



## Applications for ancillary rights under the Mines (Working Facilities and Support) Act 1966 by holders of Petroleum Exploration and Development Licences

### Background

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1. The Oil and Gas Authority (“OGA”) is now operating as the North Sea Transition Authority (“NSTA”) and will be referred to as the NSTA in this document. The OGA remains the legal name of the company, and all licences and other legal documentation will continue to refer to the OGA
2. The NSTA issues landward production licences (Petroleum Exploration and Development Licences (“**PEDLs**”)) under powers granted by the Petroleum Act 1998 (“**Petroleum Act**”). PEDLs confer upon the licensee the right to search for, bore for and get hydrocarbons, but do not confer any exemption from other legal/regulatory requirements such as any need to gain access rights from landowners. Specifically, the Petroleum Act does not confer, or enable the NSTA to confer a right to enter on or interfere with land.<sup>1</sup> PEDL holders should make reasonable and sustained efforts to negotiate with landowners for any ancillary rights required to carry out

licensed activities, such as those ancillary rights described at section 2(1) of the Mines (Working Facilities and Support) Act 1966 (“**Mines Act**”). Where it is not practical to obtain such rights through private negotiations, the PEDL holder could consider applying for ancillary rights through the Mines Act.

3. Section 7(1) of the Petroleum Act applies the Mines Act for the purpose of enabling a licensee to acquire such ancillary rights as may be required for the exercise of the rights granted by their PEDL.
4. This document provides guidance for PEDL holders on when it might be appropriate to consider making, and how to make, an application for ancillary rights under the Mines Act. The information in this document does not constitute legal advice. It is advisable for a licensee to take legal advice in connection with the making of an application under the Mines Act.

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<sup>1</sup> For Clarity, this guidance does not cover the Infrastructure Act 2015, which simplifies the procedure for obtaining the right to use underground land 300 metres

and below for the purpose of exploiting oil and gas (petroleum) and deep geothermal energy.

## When to make an application

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5. The Mines Act makes clear that no ancillary rights shall be granted by a court under that Act unless the court considers it is expedient in the national interest<sup>2</sup> and it is shown that it is not reasonably practicable to obtain the right by private arrangement for any of the following reasons:
- a) that the person with power to grant the right are **numerous**<sup>3</sup> or have **conflicting interests**;
  - b) that the persons with power to grant the right, or any of them, **cannot be ascertained** or **cannot be found**;
  - c) that the persons from whom the right must be obtained, or any of them, **have not the necessary powers of disposition**, whether by reason of defect in title, legal disability or otherwise; or
  - d) that the person with power to grant the right **unreasonably refuses** to grant it or **demand terms which**, having regard to the circumstances, **are unreasonable**.<sup>4</sup>
6. In most cases, in order to demonstrate that it is not reasonably practicable to obtain the right by private arrangement, it will be necessary for the licensee to make reasonable and sustained efforts to engage and, if successful, to negotiate the required ancillary rights with the relevant landowners before submitting an application for ancillary rights under the Mines Act (for guidance on evidence to be included in an application see “**How to make an application**” below).
7. Where the conditions described in paragraph 5 above have been fulfilled, it might be appropriate for the licensee to consider making an application for ancillary rights under the Mines Act.

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<sup>2</sup> Section 3(1) of the Mines Act

<sup>3</sup> For guidance see paragraphs 15 to 21

<sup>4</sup> Section 3(2) of the Mines Act

## How to make an application

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8. An application should be made to the NSTA<sup>5</sup> setting out the circumstances the applicant believes justify the grant of the ancillary rights. The NSTA will consider the application and determine whether or not to refer the matter to the court. The NSTA's role under the Mines Act is to refer applications to the court unless of the opinion that a *prima facie* case for section 3(2) of the Mines Act has not been made out.<sup>6</sup>
9. It is important to note that a reference to the court does not prejudice the application. The *prima facie* case test is a procedural step in order to enable the applicant to bring a case before the court.
10. The applicant should place all relevant facts before the NSTA in order to enable it to decide whether or not it is appropriate to refer the application to the court. There is no prescribed form in which this should be done and the following is intended as guidance only.
11. Consideration of whether or not a *prima facie* case is made will be carried out on an individual landowner basis (rather than considering the case as a whole where there are multiple landowners). Evidence should therefore be provided to justify the grant of ancillary rights for each landowner where more than one landowner is involved.
12. In all cases, the applicant should make clear the ancillary rights sought in terms of the wording of section 2(1) of the Mines Act, supported by facts the applicant believes justify the grant of such rights.
13. As a guide, in order to enable the NSTA to consider whether or not to refer the matter to the Court, the applicant should provide:
  - a) an explanation of the ancillary rights sought (including their nature and duration);
  - b) an explanation of why the ancillary rights are needed;
  - c) an explanation of why a grant of the rights is expedient in the national interest;
  - d) a statement of the reason(s) the application is being made (as described in paragraph 5 above) and an explanation as to why it is not reasonably practicable to obtain the rights by private arrangement (see paragraph 15 onward below for further guidance);
  - e) plans identifying the land in relation to which ancillary rights are sought;

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<sup>5</sup> Regulation 2(7)(d) of the Petroleum (Transfer of Functions) Regulations 2016

<sup>6</sup> Section 4(3) of the Mines Act

- f) the name, address and contact details of the persons from whom the rights in question are sought; and
- g) in most cases, evidence of engaging, and making reasonable and sustained efforts to negotiate the required ancillary rights, with the relevant landowners. For example, a correspondence log and details of negotiations that demonstrate that:
  - (i) numerous attempts to contact landowners have been made through all reasonable means available;
  - (ii) sustained efforts have been made to verify contact information where no response has been received; and
  - (iii) numerous reasonable attempts to engage and negotiate with landowners have been made where contact has been made.As part of demonstrating such sustained efforts to negotiate, it might also be appropriate to provide evidence of notifying the relevant landowners that an application for ancillary rights under the Mines Act could be made if the required ancillary rights cannot be obtained through private arrangement, including explaining the compensation procedures under the Mines Act to such persons.<sup>7</sup>

14. Evidence as to why it is not reasonably practicable to obtain the rights by private arrangement will depend on the reason(s) being relied on.

15. **Examples of the sort of information that could helpfully be provided in relation to each reason (as listed in paragraph 5) are set out in the following paragraphs.**

#### *Numerous*

16. Where the **first part of reason (a)** is relied on, the applicant should provide evidence that the persons from whom the rights must be obtained are numerous and why it is therefore not reasonably practicable to obtain the right by private arrangement. Our expectation is that the Court would interpret “numerous” by reference to its ordinary meaning (*i.e.* great in number) and in the context of the wording of the Mines Act (*i.e.* not reasonably practicable to obtain the right by private arrangement with such a number) and therefore the applicant should provide evidence to this effect as part of its demonstration of a *prima facie* case.

#### *Conflicting interests*

17. Where the **second part of reason (a)** is relied on, the applicant should provide evidence that the persons from whom the rights must be obtained have conflicting interests (for example, by setting out details of the landowners’ interests and how they are incompatible with one another) and why it is therefore not reasonably practicable to obtain the right by private arrangement.

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<sup>7</sup> Section 8 Mines Act

### *Cannot be ascertained or found*

18. Where **reason (b)** is relied on, the applicant should provide evidence that the persons from whom the rights must be obtained cannot be ascertained or found (for example, evidence of reasonable endeavours made to trace such persons) and why it is therefore not reasonably practicable to obtain the right by private arrangement.

### *Not the power to grant the right*

19. Where **reason (c)** is relied on, the applicant should provide evidence that the persons from whom the rights must be obtained have not the power to grant the rights (for example, evidence of defect in title) and why it is therefore not reasonably practicable to obtain the right by private arrangement.

### *Unreasonable refusal*

20. Where the **first part of reason (d)** is relied on, the applicant should provide evidence that the persons from whom the rights must be obtained unreasonably refuse to grant the rights and why it is therefore not reasonably practicable to obtain the right by private arrangement. Evidence of (i) *refusal* by the landowners could be demonstrated, for example, by a sufficient level of negotiations having taken place between the applicant and the

relevant landowners, and that such negotiations have concluded in either a clear expression of refusal, a refusal to respond on the substantive question of the ancillary rights request, or silence, and evidence of (ii) the *unreasonableness* of such refusal could be demonstrated, for example, by reference to any reasons provided by landowners for their refusal and the impact of such a refusal on the applicant's activities or application as a whole.

### *Demand unreasonable terms*

21. Where the **second part of reason (d)** is relied on, the applicant should provide evidence that the persons from whom the rights must be obtained demand unreasonable terms and why it is therefore not reasonably practicable to obtain the right by private arrangement. For example, information on (i) details of the terms offered by the applicant to the landowners, (ii) details of the terms required by the landowners, and (iii) details of market standard terms (in considering whether or not a *prima facie* case is made, the NSTA is likely to consider terms reasonable where they are fair and representative of market conditions).

## Timings regarding applications

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22. The following timings are as a guide only. Once an application has been submitted, the NSTA will aim to respond within 14 days to acknowledge the application.
23. The NSTA may request further information from the applicant at any point to help its consideration of whether or not to refer the application to the court for determination.
24. The NSTA may also communicate with other interested parties as it thinks fit and where the application relies on reason (c) or (d) (*i.e.* where the persons from whom the right must be obtained have not the power to grant the right or unreasonably refuse to grant the right or demand unreasonable terms) the NSTA will communicate with the person against whom the assertion is made. The NSTA would expect to give landowners at least 14 days to consider and respond to such communication.
25. Following consideration of the information provided by the applicant and, if applicable, landowners, the NSTA will determine, as soon as reasonably practical, whether or not a *prima facie* case has been made, and consequently, whether to refer the case to the court for determination.
26. The total time period for application review and a decision on whether or not to refer the matter to the court will be dependent on the quality and complexity of the application.
27. Should applicants have further questions on this process, please e-mail: [correspondence@nstaauthority.co.uk](mailto:correspondence@nstaauthority.co.uk)



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Our registered office is at Sanctuary Buildings, 20 Great Smith Street, London SW1P 2BT

[www.nstauthority.co.uk](http://www.nstauthority.co.uk)