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UK Shale Gas - September 2016

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Introduction

Estimates of the length of time that the UK's onshore shale gas reserves could supply the UK for have ranged from 25 to 500 years. Given such estimates, uncertainty in the UK's energy security, and the economic benefits associated with the shale gas industry (eg the US "shale gas revolution" and its remarkable resilience through the downturn in gas prices), the UK Government is keen to exploit these reserves. However, resistance at a local level has hitherto been a largely insurmountable hurdle for the industry, with no shale gas yet having been recovered on a commercial scale. This article looks at the current regulatory landscape for shale gas extraction, problems struck by applications to date, the latest Government proposal to overcome the local engagement problem, and finally analyses whether this proposal is likely to be successful.

Current regulatory regime for shale gas

A shale gas operation in England[1] triggers the need to comply with or obtain permits under myriad different statutes and permitting regimes, including those relating to petroleum exploration and development licensing, health and safety laws, water abstraction licensing, environmental permitting, planning (and environmental impact assessments), drilling and hydraulic fracturing, not to mention the need to negotiate land access agreements. However, the area that has proved most problematic for the onshore shale gas industry to date is the planning regime.

The planning regime gives decision-making power to local planning authorities (which, for mineral-related applications, are referred to as mineral planning authorities ("**MPAs**"). Members of the local community have a right to make submissions on these applications. Planning permissions will also be needed for each step of a shale gas operation, from exploration to appraisal to production. Environmental impact assessments ("**EIAs**") may also be required if effects are likely to be significant or the proposed site is close to a particularly sensitive area, which introduces another layer of cost (and grounds for challenge). There is a 13 week statutory determination period for planning applications, and 16 weeks where an EIA is involved. There is a six week window for judicial review applications and for statutory challenges under the planning regime, after a decision is made.

1 A moratorium is currently in place on all unconventional oil and gas extraction, including fracking, in Scotland. In Wales, in what is often referred to as a "moratorium", no application may be approved without consent of the Minister of Natural Resources. In Northern Ireland, in what is also sometimes referred to as a "moratorium", devolved central government has issued a planning guidance document that requires a presumption against unconventional hydrocarbon extraction until there is sufficient and robust evidence on all environmental impacts. No such measures are in place in England.

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The main tool central government has used to make the planning regime more favourable towards shale gas is the National Planning Policy Framework (the "**NPPF**").[2] This document is a mandatory consideration in planning applications. The NPPF includes a set of paragraphs that favour shale gas development, including a requirement that local planning authorities (or MPAs), in determining applications "*give great weight to the benefits of the mineral extraction, including to the economy*", and in preparing Local Plans, that they "*identify and include policies for extraction of mineral resource of local and national importance in their area*". The NPPF is supported by National Planning Practice Guidance ("**NPPG**"),[3] which includes guidance intended to clarify the process for, and encourage, shale gas developments. However, as discussed below, applications have had mixed results.

Recent applications

In late June 2015, Lancashire County Council rejected planning applications from Cuadrilla Bowland Limited for drilling and hydraulic fracturing of exploratory wells, and the testing of those wells for hydrocarbons. Cuadrilla appealed these decisions to the Planning Inspectorate, and the Secretary of State subsequently used his call-in powers to make himself the decision-maker in respect of the appeal. At the time of writing, there is still no decision or even event date for the inquiry (although evidence was due in January 2016, and some reporting suggested it would be happening in early 2016).

In May this year, Third Energy was granted planning permission by the North Yorkshire County Council for hydraulic fracturing of previously drilled wells, and production of gas from those wells, near Ryedale. This decision was made despite fierce public opposition to the application. The application from Friends of the Earth and members of a local residents group for judicial review of this decision reflects continued public opposition to the application, although we understand this application is no longer on foot.[4]

These decisions have received considerable media coverage, and have come to typify problems that the onshore shale gas industry has experienced in advancing their projects, particularly, in relation to public buy-in. This is perhaps part of the thinking behind the Government's latest initiative.

Latest Government incentive: funds directly to households

It is in this context that, on 7 August 2016, the British Prime Minister Theresa May launched a new consultation into changes to the Shale Wealth Fund (the "**SWF**"), under which it was mooted that residents could directly be given money from this fund. Under the SWF, communities could receive up to 10% of tax revenues derived from shale exploration in their area, with the Government suggesting this could mean up to £10 million per eligible community. The Treasury has stated that the benefits from the SWF would only be delivered after full production commences and tax revenues are accrued. It is difficult to think of a more direct manner in which the Government could attempt to get local communities on board with shale gas.

2 *National Planning Policy Framework*, Department for Communities and Local Government, March 2012.

3 *Planning practice guidance for onshore oil and gas*, Department for Communities and Local Government, July 2013.

4 Personal communication, Administrative Court, 16.09.16.

One of the key drivers of the US shale gas industry has been the direct benefit accruing to landowners through shale gas productions as a result of the interest that they hold in sub-surface mineral resources. In the UK, however, the surface owners do not generally own an interest in those resources.

The SWF should not be confused with the United Kingdom Oil and Gas community benefits scheme, under which operators would pay £100,000 per site to the local community, regardless of whether or not recoverable deposits are found, and 1% of gross production revenues.

Comment

If the recent experience of a similar initiative in respect of housing applications is anything to go by, this initiative is unlikely to change the stance of local communities. The New Homes Bonus Scheme was implemented in 2011. Under this initiative central government rewarded local authorities for granting housing developments by matching Council Tax raised on each new home built for a period of six years. Although it did not expressly provide for funds to directly be given to homeowners (distribution was at local authority discretion), studies on this policy have generally concluded that it has had little impact on housing supply.[5]

There are also practicability problems with the SWF policy, such as how to quantify the level of inconvenience on different home occupiers in payments given (for example a slight increase in background noise may be considered less significant than frequent lorry truck drive-bys).

If this initiative proves unsuccessful, the Government may consider taking power away from local authorities, for example by using call-in powers on all shale gas applications, or by making such applications subject to the centrally determined consent development order regime rather than the planning regime. However, this kind of power reshuffling is unlikely to be politically acceptable.

Shale gas developers should therefore have a strong and clear public relations strategy in place well before making planning applications associated with their proposals. Despite the Government's attempts to smooth the path for shale gas extraction, without local buy-in, applications will inevitably still meet resistance under the planning regime.

Mayer Brown have recently established an unconventional hydrocarbons team in London. This team comprises experts in upstream joint ventures and commercial documentation, regulatory issues for petroleum explorers and developers, and in planning and real estate matters. In addition the team work closely with our highly respected real estate litigation team and various independent PR houses to provide a comprehensive service to companies wishing to enter the UK shale market.

5 See the summary of reports commissioned on the impact of the New Homes Bonus and their key conclusions in *The New Homes Bonus (England)*, Briefing Paper Number 05724, House of Commons Library, 15 April 2016.

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