

**APPENDIX 1****YORK POTASH HARBOUR FACILITIES ORDER – NETWORK RAIL****Section 127 PLANNING ACT 2008**

1. This note addresses the situation relating to the relevant representation which was submitted on behalf of Network Rail Infrastructure Ltd (Network Rail) in respect of the above Order which in the course of its Examination. It follows a discussion of the position of Network Rail at the CA Hearing held on 24 September 2015.
2. Network Rail did not submit any representation within the requisite time period but made late representations which were accepted by the Examining Authority.
3. Network Rail being a statutory undertaker, has a certain protection under the Planning Act 2008. If the representation submitted by Network Rail is not withdrawn then the Secretary of State may only grant an Order authorising the compulsory acquisition in respect of Network Rail's interests if the provisions of section 127 of the Planning Act 2008 are satisfied.
4. In relation to the acquisition of rights only (which is what is proposed in the Order) Section 127 (5) and (6) apply. They state as follows:-
  - (5) *An order granting development consent may include provision authorising the compulsory acquisition of a right over statutory undertaker's land by the creation of a new right over land only to the extent that the Secretary of State is satisfied of the matters set out in subsection (6).*
  - (6) *The matters are that the nature and situation of the land are such that:-*
    - (a) *the right can be purchased without serious detriment to the carrying on of the undertaking, or*
    - (b) *any detriment to the carrying on of the undertaking, in consequence of the acquisition of the right, can be made good by the undertakers by the use of other land belonging to or available for acquisition by them."*
5. Provided that the Secretary of State is satisfied in relation to the above matters then there is no barrier to the Order, containing the compulsory acquisition of the rights that we are envisaging, being approved by the Secretary of State.
6. The applicant has been attempting to agree with Network Rail the terms of an easement for the conveyor to pass over the rail line. The applicant has been in contact with Network Rail in this regard since 2013. Whilst the parties have not been able to agree commercial terms the Applicant agreed to include Network Rail's standard protective provisions in the draft order submitted with the application on the understanding that this would protect Network Rail's position when commercial terms were agreed.
7. In its late representation Network Rail stated:

*"Prior to submission of the application, Network Rail was in contact with the promoter regarding the appropriate form that these [protective] provisions should take and is pleased to see that these have been incorporated within the draft Order. Network Rail would like to highlight to the Examining Authority the absolute need for these protective provisions to remain included in a DCO where Network Rail's operational infrastructure is affected by the proposal"*
8. The only change made by the Applicant to the agreed protective provisions (in the second version of the Order submitted on 7 September 2015 (Document 4.1A)) was to delete the provision which prevented the Applicant utilising the CA powers in respect of granting a right to overfly the conveyor. This was because there had been a failure to reach agreement on commercial terms with Network Rail by that point and there is no confidence that such agreement will necessarily be reached.

9. Network Rail have confirmed to the Examining Authority that the protective provisions proposed are agreed (with the exception only of the compulsory acquisition power) and adequately protect its interest. Given that position, it would not now be credible for Network Rail to assert that there would be "*serious detriment*" to their undertaking. Accordingly the Applicant is confident that, if asked, the Secretary of State will approve the compulsory acquisition rights sought in respect of Network Rail since there is no basis for him not to do so.
10. Given the nature of the representations already made to the Examining Authority by Network Rail it will be readily apparent that it is very difficult, if not impossible, for Network Rail to argue that subsections (5) and (6) of Section 127 are not satisfied.
11. Failure to agree on the quantum in a commercial arrangement is not relevant to the decision whether or not S.127 has been satisfied or whether or not to approve a DCO.