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CLLS Planning & Environmental Law Committee response to DECC's Consultation on Proposal for Underground Access for the Extraction Of Gas, Oil or Geothermal Energy - Response by 15th of August 2014

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response in respect of the Consultation on Proposal for Underground Access for the Extraction of Gas, Oil or Geothermal Energy dated May 2014 published by the Department of Energy & Climate Change (the "**Consultation**") has been prepared on behalf of the CLLS Planning & Environmental Law Committee (the "**Committee**"), by members of the Committee from Charles Russell LLP, Travers Smith LLP, Herbert Smith Freehills LLP and Field Fisher Waterhouse LLP.

RESPONSE TO CONSULTATION

The Consultation Paper has been published by the Office of Unconventional Gas and Oil which forms part of DECC. As the Consultation acknowledges and as the Committee wishes to highlight, the proposed changes to the law would also apply to conventional hydrocarbon exploration and extraction, as well as to the unconventional. This is vital to assist the established as well as the fledgling elements of the oil and gas industry in the UK. The increased public awareness in hydrocarbon activities generally, mainly caused by public concern over unconventional activities, has affected the drilling of conventional lateral oil and gas wells too.

This response to the Consultation is made mainly in relation to oil and gas drilling.

The individual Committee members often represent a wide range of different organisations from international oil and gas exploration and extraction companies, to owners of landed estates. The members of the Committee are overwhelmingly in favour of the proposed solution set out in the Consultation. Consequently, responses to the specific questions set out in the Consultation are:

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

Yes.

The current subterranean access consent system is unwieldy and uncertain. By adopting these proposals, the Government would be granting rapid and certain access to licence holders, to any available hydrocarbons which might otherwise never be extracted. Delays and uncertainty currently experienced by hydrocarbon players in the system cost a great deal and so, due to the severity of the issues, many companies are currently cautious of investing in onshore operations, in the face of such risk. This positive legislative support is important to

help achieve the Government's stated aim for the UK to become more self-reliant in terms of use of onshore hydrocarbon resources.

At page 20, the Consultation paper includes the observation: "In practice, we expect a Court is always likely to grant access because granting access to enable these projects to take place would be expedient in the national interest". The test of expediency in the national interest is, in fact, only one element in the current scenario. The Court must also be satisfied that at least one of the grounds set out in the 1966 Act, s 3(2) applies. It can take up to 20 months[1] to obtain consent under the Mines (Working Facilities and Support) Act 1966 process. Further, the Court currently has no jurisdiction to grant access on the basis of a retrospective application or on an interim basis (eg where directional drilling has, for sound geological reasons) had to divert with the result that it passes under land not covered by an initial application (Re ***W & J King's Application*** [1976] 1 All ER 770). If a general consent could be granted to licensed operators, while ensuring that a compensation payment is made to the relevant communities, then in legal terms there should not be any prejudice or loss since individual land owners will not be affected "one iota"[2] by such underground operations.

Given the costs, length and uncertain outcome of 1966 Act proceedings, potential applicants are strongly inclined to persist with negotiations, but have no way to prevent landowners whose real interest is in opposing a project, rather than concluding a settlement, from simply withdrawing at a late stage, leaving the operator with no alternative but to commence proceedings. As the current regime provides landowners with ample opportunity to use negotiations to block or at least delay significantly rather than to work genuinely towards the grant of rights, rapid implementation of the proposals set out in the Consultation would be a significant benefit to a sector that has an exceptionally important contribution to make in the national interest.

The Committee considers that 300 metres is the appropriate depth below which this legislation should apply. Many in the industry would argue for a minimum depth of 200m on the basis that no landowner could reasonably claim use or need of land below around 75m (the depth of the Channel Tunnel), so there would still be a clear degree of separation in setting the level at 200m. However, it is appreciated that a depth of 300m may well provide the public with added comfort if any risks are perceived in any drilling processes by these industries.

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

Not applicable.

The Committee considers that the Government should indeed legislate about underground access as the issues in the answer to question 1 outline. It considers this proposed solution to be fair and workable.

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

Yes.

The Committee appreciates that some members of the public may not be happy with a voluntary payment scheme, which scheme might suggest that payment would not be forthcoming, but the statutory reserve power should provide sufficient comfort. Confidence of the public is essential to ensure this scheme operates fairly for the benefit of local residents.

A payment mechanism, to ensure that the payment is accepted by the recipient body as fully paid, should provide the industry with some comfort that no further demands could be made.

[1] BP Petroleum Ltd vs Ryder and Others 1987

[2] LJ Brown in Bocardo v Start Energy 2010

CONCLUSION

The Committee urges the Government to adopt the clear proposals in the Consultation Paper expeditiously, to remove one of the inappropriate hurdles, which currently presents delays and ambiguity in the consent process for on-shore exploration and extraction of both conventional and unconventional hydrocarbons.

15 August 2014

THE CITY OF LONDON LAW SOCIETY
PLANNING & ENVIRONMENTAL LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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