

**PROTECTIVE PROVISIONS FOR THE PROTECTION OF
NAVIGATOR TERMINALS SEAL SANDS LIMITED**

1. For the protection of Navigator Terminals, the following provisions have effect, unless otherwise agreed in writing between the undertaker and Navigator Terminals.

2. In this Schedule—

“Navigator Terminals” means Navigator Terminals Seal Sands Limited (company number 00829104), whose registered office is Oliver Road, Grays, RM20 3ED and Navigator Terminals North Tees Limited (company number 09889506), whose registered office is Oliver Road, Grays, RM20 3ED and any successor in title or function to the Navigator Terminals operations;

“Navigator Terminals operations” means the operations within the Order limits vested in Navigator Terminals including the pipeline crossing the Order limits operated by Navigator Terminals used at various times for the passage of multi-purpose hydrocarbon fuels and all ancillary apparatus including such works and apparatus properly appurtenant to the pipelines as are specified by section 65(2) (meaning of “pipe-line”) of the Pipe-Lines Act 1962; and

“works details” means—

- (a) plans and sections;
- (b) details of the proposed method of working and timing of execution of works (including, but not limited to, the details for managing any contamination and contaminated land relevant to the proposed work and arrangements for remediating the said contamination);
- (c) details of vehicle access routes for construction and operational traffic;
- (d) schedules of work and risk assessments for the proposed work; and
- (e) any further particulars provided in response to a request under paragraph 3.

Consent under this Schedule

3. Before commencing any part of the authorised development which would have an effect on the operation or maintenance of the Navigator Terminals operations, or all necessary and existing access to them, or access to any land owned by Navigator Terminals that is adjacent to the Order Limits, the undertaker must submit to Navigator Terminals the works details for the proposed works and such further particulars as Navigator Terminals may, within 28 days from the day on which the works details are submitted under this paragraph, reasonably require for approval by Navigator Terminals.

4. No works comprising any part of the authorised development which would have an effect on the operation or maintenance of the Navigator Terminals operations, or access to them, or access to any land owned by Navigator Terminals that is adjacent to the Order Limits, are to be commenced until the works details in respect of those works submitted under paragraph 3 have been approved by Navigator Terminals.

5. Any approval of Navigator Terminals required under paragraph 4 must not be unreasonably withheld or delayed and a determination shall be provided within 28 days from the day when the last such works details (including any additional details reasonably required within the 28 day period following submission of works details as referred to in paragraph 3 above) are provided pursuant to paragraph 3 but may be given subject to such reasonable requirements as Navigator Terminals may require to be made for—

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- (a) Avoiding any material impact on Navigator Terminals operations (for the avoidance of doubt where the reasonable requirements relate to such matters, a reasoned explanation will be provided by Navigator Terminals to substantiate the need for these requirements); and
- (b) the requirement for Navigator Terminals to have reasonable access with or without vehicles at all times to inspect, repair, replace and maintain and ensure the continuing safety and operation or viability of the Navigator Terminals operations.

Commented [PM5]: Issue 3

6.—(1) The authorised development must be carried out with good and suitable materials in a good and workmanlike manner in accordance with the works details approved under paragraph 4 and any requirements imposed on the approval under paragraph 9 and all other statutory and other requirements or regulations.

(2) Where there has been a reference to an arbitrator in accordance with paragraph 9 and the arbitrator gives approval for the works details, the authorised development must be carried out in accordance with the approval and conditions contained in the decision of the arbitrator under paragraph 9.

Commented [PM6]: Issue 7

Commented [PM7]: Issue 4 - location of tunnel head and temporary construction compound

Costs

7.—(1) Subject to the following provisions of this paragraph 7, the undertaker must pay to Navigator Terminals the reasonable and properly incurred costs and expenses (including reasonable staffing costs if work is carried out in-house) incurred by Navigator Terminals in, or in connection with—

- (a) undertaking its obligations under this Order including—
 - (i) the execution of any works under this Order including for the protection of the affected apparatus; and
 - (ii) the review and assessment of works details in accordance with paragraph 3;
- (b) the watching of and inspecting the execution of the works approved under paragraph 4; and
- (c) imposing reasonable requirements in accordance with paragraph 5.

(2) Prior to incurring any costs or expenses associated with the activities in sub-paragraph (1), Navigator Terminals must give prior written notice to the undertaker of the activities to be undertaken and an estimate of the costs or expenses to be incurred.

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Commented [PM9]: Issue 5 - costs

Indemnity

8.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any of the works referred to in paragraph 3, any damage is caused to the Navigator Terminals operations, or there is any interruption in any service provided, or in the supply of any goods, by Navigator Terminals, the undertaker must—

- (a) bear and pay the cost reasonably incurred by Navigator Terminals in making good such damage or restoring the supply; and
- (b) make reasonable compensation to Navigator Terminals for any other expenses, loss, damages, penalty or costs incurred by Navigator Terminals, by reason or in consequence of any such damage or interruption.

(2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to—

- (a) any damage or interruption to the extent that it is attributable to the act, neglect or default of Navigator Terminals, its officers, employees, servants, contractors or agents; or
- (b) any indirect or consequential loss or loss of profits by Navigator Terminals.

(3) Navigator Terminals must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker which, if it withholds such consent, has the sole conduct of any settlement or compromise or of any proceedings necessary to resist the claim or demand.

(4) Navigator Terminals must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 8 applies.

(5) If requested to do so by the undertaker, Navigator Terminals must provide an explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1).

(6) The undertaker shall only be liable under this paragraph 8 for claims reasonably incurred by Navigator Terminals.

Arbitration

9. Any difference or dispute arising between the undertaker and Navigator Terminals under this Schedule must, unless otherwise agreed in writing between the undertaker and Navigator Terminals, be referred to and settled by arbitration in accordance with article 46 (arbitration).

Commented [PM10]: Issue 6

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Applicant's submissions

1. Issue 1 –various definitions

- 1.1. The definitions that are contained in Schedule 25 to the draft DCO differ from those contained in Navigator's preferred protective provisions [REP5-079].
- 1.2. **Navigator Terminals Operations:** The definition of Navigator Terminals operations contained in Schedule 25 of the draft DCO comprises all of the operations of Navigator that are within the Order Limits of the authorised development. This definition is sufficiently broad enough to protect all of Navigator Terminals' operations that may be impacted by the authorised development. It is consistent with the definition that was accepted by the Secretary of State (SoS) in the Net Zero Teesside Order, which was a project of a similar nature to the authorised development and had similar impacts.
- 1.3. It is not appropriate to broaden this definition to include Navigator Terminals' operations that are outside of the Order Limits as Navigator Terminals have suggested, as there are no works proposed by the authorised development to these areas. Broadening the Applicant's obligations to these areas will impose additional obligations on the Applicant that are unnecessary to protect Navigator Terminals' assets from the authorised development, which is the purpose of the protective provisions.
- 1.4. Including land that is 'adjacent to' the Order Limits, also suggested by Navigator Terminals, is imprecise, which makes it difficult for the parties to understand the extent of the obligations that are imposed by the protective provisions. This lack of certainty may result in disputes between the parties. The Applicant has however included protection for Navigator Terminals' access to its adjacent land or operations, as per paragraphs 3 and 4, as the accesses may be crossed by the authorised development and may therefore be directly affected by it.
- 1.5. **Works Details definition:** The Applicant has made minor amendments to paragraph (b) of Navigator Terminals' preferred definition of 'works details' to clarify that the management of contamination, contaminated land and remediation only relates to the proposed work.
- 1.6. (d) of Navigator Terminals' preferred definition of 'works details' to clarify that the risk assessments that need to be carried out relate to the proposed work.

2. Issue 2 – consent for works provisions (paragraphs 3 and 4)

- 2.1. The breadth of the works to which paragraphs 3-6 apply provides appropriate protection for Navigator Terminals' operations. The works comprise any part of the authorised development that will have an effect on the operation or maintenance of Navigator Terminals' operations and necessary and existing access to them. The scope of these works is standard wording contained in protective provisions and is consistent with the scope of works that was contained in the protective provisions for the benefit of Navigator Terminals in Net Zero Teesside Order (see paragraphs 334-335 in Part 24 of Schedule 12).
- 2.2. Extending the application of these paragraphs to include all works on all land owned or controlled by Navigator Terminals, as suggested by Navigator, is unnecessary as it includes land that will not be effected by the authorised development and land that is not within the Order Limits and therefore is not the subject of any proposed works. The need to seek such consent goes beyond the purpose of protective provisions. However, the Applicant appreciates that Navigator Terminals' access to land which is adjacent to the Order Limits should be protected and has therefore amended paragraphs 3 and 4 of Schedule 25.

3. Issue 3 – requirements made to Navigator Terminals' consent (paragraph 5)

- 3.1. Paragraph 5 outlines the conditions on which Navigator Terminals can impose on any consent it provides pursuant to paragraph 4.
- 3.2. The conditions contained in paragraphs 5 (a) and (b) are generally consistent with the conditions contained in the protective provisions for the benefit of Navigator Terminals in

Net Zero Teesside Order (see paragraphs 334-335 in Part 24 of Schedule 12). The Applicant has made minor changes to reflect the protective provisions sought by Navigator Terminals to which the Applicant agrees.

- 3.3. It is reasonable for Navigator Terminals to provide a reasoned explanation about any conditions it imposes to avoid material impacts on the Navigator Terminals' operations. This is so the Applicant can properly understand those conditions and determine if they should be disputed.
 - 3.4. The Applicant cannot guarantee uninterrupted and unimpeded access, as requested by Navigator, given the construction that will be carried out on Navigator Terminals' land and the current stage of the design of the authorised development. However, the Applicant appreciates that Navigator Terminals requires access and has instead noted in paragraph 5(b) that Navigator Terminals can impose conditions on any approval to have reasonable access. This is consistent with the protective provisions that benefited Navigator Terminals in the Net Zero Teesside Order (see paragraph 336(b) of Part 24) as well as various other bespoke protective provisions in that Order (see for example paragraphs 90(3)(b) (Exolum Seal Sands LTD and Exolum Riverside LTD), 192(b)(ii) (Sabic Petrochemicals UK Limited), 293(b)(ii) (The Breagh Pipeline Owners), 311(b)(ii) (Huntsman Polyurethanes (UK) Limited), 395(b) (TGLP, TGPP and TGPL) of Parts 8, 16, 21, 23 and 28 respectively of Schedule 12 to the Net Zero Teesside Order).
 - 3.5. It is not appropriate for Navigator Terminals to impose conditions that restrict the location of the authorised development in order that Navigator Terminals may route any carbon pipeline to the 'north and west' of planning approval 24/1208/FUL for the installation and operation of a carbon dioxide storage terminal in the CO2 Development Area approved by Stockton-on-Tees Borough Council on 20 December 2024 (**CO2 Development**), as suggested by Navigator Terminals. This is particularly the case as:
 - 3.5.1. such pipeline does not have planning approval and so is neither 'apparatus' nor operations which are what is protected by protective provisions. Relevantly, the CO2 Development has consent for a pipeline that connects to the south of the Seal Sands Terminal Facility, not to the 'north or west' of this facility; and
 - 3.5.2. the location of the potential pipeline is not known. Based on the information provided in [REP5-079], the potential pipeline could be located anywhere to the 'north and west of the CO2 Development'. The lack of detail emphasises the early stages of design and planning associated with such pipeline and has the effect of sterilising a large amount of area that is necessary for the authorised development.
 - 3.6. The authorised development, being a project of national significance (by virtue of the direction issued pursuant to s 35 of the Planning Act 2008 on 22 December 2022) should not be inhibited by a development which does not have planning permission and may not be constructed.
- 4. Issue 4 – location of the tunnel head (Work 6B.1 - Hydrogen Distribution Network - Above Ground Installations) and construction compound (Work No. 9 - Temporary Construction Compounds)**
- 4.1. The Order Limits for the authorised development have been determined based on the concept design and pre-front end engineering and design process. This level of design is appropriate to determine the Order Limits and also at the stage of DCO submission. These aspects identified that the most appropriate location for the tunnel head was on Navigator Terminals' land. This is because it is the only feasible industrial crossing location of the river. The existing tunnel upstream was subject to screening in feasibility studies, but it could not be confirmed that it was feasible due to a number of reasons (e.g. it was not possible to confirm routing through the legacy pipeline corridor which is at capacity).

- 4.2. Based on the current design, there is a potential for the location of the proposed tunnel head (Work 6B.1 - Hydrogen Distribution Network - Above Ground Installations) and temporary construction compound (Work No. 9 - Temporary Construction Compounds) to overlap to some extent with the planning application boundary for the CO2 Development. The exact specifications of the tunnel head and temporary construction compound(s), including the size, footprint and siting on Navigator Terminals' land will be determined once the detailed design process is completed.
- 4.3. Until the detailed design is carried out, the Applicant requires flexibility in order to account for uncertainty in relation to aspects of the authorised development's detailed design. Accordingly, at this stage the Applicant cannot commit to locating the tunnel head and temporary construction compounds outside of the planning application boundary for the CO2 Development.
- 4.4. The Applicant is committed to continue working with Navigator Terminals in order to minimise as far as reasonably practicable the impact of the authorised development on the CO2 Development. The Applicant is also seeking to minimise disturbances and development opportunities for Navigator Terminals by siting the tunnel head as close to the existing crossing corridor as is reasonably practicable.
- 4.5. In the event that the tunnel head cannot be located outside of the planning application boundary for the CO2 Development, Navigator Terminals will be entitled to compensation in accordance with the *Land Compensation Act 1961* and *Compulsory Purchase Act 1965*.

5. Issue 5 – costs

- 5.1. The Applicant included paragraph 7 in Schedule 25 at Deadline 7A to reflect the current status of negotiations with Navigator Terminals. This paragraph provides adequate costs compensation for Navigator Terminals in relation to the costs it will incur pursuant to paragraphs 3-5.
- 5.2. Navigator Terminals is seeking the protective provisions to require the Applicant to pay for Navigator Terminals' costs relating to auditing, safety assessments, engineering advice, lawyers' and other professional fees [REP5-079]. It is also not clear how these costs can be properly and reasonably incurred by Navigator Terminals in accordance with the protective provisions contained in Schedule 25 to the draft DCO, or in Navigator Terminals' preferred protective provisions [REP5-079]. The Applicant has already provided a costs undertaking to cover Navigator Terminals' legal costs for the negotiation of land agreements, protective provisions and side agreement with Navigator Terminals.
- 5.3. Excluding provisions relating to the payment of Navigator Terminals' costs is consistent with the protective provisions for the benefit of Navigator Terminals in Net Zero Teesside Order (see Part 24 of Schedule 12).

6. Issue 6 – indemnity (paragraph 8)

- 6.1. The indemnity clause continued in paragraph 8 of Schedule 25 to the draft DCO provides sufficient protection to Navigator Terminals as it covers the scope of the damage, service interruption or supply of goods that Navigator is most likely to suffer as a result of the works referred to in paragraph 3 of the protective provisions.
- 6.2. The Applicant should not be responsible for paying for any unreasonable costs incurred by Navigator Terminals, hence the inclusion of 'reasonable' in paragraphs 8(1)(a) and (b). This is also consistent with paragraph 8(6) of the protective provisions. Further, the inclusion of 'reasonableness' in paragraphs 8(1)(a) and (b) is precedent in various bespoke protective provisions (see, for example paragraphs 56 (Air Products PLC), 86 (CF Fertilisers UK Limited), 94 (Exolum Seal Sands LTD and Exolum Riverside LTD), 102 (Ineos Nitriles (UK) Limited), 157 (NPL Waste Management Limited), 208(2)(b) (Sabic Petrochemicals UK Limited), 224 (Sembcorp Utilities (UK) Limited), 255 (Suez Recycling and Recovery UK Limited), 295 (The Breagh Pipeline Owners), 327 (Huntsman Polyurethanes (UK) Limited),

and 400 (TGLP, TGPP and NGPL) of Parts 5, 7-9, 13, 16-17, 19, 21, 23 and 28 respectively of Schedule 12 to the Net Zero Teesside Order).

- 6.3. The scope of compensation included in paragraph 8(1)(b) is broad enough to cover the types of expenses, losses etc. Navigator Terminals is likely to suffer as a result of the damage, service interruption or supply of goods contemplated by paragraph 8(1). This is consistent with the protective provisions for the benefit of Navigator Terminals in Net Zero Teesside Order (see paragraph 338 in Part 24 of Schedule 12) as well as the examples listed in paragraph 6.2 above. Conversely, the scope of compensation sought by Navigator Terminals goes far beyond this and is unreasonable.
- 6.4. The Applicant should not be liable for consequential loss, indirect loss or loss of profits as these losses are far too remote from, and lack a causal link to, the damage or interruption to service of supply of goods contemplated by paragraph 8(1). As such, the exclusion in paragraph 8(2) is appropriate. Paragraph 8(2) is preceded in the protective provisions for the benefit of Navigator Terminals in Net Zero Teesside Order (see paragraph 338(2)(b) in Part 24 of Schedule 12) as well as the bespoke protective provisions elsewhere in that Order (see for example, paragraphs 255(2)(b) (Suez Recycling and Recovery UK Limited) and 295(2)(b) (The Breagh Pipeline Owners) of Parts 19 and 21 respectively of Schedule 12 to the Net Zero Teesside Order).
- 6.5. The Applicant should not be liable for any act, neglect or default of Navigator Terminals and therefore the inclusion of 'solely' in paragraph 8(2)(a) in Navigator Terminals' preferred protective provisions is not appropriate [REP5-079].
- 6.6. Paragraph 8(3) balances the need between the Applicant approving claims or demands it is going to pay for, and any burden imposed on Navigator Terminals for seeking such approvals from the Applicant. It is appropriate for Navigator Terminals to seek the Applicant's consent before it settles or makes any compromise of any claim or demand, given the Applicant is the party that is ultimately going to pay for such claim or demand. The Applicant requires oversight of and a level of control over claims to be able to manage its liability. Paragraph 8(3) avoids any additional burden placed on Navigator Terminals by having to continually seek the Applicant's consent before settling or making any compromise, as in the event the Applicant withholds its consent, the Applicant is from then on, responsible for resolving the claim or demand. This also enables the Applicant to have the possibility of minimising its liability, whereas Navigator Terminals' would have no incentive to do so. This is consistent with various bespoke protective provisions (see for example paragraphs 56(3) (Air Products PLC), 86(3) (CF Fertilisers UK Limited), 94(3) (Exolum Seal Sands LTD and Exolum Riverside LTD), 102(3) (INEOS Nitriles (UK) Limited), 208(4) (Sabic Petrochemicals UK Limited), 224(3) (Sembcorp Utilities (UK) Limited), 255(3) (Suez Recycling and Recovery UK Limited), 295(3) (The Breagh Pipeline Owners), 327(4) (Huntsman Polyurethanes (UK) Limited) and 400(3) (TGLP, TGPP and NGPL) of Parts 5, 7-8, 16-17, 19, 21, 23 and 28 respectively of Schedule 12 to the Net Zero Teesside Order).
- 6.7. Paragraph 8(4) requires Navigator Terminals to use reasonable endeavours to mitigate its loss, costs etc. to which paragraph 8 applies. It is not necessary to caveat this obligation to the extent Navigator Terminals "is able to and using the steps of a reasonably prudent operator of such a facility" as the paragraph is already subject to 'reasonable endeavours'. The Applicant's preferred wording of paragraph 8(4) is consistent with various bespoke protective provisions (see for example paragraphs 56(4) (Air Products PLC), 86(5) (CF Fertilisers UK Limited), 94(4) (Exolum Seal Sands LTD and Exolum Riverside LTD), 102(4) (INEOS Nitriles (UK) Limited), 208(7) (Sabic Petrochemicals UK Limited), 224(4) (Sembcorp Utilities (UK) Limited), 295(4) (The Breagh Pipeline Owners), 327(7) (Huntsman Polyurethanes (UK) Limited) and 400(4) (TGLP, TGPP and NGPL) of Parts 5-9, 16-17, 21, 23 and 28, respectively of Schedule 12 to the Net Zero Teesside Order).

6.8. Navigator Terminals is under a duty to mitigate its loss, costs etc. per paragraph 8(4). Accordingly, Navigator Terminals ought to be required to show the Applicant how it has complied with this duty by minimising any claim, if requested by the Applicant, per the requirement in paragraph 8(5). This is consistent with various bespoke protective provisions (see for example paragraphs 56(4) (Air Products PLC), 86(5) CF Fertilisers UK Limited, 94(4) (Exolum Seal Sands LTD and Exolum Riverside LTD), 102(4) (INEOS Nitriles (UK) Limited), 208(7) (Sabic Petrochemicals UK Limited), 224(4) (Sembcorp Utilities (UK) Limited), 295(4) (The Breagh Pipeline Owners) and 327(7) (Huntsman Polyurethanes (UK) Limited), of Parts , 5, 7-9, 16-17, 21 and 23 respectively of Schedule 12 to the Net Zero Teesside Order).

7. Issue 7 – dispute resolution mechanism (paragraph 9)

- 7.1. The Applicant does not consider expert determination is an appropriate dispute resolution mechanism. This is because there are various matters arising from these protective provisions that cannot be determined by an expert. For example, disputes regarding the construction of the tunnel head and pipeline supports which would need to be resolved by a civil engineer, disputes regard the integrity of the pipeline would be resolved by a mechanical engineer and safety related issues would be determined by a chemical engineer. As such, the Applicant considers arbitration is a more appropriate dispute resolution mechanism. Arbitration is consistent with the dispute resolution mechanism outlined in Article 46 of the draft DCO and is used as the dispute resolution mechanism for almost all counterparties in the draft DCO.
- 7.2. If the Examining Authority recommends or the SoS determines that expert determination is the appropriate dispute resolution mechanism, the Applicant considers that paragraph 10 of Navigator Terminals' preferred protective provisions [REP5-079] should be amended in four respects.
- 7.3. Firstly, the Applicant does not consider that the President of the Institute of Civil Engineers is the appropriate body to determine the expert to be appointed for any dispute arising from the protective provisions. The interactions of the authorised development with Navigator Terminals' operations and the types of disputes that may arise from the protective provisions are much broader than civil engineering issues, and for example, can relate to legal issues and contamination matters. As such, the Applicant considers that a more generalist person, such as the President of the Law Society is the more appropriate body to appoint an expert.
- 7.4. Secondly, the Applicant considers that the matters the expert must consider should include various matters relating to the authorised development. Accordingly, in addition to the matters Navigator Terminals has identified at paragraph 10(5) of its preferred protective provisions [REP5-079], the Applicant considers that the expert must also consider:
 - 7.4.1. the authorised development being a nationally significant project by virtue of the direction issued pursuant to s 35 of the Planning Act 2008 on 22 December 2022;
 - 7.4.2. the development outcomes sought by the Applicant;
 - 7.4.3. the ability of the Applicant to achieve the outcomes referred to in paragraph 7.4.2 in a timely and cost-effective manner; and
 - 7.4.4. any increased costs on any party as a result of the matter in dispute.
- 7.5. Thirdly, paragraph 10(6) should be amended so it is clear that the expert's decision is enforceable by way of injunction. This ensures the decision is enforceable and will promote the parties' compliance with the decision.
- 7.6. Fourthly, in the event the expert makes a manifest error, the decision should be determined by an arbitrator, rather than the Courts. Arbitration is a quicker and cheaper form of dispute resolution, which is particularly important where the parties have already progressed through expert determination.