

1 INTRODUCTION

- 1.1 This written submission is made on behalf of Phillips 66 Limited (“P66”) to the Examining Authority (“ExA”) in respect of VPI Immingham B’s application for the VPI Immingham OCGT DCO, reference EN010097 at deadline 4 (being 14 November 2019) in response to the ExA’s written questions of 24 October 2019.
- 1.2 In particular, P66 is responding to questions Q2.2.10 to Q2.2.14 inclusive, and Q2.2.16.
- 1.3 All terms used within this document are as defined in the Applicant’s Application Documents, and P66’s previous submissions, unless otherwise stated.

2 RESPONSES TO EXA QUESTIONS

ExA Q2.2.10

The Applicant states (Appendix 1 [REP3-011]) that protective provisions included in the revised dDCO [REP3-003] are based very substantially on the Existing Arrangements, and therefore the position of Phillips 66 is the same as today.

Please comment on the sufficiency of the protective provisions included in Part 4, Schedule 9 of the revised dDCO [REP3-003].

Existing Arrangements

- 2.1 The statement of the Applicant, as referred to in the question, is incorrect.
- 2.2 The protective provisions within the revised dDCO (submitted at deadline 3 [REP3-003]) do not replicate the Existing Arrangements.
- 2.3 The Existing Arrangements relate to the Existing Gas Pipeline Site, and the Existing CHP VPI Plant Site. This can be seen with reference to, for example, our explanation at section 4 and appendix 1 to P66’s Written Representation [REP2-024].
- 2.4 The protective provisions (as revised in the latest dDCO [REP3-003]) relate only to the crossing of the three existing hydrocarbon pipelines¹ described at section 7 of P66’s Written Representation [REP2-024]. Those three existing hydrocarbon pipelines fall within the order limits within plot number 17 as shown on the Land Plans [APP-011].
- 2.5 The two areas of land affected by the Existing Arrangements and the protective provisions for the benefit of P66 are separate and distinct. It is therefore clear that the protective provisions do not replicate the Existing Arrangements.
- 2.6 In case there is any doubt, any comparison of the protective provisions (which control the manner in which works for the crossing of the three existing hydrocarbon pipelines may be carried out) and the Existing Arrangements (which control the granting of rights to the Applicant (its sister company) to use the Existing Gas Pipeline and operate the Existing CHP VPI Plant shows that the two sets of drafting are aimed at different matters. They

¹ The drafting of the protective provisions has been taken from the York Potash DCO. As presently drafted, the key operative term is “pipelines” (see paragraph 35 of Schedule 9) which refers expressly to those three hydrocarbon pipelines. That definition tracks through to that of “relative work”, which is the trigger point for the protective provisions applying (see paragraph 36 onwards).

do not replicate one another. For the avoidance of doubt they do not place P66 in the same position they are in today.

- 2.7 The Applicant's comments on page 11 of its submissions following the CA Hearing, to which the ExA refers, could be interpreted to refer to the ongoing negotiations between P66 and the Applicant in respect of a side agreement², and underlying lease arrangements (referred to as the "Proposed Arrangements"). However, as was indicated in P66's submissions at Deadline 3a [REP3a-007], those negotiations are ongoing, and have not reached a conclusion. Therefore it remains the case that the Existing Arrangements have not been replicated, and P66's position that articulated in its Written Representation.
- 2.8 It is acknowledged on behalf of P66 that terms are being offered as part of the ongoing discussions between P66 and the Applicant on the Proposed Arrangements, with the stated intent that they should broadly replicate the protections of the Existing Arrangements). However, it is not enough for the Applicant to point to lease terms being offered as an answer to P66's objection to the dDCO in its current form. In default of lease terms being agreed for whatever reason, the Applicant has to show that rights and obligations needed to ensure safety are contained in the dDCO itself. That is not currently the case, nor has any drafting been offered which would replicate the Existing Arrangements within the dDCO.
- 2.9 It is also relevant to note that the Applicant itself is presently seeking to extend the Proposed Arrangements beyond the scope of the Existing Arrangements. That is, the Applicant seeks to do more than simply replicate the Existing Arrangements. Detailed evidence on the points of difference between the parties can be offered at CAH2 if it would be of assistance to hear from the parties on the remaining issues at that time.

Protective provisions

- 2.10 The second half of the ExA's question relates to the adequacy of the protective provisions contained at Part 4 of Schedule 9 of the dDCO. P66's comments in this section are made without prejudice to its position that the compulsory acquisition powers sought by the Applicant should not be granted, and the DCO refused.
- 2.11 It is essential that protective provisions are offered which provide protection against, and indemnities for, any possible damage to the existing hydrocarbon pipelines occasioned by works to construct the proposed development. A catastrophic failure of the hydrocarbon pipelines would result in a loss of containment and significant safety and environmental consequences. Two of the pipelines contain highly flammable materials; there is a risk that their release could find a source of ignition and cause an explosion and/or fire and risk further escalation. The contents of the third pipeline, although flammable, would likely cause more of an environmental issue that could require months, if not years, of remediation and monitoring. The repair from such an event would be dependent on the damage that had been caused, but would take a number of weeks at best, and potentially many months. While these lines were unavailable, the HOR would be unable to supply fuel to two of the P66's three core terminals in the UK, significantly affecting the availability of road fuels in both areas (60% of the HOR's output of road fuel). Clearly this would have a significant financial effect on P66's UK business.
- 2.12 The protective provisions contained in the latest dDCO [Rep3-003] are based very closely on those identified as being necessary by P66 in its earlier submission [section 7 and appendix 5 of REP2-024].
- 2.13 However, the Applicant has chosen to make a number of unjustified amendments to those sought by P66. In particular:

² Note this is distinct to the Proposed Protection Agreement referred to by the Applicant, for the reasons explained in response to Q2.2.16 below.

- (a) The Applicant limits the benefit of the protective provisions to P66 in particular. P66's preferred drafted (see Appendix 5 of P66's WR [REP2-024]) offered protection to the owners of the three existing hydrocarbon pipelines for the time being³. Given that it is the pipelines themselves which justify the protection concerned, and the potential for their ownership to change hands over the life of the authorised development, there is no justification to limit the protection offered to P66 in particular.
- (b) The Applicant limits its liability for any damage to the pipelines to exclude consequential loss and damage from its indemnity at paragraph 49(2) of Schedule 9 dDCO⁴. Such losses are clearly foreseeable in the event of damage to the three existing hydrocarbon pipelines. The nature of the potential impacts are outlined above. Such losses were covered by the indemnity in the equivalent protective provision within the York Potash DCO. Absent amendment to include cover for consequential loss and damage, the Applicant's proposed protective provisions are insufficient to address the very significant consequences that may arise from carrying out the authorised development.

2.14 In addition, paragraph 56 of Part 4 Schedule 9 dDCO ought to be amended such that notices must be served both by post and electronic submission to be effective.

ExA Q2.2.11

Please explain how the CA of the rights proposed would impact on the ongoing operation of the HOR. Please also explain the impact on the COMAH risk profile, taking into account the dDCO revisions at Deadline 3 [REP3-003].

- 2.15 P66 outlines below what the impacts of the dDCO would be on the ongoing operation of the HOR. To the extent that these matters remain unresolved by CAH2 we will expand further there on why those issues remain important and why it is unreasonable not to include them as protections within any dDCO which may be granted. We will also explain what effect there will be, if they are not included as protections within the dDCO, including that permission should not be granted including these disputed powers of acquisition.
- 2.16 We acknowledge that discussions are ongoing with the Applicant in respect of the Proposed Arrangements and a potential side agreement.

Existing Gas Pipeline Site

Access and works

- 2.17 The Existing Gas Pipeline line runs underground through the Tank Farm, which is a critical operational element of the HOR in constant use. The Applicant would have unfettered rights under the dDCO to enter the site, with or without machinery, and carry out works to the pipeline. Those works could be carried out without any notice being provided to P66 (see Schedule 6 to the dDCO).
- 2.18 Any excavations in the Tank Farm would potentially have a significant impact on P66's operation of the HOR. The Existing Gas Pipeline runs underneath one of P66's main roads (16th Street) and access is required across and along that road many times a day for routine operations on P66's Liquid Petroleum Gas (LPG) area and for tank transfer operations. If P66 are prevented (by the Applicant's presence of works) from accessing

³ Drafting changes ought to be made to paragraph 34, and all references to P66, to give effect to this change. P66's suggested drafting in that regard can be seen at Appendix 5 of its WR [REP2-024].

⁴ Again, the specific drafting is that which has been omitted from paragraph 49(2) of P66's suggested protective provisions. The words "*and against consequential loss and damage,*" should be inserted immediately after "expenses" in line two of paragraph 49(2).

that area, continued refinery operation would not be possible and the emergency response to incidents in this area would be impaired.

Maintenance and catastrophic failure

- 2.19 Under the Existing Arrangements, the Applicant is required to maintain the Existing Gas Pipeline. P66 has an enforceable right to secure that maintenance. There is no equivalent provision in the dDCO. In its absence, P66 must consider the prospect of the failure of the pipe for want of repair. In a worst case scenario, that may include the catastrophic failure of the pipeline.
- 2.20 If the gas pipeline failed catastrophically, the hazard ranges would be significant and have the potential to cause both onsite and offsite fatalities. There is equipment located close to the route of the pipeline, which could cause significant escalation of this incident if they were damaged. There is also ancillary equipment, e.g. product export pumps, which even if this equipment is not damaged to the point of failure leading to a release, significant damage could be done to cabling such that continued operation would be compromised. The Tank Farm is integrated with the HOR processes and logistics, such that significant damage and disruption in these areas would severely impact the HOR's ability to continue operations, and hence the manufacture and distribution of road fuels.

Absence of lift and shift provisions

- 2.21 Under the Existing Arrangements, P66 are able to request the Applicant to "lift and shift" the Existing Gas Pipeline in the event P66 obtains planning permission for a reorganisation or redevelopment of the Tank Farm area, or pay compensation should they choose not to do so (or should planning permission be refused due to the presence of the pipelines). There is no equivalent provision in the dDCO.
- 2.22 Given the complexity of the issues that can emerge in the application of lift and shift provisions, it is essential that those provisions are contained within bilateral agreements with identifiable enforcement mechanisms. No suggestion has been made by the Applicant as to how such a mechanism could be incorporated in a dDCO. Absent any such drafting being suggested and considered, it is P66's position that an equivalent and effective set of controls cannot be imposed unilaterally through a DCO. That the DCO process is not an appropriate means of securing those provisions is heightened with reference to the historical context and the relationship between the Applicant and P66 as explained in response to Q2.2.14 below.
- 2.23 P66 continues to invest in major capital projects at the HOR, building on its strong environmental performance and ensuring it can meet market demand. Removing the ability to relocate the Existing Gas Pipeline significantly constrains future flexibility around siting of large items of new equipment and risks the economic viability of the HOR.
- 2.24 As an example, P66 is currently working with the UK Government (BEIS and DfT) and other stakeholders on a range of low-carbon technologies. These will enable the refinery to support the UK in meeting its decarbonisation goals without the offshoring of emissions to countries with poorer emissions standards. All of these projects will require uninhibited land, with space to site the equipment and to run the associated utilities and connections.

Presence of pipeline beyond 2047

- 2.25 Under the Existing Arrangements, the lease of the Existing Gas Pipeline to the Applicant will determine (at the latest) in 2047.
- 2.26 Its presence beyond that time period therefore places a major constraint on the HOR's future development of land within the Tank Farm. By industry standards, the refinery is dense with a high number of process units per unit area. As new projects are identified and sanctioned, it is therefore necessary to further allocate the very limited plot space in order to make the investment. The proposal to for the Applicant to acquire rights over the Existing Gas Pipeline in perpetuity will only increase that impact over time.

Existing VPI CHP Plant Site

- 2.27 Under the Existing Arrangements, the lease of the Existing VPI CHP Plant Site to the Applicant will (also) determine (at the latest) in 2047. The comments which are made above in respect of the impact of rights to use the Existing Gas Pipeline Site being granted to the Applicant by compulsion apply, in an accentuated manner, to the Existing VPI CHP Plant Site.
- 2.28 The reason why the impact will be felt more keenly by P66 on the Existing VPI CHP Plant Site is because, absent the dDCO, that site will be returned to P66 as an unencumbered development site in 2047. If the dDCO is made in the form sought, it will instead be a development site encumbered by various electrical, gas, and other utility and service connections for the benefit of the adjoining land (on which the authorised development would be constructed).

COMAH

- 2.29 As explained in previous submissions, COMAH is based upon risk assessment and reduction of any risk to ALARP.
- 2.30 As a top tier COMAH site P66 has numerous controls to manage working in potential hazardous environments, vehicular access, and the security of the site. These include for example, staff induced into site safety, work programmes assessed for risk, approved contractors by reference to appropriate competency standards, and the availability of adequate insurance.
- 2.31 Those critical safety systems would be compromised by the Applicant's unfettered access rights being sought in the dDCO. Those safety systems are not being proposed to be replicated by the Applicant. In order to inform an assessment of the likely impact on the COMAH profile of the site P66 first needs to understand what (if any) controls are proposed by the Applicant to limit the sorts of issues outlined in the previous sections of P66's response to this question. By way of example, if the Applicant's proposal is that:
- (a) its access will be entirely unfettered, in time, numbers, duration, and the equipment brought onto site; and
 - (b) there is to be no enforceable obligation for it to maintain the Existing Gas Pipeline,
- then those factors may need to be factored into the risk assessments for P66's future COMAH submissions.
- 2.32 In a worst case scenario, the HSE (as competent authority) may prohibit the operation of any COMAH facility where it is concerned that the operator's measures to control major accidents are seriously deficient. If it is the Applicant's case that no controls are to be imposed which manage its unfettered access to the Existing Gas Pipeline, or retain any liability to keep that pipeline in good repair, then P66 can at the second DCO ISH provide further evidence as to the likelihood of such a prohibition notice being served.
- 2.33 However, P66's suggestion to the ExA would be that the burden must sit with the Applicant to demonstrate that any powers of CA within a DCO will not result in a potentially unsafe situation arising. At present, and for the reasons outlined within these and P66's previous submissions, that standard is clearly not being met. The Applicant seeks unfettered rights to use an existing high pressure gas pipeline. No corresponding measures to ensure the safety of its operation of that gas pipeline are being offered.

ExA Q2.2.12

Phillips 66 invites the ExA to draw a comparison between the respective national importance of the HOR and the public interest in permitting the proposed development. Please provide a detailed justification for, and explanation of, the approach proposed.

- 2.34 The Applicant is the agent of change in this situation. It is a well-established principle that the agent of change in the context of new development bears the burden of ensuring its operation does not have unacceptable or reasonably avoidable adverse consequences on existing users⁵. The adverse consequences arising from the Applicant's proposals are set out elsewhere in this response, and P66's previous submissions.
- 2.35 The adverse consequences of the rights the Applicant seeks in any event have to be balanced against any claimed benefit. That includes the effects of the dDCO being granted, but then not implemented, and the shadow even that would cause to the operation of the HOR.
- 2.36 The following paragraphs of EN-1 provide the context for these submissions:
- 4.1.3: In considering any proposed development, and in particular when weighing its adverse impacts against its benefits, the IPC should take into account:*
- *its potential benefits including its contribution to meeting the need for energy infrastructure, job creation and any long-term or wider benefits; and*
 - *its potential adverse impacts, including any long-term and cumulative adverse impacts, as well as any measures to avoid, reduce or compensate for any adverse impacts.*
- 4.1.4: In this context, the IPC should take into account environmental, social and economic benefits and adverse impacts, at national, regional and local levels. These may be identified in this NPS, the relevant technology-specific NPS, in the application or elsewhere (including in local impact reports).*
- 2.37 When considering the impacts of any NSIP proposal, in this case the impact on P66's nationally significant operations, the ExA ought to have regard to whether those impacts are reasonably avoidable. Has the Applicant shown that the content of the DCO is all that can be provided, or has it simply failed (or is unwilling) to offer rights and obligations unconditionally in the DCO that make protection of existing HOR operation paramount? The answer to that question is that the Applicant has failed to offer the necessary package of rights and obligations within the DCO to offer the necessary protections to the HOR.

ExA Q2.2.13

Please explain the effect that the creation of new rights, unlimited in time, would have on the future expansion / operation of the HOR.

- 2.38 This question has been answered in response to Q2.2.11 above.
- 2.39 In addition to those particular impacts which have been identified in respect of the Existing Gas Pipeline, it is relevant to note that there is a danger here of an historic situation exerting unreasonable constraints for the HOR. As the Applicant has explained, the Existing VPI CHP Plant and the Existing Gas Pipeline were constructed by P66 for the benefit of the HOR. P66 subsequently transferred those assets to a third party provider (the Applicant's sister company) as part of a commercial transaction. Rather than successfully obtain a variation to the existing framework of negotiated contractual rights (i.e. varying the Existing Arrangements to enable its proposed development), the Applicant now seeks to exert a much more extensive control and influence over the future operation of HOR:
- (a) than was ever intended in the original agreements to lease the Existing Gas Pipeline and Existing VPI CHP Plant Site to that third party; and

⁵ In the TCPA regime, this is given effect by paragraph 182 of the National Planning Policy Framework.

- (b) that is not in the public interest (for the reasons put forward by P66; namely the impact of the proposals on the HOR).
- 2.40 In seeking to obtain that commercial advantage it is proposing to rely on powers of compulsory purchase, for which it asserts there is a compelling case in the public interest.
- 2.41 P66 disagrees and resists those powers. Although oil refineries are not NSIPs in their own right⁶, the HOR is clearly meeting a national need and any threat to it that which has not been shown as unavoidable must weigh strongly against any application for other plant even when that other application is made on the basis of also meeting some other aspect of national energy need.

ExA Q2.2.14

Please provide an update on discussions.

- 2.42 Discussions are ongoing concerning potential lease arrangements (the Proposed Arrangements) in respect of the rights sought by the Applicant, and separate protections in a side agreement. Those negotiations are complex, and have not reached a conclusion. P66 therefore strenuously maintains its objection to the proposed compulsory acquisition powers contained within the dDCO which affect its land and rights
- 2.43 It should be noted that deadline 4 is a point in time before a further report at CAH2 and DCO ISH2. If agreements have not been reached between P66 and the Applicant by that time, we reserve the ability to develop arguments outlined here and in previous submissions further it that time.

ExA Q2.2.16

Please comment on adequacy of the Proposed Arrangements. Please also comment on the Proposed Protection Agreement (Appendix 1, Paragraph 4.6 of [REP3-007]).

- 2.44 The Proposed Arrangements are the subject of ongoing discussions between P66 and the Applicant. Their interaction with the existing infrastructure onsite is complex, and negotiations are ongoing (as indicated above in response to Q2.2.14). P66's submissions on the regard that the ExA should have to that situation, pending completion of any negotiations, is outlined at 2.8 above.
- 2.45 In so far as the Proposed Protection Agreement is concerned, they are no longer the subject of discussion between the parties. Discussions have instead focused on the proposed side agreement. The Applicant has accepted in its discussions with P66 that it would be inappropriate to seek powers of compulsory acquisition over a site such as the HOR within the DCO. The terms of the draft side agreement currently being negotiated between the parties would therefore see (if completed) the Applicant seek to withdraw the powers of CA from the dDCO in so far as they relate to P66 interests. That side agreement remains the subject of negotiation between the parties, as do the Proposed Arrangements.

Burges Salmon LLP

On behalf of Phillips 66 Limited

14 November 2019

⁶ Unless the amount of gas being received at the plant is above the limits in s19 PA 2008 for gas reception facilities.