

The Planning Act 2008 (as amended)

The Infrastructure Planning (Examination Procedure) Rules 2010 (as amended)

The York Potash Harbour Facilities Order

Planning Inspectorate Reference: TR030002

Comments on responses to Examining Authority's First Written Questions and Response to Comments on Relevant Representations - Tata Steel UK Limited and others (Reference: YPOT - AFP050)

7 September 2015

1. Introduction

1.1 This document comprises comments on the responses to the Examining Authority's First Written Questions and a response to Comments on Relevant Representation. They are submitted by Tata Steel UK Limited (Tata) on its behalf and also on behalf of Sahaviriya Steel Industries UK Limited (SSI). These parties together own and operate Redcar Bulk Terminal Limited (RBT). All three parties are Affected Persons. These Comments should be read in conjunction with the parties' Written Representations dated 21 August 2015.

1.2 These comments/responses focus on the responses of the Applicant.

2. Response to Comments on the Relevant Representations

2.1 Our response is contained in our comments in respect of questions DCO 1.12 and TT 1.6 as set out in the next section.

3. Comments on Responses to the Examining Authority's First Written Questions

3.1 These comments focus on the responses of the Applicant and follow the question references given by the Examining Authority.

CA 1.1

The need for the rights proposed to be subject to compulsory acquisition

Comment:

(a) It is apparent that the Applicant is seeking powers of compulsory acquisition in order to support a commercial decision as to the route of the conveyor. The principal driver as to choice appears to be cost and commercial expediency. The choice of conveyor route does not appear to be driven by impact on Affected Persons and their interests/operations. What is also clear is the lack of technical examination of the construction of the conveyor or the potential routes: this is a largely theoretical

proposal. It is inherently circular to suggest that further detail as to the "technical solution" is subject to the constraints imposed by the DCO: how can the DCO be properly determined where there is no clear technical approach identified. Equally, the technical solution is stated as being dependent upon the constructor's preferred approach and the operational equipment available to the contractor; surely these matters should be part of the proper consideration and examination of the scheme *prior to* and in support of the determination of the DCO. The various studies outlined in the Applicant's response should already have been carried out, particularly in the context of EIA requirements (applying the principle in *Wells (R (Wells) v Secretary of State for Transport, Local Government and the Regions* [2004] Env LR 27). Overall, it is apparent that the Applicant cannot adequately demonstrate the need or requirement for the Order Land in accordance with S.122 of the PA 2008.

(b) As discussed above, there is a fundamental flaw in the Applicant's approach to the choice of conveyor route and this response underlines the fact that the choice is being made on the basis of matters outside of proper scope of the DCO such as planning and compulsory acquisition considerations.

(c) This response suggests that the alternative options have been "fully assessed" which begs the question as to why a choice cannot be made. This again underlines the fact that the choice is being based on commercial considerations only.

(d) The flexibility being sought relies on purported precedent rather than any identified need or technical justification. This highlights also the lack of proper assessment to date. The problem with such flexibility is that it introduces greater uncertainty for the Affected Persons as to the nature and extent of the rights that may be imposed over their interests. It is important to note that land is not being acquired outright and that existing owners will be continuing to use (or trying to use) and operate on this land, subject to uncertain rights on the part of the Applicant. "Constructability" needs to be assessed ahead of the DCO examination.

CA 1.2

The need for the land proposed to be subject to compulsory acquisition

Comment:

a) As discussed above, the Applicant's case for the justification of the powers of compulsory purchase is not made out due to its inability at this examination stage to determine the proper requirements of the scheme. The Applicant should determine the conveyor route prior to the determination of the

DCO. It is not clear how this response addresses the issues raised by the Examination Authority in respect of Articles 29 and 30 as it only relates to the question as to the Northern or Southern routes.

b) As discussed above, the Applicant's reason for not confirming the conveyor route is unsustainable in the context of DCO.

CA 1.7

The guarantee

Comment:

Article 23 of the Dogger Bank A & B DCO provides that the relevant planning authority may not unreasonably withhold its approval of the form and amount of the guarantee/security. The Affected Persons and the relevant planning authority need certainty as to the adequacy of the guarantee to cover all potential liability to compensate. More certainty is needed as to the scope of "reasonableness" in this regard. As drafted in the Dogger Bank DCO, it is only the Applicant's assessment of compensation that is to be provided to the relevant planning authority; Affected Persons should be provided with the opportunity to make their compensation case to the relevant planning authority so as to ensure that the guarantee is adequate.

State and justify whether you would prefer to be the body approving an alternative form of security relating to that part of the project lying within your area. Do you consider that you (or the Secretary of State) should be involved in approval of a guarantee?

DCO 1.1

Article 2: Definition of "Authorised development".

Comment:

The Applicant explains that this wording is to cover licenced activity under the DML. For the avoidance of doubt, Article 2 should specifically refer to the DML activity and the "any other development..." wording be removed. The DCO should provide for certainty rather than "catch-all" drafting.

DCO 1.3

Article 2: Definition of “maintain”.

Comment:

The term "alter" should also be deleted. The Applicant relies on the natural meaning of "maintain" but seeks to retain "alter" which is clear attempt to extend the natural meaning of "maintain". The Oxford Dictionaries online service defines "maintain" as follows:

- **verb**

[with object]

1 Cause or enable (a condition or situation) to continue: *the need to maintain close links between industry and schools*

Synonyms

continue, keep, keep going, keep up, keep alive, keep in existence, carry on, preserve, conserve, prolong, perpetuate, sustain, bolster (up), prop up, retain, support, bear

2 Keep (something) at the same level or rate: *agricultural prices will have to be maintained*

3 Keep (a building, machine, or road) in good condition by checking or repairing it regularly: *the Department for Transport is responsible for maintaining the main roads in England*

Synonyms

keep in good condition, keep in repair, keep up, service, rebuild, conserve, preserve, keep intact, care for, take good care of, look after

4 Provide with necessities for life or existence: *the allowance covers the basic costs of maintaining a child*

support, provide for, keep, finance;

nurture, feed, nourish, sustain

5 Keep (a military unit) supplied with equipment and other requirements: *an English garrison was maintained there in the seventeenth century*

It is clear that the ordinary meaning of "maintain" cannot include the concept of alteration. If the Applicant needs powers to alter, it should seek and justify them separately.

Here, as in other responses, the Applicant seeks to rely on similar drafting being accepted in the Dogger Bank DCO as precedent. This is not justification in itself and should not be relied upon. The Dogger Bank DCO was justified for its own purpose and the Applicant should properly justify all drafting included in the present DCO.

DCO 1.4

Article 2, Article 2 and Article 8

Comment: Account needs to be taken of other harbour users and their operations, in particular the use of the Redcar Bulk Terminal when considering issues with the use of the harbour.

DCO 1.7

Article 10-13: Streets

Comment:

See comment at ES 1.4 (below)

DCO 1.9

Articles 17-21 Tidal works and Article 31/Schedule 5 Deemed marine licence

Comment: No account appears to have been taken of (and in the case of RBT, no consultation has taken place with) other harbour users and their operations, and in particular in respect of Redcar Bulk Terminal, which is immediately adjacent to the Quay Works, in either the DCO or the DML. There are also no protective provisions in this regard. What safeguards are to be put in place in respect of RBT and its harbour assets and operations?

DCO 1.10

Article 30: Temporary use of land for carrying out the authorised project

Comment:

Notwithstanding the Applicant's response, there is considerable concern as to the scope of Article 30 (1)(a)(ii). This effectively means that any part of the Order Land may be entered and possession

taken at any stage during the lifetime of the Order pending any notice of entry or GVD. The uncertainty that is inherent in such an approach is unacceptable and this again demonstrates that the Applicant cannot properly justify the need for and extent of the Order Land proposed. Affected Persons cannot be expected to operate under such uncertainty, particularly given the scope of the powers ought under A.30 (1)(b) and (c). Inevitably all of the Order Land is sterilised until such time as the acquisition powers cease to be exercisable but the Applicant is not even obliged to properly address such sterilisation by being required to acquire the land in question (A.30 (8)). This needs to be reconsidered.

There is further significant concern as to the risk to operational assets as a result of this Article (1), whether by removal under (b) or interference as a result of (c).

DCO 1.11

Article 34 Protective Provisions

Comment:

We are concerned as to the extent to which reliance is being placed on the Dogger Bank DCO in relation to the Protective Provisions. Whilst the provisions in that DCO are highly relevant and should be incorporated to the extent to which they are relevant and provide greater protection than the present draft DCO, not all of the interests to be protected were considered or represented in the Dogger Bank DCO. It is important that all relevant interests and assets are properly considered afresh. To date, Tata/SSI/RBT have not been fully consulted as regards the protective provisions. The only relevant discussion took place on 13 August 2015 at which the Applicant sought merely to understand the operational activity affected by the DCO. No discussions have taken place with Tata to date in respect of protective provisions. As is clear from Tata's written representations, the provisions as drafted took no proper account of the nature of its assets and operational requirements and are accordingly not fit for purpose and inadequate in scope. As stated above, no account has been taken of RBT's harbour/harbour-side activity.

Whilst we could critique the Protective Provisions as set out in the present draft DCO, given that these have not been drafted with any proper understanding of the assets and operations, we reserve the right to comment further in respect of a revised draft DCO and, to the extent to which they may happen, any discussions held with the Applicant.

DCO 1.12

Article 34 and Schedules 7-11 Protection of interests

Comment:

Tata/SSI/RBT are not statutory undertakers although the Applicant mentions Tata and SSI in its reply. Please see comments in respect of DCO 1.11. Whilst the Applicant has begun to engage with Tata/SSI they have not reached agreement with either party yet and therefore the potential for significant effects on Tata and SSI operations have not been addressed to date.

DCO 1.13

Schedule 1

Comment:

We consider that the Parameters Table should be included in the DCO for certainty.

DCO 1.14

Schedule 2: Requirements – Definition of Phases 1 and 2

Comment:

Has the Applicant provided evidence to support its assertion that Phase 2 overlap is not material in relation to Road Traffic.

We do not accept the Applicant's assertion that no further EIA is required or should be considered in relation to Phase 2. The response appears to take in to account only the Phase 1 works as potentially affecting the baseline. Clearly other external matters may significantly affect the baseline. A Requirement should be added.

DCO 1.15

Schedule 4 Temporary possession

Comment:

The Applicant's response only serves to emphasise the extent of the impact on Affected Persons.

ES 1.4

Plans requested - Public Rights of Way

Comment:

There is concern as to the breadth of the term "street" as used in the DCO. Does this definition extend to the estate roads used by the Affected Parties? Certainty should be provided by scheduling the affected "streets". If estate roads are affected, protective provisions will be required.

PAR 1.2

Alternative means of crossing the A1058

Comment:

Alternative means of crossing or passing under the Hot Metal Rail and the SSI Bridge should also be addressed. No discussions have taken place with Tata/SSI in relation to how the conveyor can avoid conflict with these operational assets.

PAR 1.8

Accesses

Comment:

Given the scope of the rights being sought (see in particular Article 12 (Access to works)), such a schedule should be included in the DCO. In any event, Article 12 is not limited to temporary matters. Again, for certainty, the DCO should limit the scope of such powers to identified, i.e. scheduled, interests.

SEM 1.1

Pipelines Safety including in relation to the Regulations of 1996

Comment:

It is important to note that there has been NO continuous engagement with Tata or SSI in this regard. Key Tata and SSI assets are in close proximity with (and oversail) various major pipelines. Tata and SSI should benefit from the protective provisions in Schedule 9.

SEM 1.2

Navigational safety

Comment:

There has been no engagement with Tata/SSI and RBT in respect of their harbour use and operations. Accordingly, Tata/SSI/RBT have not been afforded opportunity to comment on these matters. Schedule 11 should be expanded so as to provide protective measures in respect of RBT, its quay and the use of the harbour/river.

HWF 1.2

Flood risk assessment

1.2.1.

Comment:

The Applicant refers to "some areas of the site could see increased flood risk as a result of the development". It is not clear what is meant by "site" in this context. Are the interests (land, assets and operations) of Affected Persons at risk? Flood risk should be addressed by the Protective Provisions.

HWF 1.3

Disposal of contaminated sediments from capital dredging

Comment:

Order Land must not be used for the disposal of any dredging materials.

HWF 1.7

Effect of spill of polyhalite product on the marine environment

Comment:

To what extent has the impact of polyhalite spill on land and assets been assessed?

HWF 1.10

Comment:

The Applicant's approach does not accord with the *Wells* principle (see above).

TT 1.6

Impacts on Rail Infrastructure

Comment:

The Applicant's response is inadequate and cannot be relied upon. Its assertion is not delivered by the draft DCO. The only discussion as to operational practice and requirements took place on 13 August 2015 and well after the drafting of the DCO. That discussion comprised a "fact-finding" exercise on the part of the Applicant and it should be pointed out that no assurances or safeguards have been made or given by the Applicant in respect of the construction and operation of the proposed development insofar as it impacts on Tata and SSI's assets and operations or otherwise. No discussion or approach has taken place in respect of Protective Provisions, despite the concerns raised at that meeting or by way of the relevant representations or the written representations. As clearly set out in Tata's written representations, the draft DCO does not adequately address the operational requirements and realities in relation to the Hot Metal Rail or the freight rail line.

End of Comments on Responses to EA's First Questions