

## Preesall Underground Gas Storage Facility

### Achieving development consent for underground gas storage in Lancashire – a marathon not a sprint

In July 2015, the Secretary of State for Energy & Climate Change made a development consent order (DCO) for Halite Energy Group's underground gas storage facility in Preesall, Lancashire.

This had been the successful culmination of an uphill four-year planning struggle to bring underground gas storage to Preesall, involving a Secretary of State's refusal against his examiners' recommendation (a DCO first), a successful judicial review against that decision (another DCO first) and a re-determination resulting in consent (yet another DCO first).

Though things can go wrong in the examination of a DCO application, particularly where the infrastructure is technically complex and has vocal local opposition, Government and the Planning Inspectorate are very much open to learning as the Planning Act's fast-track consenting process continues to bed down and a well-advised promoter with staying power and positive engagement can achieve a successful outcome. With 43 of 45 applications now approved, the DCO regime has much to offer promoters of nationally significant infrastructure and investors.

#### **Consent for underground gas storage in Lancashire**

In July 2015, the Secretary of State for Energy & Climate Change made the development consent order (DCO) for Halite Energy Group's underground gas storage facility in Preesall, Lancashire, saying that it would make a "nationally significant" contribution to ensure the UK's security of gas supply.

This has been the culmination of an uphill planning struggle to bring gas storage to Preesall, where the salt strata provide one of the few locations in the UK suitable for man-made caverns to be created by solution mining for the underground storage of gas.

#### **Canatxx**

Halite's predecessor, Canatxx Gas Storage, made a number of planning applications under the Town and Country Planning Act to Lancashire County Council for a facility on the site. With significant opposition from a local objectors group, both a 2004 application determined by the Secretary of State in 2007 (following a public inquiry) and a 2009 application before the County Council were refused. The reasons for refusal were predominantly that insufficient information had been provided on the project's geology such that safety concerns remained.

#### **Halite's DCO application**

Halite and its new management team took on the project in early 2010 and instructed BLP to advise on planning consents later in 2010. The BLP team was led by Partner Tim Smith and Associate Director Paul Grace, assisted by Senior Associate Sheridan Treger.

The Government's new fast-track consents process for nationally significant infrastructure under the Planning Act 2008 allowed a change of tack:

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- Underground gas storage facilities were one of the named categories of infrastructure for which the new process had been designed.
- The Government had also introduced a “National Policy Statement for Gas Supply Infrastructure and Gas and Oil Pipelines”, called “EN-4”. This set out a policy matrix for underground gas storage against which applications would be determined. A particular advantage of national policy statements is that they make it clear that objectors cannot question *the need* for the infrastructure in question, a major cause of delay and uncertainty for historic projects like Heathrow’s terminal five. Instead, need is to be assumed.

Halite applied for a DCO in November 2011 for a smaller scheme in a more confined geographical area than those previously proposed by Canatxx, albeit still a very substantial facility that will potentially add up to 20% to the UK’s gas storage capacity.

The British Geological Survey and the global engineering consultancy Mott McDonald assembled detailed geological evidence, including the preparation of a geological summary report on behalf of Halite. This report was to meet the tests in EN-4 for the project’s geology.

With a positive approach, praised even by longstanding objectors to a facility in Preesall, Halite agreed 43 statements of common ground with statutory bodies. This included one on geology with the County Council (who had previously rejected Canatxx applications on that basis), agreeing that the geology was now sufficiently well-defined for the proposals.

### **The examiners’ report**

Following a six month examination in accordance with the Planning Act’s statutory timescales, the examiners recommended that the DCO be made.

In terms of geology, the examiners were satisfied with the position on safety, the key plank of local objection: the risk to local residents would be low and the stringent safety requirements of the Control of Major Accident Hazards Regulations would lead to an entirely safe and stable facility, examples of which exist in other parts of the UK and indeed in much larger numbers elsewhere in the world.

A local objector’s group, not advised by specialist geologists, had made representations disagreeing with the British Geological Survey and Mott MacDonald on whether certain of the salt formations were safe. These representations had been addressed by Halite during the examination.

Section 104 of the Planning Act requires that a scheme compliant with the relevant national policy statement should be granted consent unless its adverse impact would outweigh its benefits, i.e. there is a planning balance to be considered but there is a rebuttable presumption in favour of a policy-compliant project.

Having concluded that the position on safety was satisfactory, the examiners turned to the visual impacts of the project – predominantly the project’s gas compressor compound.

In considering whether the benefits of the project outweighed this visual impact, the examiners then explored the possibility that all of the geological objections raised by the local objectors could turn out to be correct, and could all turn out to be correct simultaneously, even though they acknowledged this was “highly improbable”. They explored these scenarios not in terms of safety but in terms of what they could mean for the minimum likely capacity of the project on one hand, as part of the planning balance, against the visual impact of the project on the other. The examiners then applied what they acknowledged was their own “rough order of magnitude” calculations to what the local objectors’ scenarios could mean for the project’s gas storage capacity, significantly downgrading it.

Despite this, the examiners concluded that concerns about capacity versus visual impact could be rectified by applying a Requirement (equivalent to a planning condition) for Halite to submit certain further geological data, ordinarily obtained by promoters following the planning stage prior to detailed design, and applying a minimum floor to the capacity the project would need to demonstrate. The examiners noted that Halite had confirmed during an issue specific hearing on safety that it would be obtaining such further data in any case. Provided that the Requirement was satisfied, the examiners concluded that the visual impact of the gas compressor compound did not outweigh the need for the project.

However, neither the assumed problem which the examiners had introduced in respect of capacity, nor the Requirement with which they had sought to rectify it, had been raised by them or any other party during the examination. No written questions had been raised on the subject. Neither, had the examiners called for an issue specific hearing on geology or on capacity.

### **The Secretary of State’s decision**

In April 2013, the Secretary of State for Energy and Climate Change refused the application, against the examiners’ recommendation that the DCO should be made. A first for a DCO.

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The Secretary of State agreed with the positive conclusion on safety, and that the need for such a facility to make gas quickly available during peak times of demand was clear in the Government's national policy. However, looking at the examiners' report, he was concerned that he had "no convincing evidence" as to the capacity of the project that might ultimately be constructed in the salt formations in Preesall. Indeed, he was concerned that potentially no development might be possible at all.

He concluded, therefore, that he was not in a position to form a view on whether the visual impact of the gas compressor compound overcame the need for the project. The policy basis for the refusal was explained as being that Halite had not demonstrated that the geology was suitable "for the type of underground gas storage proposed", a requirement of EN-4.

The independence of the Planning Inspectorate from political decision-makers in planning decisions is a distinct feature of the English and Welsh planning systems, marked by a real physical and procedural separation.

In this case, the lack of opportunity for DECC officials to discuss the examiners' report with the examiners who had compiled it may have made it harder to appreciate that the examiners' were satisfied with the position. The examiners were at the same time acting as an extreme "devil's advocate" in considering what they acknowledged were improbable scenarios and then providing a solution so as to "cover all the bases", as they saw them. The highly technical nature of the geological matters would not have assisted.

### **The judicial review**

BLP was instructed by Halite to judicially review the decision. In January 2014 the Court quashed the refusal. It found that there had been a lack of fairness in the process. This has been the first and only successful judicial review of a DCO decision.

The Court made comments which have affected how examining authorities must approach issues during DCO examinations:

- 1) The examiners were not bound by the statement of common ground on geology. However, Halite and the County Council were entitled to rely on it as "determinative" as between themselves. If examiners are going to disagree with a statement of common ground fundamentally, here on whether the geology was adequately defined for the purposes of the DCO, they should give the parties a chance in written questions or a hearing to have their say.
- 2) Examiners do not have to share their provisional conclusions. However, they should share the route to their conclusions where it relates to a main issue of an examination and the thinking is based on scenarios that have not been in the public domain. Mott MacDonald and the British Geological Survey had not had the opportunity of providing expert comments on the examiners' own capacity calculations and the assumptions these were based on.
- 3) It was unfair for the examiners to have applied a criminal standard of proof to geology in the context of the balance between the project's capacity and its visual impact. The standard planning test of a balance of probabilities applies.
- 4) As in the Town and Country Planning regime, policy is to be read on its face and given its natural meaning. EN-4's requirement to demonstrate that the geology was suitable "for the type of underground gas storage proposed" could not be stretched to require Halite to evidence a minimum capacity where the question had not been raised during the examination or in policy.

### **The redetermination**

The Secretary of State appointed a firm of specialist geotechnical consultants with commercial experience of underground gas storage, Senergy, to assist him in re-determining the decision. They prepared a report which independently assessed Halite's geological data. For Halite, this enabled informed and objective debate between professionals on the likely capacity of the project.

The British Geological Survey and Mott MacDonald considered Senergy's assessment of the geological data to be on the pessimistic side. Nevertheless, Senergy's independent report concluded a likely storage capacity of three to four times the threshold for an underground gas storage facility being considered "nationally significant" under the Planning Act, meaning an effective annual gas storage capacity at a similar volume to some of the largest facilities in the country. This was as a result of the project's particular ability to fast-cycle gas into and out of the national grid at short notice.

On redetermination, Halite's legal submissions set out that it had demonstrated that the geology was suitable for underground gas storage; it was a central tenet of the Planning Act regime that where a development is in accordance with the relevant national policy statement (as was therefore the case with Preesall) there is a presumption in favour of development consent being granted. Within the context of that presumption, the decision-maker must consider whether there are any adverse impacts of such a magnitude that they outweigh the project's benefits (section 104 again). Halite submitted that the relatively modest adverse visual impacts on the landscape did not outweigh the benefits of a scheme of the magnitude now independently confirmed.

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Having already expressed himself to be satisfied with the safety of the project, as his examiners had done, the Secretary of State agreed that Halite had complied with the policies in EN-4 and concluded in his decision that there was a “compelling case” for authorising the application: the project’s added contribution to the UK’s gas storage capacity would help ensure security of supply and there is a pressing need for projects of this type.

## **Lessons learned**

### **Still “bedding” down**

Halite has shown that, seven years after its introduction, the Government’s dedicated consenting process is still “bedding” down, having to reconcile the speed and certainty of statutory timescales for examination with the careful and fair consideration of very complex, specialist technical matters.

### **More and later questions**

Examiners are increasingly mindful of the need during examinations to bring points of concern to promoters’ attention. Examiners aim to do this during the first two rounds of written questions at the front-end of examinations or during issue-specific hearings around the mid-point.

Given the volume of material to be covered and limited time after hearings to do so, however, examiners are increasingly issuing single-issue written questions towards the end of examinations. These may well represent key outstanding concerns and promoters need to treat them with great care, considering carefully whether to request a hearing where clarity is needed.

### **More extensions**

Government and promoters value the certainty given by the six month examination period and this has never been extended. However, the Planning Inspectorate has indicated that there may be special circumstances where an extension might be appropriate and could be granted if requested with sufficient advance warning – officials have mentioned this publicly with particular regard to potential forthcoming major airport applications.

Much like promoters, examiners themselves are under enormous pressure during fast-paced examinations. In Halite, the examiners’ “devil’s advocate” reasoning on capacity, albeit done in the context of a recommendation to grant, may well be an example of where it might have been appropriate for a minor extension to be granted for examiners to explore fundamental concerns, not previously raised, with parties to an examination before it closes.

### **Questions from the Secretary of State too...**

Given the political impetus to retain the six month examination timescales without extensions, another trend appears to be for examiners to highlight in their reports during their three month reporting period matters which remain outstanding. The Secretary of State’s Department, then, rather than simply issuing a refusal, itself issues written questions during its three month determination period until a particular issue has been resolved, and extends that three month period where needed.

For example, in 2013 the Able Marine Energy Park project was granted an extension to the determination period to pursue lease negotiations with the Crown Estate. The Secretary of State then issued a decision notice stating that he was “minded to grant” consent as recommended by the examiners. However, he was not yet in a position to do so until he had evidence that Network Rail was no longer concerned about operational impacts on the Killingholme Branch railway and Natural England no longer considered certain ecological compensation measures to be inadequate. Again, an extension was granted and the DCO was ultimately made in January 2014.

Halite’s position was different in that it had agreed approaches on matters of this nature with stakeholders during the examination. Nevertheless, one would imagine that where the Secretary of State has soluble technical concerns of the type noted in his original determination of the Halite decision, it is more likely nowadays to result in a “minded to grant” notice than an outright refusal. This will be of comfort to infrastructure investors and promoters, though it is better of course not to be in this position at all.

### **Policy interpretation**

The certainty that national policy statements have given the DCO regime has been one of its core strengths, avoiding inquiries running into months or years on the merits of a particular type of technology, for example. However, Halite’s case has shown that the pitfalls of interpretation so common in the Town and Country Planning Act arena may sometimes apply to DCOs too.

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## Speaking to promoters

In a Town and Country Planning Act application, the local planning authority's case officer can immediately identify any concerns with the applicant and meet to discuss whether these are well-founded (and indeed agree extensions to determine the application if necessary, should further information or consideration be needed). However, DCO examinations maintain the convention from public local inquiries in the Town and Country Planning Act system that the examiners only communicate formally with promoters in writing or during issue specific hearings, which are usually limited to a few days in a six month examination. The examiners are also bound by the statutory six month examination target.

The examiners may therefore have felt that there was insufficient time towards the end of the Halite examination and insufficient procedural opportunity to bring the matter to Halite's attention, and considered that this was not necessary in any case the context that they understood that they had provided a resolution to the perceived capacity problem and were recommending that the DCO be made.

It has been noticed that the Planning Inspectorate's case officers at examinations have over recent years increasingly maintained some degree of informal email and telephone contact with promoters, statutory bodies and objectors to provide minor clarifications on queries raised by examiners and list and chase outstanding items. This may have been a response to the Halite case or could be characteristic of the individual approaches taken by different examiners. In any event, it is a welcome development because, ultimately, DCO examinations are not appeals which have already been heard and are before an inspector wholly distanced from the parties – they are a different species of planning application where the examiner should have an outlet to speak to parties to clarify matters as concerns arise during examinations.

## Independent consultant advice

In the Town and Country Planning Act regime, it is entirely common for local planning authorities to have the benefit of independent professional advice on complex technical matters, such as geology, from leading firms in their fields. Following Halite, where the Secretary of State had this advice available in a way in which his examiners had not, promoters might expect increased use of independent consultant firms during the most complex of examinations (though it is not clear whether current statutory application fees can accommodate this without separate arrangements being entered into).

## Looking forward

Ultimately, Halite has shown two things.

Firstly, where things go wrong in the examination of a DCO application, particularly on infrastructure which is urgent but also technically complex and has vocal local opposition, a promoter's staying power and positive engagement can lead to a successful outcome.

Secondly, Government appears entirely open to learning from the early days of the DCO regime and, following Halite, is mindful of the need to assess projects rigorously but also fairly, so that promoters seeking to bring forward well-prepared DCO applications are not thwarted by the demands of procedure alone. As of today's date, the Government's Planning Act system has delivered 43 consents for nationally significant infrastructure projects, with all applications ultimately approved (other than those withdrawn and only two, the Navitus Bay and Mynydd y Gwynt wind farms, turned down).

BLP is advising Halite as this exciting project for UK energy moves towards implementation.

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