

## WHAT'S HAPPENING UNDER YOUR LAND?

*Catherine Davey, a planning consultant at Stevens & Bolton LLP, looks into the draft Infrastructure Bill and the likely impact this may have on landowners.*

### Background

Draft legislation currently being considered by the UK parliament proposes significant changes to existing trespass laws to facilitate the development and growth of the geothermal and shale-gas industries in the UK.

You may not have been aware that the UK had potential for using geothermal energy. Although the UK does not have the potential of volcanic regions like those in New Zealand and Iceland, there are some locations where underground temperatures have the potential for exploitation in geothermal projects at depths of over 1km (heat only projects) and at depths of 4 to 5km (power projects). For more information on the potential see:

<https://www.gov.uk/government/policies/increasing-the-use-of-low-carbon-technologies/supporting-pages/geothermal-energy>

The draft Infrastructure Bill 2014-15 had its second reading in the House of Commons on 8 December 2014. The bill contains provisions (which will not apply to Northern Ireland) granting deep-level underground access rights for energy companies seeking to explore for and to extract gas, oil or geothermal energy.

### Existing law

Ownership of land in the UK currently entitles the owner not just to ownership of the surface but also, with some exceptions, down to the "centre of the earth". This relies on common-law principles dating back many years and was affirmed in a recent case (*Bocardo SA v Star Energy* (2010)).

As the law stands energy companies may need to obtain the consent of many different landowners before installing lateral underground wells. If permission is not obtained, energy companies may face claims for damages in trespass, although the damages awarded are likely to be nominal.

Currently negotiations between a landowner and a shale gas/geothermal energy company for drilling access under a site are a private contractual process. If consent is refused usually the energy company's only options are to divert the well to avoid the relevant land or to abandon the project. Since most geothermal projects will be located near densely populated areas, the need for multiple consents and the risk of refusal by one or more landowners is greatly increased.

Recognising these issues and given the government's commitment to developing geothermal energy and shale gas in the UK, the government launched a consultation process on changes to the regime earlier this year.

## **Consultation and Response**

In May 2014, the Department of Energy and Climate Change (DECC) published a consultation paper, 'Proposal for Underground Access for the Extraction of Gas, Oil or Geothermal Energy'. The paper included proposals for:

- legislation to allow underground access rights for energy companies extracting gas, oil or geothermal energy from land at least 300m below the surface (ownership of the land would be unaffected and drilling above 300m would still require the landowner's consent);
- a system for voluntary payments (£20,000 for each lateral well extending more than 200m) to be made to local community bodies instead of to individual landowners, supported by powers to enforce payment through regulations if the industry voluntary payment system is not honoured; and
- a voluntary public notification system, under which the energy company provides details to the community of the land to be accessed and related payments.

On September 25, 2014, DECC published details of the responses received during the consultation period. Whilst the overwhelming majority (99%) of respondents opposed the proposals, according to DECC, they "did not provide sufficient commentary to enable the government to change or refine the proposals". The government is therefore pressing on with legislation.

## **Infrastructure Bill**

The provisions contained in the Infrastructure Bill 2014-2015 include the following:

- a right to use "deep-level land" (i.e. any onshore land at a depth of 300m or more below surface level) "in any way for the purposes of exploiting petroleum (which includes oil and gas) or deep geothermal energy". In Scotland, this right can only be used to exploit deep geothermal energy where the energy is to be used for the generation of electricity;
- a non-exhaustive list of ways in which the rights may be exercised, including: drilling, boring, fracturing or otherwise altering deep-level land; installing infrastructure in deep-level land; and passing any substance through deep-level land;
- a non-exhaustive list of purposes for which the right of use may be exercised, including:
  - searching for petroleum or deep geothermal energy;
  - assessing the feasibility of and preparing for exploiting petroleum or deep geothermal energy; and
  - decommissioning;
- power for the secretary of state to introduce regulations requiring energy companies to make payments to landowners of affected land or to other persons for the benefit of affected communities. We are told this power will only be exercised where there is non-compliance with the voluntary payment system;
- power for the secretary of state to introduce regulations requiring energy companies to comply with a statutory public notification scheme. Again, the intent is that regulations will only be made if the voluntary notification system is not complied with; and
- further provisions, allowing the secretary of state to introduce enforcement mechanisms into any regulations he makes in relation to the right of use (such as financial penalties, restrictions / prohibitions and a requirement to consult).

The bill is due to move to the Committee stage in the House of Commons on a date to be announced and, if passed, is likely to become law by March 2015.

## **Comment**

The proposed underground access regime as detailed in the current draft of the Infrastructure Bill aims to remove a significant hurdle currently faced by geothermal and shale-gas energy companies in the UK. The government's hope is that in so doing it will allow the industries to develop to their full potential and provide substantial new energy resources for the UK.

Whilst these proposals will no doubt be welcomed by the industry, it remains to be seen whether landowners' concerns will be appeased by the proposed voluntary payment system and how this will operate in practice.

By an amendment tabled in the House of Lords in October 2014, the 'right of use' does not give the energy company any greater powers or duties/obligations than it would have had if the right had been if the " by a person legally entitled to grant it". It already has the making of provision which will give rise to litigation given that different landowners might grant rights subject to more or less onerous obligations.

The proposals represent a significant change to long-established UK land-law principles, but is one which may not have any significant effect on the majority of landowners.

**If you require further information or advice, please get in touch with  
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