing requirements.

Paragraph 34 of the consultation document acknowledges that it is unclear how effective the proposed legislation would be (in the Government's aim to further the industry) given it envisages a range of exclusions, limitations and restrictions. This shows that these types of proposals would result in multiple and complex planning issues which require expert consideration by planning and regulatory experts with local knowledge on a case by case basis.

Prior approval and fee income

In some of the more recent amendments to the GPDO the legislation has introduced the requirement for prior approval for certain limited and technical matters such as flooding, noise and transport. The introduction of a similar type of procedure for shale exploration would allow at least some consideration of these technical matters at a local level and provide additional safeguards to prevent unacceptable developments. It does however introduce additional work for the Minerals Planning

Authorities which has not been matched with an appropriate level of fee payment (currently £96 or £206 for prior approvals). The consultation also considers whether there should be a level of public consultation which, together with the technical assessments, can result in a similar level of work as a full planning application. If such an approach is taken forward it would be appropriate to make an accompanying amendment to the Town and Country Planning (Fees for Applications, etc.) Regulations to set an appropriate fee level. Officers suggest that it sets the fee as it would be the same if a full application was being made. For the applications dealt with at Nottinghamshire Tinker Lane attracted a fee of just under £10,000 and Misson Spring just under £23,000. Officers suggest there should be a fee schedule based upon a certain amount per well, or based on the site area similar to planning application fees at present.

Another potential method of dealing with a fee shortfall might be for there to be an extension of the existing shale wealth fund provisions which would allow for grants to be paid to the MPAs who deal with these matters.

Unreasonable delays

This proposal to make shale gas exploration permitted development appears to be an attempt to speed up the time it takes to get exploration off the ground, which would remove the thorough consideration of potential impacts and the measures which can be put in place (through conditions and S106) to mitigate and compensate such impacts.

With reference to Paragraph 11 of the consultation document in relation to the time taken to deal with the application, this states that MPAs have taken up to 83 weeks for a decision with agreement for time extensions. This is a direct reference to the Misson Springs planning application. However, in the case of that application the delays were due to multiple Regulation 22 requests for further information, which the applicant was slow at providing; the long and complex Section 106 negotiations; and delays caused by the legal challenges relating to restrictive covenants raised by objectors during committee proceedings. All these factors increased the time taken to deal with an already complex application. It is likely that even if exploration were made permitted development there may be so many processes, limitations and other complex considerations that decisions may not be much quicker than the current process.

Enforceability

If shale gas exploration development was to be defined as permitted development the limitations list would have to be very carefully worded to cover all the possible impacts and issues which might fall to be considered in the planning arena for each any every possible site. These would then have to be enforceable which would no doubt be via an enforcement notice for unauthorised development if it fell outside those permitted. If only one aspect was breached the County Council would have to consider whether it would be expedient to take enforcement action bearing in mind the undoubted public pressure the authority would be put under to act.

To conclude, permitted development rights should only be used to free up the planning system by allowing uncontroversial and limited impact development to be granted. Officers do not consider that this should relate to shale gas exploration for the reasons given above.

Question 3

a) Do you agree that a permitted development right for non-hydraulic fracturing shale gas exploration development would not apply to the following?

Areas of Outstanding Natural Beauty; National Parks; The Broads; World Heritage Sites; Sites of Special Scientific Interest; Scheduled Monuments; Conservation Areas; Sites of archaeological Interest; Safety hazard areas; Military explosive areas; Land safeguarded for aviation or defence purposes; and protected groundwater source areas.

This appears to be a relatively comprehensive list and, as such, officers generally agree with the suggested list of excluded areas where permitted development rights would not apply. Additionally, if the development would be EIA development then the new rights do not apply and officers consider that it would be useful to make reference to this within this list of restrictions.

All excluded areas set out above have definitions within the legislation so it would be beneficial for the legislation to cross reference to these definitions. For instance:

"Sites of archaeological interest" (as defined in The Town and Country Planning General Permitted Development (England) Order 2015) means land which:

(a) is included in the schedule of monuments compiled by the Secretary of State under section 1 of the Ancient Monuments and Archaeological Areas Act 1979 (schedule of monuments);
(b) is within an area of land which is designated as an area of archaeological importance under section 33 of that Act (designation of areas of archaeological importance) (19), or
(c) is within a site registered in any record adopted by resolution by a county council and known as the County Sites and Monuments Record.

It will be necessary to provide absolute clarity in terms of the definitions of the various excluded areas within the list. For instance if "sites of archaeological interest" included any site with a Historic Environment Record (HER) on it, there may be very few sites in Nottinghamshire that would qualify for permitted development. Both the Misson Springs and Tinker Lane sites have records as they have been identified as having archaeological interest and would, in planning be terms, be regarded as Non Designated Heritage Assets.

The definition of "Protected groundwater source areas" is set out in The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016 as follows:

(1) For the purposes of Class JA, "protected groundwater source area" means any land at a depth of less than 1,200 metres beneath a relevant surface area.

(2) In paragraph (1), "relevant surface area" means any land at the surface that is:

(a) within 50 metres of a point at the surface at which water is abstracted from underground strata and which is used to supply water for domestic or food production purposes, or

(b) within or above a zone defined by a 50-day travel time for groundwater to reach a groundwater abstraction point that is used to supply water for domestic or food production purposes."

It is worth noting that reference to protected groundwater source areas, as defined above, appears to be the same as Source Protection Zone 1 (Inner Protection Zone) only, and would not include SPZ2 and 3. In the case of the planning applications submitted to Nottinghamshire County Council, Tinker Lane fell into SPZ3 and Misson Springs was just outside a SPZ 3.

b) If 'No', please indicate why

Officers recommend some additional area should also be protected from non-hydraulic fracturing shale gas exploration development, as detailed in the answer to (c) below.

c) Are there any other types of land where a permitted development right for non-hydraulic fracturing shale gas exploration development should not apply?

Irreplaceable habitats

The revised NPPF includes greater protection for 'irreplaceable habitats' including ancient woodlands and trees. They are defined in the NPPF as *Habitats which would be technically very difficult (or take a very significant time) to restore, recreate or replace once destroyed, taking into account their age, uniqueness, species diversity or rarity. They include ancient woodland, ancient and veteran trees, blanket bog, limestone pavement, sand dunes, salt marsh and lowland fen.*

In line with this and the Government's 20 year Environment Plan, this additional protection could be given. This would be particularly relevant to Nottinghamshire in the case of Sherwood Forest.

Listed Buildings

Whilst the demolition of a Listed Building would require planning permission there is no restriction where a proposal would indirectly affect the setting of a listed building. Currently Article 5 offers the only power available to MPAs in such cases where there would be an unacceptable adverse impact to the setting of a Grade I listed building. This is a very limited power and does not fully respond to the legal duty local authorities and the Secretary of State have to preserve listed buildings and their settings and

Conservation Areas. It is not possible to set an arbitrary stand-off to listed buildings as their settings can vary greatly. It is a professional judgment which is required on a case by case basis. This also applies to stand-offs to ecological designations. This matter was relevant to the Misson Springs site with its proximity to a SSSI.

It is suggested that Article 5 could be amended to give MPAs greater ability to restrict developments where appropriate, such as to include the protection of all listed buildings or the setting of conservation areas.

Question 4

What conditions and restrictions would be appropriate for a permitted development right for non-hydraulic shale gas exploration development?

Officers consider that the protection of residential amenity seems to be generally lacking here, except for the reference to "restrictions on any operations carried out within a certain distance of sensitive site users".

The starting point for restrictions should be Class KA as introduced in The Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2016. If the Government decides not to make the new permitted development right subject to any local prior approval process it should at the least require a prior notification, allowing the MPA the opportunity to consider the use of an Article 5 direction (which should be widened in scope as suggested in the answer to Question 3 above).

As set out in the answer to Question 3 above if the development would be EIA development then the new rights do not apply by virtue of Article 3 (10) and (11). It would be useful to provide a cross reference to this within any list of restrictions that may be specified so to make it clear that it is likely that the developer would have to engage with the MPA to screen the proposal for EIA Regulation purposes.

In officers' experience of dealing with the two sites in Nottinghamshire, there were a significant amount of site specific conditions (and matters covered under the associated legal agreements) that were needed to make both developments acceptable in planning terms. Officers remain extremely concerned about the effectiveness of generic conditions or restrictions being used to mitigate the specific impacts at different sites. This highlights why this type of development is not suitable for the permitted development regime.

However, one area that would benefit from specific restrictions is noise. In line with the Planning Practice Guidance, day time noise limits at the nearest sensitive receptors should be limited to no more than 10dB above background level, with total noise not exceeding 55dB. With regards to night time noise, levels should be no higher than 42dB at the nearest sensitive receptors.

Question 5

Do you have comments on the potential considerations that a developer should apply to the local planning authority for a determination, before beginning the development?

Paragraph 33 of the consultation paper states:

"*By way of example, the prior approval considerations might include transport and highway impact, contamination issues, air quality and noise impacts, visual impacts, proximity of occupied areas, setting in the landscape and could include elements of public consultation*".

The prior approval topics set out are very similar to the topics that would be covered in a planning application, but without the democratic decision making process involved in a planning application. Also, as raised in officers' response to Question 2 above, the amount of work involved (officer time and cost) would be comparable to that of a planning application, albeit with no planning application fee associated with it. It would be unreasonable to significantly increase the workload of MPAs in this way without adequate financial recompense for the work that would need to be undertaken and which would allow the MPA to properly resource the work. Suggestions that this could be adequately covered by a Planning Performance Agreement (PPA) are misguided. Covering these costs under a PPA would rely on the goodwill of the applicant/developer to pay the authority, with no requirement for them to do so. Officers would welcome the continuation/expansion of the shale wealth fund to guarantee funds to MPAs to deal with these matters.

Furthermore, there are concerns about the amount of time that would be given to consider these issues. For example, the County Council has recent experience of dealing with prior approvals under Part 17 Class K (b), which allows for the carrying out of seismic surveys. This basically allows 28 days for the MPA to agree additional conditions. Such a time period would not be adequate to consider the issues listed in Paragraph 33 above.

Question 6

Should a permitted development right for non-hydraulic fracturing shale gas exploration development only apply for 2 years, or be made permanent?

Officers have interpreted this question as asking whether the permitted development rights should be changed permanently, or whether they should be trialled for a two year period before being made permanent. The draft response is based on that assumption.

Given the clear lack of understanding as to the impact that the changes would have, or how effective they would be (as admitted in Paragraph 34), going ahead with permanently changing the permitted development rights would seem to be quite a risk. However, it would be less risky for the Government to make the change temporary with the option to remove the permitted development rights in two years' time, rather than permanently changing them. This two year trial would allow for a full

assessment of the effectiveness of the permitted development regime for this type of development and enable Government and MPAs to judge what the impacts have been and whether any exploratory development has been sufficiently controlled and its impacts properly mitigated.

Question 7
Do you have any views the potential impact of the matters raised in this consultation on people with protected characteristics as defined in section 149 of the Equalities Act 2010?

Officers have no specific comments on this question.