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## Fractured logic--FAQs

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**Environment analysis:** Recent months have seen a number of important legal developments to onshore oil and gas activity in the UK. These were considered in Part 1 of the series. Practical and political developments have been no less seismic and were considered in Part 2. In the final part of this series on fracking, Tim Pugh, partner in the planning, environment and infrastructure team at Berwin Leighton Paisner, offers answers to some often asked questions.

### The series

- o Part 1--legal developments
- o Part 2--practical and political developments
- o Part 3--FAQs

### **Are the Scottish moratorium and additional environmental protections introduced by the Infrastructure Act 2015 (InA 2015) the death knell for a viable fracking industry in the UK?**

It is popular for headline writers to greet every political twist and turn as another premature nail in the coffin of an as yet unborn UK shale industry.

The reality is very different. The Scottish moratorium will doubtless be a vote-winner and an industry inconvenience in the short term. Research to date has tended to conclude that hydraulic fracking is safe so long as appropriate precautions are put in place. Indeed, the 2014 Independent Expert Scientific Panel Report on Unconventional Oil and Gas commissioned by the Scottish Government concluded:

'Public concerns around unconventional oil and gas development include concerns about technical risk, such as water contamination, public health and seismicity, but also wider issues such as social impacts on communities, effect on climate targets and trust in operators, regulators and policymakers.

'Many of these social (and environmental) impacts can be mitigated if they are carefully considered at the planning application stage. Added to which, there are already considerable legislative safeguards to ensure such impacts are not realised.'

There seems no reason to assume that future Scottish Government research will differ dramatically in its conclusions. To the extent that the research recommends stiffer precautions, regulations and/or guidance, and those recommendations are implemented, this can only add to social licence and democratic legitimacy in the medium to long term.

Leaving aside five yearly reports from the Commons Climate Change Committee on effects of fracking on carbon budgets, the additional environmental protections introduced by InA 2015 when analysed closely do little more than require the Secretary of State to be satisfied that a series of requirements embedded in the existing regime have been met before well consents are issued. If this represents the death knell for a viable industry, then the industry's future in the UK must always have been questionable.

In reality, UK Onshore Oil and Gas, the voice of the UK shale gas industry has always emphasised the ability of the industry to comply with stringent environmental requirements and the comfort to be taken from this. Far from being the death knell, recent developments stand to be helpful in providing public reassurance.

### **How do the fracking licensed blocks interact with environmental protections? Which takes priority?**

In the first part of this series (Fractured logic--legal developments), I mentioned that research by Greenpeace indicated that some 45% of the 931 licensing blocks for the purpose of the fourteenth onshore licensing round would have at least 50% of their areas falling within areas of outstanding natural beauty, National Park, sites of specific scientific interest or groundwater protection zones.

Falling within one of these protected areas would not prevent a Petroleum Exploration and Development Licence (PEDL) being granted, but InA 2015, s 50 stipulates that the Secretary of State will not authorise hydraulic fracturing within either protected areas or protected groundwater areas.

Nevertheless (and doubtless mindful of the implications for the current licensing round negotiations and of blanket prohibitions against exploiting deep level resources within large areas of the country), government ministers indicated in debate on the Infrastructure Bill that:

- o prohibitions on hydraulic fracturing 'within' areas are not intended to preclude activity under those areas, and
- o the areas subject to protections are to be further defined by regulations to be made by 31 July 2015

The scope of prohibitions has therefore not only been diluted to apply to surface working only, but also (for now) remains at large as to the exact areas covered.

Where a licensed block includes areas of land which enjoy European habitat protections, stringent protections will still apply. Development (which would include environmental permits and planning permissions) which would significantly affect the integrity of areas subject to such designations will continue to be proscribed unless strict criteria are met. Even so, activity deep underground can be expected to have a significant effect on integrity only very rarely.

### **What will the protections introduced under InA 2015, actual and threatened moratoria and plummeting commodity prices mean for businesses hoping to secure fracking licences?**

There has been a great deal of to-ing and fro-ing over recent weeks, particularly during the late debates on the Infrastructure Bill. Applicants for PEDLs will have been concerned but, as well-advised commercial organisations, will also have seized opportunities to factor in risk. They will have negotiated harder, reappraised their projections as to recoverable quantities and will have qualified and conditioned commitments.

In all likelihood, Department of Energy & Climate Change negotiators will have been emphasising the reassurance to be gained from government ministers having stuck to their guns and, with limited practical concessions, put things back together after the Commons third reading debate wobble. At the same time, they can be expected to have scrutinised and stress-tested costings and economic projections.

It remains to be seen whether decisions on applications will have been delayed or whether bullets will be bitten and announcements made before the general election.

### **How much will the outcome of the general election affect the future of fracking in the UK?**

Much is made of differences between the positions of the main political parties. However, the differences are likely to be more apparent than real.

Onshore oil and gas are important to national economic and revenue projections, and energy security. Therefore, if either of the two main parties is returned, pragmatism will prevail, particularly if there are working majorities. During the latter parliamentary stages of the Infrastructure Bill, minority spokespeople were complaining of a stitch up between front bench representatives to see the Bill through.

The finer the balance of power post-election, however, the greater the challenge for shale. While UKIP and the Greens may, for different reasons, retain an absolute stance against shale, absent holding the balance of power in a coalition government (which currently seems unlikely), their long term influence cannot be expected to be great. Nevertheless, if an onshore shale gas industry is to become a reality in the UK, the incoming government will need to operate bravely, skilfully and decisively. It will be difficult for politicians who rely on saying only what they think people want to hear.

Some short term comfort may be taken from the first wave of applications relating mainly to exploration. These will generate opportunities for the new system to bed down. The next few years will be critically important if investors are to have confidence to invest and communities are to be confident that a new form of industry can be established near and under them.

*Interviewed by Jane Crinnion.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*