

BY E-MAIL (KEUPERGSP@PINS.GSI.GOV.UK)

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Dear Sirs

**APPLICATION BY KEUPER GAS STORAGE LIMITED FOR AN ORDER GRANTING DEVELOPMENT CONSENT FOR THE KEUPER GAS STORAGE PROJECT  
APPLICATION REFERENCE EN030002**

We act for Holford Gas Storage Limited (HGSL) and write in response to the Applicant's revised draft DCO submitted for Deadline 8.

HGSL makes the following comments on Part 5 of Schedule 9 (Protective Provisions) of the draft DCO which sets out the protective provisions for the protection of Holford Gas Storage Limited:

Relevant paragraph in Part 5 of Schedule 9 (Protective Provisions) of the Applicant's draft DCO submitted for Deadline 8	Comments by HGSL
Paragraph 56: Definition of "apparatus"	<p>HGSL notes that at paragraph 6.1.1 of the Applicant's Response to Written Representations of HGSL (submitted for Deadline 8), the Applicant agreed to the insertion of "cavities" in the definition of "apparatus" and this is reflected in the tracked version of the draft DCO.</p> <p>However, the clean version of the draft DCO does not reflect this change. HGSL assumes this is a typographical error and requests that the definition of "apparatus" is amended to include "cavities" by the Secretary of State if the DCO is granted.</p> <p>The Examining Authority may wish to check that the remainder</p>

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Relevant paragraph in Part 5 of Schedule 9 (Protective Provisions) of the Applicant's draft DCO submitted for Deadline 8	Comments by HGSL
	of the clean version of the draft DCO accurately reflects the tracked version.
Paragraph 63: Expenses	<p>The Applicant has rejected HGSL's inclusion of the following sub paragraphs on the basis that it considers it could be used by HGSL to seek commercial gain (paragraph 6.2 of the Applicant's Response to Written Representations of HGSL (submitted for Deadline 8)):</p> <ul style="list-style-type: none"><li><i>(a) in connection with the cost of the carrying out of any assessment of the undertaker's apparatus under the Control of Major Accident Hazards (COMAH) Regulations 2015 reasonably necessary as a consequence of the authorised works;</i></li><li><i>(b) implementing any mitigation measures required as a result of any assessment referred to in sub-paragraph (a) reasonably necessary as a consequence of the authorised works;</i></li></ul> <p>HGSL's position is that paragraph 63 should include the above sub paragraphs for the reasons set out below.</p> <p>The Applicant has repeatedly stated in its written submissions that it has experience in designing and constructing COMAH regulated gas storage facilities. However, notwithstanding the concerns raised by HGSL in its written representation and oral submissions, the Applicant has not provided any evidence or confirmation from the Health and Safety Executive (HSE) that the construction and operation of the Proposed Development will not negatively impact the risk profile of the HGSL Project under the COMAH Regulations.</p> <p>Matters relating to health and safety and the impact of the Proposed Development on neighbouring facilities must be considered as part of the DCO process as matters that are both important and relevant and will go to the Secretary of State's assessment of the adverse impacts of the Proposed Development.</p> <p>Under the COMAH Regulations, HGSL will need to demonstrate to the HSE that the revised risks at the HGSL site as a result of the Proposed Development remain As Low As Reasonably Practicable and take into consideration any additional risk reduction measures. As the potential impacts on the HGSL Project have not been fully assessed as part of the Examination, HGSL considers that it is reasonable and proportionate for the costs associated with carrying out this assessment and implementing any mitigation measures required as a consequence of the authorised development are borne by the Applicant. The purpose of this drafting is to mitigate the potential</p>



Relevant paragraph in Part 5 of Schedule 9 (Protective Provisions) of the Applicant's draft DCO submitted for Deadline 8	Comments by HGSL
	<p>adverse impacts of the Proposed Development on the HGSL Project.</p> <p>At paragraph 6.4 of the Applicant's Response to Written Representations of HGSL (submitted for Deadline 8) the Applicant states that it will "<i>of course seek to liaise with HGSL at all the key stages of its Project design and construction to ensure the Project development is managed without impact on HGSL</i>". However, this specific commitment is not secured in the draft DCO or any of the documents to be submitted and approved pursuant to the draft DCO.</p> <p>The costs incurred in respect of the assessment and/or mitigation measures must be "reasonably necessary as a consequence of the authorised works" and HGSL therefore rejects the Applicant's position that the wording would enable HGSL to "<i>propose and implement significantly and disproportionate control measures</i>" (paragraph 6.5 of the Applicant's Response to Written Representations of HGSL (submitted for Deadline 8)).</p> <p>The Applicant has referred to the national need for gas storage facilities and how gas storage facilities contribute to the security of energy supply to support its Application. However, the Applicant appears not to appreciate that there is also a national need for the HGSL Project to be able to continue operating. The Applicant continues to dismiss HGSL's concerns as those of a "commercial competitor" as opposed to recognising that HGSL is the operator of an integral part of the UK's security of energy supply.</p>
Paragraph 64(1): Indemnity	<p>HGSL does not accept the Applicant's revised drafting and reiterates its position that an indemnity is required to cover any third party claims. The cost of making good damage caused to third party property may only be part of the costs incurred by HGSL as a result of damage to HGSL's apparatus causing damage to third party property.</p> <p>HGSL accepts the insertion of an obligation to mitigate its loss.</p> <p>HGSL's position is that paragraph 64(1) should be as follows:</p> <p><i>Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any such works authorised by this Part of this Schedule or in consequence of the construction, use, maintenance, decommissioning or failure of any of the authorised works by or on behalf of the promoter or in consequence of any act or default of the promoter (or any person employed or authorised by him) in the course of carrying out such works, including without limitation works carried out by the promoter under this Part of this Schedule or any subsidence resulting from any of these works, any damage is caused to any</i></p>



Relevant paragraph in Part 5 of Schedule 9 (Protective Provisions) of the Applicant's draft DCO submitted for Deadline 8	Comments by HGSL
	<p><i>apparatus or property of the undertaker, or there is any interruption in any service provided by the undertaker, or the undertaker becomes liable to pay any amount to any third party (including but not limited to INOVYN Enterprises), the promoter will bear and pay on demand the cost reasonably incurred by the undertaker in making good such damage, restoring the supply or paying such amount and indemnify the undertaker for any other expenses, loss, demands, proceedings, damages, claims, penalty or costs incurred by or recovered from the undertaker, by reason or in consequence of any such damage or interruption or the undertaker becoming liable to any third party as aforesaid provided that at all times the undertaker shall be under an obligation to take reasonable steps to mitigate its loss.</i></p>
Paragraph 64(3): Indemnity	<p>HGSL does not accept the Applicant's revised drafting and reiterates its position that it is appropriate and reasonable that any costs incurred as a result of any interruption to the service that HGSL provides to its customers should be covered by the indemnity. HGSL acknowledges that it is not a "statutory undertaker" as defined in the Planning Act 2008. However, the HGSL Project is an integral part of the UK's security of energy supply and its high pressure gas pipeline is of the same specification and requires the same protection as the gas pipelines operated by National Grid Gas plc.</p> <p>It should be noted that protective provisions are required solely as a result of the fact that the extent and range of powers in the DCO enable the Applicant to carry out certain works to HGSL's apparatus <u>without</u> the need to enter into a commercial agreement with HGSL. The protective provisions must therefore cover all circumstances that could arise and adequately provide for a situation where substantial damage is caused to HGSL's apparatus. In the event that a commercial agreement was required, HGSL would request that the Applicant provided an indemnity to cover such costs.</p> <p>HGSL's position is that paragraph 64(3) should be as follows:</p> <p><i>(3) Nothing in sub-paragraph (1) shall impose any liability on the promoter in any circumstances in respect of—</i></p> <p><i>(a) any damage or interruption to the extent that it is attributable to the neglect or default of the undertaker, its officers, servants, contractors or agents;</i></p> <p><i>(b) loss of profits, loss of use, loss of revenue, loss of contract, loss of goodwill, loss of products, loss of productivity, loss of profitability or any indirect or consequential losses of any nature whatsoever save that the sums payable by the promoter under sub-paragraph (1) shall include a sum equivalent to the</i></p>



Relevant paragraph in Part 5 of Schedule 9 (Protective Provisions) of the Applicant's draft DCO submitted for Deadline 8	Comments by HGSL
	<p><i>relevant costs in circumstances where</i></p> <p>(i) <i>the undertaker is liable to make payment of the relevant costs pursuant to the terms of an agreement between the undertaker and a gas storage customer relating to the storage of gas in the undertaker's apparatus; and</i></p> <p>(ii) <i>the existence of that agreement and the extent of the undertaker's liability to make payment of the relevant costs pursuant to its terms has previously been disclosed in writing to the promoter</i></p> <p><i>but not otherwise.</i></p> <p>HGSL's position is that paragraph 64(6) should be as follows:</p> <p><i>(6) In this paragraph</i></p> <p><i>"relevant costs" means the costs, direct losses and expenses (including loss of revenue) reasonably incurred by a gas storage customer as a consequence of any restriction of the use of the undertaker's apparatus as a result of the construction, maintenance or failure of any specified works or any such act or omission as mentioned in sub-paragraph (1)</i></p> <p><i>"gas storage customer" means any person licensed to ship, transmit, distribute or supply gas under the Gas Act 1986</i></p> <p>It should be noted that the terms of the existing commercial arrangements between HGSL and INOVYN Enterprises Limited are confidential. HGSL has taken steps outside of the Examination to request that the Applicant immediately applies to the Examining Authority to formally withdraw the comments made by the Applicant in paragraph 5.2 of the Applicant's Response to Written Representations of HGSL (submitted for Deadline 8) which constitute a breach of the confidentiality provisions.</p> <p>The terms of latest draft of the side agreement between HGSL and the Applicant were sent on a without prejudice basis and should not therefore have been referred to in the Applicant's written submission.</p> <p>HGSL considers that these are clearly matters which should not be taken into account by the Examining Authority and/or the Secretary of State. HGSL is therefore informing the Examining Authority of the position so as to ensure that the disclosure of this confidential information does not prejudice HGSL's position.</p>
Paragraph 65: Enactments and agreements	HGSL deleted this provision in its Deadline 7 submission as there are no existing agreements between the Applicant (Keuper Gas Storage Limited) and HGSL. HGSL therefore



<b>Relevant paragraph in Part 5 of Schedule 9 (Protective Provisions) of the Applicant's draft DCO submitted for Deadline 8</b>	<b>Comments by HGSL</b>
	<p>considers that there is no justification for the inclusion of paragraph 65.</p> <p>In response to paragraph 6.6 of the Applicant's Response to Written Representations of HGSL (submitted for Deadline 8), HGSL notes that INOVYN Enterprises Limited is not the undertaker for the purposes of the draft DCO. The powers in the draft DCO are not being granted to Keuper Gas Storage Limited as agent for INOVYN Enterprises Limited.</p> <p>Whilst the undertaker (as defined in the draft DCO) is currently part of the INEOS group of companies, there is no requirement in the DCO for it to remain part of the INEOS group of companies for the life of the authorised development.</p> <p>In the absence of a side agreement, the protective provisions in the DCO are intended to govern the relationship between the undertaker (as defined in the DCO) and HGSL in respect of the authorised development. HGSL considers that existing commercial agreements between HGSL and another company in the INEOS group of companies are not relevant for the purposes of the powers in the DCO.</p>

We should be grateful if you would acknowledge receipt of this letter.

Yours faithfully

**Pinsent Masons LLP**