

The Hydrogen Regulation Highway – pointing in the right direction but nothing is moving for a while yet!

On 17 August 2021, the UK Government's long awaited Hydrogen Strategy was released for public digestion and assessment. Stephenson Harwood released a summary of the pertinent points in the Strategy which can be found [here](#).

Furthermore, following on from our "[Regulation & Licence Highway – key milestones in UK hydrogen projects](#)" article which we published in May 2021 in conjunction with Gordon Nardell QC from Twenty Essex, we thought it useful for our clients and contacts to understand the implications the Strategy has had specifically on the regulatory environment.

Overall and as predicted, the Strategy unfortunately does not announce or give any details about changes to the regulatory environment.

While the Strategy identifies that investors, developers and companies across the UK are ready to build hydrogen projects if the right policy environment is in place and that hydrogen is currently a nascent area of energy law, the Government's timelines set out throughout the Strategy are also bleak for early adopters.

The Strategy is unfortunately extremely light on detail when it addresses regulation, policy and legal. The Government acknowledges that the UK's hydrogen policy and regulatory arena is broad, complex and the uncertainty is a major challenge which needs to be overcome in order for hydrogen to reach its potential. Yet, there appears to be an unspoken acceptance that hydrogen projects must proceed now in order to meet the UK's decarbonisation targets and consumer appetite and eventually, the regulations will catch up.

What the Government is doing to progress the issue?

Encouragingly, the UK Government is already working with regulators and industry to develop a common understanding of how current regulation supports or impedes hydrogen production. The Government explains by doing so, it is able to consider the immediate regulatory barriers to the initial development of the hydrogen economy.

The Strategy stresses however that any potential immediate regulatory developments must be weighed against a broader and longer term regulatory environment which is by no means an easy task given the transformation of the sector over the last 19 months alone.

The Government accepts that early adopters are encountering unexpected regulatory barriers across the regulatory spectrum of safety, planning, licensing and access to end uses. From our experience on a number of hydrogen projects across the UK, we wholeheartedly agree.

The following areas were specifically addressed within the Strategy:

1. Network Frameworks

The Strategy states that hydrogen projects in 2021 – 2024 will need to proceed through the existing regulatory and legal framework.

The Strategy states that the Government aims to have:

- An "initial" network regulatory and legal framework in place between 2025 – 2027; and
- a long-term network regulatory and legal framework in place between 2028 – 2030.

The above announcements are positive especially given the focus on blending however as we identified in our original publication on this topic, this leaves stakeholders facing a patchwork of rules and policies

introduced prior to hydrogen being even contemplated for a number of years to come.

Encouragingly, the Strategy highlights that the Government will;

- review the Gas Act 1986 to ensure appropriate powers and responsibilities are in place to facilitate a decarbonised gas future;
- review gas quality standards with a view to enabling the existing gas network to have access to a wider range of gases; and
- launch a 'Call for Evidence' which will look at the current gas types and assess the potential role of hydrogen in the existing gas system.

2. Planning Permission & Permitting

The Strategy aims to have planning and permitting regimes in place before 2024. While this is welcomed news, the Strategy contains no information about how this will be done and what changes will be implemented to the current regimes.

The Strategy recognises that there are major uncertainties around;

- the permitting procedures and their accompanying regulations for new hydrogen pipeline infrastructure;
- how to deal with applications to join new hydrogen pipelines to existing hydrogen pipelines; and
- providing sufficient flexibility for any future regulation of end use applications (such as domestic consumers using hydrogen for heat).

There are meanwhile signs of modest steps forward in relation to the development consent regime for larger hydrogen infrastructure projects. Shortly after publication of the Strategy, BEIS issued [consultation drafts](#) of revised versions of the energy-related National Policy Statements (NPS) which guide “one-stop” consenting under the Planning Act 2008 for nationally significant infrastructure projects (NSIPs). The overarching policy statement, EN-1, currently operates entirely in tandem with the technology-specific NPS, EN-2 to EN-6. BEIS now proposes that it should have a free-standing role for technologies not covered by another NPS. The aim is to aid development of infrastructure for low-carbon technologies including CCUS and hydrogen, reinforced by new text in EN-1 itself requiring the decision-maker to give “substantial

weight” to the need for (among other things) new hydrogen infrastructure.

Smaller scale energy developments remain outside the statutory categories of NSIP. So consenting of these projects remains via planning permission at local level, where individual council’s policies on energy infrastructure may differ widely. BEIS’ consultation document contains a reminder of the Secretary of State’s power under s. 35 of the Planning Act 1998 to direct projects outside the statutory NSIP categories into the development consent regime, adding the tantalising statement that “*this added flexibility allows for the NPSs to support new and developing forms of energy infrastructure that are vital for our transition to net zero*”. This power is available where a number of smaller projects form part of a cumulative whole. So, with a little inventiveness, it may still be possible to bring a series of connected local or small-scale hydrogen infrastructure projects into the NSIP regime. Section 35 requests are considered on their individual merits, but one helpful short-term output from the reform process envisaged by the Strategy would be a robust statement of policy by BEIS supporting the use of s. 35 to promote new hydrogen projects.

3. Regulatory activity

We welcome the announcement that the UK Government will create a ‘*Hydrogen Regulators Forum*’ to assist with developing the area. The regulatory and legal frameworks to support hydrogen’s continued development are complex and will most likely need new administrative bodies or grant additional powers to existing ones.

This is a positive step and we look forward to further announcements about when the forum will be created, who will be on it and most importantly, when will the forum’s conclusions be considered by Government. One key issue for the sector is how economic regulation will be integrated into the holistic approach Government is aiming for. For example, the elaborate regime for grid access and pricing, governed by network codes administered by Ofgem via licence conditions, is currently regarded by many in the sector as inhibiting and even deterring the development of hydrogen production and use. The Strategy promotes Ofgem’s role in supporting a number of headline projects and initiatives, but says little about Government’s vision for hydrogen-friendly rules governing, for instance, grid access and offtake for electrolysis. Attention to this kind of detail is vital to achieving the Government’s overall targets for hydrogen deployment.

Conclusion

The UK Government recognises the need to put in place clear policies and regulatory regimes that support hydrogen stakeholders. It confirms that "*[i]n the 2020s, we will seek to ensure that an appropriate legislative framework is in place to inventive investment...*".

We hope the timelines provided within the Strategy are worst case scenarios. The speed at which a hydrogen regulatory and policy environment needs to be created cannot be underestimated or overlooked. The

uncertainty that current exists will unfortunately only lead to increased costs and time associated with any early project development. We strongly believe stakeholders will only be comfortable that they are making a no (or even low) regret investment in the sector when they can accurately assess and predict the regulatory environment.

We look forward to the Government providing further information on all of the issues identified above, sooner rather than later.

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