

**brownfield**briefing

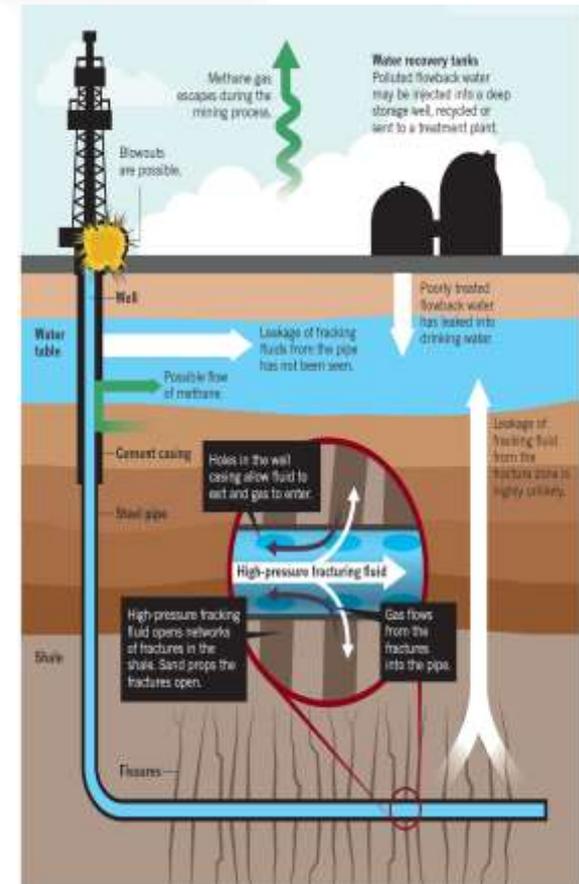
# Clarifying the legal issues associated with shale gas exploration in the UK

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# Agenda

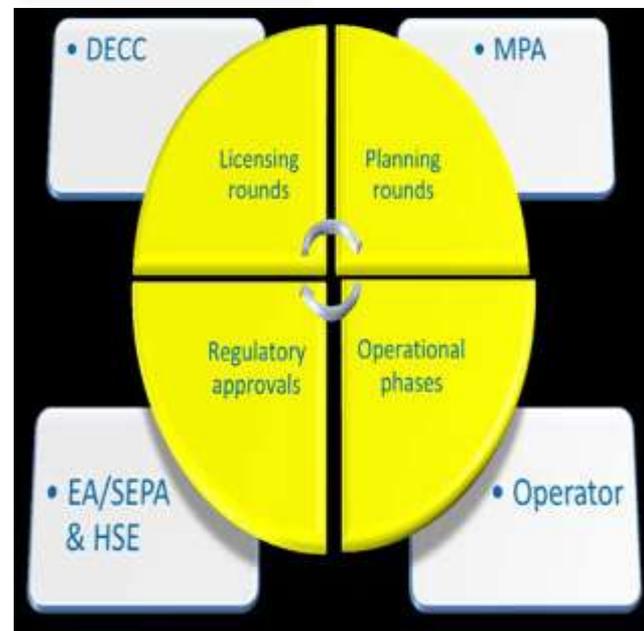
- Overview of UK Regime for Shale Gas Exploration
  - Rights and Consents
  - Petroleum Exploration and Development Licence (PEDL)
  - Land Rights
  - Planning Permission
  - Environmental Permits
- Environmental Impact Assessments (EIA)
- Legal complexities/challenges/ “fit for purpose”?
- Conclusions



# Heavy Regulatory Framework

- **No single legislative framework** - 6 stages of the process

- Identification
- exploration
- appraisal
- initial development
- full development and
- production and abandonment



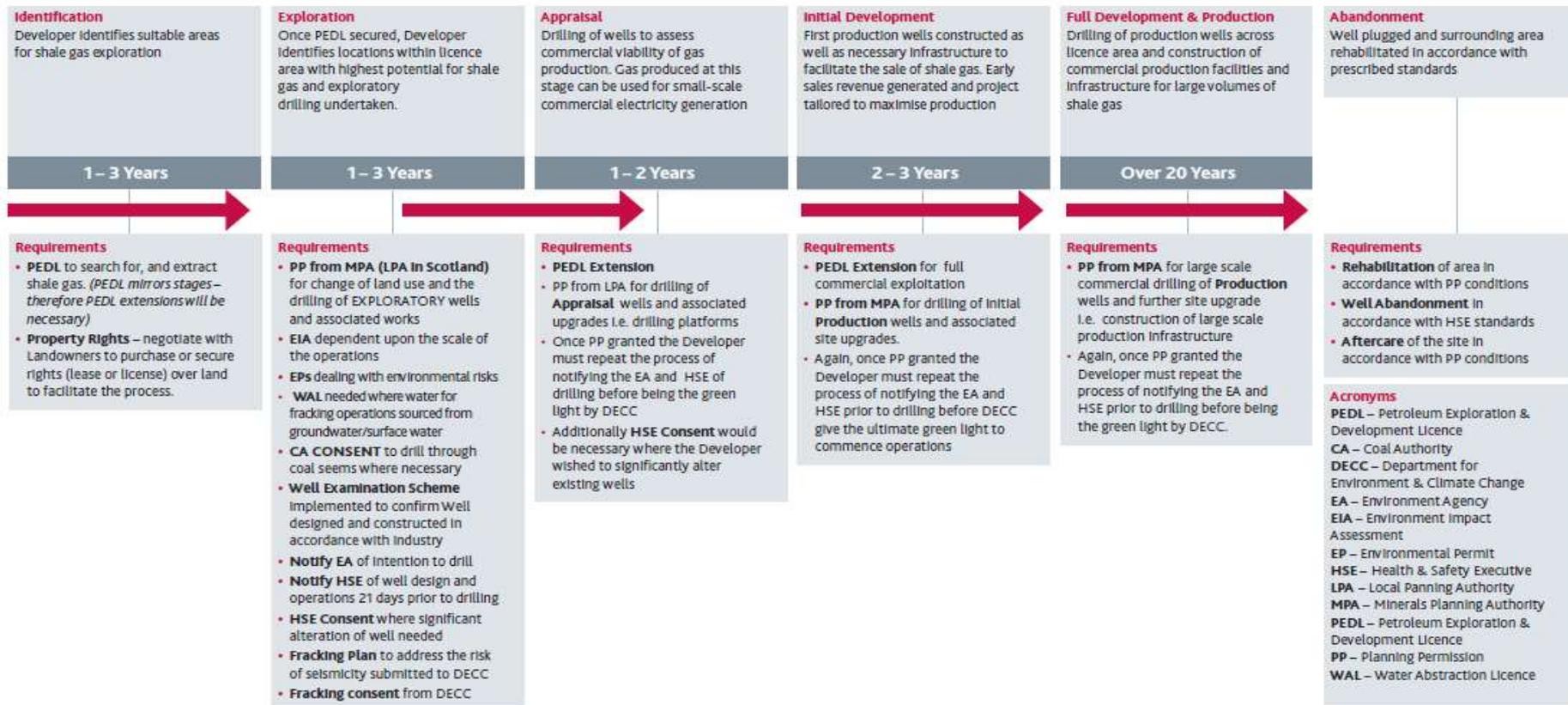
- **DECC:** PEDL (licensing rounds), Fracking Consent (ERA – Fracking Plan), Flaring & Venting Consents
- **Landowners:** property rights, minerals rights
- **MPAs (LPA in Scotland):** Planning Permission, EIA (associated planning obligations and Planning Performance Agreements)
- **Environment Agency (NRW, Wales and SEPA in Scotland):** Environmental Permits, Water Abstraction Licences as well as WRA 1991 notification of drilling
- **HSE:** well consents



# Shale Gas Extraction Process Timeline

The Shale Gas Extraction Process, from identification of a potential development area to the full commercial exploitation of that area, contains many stages and can last over 30 years. At each stage Developers must meet a number of regulatory requirements that are set out in the time line below.

**SEISMICITY:** this issue has the potential to be a stumbling block to proposed or commenced operations and is something to which Developers must give considerable thought. Developers must assess the risk of activating faults in the proposed licence area and also monitor background seismicity before fracking operations commence. Real time seismic monitoring will also be necessary during operations and operations will need to be paused or halted where seismicity passes a certain level



# No shortage of applicable laws...

- Petroleum Act 1998
- Town & Country Planning Act 1990 and EIA Regs
- HSWA and Borehole Site Regs (Well consents), Wells Design and Construction Regs
- Environmental Protection Act 1990
  - Environmental Permitting Regulations
  - Wastes management/contamination
- Water Resources Act: Anti-pollution works notices, Groundwater Regulations and Water Resources Management Plans
- Drinking Water Standards
- REACH/radiological assessments
- Contractual and Civil Liability (Tort/Environmental Liability Directive)

# Regulatory bodies: role and responsibilities

DECC  
Energy  
development &  
licensing

Licensing energy  
development

Carbon emission  
targets

Fracturing plan for  
induced seismicity

Resource  
management  
(venting, flaring etc)

Environmental Risk  
Assessment

DEFRA &  
Environmental  
regulators  
Environment

Environmental  
permits

Water abstraction  
licensing

Groundwater and  
aquifers

Fracking fluid  
additives

Flow back disposal

Fugitive emissions to  
air (also DECC, LAs)

DCLG  
& Local  
Authorities  
Minerals planning

Planning consent

Environmental  
Impact Assessment

HSE

Safety

Well integrity

Well design and  
construction

Safety of workforce  
& personnel

**DECC:** award of exclusive Petroleum Exploration & Development Licence after open competition

**DECC:** online well application for <96 hr testing

**DECC** checks with **HSE/EA/SEPA** before issuing well consent

**Local Authority**  
Planning Permission

**EA/SEPA**  
Statutory  
Consultee

**HSE**  
Notification

**EA/SEPA**

- Notices
- Abstraction licences
- Discharge and radioactive substances regulations permits

**Exploration Well**

**DECC:** 90-day extended well test (EWT), if required, setting limit on hydrocarbons produced, vented or flared.



# Petroleum Exploration and Development Licences (PEDL)

- Granted under the Petroleum Act 1998
- Regular Licensing Rounds
  - 14<sup>th</sup> Licensing Round (closed 28 Oct 2014)
  - No auction- focus on technical and financial competence
- 334 PEDLs granted to date – a dramatic increase to this figure is expected following the 14<sup>th</sup> round
- Life-cycle aligned to shale extraction process
  - 5 years for exploration
  - 5 years for appraisal and development
  - 20 years for production (may be extended)

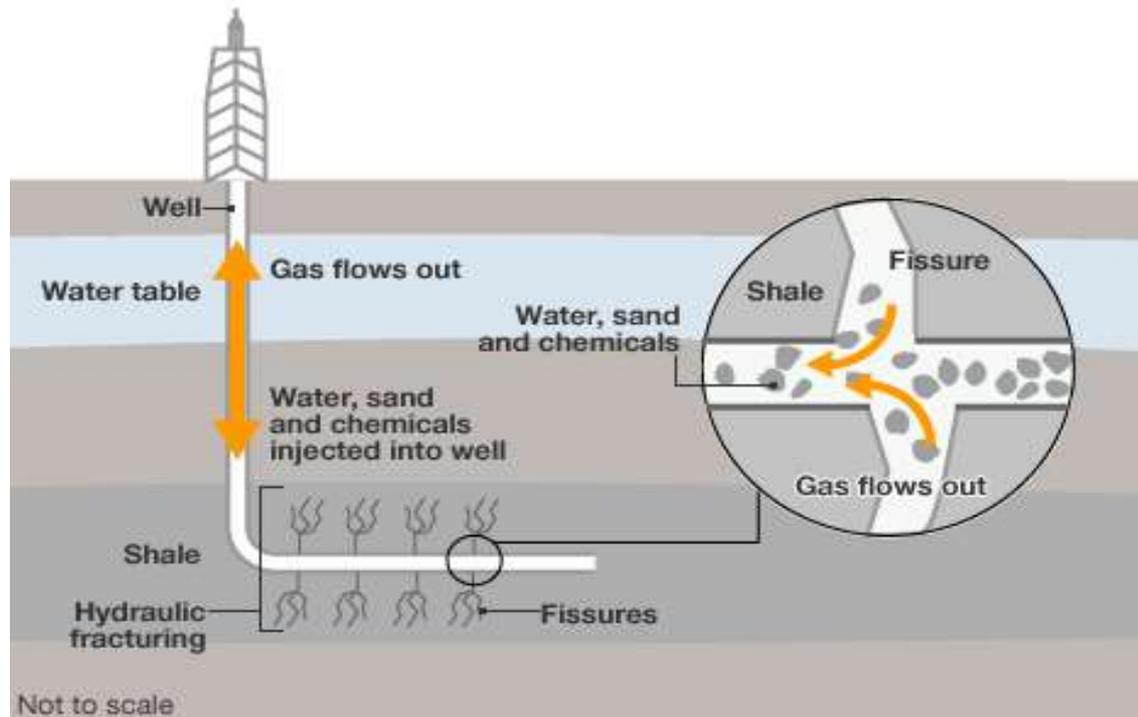
# Land Rights

## SHALE GAS EXTRACTION

### - Required Land Access

- Surface
- Subsurface
- Vertical
- Horizontal

Shale gas extraction



# Land Rights – current framework

- **SECURING LAND RIGHTS**

- No automatic grant of land rights with licence under the Petroleum Act 1998 (PEDL)

Negotiation

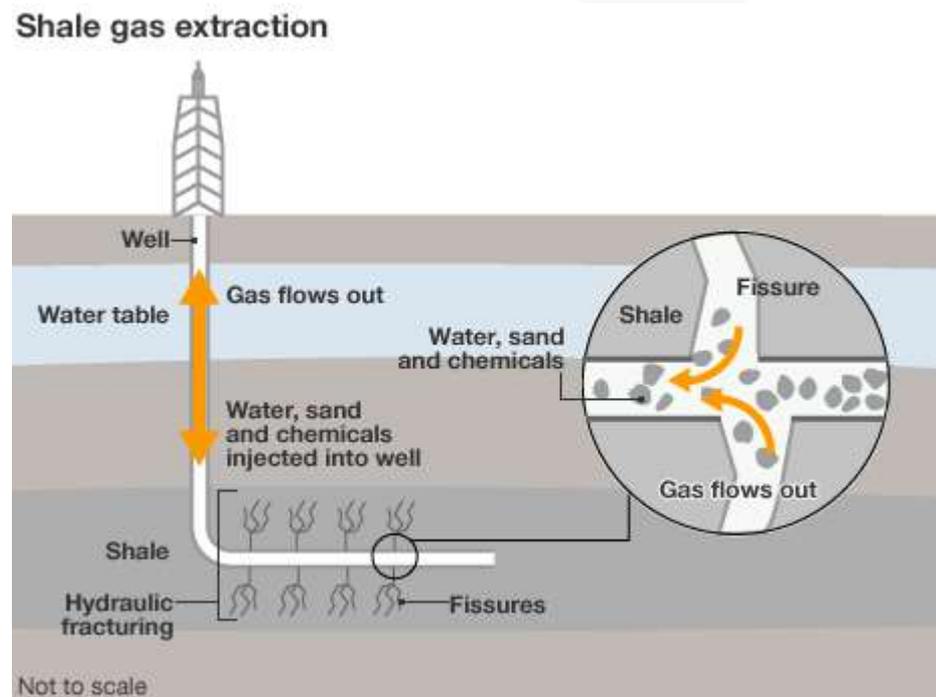
Compulsory  
Acquisition  
(Petroleum Act  
1998)

Insure

- Proceeding without land rights constitutes trespass
  - Injunction / Damages
  - *Bocardo SA v Star Energy (2010) (Supreme Court)*

# Land Rights – current framework

- Problems with the current underground access regime
  - Negotiation
  - Court order
  - Trespass
  - Complexity
  - Length
  - Cost

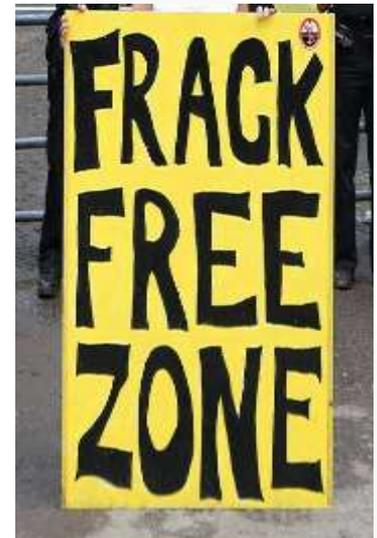


# Land Rights – Infrastructure Bill

- Amendments to the Bill to introduce a new underground access regime were issued on 14 October 2014
- Removes the need to negotiate with large numbers of land owners to access underground land
- Developers are given the right to use land 300m below surface to exploit petroleum
- Landowners are to be given notice of the activities
- Regulations are to be issued detailing the payment obligations on the landowners

# Land Rights – Infrastructure Bill – the reaction

- Developers have welcomed the proposals
- Considerable backlash from communities
  - 99% of consultation responses were opposed to the amendments. Most of these relate to opposition to shale gas generally rather than these amendments specifically
- Many of the concerns relate to environmental matters
- Environmental Audit Committee Report – 26 Jan 2015
- MPs demand fracking moratorium



# Infrastructure Bill: Update !

- Labour proposed a raft of new amends to the Bill on 6 and 8 Jan 2015
- 26 Jan 2015 – MPs in the House of Commons voted against moratorium
- Voted in favour of including amendments to **TIGHTEN REGULATION**
- No fracking
  - Groundwater source protection zones
  - Protected areas
  - On land under 1,000m



# Infrastructure Bill – Update !

- 13 new conditions have been brought into the Bill
  - **need for EIAs**
  - independent inspections on well integrity
  - monitoring on the site for the previous 12 months
  - site-by-site assessment, monitoring and public disclosure of existing fugitive emissions
  - planning authorities to consider cumulative impacts
  - community benefit schemes
  - residents in affected areas notified individually
  - substances used subject to EA approval
  - land is left in condition required by the Planning Authority
  - water companies to be statutory consultees

# Planning- Policy

- Consent required from the LPA/MPA
- England and Wales
  - National Planning Policy Framework
  - Planning Practice Guidance for Onshore Oil and Gas (March 2012)
  - Online Planning Practice Guidance (March 2014)
- Scotland
  - National Planning Policy Framework
  - Scottish Planning Policy



# Planning - Key Issues

- Multi-stage consenting
  - Permissions required for each phase of development
- Environmental Impact Assessments
- Decision makers
  - Local or National?
  - Move towards DCO?
- Also need for an Environmental Risk Assessment (“**ERA**”)
- Extensive pre-application consultation
- Community benefit
- Appeal Costs
- Judicial Review – a cause of delay in the future?
- Would government intervention in shale gas planning decisions help?

# Environmental Impact Assessments (EIA)

- It is necessary to consider need for an EIA at all stages of shale gas extraction
- **Town and Country Planning (Environmental Impact Assessment) Regulations 2011**
  - Schedule 1
  - Schedule 2
- Some types of project will automatically require an EIA
- Others will only require one if they're likely to have significant environmental effects
- Where an EIA is required it should be submitted to the MPA as part of the planning application process
- Onshore oil and gas exploratory drilling operations may fall under Sch 2 (2)(d) (deep drillings where the area of work exceeds 1 ha) to the EIA Regs

# EIA

- **Jan 2014** – UK Onshore Operators' Group committed the industry to carrying out EIA for all exploration wells that involve hydraulic fracturing
  - operators will want to demonstrate rigorous assessment of environmental impacts
  - LAs and statutory consultees are likely to want to see an assessment on a precautionary basis
  - some of the info will be needed in any event to support related applications
  - failure to provide an EIA where the courts consider one is required = fertile ground for judicial reviews



# EIA

- Contact the MPA for a formal screening opinion
- All applications assessed on a **case by case basis**
- Current EIA guidance and practice, at the exploration phase - only the exploration activities themselves need to be considered and not any future appraisal and production phases
- If an EIA is deemed necessary – EIA Scoping Report
- EIA must cover the geographical area where the impacts occur, both above and below ground – **likely to be broader area than the application area**
- Again, multi-stage process – if exploration results in production – need to consider planning/EIA again at the production phase

# EIA - Scope

- Description of the development
- Hydrological assessment
- Identification of waste streams and methods of recovery, treatment and disposal
- Likelihood of induced seismic activity
- Requirement for water
- Flood risk assessment
- Impacts on sensitive ecological receptors
- Air quality impacts
- Emissions of greenhouse gases
- Monitoring and site management

# EIA

- When should an operator assess cumulative impacts ?
- Extent of the EIA ?
- Timings ? Delays ?
- Will the scope of EIAs be scaled back over time?



# Environmental Permits

- EA's Onshore Oil and Gas Exploratory Operations: Technical Guidance (Consultation draft, Aug 2013) (England)
- Environmental Permitting (England and Wales) Regulations 2010 (as amended) – EPs likely to be required are:-
  - A groundwater activity;
  - A mining waste activity;
  - An installation under the IED;
  - A RSA – likely to apply in all cases where oil and gas is produced; and
  - A water discharge activity – if surface water run-off becomes polluted.
- Notice to be served on EA under s 199 of the WRA 1991
- Water Abstraction Licence?
- Flood defence consent ?
- Others ? e.g. EU ETS Permit ?

# Environmental Permits

- EA has committed to delivering more standard rules permits
- Consultation Feb 2014 on four such permits e.g. temporary gas flaring at exploration and appraisal sites
- Applications for permits to be twin-tracked with planning applications
- Scope to change the permitting process is limited by the need to comply with the relevant EU Directives

# Conclusions

- Robust legislation is already in place BUT tangled web of consents required !
- **Streamlining of legislation**
  - Strong regulation vs fair/proportionate regulation
  - Consistency/transparency/removal of duplication
- Interaction with European requirements – could this lead to further duplication?

# Legal Risk Management

- Appropriate drafting on acquisition of sites for shale gas activities or in relation to access arrangements
- Guidance for companies on EIA procedures and processes
- Legal review of appointment documents
- Consideration of legal issues associated with water management plans and water re-use proposals
- Liaison with regulatory authorities in relation to environmental issues e.g. waste and wastewater management
- Advice on threatened nuisance claims by neighbours

# Pinsent Masons' Fracking Toolkit Series

- Regulatory Background – Introduction and Consenting
- Shale Gas and the Tax Regime
- Shale Gas and Planning
- Managing Protestor Action
- Managing Environmental Issues

<http://www.pinsentmasons.com/en/media/publications/shale-gas-and-fracking-in-the-uk/>

# Further Information

The strength and depth of Pinsent Masons' Environment team means we are perfectly placed to help our clients through the fragmented regulatory regime that is relevant to exploration, development and production of shale gas in the UK.

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