

energy lawflash

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UK Government Considers Curtailing Trespass Laws in Favour of Fracking

Following a change to planning laws that was welcomed by developers, government shows signs of promoting shale gas extraction operations in the UK.

The UK government has announced that it is reviewing the existing route by which operators can apply for access to shale gas located deep below the surface. In a statement, the UK Department of Energy and Climate Change said that it is “currently considering whether this existing route is fit for purpose”.

The UK is thought to be sitting on shale gas reserves valued in the region of £1.5 trillion (about \$2.5 trillion), and it is believed that much of these reserves can be accessed by fracking, which involves pumping water and sand into subsurface rock to create small fractures through which natural gas may escape for collection. Drilling often occurs horizontally, hundreds of feet below the surface and without the surface landowner’s knowledge.

Following the UK Supreme Court’s 2010 decision in *Energy Weald Basin Ltd v Bocardo*, even drilling that causes no loss of enjoyment on the surface may amount to a trespass under English law. Accordingly, surface landowners may, in some circumstances, obtain an injunction that prevents drilling or delay a project by pursuing lengthy appeals.

To avoid breaching current trespass laws, fracking developers must either obtain the landowner’s permission or apply to the Secretary of State for ancillary rights needed to exercise the rights contained in a Petroleum Extraction and Development License. In addition to introducing a potentially costly administrative burden, an application for ancillary rights may delay development because affected parties must be consulted and the High Court must eventually be satisfied that “reasonable efforts” have been made to reach agreement with landowners.

It is not yet clear how, if at all, the UK government will reform existing laws. One option under discussion would see developers pay landowners a set amount of nominal damages for notional trespass whilst, at the same time, removing landowners’ rights to apply for an injunction or appeal. Whatever changes are made, the UK government appears keen to reduce the uncertainty and possible delay faced by fracking developers under the current trespass laws.

This announcement reflects a general trend in UK government policy to encourage more widespread fracking in the UK. In December 2012, the UK government lifted an 18-month ban on fracking, allowing shale gas exploration to continue at various sites around Britain. Although the government has imposed a strict regulatory regime on fracking operations themselves, it has recently relaxed planning laws so that individual notices need no longer be served on landowners whose land will be subject only to underground operations. Such reform aims to make it easier and quicker for developers to get projects operational.

Morgan Lewis

Contacts

Although shale gas extraction remains in its infancy in the UK, Morgan Lewis has experience advising on shale gas projects and disputes throughout the United States, where fracking has been in widespread operation for several years. If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

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