

Insights

WHAT WILL THE INFRASTRUCTURE ACT 2015 MEAN IN PRACTICE?

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Will the Infrastructure Act 2015 (InA 2015) make the delivery of infrastructure faster and more efficient?

WHAT ARE THE HEADLINE PROVISIONS OF INA 2015?

The main provisions are:

- to make the Highways Agency its own organisation rather than part of the Department for Transport (it is to be renamed Highways England from 1 April)—not dissimilar to Network Rail
- to allow fracking under people's land without their permission, subject to various conditions
- to introduce deemed discharge of certain planning condition
- to make some minor reforms to the nationally significant infrastructure project regime

The principal changes relate to fracking/energy exploitation and the Highways Agency:

FRACKING AND ENERGY EXPLOITATION

InA 2015 provides for a new right to use land to exploit petrol or deep geothermal energy without notifying owners, which includes the right for fracking (hydraulic fracturing) under land. Previously, access to these resources was by agreement. Voluntary commitments have been made by the energy industry to notify communities of the exercise of these rights, but if the Secretary of State is not satisfied, he may introduce regulations setting up a statutory notice scheme. There are also a number of pre-conditions that must be satisfied before a well consent for fracking can be issued. The provisions allow for the drilling, boring, fracturing and alteration of deep-level land, installation of infrastructure, feasibility assessments, energy preparation and decommissioning. There is a right to leave the land in a different condition and the right to leave infrastructure or substances in the land. InA 2015 expressly removes landowners' liability for any loss or damage attributable to the exercise of these rights by another person.

HIGHWAYS

InA 2015 creates a new government-owned company from 1 April 2015 to be known as 'Highways England', which will take over the responsibility for strategic roads from the Highways Agency. This change is intended to support the government's road investment programme over the next five to six years with the new body having access to long-term funding and greater accountability to Parliament.

Other changes of note are in respect of:

INVASIVE NON-NATIVE SPECIES

InA 2015 contains new powers to compel landowners to take action on invasive non-native species and permit others to enter the land and carry out works for their eradication. These species have a huge economic impact particularly on agriculture and the construction, development and infrastructure sectors. Currently, their eradication is reliant on voluntary agreements between landowners and the Department for Environment, Food and Rural Affairs (Defra) to undertake works and gain access.

PLANNING PROCEDURE

InA 2015 sets out changes to the Town and Country Planning Act 1990 to streamline aspects of planning procedure to prevent delays on schemes for which planning permission has been granted, and includes a new provision for the 'deemed discharge' of certain planning conditions if a planning authority has not responded to an application within a prescribed period. The exclusions and time period will be set out in secondary legislation. The government confirmed in November 2014 that the following would be exempt from this provision:

- all conditions attached to development that is subject to an environmental impact assessment
- all conditions attached to development that is likely to have a significant effect on a qualifying European site
- conditions designed to manage flood risk
- conditions that have the effect of requiring that an agreement under the Town and Country Planning Act 1990, s 106, or the Highways Act 1980, s 278 be entered into
- conditions requiring the approval of details for outline planning permissions required by reserved matters
- conditions relating to the investigation and remediation of contaminated land
- conditions relating to highway safety

- sites of special scientific interest, and
- conditions relating to investigation of archaeological potential

NATIONALLY SIGNIFICANT INFRASTRUCTURE PROJECTS (NSIPS)

Since the introduction of the Planning Act 2008 (PA 2008) there has been a review of how the system is working, which concluded that the system was bedding down and hence only 'tweaks' were necessary—these were consulted on and the government responded last year by identifying certain measures to improve the regime. Three of those administrative changes to the NSIP regime have been included in InA 2015. The changes are:

- the early appointment of inspectors in the application process
- a panel of two inspectors may decide NSIP applications (currently a single person or a panel of three to five people can be appointed), and
- a simplified procedure to make material and non-material changes to approved DCOs

MAYOR OF LONDON

New powers are given to the Mayor of London to make mayoral development orders (MDOs) granting planning permission for development on specified sites within London. This is intended to overcome cross-boundary planning issues and remove barriers to major development.

HOMES AND COMMUNITIES AGENCY (HCA) AND THE GREATER LONDON AUTHORITY (GLA)

InA 2015 provides for greater powers to be given to the HCA and GLA to assemble land for disposal, with powers to override certain easements and restrictions that may exist so that the land can be used and developed by future purchasers. These powers put the HCA and GLA on the same footing as local authorities. The extension of the HCA's remit as a land disposal agency is intended to speed up the sale of surplus and redundant public land and increase the amount of previously developed land available for new homes.

WHAT ARE THE KEY ENERGY PROVISIONS IN INA 2015?

Other than the fracking provisions, there are provisions about a community electricity right, allowing communities to buy stakes in renewable generation facilities; signing the UK up to the 'Extractive Industries Transparency Initiative'; and paving the way for changes to the renewable heat incentive

InA 2015, Pt 6 addresses energy, and the key provisions are:

- the right to use deep land in respect of energy: as reported above, these provisions allow for fracking without landowner consent
- the community electricity right: in essence, this allows regulations to be made so that communities can buy a stake in renewable electricity generation facilities in or near the community (for example, solar farms, or wind farms)—clearly, the policy aim is to give communities a real stake in generation occurring on their doorstep
- recovery of UK petroleum: these provisions are targeted at maximising the recovery of UK petroleum, along with the need for an associated strategy to be produced by the Secretary of State

HOW WILL THE CHANGES TO THE LAWS OF TRESPASS AFFECT THE DEVELOPMENT OF THE SHALE INDUSTRY?

They should be of benefit to it, but some quite onerous conditions were applied to the power to extract shale gas under land at the last minute. Having said that, the power to frack under land has come into force, but the conditions are to be added at a later time of the government's choosing, so there may be an immediate opportunity to obtain permission more easily.

This change was consulted on by the Department of Energy & Climate Change (DECC) during 2014, and to which the government responded in September 2014. That response included details of the voluntary scheme of community payment, as proposed by the industry. If the voluntary scheme is unsuccessful, however, the Secretary of State may make regulations requiring community payments.

While the changes in respect of trespass and landowner consent remove one hurdle, there remain all the other hurdles for the industry, including the necessary regulatory consents, any environmental consents, and any other planning permission required. There would also remain the usual regulations in respect of noise, vibration and groundwater contamination.

The change in respect of trespass also only relates to subsoil below 300 m, so there will still be a need to secure the land where the well is to be drilled, or to secure the consent of any or all landowners whose subsoil (above 300 m) is to be used to drill the well to reach the deeper subsoil.

In 2015 also includes certain 'safeguards' in respect of onshore fracking, by altering the Petroleum Act 1998. The provisions relate to the licence required for fracking, and certain conditions that must be satisfied before the Secretary of State may grant a licence, dealing with matters including the environmental impact of the development, inspections, monitoring, protections for groundwater, cumulative effects and public notification.

So the intent of the Act is clear in terms of trespass and landowner consent, but for every site there will remain much to do before there can be certainty that reserves can be extracted—and even then

there will remain the battle for hearts and minds.

DOES INA 2015 RAISE ANY CONCERNS? WHAT ARE THE CHALLENGES PRESENTED BY INA 2015?

The introduction of deemed discharge of planning conditions may encourage local authorities to refuse to discharge them more often if they feel they don't have enough time to consider them properly. How InA 2015 will encourage or discourage fracking in the UK remains to be seen.

The community right to electricity, while laudable in its policy approach, does raise the issue of how it will impact on promoters of such renewables schemes, and how that will play out in terms of viability. The detail of the subsequent regulations will be important in informing just how much of an impact this provision will have. However, from the wider perspective it may be that this provision enables a greater number of sites to be developed for renewables, where the concerns of a community can be mitigated through their being able to be part of the financial benefit of such a scheme.

The changes in respect of NSIPs again are welcomed, but where promoters of such projects are looking to make amendments to an extant development consent order, there remains the challenge of an involved process and the uncertainty which that brings, which in an era when investment in UK infrastructure is necessary and indeed encouraged, is an uncertainty that is not necessarily ideal. But as with the PA 2008 generally, there will need to be a bedding-in period for the change regime to find its feet.

In relation to fracking, it remains to be seen how the voluntary notice and community payment schemes will operate. The Secretary of State will be concerned with and is likely to monitor industry compliance. Landowners will need to be aware of the industry's new rights, and also the details of the voluntary schemes.

Highways England is likely to be a more pro-active, economically active body than its predecessor. To fund highway infrastructure improvements it will be looking for funding sources beyond the government. It is likely that there will be revenue raising on existing highways. Industries reliant on road transport may well find journeys becoming more expensive as a consequence, with costs ultimately passed onto consumers.

WITH THE GENERAL ELECTION LOOMING, ARE THERE CONCERNS ASPECTS OF THIS LEGISLATION COULD BE CHANGED BY A DIFFERENT INCOMING GOVERNMENT?

The Labour Party did oppose the new status of the Highways Agency, saying that the issue was lack of long term planning rather than being a government agency, but I would have thought that a Labour government would be unlikely to reverse the reform. Other provisions of InA 2015 have not

been vehemently opposed by party front benchers, but the fracking proposals in particular were opposed by back benchers.

Naturally, any new administration will have the opportunity to undo the perceived errors of their predecessors. However, the nature of InA 2015 is more one of 'little steps', and in light of the likely outcomes of the general election, this Act seems unlikely to be a prime target for change, when there would seem to be many much bigger and more electorate friendly steps.

The only exception might be in relation to fracking and trespass. The DECC consultation last year received some 40,000 responses, with over 99% objecting to the proposals to allow deep level fracking without landowner consent. So the politicians could well be expected to be looking at that one as an easy win, however at the start of the new Parliament one suspects the new government will have bigger problems to resolve.

It seems unlikely that Highways England would be 're-nationalised' back into the Highways Agency, particularly if it was turning a profit and reinvesting this in the strategic road network. However, there will be little opportunity for it to prove its value ahead of the general election.

SHOULD LAWYERS BE TAKING ANY ACTION NOW THAT INA 2015 HAS RECEIVED ROYAL ASSENT?

The introduction of deemed discharge of planning conditions has come into force upon the passing of the Act (subject to the government making development orders) and so needs immediate awareness.

Of particular note are the provisions about invasive species; and the advisors of existing landowners and those looking to purchase land might well want to consider how these new obligations are approached, both when assessing land to be acquired (and its value) and also when considering the management of existing portfolios of assets.

In relation to fracking, landowners may consider whether there is a need to carry out before and after building and environmental surveys and, if necessary, periodic monitoring, where fracking is proposed under or adjacent to their property. In the event of any damage such surveys can provide clarity on causation, which can then enable landowners to tap into compensation or mitigation schemes.

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MEET THE TEAM



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