H2Teesside Project

Planning Inspectorate Reference: EN070009

Land within the boroughs of Redcar and Cleveland and Stockton-on-Tees, Teesside and within the borough of Hartlepool, County Durham

The H2 Teesside Order

Document Reference: 8.35 Summary of Applicant's Oral Submissions at the Issue Specific hearing 4 (ISH4)

The Planning Act 2008

Applicant: H2 Teesside Ltd

Date: January 2025

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3. Articles and Schedules of the draft DCO	
The Applicant will be asked to provide a very brief overview of how the Change Request (CR) has resulted in alterations to the draft Development Consent Order (DCO). The Examining Authority (ExA) will then ask questions, as relevant, seeking responses where appropriate from the Applicant, the Local Authorities and other Interested Parties (IP), who have registered to speak. These IPs will also be invited to ask questions of clarification in relation to DCO Articles and Schedules.	Mr Hereward Phillpot KC, on behalf of the Applicant, provided a brief overview of how the Change Application draft Development Consent Order (DCO) (rev. 3) was submitted in October 2024 as **[CR1-015]** (clean version) and **[CR1-016]** (tracked version). He summarised the alterations made to the draft DCO as a result of the Change Application as follows: • Addition of Work No. 2C (to reflect Change No. 8 (the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 change) as set out in the Change Application Report **[CR1-044]**); • Amendments to sub-works within Schedule 1 to reflect various work removals, addition of the second flare and associated cross-reference changes; • Modification to Requirement 3 to remove deleted works from the scope of detailed design approval; • Changes to the land and streets related schedules to reflect the removal and modification of works; and • Changes to the Parameters Schedule 15 to reflect the changes to the Main Site's dimensions (to reflect Change 7). Amendments made between draft DCO rev. 2 (DCO submitted at DL2) and rev.3 (Change Application DCO) are also set out in the Schedule of Changes to the Draft Development Consent Order submitted with the Change Application **[CR1-017]**. The Applicant also submitted an Explanatory Memorandum (**[CR1-018]** (clean version) and **[CR1-019]** (tracked version)) updated to account for the changes made to the draft DCO by the Change Application and how these relate to the Change Application Report **[CR1-044]**. Further to the Examining Authority's (ExA) invitation to Interested Parties (IP) to provide submissions about the articles and schedules of the current version of the Draft DCO (Rev 5) **[REP5-006]**, Mr James Cox, on behalf of Anglo American (AA), raised concerns about the legal effectiveness of article 48 (interface with Anglo American permit) preventing AA from being accountable for a breach of the environmental permit caused by the Applicant as well as the need for an indemnity for AA in such circumstances. Responding on behalf of the Applicant, Mr Phillpot KC said that commercial negotiations are ongoing (including in respect of indemnities). While the Applicant has previously explained the effect of article 48 in various written submissions, Mr Phillpot highlighted how it was also important for the ExA to see this as a whole alongside the Protective Provisions in Schedule 29 in favour of AA which were included on the face of the draft DCO **[REP5-006]** at Deadline 5. Paragraph 3 of Schedule 29 deals with the issue of consent to works in the Shared Area and of particular relevance to this issue is paragraph 3(5)(c) which states: *'Wherever in this Schedule provision is made with respect to the agreement approval or consent of Anglo American, that approval or consent must be in writing and subject to such reasonable terms and conditions as Anglo American may require including conditions requiring protective works to be carried out, but must not be unreasonably refused or delayed and for the purposes of these provisions it will be deemed to be reasonable for any consent to be refused if it would—* *…* *(c) cause a breach of the obligations under, or conditions attached to, the EA Permit or render compliance with the obligations under, or conditions attached to, the EA Permit—* *(i) more difficult; and/or* *(ii) more expensive;'.* Mr Phillpot KC noted that these were new provisions added at Deadline 5 which were not available for the ExA to consider during ISH2. However, this is an important legal protection in favour of AA for the ExA to have regard to when considering article 48 in the event that an agreement is not reached with AA on this issue by the end of the examination.

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	Mr Phillpot KC, responding on behalf of the Applicant, agreed with the submission by Mr Colin Innes, on behalf of NSMP Entities, which confirmed that NSMP Entities and the Applicant had reached agreement in relation to their Protective Provisions in Schedule 37 of the draft DCO **[REP5-006]**, that remaining matters outstanding in relation to DCO requirements were extremely limited in number and minor and that they anticipated being able to resolve these quickly. Mr Stephen Dagg, on behalf of Sabic, welcomed the Applicant's amendment to the Framework Construction Environmental Management Plan [REP5-013] regarding the mandatory use of trenchless technology in relation to the River Tees but flagged how it wanted to be sure that PD Teesport (PDT) was satisfied that it has sufficient powers to control the works either through its Port powers or through protective provisions. In response to Sabic, Mr Peter Nesbit, on behalf of PDT, noted that PDT's position had not changed since the last hearing and it was still requesting that disapplication provisions are removed from the draft DCO and its powers in relation to licensing in the River Tees are retained. However, Mr Nesbit said PDT were having continuing discussions with the Applicant on this point in the context of Protective Provisions, that it was making progress and there had been number of meetings and discussions. While there are residual questions about the process to be discussed and a further technical meeting to take place regarding the potential interface between the H2T and PDT's proposed container port development, it was hoped that a solution could be found through Protective Provisions. Responding to these submissions on behalf of the Applicant, Mr Phillpot KC agreed that Mr Nesbit's submission reflected the Applicant's understanding of the status of negotiations about the positive approach and the levels of optimism of those involved and that the Applicant was cautiously optimistic about the outcome of these negotiations.
4. Schedule 2 of the draft DCO - Requirements	
The Applicant will be asked to provide an overview of the Requirements, as amended by the CR. The ExA will then ask questions, seeking responses where appropriate from the Applicant, the Local Authorities, and any other IPs who have registered to speak. These IPs will also be invited to ask questions of clarification in relation to the draft DCO requirements.	Mr Hereward Phillpot KC, speaking on behalf of the Applicant, explained how the only changes to the Requirements made as a result of the Change Application were the removal of references to Work Nos. 6A.3 and 6B.3 from Requirements 3(7) and 3(8) (detailed design). This is because these Work numbers have been removed from Schedule 1 as a result of Change No. 2.F in the Change Application Report **[CR1-044]**, the change being the removal of the Northern Gas Networks Above Ground Installation off A178 Seaton Carew Road. No other amendments have been made to the Requirements in the draft DCO as a result of the Change Application. Mr James Cox, on behalf of AA, explained how they welcomed the Applicant's draft wording for an operational noise requirement, which had been provided on a without prejudice basis in its response to ExQ2.9.9 **[REP5-045]**, and maintained that this should be included in the DCO. In response, Mr Phillpot KC, on behalf of the Applicant, explained that while the Applicant did not consider an operational noise requirement to be necessary, the ExA now had both parties' submissions on this point and draft wording in the event that the ExA accepted AA's position in respect of operational noise. He also noted AA's position that the Applicant is proposing to address its concerns about Requirements 18, 22, 25 and 28 through protective provisions or side agreement. In relation to Requirement 33, Mr Tom Henderson, on behalf of South Tees Group (STG), said that STG is supportive of the Net Zero Teesside (NZT) Project and H2T sharing infrastructure to rationalise assets and minimise impacts on the estate. However, they had four drafting points to raise about the Requirement: 1. It is important that any shared infrastructure is capable of accommodating both projects and where reliance is placed on a previous approval under NZT, how would this ensure that the design of the asset can accommodate both projects and not just one project? 2. Requirement 33 references 'part' to refer to both parts of the works and also parts of the requirement which is confusing. 3. Paragraph 33(1)(a) talks about relevant part of the NZT Project requirement but that relevant part is not defined. 4. Mr Henderson noted that paragraph 33(1)c) refers to infrastructure to be constructed etc, and only a situation where the NZT infrastructure has not yet been built, but there could be a scenario where design has been discharged for H2T and the NZT infrastructure has already been constructed. Mr Henderson said that the paragraph should accommodate scenarios for both where the NZT infrastructure has or has not been constructed.

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	Responding on behalf of the Applicant to Mr Henderson's points 2, 3 and 4, Mr Phillpot KC said that these matters had been raised by STG in their Deadline 5 submissions and responded to in the Applicant's Responses to D5 Submissions **[REP6-006**]. The Applicant's revised draft DCO submitted at Deadline 6A would include amendments to address those points. In response to Mr Henderson's point 1, Mr Phillpot KC said he did not see this as a real issue as ultimately, this is an example of something that the Local Planning Authority (LPA) would need to consider when deciding whether to approve any request made by the Applicant under Requirement 33 as sub-paragraph (1) is worded so that the two requirements may be deemed to be discharged, subject to approval by the LPA. Whether the design discharged under NZT may also accommodate H2T would be a material consideration for the LPA in making that decision. It becomes a risk or issue which the Applicant will need to address in order to persuade the LPA that it is appropriate in a particular instance but this does not call into question either the principle or the wording of Requirement 33 as drafted. In response to ExA's query about whether the drafting in Requirement 33(3) referring to "consultation with a third party" was sufficiently precise, Mr Phillpott KC, on behalf of the Applicant, said this wording inevitably requires the reader to look at the relevant requirement which is engaged in the specific case. In this case, combining that other requirement with the wording in paragraph 33(3) makes it entirely clear who the relevant third party is. Third party is also a common term which does not need to be defined. The Applicant would also note Mr Henderson's response on the same point on behalf of STG where he said he thought the drafting was sufficiently precise. Responding to the ExA's query about whether the appeal provisions would be engaged if the LPA did not approve the discharge the Requirement 33, Mr Phillpot KC, on behalf of the Applicant, confirmed that they would be engaged and all the same considerations would be put before the decision maker and the appeal process would protect the public interest in the usual way. Adrian Miller, who on behalf of Redcar and Cleveland Borough Council, said that their only concern was the potential for a difference of opinion to arise between the respective parties (the Applicant and STG) about how the requirement applies and how he would hope these would be resolved so that the LPA is not put in position of being an arbiter between these differences of opinion. In response Mr Phillpot KC, on behalf of the Applicant, said that it is a normal part of a LPA's business in determining discharge of DCO requirements or conditions to exercise its judgment where there are differences of opinion between the Applicant and people who have legitimate part to play in the process. Requirement 33 is no different in principle to a number of other requirements in the DCO where there may be different points of view. The process allows for everyone's views to be taken into account by the discharging body. ExA noted a number of what it considered to be errors in Requirement 33, such as references to 'Requirement 11' instead of 'Requirement 10' and the repetition of 'sub' in '*sub sub paragraph*'. Mr Phillpot KC said that the Applicant would take these points away and either amend the DCO or explain these at Deadline 6A. **Post-hearing note:** *The Applicant has amended Requirement 33 of the draft DCO submitted at Deadline 6A to address points 2 to 4 raised by STG during the hearing.* *In response to the ExA's comments about 'typographical errors' in the drafting in Requirement 33, the Applicant would note the following:-* *The references to Requirement 11 (surface and foul water drainage) in Requirement 33(1)(a) and (b) are not typographical errors because these are references to Requirement 11 in The Net Teesside Order 2024 [REP1-009] and not a reference to the H2T Order. The numbering of requirements in Schedule 2 of The Net Teesside Order 2024 is slightly different to the numbering of requirements in the H2T DCO, hence the reference to Requirement 10 (surface and foul water drainage) when referring to this requirement in the H2T Order and reference to Requirement 11 when referring to this equivalent requirement in the NZT Order.* *The reference to "sub-sub-paragraph (a)" has been corrected at Deadline 6A to "paragraph (a)" in accordance with Statutory Instrument Practice (5th Edition) published in November 2017.*
5. Article 44 of the draft DCO – Certification of Plans	

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The Applicant will be asked to explain any changes to this Article as a result of the CR and whether the plans and documents listed in draft DCO [REP4-004] represents the complete list to be certified. The ExA will seek views as to whether the list is complete and if not, what additional documents would need to be included.	Responding to the ExA's query asking the Applicant to explain any changes to article 44 of the **d**raft DCO as a result of the Change Application and whether the plans and documents listed in the draft DCO represent the complete list to be certified, Mr Hereward Phillpot KC, on behalf of the Applicant, confirmed that there have been no changes to article 44 of the draft DCO as a result of the Change Application. Mr Phillpot KC explained that the list of documents in Schedule 14 had been updated in the Change Application DCO to remove reference to the Design and Access Statement (DAS). The removal of the DAS from Schedule 14 was not a result of or related to the Change Application, but the Applicant simply taking the opportunity to make this amendment given there is no other reference to the DAS in the draft DCO. The Applicant's reasons for not including the DAS as part of the design Requirement is set out fully in its responses to ExQ1.9.44 **[REP2-027]** and ExQ2.9.5 **[REP5-045]** which explain how elements in the DAS are either already secured by a requirement in the draft DCO or are not defined in terms that are specific enough to be secured by requirement. Mr Phillpot KC also said that, in response to ExQ2.9.10 **[REP5-045],** the Applicant inserted the Change Application Report **[CF1-044]** and the Change Application Report – Appendices **[CR1-045]** into Schedule 14 of the draft DCO at Deadline 5. Mr Phillpot KC also noted that "*H2 Teesside Anglo American Shared Plan*" was also inserted into Schedule 14 at Deadline 5 in square brackets due to the plan being mentioned in the draft protective provisions for Anglo American but the plan is not yet in an agreed form.
6. Consents, licences and other agreements	
In the light of the accepted CR and irrespective of the Applicant's Oral submission made during ISH2, the Applicant will be asked to provide: • An overview of consents, licences and other agreements required in order to undertake the Proposed Development, as previously outlined in ISH2. • Progress and timescales for completion of such consents, licences and other agreements, including an update concerning any agreement(s) being sought under section 111 of the Local Government Act 1972, (such as Planning Performance Agreements) and/ or Planning Obligations/ Section 106 or other Agreements. In the event of such agreement(s) being sought the ExA will ask about predicted timescales for finalising such documents.	In response to the ExA's first bullet point of this agenda item, Mr Hereward Phillpot KC, on behalf of the Applicant noted that key other consents and licences required for the development are outlined at a high level in Other Consents and Licenses statement that was updated at **Deadline 5 [REP5-009]** on 18 December 2024. The Applicant confirms that no additional consents or licences over and above those already envisaged are anticipated to be required as a result of the Change Application. In response to the ExA's second bullet point of this agenda item, Mr Ross Nickson, Environmental and Social Manager, speaking on behalf of the Applicant, provided an update for key early consents, namely the Environmental Permit, the COMAH (Control of Major Accident Hazards) application and the Hazardous Substances Consent as well as the District Level Licencing application made to Natural England for the presence of Great Crested Newts in the Cowpen Bewley Woodland area. These are as follows: <u>Environmental Permit</u> At ISH2 the Applicant was awaiting the Environment Agency (EA) to complete its review of the additional information submitted on 11 October 2024. Mr Nickson confirmed that this review had now been completed and the Environmental Permit was 'duly made' on 6 December 2024 as outlined in the updated Consents and Licences Statement [**REP5-009]** (clean version) and **[REP5-010]** (tracked version) submitted at Deadline 5. While it is noted that the EA did not concur in their Deadline 5 submission, the Applicant has had the relevant documentation from the EA to confirm this is the case and this was submitted into the Examination at Deadline 6 as Appendix 1 to the Applicant's Responses to Deadline 5 submissions **[REP6-006].** The Applicant now expects the permit determination period and consultation to start imminently. This is due to take several months with a decision due later in 2025 and is not expected to be completed prior to the end of the Examination. The EA indicated on 14th January 2025 that the public consultation on the Environmental Permit should go live in 5 to 10 working days, but it had not done so at the time of Deadline 6A. <u>COMAH</u> Mr Nickson said that the H2T site will be a Tier 1 COMAH site and as such a COMAH notification and Safety Report must be submitted under the Control of Major Accident Hazards Regulations (COMAH) 2015 three to six months prior to the start of construction. This will be informed by the Front End Engineering Design (FEED). As per the programme schedule given in Chapter 5 Construction Programme and Management **[APP-057]** the earliest construction is anticipated to start on Phase 1 is Q4 2025. As such, submission of the COMAH notification would be anticipated in Q2 2025. The Applicant has held numerous discussions with the Health and Safety Executive (HSE) regarding the East Coast Cluster more broadly and these are outlined in the draft Statement of Common Ground **[REP1-015]**. The Applicant is currently seeking to arrange a meeting with the HSE in early 2025 to specifically discuss the timeline for submission of the COMAH Application for H2T.

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In addition to the above the ExA will also seek: • Clarification concerning exemption from requiring a Deemed Marine Licence and how the ExA can be satisfied that no Deemed Marine Licence will be required, especially when considering the two conditions set out in Article 35 of The Marine Licensing (Exempted Activities) Order 2011. The ExA may ask any Interested Party for comment, observations or their views related to the above matters at any appropriate point during this agenda item and the ExA may ask questions.	<u>Hazardous Substances Consent</u> Mr Nickson noted that an application for Hazardous Substances Consent for the site is to be submitted under the Planning (Hazardous Substances) Regulations 2015 six to 12 months prior to the hazardous substances being present on site i.e. prior to commissioning of the plant. As such, this application will not be submitted until 2027. <u>District Level Licencing (DLL)</u> Mr Nickson said that the ExA will be aware that Great Crested Newts (GCN) had been detected in the pond within the Cowpen Bewley Woodland area. Although not directly impacted by H2T, this pond is within 250m of the red line boundary (as are a number of other ponds that provide suitable habitat but where GCN were not detected). As such, a District Level Licencing (DLL) Enquiry was first submitted to Natural England on 22 January 2024. Following engagement with Natural England and payment of the 1st Stage Conservation Payment an Impact Assessment and Conservation Payment Certificate (IACPC) **[REP6-007]** was countersigned by Natural England on 21 October 2024, a copy of which the Applicant submitted at Deadline 6 **[REP6-007].** The DLL process consists of 5 steps and the Applicant is now at Step 3 in the process. **Commuted sum** In response to the ExA's query about the Applicant's Response to Deadline 5 Submissions **[REP6-006]** and if a commuted lump sum were agreed in relation to Cowpen Bewley Replacement Special Category Land how would it be secured, Mr Phillpot KC, on behalf of the Applicant, said that the intention is that a commuted sum would be dealt with through the property agreement that is currently being negotiated with Stockton-on-Tees Borough Council (STBC) regarding that land and that would be the mechanism by which the commuted sum would be secured. Mr Phillpot KC added that, in the event that an agreement is not reached with STBC by the end of the examination, there would be scope for it to be secured through article 29. He highlighted how this article was amended quite significantly at Deadline 5 and, as currently drafted, pursuant to article 29(1) the undertaker cannot exercise relevant powers in relation to Special Category Land until it has obtained the approval of relevant planning authority for a scheme for the layout of the replacement special category land. Mr Phillpot KC said it would be possible to broaden out that part of the article to specify that the scheme submitted to the relevant planning authority must include details of ongoing management, if necessary and that would ensure that the matter would be controlled by the planning authority, including if they considered that any commuted sum payments were required. Mr Phillpot KC said that this is a matter that the Applicant can explore but it is hoping in the first instance that it can be dealt with by agreement. The Applicant is not proposing to secure a commuted sum through a section 106 obligation. **Post-hearing note:** *Further to the ExA's comments during ISH4, article 29(1)(b) has been amended in the DCO submitted at Deadline 6A to refer to the undertaker needing to obtain the approval of the relevant planning authority 'for a scheme for the layout* ***<u>and management</u>*** *of the replacement special category land'.* **In response to Action Point ISH4-AP1**, the Applicant considers that this mechanism will allow for the relevant planning authority to require commuted sum payments as part of any scheme 'for management' for the replacement special category land. It would be for the relevant planning authority to determine at that time, how it wanted to secure that funding. **Deemed Marine Licence (DML)** In response to the ExA's query concerning the Deemed Marine Licence (DML) exemption and how the ExA can be satisfied that no DML will be required, Mr Phillpot KC, on behalf of the Applicant, noted that the Applicant's position is that a DML is not required and does not need to be included in the draft DCO, pointing to the Applicant's Deadline 5A submission **[REP5a-013]**, which said that the Marine Management Organisation (MMO) have noted that '*all concerns raised have now been addressed, and that there is no requirement for a DML to be added.*'

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	Article 35 of The Marine Licensing (Exempted Activities) Order 2011 enables the Bored Tunnel exemption and applies to works "*carried on wholly under the seabed in connection with the construction or operation of a bored tunnel*" if two conditions are satisfied: • Condition 1 is that notice of the intention to carry on the activity must be given to the licensing authority before the activity is carried on. • Condition 2 is that the activity must not significantly adversely affect any part of the environment of the UK marine area or the living resources that it supports. Mr Phillpot KC noted that the activities that the Bored Tunnel exemption would relate to are the proposed trenchless crossings as they pass below the beds of the River Tees and Greatham Creek only. The launch and reception pits for the crossings are inland of Mean High Water Springs (MHWS) and outside of the jurisdiction of the Marine Licensing process. He added that the Applicant will need to fulfil Condition 1 of the exemption and notify the licensing authority in advance of the works being undertaken in each case and there are no issues arising in respect of its ability to do so. In respect of Condition 2, Mr Phillpot KC noted that, as set out in the Statement of Common Ground with the Marine Management Organisation **[REP5-055]**, the Applicant is confident that this condition will be met and the activities will not significantly adversely affect any part of the environment of the UK marine area or the living resources it supports. This is because the proposed trenchless crossings will be installed at a minimum depth of 25 metres below the bed of the River Tees at the deepest point of the crossing and a maximum depth of 60 metres and are therefore so far below the ground as to be unable to affect the marine environment above the ground. Furthermore, the launch and reception pits for the River Tees Crossing is inland of Mean High Water Springs (MHWS) and so are not within the jurisdiction of the MMO. Mr Phillpot KC added that the Applicant is intending to provide a detailed response on Natural England's comments in relation to potential disturbance to seals at Deadline 6A in relation to noise from HDD activities taking place above Mean High Water Springs. It considers that there is only a minimal potential for disturbance to seals, citing the Statement of Common Ground with Natural England **[REP5-056].** The Applicant is therefore satisfied that the exemption is applicable, and its detailed response at Deadline 6A is intended to provide further reassurance to the ExA as to the reasonableness and robustness of that position. Mr Phillpot KC added that the MMO submitted in the Statement of Common Ground at Deadline 5 **[REP5-055]** and the Applicant's Comments on any other submissions received at Deadline 4 **[REP5-067]** noted that "*the MMO wants to make it clear to the ExA that the MMO will not be requesting a DML to be added".* Notwithstanding those points, Mr Phillpot KC said even in the unlikely event that a DML were necessary, this would not constitute an impediment to the delivery of H2T given the nature of the activities being so far below Mean High Water Springs, such that there is no reason to believe any such licence would not be granted and only limited controls would be required in those circumstances The Applicant agreed to take away and respond to the ExA's query at Deadline 6A about whether there were any implications in respect of requiring a DML relating to Natural England's comment about the potential risk that an HDD collapse. **Post-hearing note (and in response to Action Point ISH4-AP2):** *Further to the ExA's query about whether a DML is required because of a potential risk of an HDD collapse, the Applicant's position is that in the unlikely event of a HDD collapse underneath the river bed, the depth of the bored tunnel below the riverbed would be such that the collapse would not impact the marine environment above the river bed. Also, as the launch and reception pits are inland of Mean High Water Springs (MHWS) a HDD collapse at these pits could not have an effect on the marine area either. Regardless of this The Applicant in its discussions with Natural England associated with NE's Key issue 1 confirmed that measures to control effects of HDD collapse are included in the Framework CEMP. This is recorded in the SoCG with Natural England [REP5-056].*