

Underground access



David Gervais of global specialist law firm Dechert explains the proposed changes to access rights for deep-level drilling in the UK

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

The UK government's Infrastructure Bill 2014-15, which had its third hearing in the House of Lords on November 19, 2014, contains provisions granting deep-level underground access rights for energy companies seeking to extract gas, oil or geothermal energy.

The proposed new legislation (which will not apply to Northern Ireland) will allow for geothermal energy exploration, drilling and extraction and will represent a significant shift from the current cumbersome regime for gaining access to subterranean assets.

EXISTING REGIME

At present, ownership of land in the UK entitles the owner not just to ownership of the surface but also, with some exceptions, down to the "centre of the earth". This ownership is derived from common-law principles dating back to the 18th century and was affirmed recently in the case of *Bocado SA v Star Energy* (2010).

Geothermal energy companies are therefore likely to require the consent of many different landowners to facilitate the running of 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.

Unlike petroleum projects, where there is a statutory appeals process via the secretary of state

and the courts, if negotiations between a landowner and a geothermal energy company fail, there is no appeals process, and 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 are 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



a constant flow of solutions

MULTICOUPLING GR

stucchi.it



- Quick connection and disconnection of up to ten hydraulic lines without risk of incorrect connection.
- Flat face couplings: easy to clean avoiding contamination of circuit, no fluid loss to the environment.
- Possible connection and disconnection with high residual pressure in the circuit.
- Safety lock on handle allows single hand operation.
- Safe and simple to use.



(DECC) published a consultation paper, 'Proposal for Underground Access for the Extraction of Gas, Oil or Geothermal Energy'. The paper includes 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 [US\$31,359] 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, the DECC published details of the responses received during the consultation period. The overwhelming majority (in fact 99%) of respondents were opposed to the proposals but, according to the DECC, these respondents "did not provide sufficient commentary to enable the government to change or refine the proposals" and the consultation was not intended to focus on wider issues. The government is therefore proceeding with legislation to implement the proposals without amendment.

INFRASTRUCTURE BILL

The draft 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;
- a 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. The intention is that this power will only be exercised where there is non-compliance with the voluntary payment system;
- a 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 there is non-compliance with the voluntary notification system; and
- further provisions, which allow 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 right of use includes the right to leave infrastructure and substances in the deep-level land; and does not give the energy company any greater rights than it would have had if the right had been granted by the landowner, nor does it relieve the energy company from any liability it would have had if the right had been granted by the landowner.

The bill is expected to move to the House of Commons shortly for further consideration by MPs 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 promises 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.

The proposals represent a significant change to long-established UK land-law principles, but one perhaps unlikely to have any direct or meaningful effect on the majority of landowners.♥

Dechert details

Dechert's energy lawyers represent clients worldwide on matters involving a wide array of energy resources, including oil, gas, liquefied natural gas, coal, nuclear, wind, solar, biofuels, hydroelectric, geothermal and other renewable energy sources.

The firm's finance and real-estate group is a provider of legal services to the real-estate, structured finance and securitisation markets.

Drilling of the Science Central borehole in the centre of Newcastle upon Tyne
Photo: BGS

"The proposals represent a significant change to long-established UK land-law principles, but one perhaps unlikely to have any direct or meaningful effect on the majority of landowners"

David Gervais is senior associate in the finance and real-estate group at Dechert