

One Further Step Towards UK Shale: Government Provides Underground Drilling Access for Developers

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In June this year we reported on the opening of the UK Government's public consultation concerning its proposal for changes to the laws concerning underground drilling access in connection with projects involving shale drilling and fracking, as well as geothermal energy extraction.

The existing UK legal framework dictates that mineral rights to petroleum belong to the Crown, with the Government issuing licences to operators to permit them to exploit those petroleum rights. However, subject to those mineral rights in favour of the Crown, owners of freehold land have rights over their land both at surface level and down to the centre of the earth. This means that after receiving a licence from the Government, an operator must also obtain the landowner's permission in order to have access to and operate under privately owned land. If an operator fails to obtain such permission it will be committing a trespass. Operators must therefore negotiate with individual landowners to secure underground access (usually in return for a payment). These negotiations can be protracted and there is currently no standardised approach.

The Government's public consultation proposed underground access legislation, pursuant to which:

- (i) operators would be permitted to drill below private land without first having to negotiate access rights, provided such drilling would be at depths of at least 300 metres. Operators would still need to obtain any necessary consent to commence drilling but the right of access would not be dependent on landowner permission, thereby removing the issues relating to the law of trespass;
- (ii) operators would make a voluntary payment to the relevant local community body in return for the automatic right of access, and the Government would retain the right to enforce payment through regulation if the proposed voluntary scheme was not followed; and
- (iii) a voluntary notification system would be introduced to enable operators to notify the public, in particular the affected communities, of details of the relevant areas of underground land that would be accessed by drilling and the payments made in return for such access.

The public consultation was open from 23 May to 15 August 2014 and received over 40,000

responses with 99% of respondents being opposed the proposed legislative amendments. The Government has indicated that 90% of the total responses received did not respond to the specific consultation questions but instead used the consultation to voice objections to fracking and shale gas operations (with nearly 29,000 of these responses submitting a template anti-fracking campaign text).

With respect to the responses received from “stakeholder organisations” (being respondents with national or regional presence, representative bodies, public sector bodies, locally elected bodies and bodies operating in relevant sectors including oil and gas, energy and law), 55% supported the proposed underground access legislation and 24% opposed to the changes. The full break-down, by respondent, of the responses received to the consultation question of “should the Government legislate to provide underground access to gas, oil and geothermal developers below 300 metres?” is set out below:

Source: Government Response to the Consultation on Proposal for Underground Access for the Extraction of Gas, Oil or Geothermal Energy, 25 September 2014

In the face of the significantly negative feedback, the Government has replied that it recognises “that there is opposition to hydraulic fracturing and the use of fossil fuels in general. The consultation was not intended to address this wider issue, and focussed specifically on underground access”. The Government concluded that “Having carefully considered the consultation responses, we believe that the proposed policy remains the right approach to underground access and that no issues have been identified that would mean that our overall policy approach is not the best available solution”.

As was announced in the Queen’s Speech earlier this year (which presents the Government’s legislative agenda for the year ahead), the Government has already proposed draft legislation in the Infrastructure Bill to enable the proposals set out in the consultation to become law. Following conclusion of this consultation, the Government has announced that it will “put before Parliament primary legislation to implement the policy proposals set out in the consultation paper”.

The Government’s consultation evidences that the issue of hydraulic fracking continues to polarise public opinion and that the anti-fracking campaign remains highly active. Nonetheless, the Government’s response to this consultation shows that it remains committed to the development of the UK’s indigenous shale resources. Coming shortly after the “No” vote in the Scottish referendum, this development will further enhance certainty for the UK oil and gas industry and its

key project developers and investors.

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