



Department for Transport

**Eversheds Sutherland
(International) LLP**
Water Court
116-118 Canal Street
Nottingham
NG1 7HF

Natasha Kopala
Head of the Transport and Works Act Orders Unit
Department for Transport
Great Minster House
33 Horseferry Road
London
SW1P 4DR

Email: transportinfrastructure@dft.gov.uk

Web Site: www.dft.gov.uk/dft

25th August 2022

Dear Sirs,

PLANNING ACT 2008 APPLICATION FOR A NON-MATERIAL CHANGE TO THE YORK POTASH HARBOUR FACILITIES ORDER

1. I am directed by the Secretary of State for Transport ("the Secretary of State") to advise you that consideration has been given to the application ("the Application") by York Potash Limited and Anglo American Woodsmith Limited (previously Sirius Minerals plc) ("the Applicant") on 9 February 2022 for a non-material change to the York Potash Harbour Facilities Order 2016 ("the 2016 Order"). The application was made under section 153 of, and paragraph 2 of Schedule 6 to, the Planning Act 2008 ("the 2008 Act"). This letter is the notification of the Secretary of State's decision in accordance with regulation 8 of the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations ("the 2011 Regulations").
2. The 2016 Order was granted on 20 July 2016 and provided consent for the development of harbour facilities and associated development at Bran Sands, Teesside ("the Development"). The Development comprises the construction and operation of a quay structure; the dredging of the approach channel and a berth pocket; the construction of ship loaders and surge bins on the quay; the construction of a conveyor system to transport polyhalite from a Materials Handling Facility within the Wilton International chemicals complex to the harbour; enhancement works within the Bran Sands lagoon; and improvement works to the A1085 junction.

3. The Application would allow for the rephasing of construction works as follows;

Phasing split from 'phase 1' to 'phase 1a' and 'phase 1b'

4. Requirement 2 of Schedule 2 to the 2016 Order requires the Applicant to seek approval of the component parts of phase 1 from the local planning authority before the Development can commence.

5. Phase 1 means the part of the authorised development required to be completed in order to facilitate the movement of 6.5 million tonnes per annum of polyhalite comprising:
 - (a) site compounds;
 - (b) construction of a quay 28 metres wide and 280 metres in length including ship loader and ship loader rails;
 - (c) dredging of up to 750,000 cubic metres of material from the approach channel and berth pocket;
 - (d) lagoon habitat enhancement works;
 - (e) installation of a surge bin;
 - (f) installation of conveyor system and transfer towers;
 - (g) construction of buildings and parking area;
 - (h) erection of security fencing; and
 - (i) provision of ancillary infrastructure.
6. The Applicant proposes to ‘split’ phase 1, as set out in the 2016 Order, into ‘phase 1a’ and ‘phase 1b’. The Applicant proposes phase 1a would include all elements listed in (a)- (h) with the exception of (f) “installation of conveyor system and transfer towers” which would fall under the new ‘phase 1b’. They also propose that element (i) “provision of ancillary infrastructure” be retained in both phases.
7. Additionally, requirement 5 of Schedule 2 to the 2016 Order requires the Applicant to carry out improvement works to the A1085 roundabout before the Development can commence. The Applicant has advised that the improvement works to the roundabout are only needed to accommodate vehicular movements for the construction of the conveyor system. As improvement works to the roundabout are not needed for the construction of the quay facilities, the Applicant has also requested that requirement 5 be amended to permit phase 1a works to commence prior to the highways works being completed, with the requirement remaining in respect of all other phases.

Summary of the Secretary of State’s decision

8. The Secretary of State has decided under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make non-material changes to the 2016 Order, so as to authorise the changes as detailed in the Application. This letter is notification of the Secretary of State’s decision in accordance with regulation 8 the 2011 Regulations.

Consultation

9. On 20 January 2022, the Secretary of State approved the Applicant’s request dated 28 October 2021, which was further clarified in their subsequent second letter dated 29 November 2022 and email of 13 January

2022, to not consult those consultees identified in Appendix 1 of their 16 November 2021 letter, in accordance with regulation 7(3) of the 2011 Regulations. This approval was subject to the Applicant also consulting those parties listed in their 29 November letter.

10. The Applicant publicised this Application in accordance with regulation 6 of the 2011 Regulations and, on 9 February 2022 and subject to the reduced consultation approved by the Secretary of State (outlined above), consulted the persons specified in regulation 7 of those Regulations in the manner prescribed. The deadline for receipt of representations on the Application was 21 March 2022.
11. The Application was made publicly available on the Planning Inspectorate website on 14 February 2022 for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations, and to provide anyone not notified of the Application the opportunity to also submit representations to the Planning Inspectorate.
12. Representations were received from Natural England and Net Zero Teesside Limited. Having considered these responses, the Secretary of State does not consider that further information needs to be provided by the Applicant nor that further consultation of those already consulted is necessary.

Consultation Responses

Net Zero Teesside Power Limited

13. Net Zero Teesside Power Limited (NZT Power) responded to confirm that whilst they and Net Zero North Sea Storage Limited have no objection in principle to the changes being sought by the Applicant, the Applicant should not prevent or unreasonably prejudice the ability to construct and operate the Net Zero Teesside Project, which is a DCO application currently being considered by the Examining Authority. Net Zero Power confirmed that it has engaged in regular discussions with the Applicant regarding the physical interfaces, potential interactions and potential overlaps that exist between the two projects. They also confirmed that both parties are actively working to deliver an agreement and protective provisions to ensure both projects can proceed unhindered and with certainty. Net Zero Power also confirmed that the change proposed by the Applicant to the 2016 Order does not appear to raise any additional issues to those already under consideration in relation to the Net Zero Teesside DCO.

Natural England

14. Natural England responded to confirm that the change proposed by the Applicant was considered not to have likely significant effects on the Teesmouth and Cleveland Coast Special Protection Area and Ramsar site, nor would it damage or destroy the interest features for which the Teesmouth and Cleveland Coast Site of Special Scientific Interest has been notified. Therefore Natural England had no objection.

The Secretary of State's Consideration of the Application

Consideration of the materiality of the proposed change

15. The Secretary of State has given consideration as to whether the Application is for a material or non-material change. In doing so, he has had regard to paragraph 2(2) of Schedule 6 to the Planning Act 2008 which requires the Secretary of State to consider the effect of the change on the 2016 Order.
16. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations.
17. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the then Department for Communities and Local Government, entitled the "Planning Act 2008: Guidance on Changes to Development Consent Orders" (December 2015) ("the Guidance"). Given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could possibly be proposed for a single project, the Guidance cannot, and does not attempt to, prescribe whether any particular type of change would be material or non material. However, it sets out that there may be certain characteristics that indicate whether a change to a consent is more likely to be treated as a material change, namely:
 - a) whether an update would be required to the Environmental Statement (from the time the original DCO was made) to take account of new, or materially different, likely significant effects on the environment;
 - b) whether there would be a need for a Habitats Regulations Assessment ("HRA"), or a need for a new or additional licence in respect of European Protected Species ("EPS");
 - c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the original DCO; or
 - d) whether the proposed change would have a potential impact on local people and business.
18. Although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the materiality of a change. Each case must depend on thorough consideration of its own circumstances.
19. The Secretary of State began his consideration of the materiality of the variation proposed by the Application by considering the four matters referred to in paragraph 17:

Environmental Impact Assessment

20. The Applicant supplied an Application Statement which detailed the nature of the proposed change and its implications. The Application Statement provided further environmental information which concludes the proposed change to the 2016 Order will not have any new or materially different likely significant effects from those already assessed in the Environmental Statement for the 2016 Order. In response to the consultation, no objections or concerns were raised by any party.

Impacts on road traffic

21. Given the requested change to requirement 5 of Schedule 2 to the 2016 Order, the Secretary of State has given particular consideration as to whether allowing improvement works to the A1085 roundabout after the Development commences will have effect impacts from traffic construction.
22. The Applicant's Application Statement states that the highway works relate to the western arm of the A1085 roundabout, and that these works are to enable construction traffic to enter the eastern part of the site to construct the conveyer system as it passes over the A1085. The construction works for the quay facilities will use an existing access to the Wilton Estate site using the southern arm of the roundabout.
23. The Secretary of State has reviewed the Environment Statement that was submitted in support of the 2016 Order and Appendix 1 in the Application Statement which assesses potential implications of the proposed change against the Environmental Statement. He notes that in the Environmental Statement, the accompanying framework Construction Traffic Management Plan sets out principles for construction phase traffic management. Requirement 7 of Schedule 2 to the 2016 Order, which requires the submission of a further Construction Traffic Management Plan, states that:

"None of the authorised development is to commence (excluding ecological mitigation or enhancement works referred to in the outline ecological management plan) until a Construction Traffic Management Plan ("CTMP") drafted in accordance with the principles set out in Appendix 12.3 of the environmental statement has been submitted to and approved by the local planning authority. The provisions of the approved CTMP must be observed at all times during the construction of the authorised development."

24. The Secretary of State is aware that the CTMP, which is to be submitted for approval by the local planning authority, will set out in more detail how construction management will be managed to ensure it does not compromise the safe and efficient operation of the local road network, nor create unacceptable levels of construction traffic. He is therefore satisfied that the requirement to submit the CTMP safeguards against any unacceptable traffic impacts from construction traffic that may result from the Application.

25. On 16 November 2021, the Secretary of State requested the Applicant to confirm whether carrying out the quay instruction works in advance of the highways works would change the conclusions of the Environmental Statement in terms of traffic impacts. On 29 November 2021, the Department received a response from the Applicant confirming that neither the deferral of the highway works nor the construction of the overhead conveyor will alter the conclusions in the Environmental Statement or the findings of the traffic impact assessment on which the environmental impact assessment was based.
26. The Applicant has also provided an assessment of the environmental implications of the proposed non-material change at Appendix A of the Application Statement. The Secretary of State notes that the local highways authority was consulted on the Application but did not respond to the Secretary of State's consultation. The Secretary of State is satisfied with the Applicant's analysis and that with the CTMP in place, has no reason to consider that the proposed change will generate construction traffic that would exceed the peak traffic demand as assessed in the original Environmental Statement.

Conclusion

27. The Secretary of State has considered the information provided by the Applicant and the views of consultees. The Secretary of State agrees with the Applicant's conclusion that there will not be any new or materially different likely significant effects when compared to the effects set out in the Environmental Statement for the Development authorised by 2016 Order, and as such considers that there is no requirement to update the Environmental Statement.

Habitats Regulation Assessment (“HRA”)

28. The Secretary of State notes the assessment in the Application Statement, that the proposed change will have no new impacts on habitats and protected species and the proposed change will not result in a need for a HRA or any new or additional licences for EPS and, additionally, that no concerns have been raised in relation to the Applicant's assessment by Natural England or any other consultee that could be attributed to a need for a HRA or for new or additional licences for EPS. Therefore, the Secretary of State is satisfied that a HRA is not required and is also satisfied that the proposed change does not bring about the need for new or additional licenses in respect of EPS as the amendments proposed are not anticipated to give rise to any new or different effects from an ecological perspective.

Compulsory Acquisition

29. The Secretary of State is satisfied that the proposed change does not result in any change to the compulsory acquisition provisions of the 2014 Order and he is satisfied that this does not raise any issues of materiality.

Impacts on local People

30. The Secretary of State notes that the Application Statement concludes that the proposed change will not result in any new (or different) impacts on local people and businesses that were not previously identified and addressed.

Period of construction

31. The Secretary of State notes that the Application Statement states that the construction period will be approximately 17 months (as set out in the original Environmental Statement for the 2016 Order), with the conveyor and associated development estimated to take 11 months within this programme period. He acknowledges that within the Applicant's 'Statement of Environmental Considerations' at Appendix 1 of their Application Statement, that they state that the construction of the quay works prior to the conveyor is not likely to extend the construction period.

32. The Secretary of State has no reason to disagree with the Applicant's conclusion that the proposed change does not entail any new or different impacts on local people and businesses.

Conclusion on Materiality

33. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance, or other relevant considerations, suggest that the amendment considered in this letter is a material change. He has also had regard to the effect of the change to consider whether there are any circumstances in this particular case which would lead him to conclude that the proposed change is material but has seen no evidence to that effect.

34. The Secretary of State is therefore satisfied that the amendment is not material and should be dealt with under the procedures for non-material changes.

General Considerations

Equality Act 2010

35. The Equality Act 2010 includes a public sector equality duty. This requires a public authority to have due regard in the exercise of its functions to the need: (a) to eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between people who share a protected characteristic (e.g. age, disability, gender reassignment, marriage and civil partnerships¹, pregnancy and maternity, race, religion and belief, sex and sexual orientation) and those who do not; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in section 149 of the Equality

¹ In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

Act, and is satisfied that there is no evidence that granting this Application will adversely affect the achievement of those objectives.

Section 40(1) of the Natural Environment and Rural Communities Act 2006

36. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting development consent. The Secretary of State is of the view that the Application considers biodiversity sufficiently to accord with this duty.

Secretary of State's conclusions and decision

37. The Secretary of State notes that the Applicant set out in their Application Statement that the design detail of the harbour is progressing well whilst consideration is still being given to the detailed development of the options for the conveyor. The Applicant has therefore stated that the earlier approval of the details of the harbour works by the relevant planning authority and commencement of this work, will allow a swifter start to the DCO scheme. This will mean progress on the quay can be made without waiting for details of the conveyor to be finalised, submitted and approved.
38. With regard to the Proposed Change to Requirement 5 of Schedule 2 to the DCO, the Applicant stated that the highway works are limited in nature and are required to enable construction traffic to enter the relevant part of the site to facilitate the construction of the conveyor. These works are therefore not needed for the construction of the harbour.
39. The Secretary of State has considered the ongoing need for the development and considers that the project continues to conform with the policy objectives set out in the National Policy Statement for Ports. The Secretary of State considers that the need for this Development remains as set out in his letter of 20 July 2016. The Secretary of State is also satisfied with the Applicant's reasoning for the requested change and that no party has questioned this.
40. The Secretary of State is content that the proposed amendment will not lead to any impacts on road traffic from construction vehicles that go beyond what was assessed for the 2016 Order, and is assured that through the CTMP the local planning authority can ensure there will be no unacceptable impacts from construction traffic. He also notes that no objections or concerns were raised by those that were consulted.
41. The Secretary of State has considered the nature of the proposed change, noting that it would have no additional significant environmental effect. He is satisfied that his conclusions set out in his decision letter of 20 July 2016 in this respect remain unchanged, and that no new powers of compulsory acquisition are sought through the Application.

42. The Secretary of State has considered the nature of the changes sought through this Application, noting that they would have no additional significant environmental effects, and the benefits of the changes in facilitating the deployment of the development authorised by the 2016 Order. He concludes that the changes considered in this letter are not material and that it would be appropriate and advantageous to authorise the proposed changes as detailed in this letter.
43. For the reasons set out above, the Secretary of State considers that there is a compelling case for authorising the changes considered in this letter to the 2016 Order. The Secretary of State has therefore decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make a non-material change to the 2016 Order so as to authorise the changes.

Modifications to the Applicant's draft Order

44. Minor drafting amendments have been made by the Secretary of State to the draft Order proposed by the Applicant. These changes do not materially alter the terms of the draft Order.

Challenge to decision

45. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

Publicity for decision

46. The Secretary of State's decision on this Application is being notified as required by regulation 8 of the 2011 Regulations.

Yours faithfully

Natasha Kopala

ANNEX

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118(5) of the Planning Act 2008, a decision under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a change to an Order granting development consent can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The Amendment Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/north-east/york-potash-harbour-facilities-order/>

These notes are provided for guidance only. A person who thinks they may have grounds for challenging this decision to make the Amendment Order referred to in this letter is advised to seek legal advice before taking any action. If you require advice on the process for making any challenge you should contact the Administrative Court Office at the Royal Courts of Justice, Strand, London, WC2A 2LL (020 7947 6655)