

Paul Grace
Berwin Leighton Paisner LLP
Adelaide House
London Bridge
London
EC4R 9HA

Our Ref: 110930_EN030001_836187

30 September 2011

Dear Mr Grace

EN030001 Proposed Underground Gas Storage facility at Preesall Saltfield: Draft Development Consent Order and Explanatory Memorandum

I refer to your letter dated 11 August 2011 seeking comments from the Infrastructure Planning Commission (IPC) on the draft development consent order (the Order) and draft Explanatory Memorandum (EM) relating to the proposed underground gas storage facility at Preesall Saltfield. I set out below the points discussed at our meeting on 19 September 2011 together with additional comments.

The IPC's advice below relates to technical and drafting aspects of the draft Order without prejudice to the eventual decision of the Commissioner appointed to decide whether to accept the application under s55 of the Planning Act 2008 (PA 2008). It will be for the Examining authority (ExA) appointed to examine the application to consider and decide whether or not, with legal advice as appropriate, an Order can be made in the form submitted within the powers of the PA 2008 and subject to any decision-making tests imposed by the PA 2008.

Although consistent drafting will be helpful, whether or not a provision in a draft Order is acceptable will depend on the facts and circumstances of the particular nationally significant infrastructure project (NSIP) and its impacts. It is not appropriate or relevant to assume that it will be acceptable because it has been used in another Order. The EM must explain the purpose and effect of each provision in the draft Order and any departures from the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (the MP Order). Providing provisions used in predecessor regimes such as for Transport and Works Act Orders in the EM may be helpful but is not sufficient. The IPC will need to understand the rationale for including the particular working of a provision in the context of the PA 2008.

It is unclear whether the draft Order is seeking to use the provision in s150 of the PA 2008 in relation to obtaining certain additional authorisations. Authorisations which can be treated in this way are contained in Schedule 1 of the Infrastructure Planning (Miscellaneous Prescribed Provisions) Regulations 2010. It is necessary for the authority responsible for granting the authorisation to consent to this process (see s150 of the PA 2008). The EM should identify the authorisation, the reasons why the developer is following this route and state how close the developer is to achieving the consent of the

authority concerned. Where a developer is seeking separate authorisations, these should be separately listed in the application form submitted to the IPC.

It is ultimately the responsibility of developers to ensure that the draft Order applied for would provide them with all the necessary authorisations to implement the scheme. It is essential that the drafting of the Order accurately defines the land over which powers are required and so as to be consistent with the approach taken in the land and works plans.

Draft Development Consent Order

Preamble

We appreciate that this will need to be refined to reflect decision-making roles following changes to the PA 2008. At present it is not clear why there is reference to the Local Planning Authority (LPA) and its determination.

Article 5: Limits of Deviation

Article 5 only refers to the lateral limits of deviation as shown on the works plan. It is unclear what, if any, above ground surface vertical limits of deviation are sought. Whilst Work No 1A in Schedule 1 of the draft Order limits the deviation below ground surface, there is no express reference to the parameters for the vertical limits of deviation, for example Booster Pump Station (Work No 4). It is also unclear what the limits of deviation are for the other below ground infrastructure, for example Work Nos. 14 and 15 (power cables laid beneath the River Wyre). The limits of deviation would need to have been clearly assessed in the Environmental Statement (ES).

It is for the ExA to judge whether the flexibility sought, both by the limits of deviation proposed in article 5 and through any requirements, has been properly assessed and is acceptable in terms of impacts and enforceability of requirements. The ExA will have regard to representations from interested parties such as the local authorities, the Health and Safety Executive (HSE) and the Environment Agency (EA). If the applicant is able to agree a position with statutory consultees in relation to their views on flexibility, as well as other matters, this would assist the ExA.

Article 7: Benefit of Order

It is proposed to allow the benefit of the DCO to have effect for the benefit of any person authorised by the undertaker. This does not follow exactly the model provisions and it will be helpful if the explanatory memorandum (EM) clarified whether the proposed article followed any precedents in authorisations under the Gas Act 1965.

Article 8: Transfer of benefit of Order

It is noted that the benefit is personal to the undertaker and that it is proposed to allow transfer, subject to the same restrictions, liabilities and obligations, without the need for the consent of any Secretary of State. The ExA will need to understand the implications of this and justification for this article should be provided, in particular addressing in the statement of reasons and funding statement the implications of transferring compulsory acquisition powers. Any constraints on transfer of powers which may be sought by HSE, in relation to

the hazardous substances direction, should also be identified in pre-application discussions and should not be inconsistent with powers sought in the Order.

Article 10: Construction and maintenance of new or altered streets

This is a novel provision and the views of the highway authority, expressed in a Statement of Common Ground (SoCG) for example, would be helpful. The EM should explain why this power is necessary and expedient and provide justification, by reference to the relevant power in s120(4) and Schedule 5 of the PA 2008. Consideration should also be given to s120(8) which limits the scope of provisions which may be included in an Order.

Article 11: Power to alter layout, etc., of streets

As above, the EM should explain why this power is necessary and expedient and provide justification by reference to the relevant power in s120(4) and Schedule 5 of the PA 2008.

Article 13: Temporary stopping up of streets and rights of way

The EM should provide justification by reference to the relevant power in s120(4) and Schedule 5 of the PA 2008.

Article 22: Power to override easements and other rights

The EM should explain and justify application of s237 of the Town and Country Planning Act 1990 (TCPA 1990) with a modification that has the effect of removing the undertaker's residual liability. In particular, consideration should be given to s126(2) of the PA 2008 which provides that an Order may not modify the application of a compensation provision except to the extent necessary to apply the provision to the compulsory acquisition of land authorised by the Order.

Articles 26, 27 and 28: *Compensation*

The justification for these articles was queried given that the compensation code is established by the Acquisition of Land Act and the Land Compensation Act. Explanation and justification should be provided in the EM in the light of s126(2) of the PA 2008 which provides that an Order may not modify the application of a compensation provision except to the extent necessary to apply the provision to the compulsory acquisition of land authorised by the Order.

Article 40: Traffic regulation

Attention was drawn to s120(8) of the PA 2008 which provides that an Order may not create offences or confer power to create offences.

Schedule 1: Authorised Development

In relation to flexibility sought by way of the limits of deviation, the expression "Preesall halite deposit" should be defined so that it is precise and unambiguous. The views of the LPA with enforcement powers would be helpful.

Having regard to CLG Guidance on Associated Development (September 2009), it is not clear why internal site roads are considered to be associated development and not integral to the NSIP. The EM should explain the approach taken to associated and integral development.

Queries raised in letter dated 11 August 2011

It is for the ExA to decide whether it would be proportionate to authorise temporary possession.

In relation to a query raised about discharge of requirements, it is for applicants to draft requirements in the Order (in consultation with the relevant authorities) and to identify the body which will be responsible for approvals, bearing in mind CLG Guidance for Local Authorities (March 2010) which anticipates that this role will be carried out by LPAs. Different approaches have been taken in other draft Orders, one example being application (through s120 of the PA 2008) of s78 of the TCPA 1990 to put in place an appeal mechanism. Applicants should take their own legal advice about this and give careful consideration to the drafting of the Order.

Hazardous substances direction

It was confirmed that there is no requirement for separate publicity in relation to the application for a hazardous substances direction under the PA 2008. Please note that the draft list of consents provided by the developer refers to the ability of the IPC to deem Hazardous Substances Consent under s43(2) of the PA 2008. This is the incorrect legislative provision and reference should be made to the Planning (Hazardous Substances) Act 1990 (as amended by Schedule 2, paragraphs 42 to 47 of the PA 2008).

Works Plans

Generally, the work plans are to a good standard and comply with IPC Advice Note 6: Preparation and submission of application documents (September 2011). For a full summary of points noted please see the table at Appendix 1.

Should you have any queries in relation to the above or any other matter, please do not hesitate to contact me.

Yours sincerely

Tom Carpen
Case Leader

Direct Line: 0303 444 5064

Helpline: 0303 444 5000

Email: tom.carpen@infrastructure.gsi.gov.uk

The IPC gives advice about applying for an order granting development consent or making representations about an application (or a proposed application). The IPC takes care to ensure that the advice we provide is accurate. This email message does not however constitute legal advice upon which you can rely and you should note that IPC lawyers are not covered by the compulsory professional indemnity insurance scheme. You should obtain your own legal advice and professional advice as required.

We are required by law to publish on our website a record of the advice we provide and to record on our website the name of the person or organisation who asked for the advice. We will however protect the privacy of any other personal information which you choose to share with us and we will not hold the information any longer than is necessary.

You should note that we have a Policy Commitment to Openness and Transparency and you should not provide us with confidential or commercial information which you do not wish to be put in the public domain.

Appendix 1: Drafting Points

<p>Works Plans</p> <p>MMD-277663-C-DR-00-XX-0000 to MMD-277663-C-DR-00-XX-0023</p>	<p>All plans except Plan 11 (MMD-277663-C-DR-00-XX-0011) appear to conform to the standards specified in IPC Advice Note 6: Preparation and submission of application documents (September 2011) with the exception of plan MMD-277663-C-DR-00-XX-0011 which does not include a North arrow.</p> <p>Generally:</p> <ul style="list-style-type: none"> • The shading could be clearer as the temporary works compound and subsurface works shading are too similar. • Some of the points which demonstrate streets subject to street works in Schedule 3 of the Order are outside the Order limits and the limits of deviation. Please ensure that all works forming part of this application are within the Order limits and the limits of deviation. • Some of the labelling on the plans is obscured by other labels or drawings. Please ensure that all labels of roads, footpaths, bridleways and other notes are clearly legible. • Query High Gate Lane and Hall Gate Lane which have both been used with reference to the same road. Please ensure that the naming is correct in the draft Order and all plans. • Agglesbys Road not listed in Schedule 3, Work No 17 (MMD-277663-C-DR-00-XX-0010)
<p>Proposed Access Road Plan</p> <p>MMD-277663-D-DR-00-XX-0100</p>	<p>A contextual plan identifying the proposed access road in relation to the remainder of the site would be useful.</p>
<p>Article 8(1)(b)</p>	<p>Query line break between “lessee” and “any”.</p>
<p>Schedule 3 of the draft Order and Works Plans</p>	<p>Schedule 7 has been cross-referenced with the plans. A similar approach would be helpful for Schedule 3 as some streets identified in Schedule 3 are not clearly labelled on the Works Plans.</p> <p>No points which cross Work Nos. 7 and 13 in Schedule 3 to demonstrate streets to be stopped up or altered.</p>

Schedule 4 of the draft Order	No reference to Work No 7 in relation to the alteration of Hall/High Gate Lane between points AA and BB on Works Plan MMD-277663-C-DR-00-XX-0016.
Terminology	Unclear and inconsistent use of terminology in the interpretations and articles set out in Part 1 and Schedule 12 of the draft Order. Examples include (but may not be limited to): <ul style="list-style-type: none"> • ‘decommissioning’ included in the interpretation of “maintain”; and • “traffic authority”, “development”, “construction” and “authorised development” not included in ‘Interpretation’ under Part 1 or Schedule 12 of the Order.
Dimensions	The dimensions of infrastructure are not always consistently provided in the draft Order. For example the length of the NTS Interconnector Pipeline (Work No 20) is not stated in Schedule 1, whilst only the lengths of certain parts of the Brine Pipeline (Work No 16) are stated (Work No 16D, 16E but not Works No 16K and 16L). It is not clear why the length of some of the infrastructure is clear whilst others are not.
Technical Explanation of DCO Schedule 1 (Authorised Development) and Works Plans	It is not clear how the document entitled ‘Technical Explanation of DCO Schedule 1 (Authorised Development) and Works Plans’ relates to the draft Order and EM. Information included in this technical report includes details not provided in the draft Order or the EM.