

**PROTECTIVE PROVISIONS FOR THE PROTECTION OF PD
TEESPORT LIMITED**

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

2. In this Schedule—

“PD Teesport” means PD Teesport Limited (company number 02636007) and any successor in title or function to the PD Teesport operations;

the “PD Teesport operations” means the port operations or property (including all freehold, leasehold, easements, wayleaves, licences and other rights) vested in PD Teesport Limited (or any related company whose assets or operations are impacted by the construction, maintenance and operation of the authorised development), including access to and from those operations or activities via Tees Dock Road and access, use and occupation of the Redcar Bulk Terminal as well as access over Seal Sands Road;

“road user(s)” means any person who has a—

- (a) right to use Seal Sands Road (including parties authorised by PD Teesport);
- (b) need to use Seal Sands Road to access property or facilities owned, operated or occupied by them; and
- (c) need to use Seal Sands Road or in connection with undertaking their business operations or statutory functions;

“Seal Sands Road” means any part of Seal Sands Road within the Order limits;

“works details” means—

- (a) plans and sections;
- (b) details of the proposed method of working and timing of execution of works;
- (c) details of vehicle access routes for construction and operational traffic; and
- (d) any further particulars provided in response to a request under paragraph 3.

Commented [PM1]: Issue 1

Commented [PM2]: Issue 2 - restriction on DCO powers

Commented [PM3]: Issue 3 - restriction on DCO powers re: construction of tunnel

Consent under this Schedule

3. Before commencing any part of the authorised development—

- (a) that would have an effect on the PD Teesport operations;
- (b) located on or in immediate proximity of the PD Teesport operations; or
- (c) that would affect the use of Seal Sands Road by PD Teesport and road users (such access to be along the existing highway route at Seal Sands Road),

the undertaker must submit to PD Teesport the works details for the proposed works and such further particulars as PD Teesport may, within 21 days from the day on which the works details are submitted under this paragraph, reasonably require.

Commented [PM4]: Issue 4

4. No works comprising any part of the authorised development—

- (a) that would have an effect on the PD Teesport operations;
- (b) located on or in immediate proximity of the PD Teesport operations; or
- (c) located on or in immediate proximity of the PD Teesport operations so as to affect use of Seal Sands Road by PD Teesport and road users (such access to be along the existing highway route at Seal Sands Road).

Commented [PM5]: Issue 4

are to be commenced until the works details in respect of those works submitted under paragraph 3 have been approved by PD Teesport, such approval to be provided no later than 21 days from the later of the details of the proposed works being provided or the provision of the last such further particulars as may have been requested by PD Teesport in respect of the works.

5. Any approval of PD Teesport required under paragraph 4 must not be unreasonably withheld or delayed but may be given subject to such reasonable requirements as PD Teesport may require to be made for—

- (a) the continuing safety, operational activity or business interests of the PD Teesport operations (for the avoidance of doubt where the reasonable requirements relate to such matters, a reasoned explanation or other form of evidence will be provided by PD Teesport to substantiate the need for these requirements); and
- (b) the requirement for PD Teesport to have uninterrupted and unimpeded access (including river access) to PD Teesport operations at all times.

6. The authorised development must be carried out in accordance with the works details approved under paragraph 4 and any requirements imposed on the approval under paragraph 5.

7. 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 5

Commented [PM7]: Issue 6 - insertion of costs clause re: reviewing approvals etc

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Commented [PM8]: Issue 2- restriction on DCO powers

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 PD Teesport operations, or there is any interruption in any service provided, or in the supply of any goods, by PD Teesport, the undertaker must—

- (a) bear and pay the cost reasonably incurred by PD Teesport in making good such damage or restoring the supply; and
- (b) indemnify PD Teesport for any other expenses, loss (including loss of profits), damages, penalty, claims, investigations, demands, charges, actions, notices, proceedings, orders, awards, judgments, damages, other liabilities and expenses (including legal fees, expenses and fines) or costs incurred of any kind or nature whatsoever by them, 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 any damage or interruption to the extent that it is attributable to the act, neglect, or default of PD Teesport, its officers, employees, servants, contractors or agents.

(3) PD Teesport 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.

Commented [PM9]: Issue 7

(4) If the undertaker becomes responsible for a claim or demand pursuant to sub-paragraph (3) it must—

- (a) keep PD Teesport fully informed of the developments and material elements of the proceedings;
- (b) take account of the views of PD Teesport before taking any action in relation to the claim;
- (c) not bring the name of PD Teesport or any related company into disrepute and act in an appropriate and professional manner when disputing any claim; and
- (d) not pay or settle such claims without the prior written consent of PD Teesport, such consent not to be unreasonably withheld or delayed.

(5) PD Teesport 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.

(6) If requested to do so by the undertaker, PD Teesport 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).

Commented [PM10]: Issue 7

(7) The undertaker shall only be liable under this paragraph 8 for claims reasonably incurred by PD Teesport.

Arbitration

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

Commented [PM11]: Issue 5

1. Issue 1 – Definitions of ‘Emergency Access Road’, ‘Redcar Bulk Terminal Access’ and ‘Tees Dock Roundabout Roads’ (paragraph 2)

1.1. PD Teesport has inserted definitions for ‘Emergency Access Road’, ‘Redcar Bulk Terminal Access’ and ‘Tees Dock Roundabout Roads’ at paragraph 2. These definitions relate to PD Teesport’s proposed paragraph 12 (Regulation of powers in relation to accesses). As set out below, the Applicant does not agree with the inclusion of this clause and the related definitions are therefore irrelevant and have not been included in the Applicant’s preferred form of PPs.

2. Issue 2 – restrictions on DCO land powers

2.1. PD Teesport has sought in its preferred protective provisions to restrict the Applicant exercising the powers contained within the draft DCO as well as the Applicant’s compulsory acquisition powers, temporary possession powers and powers to appropriate, acquire, create, extinguish or override any easement or other interests (see paragraphs 3, 4, 5 and 12 of the PD Teesport’s preferred form of protective provisions submitted at Deadline 7 [REP7-058]).

2.2. The Applicant understands that PD Teesport will want to manage access and traffic impacts in respect of the PD Teesport operations. However, in respect of articles 19-20 and controls on land powers, the Applicant strongly refutes such restrictions as they would jeopardise the delivery of the authorised development. These powers are required to ensure the authorised development can be constructed, operated and maintained and also to ensure that the authorised development’s nationally significant public benefits can be realised, including supporting the Government’s policies in relation to the timely delivery of new generating capacity and achieving ambitious net zero targets.

2.3. With the controls in place in the protective provisions in respect of controlling impacts of works on the PD Teesport operations, the impacts to the PD Teesport operations are able to be controlled. The Applicant is required to obtain consent from PD Teesport for the works described in paragraph 3 which can be made subject to such reasonable requirements as PD Teesport may require in relation to (a) the continuing safety operational activity or business interests of the PD Teesport operations; and (b) the requirement for PD Teesport to have uninterrupted and impeded access (including river access to PD Teesport operations at all times. The term ‘PD Teesport operations’ is broad and captures port operations or property (including freehold, leasehold, easements, wayleaves, licences and other rights) vested in PD Teesport or related companies whose assets and operations are affected by the authorised development and specifically covers access to and from those operations via the accesses listed at paragraph 2. With these measures in place, the Applicant ensures that there is no realistic prospect that the exercise of compulsory acquisition powers would have a detrimental impact on the ability of the PD Teesport operations to function.

2.4. However, the Applicant needs the ability to then deliver those approved works, utilising the land shown on the Order limits. In this context, the Applicant considers that the balance lies clearly in favour of the grant of compulsory acquisition powers, taking into account the measures to avoid, minimise or mitigate the effects of such powers, and noting the substantial public benefits that it considers exist for the authorised development.

2.5. The Applicant also refers to the justification for compulsory acquisition powers that is outlined in the Statement of Reasons [CR1-013].

3. Issue 3 – restriction on DCO powers (construction of tunnel)

3.1. The Applicant understands that PD Teesport’s preferred form of protective provisions contain a clause (at paragraph 5) which prohibits the Applicant from constructing a tunnel, underground pipeline or similar structure below the PD Teesport operations without the prior consent of PD Teesport unless that tunnel, underground pipeline or similar structure meets certain specifications.

3.2. The Applicant notes that this is a technical matter subject to ongoing engineering discussions and negotiation between the parties. At this stage of Project design, the Applicant is working within the parameters of the submitted DCO application and the environmental impact assessment that has been conducted in respect of the Project. Crucially, this includes that the River Tees crossing will be sufficiently deep under the River Tees. The Applicant therefore considers that this provision is not necessary as such a tunnel or similar structure would not impact PD Teesport operations. Any above ground matters are covered by paragraph 3 of the Protective Provisions. Accordingly, the Applicant is currently unable and does not think it necessary to include this proposed drafting in the protective provisions.

4. Issue 4 – consent under Schedule (paragraphs 3 and 4)

- 4.1. Paragraphs 3 to 7 govern the consenting process under this Schedule for the works described in paragraph 3.
- 4.2. The Applicant understands that, in PD Teesport's preferred protective provisions, the works comprise any part of the authorised development which may have an effect on the operations or maintenance or be located in proximity to the PD Teesport operations or access to them.
- 4.3. The Applicant considers that this drafting is too uncertain. For example, the precise scope of 'parts of the authorised development in proximity' to the PD Teesport operations is potentially very large, particularly in the context of the broad definition of 'the PD Teesport operations' as discussed above in these submissions at paragraph 2.3.
- 4.4. Under the Applicant's preferred drafting, the works comprise any part of the authorised development (a) that would have an effect on the PD Teesport operations; (b) located on or in the immediate proximity of the PD Teesport operations; or (c) that would affect the use of Seal Sands Road by PD Teesport and road users (such access to be along the existing highway route at Seal Sands Road).
- 4.5. The breadth of works to which paragraph 3 applies in the Applicant's preferred protective provisions provides appropriate protection for PD Teesport's operations and covers points of concern such as the continued functioning of the PD Teesport operations, proximity of works and access. Importantly, the Applicant's preferred drafting also gives reasonable and sufficient certainty to the Applicant about the scope of works to which the consent process applies which limits risk of delay to the delivery of the Project.
- 4.6. The arguments above also apply to the point of disagreement between the parties in respect of paragraph 4.
- 4.7. In an effort to reduce risk of delay to works and the delivery of the Project, the Applicant has included a 21 day timeframe during which PD Teesport may request further particulars in relation to works details for proposed works submitted by the Applicant under paragraph 3. The Applicant understand that PD Teesport has suggested a 28 day timeframe instead.
- 4.8. A 21 day timeframe is a standard timeframe for protective provisions of this nature for projects of similar complexity. The Applicant understands, for example, that both parties have agreed to a 21 day timeframe for approval of the works details by PD Teesport under paragraph 4 (from the date of the works details being provided or the provision of the last further particulars as may have been requested). The Applicant submits that both timeframes included as part of the consenting process under this Schedule should be consistent.
- 4.9. A 21 day timeframe has also been included in similar circumstances in other bespoke protective provisions for other counterparties in the draft DCO (see, for example, paragraph 3 of Schedule 25).

5. Issue 5 – dispute resolution mechanism (paragraphs 7 and 9)

- 5.1. The Applicant understands that PD Teesport's preferred protective provisions have replaced the Arbitration clause in the Applicant's preferred protective provisions with a clause requiring expert determination.

- 5.2. The Applicant considers arbitration is the most appropriate dispute resolution mechanism for the types of issues and disputes that may arise in relation to these provisions. 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.
 - 5.3. If the Examining Authority recommends or the SoS determines that expert determination is the appropriate dispute resolution mechanism, the Applicant considers that paragraphs 13.1 to 13.5 of PD Teesport's preferred protective provisions [REP7-058] should be amended in four respects.
 - 5.4. 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 PD Teesport's 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.
 - 5.5. 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 PD Teesport has identified at paragraph 13.4 of its preferred protective provisions [REP7-058], the Applicant considers that the expert must also consider:
 - 5.5.1. 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;
 - 5.5.2. the development outcomes sought by the Applicant;
 - 5.5.3. the ability of the Applicant to achieve the outcomes referred to in paragraph 5.5.2 in a timely and cost-effective manner; and
 - 5.5.4. any increased costs on any party as a result of the matter in dispute.
 - 5.6. Thirdly, paragraph 13.5 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.
 - 5.7. 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.
 - 5.8. PD Teesport has proposed related amendments to paragraph 7 in light of its proposed changes to paragraph 9. The Applicant has not included these changes in its preferred protective provisions on the basis that they are irrelevant in the context of the Applicant's preferred drafting.
- 6. Issue 6 – costs**
- 6.1. PD Teesport has inserted a costs clause at paragraph 11 of its preferred protective provisions [REP7-058]. The Applicant considers that this clause is a commercial issue that is still a point of negotiation between the parties. On this basis, the Applicant has not included this provision in its preferred protective provisions. This is consistent with the approach taken with the protective provisions for the benefit of PD Teesport contained in the Net Zero Teesside Order 2024 (see Part 14, Schedule 12).
- 7. Issue 7 – indemnity**
- 7.1. The Applicant understands that PD Teesport has deleted the majority of paragraphs 8(3) and 8(4) from its preferred form of protective provisions. The Applicant submits that this drafting should be included.
 - 7.2. Paragraphs 8(3) and 8(4) balances the need between the Applicant approving claims or demands it is going to pay for, and any burden imposed on PD Teesport for seeking such

approvals from the Applicant. It is appropriate for PD Teesport 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. Paragraphs 8(3) and 8(4) avoids any additional burden placed on PD Teesport 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 NWL would have no incentive to do so. This is consistent with various bespoke protective provisions (see, for example, paragraphs 26(4), 41(4) of Parts 3 and 4 respectively of Schedule 12 to the Net Zero Teesside Order 2024.)

- 7.3. The Applicant understands that PD Teesport have also added drafting to paragraph 8(6) stating that the undertaker 'shall only be liable under this paragraph 12 for claims reasonably incurred by PD Teesport'. The purpose of this addition and how it interacts with the balance of the indemnity clause and proposed amendments to paragraphs 8(3) and 8(4) is unclear. Accordingly, it has been excluded from the Applicant's preferred form of protective provisions.