

## Shale gas – will the new ‘fast track’ regime live up to expectations?

### **Claire Dutch and Harry Spurr consider whether the widespread and rapid deployment of hydraulic fracturing will become a reality.**

The government's September announcements on planning policy changes to support shale gas extraction have boosted confidence within the industry. Those announcements come in the aftermath of Lancashire County Council's decision in June to refuse consent for drilling at two sites between Preston and Blackpool. This came as a blow both to those within the sector, and to the government, where there is strong support for the widespread and rapid deployment of hydraulic fracturing. The changes announced in September reflect Whitehall's recognition of the local political and procedural obstacles that lie in the way of this objective. In this article, those measures are examined, and their implications considered.

Perhaps the most significant change in the package is the creation of a new regime to monitor the speed at which councils determine shale gas applications, and to take matters out of the hands of those whose performance is deemed unsatisfactory in this respect. Much like existing rules that apply to certain other planning applications, the system will require councils to decide more than 50% of shale gas proposals within the statutory determination period (or such other period as may have been agreed with the developer in a given case) or risk losing control of decision-making. Monitoring will be carried out annually, and where councils consistently fail to meet deadlines they will be "identified" as underperforming. In such cases Communities and Local Government Secretary of State, Greg Clark will actively consider calling in, for his own decision, further shale gas planning applications. Underperforming councils will be excused in two sets of circumstances – where they can demonstrate that exceptional circumstances have affected the speed of decision-making such that it would be unreasonable to treat their performance as unacceptable, and where the number of shale gas applications determined during the year in question is no more than two.

Among the other measures announced was a change in the Secretary of State's policy on recovering planning appeals for his own determination; the result is that the final decision on a greater number of shale gas

appeals will now be made by the minister. This policy change, which will remove decisions from the hands of councils and reflects the government's determination to influence more closely the deployment of projects, will take effect for a period of two years, after which it will be reviewed.

Meanwhile, a separate statement from Environment Secretary, Amber Rudd, also delivered in September, contained three important further matters.

First, in order to assist councils to deal with shale gas development proposals "as quickly as possible", they should adopt timelines agreed in advance with applicants, and use Planning Performance Agreements where appropriate. In addition, where possible, LPAs should save time by leaving certain issues to other regulatory regimes.

Second, the statement indicated that appeals – whether against the refusal of planning permission or non-determination – will be "prioritised" for urgent determination.

Third, it included confirmation that permitted development rights will be amended to allow borehole drilling for groundwater monitoring, and that consultation will take place on further changes to allow drilling for seismic and mine works investigations.

So what is the purpose of these changes and how effective will they be?

This government has been a supporter of shale gas extraction for some time – most actively since May's general election, but also when in coalition during the previous parliament. As long ago as January 2014 the Prime Minister is reported to have said that the then government was "going all out for shale", almost exactly a year before Chancellor George Osborne wrote to colleagues in the coalition cabinet urging action on various measures to promote hydraulic fracturing. Nonetheless such an approach has not been entirely uncontroversial. It appeared to run contrary to the instincts of the Liberal Democrat coalition partners, and indeed exposed tensions within the Conservative party itself, where many MPs and much grass roots support has been, and remains, opposed for environmental and other reasons.

Accordingly, legislative and policy developments have sought to strike a balance between open

encouragement and effective support on one hand and, on the other, appropriate protection for environmental and other interests. So, for example, July 2013 saw the introduction of policy to encourage councils to include in their local plans policies for shale gas whilst, at the same time, emphasising the importance of restoration and aftercare provision. Similarly, a relaxation of planning application notification requirements in early 2014 was followed by increased policy protection for sensitive areas such as National Parks and Areas of Outstanding Natural Beauty.

But this most recent set of changes represents, perhaps, the most overtly supportive measures introduced in recent years. This more positive stance almost certainly reflects two factors: first, the departure from government of the Liberal Democrats, and their restraining influence in this context; second, government and industry-wide frustration with events in June concerning Cuadrilla's proposals for development in Lancashire. According to Clark, the objective is "to enable planning applications and appeals to be dealt with as quickly as possible". Indeed the government's own website described the

new arrangements as akin to a "fast track" system. Fast track or otherwise, a number of points emerge.

The most obvious is that the industry will welcome the measures. By allowing decision-making to be taken out of the hands of councils – where local political influence is often decisive in respect of controversial developments, whatever their merits in proper planning terms – the new system will go some way towards addressing the frustrations of companies such as Cuadrilla over the attitude of local government officers and committee members towards shale extraction. Equally, measures to accelerate the speed at which appeals are determined will be warmly received. Dilatory decision-making by councils is the enemy of all development proposals; further slow progress at the appeal stage – not uncommon in complex and controversial cases – is particularly damaging.

More significant, however, is that despite such changes, it is clear that the new arrangements fall some distance short of creating a regime that is truly "fast track", for the following reasons.

First, even at its fastest, it will operate no quicker than existing targets for other forms of development. The universal statutory determination periods



will continue to apply to council decision-making. Meanwhile, Cuadrilla's Lancashire appeals are now scheduled to be heard in February, around nine months after the refusal of planning permission. Expect the decision to follow after a further delay. Even discounting the (surely not inconceivable) prospect of a High Court legal challenge to the result, it would be unrealistic to describe such a timeline as anything approaching "fast track".

Next, the mechanics of the designation system will in practice continue to permit substantial delay. This is because it is a blunt instrument: council performance is to be assessed annually only; there will be exemptions for councils in receipt of no more than two applications each year (surely in practice the vast majority) and those with convincing reasons for under-performance; and the rules offer merely the possibility of recovery by the Secretary of State, together with no guarantee of an expedited process once matters are in his hands. Despite this, the government's intention is that the mere threat of designation should encourage expedition by councils, but it remains to be seen how councils will in practice respond to such an incentive in circumstances where the local political context is often so challenging.

Further, whatever the speed of the decision-making process, there can be no guarantee that approval rates will rise. Irrespective of the incentives to encourage expedition on the part of councils, three things are clear. The first is that shale gas development will continue to be controversial. The second is that the majority of applications will continue to be determined by councils. The reality of development control at the local level is that unpopular projects often run into trouble because planning committees find it difficult to grant consent for political reasons, whatever the merits of the proposal in question. The new arrangements will do little to address this, not least because they allow councils to be judged only on the speed of their decisions, and not, unlike the rules that apply to certain other forms of development, their performance in defending such decisions at appeal. The third matter is that, even where the Secretary of State takes over decision-making, his capacity to grant permission and facilitate delivery will be limited by the usual factors: – development plan policy; material considerations; and the increasing tendency of objectors to frustrate

controversial development by challenging decisions in the courts.

Despite all this, however, the shale gas industry will welcome the changes announced. At the very least, they represent a clear endorsement of shale gas as a technology, and a positive statement of support for the future role of shale gas in the UK's energy sector. Further, it is not inconceivable, should evidence of a more efficient and balanced approach to decision-making by LPAs not emerge in due course, that we will see further changes, both policy and legislative. September's announcements might be seen as a signal of the government's willingness to engage in future interventions should it become necessary to do so.

It is also worth noting that Whitehall's more positive approach to shale gas development appears at odds with the increasingly restrictive policy context in which renewable energy development proposals are determined, such as the new requirement for wind energy developers to win the "backing" of local communities. This is a matter of controversy in some quarters.

Finally, the government's determination to extend its control over the planning process for shale gas developments contrasts sharply with two factors. These are the recent calls from the Independent Task Force on Shale Gas for increased community engagement, and, more generally, the concept of localism introduced by the coalition government. Against this context developers will need to remain conscious of the desirability of maintaining their social licence to operate, and of the importance of boosting public confidence levels in the industry.

### **Timeline showing shale gas legislative and policy developments**

#### **July 2013**

Guidance published:

- LPAs to make provision for shale gas extraction in local plans
- List of issues for LPAs to consider when determining applications
- Pre-application engagement important
- After care and restoration important

### October 2013

European Parliament proposes to amend environmental impact assessment law so that all shale gas proposals, irrespective of size, require EIA, but seemingly elects not to.

### Early 2014

Procedural changes:

- Introduction of standard planning application form for shale gas
- Relaxation of notification requirements

### July 2014

Policy on shale gas amended, e.g.:

- Minerals Planning Practice Guidance amended to confer greater protection on sensitive landscapes and sites (National Parks, AONBs, WHSs etc.)
- So SoS to “give particular attention” to recovering shale gas appeals

### February/July 2015

Infrastructure Act 2015/Onshore Hydraulic Fracturing (Protected Areas) Regulations 2015 – increased environmental protection, and rights of access.

- Prohibition on shale gas less than 1000m below ground
- LPAs must consider environmental impact, including cumulative
- Increased protection for groundwater sources, AONBs, NPs, WHSs
- Right to drill (300m minimum depth) under private land introduced

### August 2015

- Joint CLG/DECC statement, followed by written statements from Amber Rudd and Greg Clark:
- New regime for underperforming LPAs
- LPAs encouraged to determine applications promptly, to use PPAs, and to save time by leaving non-planning matters to other regulatory regimes
- Appeals to be prioritised
- Appeals recovery criteria amended for two years to include shale gas appeals
- SoS to actively consider calling in planning applications

- PD rights to be introduced to allow borehole drilling; consultation on further PD rights to allow seismic investigation

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