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Department of Energy and Climate Change (DECC) consultation URN 14D/099:

Underground Access for the Extraction of Gas, Oil or Geothermal Energy

The National Farmers' Union of England and Wales (NFU) represents 47,000 farm businesses throughout England and Wales. In addition we have about 40,000 countryside members with an interest in farming and the countryside.

With 75 per cent of national land area in the agricultural sector, NFU members have a significant interest in land-based renewable energy, where they can benefit directly as energy producers or hosts for energy plant. The NFU's interest in other energy production technologies focuses mostly on their capacity to impact farmland and farming.

The NFU notes that unconventional oil and gas development in Britain is still at an early stage, with a number of different companies drilling exploratory test wells. We realise that there is no commercial shale gas production in the UK at present, although the UK has a history of onshore production of conventional oil and gas. Since the mineral rights to gas and oil are held by the Crown, farmers and growers would potentially receive income from exploration and production only through the access rights to their land.

The potential range of impacts (both direct and indirect) from unconventional oil and gas exploitation upon local agricultural production and the agricultural industry more widely is still uncertain – as underlined by the recent Environmental Information Request release (29-Jul-14) of a Defra internal document on “Shale Gas: Rural Economy Impacts”, which was shared with the Environment Agency. At present, we remain concerned that DECC has not identified the need for monitoring of the impact on agriculture, and that long-term responsibilities (for compensation, restoration and aftercare of sites) may be reassigned, possibly defaulting to the landowner. It is essential that the Government ensures that the right framework is in place to support not only industry and local areas but also landowners, as exploration and possible production progresses.

The NFU has participated in several site meetings with shale gas developers, and has also developed contacts among the industry, government and regulators. We agree with other stakeholder trade associations such as the CLA that “landowners must be protected from any liability if fracking causes any negative long-term effects on their land”.

According to this consultation, examination of the existing regulatory framework suggests there is scope for change to make the regime more effective with regard to access to underground land. The NFU does not believe that companies should gain access to underground land more easily if this is to the detriment of landowners.

Key concerns already raised by NFU members

- Because of current attitudes and perceptions of fracking, the value of our members' land may be reduced (even if in reality the chances of any harm occurring are very low). If the consultation proposals come into force, landowners would not be compensated for this, and if damage is actually caused they are unlikely to have any grounds for bringing such a claim.
- If land values are reduced, this could have serious implications for farmers, as land is their biggest asset. Those with mortgages secured on the land are likely to be particularly concerned, as any reduction in the value of the land could have significant financial implications.

The NFU believes that operating companies will need to consider compensation to landowners if fracking does have an impact on the open market value of their land. We do not think it would be right to deny landowners the opportunity to negotiate agreements and compensation on a basis that takes account of a possible reduction in their land values.

Geothermal drilling

We note that there has been very little public discussion so far of the needs of deep geothermal drilling, which the NFU accepts could be an attractive future source of low-carbon renewable energy. To the best of our knowledge, very few NFU members have been approached by any operators seeking underground access for deep geothermal drilling. Since landowners' rights to income from energy production would be governed by different legislation from unconventional oil and gas, there is scope for causing confusion here by conflating drilling access rights for both hydrocarbons and other energy extraction.

General comments

The NFU would like to make the following comments with specific regard to the issues raised in the consultation document.

What are the risks involved?

It is stated that this document only outlines "the main risks that could have any perceived impact on landowners", and not air pollution or emissions. However, the impact of dust on agricultural crops has to be considered from the lorries that will end up carrying water to and from sites, as well as the impact of noise on the surrounding local rural areas.

Furthermore, the risks to groundwater contamination have been highlighted as a "negligible risk" even though no drilling has taken place in the UK to be able to prove this. Furthermore, it is the same for subsidence. We do not think that it is presently possible to say as has been stated in this document "we believe that underground horizontal drilling at the depths relevant for shale or geothermal would not have any negative impacts on the landowner's use of the land".

Existing framework for access

As is stated, land ownership of freehold land entitles the owner to rights at the surface and down to the centre of the earth, in practice to any land that is useable by anyone. We do not think that DECC can state categorically that "the drilling activity itself is so far down that it will have no negative effect at the surface". This is presently unknown.

We believe that it is essential that all landowners where the drilling might pass horizontally should be contacted and notified, especially in rural areas where agricultural operations are taking place at the surface. This is not an unusual process, as all landowners for other infrastructure projects are identified and contacted even when their lands are not identifiable from the land registry. Where landowners are approached, they do normally agree to access once a payment has been made. We understand DECC's concerns that a single landowner by saying no to access may be able to significantly delay development, but it must be remembered where ownership resides – it is not with the local community. Communities in those areas where operators may wish to drill are not entitled to negotiate on behalf of the landowner.

We do not agree that if the law stays as it stands that the commercial exploitation of shale gas is unlikely to develop to a significant scale. Other gas and oil projects have developed under the law as it stands. We do not know that this will be a considerable deterrent to development, as it has not been tested. The NFU agrees that compensation to each individual landowner may be modest, but there is an important matter of principle here – of a landowner's right to know which operator is working underground on their land.

Alternative methods of granting access

With regard to the methods of access highlighted, and in particular oil and gas pipelines which are installed underground, National Grid have a good record with the land owning sector and its advisers for negotiating an access fee upfront for their work. An effective National Agreement has been drawn up between National Grid, NFU and CLA, which includes advisory minimum rates of payment. It is shown in the consultation table how other utility companies have to enter into negotiations with individual landowners and pay compensation. The NFU does not see why it should be any different for operators wishing to carry out underground drilling.

Potential options

We do not think that it is right to say that doing nothing will let the situation persist. No drilling has been carried out yet at a commercial scale, so no operator has yet had to contact large numbers of landowners.

The NFU agrees that the existing framework does provide protection for landowners and that it is important that this protection is kept. We do not agree that the ability of landowners to not allow access and so obstruct a project could be disproportionate to any impact on them, since it is presently unknown what the actual impact may be once drilling starts at a commercial scale.

The NFU believes that it may be possible to standardise the process and agree a minimum level of compensation, which would give more certainty to the industry. Other standardised processes are already followed for other major infrastructure schemes and they do work. The NFU agrees that it would not be the right option for companies to have to apply for compulsory rights orders, and community ownership would not address this problem, either. However, as stated before, we disagree with DECC over whether drilling and use of underground wells will affect landowners' enjoyment of their land, since this is not yet known.

Consultation questions

The NFU would like to submit the following responses to the specific questions posed in this Consultation.

1. Should the Government legislate to provide underground access to gas, oil and geothermal developers below 300 metres?

The NFU can see that a statutory right of access is probably needed, but this should only be on the basis that each landowner is notified that drilling is taking place underground and individual compensation is made to each landowner. The consultation document is actually inconsistent on this point: it states that “a well for shale gas usually runs vertically down for over a mile before extending horizontally” but elsewhere that below 300m “the vertical drill may need to start changing direction”. If a statutory right of access is to be offered to fracking operators, as for coal operators, this access must only apply to companies seeking to extract from below 1000 metres.

The NFU is aware of previous discussions about setting a specific depth limit, and we consider that there are potential disadvantages to farming and land-based businesses with a 300-metre limit. We disagree that “the landowner is very unlikely to have any use of the land below this level”. Certain mineral rights under farmland (e.g. mining of potash) could be “sterilised” by setting such a precedent, and conventional oil and gas drilling could be enabled in addition to unconventional exploitation. The NFU would prefer a depth limit which is more clearly specific to the needs of unconventional gas (and potentially geothermal heat), e.g. at 1000 metres as stated above. The 300m proposal is not acceptable.

2. If you do not believe the Government should legislate for underground access, do you have a preferred alternative solution?

The NFU is worried that only one solution has been proposed in this consultation, rather than a choice of alternatives. See our response to the Question 3 for an alternative approach.

3. Should a payment and notification for access be administered through the voluntary scheme proposed by industry?

The NFU is pleased to see that DECC has recognised that people living above underground drilling should receive a payment from the operator for a right of access. The NFU believes that this is particularly important for landowners. We agree that this is in line with other schemes like underground cables and tunnels. The right of access does have a value and it is not just nominal.

The NFU does not agree with or like the voluntary scheme proposed, whereby a one-off lump sum payment is made to a “relevant community body”. Landowners will be particularly affected due to the location of wells, and it is only right that payments should be made individually to landowners affected. The NFU would also want to see further engagement with operators in regard to the basis for this payment system - why the figure of £20,000, and why only after 200m laterally?

Other infrastructure companies have to cope with the administrative burden of paying to individuals, and so the NFU does not see why it should be any different for fracking operators. The NFU believes that some type of standard national agreement could be worked upon with other stakeholders, including a minimum standard rate per lateral metre run of lateral. However, we would not agree to payments being capped. If there is extensive lateral drilling under a landowners land, then it is only right that the payment should be greater. In urban or peri-urban areas, it may be possible to work with community representatives with regard to multiple small parcels of land.

The NFU is particularly concerned that under the consultation proposals the landowners themselves will not see any of the compensation directly, which will be paid to a “relevant community body” agreed by the operator under government guidance. The NFU is also aware that where other schemes have tried to work at a ‘community forum’ level, this has not been a success. We believe that payments to individual land owners will be greater than the nominal £50, as highlighted in one specific case. It is a difficult challenge to ensure that relevant landowners are among the wider beneficiaries if a community payment is made – we cannot see this happening.

Our conclusions

The NFU understands that access rights might have to be changed so that operators have a right to drill underground without having to get permission from every landowner. However, this right should not be granted unless operators are obliged to notify any landowner where drilling may take place, with individual compensation payments made to each individual owner.

A community level payment is not acceptable.

A regulatory system covering the obtaining of licences, planning permissions and permits must be maintained and monitored to the highest standard.

The NFU believes that an independent consultation on underground access for geothermal drilling would be merited, once there is greater public knowledge of the specific needs of this industry.