

From: [REDACTED]
To: [Immingham OCGT](#)
Subject: VPI Immingham OCGT – EN010097 - deadline 6 response on behalf of Phillips 66 [BURGES-WORK.FID9679692]
Date: 02 January 2020 16:44:30
Attachments: [REDACTED]

Dear Sirs

Please find attached deadline 6 submissions on behalf of Phillips 66.

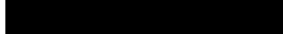
Kind regards

Alex

Alex Minhinick
Senior Associate
[Borges Salmon LLP](#)



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



Legal Team PA (Thurs/Fri): Su Hunt



www.borges-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 Borges Salmon Company Limited) are authorised and regulated by the Solicitors Regulation Authority: Borges Salmon LLP, a limited liability partnership registered in England and Wales (LLP number OC307212); Borges 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 Borges 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 These submissions comprise the comments 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 6 on 2 January 2020.
- 1.2 In particular, these comments are made on the dDCO submitted by the Applicant at D5 [REP5-003].
- 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 "OLD" PROTECTIVE PROVISIONS – HYDROCARBON PIPELINES CROSSING (PLOT 17)

- 2.1 P66 sought protective provisions within its Written Representation [REP2-024] at D2. These have been referred to as the "old" protective provisions. They relate to the protection of 3 hydrocarbon pipelines operated by P66 within the Order Limits and over which the Applicant proposes crossing works for the service connections (gas, electricity, and other utilities) of its proposed OCGT plant. Those pipelines are situated within plot 17 of the Land Plans.
- 2.2 An amended version of those provisions were included by the Applicant in its dDCO at D3 [REP3-004].
- 2.3 P66 addressed the outstanding issues with those amended provisions at the first DCO ISH and subsequently in its D4 submissions at paragraphs 2.13 and 2.14 [REP4-018].
- 2.4 The Applicant's latest amendments to the dDCO (as shown in the comparison version [REP5-004]) now achieve the effect sought by P66 at D2.
- 2.5 P66 is therefore now content with the drafting of paragraphs 36 to 50 of Part 4 of Schedule 9 to the dDCO [REP5-003].
- 2.6 Notwithstanding what is said above in respect of the old protective provisions, P66 continues to object to the principle of compulsory acquisition of the rights necessary for these works to be carried out. These rights are available (subject to agreement of appropriate commercial terms) to the Applicant on a voluntary basis, and the compulsory acquisition of such rights is not therefore capable of meeting the test under s.122 of the Planning Act 2008.

3 "NEW" PROTECTIVE PROVISIONS – CREATING NEW RIGHTS IN THE EXISTING GAS PIPELINE SITE (PLOTS 33, 39 TO 40, 42 TO 58) AND EXISTING VPI CHP SITE (PLOTS 7 TO 16, 18 TO 32, 34 TO 38)

- 3.1 These are the protective provisions offered by the Applicant at D4 [See Appendix 1 of REP4-007] and relate to the manner in which the Applicant may exercise the "specified rights" (i.e. those rights if proposes to acquire by compulsion over P66's Land at the HOR). The relevant provisions of the Applicant's latest dDCO are paragraphs 51 to 82 of Part 4 of Schedule 9 to the dDCO [REP5-003].
- 3.2 P66 has previously addressed the ExA on its concerns with the principle of relying on protective provisions to recreate a package of existing rights and liabilities affecting the use of land (i.e. a lease) [REP5-009], which is novel and without precedent. These comments on the detail of the new protective provisions should be read in conjunction with P66's earlier comments opposing the principle of their use for the purpose proposed.

- 3.3 The following comments are made without prejudice to P66's submissions that the rights of compulsory acquisition over its land should not be authorised. If despite those submissions, the SoS is minded to authorise such acquisitions, the following matters comprise the minimum safeguards which must be secured by the proposed protective provisions, however they would remain inadequate to meet P66's reasonable needs.

Contamination indemnity (paragraph 70)

- 3.4 The Applicant's proposed indemnity in respect of contamination (paragraph 70) limits the scope of the liability to the HOR Land. That compares to the position under the Existing Arrangements where the Pipeline Lease (Clause 6.3¹) indemnity covers losses suffered on the HOR Land (the Landlord's Land) and adjacent land not in the ownership of P66.
- 3.5 To the extent that the exercise of the specified rights results in contamination being caused, the Applicant's liability should not be limited in its spatial extent in the manner proposed.
- 3.6 Since its first draft of the new protective provisions at D4, the Applicant has also introduced further controls (paragraphs 70(2) and 70(3)) on the scope of this indemnity. They have the effect of requiring P66 to give notice of any claim it may have against the Applicant as soon as reasonably practicable and in any case within seven days. If that notice provision is not complied with, the indemnity will not be effective.
- 3.7 This limitation on the effect of the indemnity is unacceptable. It places an unnecessary restriction on the protections being offered by the Applicant. Imposing a seven day time limit is disproportionate and imposes an unnecessary administrative burden on P66, with the risk of an unfair outcome. It was also clearly not felt necessary for such provisions to be included at D4. These new controls (paragraphs 70(2) and 70(3)) should be removed.

Terms and conditions and scope of "specified works" (paragraph 35)

- 3.8 Schedule 3 of the Pipeline Lease² contains a series of detailed controls on the manner in which the Applicant's sister company is to operate within the site of the Existing Gas Pipeline. These controls are not reproduced in the Applicant's new protective provisions, and relate to a wide range of matters governing the detailed manner in which access and works on the site are to be carried out.
- 3.9 What the Applicant appears to have done is to instead propose a method by which, under paragraphs 56 to 58, it provides details of "specified works" to P66 in advance for its approval. Under paragraph 57 P66 can impose reasonable conditions on its approval of such works.
- 3.10 As a minimum, what must be amended in the drafting is the definition of "specified works". Under current drafting that is any works which "*may have an effect on the operation, maintenance, abandonment of or access to any part of the HOR*". There is no means by which the scope of what does or does not comprise a specified work can be tested or clarified. To remove any ambiguity as to how the measures will be applied, and because any access by the Applicant to the land it seeks to acquire rights over compulsorily may effect the operation of the HOR, that definition of "specified works" should be amended so that it reads as follows:

"specified work" means any work carried out pursuant to the specified rights.

¹ See page 34 of the pdf of [REP2-024]

² See page 48 of the pdf of [REP2-024]

Emergency access (paragraph 74)

- 3.11 Another problem which is created by the Applicant's proposed omission of standing terms and conditions which apply to its access to the HOR land is evident in its new proposal for emergency access being permitted without any controls on such access (paragraph 74).
- 3.12 This is unacceptable to P66, and disproportionate. The Applicant is in a position where it is able to specify what those controls should be, but it refuses to do so. This paragraph 74 should be deleted.

Specified rights and specified assets (paragraph 35)

- 3.13 The Applicant's proposed use of terms to refer to the spatial extent of the protective provisions is inadequate.
- 3.14 Under the proposed drafting the "*specified rights*" are those granted under the DCO in respect of the "*HOR Land*". That those rights affect the HOR Land is therefore an essential pre-condition of the protective provisions applying.
- 3.15 The HOR Land in turn is defined as land which forms part of the HOR, being the Humber Oil Refinery owned and operated by P66.
- 3.16 The operational HOR does not currently include the Existing VPI CHP Site. It is a separate site operated by VPI, in respect of which P66 retains the freehold reversion.
- 3.17 On the Applicant's own drafting therefore the protective provisions would not extend to protect P66's interests in the Existing VPI CHP Site. That is despite a clear indication that the intention is that the provisions should extend to that land.
- 3.18 It is understood that this is simply a drafting error and not the Applicant's intent. However, should this point be in issue, paragraph 75 makes it clear that the diversion provisions in that part are intended to offer protection to P66 in respect of both the Existing Gas Pipeline Site, and the Existing VPI CHP Site.
- 3.19 The means by which these drafting errors can be remedied requires both of the following changes:
- (a) First the definition of "*specified rights*" should omit express reference to the HOR and should instead refer to rights acquired over any land P66 has an interest in as of the date of the Order; and
 - (b) Any reference to the HOR within the remainder of the drafting of the protective provisions should be omitted. It is not an area of land which ought to control the effect of the protective provisions.

Lift and shift / diversion provisions (paragraphs 75 to 82)

- 3.20 The drafting of the lift and shift provisions has been amended apparently to avoid any obligation to pay compensation. The Applicant has offered an explanation of the justification for this in its D5 submissions, and has also since amended the drafting of the protective provisions compared to those submitted at D4. The point remains that the diversion provisions as offered by the Applicant do not provide compensation in the event that planning permission cannot be obtained for P66's proposed development as a result of the presence of the Existing Gas Pipeline.
- 3.21 As has been stated consistently, the drafting and enforcement of lift and shift provisions is notoriously difficult. However, their intention is clear. The owner³ of a piece of apparatus

³ Usually a party with the benefit of an easement, or sometimes a leasehold arrangement.

(e.g. a pipeline) which may impact on the future development of the underlying freehold land should be responsible for either:

- (a) Moving the apparatus to enable that development to be carried out; or
- (b) Carrying out enabling or protective works to allow that development to be carried out; or
- (c) Paying compensation for resulting loss where it elects to maintain its apparatus.

3.22 The Applicant proposes to amend the diversion provisions to remove any obligation on it to pay compensation. It does not offer an explanation as to why that approach is taken.

3.23 Its solution is to turn the usual mechanism on its head. Instead of it being the owner of the apparatus which elects to “lift and shift” or pay compensation, on the Applicant’s drafting it is the freeholder of land (i.e. P66) which can elect whether or not the apparatus owner “lifts and shifts” or carries out protective works. Any reference to compensation is omitted.

3.24 What that solution does not address is a situation where it is impossible to divert the apparatus, or carry out protective works. The risk for P66 is that the Applicant then argues that there is no further obligation on it to move the apparatus in such a situation.

3.25 That it may not be possible to divert apparatus is a key factor in the rationale behind the conventional drafting of lift and shift provisions⁴. The owner of the apparatus seeks a form of land interest less than the acquisition of the freehold, in part on the basis that its apparatus will be moved (or compensation paid) should it impact on the future development of the land. In this instance the Applicant refuses to countenance the industry-standard approach, and instead seeks to place all future risk around the ability to develop land around the constraint of the Existing Pipeline onto P66 as landowner.

3.26 This is unacceptable, and an illustration of the submission made from the outset of this examination on behalf of P66 that unilaterally imposing complex landlord and tenant provisions, such as lift and shift provisions, through a public law statutory instrument is an inappropriate use of the SoS’s powers in this regard. The Applicant has continually failed to adequately address this issue.

3.27 The Applicant’s fall-back argument is that any issue with the diversion provisions becomes a matter of compensation for P66 on the grant of the specified rights. Clearly the Applicant accepts it is necessary to recreate the diversion provisions in order to avoid a disproportionate impact on P66’s ongoing operations at the HOR. However, the problem for the Applicant its attempt to do so simply illustrates the inadequacies of a statutory instrument to recreate what ought to form part of private treaty negotiations (i.e. effective diversion provisions).

3.28 If, despite these submissions, the drafting suggested by the Applicant is to be used by the SoS in any DCO, it must include an additional provision which covers the scenario where it is not possible to divert the apparatus, or carry out protective works. In such circumstances the drafting should require the Applicant to remove its apparatus from the relevant part of the Order Land, so as to prevent interference with future development, or to pay compensation for the loss occasioned by the sterilisation of future development.

⁴ By way of example, paragraph 81 compels P66 to grant any rights necessary to the Applicant to carry out the diversion. But that provision is only relevant if the form of future development sought by P66 of its land is compatible with the Existing Gas Pipeline being present within that development’s configuration. That cannot be assumed to necessarily be the case.

Excluding the CHP Land (paragraph 75)

- 3.29 A further problem faced by the Applicant is that it seeks to offer drafting for the protection of P66 in respect of the diversion provisions which applies to both the Existing Gas Pipeline Site, and the Existing VPI CHP Site.
- 3.30 It therefore offers paragraph 75 which provides that the diversion provisions do not apply until P66 occupies (“*has permanent occupational control*”) the CHP land (the Existing VPI CHP Site).
- 3.31 When doing so, the Applicant presumably has in mind the existing terms of the lease for that land which expires in 2047, which makes sense of the drafting. On expiry of a lease the land returns unencumbered to the reversionary freeholder.
- 3.32 However, in proposing this drafting the Applicant overlooks the permanent rights that it proposes to acquire over that same land by virtue of Schedule 6 to the DCO. Those include the rights to “*install, retain, use, maintain, inspect, alter, remove, refurbish, reconstruct, replace and improve*” various over ground services across that site including a gas pipeline with a nominal internal diameter of up to 600mm, an electrical connection of 400 kilovolts and various other services.
- 3.33 Those indefinite and unlimited rights acquired over the Existing VPI CHP Site mean that there must at least be a question whether P66 will ever be capable of showing that it has “*permanent occupational control*” of the Existing VPI CHP Site in order to satisfy the precondition of paragraph 75.
- 3.34 Paragraph 75 should be deleted.

Identity of the beneficiary of the protective provisions

- 3.35 The Applicant accepts that it ought to be P66, and its successors in title, which benefit from the protective provisions. Its definition of “P66” has been amended to include reference to future owners of the pipelines. This is correct: it is the purpose to which the HOR and its associated assets is put which is the matter to which the protective provisions, rather than P66 solely in its capacity as the current owner and operator of those assets.
- 3.36 Unfortunately, the Applicant has not considered its terms. “*Pipelines*” is defined to mean the 3 hydrocarbon pipelines crossing the Order Limits⁵. What it does not include, is the Existing Gas Pipeline or the Existing VPI CHP Site. That is problematic as the “new” protective provisions are aimed at protecting the Existing Gas Pipeline Site and Existing VPI CHP Site.
- 3.37 The definition of the beneficiary of the protective provisions should be amended to refer to the:
- (a) Owners or operators from time to time of the Existing Gas Pipeline Site and Existing VPI CHP Site; and
 - (b) Owners or operators from time to time of the 3 hydrocarbon pipelines.

Burges Salmon LLP on behalf of Phillips 66 Limited

2 January 2020

⁵ i.e. only plot 17 of the Land Plans