

INSIGHTS

UK Government Continues The Fight for Shale

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By: [Darren Spalding](#) and [Eimear Murphy](#)

Introduction Despite facing opposition on numerous fronts, the development of a regulatory regime to promote the exploration of shale gas in the UK has continued apace following David Cameron's comments earlier this year that the UK was "going all out for shale"^[i]. The UK government has reiterated the national need to develop the UK's shale gas resources to improve the country's energy security and transition to a low-carbon economy. For over a decade, the UK has been a net importer of gas following declining levels of production from the UK's North Sea's gasfields. Imports of gas accounted for 45% of the UK's supply last year.^[ii] The Department of Energy and Climate Change ("DECC"^[3]) predicts that, without any contribution from shale gas, net imports of gas could increase to 75% by 2030.^[iii] Amber Rudd, Secretary of State for Energy and Climate Change, considers the development of the UK's shale resources as an essential component of the UK's energy mix going forward and has pledged to "deliver shale"^[4]. The passing of the Infrastructure Act 2015 and new measures introduced by the UK government in August 2015 to enable shale gas planning applications to be fast-tracked continue to foster the development of the industry. This article gives an overview of the latest legislative reforms and measures affecting the shale gas industry in the UK.

Underground access rights and the Infrastructure Act 2015 In the UK, rights to petroleum belong to the Crown and the UK government issues licences to operators to search for, bore for and extract petroleum (which includes shale gas and oil). Ownership of freehold land in the UK generally entitles the landowner to rights at the surface and down to the centre of the earth. As a result, prior to the introduction of the Infrastructure Act 2015, onshore extraction companies were required to obtain the consent of potentially numerous landowners to gain underground access following receipt of a licence from the UK government. Failure to do so would constitute a trespass. *Bocardo SA v Star Energy*^[iv] was the first modern case to consider how far beneath the surface a landowner's title to land extends and whether the landowner can sue for trespass for underground incursions. The Supreme Court held that the landowner owns everything below the surface and can sue for damages for subterranean trespasses. As a result, prior to commencing any form of onshore drilling programme, extraction companies were compelled to enter into negotiations with landowners to secure underground access, which often resulted in a protracted and costly process. In May 2014, DECC launched a public consultation which proposed various legislative changes, including:

- granting underground access rights to operators seeking to extract petroleum and geothermal energy from below 300 metres, without the need to obtain landowner consent;
- a requirement for a voluntary payment to be made to the local community in return for underground access; and
- a notification system to enable companies to inform the public of areas of underground land that would be accessed by drilling and the payments which would be made in return for such access.

Notwithstanding that over 99% of the 40,647 responses to DECC's public consultation opposed the proposal to legislate to grant underground access below 300 metres,^[v] the UK government confirmed its intention for the proposal to become law. The Infrastructure Act 2015^[vi] (the "Act"^[v]) came into force earlier this year and gives a person the right to use "deep-level land"^[v] (at least 300 metres below surface level) to exploit petroleum or geothermal energy without the consent of the landowner. This legislation effectively put an end to the increasing number of trespass cases being used tactically by anti-fracking organisations to hinder the development of shale gas in the UK. The Act also confirms that deep-level land may be left in a different condition than it was in before the exercise of the right and absolves landowners of any liability for loss or damage caused. The Secretary of State may require companies using land for the purposes of exploiting petroleum or geothermal energy to pay landowners financial compensation for the use of that land. The amount of financial compensation and the means such compensation is determined can be specified by the Secretary of State by regulations but, until such regulations have been passed, any compensation is voluntary. Notwithstanding the voluntary nature of such payments, the UK Onshore Operator's Group ("UKOOG"^[v]) (the representative body for the UK onshore oil and gas industry) published a Community Engagement Charter^[vii] setting out the industry's commitment to public engagement and setting forth the industry's proposals for financial compensation for affected communities, including:

- at the exploration stage, benefits of £100,000 per well-site where fracking takes place (split between the local community and the county); and
- at production stage, 1% of revenues to communities (which it is estimated could be worth in the region of £5 " 10 million for a producing site over its lifetime).^[viii]

It is likely that the Secretary of State will gauge the success of UKOOG's voluntary scheme before determining whether further regulation or guidance from DECC is necessary. Finally, it is worth noting that the provisions of the Act concerning the exploitation of petroleum and geothermal energy in deep-level land and safeguards for hydraulic fracturing only extend to England and Wales and not to Scotland and Northern Ireland. **Fast-track planning for shale gas applications** The UK government and industry participants have been frustrated at the slow rate of progress of exploratory fracking for shale gas and oil. One of the factors which has stymied growth to date has been the protracted planning process. This was recently demonstrated following applications from Cuadrilla Resources to Lancashire county council in May 2014 to drill and frack a number of wells in two sites (Preston New Road and Roseacre Wood). The

county council repeatedly delayed proceedings and then finally rejected the bids in June 2015.

The county council's decisions and, in particular, the length of time taken to reach them were met with dismay by the oil and gas industry. On 13 August 2015, the UK government announced new measures for shale gas planning applications to be fast-tracked through a new, dedicated planning process and which could deny councils the right to decide fracking applications, unless they approve them quickly. The Secretary of State for Energy and Climate Change commented that *"to ensure we get this industry up and running we can't have a planning system that sees applications dragged out for months, or even years on end"*^[ix] As part of the new measures, appeals against any refusals of planning permission for exploring and developing shale gas must be treated as a priority for urgent resolution. Councils that repeatedly fail to determine oil and gas applications within the 16 week statutory timeframe (unless applicants agree to a longer period) will be identified and, where applications are made to underperforming local planning authorities, the Communities Secretary of State will consider whether he/she should determine the application instead of the relevant council. The measures announced by DECC have been welcomed by UKOOG who commented that *"recent experience has shown that the planning process is unwieldy and the time taken for planning decisions has soared from three months to over a year, causing delay and costs and this is not in the interests of local people, the industry, or indeed the British people"*^[x] **Establishment of a sovereign wealth fund** Last year the UK government proposed that, to ensure that local communities continue to benefit from the development of shale gas extraction in the long term, an amount of shale gas extraction revenues may be held in a new sovereign wealth fund. As fracking continues to polarise public opinion, the establishment of a sovereign wealth fund by the UK government is viewed in some quarters as an attempt to "win over"^[xi] communities by advocating the long term benefits the development of the shale gas industry. The UK government confirmed in August 2015 that it plans to present its proposals for a new sovereign wealth fund towards the end of 2015.

Conclusion The impetus to increase shale production in the UK is linked with the government's goal to bolster energy security by decreasing the nation's dependency on imported energy sources, as demonstrated to great success in the US. The passing of the Act and introduction of measures to fast-track shale gas planning applications confirm the UK government's commitment to the development of the UK's indigenous shale gas resources. Industry will certainly welcome these initiatives as developers remain keen to accelerate the rate of progress of exploratory fracking in the UK. ^[i] <https://www.gov.uk/government/news/local-councils-to-receive-millions-in-business-rates-from-shale-gas-developments> ^[ii] <https://www.gov.uk/government/publications/shale-gas-and-oil-policy-statement-by-decc-and-dclg/shale-gas-and-oil-policy-statement-by-decc-and-dclg> - DECC,

Digest of UK Energy Statistics, July 2015 ^[iii] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/414172/Productivity

^[iv] *Bocardo SA v Star Energy* [2010] UKSC 35 ^[v] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/358521/government

^[vi] <http://www.legislation.gov.uk/ukpga/2015/7/contents/enacted> ^[vii]

<http://www.ukoog.org.uk/images/ukoog/pdfs/communityengagementcharterversion6.pdf>

^[viii] <https://decc.blog.gov.uk/2015/08/10/amber-rudd-secretary-of-state-for-energy-and-climate-change-on-shale-gas/> ^[ix]

[https://www.gov.uk/government/news/faster-decision-making-on-shale-gas-for-](https://www.gov.uk/government/news/faster-decision-making-on-shale-gas-for)

economic-growth-and-energy-security [x] <http://www.ukoog.org.uk/about-ukoog/press-releases/158-ukoog-welcomes-the-government-s-move-to-speed-up-decision-making-on-shale-gas-applications>