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UK GOVERNMENT BUILDS ITS CASE FOR SHALE DEVELOPMENT

By Michael Hutchinson

Shale Gas: UK Government seeks to allay climate change fears

A government report into the carbon impacts of shale gas has found that a properly regulated UK shale gas industry will not compromise Britain's ability to achieve its ambitious carbon reduction targets.

The findings, announced by Secretary of State for the Department of Energy and Climate Change (“DECC”) Ed Davey in a speech in September, are consistent with those of the Committee on Climate Change in April 2013 and challenge anti-fracking protestors to articulate better their climate change case.

With that and recent tax benefit announcements, the government is beginning to assemble a regulatory and fiscal regime which could kick-start investment in the U.K.'s shale sector, help reduce the UK's reliance on imported fuel and boost the economy.

Yet while fracking has government support, public scepticism on shale gas extraction remains a key potential hurdle. Protestors' physical presence at sites has already obstructed permitted operations. The need to obtain and maintain a so-called “social licence to operate” (“SLO”), a consent from within communities to develop in their area, has never been more crucial.

Regulating Fracking

Shale gas extraction is currently regulated like any other type of gas or oil exploration, although the government plans to streamline the regulatory regime for fracking to spark investment.

Under current regulations, companies wishing to start fracking are likely to require:

- One or more planning permissions accompanied by an Environmental Impact Assessment;
- A DECC production and exploration licence;
- An environmental permit for fracking fluid injection, waste water discharges and where there is a risk that natural substances could pollute groundwater as a result of the fracking process and/or for the release or burning of waste gases;
- A water abstraction licence;
- Coal Authority consent;
- Health and Safety Executive (“HSE”) approval of the design of the proposed well and ongoing supervision by the HSE; and
- Notify the Environment Agency that the operation could affect water conservation.

The Environmental Damage (Prevention and Remediation) Regulations 2009/153 and contaminated land regime may also apply



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where there is actual or threatened pollution while it may be necessary to consider hazardous waste regulations when disposing of fracking fluid. Under the Borehole Sites and Operations Regulations 1995/2038, operators must also notify HSE in advance of significant alterations to wells or risk of accidental release of fracking fluid or shale gas.

Companies must monitor seismic activity in potential development areas especially following public alarm after fracking tests triggered the 2009 earthquakes near Blackpool. The government has implemented a traffic light monitoring system whereby any magnitudes greater than 0.5 on the Richter scale will halt operations. U.S. companies have been subject to property damage and personal injury claims caused by tremors, albeit amidst less well-regulated and far more extensive fracking operations.

Government reforms

Protestor legal action is one of the main risks associated with unconventional fuel exploration and production. A cottage industry has developed over the past 15 years comprising eco-protestors and service providers, notably lawyers acting on a contingent fee basis, launching judicial review (“JR”) proceedings and challenging the legality of planning permissions with activists developing a sophisticated understanding of relevant law and procedure.

Anticipating multiple JR challenges to fracking projects, the government has started to tackle risks which may cause delay and additional cost.

Planning Fast-Track, introduced in July 2013, identifies planning related challenges and JRs at an early stage and refers them to appropriate members of the judiciary. A Specialist Planning Liaison Judge now reviews all major infrastructure cases to ensure they are heard by a specialist High Court Judge. Judges have

also been identified in the other Administrative Court centres where cases are expected to generate intense local interest.

The government is also planning to create a Specialist Planning Chamber in the Upper Tribunal to deal with planning JRs and related statutory challenges. Specialist planning judges will be deployed to the Lands Chamber to help resolve challenges faster and prioritise cases. There are also plans for a s288 challenge permission filter to stop weak cases progressing further and to abolish legal aid for s288 and s289 challenges, limiting the number of applicants opposing developments.

Revising the test on standing

Controversial proposals also seek to restrict the test on standing for JR claimants to those with a direct and tangible interest. The government hopes this shall reduce the number of politically-driven claimants, such as anti-fracking NGOs.

Reforming procedure

The government is also consulting on ‘no difference’ arguments: proposing to consider claims which would not make a difference to the overall decision earlier in the process and amending the threshold on whether the law would have affected the outcome.

Social licence to operate still key

While government proposals make it less likely that courts or authorities will oppose potential developments despite community opposition, a social interest strategy that will give companies a SLO and also help maintain it must be central to every company’s strategy. Without it, operational development will just not be possible as companies will be spending their time negotiating and removing protestors, as we have seen at Balcombe.

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The government needs to work towards establishing a regulatory framework which promotes stakeholder and community engagement and incorporates Corporate Social Responsibility principles. Businesses working in the well-established mining regimes of Canada and Australia are encouraged to build a strong SLO by informing communities of developments, keeping to timescales, making adequate planning provisions and establishing a dialogue with affected communities. Environmental set backs, failure to meet targets, safety incidents and land disputes during development have been the main challenges companies trying to maintain this SLO face.

The government has made great progress in establishing a sympathetic regulatory and legislative framework that facilitates fracking projects. However, if it fails to foster a regime to institutionalise SLO and if companies neglect to make SLO considerations an integral part of future strategic plans, then community and public opposition and not the legal and regulatory framework could prevent the UK capitalising on shale gas exploration.

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