

Regulation – a help or a hindrance to the UK shale industry?

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DESPITE significant public opposition in the UK to hydraulic fracturing (fracking) and shale gas development, there has been an upswing of activity and announcements in the first half of 2014.

In May, the British Geological Survey (BGS) released a report on the potential of the Weald basin shale. Weeks later, the government announced its proposal to change trespass laws to enable horizontal drilling for shale gas and oil to be carried out without threat of challenge from surface landowners. At the same time, the Department of Energy and Climate Change (DECC) is pushing ahead with the framework for the 14th onshore licensing round, which is expected to open significant acreage in the UK to shale gas exploration.

An issue regularly identified by shale industry groups is the permitting and regulatory system in the UK, described as a “major barrier” in a 2013 Institute of Directors report. This May, the Economic Affairs Committee of the House of Lords took a pro-industry stance on development of the UK’s shale resource describing it as a “national priority” and calling for urgent action to be taken. The common concern is that development of the UK’s shale is proceeding too slowly and that the planning and permitting process is putting-off investment.

Opponents of the industry argue the opposite, that the industry is insufficiently regulated, and that public consultation and land owner rights are being marginalised. Which side is correct, and can we expect to see significant changes in regulations both at the UK and European Union level?

The legal framework in which the UK is developing unconventional oil and gas is dynamic and will be significantly tested over the next two years. A key part of this process is the parallel regulatory review and assessment that is taking place in Brussels, a process that culminated in January 2014 with the European Commission’s “Recommendation” (on minimum principles for the exploration and production of hydrocarbons, such as shale gas, using high-volume

hydraulic fracturing) and the related “Communication”. Accumulated European legislation already provided a framework for oil and gas exploration and production, both conventional and unconventional, but the early stage nature of shale gas in Europe, and concerns about the industry generally, has meant that this legal framework has been put under the microscope.

Health and safety

A Europe-wide public consultation on shale gas and whether further safeguards with respect to health and the environment were required reported in June 2013. Some 60% of respondents considered that shale gas should be developed in Europe if proper health and environmental safeguards were in place, although 30% considered that such activity could proceed without the need for further safeguards. In general, the responses indicated support for EU level action and a more a comprehensive regulatory regime.

Assessment of the laws of member states found that general mining and environmental legislation was being applied to both unconventional and conventional oil and gas, and that there was no consistent application of existing EU laws, particularly environmental laws, across the member states. In some areas, including well design and integrity, and disclosure requirements for fracking chemicals, the broad conclusion was that there was insufficient coverage under existing EU law. The Recommendation forms part of the European Commission’s integrated energy and climate policy framework to 2030, as well as seeking to address problems in the working of the internal market caused by divergent laws for shale gas across the EU. It is a set of policy guidelines setting out “minimum principles” that Member States are “invited” to follow so as to address environmental and health concerns and to give operators and investors a required certainty. The Communication accompanies the Recommendation and explains its purpose and legal effect. Technically the Recommendation relates only to certain “high-volume hydraulic fracturing” activities, however the Commission made clear that it could have a broader application to both conventional and unconventional hydrocarbon activities.

The Recommendation does not itself have the force of EU law, but member states are encouraged to apply its principles and “invited to give effect” to them by 28 July 2014. Commencing December 2014, member states will be required to report annually on the measures they put in place in response to the Recommendation, and the European Commission will review the effectiveness of the Recommendation in 18 months (22 July 2015), after which it will decide whether to propose legislation for fracking that is legally binding.

14th Licensing Round

The DECC consultation on the UK’s strategic environmental assessment for the licensing of onshore unconventional oil and gas closed for comments on 28 March, and DECC is now working on its “Post-Adoption Statement” summarising how it intends to proceed in relation to further onshore licensing. DECC’s strategic environmental assessment ahead of new licensing concluded that the existing regulatory framework in the UK was sufficient to identify and mitigate environmental effects, and that adopting current best practice in shale gas operations would minimise environmental effects to an acceptable level. In a significant intervention, the report *Are we fit to frack?*, prepared by six environmental groups, including the National Trust and the RSPB, challenged DECC’s findings, concluding that the current regulatory regime was not fit for purpose, and that too much reliance is placed on self-regulation and inspection by regulators with insufficient shale industry knowledge. Whilst some of the conclusions in *Are we fit to frack?* have been challenged as inaccurate, there is nonetheless a clear division of opinion on what regulations are needed to safeguard health and the environment, and how they should be implemented. It seems likely that some legal challenges will be made to DECC’s 14th licensing round process.

So why is there such a difference of opinion? It is correct that there is no overarching legislative package in the UK regulating unconventional hydrocarbon exploration and development. The existing regime has been described as cumbersome in



its complexity and lack of a single source of guidance. The UK's system of regulation of shale exploration and development is however considered to be compliant with the European Commission's Recommendation. It is therefore unsurprising that commentators, operators and now the House of Lords Economic Affairs Committee are urging the government to take action to streamline these regulations into a single coherent system, with consistent timelines, coordinated (and where possible reduced) oversight from the lead agencies and departments of national and local government, and a process of appeal that is consistent in its criteria and not duplicated. Notwithstanding that the government has strived to promote a business friendly tax and regulatory environment for shale in the UK, its failure to address these regulatory issues has delayed the progress of exploration drilling, and may contribute to lower levels of investment than could have been expected.

UK onshore oil and gas licences were developed for conventional oil and gas exploration and development and not with respect to shale oil and gas, and the specific characteristics that apply particularly to the exploration and appraisal of shale. New terms for onshore licences will be issued in the 14th licensing round, expected

Fracking revolution: Shale gas could change the UK energy landscape

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later in 2014, and DECC is currently completing its process of consultation following which it will publish how the government will proceed with onshore licensing. It is anticipated that the new licence terms will address the exploration period term, flexibility on timing of work obligations, broader options to retain acreage, ability to stratigraphically split a licence area, and shortening of time periods for confidentiality of well data.

Weald results

The potential opportunities available in the 14th licensing round were highlighted by the recent report of the BGS on the shale oil and gas resource in the Weald, a prosperous rural area in the south of England. The report suggests that between 2.2 billion and 8.6 billion barrels of oil may be contained in the Weald rock formations, but a less significant amount of gas given the relative immaturity of the shale's development. There is considerable opposition in the Weald area to shale activity and fracking, not least because the Weald covers areas important for wildlife and scenic natural beauty. However there are currently 13 producing conventional oil wells in the Weald, and so the findings of the report are perhaps unsurprising. This report, together

with the earlier BGS report on the Bowland shale (in the north and west of England), suggest significant potential, however the BGS stresses that the absence of significant exploration in these areas means that there is still insufficient information on the potential of the resource.

Further complicating the picture has been the prospect of landowners, supported by those that oppose shale development, using the law of trespass to frustrate, delay or increase the cost of UK shale exploration and development. Landowners hold rights to the subsurface of their property as well as the surface, and a horizontal wellbore passing under their land without consent could amount to trespass, a position confirmed by the Supreme Court in the Star Energy case. Although the conclusion of that case was that an oil company can be liable for trespass where it drills below land without the landowner's consent, the actual compensation awarded was minimal. However the prospect to the shale industry of delay and court proceedings relating to trespass actions has spurred the Government to bring forward a 12-week consultation for new legislation to disapply the law of trespass to underground drilling below 300 metres, coupled with a "voluntary" payment of £20,000 (\$34,000) to the affected community (not to individual landowners) for each horizontal well drilled. Based on an average well pad, the payment under such a scheme could reach £800,000.

The European Commission's position therefore is to hold-off from developing a new law specific to shale, and instead to rely on existing legislation, and to monitor its guidance and good practice. The possibility of a European shale law does however remain should the member states fail to take account of the Recommendation. The UK is at a different cross roads, and the question is not so much the adequacy of its laws for the shale activity itself, as to their adequacy to meet the demands and concerns of the industry to support successful exploitation without further delay. The recent government initiatives suggest that the industry's message, that it wants effective delivery by Government, has finally been received. ●