

**From:** [REDACTED]  
**To:** [Immingham OCGT](#)  
**Cc:** [REDACTED]  
**Subject:** EN010097 - VPI Immingham OCGT Project - Deadline 3 submissions on behalf of Phillips 66 Limited [BURGES-WORK.FID9679692]  
**Date:** 10 October 2019 17:52:00  
**Attachments:** [REDACTED]

---

Dear Sirs

Please find attached deadline 3 submissions on behalf of our client, Phillips 66 Ltd.

Kind regards

Alex

---

**Alex Minhinick**  
Senior Associate  
**Burges Salmon LLP**

T: +44 (0) 117 307 6874

[REDACTED]  
F: +44 (0) 117 378 6124

Legal Team PA (Mon/Tues/Weds): Kia Jarrett

T: +44 (0) 117 307 6260

Legal Team PA (Thurs/Fri): Su Hunt

T: +44 (0) 117 307 6250

[www.burges-salmon.com](http://www.burges-salmon.com)



This email (and any attachment) is intended solely for the addressee, is confidential and may be legally privileged. If you have received this email in error, please send it back to us immediately and delete it without reading, copying or disseminating it.

This email is being sent to you on behalf of one or more of the following entities with registered offices at One Glass Wharf, Bristol, BS2 0ZX, all of which (apart from Burges Salmon Company Limited) are authorised and regulated by the Solicitors Regulation Authority: Burges Salmon LLP, a limited liability partnership registered in England and Wales (LLP number OC307212); Burges Salmon Company Limited, a company registered in England and Wales (number 07556770); BS Pensions Trustees Limited, a company registered in England and Wales (number 2682277); and/or on behalf of Burges Salmon (Northern Ireland) Limited, a company registered in Northern Ireland (number NI611307) which is authorised and regulated by the Law Society of Northern Ireland and with a registered office at Forsyth House, Cromac Square, Belfast, Northern Ireland, BT2 8LA. Burges Salmon LLP is also regulated by the Law Society of Scotland.

A list of the members and directors of the above entities may be inspected at the relevant registered office and also at Burges Salmon LLP, One Glass Wharf, Bristol, BS2 0ZX Tel: +44 (0)117 939 2000 Fax:+44 (0)117 902 4400 <https://www.burges-salmon.com>. Further information about Burges Salmon entities, including details of their regulators, is set out in the "Who we are" section of the Burges Salmon website at <https://www.burges-salmon.com>.

For information about how we handle any personal data we collect about you, please see our Privacy Policy on the website

<https://www.burges-salmon.com/privacy-policy/>.

## 1 INTRODUCTION

- 1.1 This is the written submissions of the oral case made to the Examining Authority (“**ExA**”) on behalf of Phillips 66 Limited (“**P66**”) in respect of VPI Immingham B’s application for the VPI Immingham OCGT DCO, reference EN010097, at the hearings held on Wednesday 2 October 2019.
- 1.2 All terms used within this document are as defined in the Applicant’s Application Documents, and P66’s previous submissions, unless otherwise stated.

## 2 DCO HEARING - WRITTEN SUBMISSION OF ORAL CASE

- 2.1 The following submissions were made on behalf of P66 at the DCO hearing.
- 2.2 P66 explained that the protective provisions offered by the Applicant for the benefit of P66 affect only the works near the Existing VPI CHP Plant (Works 4, 5 and 6)<sup>1</sup>. They do not affect the compulsory acquisition of rights over the Existing Gas Pipeline through the HOR site (in respect of which no protective provisions have been suggested by the Applicant).
- 2.3 It was explained that a mark-up of protective provisions provided by the Applicant to P66 has not yet been supplied to the ExA. Recognising there is to be further discussion between the parties on the protective provisions, P66 highlighted some keys points to illustrate the nature of the considerations that bear upon the protective provisions:
- (a) The provisions suggested by P66 come from the York Potash DCO, and so have additional weight attached to them that they have been tested and considered appropriate for a confirmed DCO.
  - (b) In its interim response the Applicant seeks to remove a limitation on the use of compulsory acquisition (in paragraph 46 of the Applicant’s mark up). P66’s case is that there should be no compulsory acquisition rights at all in respect of its land ownership, so that protective provision would fall away in any event. Compulsory acquisition rights are dealt with more extensively in the note to the compulsory acquisition hearing elsewhere.
  - (c) The Applicant has deleted reference to meeting consequential losses (paragraph 49) which is a feature of the York Potash drafting. This illustrates a facet of the negotiations between the Applicant and P66. Consequential losses on an interruption to the operation of the HOR could be very extensive indeed. The strength of covenant of the party providing a guarantee such as this is a matter of commercial interest to P66, but also of wider public interest in terms of the harm that such interruption could cause. The funding statement, which is part of the application, makes no reference at all to matters such as consequential loss. Whilst the funding statement states it is directed to development costs and land acquisition cost, there still remains an issue of covenant strength that P66 has legitimately raised before these proceedings and in the ongoing negotiation with the Applicant.
  - (d) One matter of a simple nature is paragraph 56. P66 want service of notices by post and by email, rather that post or email.

---

<sup>1</sup> In particular, it is where development is proposed as part of those Work No.s which involve crossing the existing hydrocarbon pipelines. This is plot 17 on the Land Plans

- 2.4 The Applicant referred to a protection agreement it has proposed for the benefit of P66 to address its concerns with the operation of the HOR, and the Existing Gas Pipeline. The scope of that agreement would extend beyond the protective provisions being discussed between the parties at this stage. P66 explained that the precise structure of any agreement between the parties will depend on how the terms emerge during negotiation, and how the DCO is proposed to operate.
- 2.5 P66 confirmed in response to the ExA's question that its case that there should be no compulsory acquisition powers confirmed, is made only in respect of P66's land. P66 are not advancing a wider case about other parties'

### **3 NEGOTIATION OF PROTECTIVE PROVISIONS**

- 3.1 P66 expect to be in a position to provide an update to the ExA on the status of negotiations with the Applicant on the protective provisions for the benefit of P66 at D4.

### **4 COMPULSORY ACQUISITION HEARING - WRITTEN SUBMISSION OF ORAL CASE**

- 4.1 The following submissions were made on behalf of P66 at the compulsory acquisition hearing.
- 4.2 P66's primary submission was that compulsory acquisition powers are unjustified and should not be confirmed in respect of any P66 land for this proposal.
- 4.3 It was explained that HOR is a nationally important asset, described in the WR, and which the ExA has seen first-hand at the ASI. In contrast the Applicant's proposal represents a much smaller scale provision of energy resource and in any comparison between the national importance of each (together), the balance will fall in favour of HOR as the more important in terms of protecting its ongoing existence and operation.
- 4.4 The ExA queried whether P66 means to refer to the national interest in the HOR, rather than the public interest. P66's position was that the public interest in the HOR is at the level of a national interest.
- 4.5 It was submitted that a willingness by P66 to consider arrangements by which the Applicant's proposal can be accommodated should not be seen as acceptance that mutually agreeable terms to P66 and the Applicant can be agreed. It is not a safe assumption that on-going discussions, even starting from the terms of the existing lease arrangements for the Existing Gas Pipeline and Existing VPI CHP Plant, mean that future acceptable arrangements will inevitably be agreed. Adequate protections for HOR's on-going operation need to be clearly identified and secured and it will be extremely difficult, potentially impossible, to set out those rights essentially in a unilateral form in drafting amendments to DCO schedules, describing the rights sought to be acquired.
- 4.6 An illustration of present difference between rights needed and those sought can be seen in the very simplistic and unfettered rights by which the easement terms are described in terms of the rights to be acquired are described in DCO Schedule 6 sub-sections (a) and (f). Unfettered rights of this nature, unlimited in time, threaten severe potential adverse impact to the on-going operation of the refinery.
- 4.7 In response to the ExA's query, it was confirmed that the extent of rights sought by the Applicant (classes (a) and (f) of Schedule 6) over the Existing Gas Pipeline are greater than those the Applicant's sister company enjoys over the Existing Gas Pipeline. P66 confirmed the key differences were that:
- (a) the rights sought are unconstrained in their operation; and
  - (b) the rights sought are not time limited (whereas those under the existing leases determine in 2047).

- 4.8 The existing VPI leases over both the Existing Gas Pipeline and Existing VPI CHP Plant are relevant to the terms that need to be agreed, however, a re-assessment is needed now of the rights needed into the future against the existing future anticipated use of the HOR site. The main consideration for the ExA should be the protection of HOR as a significant asset operating in the public interest and the continuation of the land uses taking place on it.
- 4.9 The consideration of baseline conditions in the planning arena (including in case law) refers to the ability to use land lawfully for existing operations or for operations that have been lawfully approved and are capable of implementation. Baseline does not address itself to existing lease terms between parties as matters to which regard must be had as if they were e.g. existing lawful use rights.
- 4.10 The change in duration of rights, from two leases which determine in 2047 (at the latest) to easements of permanent duration, alters the future prospects of use of both the HOR site, particularly the tank farm, and the Existing VPI CHP Plant the freehold of which is owned by P66. For this land, on determination of the lease and decommissioning, the site will revert to P66 ownership and occupation.
- 4.11 P66's case is that the Applicant has not met the compulsory acquisition tests either by reference to section 122 of the Planning Act 2008 or to the DCLG guidance particularly paragraphs 8, 12 and 14 – 16. Alternatives have not been considered, reasonable or otherwise, as the case has simply advanced on the use of existing infrastructure. Any argument by the Applicant on a compelling case in the public interest will return again to the balance between national importance of HOR versus the Applicant's proposal.
- 4.12 The ExA should also make reference to EN1 paragraph 4.4.3 page 49 dealing with the approach to alternatives. That guidance effectively stops those opposing development simply placing the burden on an applicant to demonstrate the comparative harm of developing the entire project somewhere else. That is not the present case at all. There is very real harm to the ongoing operation of the existing refinery which makes that a competing land use of great importance which has to be weighed in the balance. The only alternative considered by the applicant in its Statement of Reasons (Document 3.2) at pages 31/32 are alternative connection configurations for new pipe work, in the vicinity of the Existing VPI CHP Plant.
- 4.13 A further illustration of the potential harm from the Applicant's proposal comes from the inability to regulate numbers of people who would be potentially proximate to the risks on the COMAH site. HOR is a higher tier site under COMAH regulation and proper and effective discharge of the responsibilities that requires P66 to undertake ongoing risk assessment particularly by reference to the proximity of people to the risk on site and to demonstrate that risk is as low as reasonably practicable (ALARP). The unfettered rights of access being sought by the Applicant would leave P66 unable to discharge that risk assessment obligation and the ExA should not be placed in a position where it is being asked to approve a state of affairs that would mean that licencing obligation is not properly being met.
- 4.14 In response to the ExA's question, P66 confirmed that the concern with COMAH regulation arises not from the works proposed under the DCO, but from the unfettered rights the Applicant would obtain over the Existing Gas Pipeline. P66 confirmed that the protective provisions offered by the Applicant (and discussed in the DCO hearing) would not apply to the Existing Gas Pipeline.
- 4.15 In response to the ExA's questions P66 confirmed that it would keep the ExA apprised of progress of negotiations and particularly in relation to 6 November point at which decision would need to be made whether a further compulsory acquisition hearing is needed in December.
- 4.16 It is acknowledged that if the parties are unable to reach agreement between themselves then it would increase the need for submissions to the ExA on:-

- (a) Why, whatever terms by that point were being suggested for inclusion in the DCO to protect HOR's operation were inadequate; and
- (b) Potentially also if the ExA so require, a more detailed exposition of how the balance between the contributions made to energy supply needs by the Applicant's proposal could be struck against the risk to continued supply of the contribution made by the HOW to the UK's energy needs.

## **5 NEGOTIATION WITH THE APPLICANT**

- 5.1 P66 expect to be in a position to provide an update to the ExA on the status of negotiations with the Applicant prior to 6 November 2019.

**Burges Salmon LLP**

**On behalf of Phillips 66 Limited**

10 October 2019