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Our ref: JLW/185618.1

1 November 2022

Dear Sir / Madam

**The Net Zero Teesside Project EN010103 (“the Project”)  
Deadline 12 Submission on behalf of Redcar Bulk Terminal Limited (“RBT”)**

We write on behalf of RBT further to their Deadline 11 submission [REP11-039].

The purpose of this submission is to update the Examining Authority as to progress made with the Applicant in agreeing Protective Provisions and the settling of a Side Agreement and its associated legal agreements.

At present the Side Agreement still needs further negotiation to reach agreement between the parties. This mainly concerns the need to reach an agreed position regarding indemnities given by the Applicant to RBT.

The associated legal agreements referred to within [REP11-039], being an Upgrade Works Agreement, Materials Handling Agreement, Option and Lease are still to be settled, although some progress is being made.

It is still intended between both parties that these negotiations will be concluded and the Side Agreement and its associated legal agreements will be settled prior to the end of the Examination.

However, given only 7 working days are left to achieve this prior to the end of the Examination, to protect its position RBT would request that the Examining Authority impose RBT’s version of the Protective Provisions provided within their Deadline 9 submission [REP9-034] on the version of the DCO to be recommended to the Secretary of State. These RBT preferred Protective Provisions are attached to this submission.

The Applicant has shared with us a mark-up copy of their preferred Protective Provisions for the event that the Side Agreement and associated agreements are not completed prior to the end of the Examination. A copy of the Applicant’s preferred Protective Provisions are attached to this submission and we understand these will be included within the Applicant’s Deadline 12 Finalised dDCO.

This version of the Applicant’s Protective Provisions is agreed between the parties with the exception of two changes still required in order for these to be acceptable to RBT. These are as follows:

- (1) A deletion and insertion of wording within paragraph 170 (1)(b):

*(b) make ~~reasonable~~ reasonable compensation to RBT for any other expenses, loss, damages, penalty or costs reasonably incurred by RBT (including, without limitation, all costs for the repair or replacement necessitated by physical damage), by reason or in consequence of any such damage or interruption or denial of any service provided by RBT.*

This is deleting the first “reasonable” and replace with “reasonably” as underlined. This is to make it clear that compensation that is reasonably incurred is due – rather than to deal with a concept of “reasonable compensation” for expenses, loss, damages, penalty or costs which leads to a far more uncertain outcome.

(2) A deletion of wording from paragraph 170 (3) as follows

*“(3) RBT must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker which must not be unreasonably withheld. which, if it withholds such consent, has the sole conduct of any settlement or compromise of any proceedings necessary to resist the claim or demand”.*

RBT strongly objects to this struck through wording and this should be deleted. This wording seeks that the Applicant will be able to take over any litigation conducted by RBT under this provision, should the Applicant not agree with any settlement or compromise that RBT reaches with a third party as a result of that litigation.

RBT is an existing business with close and ongoing commercial relationships with its customers and third parties. Given the likely scope of the wording above, any litigation could include these parties. RBT cannot risk these commercial relationships being jeopardised or destroyed by the Applicant in its taking over of the handling of any dispute proceedings, where RBT has otherwise reached agreement to settle it.

Although RBT will still continue to negotiate and seek the completion of the Side Agreement and its associated legal agreements after the end of the Examination, this still means that the Applicant has failed to complete a voluntary agreement with RBT prior to the close of the Examination. RBT's position is that Protective Provisions are a compromise and not as adequate as agreement of commercial arrangements which will treat the Applicant as any other paying customer using RBT's facilities and would avoid the use of powers under the Order.

RBT is a party whose interests will be impacted by both Compulsory Acquisition and Temporary Possession powers sought within the Order, which have the potential to seriously impact on RBT's operations and those of its lessees' and licensees.

As RBT has stated in their Deadline 11 submission [REP11-039], in default of the completion of the Side Agreement, RBT's position is as argued in within its Written Representation [REP2-095] and submissions at the previous ISH3 and CAH2, that Temporary Possession and Compulsory Acquisition powers should not be imposed over RBT interests.

Yours sincerely,

[Redacted signature]

[Redacted name]

## **RBT's PREFERRED PROTECTIVE PROVISIONS**

### **AS SUBMITTED AT DEADLINE 9 [REP9-034]**

#### **PART 14**

##### **FOR THE PROTECTION OF REDCAR BULK TERMINAL LIMITED**

157. For the protection of RBT, the following provisions have effect, unless otherwise agreed in writing between the undertaker and RBT.

158. In this Part of this Schedule—

“apparatus” means any mains, pipes, cables or other apparatus within the Order limits which provide water, electricity or electronic communications to the RBT operations together with any replacement of that apparatus pursuant to the Order;

“alternative access” means appropriate alternative road or rail access which enables RBT to access the RBT operations and RBT site in a manner no less efficiently than previously by means of RBT’s existing road or rail accesses;

“alternative apparatus” means appropriate alternative apparatus which enables water, electricity and electronic communications supply to be provided to the RBT operations in a manner no less efficiently than previously by existing apparatus;

“offloading procedure” means the procedure whereby the undertaker, its employees, contractors or sub-contractors are offloading materials, plant or machinery required for the authorised development at the wharf within the RBT site, such procedure to commence when the undertaker, its employees, contractors or sub-contractors have commenced docking the relevant vessel at the wharf for the purposes of such offloading;

“RBT” means Redcar Bulk Terminal Limited (Company number 07402297) and any successor in title or function to the RBT operations;

“the RBT operations” means the port business and other operations of RBT carried out upon the RBT site;

“the RBT site” means land and property within the Order limits, vested in RBT

“works details” means—

(a) plans and sections;

(b) details of the proposed method of working, management measures and locations on the RBT site;

(c) details of the timing of execution of works and any interference this may cause to the RBT operations;

(d) details of any management measures (including details of access routes for vehicles to undertake) that will be put in place to ensure that road and rail traffic is still able to access the RBT operations and the RBT site (unless it would be unsafe to do so in which case such details must provide details of how alternative access is to be provided);

(e) details of lifting and scheduling activities on the RBT site, including the programming and access requirements for any offloading procedures; and

(f) any further particulars provided in response to a request under paragraph 163.

### **Regulation of powers**

159. The undertaker must not exercise the powers granted under this Order so as to hinder or prevent the RBT operations, or access to the RBT site without the prior written consent of RBT.

160. Any approval of RBT required under paragraph 159 must not be unreasonably withheld or delayed but may be given subject to such reasonable requirements as RBT may require to be made for—

(a) the continuing safety and operational viability of the RBT operations

(b) the avoidance of commercial losses to the RBT operations;

and

(c) the requirement for RBT to have reasonable access to the RBT operations and the RBT site at all times.

161. Without limiting paragraph 160, it is not reasonable for RBT to give approval pursuant to paragraph 160 subject to requirements which restrict or interfere with the undertaker's access to the RBT site during an offloading procedure.

### **Interference with Apparatus and Access**

162. (1) If, in the exercise of the powers conferred by this Order, the undertaker requires that apparatus is removed, interrupted, severed or disconnected, that apparatus must not be removed, interrupted, severed or disconnected until details of the alternative apparatus have been approved by RBT and the alternative apparatus has been constructed at the undertaker's cost and is in operation to the satisfaction of RBT.

(2) The undertaker must ensure that RBT shall hold the same facilities and rights that it holds for the apparatus in respect of the alternative apparatus.

(3) Regardless of the temporary prohibition or restriction of use of streets under the powers conferred by article 13 (temporary stopping up of streets, public rights of way and access land), the undertaker shall ensure that the party responsible for any apparatus is at liberty at all times to take all necessary access across any such street and to execute and do all such works and things in, upon or under any such street as may be reasonably necessary or desirable to enable it to maintain any apparatus which at the time of the prohibition or restriction was in that street.

(4) The provisions of this paragraph do not apply to apparatus in respect of which the relations between the undertaker and the party responsible for the apparatus in question are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act.

(5) If the undertaker uses its powers under the Order to temporarily extinguish or permanently acquire any right of road or rail access which RBT benefits from the undertaker must provide at its own cost an alternative access prior to the extinguishment or acquisition

of that right of access and ensure that RBT shall hold the equivalent rights for that access in respect of an alternative access.

### **Consent under this Part**

163. Before commencing—

(a) any part of the authorised development which would have an effect on the RBT operations or access to them; or

(b) any activities on or to the RBT site,

the undertaker must submit to RBT the works details for the proposed works or activities and such further particulars as RBT may, not less than 28 days from the day on which the works details are submitted under this paragraph, reasonably require.

164. No—

(a) works comprising any part of the authorised development which would have an effect on the RBT operations or access to them; or

(b) activities on the RBT site, are to be commenced until the works details in respect of those works or activities submitted under paragraph 163 have been approved by RBT.

165. Any approval of RBT required under paragraph 164 must not be unreasonably withheld or delayed but may be given subject to such reasonable requirements as RBT may require to be made for—

(a) the continuing safety and operational viability of the RBT operations

(b) the avoidance of commercial losses to the RBT operations;

and

(c) the requirement for RBT to have reasonable access to the RBT site at all times.

166. Without limiting paragraph 165, it is not reasonable for RBT to give approval pursuant to paragraph 165 subject to requirements which restrict or interfere with the undertaker's access to the wharf and roadways within the RBT site during an offloading procedure.

167.—

(1) The authorised development and activities on the wharf and roadways within the RBT site must be carried out in accordance with the works details approved under paragraph 164 and any requirements imposed on the approval under paragraph 165.

(2) Where there has been a reference to an arbitrator in accordance with paragraph 171 and the arbitrator gives approval for the works details, the authorised development and activities on the wharf and roadways within the RBT site must be carried out in accordance with the approval and conditions contained in the decision of the arbitrator under paragraph 171.

### **Co-operation**

168. Insofar as the construction of any part of the authorised development or activities on the wharf and roadways within the RBT site, and the operation or maintenance of the RBT

operations or access to them would have an effect on each other, the undertaker and RBT must—

(a) co-operate with each other with a view to ensuring—

(i) the co-ordination of activities and programming to allow the authorised development, the undertaker's activities on the wharf and the roadways within the RBT site (including offloading procedures) and the RBT operations to continue;

(ii) that reasonable access for the purposes of constructing the authorised development and the undertaker's activities on the wharf and the roadways within the RBT site (including offloading procedures) is maintained for the undertaker, its employees, contractors and sub-contractors; and

(iii) that operation of the RBT operations and access to the RBT site is maintained for RBT at all times; and

(b) use reasonable endeavours to avoid any conflict arising from the carrying out of the RBT operations, the construction of the authorised development and the undertaker's activities on the wharf and roadways within the RBT site (including offloading procedures).

169. The undertaker must pay to RBT—

(a) a cost agreed with RBT for the daily use of the RBT site and RBT services in consequence of the construction of any works referred to in paragraph 163 and use of the RBT site by the undertaker; and

(b) the reasonable costs and expenses incurred by RBT in connection with the approval of plans, inspection and approval of any works details.

### **Indemnity**

170.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any of the works referred to in paragraph 163 or by the use of the RBT site by the undertaker any damage is caused to the RBT site (including the wharf, roadways, any RBT buildings, plant or machinery on the RBT site) or to the RBT operations, or there is any interruption in any service provided, or in the provision by RBT or denial of any services, or in any loss of service from apparatus that is affected by the authorised development the undertaker must—

(a) bear and pay the cost reasonably incurred by RBT in making good such damage or restoring the provision by RBT of any services; and

(b) make compensation to RBT for any other expenses, loss, damages, penalty or costs reasonably incurred by RBT (including, without limitation, all costs for the repair or replacement necessitated by physical damage), by reason or in consequence of any such damage or interruption or denial of any service provided by RBT.

(2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of RBT, its officers, employees, servants, contractors or agents.

(3) RBT must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker which must not be unreasonably withheld.

(4) RBT must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 170 applies. If requested to do so by the undertaker, RBT must provide a reasonable explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1). The undertaker shall only be liable under this paragraph 170 for claims reasonably incurred by RBT.

### **Arbitration**

171. Any difference or dispute arising between the undertaker and RBT under this Part of this Schedule must, unless otherwise agreed in writing between the undertaker and RBT, be referred to and settled by arbitration in accordance with article 47 (arbitration).

**THE APPLICANT'S PREFERRED RBT PROTECTIVE PROVISIONS**

**PROVIDED TO RBT ON 28 OCTOBER 2022**

**PART 14**

**FOR THE PROTECTION OF REDCAR BULK TERMINAL LIMITED**

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“RBT” means Redcar Bulk Terminal Limited (Company number 07402297) and any successor in title or function to the RBT operations;

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“works details” means—

(a) plans and sections;

(b) details of the proposed method of working, management measures and locations on the RBT site;

(c) details of the timing of execution of works and any interference this may cause to the RBT operations;

(d) details of any management measures (including details of access routes for vehicles to undertake) that will be put in place to ensure that road and rail traffic is still able to access the RBT operations and the RBT site (unless it would be unsafe to do so in which case such details must provide details of how alternative access is to be provided);



(e) details of lifting and scheduling activities on the RBT site, including the programming and access requirements for any offloading procedures; and

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161. Without limiting paragraph 160, it is not reasonable for RBT to give approval pursuant to paragraph 160 subject to requirements which restrict or interfere with the undertaker's access to the RBT site during an offloading procedure.

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(4) The provisions of this paragraph do not apply to apparatus in respect of which the relations between the undertaker and the party responsible for the apparatus in question are regulated by the provisions of Part 3 (street works in England and Wales) of the 1991 Act.

(5) If the undertaker uses its powers under the Order to temporarily extinguish or permanently acquire any right of road or rail access which RBT benefits from the undertaker must provide at its own cost an alternative access prior to the extinguishment or acquisition of that right of access and ensure that RBT shall hold the equivalent rights for that access in respect of an alternative access.

## **Consent under this Part**

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(1) The authorised development and activities on the wharf and roadways within the RBT site must be carried out in accordance with the works details approved under paragraph 164 and any requirements imposed on the approval under paragraph 165.

(2) Where there has been a reference to an arbitrator in accordance with paragraph 171 and the arbitrator gives approval for the works details, the authorised development and activities on the wharf and roadways within the RBT site must be carried out in accordance with the approval and conditions contained in the decision of the arbitrator under paragraph 171.

## **Co-operation**

168. Insofar as the construction of any part of the authorised development or activities on the wharf and roadways within the RBT site, and the operation or maintenance of the RBT operations or access to them would have an effect on each other, the undertaker and RBT must—

(a) co-operate with each other with a view to ensuring—

(i) the co-ordination of activities and programming to allow the authorised development, the undertaker's activities on the wharf and the roadways within the RBT site (including offloading procedures) and the RBT operations to continue;

(ii) that reasonable access for the purposes of constructing the authorised development and the undertaker's activities on the wharf and the roadways within the RBT site (including offloading procedures) is maintained for the undertaker, its employees, contractors and sub-contractors; and

(iii) that operation of the RBT operations and access to the RBT site is maintained for RBT at all times; and

(b) use reasonable endeavours to avoid any conflict arising from the carrying out of the RBT operations, the construction of the authorised development and the undertaker's activities on the wharf and roadways within the RBT site (including offloading procedures).

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(b) the reasonable costs and expenses incurred by RBT in connection with the approval of plans, inspection and approval of any works details.

### **Indemnity**

170.—(1) Subject to sub-paragraphs (2) and (3), if by reason or in consequence of the construction of any of the works referred to in paragraph 163 or by the use of the RBT site by the undertaker any damage is caused to the RBT site (including the wharf, roadways, any RBT buildings, plant or machinery on the RBT site) or to the RBT operations, or there is any interruption in any service provided, or in the provision by RBT or denial of any services, or in any loss of service from apparatus that is affected by the authorised development the undertaker must—

(a) bear and pay the cost reasonably incurred by RBT in making good such damage or restoring the provision by RBT of any services; and

(b) make reasonable compensation to RBT for any other expenses, loss, damages, penalty or costs incurred by RBT (including, without limitation, all costs for the repair or replacement necessitated by physical damage), by reason or in consequence of any such damage or interruption or denial of any service provided by RBT.

(2) Nothing in sub-paragraph (1) imposes any liability on the undertaker with respect to any damage or interruption to the extent that it is attributable to the act, neglect or default of RBT, its officers, employees, servants, contractors or agents.

(3) RBT must give the undertaker reasonable notice of any such claim or demand and no settlement or compromise is to be made without the consent of the undertaker which must not be unreasonably withheld [which, if it withholds such consent, has the sole conduct of any settlement or compromise of any proceedings necessary to resist the claim or demand].

(4) RBT must use its reasonable endeavours to mitigate in whole or in part and to minimise any costs, expenses, loss, demands, and penalties to which the indemnity under this paragraph 170 applies. If requested to do so by the undertaker, RBT must provide a

reasonable explanation of how the claim has been minimised or details to substantiate any cost or compensation claimed pursuant to sub-paragraph (1). The undertaker shall only be liable under this paragraph 170 for claims reasonably incurred by RBT.

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