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Shale gas: the developing regulatory regime

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ONE OF THE CHALLENGES FACING THE SHALE gas industry is grappling with the different regulatory regimes in each jurisdiction. The UK provides an interesting illustration of these challenges. In England, the Conservative Party supports the progression of the industry. In comparison, the Welsh, Scottish and Northern Irish administrations are taking a more cautious approach. This divergence corresponds with recent commitments made by the UK government to devolve onshore oil and gas licensing powers to Wales and Scotland. Consequently, the latest onshore licensing round, which was announced in August 2015, issued petroleum exploration and development licences to operators in England only.

While the regulatory regime in England is seeking to enable the shale gas industry to advance from the current exploratory phase, the Conservative government is mindful of the need to strike an appropriate balance between allowing the industry to develop in a timely way and ensuring that there is robust regulation. This article highlights several recent regulatory developments targeting this balance, which include:

- the insertion of new hydraulic fracturing 'safeguards' into the Petroleum Act 1998, leading to the requirement of a new hydraulic fracturing consent from the Secretary of State; and
- enabling operators, under the provisions of the Infrastructure Act (IA) 2015, to automatically access deep level land (over 300m beneath the surface) for the purpose of hydraulic fracturing operations, without needing to negotiate horizontal access rights with landowners.

The territorial extent of these measures is England and Wales only, and at the time of writing, only the second measure is in force.

There is also an important decision awaited at European level that will determine the course of the industry across Europe. Further to its 2014 Recommendation, the European Commission is considering whether there is a need for specific EU legislation to govern hydraulic fracturing operations in a consistent way across member states. It is not yet clear if the Commission will decide to introduce legally binding measures. In the meantime, member states are governing hydraulic fracturing independently, in line with national policies.

THE POLITICAL CLIMATE IN ENGLAND

The Conservative government intends to remove obstacles that are frustrating shale gas exploration and production. A statement, published on 13 August 2015 by the Department of Energy and Climate Change (DECC) and the Department for Communities and Local Government (DCLG), reiterated before Parliament on 16 September 2015, went further than ever before in stating there is a national 'need' to explore and develop our shale gas resources in a 'timely way'.

DECC/DCLG also announced they will amend existing planning processes for the purpose of 'fast-tracking' planning applications for shale gas projects if local planning authorities (LPAs) fail to determine the applications within the statutory timeframes – typically 16 weeks where an application is subject to an environmental impact assessment (EIA). In such cases, the Secretary of State will resume the power to determine the application. The delays observed to date in the determination of planning applications in England for shale gas operations have no doubt influenced this particular policy measure.

The government has also confirmed it will amend Part 17 of the Town and Country Planning (General Permitted Development) (England) Order 2015, to allow the drilling of boreholes in relation to petroleum exploration. This activity is currently excluded from the permitted development rights for mining and mineral exploration. However, the government sees merit in including this as permitted development as it would enable information on the groundwater environment to be provided early. This would help to inform the proposals for the exploratory phase (including drilling of petroleum wells), which would be subject to the full planning application process. At the time of writing, the government is also considering enabling as permitted development the drilling of boreholes for seismic investigation.

It is hoped that these measures will give more certainty to operators, reduce bureaucracy and support the growth of the industry.

THE IMPORTANCE OF LOCAL ENGAGEMENT

The DECC/DCLG statement also recognised that there is a need to engage with the public on the topic of shale gas. This includes disseminating relevant, independent and credible information to help demonstrate that the current regime is safe and robust. The August statement confirmed that the Health and Safety Executive (HSE) has received funding which will help to double its local engagement capacity and increase the availability of inspectors for onshore shale gas operations. The Environment Agency (EA) also received funding, which will enable the deployment of dedicated local officers to undertake proactive local engagement. Furthermore, funding is being made available to support mineral planning authorities deal with shale planning applications.

To enhance transparency and the provision of 'evidence-based' information, a research consortium led by the British Geological Survey, and involving DECC, is currently gathering baseline environmental data from Lancashire and North Yorkshire. The geographical remit of the project reflects the submission of planning applications for shale gas projects to LPAs in these areas. Once collated, the results will be made available directly to the public.

The DECC/DCLG statement also confirmed the government's plans for a sovereign wealth fund. This is the idea that a proportion of the tax revenues recouped from shale gas production will be used to benefit the local communities that are hosting shale gas development sites. Details of the sovereign wealth fund are expected to be announced later in 2015.

EXISTING LEGAL CONTROLS IN ENGLAND

As well as needing to obtain planning consent under the planning regime, companies that are considering entering the shale gas industry face a number of different consenting requirements before hydraulic fracturing is capable of being commenced. The following list is not exhaustive, but serves to demonstrate the number of regulators presently involved in the regulation of shale gas projects in England. The required consents include:

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(a) A Petroleum Exploration and Development Licence (PEDL) pursuant to the Petroleum Act 1998

The PEDL grants the company exclusive rights to search, bore and get hydrocarbons within a defined geographical area, based on ordnance survey 'blocks'. On 18 August 2015 the Oil and Gas Authority (OGA), the UK's oil and gas regulator, announced the results of the latest onshore licensing round. This revealed that 27 onshore blocks (mainly in the east Midlands, Lancashire and Yorkshire) will be formally offered to 12 companies. At the time of writing, a further 132 blocks are subject to detailed assessment under the Conservation of Habitats and Species Regulations 2010. As mentioned, this latest licensing round focuses on England only.

(b) Environmental permit in accordance with the Environmental Permitting Regulations 2010

This involves liaising with the EA, ideally from a very early stage (pre-application). The EA is fairly advanced in its regulation of shale gas projects, as it has already granted permits to an operator for the purpose of hydraulic fracturing in Lancashire. To make sure that the public understands the decision-making process, and the considerations that have been taken into account, the EA publishes detailed decision documents on its website.

(c) Well consent

Post-IA 2015, it is thought that the OGA may start to administer these consents going forward. Previously, DECC had the responsibility to issue a well consent (after checking it was satisfied that HSE, environmental and planning consents had been issued).

(d) Well notification in accordance with the Borehole Sites and Operations Regulations 1995

Operators must notify the HSE of the well design prior to commencing operations. In addition to this, the well provisions of the Offshore Installations and Wells (Design and Construction, etc) Regulations 1996 apply. These require independent examination of the well. This forms part of a well examination scheme, which applies from the design and construction phases through to final abandonment. The HSE also has an ongoing role to ensure the well operator complies with health and safety regulations, to protect those working at the site and members of the public more generally.

RECENT LEGAL DEVELOPMENTS

The IA 2015 contains a number of provisions that are specific to the shale gas industry. The effect of these includes changing the extent to which operators need to obtain landowner consent in the case of horizontal drilling, and introducing a new suite of hydraulic fracturing safeguards to the overall consenting regime for shale gas projects. At the time of writing, not all of these provisions have a commencement date.

Access rights

Sections 43-49 of the IA 2015 came into force on 13 April 2015. They introduce an automatic statutory right for companies to use deep-level land which is more than 300 metres below the surface, for the purpose of exploiting shale gas resources. The impact of these provisions is that there is no longer a need to obtain landowner consent for horizontal drilling under property at these depths. This prevents owners of such land from claiming trespass.

This significant change in the law was subject to public consultation and met with significant opposition. Nevertheless it was seen by the government as being crucial to the development of the shale gas industry, given the early attempts being made by some landowners to frustrate proposed shale projects using the law of

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trespass. On the basis that the exploitation of shale resources was regarded as being of significant public interest, the changes have been passed through into law.

The government has come under recent criticism for the apparent decline in its focus on climate change prevention policies. It is interesting to note that s49 of the IA 2015 provides that the Secretary of State must from time to time request the Committee on Climate Change to provide advice on the impact which combustion of, and fugitive emissions from, petroleum got through onshore activity is likely to have on the Secretary of State's ability to meet the duties imposed by the Climate Change Act. In s49(6), the Secretary of State is given the power, based on this advice, to make regulations which amend or repeal the sections providing for the right of use of deep-level land to the extent the Secretary of State considers appropriate. Such changes would not apply retrospectively but the Secretary of State could potentially use this authority to prevent the access right being used in the future without the need for primary legislation should they have concerns about the impact of emissions from onshore petroleum activities on the UK's ability to meet its carbon target.

Payments to landowners

Section 45 of the IA 2015 enables the Secretary of State to lay down secondary legislation that requires operators to compensate landowners in return for the right to use deep-level land for hydraulic fracturing operations. As there is currently a voluntary scheme in place whereby operators have offered financial benefits to local communities hosting shale gas development, it is possible that we will only see further legislation being passed if the voluntary scheme is not effective.

Safeguards

Section 50 of the IA 2015 inserts new provisions into the Petroleum Act 1998, adding further safeguards to the consenting regime for shale gas exploration in England and Wales. The new s4A provides that a well consent must contain a prohibition on hydraulic fracturing at a depth of less than 1,000 metres under the surface. For increased depths of more than 1,000 metres, a hydraulic fracturing consent must be obtained from the Secretary of State. In turn, the Secretary of State may not issue a hydraulic fracturing consent unless satisfied that 11 specific conditions are met. These conditions are:

1) that the LPA has taken into account the environmental impact of the development;

2) arrangements have been made for independent inspection of well integrity;

3) methane in groundwater will be monitored before hydraulic fracturing commences;

4) arrangements are in place for the monitoring of methane emissions to air;

5) hydraulic fracturing shall not take place within 'protected groundwater source areas';

6) hydraulic fracturing shall not take place within 'other protected areas';

7) the LPA has taken into account the cumulative effects of the planning application;

8) the substances used in hydraulic fracturing are approved by the relevant environmental regulator;

9) the LPA has considered whether to impose a site restoration condition;

10) water and sewerage undertakers are consulted during the planning process; and

11) the public is given notice of the relevant planning permission.

To a large extent, the above conditions reinforce the existing controls that are in place in relation to environmental impacts, monitoring, and providing information to the public, but there are various new aspects, such as water companies becoming statutory consultees on planning applications relating to shale oil and gas exploration.

An additional new aspect is the protection of 'groundwater source areas' and 'other protected areas'. Draft secondary legislation defining these areas is currently being considered by Parliament. If the Onshore Hydraulic Fracturing (Protected Areas) Regulations come into force as drafted (at the time of writing) the position will be that, subject to obtaining the relevant consents and permissions, hydraulic fracturing operations may take place under Sites of Scientific Interest (SSSIs) at depths of 1,000 metres or more. This represents a policy change from the previous coalition government's stance back in January 2015, when it was suggested that there would be an outright prohibition on hydraulic fracturing in SSSIs. Under the draft legislation, National Parks, the Norfolk and Suffolk Broads, Areas of Outstanding Natural Beauty and World Heritage Sites would be specifically defined as 'other protected areas', meaning that such operations could not take place within 1,200 metres of the surface in these areas – giving an additional 200 metres of protection compared with the 1,000 metres restriction already set out in s50 of the IA 2015.

POLITICAL AND REGULATORY DEVELOPMENTS IN EUROPE

There is also an EU dimension to the shale gas regulatory regime that could influence the course of regulation across member states. By way of background, the impetus for review at EU level was set in motion back in January 2014, when the Commission published a Recommendation on minimum principles for the exploration and production of shale gas using high-volume hydraulic fracturing. The Recommendation sets out minimum principles for member states to consider

when applying existing EU legislation to the regulation of shale gas in their territories. The Recommendation is not legally binding but strives for consistency across the EU in how hydraulic fracturing is being regulated.

Member states were invited to report on their application of the Recommendation by the end of 2014. To date, member states have taken different approaches in how they regulate the shale gas industry. For instance, certain countries still have in place blanket moratoriums on shale gas development until the environmental (and other) impacts have been researched further. The Commission is currently reviewing whether an EU Directive or Regulation is necessary to enforce minimum standards across Europe, or whether it is suitable for member states to develop their own legislation, considering both subsidiarity and democratic principles.

The Recommendation also brought forward the notion that, in the interests of transparency, chemicals used for hydraulic fracturing applications should be formally brought within the European chemicals registration framework under Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (known as the REACH Regulation). This proposal is now being implemented and the European Chemicals Agency (ECHA) has clarified how companies can report, more explicitly, the use of chemicals for hydraulic fracturing purposes. Ultimately, this is likely to improve the ability for interested parties to be able to search ECHA's public database for chemicals used in hydraulic fracturing, and addresses the concern that there was previously a lack of transparency in this area.

CONCLUSION

The approach adopted by the European Commission may have a significant bearing on the UK's regulatory position, although the Conservative government will be hoping that the safeguards built into the domestic regulatory regime will satisfy any minimum criteria imposed through European legislation.

The recent policy announcements by DECC/DCLG send a strong message of support to the developing industry in England, but also address the need for local engagement with communities, towards which the government has allocated funding of £5m for 2015-16. With details of a sovereign wealth fund also expected later this year, both the government and the shale gas industry will be hoping that the various recent regulatory initiatives will assist in convincing the general public of the potential advantages of an active, well-regulated shale gas industry.

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