

PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

THE YORK POTASH HARBOUR FACILITIES ORDER

TRO 30002

Written representation of PD Teesport Limited

Unique Reference No.	1003118
Rule No.	8(1), 10(1)
Author	PD Teesport Limited
Date	14 August 2015

Eversheds
1 Wood Street
London
EC2V 7WS

1. INTRODUCTION

- 1.1 This representation is submitted by PD Teesport Limited ("PDT").
- 1.2 PDT is the statutory harbour authority for Teesport ("the Port") under the Teesport Acts and Orders 1966 to 2008, the local legislation relating to the Port. Under section 12 of the Tees and Hartlepoons Port Authority Act 1966 it is PDT's duty *"to take such steps from time to time as they may consider necessary for the conservancy, maintenance and improvement of the harbour and the facilities afforded therein"*. Powers and duties relating to the Port are conferred and imposed on them under the Teesport Acts and Orders 1966 to 2008 and under public general legislation.
- 1.3 The quay and other marine works proposed to be authorised by the York Potash Harbour Facilities Order ("the Order") for which application has been made would be constructed within PDT's limits of jurisdiction and their construction and operation could potentially adversely affect PDT's harbour undertaking and other harbour users.
- 1.4 PDT support the applicant's project in principle but are concerned to ensure that the construction and operation of the proposed works do not adversely affect their harbour undertaking or other harbour users. Those concerns can be addressed by the inclusion in the Order of appropriate protective provisions.

2. THE PROTECTIVE PROVISIONS: CURRENT POSITION

- 2.1 The protective provisions in Schedule 11 to the Order were included by the applicant on a provisional basis. Since the Order was submitted there have been ongoing discussions between the applicant and PDT. Those discussions have to date resulted in the applicant's offering revised protective provisions to PDT on 10 August 2015 and the base document in the Annexe to this representation shows the revised protective provisions now offered to PDT ("the Applicant's Proposed Protective Provisions"). PDT have remaining points of concern which are not addressed by the Applicant's Proposed Protective Provisions. The amendments sought by PDT to meet their outstanding points of concern are shown as track changes to the Applicant's Proposed Protective Provisions as set out in the Annexe to this representation.
- 2.2 The points of issue between the parties are therefore confined to the amendments to the Applicant's Proposed Protective Provisions sought by PDT and shown as track changes in the provisions set out in the Annexe.
- 2.3 This representation therefore focuses on the changes sought by PDT to the Applicant's Proposed Protective Provisions as shown by the track changes in the provisions set out in the Annexe.
- 2.4 **PDT wish to attend an issue specific hearing to address any of the points mentioned below which have not been resolved by the time of the specific hearing is held.**

3. AMENDMENTS SOUGHT BY PDT TO THE APPLICANT'S PROPOSED PROTECTIVE PROVISIONS

[Note: the references to paragraph numbers below are to the paragraph numbers in the Applicant's Proposed Protective Provisions set out in the Annex to this representation.]

3.1 **Paragraph 4(5)**

Under paragraph 4(5) the works specified in paragraph 4(1) must be carried out in accordance with programmes and method statements approved by PDT. This is needed to enable PDT to carry out their statutory functions of ensuring the efficient operation of the Port by co-ordinating those activities with activities carried out by other port users and securing the overall safety of operations in the Port in accordance with the Port Marine Safety Code (issued by the Department for Transport in March 2015). The insertion of the words "construction or maintenance" is needed to make it clear that the requirement to obtain PDT's approval of programmes and method statements applies to the carrying out of any maintenance of tidal works falling within paragraph 4(1)(d) as well as to the construction of tidal works.

3.2 **Paragraph 4(6), Table**

PDT should be consulted on the written scheme for any of the works which are carried out in, over or under or in the close proximity of their limits of jurisdiction. The first item in the Table should therefore also apply to Work No. 4. The requirement to consult on Work No 4 would be subject to the qualification, in sub-paragraph (6), that consultation only needs to take place on such parts of the written scheme "*which may affect the river or any functions of the Tees Harbour Authority as harbour authority*".

3.3 **Paragraph 4 (9)**

Paragraph 4(9) provides that, where PDT's approval is required under paragraph 4 (for example to programmes and method statements for the carrying out of works) that approval can be given subject to reasonable requirements for the protection of the matters listed in paragraph 4(9)(a) to (c). PDT consider that "and" after paragraph (b) should be replaced by "or" to make it clear that paragraphs (a), (b) and (c) are alternatives and that requirements can be imposed for any of those matters.

3.4 **Paragraph 4(12)**

The Applicant's Proposed Protective Provisions include in paragraph 4(12) the words "*provided such input has been provided by the specified day*". Those words would have the effect that PDT would need to make a decision on an approval under paragraph 4 within the 28 day period provided by 4(11) even if the Environment Agency had failed to provide any input within that period. This would not be acceptable since PDT must take the Agency's views into account but would have no means of imposing the time limit on the Agency. Accordingly, it is proposed that those words be deleted.

3.5 **Paragraph 23**

PDT consider that the word "or" should be inserted in paragraph 23(1)(b) to make it clear that the indemnity provided for by paragraph 23 extends to financial costs and losses incurred by PDT by reason of, firstly, of any activity or operation authorised by the Order which affects the river or any functions of the PDT as harbour authority and, secondly, any such activity or operation which is carried out within PDT's limits of jurisdiction. This would make paragraph 23(1)(b) consistent with the wording at the end of paragraph 23.

3.6 **Article 28 (disputes)**

It is noted that the applicant intends to propose a bespoke resolution procedure. PDT will consider the procedure proposed by the applicant when it is sent to them and reserves the right to make representations concerning the proposed procedure.

4. **Other Amendment sought to the Order**

Articles 19 to 21 of the Order do not impose a sanction for non-compliance and are therefore not readily enforceable. Similar provisions in harbour empowerment and harbour revision orders made under the Harbours Act 1964 make non-compliance with requirements under the provisions a criminal offence punishable on summary conviction by a fine not exceeding the statutory maximum and on indictment to a fine. A defence of due diligence is also provided. See, for example, articles 11, 13, 14 and 33 of the Hinkley Point Harbour Empowerment Order 2012 and articles 11, 12, 13 and 17 of the Dover Harbour Revision Order 2012. PDT request that the Order be amended to provide for similar criminal sanctions.

ANNEXE

PROTECTIVE PROVISIONS PROPOSED BY THE APPLICANT AS AT 10 AUGUST 2015 WITH TRACK CHANGES TO MEET OUTSTANDING POINTS OF CONCERN OF PD TEESPORT LIMITED

SCHEDULE 11

PROTECTIVE PROVISIONS FOR THE PROTECTION OF THE TEES PORT AUTHORITY

Interpretation

1. In this Schedule—

“document” includes plans, sections and drawings;

“environmental document” means—

- (a) the environmental statement prepared for the purposes of the application for this Order together with any supplementary environmental statement or other document submitted pursuant to the provisions of this Order and prepared by way of clarification or amplification of the environmental statement; and
- (b) any other document containing environmental information provided by the undertaker to the Secretary of State or the Tees Port Authority for the purposes of any tidal works approval under article 17 (tidal works not to be executed without approval of Secretary of State) or this Schedule;

“the quay” means the quay comprised in the authorised development;

“the river” means the River Tees; and

“tidal areas” means areas on under or over tidal waters and tidal land below the level of high water in the river.

General

2.—(1) The provisions of this Schedule, unless otherwise agreed in writing between the undertaker and the Tees Port Authority, have effect for the protection of the Tees Port Authority.

(2) For the purposes of this Schedule, the definition of “tidal work” is taken to include—

- (a) any projection over the river by booms, cranes and similar plant or machinery, and
- (b) any authorised development or operation or activity authorised by this Order which affects the river or any functions of the Tees Port Authority as harbour authority or which is carried out within the limits of the jurisdiction of the Tees Port Authority under the Teesport Acts and Orders 1966 to 2008.

Location of tidal works

3. Notwithstanding article 4 (parameters of authorised development), no part of Works No.2 or any other permanent tidal work authorised by this Order may be constructed in tidal waters which lie outside the line marked “river frontage line” shown on drawing number PB1586-SK123 revision 2 (Document 3.9B).

Tidal Works: consultation and approval

4.—(1) Before—

- (a) submitting any plans and sections for any tidal work to the Secretary of State for approval under article 17 (tidal works not to be executed without approval of Secretary of State);

- (b) seeking approval from the local planning authority for any alteration of the drawings under paragraph [4] of Schedule 2 (requirements) that affects the area below mean high water mark;
- (c) commencing any construction of a tidal work where approval of the Secretary of State under article 17 is not required;
- (d) commencing any maintenance of a tidal work which may affect the river or any functions of the Tees Port Authority as harbour authority , or
- (e) commencing any dredging operation,

the undertaker must submit to the Tees Port Authority plans and sections of the tidal work, programmes and method statements relating to the construction or maintenance of the tidal work or dredging operation or altered drawings.

(2) The undertaker must provide the Tees Port Authority with such further information relating to the plans, sections, programmes and method statements or drawings submitted under sub-paragraph (1) as the Tees Port Authority may reasonably require provided that any request for such information must be received by the undertaker within 14 days from the day on which the information is submitted under sub-paragraph (1).

(3) The undertaker must consult the Tees Port Authority, and provide the Tees Port Authority with a reasonable opportunity to comment, on the plans and sections of a tidal work submitted under sub-paragraph (1)(a) or drawings submitted under sub-paragraph (1)(b).

(4) No construction of a tidal work referred to in sub-paragraph (1)(c) may be carried out except in accordance with such plans and sections as are approved in writing by the Tees Port Authority or determined under paragraph 28.

(5) No [construction or maintenance of a](#) tidal work or dredging operation referred to in sub-paragraph (1) (a), (c),(d) or (e) may be carried out except in accordance with such programmes and method statements as are approved in writing by the Tees Port Authority or determined under paragraph 28 unless in the case of the dredging operation that operation is being carried out by the Tees Port Authority.

(6) Before submitting for approval, agreement or otherwise as provided by this Order any document specified in columns (1) and (2) of the following Table, the undertaker must submit a copy to the Tees Port Authority for approval of the matters specified in column (3) of the Table and must consult the Tees Port Authority on such parts of the remainder of each such document which may affect the river or any functions of the Tees Port Authority as harbour authority .

TABLE

[To be reviewed when the Order is settled]

<i>(1)</i> <i>Document</i>	<i>(2)</i> <i>Provision of Order</i>	<i>(3)</i> <i>Provision requiring Tees Port Authority approval</i>
Written scheme so far as it relates to details of quay structure, conveyors and related infrastructure within Works Nos 1, and 2 and 4 .	Schedule 2, paragraph [2]	None
Construction Environmental Management Plan	Schedule 2, paragraph [6]	None
Timetable of works and operations	Schedule 5, paragraph [11]	The whole document
Detailed method statements	Schedule 5, paragraph [17]	The whole statements
Details of work area and access routes	Schedule 5, paragraph [19]	The work area and access routes so far as they are in an area below mean high water level
Capital dredge and disposal	Schedule 5, paragraph [35]	The whole strategy

(7) No application for a document specified in the Table under the provision of the Order specified in relation to the document for which approval of the Tees Port Authority is required may be made until the Tees Port Authority has approved the document in writing or approval is given by a determination under paragraph 28.

(8) When submitting to the Secretary of State, the MMO or the local planning authority, as the case may be, any application for approval of a document specified in sub-paragraph (1) or (6) on which the Tees Port Authority has been consulted under this paragraph, the undertaker must also forward to that person or body any comments received from the Tees Port Authority in response to the consultation.

(9) Any approval of the Tees Port Authority required under this paragraph must not be unreasonably withheld or delayed but may be given subject to such reasonable requirements as the Tees Port Authority may make for the protection of—

- (a) traffic in, or the flow or regime of, the river;
- (b) the use of the river by itself as harbour authority, licenced users under licences granted by PD Teesport under the Tees and Hartlepoons Port Authority Act 1966 or other river users; ~~and or~~
- (c) the performance of any of its functions as harbour authority connected with environmental protection.

(10) Requirements made under sub-paragraph (9) may include conditions as to—

- (a) the relocation, provision and maintenance of works, moorings, apparatus and equipment necessitated by the tidal work; and
- (b) the expiry of the approval if the undertaker does not commence construction of the tidal work approved within a prescribed period.

(11) Subject to sub-paragraphs (12) and (13), any approval required under this paragraph is deemed to have been given if it is neither given nor refused within 28 days of the specified day.

(12) Before making a decision on any approval required under this paragraph, the Tees Port Authority must take into account any opinion on plans and sections provided to it by the Environment Agency ~~provided such input has been received by the Tees Port Authority before the specified day.~~

(13) An approval of the Tees Port Authority under this paragraph is not deemed to have been unreasonably withheld if approval within the period identified in sub-paragraph (11) has not been given pending the outcome of any consultation on the approval in question that the Tees Port Authority is obliged to carry out in the proper exercise of its functions as a harbour authority provided that in commencing or during the course of such consultation, the Tees Port Authority has acted with all due expedition.

(14) In this paragraph “the specified day” means, in relation to any matter for which approval is required—

- (a) the day on which particulars of that matter are submitted to the Tees Port Authority under sub-paragraph (1) or (6); or
- (b) the day on which the undertaker provides the Tees Port Authority with all such particulars of the matter as have been reasonably requested by the Tees Port Authority under sub-paragraph (2);

whichever is later.

(15) Whenever the undertaker provides the Secretary of State with an environmental document which relates to works which may affect the area below mean high water mark it must at the same time send a copy to the Tees Port Authority.

5. If the Secretary of State, the MMO or the local planning authority requires the alteration of any document which has previously been approved by the Tees Port Authority or upon which the Tees Port Authority have been consulted by the undertaker, the undertaker must inform the Authority.

6. On receipt of any approval or agreement by the Secretary of State, the MMO or the local planning authority (as the case may be) of any of the documents specified in paragraph 4(1) or (6) or any conditions or restrictions imposed by that body, the undertaker shall send a copy to the Tees Port Authority.

Construction of tidal works

7.—(1) The undertaker must give to the harbour master not less than 7 days prior written notice of its intention to enter upon a tidal area for any purpose relating to the construction or maintenance of the authorised development and must provide such details as the harbour master may reasonably require recording how access to the authorised development will be gained and what exclusion areas will be required for the authorised development

(2) Where emergency or unanticipated access is required for maintenance, repair or safety operations to the authorised development and the undertaker is unable to give 7 days prior written notice to the Tees Port Authority, the undertaker may gain access to the tidal areas on giving such prior notice (if any) to the Authority as is reasonable in the circumstances.

(3) The undertaker shall, not more than 14 days after completion of the tidal works carried out as part of phase 1 and phase 2, give written notice to the harbour master of the completion of the relevant phase.

8. The undertaker shall at all reasonable times during construction of the authorised development and thereafter upon reasonable notice allow the Tees Port Authority, its employees and agents access and all reasonable facilities for inspection of any tidal work.

9. The construction, and any operations for the construction, of any tidal work approved in accordance with this Order, once commenced, must be carried out by the undertaker without unnecessary delay and to the reasonable satisfaction of the Tees Port Authority so that river traffic, the flow or regime of the river and the exercise of the Tees Port Authority's functions do not suffer more interference than is reasonably practicable, and an officer of the Tees Port Authority is entitled at all reasonable times, on giving such notice as may be reasonable in the circumstances, to inspect and survey such construction operations.

Discharges, etc.

10.—(1) The undertaker must not without the consent of the Tees Port Authority—

- (a) deposit in or allow to fall or be washed into the river any gravel, soil or other material; or
- (b) discharge or allow to escape either directly or indirectly into the river any offensive or injurious matter in suspension or otherwise.

(2) Any consent of the Tees Port Authority under this paragraph must not be unreasonably withheld but may be given subject to such terms and conditions as the Tees Port Authority may reasonably impose.

(3) Any such consent is deemed to have been given if it is neither given nor refused within 28 days of the day on which the request for consent is submitted under sub-paragraph (1).

(4) In its application to the discharge of water into the river, article 14 (discharge of water) has effect subject to the terms of any conditions attached to a consent given under this paragraph.

11. The undertaker must not, in exercise of the powers conferred by article 14 (discharge of water), damage or interfere with the beds or banks of any watercourse forming part of the river unless such damage or interference is approved by the Tees Port Authority as a tidal work under this Order or is otherwise approved in writing by the Tees Port Authority.

Obstruction in river

12. If any pile, stump or other obstruction to navigation becomes exposed in the course of constructing any tidal work (other than a pile, stump or other obstruction on the site of a structure comprised in any permanent work), the undertaker, as soon as reasonably practicable after the receipt of notice in writing from the Tees Port Authority requiring such action, must remove it from the river or, if it is not reasonably practicable to remove it—

- (a) cut the obstruction off at such level below the bed of the river as the Tees Port Authority may reasonably direct; or
- (b) take such other steps to make the obstruction safe as the Tees Port Authority may reasonably require.

Removal etc. of the Tees Port Authority moorings and buoys

13. If—

- (a) by reason of the construction of any tidal work it is reasonably necessary for the Tees Port Authority to incur reasonable costs in temporarily or permanently altering, removing, re-siting, repositioning or reinstating existing moorings or aids to navigation (including navigation marks or lights) owned by the Tees Port Authority, or laying down and removing substituted moorings or buoys, or carrying out dredging operations for any such purpose, not being costs which it would have incurred for any other reason; and
- (b) the Tees Port Authority gives to the undertaker not less than 28 days' notice of its intention to incur such costs, and takes into account any representations which the undertaker may make in response to the notice within 14 days of the receipt of the notice,

the undertaker must pay the costs reasonably so incurred by the Tees Port Authority.

Navigational lights, buoys, etc.

14. In addition to any requirement under articles 19 (lights on tidal works etc. during construction) and 21 (permanent lights on tidal works), the undertaker, at or near every tidal work, and any other work of which the undertaker is in possession in exercise of any of the powers conferred by this Order (being in either case a work which is below mean high water level forming part of the river), must exhibit such lights, lay down such buoys and take such other steps for preventing danger to navigation as the Tees Port Authority may from time to time reasonably require.

Removal of temporary works

15. On completion of the construction of any part of the authorised development, the undertaker must as soon as practicable

- (a) remove any temporary tidal work carried out only for the purposes of that part of the authorised development;
- (b) remove from the river any materials, plant and equipment used for, and any debris caused by, such construction.

Protective action

16.—(1) If any tidal work—

- (a) is constructed otherwise than in accordance with the requirements of this Schedule or with any condition in an approval given pursuant to paragraph 4; or
- (b) during construction gives rise to sedimentation, scouring, currents or wave action which is a hazard to safe navigation or is otherwise detrimental to traffic in, or the flow or regime of, the river,

then the Tees Port Authority may by notice in writing require the undertaker at the undertaker's own expense to comply with the remedial requirements specified in the notice.

(2) The requirements that may be specified in a notice given under sub-paragraph (1) are—

- (a) in the case of a tidal work to which sub-paragraph (1)(a) applies, such requirements as may be reasonably required and specified in the notice for the purpose of giving effect to the requirements of—
 - (i) this Schedule; or
 - (ii) the condition that has been breached; or
- (b) in any case within sub-paragraph (1)(b), such requirements as may be reasonably required and specified in the notice for the purpose of preventing, mitigating or making good the sedimentation, scouring, currents or wave action so far as required for safe navigation or by the needs of traffic in, or the flow or regime of, the river.

(3) If the undertaker does not comply with a notice under sub-paragraph (1), or is unable to do so, the Tees Port Authority may in writing require the undertaker to—

- (a) remove, alter or pull down the tidal work, and where the tidal work is removed to restore the site of that work (to such extent as the Tees Port Authority reasonably requires) to its former condition; or
- (b) take such other action as the Tees Port Authority may reasonably specify for the purpose of remedying the non-compliance to which the notice relates.

(4) If the Tees Port Authority becomes aware that any tidal work is causing an environmental impact over and above those anticipated by any environmental document, the Tees Port Authority must notify the undertaker of that environmental impact, the reasons why the Tees Port Authority believes that the environmental impact is being caused by the tidal work and is an unacceptable impact and of measures that the Tees Port Authority reasonably believes are necessary to counter or mitigate that environmental impact.

(5) The undertaker must implement the measures that the Tees Port Authority has notified to the undertaker unless within 28 days of the notification the undertaker gives the Tees Port Authority a written counter-notice-

- (a) specifying such other measures as the undertaker believes are necessary to counter or mitigate the environmental impact identified, giving reasons why the undertaker believes the measures are sufficient and preferable to the measures notified under sub-paragraph (4); or
- (b) that it does not believe that any unacceptable environmental impact has been caused so that no measures are necessary.

(6) Subject to sub-paragraph (7), the undertaker must implement any measures specified under sub-paragraph (5)(a).

(7) Where the undertaker gives the Tees Port Authority a counter-notice under sub-paragraph (5)(a) or (b) the Tees Port Authority may within 28 days (or such longer period as may be agreed between the parties) refer the questions whether there is an unacceptable environmental impact and whether any, and if so what, measures are necessary to be carried out by the undertaker to counter or mitigate the impact to be determined under paragraph 28; and any measures so determined must be implemented by the undertaker.

Abandoned or decayed works

17.—(1) If any tidal work or any other work of which the undertaker is in possession in exercise of any of the powers conferred by this Order (being in either case a work which is below mean high water level) is abandoned or falls into decay, the Tees Port Authority may by notice in writing require the undertaker to take such reasonable steps as may be specified in the notice either to repair or restore the work, or any part of it, or to remove the work and (to such extent as the Tees Port Authority reasonably requires) to restore the site to its former condition.

(2) If any tidal work is in such condition that it is, or is likely to become, a danger to or an interference with navigation in the river, the Tees Port Authority may by notice in writing require the undertaker to take such reasonable steps as may be specified in the notice—

- (a) to repair and restore the work or part of it; or
- (b) if the undertaker so elects, to remove the tidal work and (to such extent as the Tees Port Authority reasonably requires) to restore the site to its former condition.

(3) If after such reasonable period as may be specified in a notice under this paragraph the undertaker has failed to begin taking steps to comply with the requirements of the notice, or after beginning has failed to make reasonably expeditious progress towards their implementation, the Tees Port Authority may carry out the works specified in the notice and any expenditure reasonably incurred by it in so doing is recoverable from the undertaker.

Facilities for navigation

18.—(1) The undertaker must not in the exercise of the powers conferred by this Order interfere with any marks, lights or other navigational aids in the river without the agreement of the Tees Port Authority, and must ensure that access to such aids remains available during and following construction of any tidal works.

(2) The undertaker must provide at any tidal works, or must afford reasonable facilities at such works (including an electricity supply) for the Tees Port Authority to provide at the undertaker's cost, from time to time, such navigational lights, signals, radar or other apparatus for the benefit, control and direction of navigation of users of the river in general as the Tees Port Authority may deem necessary by reason of the construction of any tidal works, and must ensure that access remains available to apparatus during and following construction of such works.

(3) The undertaker must comply with the directions of the harbour master from time to time with regard to the lighting on the tidal works or within the harbour, or the screening of such lighting, so as to ensure safe navigation on the river.

Survey of riverbed

19.—(1) Before the commencement of construction of the first tidal work, and any subsequent tidal work, to be constructed following approval under article 17 (tidal works not to be executed without approval of Secretary of State), the Tees Port Authority may, at the undertaker's reasonable expense, carry out a survey of such parts of the river within the Order limits as might be affected by sedimentation, scouring, currents or wave action that might result from the construction of such of the authorised development as would constitute tidal works if it were to be constructed, for the purposes of establishing the condition of the river at that time.

(2) The Tees Port Authority may carry out such surveys of the river within the Order limits as are reasonably required during the construction of any tidal work to ascertain the effect of that tidal work on the river and the Tees Port Authority must make available to the undertaker the results of any such survey in electronic and paper format.

(3) After completion of—

- (a) the tidal work comprised in phase 1; or
- (b) all the tidal works constructed under this Order,

the Tees Port Authority may, at the undertaker's reasonable expense, carry out a further survey of the parts of the river within the Order limits which were surveyed prior to the construction of that work, or as the case may be a survey of the completed tidal works as so constructed, for the purpose of establishing the condition of the river and the effect that the tidal work is, or as the case may be the tidal works are, having on navigation, the flow and the regime of the river and the exercise of the Tees Port Authority's functions.

Sedimentation, etc.: remedial action

20.—(1) This paragraph applies if any part of the river becomes subject to sedimentation, scouring, currents or wave action which—

- (a) is wholly or partly caused by a tidal work during the period beginning with the commencement of the construction of that tidal work and ending with the expiration of 10 years after the date on which all the tidal works constructed under this Order are completed; and
- (b) for the safety of navigation or for the protection of works in the river, should in the reasonable opinion of the Tees Port Authority be removed or made good.

(2) The undertaker must either—

- (a) pay to the Tees Port Authority any additional expense to which the Tees Port Authority may reasonably be put in dredging the river to remove the sedimentation or in making good the scouring so far as (in either case) it is attributable to the tidal work; or
- (b) carry out the necessary dredging at its own expense and subject to the prior approval of the Tees Port Authority, such prior approval not to be unreasonably withheld or delayed; and the reasonable expenses payable by the undertaker under this paragraph include any additional expenses accrued or incurred by the Tees Port Authority in carrying out surveys or studies in connection with the implementation of this paragraph.

Entry for survey, etc.

21.—(1) Before exercising the powers conferred by article 16 (authority to survey and investigate the land) to enter any land situated below the level of high water the undertaker must provide the harbour master with written particulars of—

- (a) the location of the land (including a plan);
- (b) the nature of the things proposed to be done in that land in exercise of those powers;
- (c) the duration and frequency of the undertaker's intended presence on the land; and
- (d) any vehicles or equipment proposed to be brought onto the land,

and such other details as the harbour master may reasonably request.

(2) The undertaker may not enter any land which is the subject of written particulars provided under sub-paragraph (1) except in accordance with such conditions as the harbour master may reasonably impose, including conditions as to the time of entry and the way in which activities are to be carried out.

Operating procedures

22.—(1) Before commencing operations at the quay the undertaker must submit to the harbour master for approval a written statement of proposed safe operating procedures for access to and egress from the marine side of the quay and the mooring of vessels at the quay and must operate the quay only in accordance with such procedure as approved, including any alteration to the procedure as the harbour master may approve from time to time.

(2) Any approval required under sub-paragraph (1) is deemed to have been given if it is neither given nor refused within 28 days of the day on which the request for consent is submitted under sub-paragraph (1).

Indemnity

23.—(1) The undertaker is responsible for and must make good to the Tees Port Authority all reasonable financial costs or losses not otherwise provided for in this Schedule which may reasonably be incurred or suffered by the Tees Port Authority by reason of—

- (a) the construction, operation or maintenance of the authorised development carried out within or affecting the area within the limits of the jurisdiction of the Tees Port Authority under the Teesport Acts and Orders 1966 to 2008 or any failure of the authorised development including in particular any expenses reasonably incurred in considering plans, inspecting tidal works, carrying out surveys or doing anything for the purposes of this Schedule;

any other activity or operation authorised by this Order which affects the river or any functions of the Tees Port Authority as harbour authority or which is carried out within the limits of the jurisdiction of the Tees Port Authority under the Teesport Acts and Orders 1966 to 2008 and, in particular, anything done in relation to a mooring or buoy under paragraph 14, or;

- (b) any act or omission of the undertaker, its employees, contractors or agents or others whilst engaged upon the construction, operation or maintenance of the authorised development carried out within or affecting the area within the limits of the jurisdiction of the Tees Port Authority under the Teesport Acts and Orders 1966 to 2008 or dealing with any failure of such development,

and the undertaker must indemnify the Tees Port Authority from and against all claims and demands arising out of or in connection with the authorised development carried out within or affecting the area within the limits of the jurisdiction of the Tees Port Authority under the Teesport Acts and Orders 1966 to 2008 and any activity or operation authorised by this Order carried out within or affecting the area within the limits of the jurisdiction of the Tees Port Authority under the Teesport Acts and Orders 1966 to 2008 or any such failure, act or omission.

(2) The fact that any act or thing may have been done—

- (a) by the Tees Port Authority on behalf of the undertaker; or
- (b) by the undertaker, its employees, contractors or agents in accordance with plans or particulars submitted to or modifications or conditions specified by the Tees Port Authority, or in a manner

approved by the Tees Port Authority, or under its supervision or the supervision of its duly authorised representative,

does not (if it was done or required to be done without negligence on behalf of the Tees Port Authority or its duly authorised representative, employee, contractor or agent) excuse the undertaker from liability under the provisions of this paragraph.

(3) The Tees Port Authority must give the undertaker reasonable notice of any such claim or demand as is referred to in sub-paragraph (1), and no settlement or compromise of any such claim or demand is to be made without the prior consent of the undertaker.

Statutory functions

24.—(1) Any function of the undertaker or any officer of the undertaker, whether conferred by or under this Order or any other enactment, is subject to—

- (a) any enactment in the Teesport Acts and Orders 1966 to 2008 or any other enactment relating to the Tees Port Authority;
- (b) any byelaw, direction or other requirement made by the Tees Port Authority or the harbour master under any enactment; and
- (c) any other exercise by the Tees Port Authority or the harbour master of any function conferred by or under any enactment.

(2) The Tees Port Authority must consult the undertaker before giving any general direction which directly affects the construction, operation or maintenance of the authorised development.

Savings

25.—(1) With the exception of any duty owed by the Tees Port Authority to the undertaker expressly provided for in this Schedule, nothing in this Order is to be taken as imposing on the Tees Port Authority, either directly or indirectly, any form of duty or liability to which the Tees Port Authority would not otherwise be subject.

(2) Without affecting the generality of sub-paragraph (1), the Tees Port Authority shall not be under any duty to dredge the approaches from the river channel to the quay, or the berthing pocket at the quay, to a depth greater than the depth of those waters immediately before the commencement of the authorised development.

(3) Any approval or consent given by the Tees Port Authority pursuant to this Schedule does not affect any requirement to obtain an approval or consent under or by virtue of any other statutory provision.

(4) The requirements of sections 22 (licensing of works) and 23 (licence to dredge) of the Tees and Hartlepoons Port Authority Act 1966 do not apply as respects the initial construction or carrying out of the authorised development but otherwise are not affected by this Order; and accordingly sections 22 and 23 apply as regards the maintenance of the authorised works.

(5) Subject to paragraph 24(2) and sub-paragraph (4), nothing in this Order prejudices or derogates from the provisions of the Teesport Acts and Orders 1966 to 2008 or any other statutory or other rights, powers or privileges, vested in or enjoyed by the Tees Port Authority or the harbour master.

(6) Nothing in this Schedule shall require the undertaker to do anything or desist from anything if to do so would be in breach of any statutory obligations to which the undertaker is subject including but not limited to the provisions of the deemed marine licence contained in Schedule 5 of this Order

Transfer of benefit of Order

26. Within 14 days after the date of any transfer or grant under article 8 (consent to transfer benefit of Order), the undertaker who made the transfer or grant must serve notice on the harbour master containing the name and address of the transferee or lessee, the territorial extent of the transfer or grant and, in the case of a grant, the period for which it is granted and the extent of benefits and rights granted.

Notices

27. Notwithstanding article 39 (service of notices) a notice required to be served on the Tees Port Authority under this Schedule must be served both on the company secretary and the harbour master for the time being of the Tees Port Authority in the manner provided by article 39.

Disputes

28. Any dispute arising between the undertaker and the Tees Port Authority under this Part of this Schedule is to be determined by the procedure set out in this paragraph and Article 40 (arbitration) does not apply to this schedule

[TO BE DRAFTED].

PLANNING ACT 2008

THE INFRASTRUCTURE PLANNING (EXAMINATION PROCEDURE) RULES 2010

THE YORK POTASH HARBOUR FACILITIES ORDER

TRO 30002

Summary of written representation of PD Teesport Limited

(Rule 8 and letter 27 July 2015, Annex B)

Unique Reference No.	1003118
Rule No.	8(1), 10(1)
Author	PD Teesport Limited
Date	14 August 2015

Eversheds
1 Wood Street
London
EC2V 7WS

1. INTRODUCTION

- 1.1 This representation is submitted by PD Teesport Limited ("PDT").
- 1.2 PDT is the statutory harbour authority for Teesport ("the Port") under the Teesport Acts and Orders 1966 to 2008, the local legislation relating to the Port. Under section 12 of the Tees and Hartlepoons Port Authority Act 1966 it is PDT's duty *"to take such steps from time to time as they may consider necessary for the conservancy, maintenance and improvement of the harbour and the facilities afforded therein"*. Powers and duties relating to the Port are conferred and imposed on them under the Teesport Acts and Orders 1966 to 2008 and under public general legislation.
- 1.3 The quay and other marine works proposed to be authorised by the York Potash Harbour Facilities Order ("the Order") for which application has been made would be constructed within PDT's limits of jurisdiction and their construction and operation could potentially adversely affect PDT's harbour undertaking and other harbour users.
- 1.4 PDT support the applicant's project in principle but are concerned to ensure that the construction and operation of the proposed works do not adversely affect their harbour undertaking or other harbour users. Those concerns can be addressed by the inclusion in the Order of appropriate protective provisions.

2. THE PROTECTIVE PROVISIONS: CURRENT POSITION

- 2.1 The protective provisions in Schedule 11 to the Order were included by the applicant on a provisional basis. Since the Order was submitted there have been ongoing discussions between the applicant and PDT. Those discussions have to date resulted in the applicant's offering revised protective provisions to PDT on 10 August 2015 and the base document in the Annexe to PDT's full representation shows the revised protective provisions now offered to PDT ("the Applicant's Proposed Protective Provisions"). PDT have remaining points of concern which are not addressed by the Applicant's Proposed Protective Provisions. The amendments sought by PDT to meet their outstanding points of concern are shown as track changes to the Applicant's Proposed Protective Provisions as set out in the Annexe to PDT's full representation.
- 2.2 The points of issue between the parties are therefore confined to the amendments to the Applicant's Proposed Protective Provisions sought by PDT and shown as track changes in the provisions set out in the Annexe to PDT's full representation..
- 2.3 PDT's representation therefore focuses on the changes sought by PDT to the Applicant's Proposed Protective Provisions as shown by the track changes in the provisions set out in the Annexe to PDT's full representation.
- 2.4 **PDT wish to attend an issue specific hearing to address any of the points mentioned below which have not been resolved by the time of the specific hearing is held.**

3. AMENDMENTS SOUGHT BY PDT TO THE APPLICANT'S PROPOSED PROTECTIVE PROVISIONS

[Note: the references to paragraph numbers below are to the paragraph numbers in the Applicant's Proposed Protective Provisions set out in the Annex to PDT's full representation.]

3.1 **Paragraph 4(5)**

Under paragraph 4(5) the works specified in paragraph 4(1) must be carried out in accordance with programmes and method statements approved by PDT. This is needed to enable PDT to carry out their statutory functions of ensuring the efficient operation of the Port by co-ordinating those activities with activities carried out by other port users and securing the overall safety of operations in the Port in accordance with the Port Marine Safety Code (issued by the Department for Transport in March 2015). The insertion of the words "construction or maintenance" is needed to make it clear that the requirement to obtain PDT's approval of programmes and method statements applies to the carrying out of any maintenance of tidal works falling within paragraph 4(1)(d) as well as to the construction of tidal works.

3.2 **Paragraph 4(6), Table**

PDT should be consulted on the written scheme for any of the works which are carried out in, over or under or in the close proximity of their limits of jurisdiction. The first item in the Table should therefore also apply to Work No. 4. The requirement to consult on Work No 4 would be subject to the qualification, in sub-paragraph (6), that consultation only needs to take place on such parts of the written scheme "*which may affect the river or any functions of the Tees Harbour Authority as harbour authority*".

3.3 **Paragraph 4 (9)**

Paragraph 4(9) provides that, where PDT's approval is required under paragraph 4 (for example to programmes and method statements for the carrying out of works) that approval can be given subject to reasonable requirements for the protection of the matters listed in paragraph 4(9)(a) to (c). PDT consider that "and" after paragraph (b) should be replaced by "or" to make it clear that paragraphs (a), (b) and (c) are alternatives and that requirements can be imposed for any of those matters.

3.4 **Paragraph 4(12)**

The Applicant's Proposed Protective Provisions include in paragraph 4(12) the words "*provided such input has been provided by the specified day*". Those words would have the effect that PDT would need to make a decision on an approval under paragraph 4 within the 28 day period provided by 4(11) even if the Environment Agency had failed to provide any input within that period. This would not be acceptable since PDT must take the Agency's views into account but would have no means of imposing the time limit on the Agency. Accordingly, it is proposed that those words be deleted.

3.5 **Paragraph 23**

PDT consider that the word "or" should be inserted in paragraph 23(1)(b) to make it clear that the indemnity provided for by paragraph 23 extends to financial costs and losses incurred by PDT by reason of, firstly, of any activity or operation authorised by the Order which affects the river or any functions of the PDT as harbour authority and, secondly, any such activity or operation which is carried out within PDT's limits of jurisdiction. This would make paragraph 23(1)(b) consistent with the wording at the end of paragraph 23.

3.6 **Article 28 (disputes)**

It is noted that the applicant intends to propose a bespoke resolution procedure. PDT will consider the procedure proposed by the applicant when it is sent to them and reserves the right to make representations concerning the proposed procedure.

4. **Other Amendment sought to the Order**

Articles 19 to 21 of the Order do not impose a sanction for non-compliance and are therefore not readily enforceable. Similar provisions in harbour empowerment and harbour revision orders made under the Harbours Act 1964 make non-compliance with requirements under the provisions a criminal offence punishable on summary conviction by a fine not exceeding the statutory maximum and on indictment to a fine. A defence of due diligence is also provided. See, for example, articles 11, 13, 14 and 33 of the Hinkley Point Harbour Empowerment Order 2012 and articles 11, 12, 13 and 17 of the Dover Harbour Revision Order 2012. PDT request that the Order be amended to provide for similar criminal sanctions.