

THE YORK POTASH HARBOUR FACILITIES ORDER 201X

Explanatory Memorandum

(Clean)



Regulation Number 5(2)(c)

Document 4.2A

Eversheds LLP

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YORKPOTASH
A Sirius Minerals Project



THE YORK POTASH HARBOUR FACILITIES ORDER 201X

EXPLANATORY MEMORANDUM

Pursuant to Regulation 5(2)(c) Infrastructure Planning (Applications:
Prescribed Forms and Procedure) Regulations 2009

DOCUMENT 4.2A

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1. **Introduction**

1.1 This memorandum accompanies an application for a development consent order (“the Application”) submitted on behalf of York Potash Limited (“the Applicant”). The Application seeks approval of the York Potash Harbour Facilities Order 201X (“the DCO”).

1.2 As required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009, as amended, this memorandum explains the purpose and the effect of the provisions in the draft DCO. This memorandum has been prepared taking into account the guidance set out in the Advice Note 13: Preparing the Draft Order and Explanatory Memorandum (April 2012) and Advice Note 15: Drafting Development Consent Orders (October 2014).

1.3 This Explanatory Memorandum relates to the draft DCO submitted to the Examining Authority on 7 September 2015 (Document 4.1A). The principal changes to the DCO are:

- i. drafting amendments to respond to points arising from the Examining Authority’s First Questions.
- ii. additional provisions in response to discussions with, and representations from, the MMO (see, for example, changes to Article 8 and Schedule 5).;
- iii. amendments to the Order to incorporate provisions in relation to the alternative conveyor routes, in particular relating to the compulsory acquisition provisions; and
- iv. additional protective provisions in response to discussions with, and representations submitted by, interested parties.

1.4 The proposed harbour forms part of the York Potash Project which involves the creation of a mine for the winning and working of polyhalite together with the necessary infrastructure required for the subsequent distribution of the mineral. The project principally comprises the following:

- a) The mine with mine head to be located at Doves Nest Farm near Whitby.
- b) A mineral transport system, being a 36.7km long tunnel with conveyor to transport the polyhalite from the mine to Wilton, Teesside.
- c) A materials handling facility at Wilton.
- d) A harbour facility at Bran Sands, Teesside linked to the materials handling facility by a conveyor system.

1.5 It is proposed that the dry mineral would be mined, crushed, loaded onto hoppers at Doves Nest Farm, near Whitby, and transported by an underground conveyor system through the mineral transport system to Teesside. It would then pass

through a materials handling facility (for granulation and storage) in preparation for onward distribution via the proposed new harbour facilities at Bran Sands on the River Tees. Approximately 13mtpa will ultimately be produced.

- 1.6 The proposals for the mine, mineral transport system and materials handling facility (which are not NSIPs), and other associated works, are the subject of applications to the relevant local and minerals planning authorities. The Project Position Statement submitted with the application in March 2015 (Document 7.3) provided further information in respect of those applications. The following paragraphs now set out the current status of each application at the time.
- 1.7 A licence for off shore mineral extraction was granted by the Marine Management Organisation in January 2013 (Appendix 6 to Document 7.3) in January 2013.

Mine/Mineral Transport Systems

- 1.8 As detailed in the Project Position Statement (Document 7.3) the mine and mineral transport system was the subject of a single, cross-boundary, planning application submitted to the North York Moors National Park Authority (NYMNP) and Redcar and Cleveland Borough Council (RCBC).
- 1.9 RCBC issued planning permission for the Mine/Mineral Transport System on 19 August 2015 following the completion of a section 106 agreement.
- 1.10 The NYMNP resolved to approve the application and grant permission subject to the completion of a Section 106 Agreement on 30 June 2015. The Section 106 Agreement relating to planning obligations for the NYMNP application is being finalised and it is currently anticipated that planning permission will be issued by the end of September 2015.

Materials Handling Facility

- 1.11 RCBC granted planning permission for the MHF on 14 August 2015 following the completion of a section 106 agreement.

Temporary Park & Ride and Construction Village

- 1.12 Scarborough Borough Council issued planning permission for this application on 20 August 2015.

Operations Park & Ride

- 1.13 NYMNP issued planning permission for this application on 12 August 2015.

2. Purpose of the Order

Nationally Significant Infrastructure Project – construction of harbour facilities

- 2.1 Section 14(1)(j) of the Planning Act 2008 (“the 2008 Act”) provides that a Nationally Significant Infrastructure Project (“NSIP”) includes a project which consists of the construction or alteration of harbour facilities.

- 2.2 Section 24 of the 2008 Act provides the conditions which must be satisfied for the construction of harbour facilities to be classified as an NSIP. Section 24(1) states that the construction of harbour facilities will be treated as an NSIP if (when constructed) the harbour facilities satisfy the criteria listed in sub-sections (a) and (b).
- 2.3 The development to be authorised by the DCO lies wholly within England and English waters and will have a capacity of more than 5m tonnes of non-container/ro-ro cargo and therefore accords with the conditions set out in Section 24(1) and therefore falls within the definition of a NSIP as set out in the 2008 Act.
- 2.4 In respect of the 5 million tonnes criteria, the DCO seeks consent for a facility which will have the capacity to facilitate the movement of 13 million tonnes per annum. This is being provided in two phases. The first phase relates to 6.5 million tonnes per annum and the second phase then facilitates the balance. Further detail of the capacity of the facilities and how this is to be achieved is set out in Section 3 of the Environmental Statement (Document 6.4).
- 2.5 The DCO sought will permit, in summary, the following works:-
- i. the construction and operation of a quay structure on the River Tees at Bran Sands to facilitate the mooring of vessels in the estuary directly adjacent to the onshore harbour facility and allow shiploader access;
 - ii. dredging of the approach channel and berth pocket;
 - iii. the construction of shiploaders on the quay structure to load the mineral product onto ships for onward transportation;
 - iv. the erection of surge bins for the ship loading flow management of the mineral product;
 - v. a conveyor system to transfer the polyhalite from the materials handling facility at Wilton to the quay; and
 - vi. ancillary infrastructure;
- 2.6 The proposed development is more fully described in Schedule 1 of the draft DCO and includes associated development (see paragraphs 2.8 – 2.10 below). Provision for ancillary matters is made in the body of the draft DCO (see paragraph 3 below).
- 2.7 As permitted by Section 120 of the 2008 Act, the draft DCO also includes requirements to govern the authorised development. The requirements are set out in Schedule 2 of the draft DCO and have regard to the model requirements that were contained in Schedule 4 of the model provisions (albeit these are no longer in force).

Associated development

- 2.8 In connection with the construction of the quay, the draft DCO specifically authorises associated development, being development that is associated with the NSIP.
- 2.9 Guidance on associated development has been issued by the Secretary of State for Communities and Local Government. This guidance sets out core principles which will be considered when deciding whether or not development should be treated as associated development.
- 2.10 The proposed associated development comprises demolition of the existing jetty, parallel conveyors to transfer the polyhalite from the materials handling facility to the quay, temporary construction compound areas (incorporating parking, office, stores, maintenance preparation and plant areas), permanent offices, parking, substations and ancillary infrastructure.
- 2.11 2.10 These aspects of the authorised development are considered to be associated development as they are "*not an aim in itself*" but are "*subordinate to the principle of development*"¹ The rationale for the identification of the associated development is expanded upon by the Applicant's response to the Examining Authority's Q1 DCO 1.13.

3. **Ancillary matters**

- 3.1 The draft DCO also contains several ancillary matters, i.e. consent for legal powers not consisting of development.
- 3.2 The main ancillary matter is a power to acquire rights compulsorily, or by agreement in accordance with section 120(4) and Part 1 of Schedule 5, paragraphs (1 and) 2 of the Act. The draft DCO also contains powers of compulsory acquisition of rights to construct and maintain the authorised development under section 122 of the Act. The compulsory purchase powers sought are explained in the Statement of Reasons that accompanies the application (Document 5.1).

4. **Draft DCO**

- 4.1 The provisions of the draft DCO are now explained in sequence.

5. **Part 1 – Preliminary**

Article 1 (Citation)

- 5.1 Article 1 sets out the name and commencement of the Order.

Article 2 (Interpretation)

- 5.2 Article 2(1) defines terms used in the remainder of the draft DCO.

¹ See paragraph 5(ii) Guidance of associated development. Applications for Major Infrastructure Projects April 2013.

- 5.3 The Applicant is a wholly owned subsidiary of Sirius Minerals Plc which is a company listed on the Alternative Investment Market ("AIM") of the London Stock Exchange. Both the Applicant and Sirius Minerals Plc are defined as the undertaker. Since the application is for a bespoke, dedicated, facility it is not considered necessary or appropriate to extend the definition to include any other person who would otherwise have the benefit of the Order in accordance with section 156 of the 2008 Act.
- 5.4 New definitions have been added/amended in the second draft DCO to correlate with the amended drafting of the DCO. In particular:
- i. the wording within the definition of materials handling facility has been updated now that the planning permission relating to that facility has been granted;
 - ii. the reference to the access and rights of way plans has been deleted since it is not used;
 - iii. a definition of commence has been added arising out of discussions with the MMO and the Examining Authority's First Questions;
 - iv. the alternative conveyor routes have been defined for the purpose of Article 24;
 - v. reference to the governance tracker has been added;
 - vi. following discussions with the MMO the definition of "maintain" has been amended;
 - vii. phase 1 and phase 2 have been more fully defined; and
 - viii. constructability notes have been added for the purposes of the protective provisions.
- 5.5 Article 2(2) expands the definition of rights over land.
- 5.6 Article 2(3) defines measurements as approximate and an additional 2(6) has been added following discussions with the MMO to clarify the flexibility afforded by the word "approximate" and confirm that the use of that term cannot lead to authorisation of development which is outside the scope of that which has been assessed.
- 5.7 Article 2(4) explains that any references to numbered works and requirements are to those works or requirements with the same number in Schedules 1 and 2 respectively.
- 5.8 Article 2(5) confirms that all measurements referred to in the Book of Reference are approximate.

6. **Part 2 – Principal powers**

Article 3 (Development consent etc. granted by the Order)

- 6.1 Article 3(1) provides development consent for the carrying out of and use of the authorised development within the Order limits and subject to the requirements.
- 6.2 Article 3(2) provides that development carried out pursuant to a planning permission granted following implementation of the DCO would not be in breach of the DCO, ensuring no risk of criminal liability pursuant to Section 161 of the 2008 Act. This follows the Daventry International Rail Freight Interchange Alteration Order 2014².

Article 4 (Parameters of authorised development)

- 6.3 Article 4 provides that the authorised development must be carried out within the parameters set out in the parameters table (Document 6.9A). The original parameters table was included in section 3 of the Environmental Statement (Document 6.4) which contains the description of the works assessed. The table has since been updated by the addition of references to lighting and fencing following the Examining Authority's First Questions. The table is cross referred to in Schedule 1 of the draft DCO.
- 6.4 Paragraph (a) of Article 4 sets the limits in which the Applicant can deviate laterally. Paragraph (b) defines the vertical limits of deviation for Works No.4 (the conveyor) by reference to the vertical deviation plans (Document No. 3.11A and 3.11B) and paragraph (c) confirms that the scope for deviation between the boundary of two adjoining areas of works is 20m either side of that boundary, to provide limited flexibility between boundaries between the works areas. The applicant's answer to the Examining Authority's First Question DCO 1.1 expands on the rationale. In response to the point however Article 4(a) has been amended in the second draft DCO to remove this flexibility in relation to Works Nos. 1 and 2 (to address the MMO's concern) and Works No. 3 (the lagoon).

Article 5 (maintenance of authorised development)

- 6.5 Article 5 sets out the right for the Applicant to maintain the development. The definition of "maintain" in Article 2 provides, in accordance with PINS Advice Note 15, that any maintenance activities shall be confined so that the result would not be any significant environmental effect which has not been assessed in the Environmental Statement (Document 6.4)³. The definition of maintain has been amended following discussions with the MMO. The article includes reference to the protective provisions for the benefit of the Tees Port Authority, because those protective provisions include measures for the maintenance of tidal works.

Article 6 (provision of works)

² S.I. 2014/1796 Article 5(2).

³ "Drafting Development Consent Orders" Version 1 October 2014 paragraph 20.2.

- 6.6 Article 6 sets out the general works that can be provided and operated as part of the authorised development together with the ancillary works to facilitate the harbour. Articles 6 (1) and (2) set out the operations that the Applicant may undertake and facilitate the provision of the harbour. Article 6(3) confirms that works authorised by this Article must not give rise to any significant environmental effect not assessed in the environmental statement.

Article 7 (benefit of Order)

- 6.7 Article 7 overrides Section 156(1) of the Act (as permitted by Section 156(2)) to give the benefit of the Order to the undertaker rather than anyone with an interest in the land. This is to ensure that the Order is implemented in a practical and orderly manner rather than a sporadic and ad hoc development where several landowners implement different elements of the Order.

Article 8 (consent to transfer benefit of Order)

- 6.8 Article 8 enables the powers under the Order to be transferred from the undertaker to others only with the consent of the Secretary of State. A substantial addition has been made to this article in the second draft DCO to provide a mechanism for the MMO to be consulted should there be any application to transfer the benefit of all or part of the Order. The additional provisions are the same as those included in Article 8 of the Dogger Bank Teesside A and B Offshore Windfarm Order 2015.⁴

Article 9 (Application and modification of enactments)

- 6.9 This Article seeks, as permitted by section 120(5) of the 2008 Act, to incorporate and modify legislative provisions which are necessary for carrying out the authorised development.
- 6.10 Articles 9(1) and (2) apply conventional appeal arrangements to any refusal by the local planning authority of an application for approval pursuant to the provisions of a requirement, as if such approval was being sought in respect of a planning condition. This is required to resolve any dispute since there is no other statutory mechanism.
- 6.11 Article 9(3) clarifies that the application of conventional appeal arrangements pursuant to articles 4(1) and (2) should not be construed as ousting the provisions of the Infrastructure Planning (Environmental Impact Assessment) Regulation 2009 in accordance with PINS Advice Note 15.⁵
- 6.12 Article 9 (4) declares that works permitted by this Order benefit from permitted development. This replicates a provision from the Able Marine Order⁶.

⁴ S.I. 2015/1592.

⁵ "Drafting Development Consent Orders" Version 1 October 2014 paragraph 22.

⁶ Able Marine Energy Park Development Consent Order 2014 S.I. No 2935 Article 11(3).

7. **Part 3 – Streets**

Article 10 (street works)

7.1 This Article makes provision for the Applicant to carry out the works described in Article 10 (a) – (e) for the purposes of the authorised project affecting the streets within the Order limits. Ordinarily the Applicant would require a street works licence pursuant to the New Roads and Street Works Act 1991 to carry out such works, however, the inclusion of this Article in the Order will provide a statutory right to undertake street works within the specified streets without the need for the Applicant to obtain a separate licence from the street authority.

7.2 The Article provides that no works to the public highway can be carried out without consent of the highway authority.

Article 11 (temporary stopping up a street)

7.3 Article 11 allows streets to be stopped up altered or diverted temporarily for the works. In the second draft DCO words have been added to clarify that this only relates to streets within the Order limits in response to a query raised by Bond Dickinson on behalf of Huntsman/Sabic/DEA.

7.4 The Article provides that no works to the public highway can be carried out without consent of the highway authority.

Article 12 (access to works)

7.5 Article 12 allows the creation of new access points from the public highway with the approval of the highway authority.

7.6 Article 12(3) clarifies that the consent of the highway authority is not required in respect of the access improvements shown on the Highway Works Plan (Document 3.14).

Article 13 (agreement with highway authority)

7.7 Article 13 allows the Applicant and the highway authority (Redcar and Cleveland Borough Council) to enter into agreements about the street works necessitated by the project. This article has been amended in the second draft DCO to make it clear that the power can only be exercised in relation to the carrying out of the authorised development in response to a query raised by Bond Dickinson on behalf of Huntsman/Sabic/DEA.

8. **Part 4 – Supplemental Powers**

Article 14 (discharge of water)

8.1 Article 14 sets out the circumstances in which the Applicant is entitled to discharge water into a sewer or watercourse. The Applicant will be entitled to discharge with the consent of the conduits owner, who cannot withhold its consent unreasonably.

- 8.2 The Article largely reflects article 14 of the general model provisions but has been updated to refer to the Environmental Permitting (England and Wales) Regulations 2010 which supersedes the relevant provisions of the Water Resources Act 1991.

Article 15 (protective work to buildings)

- 8.3 Article 15 sets out the circumstances when the Applicant may take protective works to nearby buildings that it considers may otherwise be damaged by the works. Protective works can only be undertaken on the giving of 14 days notice, unless in an emergency, and the building owner can seek arbitration if appropriate. This power is unlimited and lasts for 5 years after the relevant part of the project comes into operation. The article also ensures the Applicant must compensate landowners and/or occupiers for any loss or damage.

Article 16 (authority to survey and investigate the land)

- 8.4 Article 16 entitles the Applicant to enter land above the level of mean high water springs with the Order limits for the purposes of investigating, surveying and testing. The Applicant is required to provide 14 days notice to owners (save where the undertaker is the owner) and occupiers of the land and compensate for any loss or damage. This Article has been amended in the second draft DCO to refer to the level of mean high water springs following discussion with the MMO.

Article 17 (tidal works not to be executed without the approval of the Secretary of State)

- 8.5 This Article, which is in a standard form included within other approved DCO⁷, provides the ability of the Secretary of State to confirm the acceptability of the tidal works if the development is not progressed within the first 5 years following the coming into force of the Order. The provisions in the Order (Requirement 1 of Schedule 2) would allow for the development to commence beyond that 5 year period.

- 8.6 The Article also gives the Secretary of State enforcement powers where the provisions of this Article are breached.

- 8.7 This Article has been amended in the second draft DCO following written representations submitted by the MMO requesting that it be consulted in any approval by the Secretary of State pursuant to this Article.

Article 18 (abatement of works abandoned or decayed)

- 8.8 Article 18 provides that where the Applicant abandons or allows tidal work to fall into disrepair the Secretary of State may require him to repair, restore or remove works. Such works are to be undertaken at the Applicant's own expense or may be recovered from the Applicant in the event that the Secretary of State undertakes the works.

⁷ See The Able Marine Energy Park Development Consent Order 2014 (S.I. 2014/2935).

- 8.9 This Article has also been amended in the second draft DCO following written representations submitted by the MMO requesting that it be consulted.

Article 19 (lights on tidal works etc. during construction)

- 8.10 Article 19 requires the Applicant to light the works during the construction between sunset and sunrise for the purposes of navigational safety.

- 8.11 A new sub-paragraph (2) has been added in the second draft DCO as requested by Trinity House and PD Teesport in their responses to the Examining Authority's First Questions to impose a criminal sanction for failure to comply with a direction under this Article.

Article 20 (provisions against danger to navigation)

- 8.12 Article 20 requires the Applicant in the case of damage to, destruction or decay of a tidal work, to lay down buoys, lights and other steps as may be required to the satisfaction of the Tees Port Authority.

- 8.13 A new sub-paragraph (2) has been added in the second draft DCO as requested by Trinity House and PD Teesport in their responses to the Examining Authority's First Questions to impose a criminal sanction for failure to comply with a direction under this Article.

Article 21 (permanent lights on tidal works)

- 8.14 Article 21 ensures that after the tidal works have been completed the Applicant must light the outer extremities of those works for navigational safety from sunset to sunrise.

- 8.15 A new sub-paragraph (2) has been added in the second draft DCO as requested by Trinity House and PD Teesport in their responses to the Examining Authority's First Questions to impose a criminal sanction for failure to comply with a direction under this Article.

Article 22 (power to charge)

- 8.16 Article 22 permits the Undertaker to make such charges as it thinks fit for the use of the authorised development.

9. **Part 5 – Powers of acquisition**

Article 23 (Guarantees in respect of payment of compensation)

- 9.1 The Applicant has included this article as security in respect of payment of compensation for the protection of any interests which are to be compulsorily acquired. The article will ensure that no compulsory acquisition can be pursued until appropriate security for the liabilities of the undertaker to pay compensation has been provided.

- 9.2 The original article was based on Article 14 of The Hornsea One Off Shore Wind Farm Order 2014⁸. As indicated in the Applicant's Responses to the Examining Authority's First Questions (Document 8.2) this Article has been amended in the second draft DCO and now is the same as that included at Article 9 of The Dogger Bank Teesside A and B Offshore Windfarm Order 2015⁹.

Article 24 (Compulsory acquisition of rights)

- 9.3 Article 24 authorises the creation of new rights by compulsory purchase. The power is limited to the rights which are required for the project and is more particularly detailed in the Book of Reference (Document 5.3) and explained in the Statement of Reasons (Document 5.1).
- 9.4 The Article has been amended in the second draft DCO so that the powers conferred by the Article are not engaged until the undertaker has elected which conveyor route to construct and notified the local planning authority of that election.
- 9.5 Once the election has been made and notified, the powers of compulsory acquisition will crystallise into those rights and restrictions listed in either Part 1 (southern route) or Part 2 (northern route of Schedule 3).
- 9.6 It is to be noted that the undertaker is seeking to impose restrictive covenants over the land required for the erection of the conveyor and the installation of the conveyor footings and supports to protect the structure and its foundations. The restrictive covenants are set out as Class 10. They comprise covenants for the benefit of the quay and remainder of the Order Land. It is considered that the nature of the authorised development is appropriate for such restrictive covenants and their imposition corresponds with the rights of access for maintenance purposes over the same areas (see clauses 4 and 5).
- 9.7 Article 24(5) authorises the extinguishment of rights if their continuance would be inconsistent with the authorised development. As explained in the Statement of Reasons (Document 5.1), the Applicant is not seeking to extinguish rights which are known. However, due to the complex and industrialised nature of rights granted over the site, there are a number of unknown rights which it is impossible to determine would be inconsistent or consistent with the authorised development. The Applicant therefore requires the security of being able to extinguish such rights, should they be sought to be exercised. This sub-paragraph (5) has been amended to clarify that the powers to extinguish rights are subject to the protective provisions contained in Schedules 9 and 10 following discussions with the representatives of Sabic/Huntsman/DEA.
- 9.8 Article 24(8) provides that compensation shall be payable for any such extinguishment.

Article 25 (Power to override easements and other rights)

⁸ S.I. 2014/3331.

⁹ S.I. 2015/1592.

- 9.9 Article 25 ensures that where the works permitted by Order interfere with existing easements or other rights, those rights shall not present an impediment to delivery. The Article provides for compensation to be payable to the beneficiary of any right that is extinguished, abrogated or discharged.

Article 26 (Compulsory acquisition of land – incorporating the mineral code)

- 9.10 By incorporating the 'mineral code' this article prevents existing minerals under land being automatically acquired. It also addresses the situation where an owner wishes to work existing minerals and provides the undertaker with the ability to compensate the owner for any liability to do so as a result of the development. This Article has been updated in the second draft DCO to further modify Schedule 2 of the Acquisition of the Land Act 1981 so that the "undertaking" is substituted by "authorised development" and the criminal offence contained in paragraph 8(3) is excluded. This follows the approach in Triton Knoll Electrical System draft order.

Article 27 (Time limit for exercising authority to acquire land compulsorily)

- 9.11 Article 27 gives the applicant 5 years to issue 'notices to treat' or a 'general vesting declaration' to acquire land using powers of compulsory purchase.

Article 28 (Application for Compulsory Purchase (Vesting Declarations) Act 1981)

- 9.12 Article 28 applies the provisions of the 1981 Act as if the Order was a Compulsory Purchase Order. The vesting declaration is a method by which land is passed to the acquiring body more quickly than using notices to treat and is a method most often used where large amounts of land are involved.

Article 29 (Rights under or over streets)

- 9.13 Article 29 gives the Applicant the power to occupy land above or below streets within the Order limits without having to acquire that land. Compensation is payable for any loss or damage to structures along the relevant street. This Article has been amended in the second draft DCO with reference to the book of reference to clarify that it is not intended to acquire or appropriate land.

Article 30 (Temporary use of land)

- 9.14 Article 30 allows the Applicant to occupy the land temporarily while the works are carried out, and also any of the land to be subject to the creation or acquisition of rights where the creation or acquisition of rights has not yet been exercised. The Article has been amended in the second draft DCO to include the ability to occupy the Order land temporarily to maintain all or part of the authorised development consistent with the approach in most orders.
- 9.15 Sub-paragraph (3) has been amended in the second draft DCO with a new (b) added to apply a time period for use of the land under Article 30(1)(a)(ii). This is rectifying an oversight. The Article also makes provision for the time limit for return of the land, restoration and payment of compensation

- 9.16 Paragraphs (10) and (20) incorporates section 13 of the Compulsory Purchase Act 1965 and applies it to the temporary use of the land to which this Article relates. Section 13, which allows enforcement of possession, is automatically applied to the powers in Articles 24 – 29 by virtue of Section 125 of the 2008 Act. The power is required in relation to the temporary use of land to ensure that the undertaker will be able to enforce the taking of temporary possession of the land to carry out the relevant works and or maintenance (as the case may be) in the event that the owner or occupier refuses to allow possession.

10. **Part 6 – Miscellaneous and general**

Article 31 (Deemed Marine Licence)

- 10.1 Article 31 deems the granting of a Marine Licence, which is a licence to deposit or build on the sea bed below high water mark to the Applicant subject to the licence terms set out in Schedule 5.

Article 32 (Operational land for purposes of the 1990 Act)

- 10.2 Article 32 declares that land within the Order limits shall be treated as operational land of a statutory undertaker for the purposes of the Town & Country Planning Act 1990.

Article 33 (Defence to proceedings)

- 10.3 Section 158 of the Act confirms statutory authority for the purposes of a defence in statutory nuisance generally. Article 33 amends the terms of the defence in the case of noise nuisance (other types of nuisance continue to have the general defence afforded by Section 158).

- 10.4 The defence is available if noise relates to the construction operation, use or maintenance of the project and is in accordance with any controls imposed by the local authority under the Control of Pollution Act 1974 or cannot reasonably be avoided.

- 10.5 Additional provisions have been incorporated in this article in the second draft DCO to provide a due diligence defence in respect of the offences added to Articles 19-21, as referred to above.

Article 34 (Protection of interests)

- 10.6 Article 34 applies Schedules 7, 8, 9, 10 and 11 which contain protective provisions for Network Rail, National Grid Electricity, to protect the existing pipelines and infrastructure which the conveyor would cross within the Order Limits, and for the Tees Port Authority as the harbour authority for the Tees Estuary.

- 10.7 The latest draft protective provisions under discussion with the relevant parties are contained within these Schedules.

Article 35 (Saving for Trinity House)

- 10.8 Article 35 protects the interests of Trinity House, the general lighthouse and navigational safety authority for England.

Article 36 (Crown Rights)

- 10.9 Article 36 includes provisions safeguarding the rights of the Crown in relation to the Crown Estate land within the estuary. The consent of the Crown Estate has been obtained to utilise Crown land for the purposes of the authorised development subject to the inclusion of this Article within the DCO. The relevant consent is contained in a letter from the Crown Estate dated 15 December 2014 (Document 7.6).

Article 37 (Approvals pursuant to requirements etc.)

- 10.10 This Article has been included as an overarching Article to restrict the ability of a local planning authority, or other body, to grant an approval or agreement pursuant to a requirement to ensure that such approval or agreement does not result in authorised development which would have significant environmental effects different to those which have been assessed in the environmental statement. This is in response to the advice contained in PINS Advice Note 15¹⁰. This Article ensures that the concern is covered whilst at the same time ensuring that there is sufficient flexibility to enable the authorised development to proceed without the need to apply for successive amendments to the DCO.

- 10.11 The Article has been amended and expanded in the second draft DCO to provide that any approvals under any of the provisions of the DCO must not have the effect of authorising development outside the scope of what has been assessed.

Article 38 (Certification of plans etc)

- 10.12 Article 38 requires the promoter to submit the final versions of the plans and documents referred to in the DCO for certification to the decision maker (the Secretary of State). This Article has been amended in the second draft DCO to update document numbers and to add additional documents referred to in the DCO.

Article 39 (Service of notices)

- 10.13 Article 39 governs how any notices that may be served under the Order shall be deemed to have been served properly. In particular, it allows service by email at the consent of the recipient, and deals with the situation of service on an unknown landowner.

Article 40 (Arbitration and expert determination)

- 10.14 Article 40 governs what happens in the event that two parties disagree in the implementation of any provision of the Order. The matter is to be settled by a

¹⁰ "Draft Development Consent Orders" version 1 October 2014 paragraph 19.

single arbitration and in the event that a single arbitrator cannot be agreed, he shall be appointed by the President of the Institute of Civil Engineers.

- 10.15 A new subparagraph (2) has been added in the second draft DCO to detail the procedure for expert determination in relation to disputes under the protective provisions. This is applied to Schedules 9, 10 and 11. The rationale for this is to ensure that there is a route map for the resolution of a dispute within a certain time period which is important in order that there can be confidence in the Applicant's construction programme.

11. **Schedules**

Schedule 1 (Authorised development)

- 11.1 This Schedule describes the authorised development for which Development Consent is sought including associated development. The wording of the descriptions of each work has been amended in the second draft DCO to refer to the specific works plan for clarity.
- 11.2 The authorised development is divided into separate works that describe the different aspects of the proposal. The works numbers relate to areas on the Works Plans (Documents 2.2A-F). They can be summarised as follows:

NSIP

Works No 1

This is the dredging of the approach channel and berth pocket and the demolition of the existing jetty.

Works No 2

This is the construction of the new quay which is to be constructed in two phases. Reference to the quay limits has been added for clarity.

The quay will be either a quay of solid construction or of open construction. The decision on which type of quay will be constructed will be based on a number of factors including:

- Geotechnical and Geo-environmental - more detailed ground investigations are necessary to further understand the soil structure and extent of contaminated silts which will have a bearing on the engineering solution. A quay of open construction is considered less sensitive to potential changes in ground conditions.
- Operational functionality and flexibility, including considerations as to type of ship loader
- Extent of benefit of additional deck area

- Extent of any additional maintenance burden associated with a solid quay
- Likely cost (which may be significantly influenced by ground conditions)
- Contractor's preference

The decision as to which form of quay will be constructed is likely to be taken at the procurement stage when the variables referred to above will be known and are capable of being weighed in the balance against each other.

Associated Development

Works No 3

This is the provision of habitat enhancement works in the lagoon. These works will involve the placing of dredged materials into the lagoon to create shallow water areas, intertidal margins and islands. A flow control structure will be improved (existing pipe) between the lagoon and the Tees estuary.

These works have resulted from discussions with Natural England, the Environment Agency and the MMO with regard to a desire to provide a habitat for water birds within the lagoon. The general arrangement of the works are shown in Appendix 3.1 of the Habitats Regulation Assessment Report (Document 6.3). The precise form of the works will be approved by the MMO under the provisions of the deemed marine licence in Schedule 5 of the draft Order.

Works No 4

These works deal with the elevated conveyor structure (Works No 5 deal with the works at ground level – i.e. below the conveyor).

This is the construction of the parallel conveyors for the transfer of the polyhalite from the materials handling facility to the quay. Reference to two parallel conveyors in a single housing has been added in the second draft DCO as requested by Bond Dickinson in its representations on behalf of Sabic/Huntsman/DEA. The conveyor will be constructed along one of the routes between points shown on the Works Plans as A-B-C (known as the northern route) or points A-B-D (known as the southern route). At this time the southern route is the Applicant's preferred option because it will require the fewest components and fewer transfer towers (since it is a straighter route to the quay). This would result in reduced construction and operational costs and a higher quality product (because fewer transfer towers will reduce the impact of product degradation as the pelletised potash changes direction and level).

Work is continuing in relation to any potential constraints to the southern route. As soon as these have been fully understood (which may not be until intrusive ground investigation surveys can be done) the final route will be determined and notified.

Works No 5

This is the provision of various works at ground level throughout the area shown as Works No 5 on the Works Plan (Document 2.2 A – F). The conveyor which oversails these works comes within Works No 4 above.

These works include accesses for construction and maintenance, the installation of the conveyor footings and supports, transfer towers (at specific locations) surface and foul water disposal arrangements, services, signage, lighting, acoustic fencing, security fencing and gating and CCTV.

Works No 6A, 7, 8, 10 and 11

These works comprise the provision of temporary facilities to include material storage, preparation and plant areas, parking, offices and stores.

Works No 6B

These works comprise the provision of a permanent substation and car parking spaces.

Works No 9

These works involve the provision of permanent facilities to include a general services building, parking, ancillary infrastructure and a substation.

Works No 12

These works comprise the access of the roundabout on the A1085 to improve an existing access for construction traffic purposes. These works comprise the widening the carriageway, construction of a new splitter island and resurfacing works.

The general arrangement of the works is shown on the highway works plan (Document 3.14)

The construction phase of the development will be undertaken in two phases. Details of the two phases are provided within Section 3 of the environmental statement (Document 6.4).

In summary, phase 1 would involve:

- Establishment of site compounds;
- Construction of initial quay length, including ship loader;
- Dredging of material from the approach channel and berth pocket;
- Placement of dredge material within Bran Sands Lagoon (habitat enhancement proposals);
- Installation of a surge bin;
- Installation of a conveyer system and transfer towers;
- Construction of buildings and parking area;

- Erection of security fencing; and
- Installation of ancillary infrastructure.

Phase 2 would involve:

- Extension of the existing quay, including ship loader;
- Dredging of material from the approach channel and berth pocket;
- Installation of a second surge bin;
- Installation of a second conveyer within the conveyer housing installed during phase 1;
- Erection of security fencing; and
- Installation of ancillary infrastructure.

Schedule 2 (Requirements)

11.3 This Schedule sets out the requirements the Applicant must meet in carrying out the construction of the authorised project. The objective of these requirements is self-explanatory.

11.4 The requirements cover the following issues:-

- Time limits (Requirement 1)
- Stages of the development and design approval (Requirements 2 - 4)
- Highways access (Requirement 5)
- Construction Environmental Management Plan (Requirement 6)
- Construction Traffic Management Plan (Requirement 7)
- Flood warning and Ground Gas Monitoring Regime (Requirement 8)
- Ecology (Requirement 9)
- Archaeology (Requirement 10)
- Decommissioning (Requirement 11).

11.5 The changes to the requirements in the second draft DCO are as follows:

- i. Requirement 2 has been amended to clarify that the alternatives which are included within the order are crystallised at the time of the approval of details of phase 1. In addition sub-paragraph (2) has been added to identify the manner by which it is intended that the external treatment of the conveyor will be determined, i.e. in conjunction with RCBC, within the constraints of the parameters and the envelope which apply.
- ii. Requirement 3 has been amended to add reference to the extended quay which had previously been incorrectly omitted. An additional sub-paragraph (3) has been added to provide for a reassessment of baseline conditions in relation to the quay and dredge area in the event that phase 2 does not commence within 6 years of the completion of phase 1, consistent with paragraph 9. (3) of the DML in Schedule 5.
- iii. Requirement 4 has been amended in light of the expanded wording in Article 37.

- iv. Requirement 6 has been amended to refer to the outline CEMP and the governance tracker, arising from the Examining Authority's First Questions.
- v. Requirement 8 relating to flood warning has been augmented and an additional provision relating to the monitoring of grounds gas monitoring has been added. This arises from the Examining Authority's First Questions. The paragraph it replaces has proved not to be needed.
- vi. Requirement 9 has been amended to refer to the outline ecological management plan and the governance tracker which will ensure the mitigation referred to by Natural England in its representations will be delivered.

Schedule 3 (Compulsory Acquisition Provisions)

- 11.6 Parts 1 and 2 have been added as referred to in paragraphs 9.4-9.5 above. These parts detail the rights and restrictions required for the whole of the authorised development, depending upon which conveyor route is chosen.
- 11.7 Part 3 of this Schedule modifies provisions for compensation following the creation of new rights and restrictive covenants.

Schedule 4 (Land of which temporary possession may be taken)

- 11.8 This Schedule identifies those parcels of land where possession may be required temporarily to facilitate the works permitted by the Order.

Schedule 5 (Deemed Marine Licence)

- 11.9 This Schedule has been created to set out the terms of the Marine Licence that will be deemed to be granted by the Order. The Schedule has been amended significantly following discussions with the MMO and following their response to the Examining Authority's First Questions and comments on the DML. It is believed that the amended drafting should meet the drafting points raised by the MMO. Of note are the amendments to paragraph 7 which seek to avoid the previous confusion between references to ecological management plans and now refer to a lagoon habitat enhancement plan which is to accord with the mitigation and monitoring strategy (Document 6.12). In addition paragraph 17 has been amended to provide certainty of timescale in respect of any approvals required from the MMO.

Schedule 6 (Limits of Quay)

- 11.10 This Schedule identifies the envelope within which the quay will be constructed. It is required to be identified for the purposes of the deemed marine licence (Schedule 5) and to identify the limits within which the quay will be constructed (Works No.2).

Schedule 7 (Provisions for the Protection of Network Rail)

- 11.11 The conveyor corridor crosses over the railway line and accordingly protective provisions have been included. These are based on Network Rail's standard provisions and were agreed with Network Rail, subject to the amendment made in the second draft DCO. In the absence of agreement with Network Rail the Applicant needs the protection of compulsory acquisition to compulsorily acquire the necessary rights

Schedule 8 (Provisions for the Protection of National Grid)

- 11.12 The conveyor corridor runs underneath existing overhead power lines and accordingly provisions for the protection of those power lines have been included in this Schedule. The protective provisions are based on provisions provided to the Applicant by National Grid, as amended by the Applicant. The provisions included within the Schedule represent the latest version of the provisions. These provisions are agreed with National Grid subject only to a side agreement which has been agreed and, it is anticipated, will shortly be completed.

Schedule 9 (Protective Provisions for the Pipeline Corridor)

- 11.13 There are numerous interests along the pipeline corridor running from the Wilton International Complex to the Tees Estuary. Protective provisions have been included in the Order to ensure that apparatus within that corridor is appropriately protected. These provisions are currently the subject of discussion with the owners of the apparatus concerned.

- 11.14 Proposed protective provisions are still awaited from Bond Dickinson (representing a number of the pipeline owners). Nor has the drafting of suggested protective provisions been received from representatives of any other pipeline asset owners. In the absence of these the provisions have nonetheless been amended in the second draft DCO. This is in response to a meeting held with Bond Dickinson on 27 July 2015; the grant of The Dogger Bank Teesside A and B Offshore Windfarm Order 2015¹¹ on 4 August 2015 and following the written representations submitted on behalf of Sabic/Huntsman/DEA, Tata Steel UK Limited, Sahaviriya Steel Industries UK Limited and the CATS parties.

Schedule 10 (Provisions for the Protection of Assets Bridged/Oversailed)

- 11.15 There are several assets which the proposed conveyor would oversail. Protective provisions have been included in the Order to ensure that these assets would be appropriately protected. These provisions have been updated following written representations submitted to the Examining Authority for Deadline 1.

Schedule 11 (Provisions for the Protection of the Tees Port Authority)

- 11.16 These provision have been included to protect the harbour authority and are currently the subject of discussions with the Tees Port Authority. The version included in the second draft DCO is a version provided to the harbour authority on 24 August 2015, a response to which is awaited. It is believed there a few, if any,

¹¹ S.I. 2015/1592

outstanding issues, however the amendment to the final paragraph of the protective provisions was not previously included.

Eversheds LLP
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