

THE YORK POTASH HARBOUR FACILITIES ORDER 201X

Draft Development Consent Obligation



Regulation Number 5(2)(q)

Document 7.4A

August 2015



Dated: 2015

- (1) The Council of the Borough of Redcar and Cleveland
- (2) The Homes and Communities Agency
- (3) York Potash Processing & Ports Limited

Development Consent Obligation

Made pursuant to Section 106 Town and Country Planning Act 1990 relating to York Potash Harbour Facilities

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DRAFT

THIS AGREEMENT is made on

date here 2015

BETWEEN

- (1) **THE COUNCIL OF THE BOROUGH OF REDCAR AND CLEVELAND** of Redcar and Cleveland House, Kirkleatham Street, Redcar, Yorkshire TS10 1RT ("RCBC");
- (2) **THE HOMES AND COMMUNITIES AGENCY** care of Legal Services Arpley House 110 Birchwood Boulevard Warrington WA3 7QH ("the Owner"); and
- (3) **YORK POTASH PROCESSING AND PORTS LIMITED** (Company Registration Number 08270855) whose registered office is situate at 3rd Floor Greener House, 66-68 Haymarket, London, SW1Y 4RF ("YPPPL")

BACKGROUND

- (A) The Developer submitted the Application to obtain authorisation for the Development in the form of the DCO and the Application was accepted by the Planning Inspectorate under section 55 of the 2008 Act on 21 April 2015.
- (B) The Owner is the registered proprietor of the Obligation Land.
- (C) YPPPL has an option to purchase the Obligation Land.
- (D) The Developer intends to construct and operate the Development authorised by the DCO.
- (E) The Owner and YPPPL have entered into this Agreement in order to ensure that the Development is subject to obligations which bind the Obligation Land and are planning obligations for the purposes of the Section 106 of the 1990 Act.

OPERATIVE PROVISIONS

1. Definitions and Interpretation

- 1.1 In this Agreement the following expressions shall have the following meanings:-

"the 1990 Act"	the Town & Country Planning Act 1990;
"the 2008 Act"	the Planning Act 2008;
"Application"	the application made pursuant to section 37 of the 2008 Act for the DCO to authorise the Development;
"Biodiversity Offset Contribution"	the sum payable pursuant to paragraph 6. of Schedule 1;

**“Commencement
Development”**

of the earliest date on which any of the material operations (as defined by Section 56(4) of the 1990 Act) pursuant to the implementation of the Development is begun save that irrespective of the provisions of Section 56(4) of the 1990 Act none of the following operations shall constitute a material operation for the purposes of constituting Commencement of Development:-

- (a) trial holes or other operations to establish the ground conditions, site survey work, or works of remediation;
- (b) archaeological investigations;
- (c) any works of demolition or site clearance;
- (d) any structural planting or landscaping works;
- (e) ecological or nature conservation works associated with the Development;
- (f) construction of boundary fencing or hoardings;
- (g) construction of access or highway works (including drainage and media);
- (h) any other preparatory works agreed in writing with RCBC; and

“Commence Development” and “Commenced Development” shall be construed accordingly;

**“Community
Environmental
Contribution”**

the sums payable pursuant to paragraph 1. of Schedule 1;

**“Community
Environmental Purposes”**

the carrying out of schemes within the Borough of Redcar for the purposes of enhancing the environment;

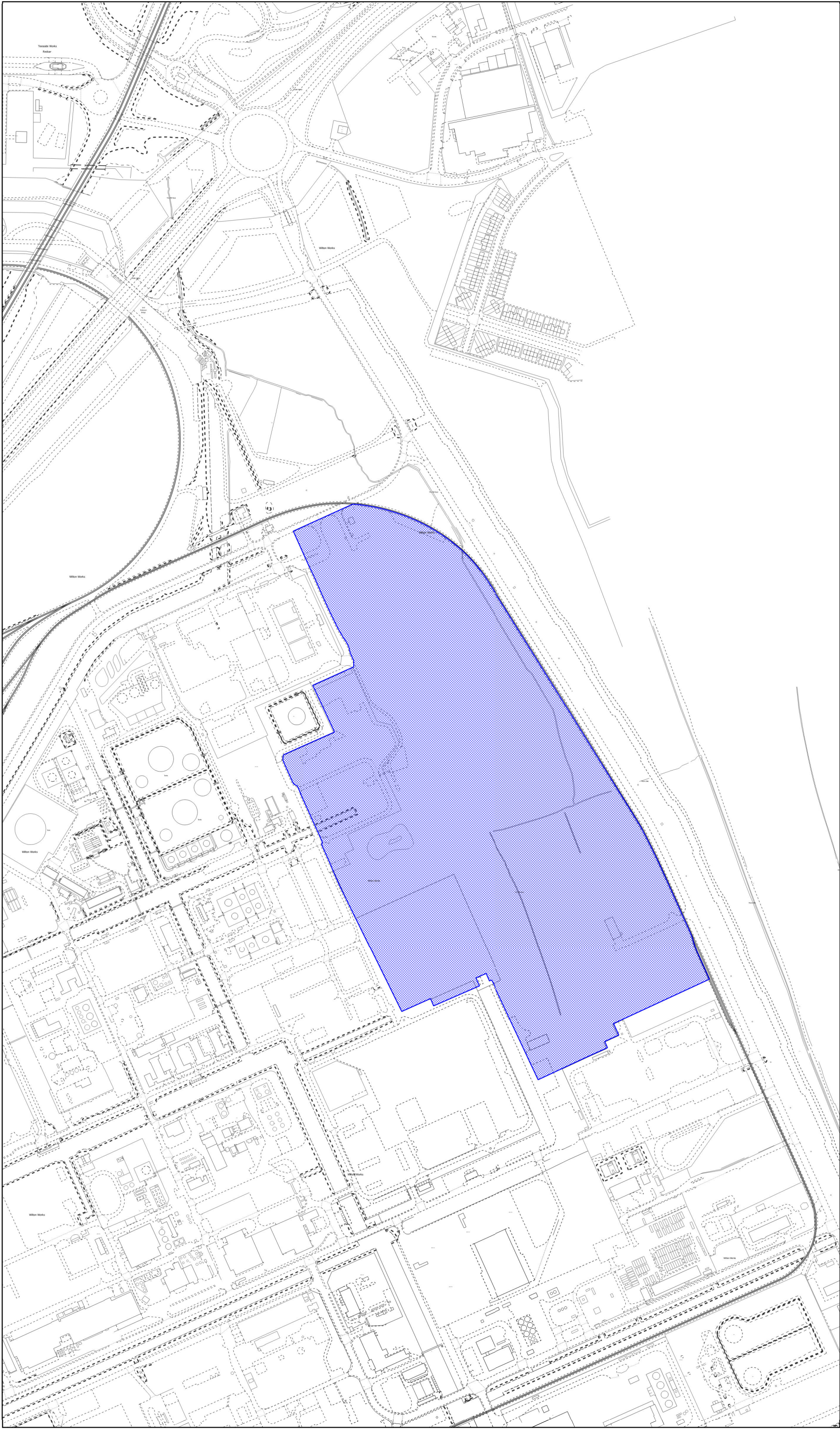
“DCO”

the development consent order to be made under the 2008 Act pursuant to the Application;

“Developer”

York Potash Limited (Company Registration Number 07251600);

"Development"		the works described in Schedule 1 of the DCO;
"Foxrush Farm"		the woodland area and car park;
"Foxrush Farm Car Park Contribution"		the sum payable pursuant to paragraph 3. of Schedule 1;
"Foxrush Farm Drainage Contribution"		means the sum payable pursuant to paragraph 2. of Schedule 1;
"Gateway Contribution"		the sum payable pursuant to paragraph 4. of Schedule 1;
"Obligation Land"		that part of the Site shown coloured blue on the Plan registered at the Land Registry under title numbers CE216413 and CE169990;
"Index Linked"		means adjusted in accordance with clause 2.17;
"Plan"		the plan attached hereto and marked as such; and
"Portrack Marsh Contribution"	Marsh	the sum payable pursuant to paragraph 5. of Schedule 1.
"Portrack Marsh Expenditure"	Marsh	expenditure comprising the cost of the Portrack Marsh Habitat Improvements including the cost of obtaining any necessary consents for such works and the cost of designing, supervising and carrying out the works
"Portrack Marsh Habitat Improvements"		works to create intertidal habitat at Portrack Marsh Nature Reserve by up to 8 hectares
"Tees Estuary Habitat Strategy"	Habitat	a strategy to identify the habitat protection and enhancement opportunities and priorities in the Tees Valley Estuary; to be produced by the Tees Valley Local Nature Partnership
"Tees Valley Local Nature Partnership"		the Tees Valley wide partnership comprising environmental organisations, local authorities and government agencies in response to the Natural Environment White Paper 2011 and recognised by the Government in 2012



Notes:



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Client

York Potash Ltd

Job title

Wilton Works

Section 106 Plan (Mine/
MTS)

Scale at A3: 1:5,000

Plan No: Y5135-0102M-WIL-1 Rev 0

- 1.2 The expressions "RCBC" "the Owner" and YPPPL shall where the context so admits include its respective successors and assigns and in the case of RCBC the successors to its statutory functions.
- 1.3 References in this Agreement to any statutes or statutory instruments shall include and refer to any statute or statutory instrument amending consolidating or replacing them respectively from time to time and for the time being in force.
- 1.4 Words in this Agreement importing the singular meaning shall where the context so admits include the plural meaning and vice versa.
- 1.5 Words in this Agreement of the masculine gender shall include the feminine and neuter genders and vice versa and words denoting natural persons shall include corporations and vice versa.
- 1.6 Where in this Agreement reference is made to a Clause or Schedule such reference (unless the context otherwise requires) is a reference to a Clause or Schedule of this Agreement.

2. General Provisions

Statutory Authority

- 2.1 The obligations in clauses 3 and 4 of this Agreement are planning obligations and are made pursuant to S106 of the 1990 Act.
- 2.2 The obligations in clause 3 and Schedule 1 of this Agreement bind the Obligation Land and are enforceable by RCBC.

Liability

- 2.3 The parties hereto agree that no person shall be liable for breach or non-performance of any covenant contained in this Agreement after he shall have parted with all his interest in the Obligation Land or the part of it in respect of which such breach or non-performance occurs but without prejudice to liability for any subsisting breach prior to parting with such interest.
- 2.4 YPPPL has the benefit of option agreements dated 1 March 2013 and 2 October 2014 to purchase the Obligation Land and signifies its consent to the Obligation Land being bound by the terms of this Agreement and for the avoidance of doubt YPPPL shall not be liable in respect of any obligations made on behalf of the Owner herein unless and until it takes possession of any part of the Obligation Land.
- 2.5 Nothing in this Agreement shall prohibit or limit the right to develop any part of the Obligation Land in accordance with a planning permission granted (whether or not on appeal) after the date of this Agreement in respect of which development this Agreement will not apply.

Contingencies

- 2.6 The obligations contained in Clause 3 and Schedule 1 to this Agreement shall take effect only on the Commencement of Development.
- 2.7 In the event of the DCO being quashed, cancelled, revoked or expiring prior to Commencement of Development the obligations under this Agreement shall cease absolutely and RCBC shall procure that any entry referring to this Agreement in the Register of Local Land Charges shall be removed forthwith.

Determination by Expert

- 2.8 Notwithstanding any specific provision in this Agreement in the event of any dispute between the parties concerning this Agreement including any dispute as to whether or not an obligation has been performed or matter to be agreed under any of the provisions of this Agreement the matter may at the written option of any relevant party (notice of which shall be given to the other party or parties) be referred to such expert as they may agree or (in default of agreement within 20 working days of the date of giving of the notice) appointed by the Chairman for the time being of the Planning and Environment Bar Association whose appointment shall be conducted on the following terms:
- 2.8.1 The person to be appointed pursuant to Clause 2.8 shall if possible be a person having fifteen years or more relevant post-qualification experience of the issue in dispute and projects comprising works of the scale and nature of the Development and of the particular issue in dispute.
- 2.8.2 The reference to the expert shall be on terms that:
- 2.8.2.1 the expert shall afford the parties to the dispute an opportunity to make representations to him/her in writing and if he/she so directs to make submissions on one another's representation;
- 2.8.2.2 the expert shall be able to stipulate periods of time for the making of such submissions and representations;
- 2.8.2.3 the expert shall be bound to have regard to the said submissions and representations;
- 2.8.2.4 the expert shall have the power to award the costs of the determination in favour of either party at the expense of the other in the event that the expert shall consider that the said other party has acted unreasonably and the extent of the costs awarded shall reflect the extent and effect of said unreasonable behaviour;

2.8.2.5 the expert shall be limited in his findings to the proposals put by either party or a proposal falling between both of them; and

2.8.2.6 the findings of the expert shall save in the case of manifest material error be final and binding on the parties save that the parties retain the right to refer to the Courts on a matter of law.

Time Periods

2.9 It is agreed between the parties that any of the periods specified in the Agreement may be extended by mutual agreement in writing between the parties **SAVE THAT** any party to this Agreement who requires time to be of the essence in respect of any period extended shall serve notice on any other relevant party stating that time is of the essence in relation to any time period so extended.

Notices

2.10 The service of notices and communications pursuant to this Agreement shall be sent to the addressee at the address stated in this Agreement or at such other address as the addressee shall have notified to the others in writing.

2.11 Notices and communications under this Agreement may be sent by personal delivery or by First Class Post (recorded delivery) and any notice or communication sent by First Class Post (recorded delivery) and correctly addressed shall be conclusively deemed to have been received by the addressee on the second business day following the date of posting.

Exclusion of the Contracts (Rights of Third Parties) Act 1999

2.12 Nothing herein contained or implied shall give or be construed as giving rights, privileges, powers or enforceability other than to the specific parties executing this document and their successors (if any) as defined herein and the provisions of the Contracts (Rights of Third Parties) Act 1999 and any benefits or rights which could arise therefrom are expressly excluded to the intent that no third party within the meaning of that Act shall have any rights of enforcement in respect of any matter herein contained.

Void Provisions

2.13 If any provision of this Agreement is declared by any judicial or other competent authority to be void voidable illegal or otherwise unenforceable the remaining provisions of this Agreement shall continue in full force and effect and the parties shall amend that provision in such reasonable manner as achieves the intention of the parties without illegality provided that any party may seek the consent of the other or others to the termination of this Agreement on such terms as may in all the circumstances be reasonable if the effect of the forgoing provisions would be to defeat the original intention of the parties.

No Fetter of Discretion

- 2.14 Save as permitted by law nothing contained or implied in this Agreement shall prejudice or affect the rights powers duties and obligations of RCBC in their rights powers duties and obligations under all public and private statutes bylaws and regulations which may be as fully and effectually exercised as if RCBC were not a party to this Agreement.

Effect of any Waiver

- 2.15 No waiver (whether express or implied) by RCBC of any breach or default by the Owner in performing or observing any of the terms or conditions of this Agreement shall constitute a continuing waiver and no such waiver shall prevent RCBC from enforcing any of the said terms or conditions or from acting upon any subsequent breach or default in respect thereof by the Owner.

General Requirement to Co-operate

- 2.16 Without prejudice to its statutory duties RCBC and the Owner shall all act in good faith and shall co-operate with each other to facilitate the discharge and performance of the obligations of the other contained within this Agreement within the timescales specified.

Indexation

- 2.17 Where payments are identified as being Index Linked in this Agreement then such sums shall be adjusted by applying the All Items Retail Prices Index as published by the Office of National Statistics (or any successor thereof) including any applicable local or regional waiting from date of this Agreement to the date of payment.

Interest

- 2.18 Where any payment or part payment which the parties hereto are obliged to pay or repay pursuant to the provisions of this Agreement is not paid on the date upon which the obligation to make such a payment falls due then interest at 4% above the base rate of HSBC Bank Plc from time to time calculated on a daily basis shall be added to the outstanding balance of the payment from the date on which the payment or part payment became due until the date of receipt of the payment or part payment.

3. THE OWNER'S PLANNING OBLIGATIONS

- 3.1 The Owner covenants with RCBC to comply with the obligations contained in Schedule 1.

4. RCBC'S COVENANTS

- 4.1 RCBC covenant with the Owner to comply with the obligations set out in Schedule 2.

SCHEDULE 1

Community Environmental Fund

1. To pay the Community Environmental Fund Contribution to RCBC as follows:
 - 1.1 TEN THOUSAND POUNDS Index Linked within 28 days of the Commencement of Development; and
 - 1.2 TEN THOUSAND POUNDS Index Linked on the first, second, third and fourth anniversary of the Commencement of Development.

Foxrush Farm Drainage Contribution

2. To pay the sum of FIVE THOUSAND POUNDS Index Linked to RCBC within 28 days of the Commencement of Development

Foxrush Farm Car Park Contribution

3. To pay the sum of THIRTY THOUSAND POUNDS Index Linked to RCBC within 28 days of the Commencement of Development

Gateway Contribution

4. To pay the sum of TWO HUNDRED AND FIFTEEN THOUSAND POUNDS to RCBC within 28 days of the Commencement of Development or receipt from RCBC of details of the purposes to which the monies are to be put whichever is the later which purposes shall accord with the purposes set out in paragraph 1.4 of Schedule 2

Portrack Marsh Contribution

5. To make available a maximum of TWO HUNDRED THOUSAND POUNDS to RCBC (for onward payment to the Tees Valley Wildlife Trust in accordance with paragraphs 1.5 and 1.9 of Schedule 2) within 28 days of the Commencement of Development or receipt by YPPPL from the Tees Valley Wildlife Trust of notice that any Portrack Marsh Expenditure is about to be incurred whichever is the later

Biodiversity Offsetting Contribution

6. To pay of FIFTY THOUSAND POUNDS to RCBC (for onward payment to the Tees Valley Local Nature Partnership in accordance with paragraphs 1.6 and 1.10 of Schedule 2) within 28 days of the Commencement of Development or receipt by YPPPL from the Tees Valley Local Nature Partnership of the commencement of the production of the Tees Estuary Habitat Strategy whichever is the later

SCHEDULE 2

1. RCBC covenants with the Owner as follows:
 - 1.1 To use the Community Environmental Contribution for the Community Environmental Purposes and for no other purposes whatsoever.
 - 1.2 To use the Foxrush Farm Drainage Contribution for the purposes of drainage works to alleviate flooding in the vicinity of the Obligation Land and for no other purposes whatsoever.
 - 1.3 To use the Foxrush Farm Car Park Contribution for the purposes of re-surfacing and extending the Foxrush Farm car park and for no other purposes whatsoever
 - 1.4 To use the Gateway Contribution to fund enhancements to the public realm and landscaping in the vicinity of Dormanstown, being a gateway to Redcar and for no other purposes whatsoever.
 - 1.5 Subject to paragraph 1.9 below to pay the Portrack Marsh Contribution to the Tees Valley Wildlife Trust for the Portrack Marsh Habitat Improvements and for no other purposes whatsoever.
 - 1.6 Subject to paragraph 1.10 below to pay the Biodiversity Offsetting Contribution to the Tees Valley Local Nature Partnership for the purpose of funding the production and implementation of the Tees Estuary Habitat Strategy and for no other purposes whatsoever.
 - 1.7 To repay to the Owner any unexpended monies paid to RCBC pursuant to paragraphs 1 to 4 in Schedule 1 along with interest thereon at the expiration of 5 years from the date of payment such payment to be made within two months of the expiry of the aforesaid 5 year period in respect of which period time shall be of the essence.
 - 1.8 To provide full and precise details of the expenditure of all monies paid pursuant to each of the obligations in this Agreement to RCBC for the use of RCBC to the Owner which details shall be provided to the Owner within 28 days following receipt of a request for the same from the Owner and provided that no more than 4 requests shall be made in any calendar year.
 - 1.9 Not to pay any monies to the Tees Valley Wildlife Trust pursuant to paragraph 1.5 above until the Trust has committed to utilise the monies solely for the Portrack Marsh Habitat Improvements and committed to repay to the Owner any unexpended monies paid to the Trust by RCBC pursuant to the obligation in paragraph 5 of Schedule 1 along with interest thereon at the expiration of 5 years from the date of payment to RCBC such repayment to be within two months of the expiry of the aforesaid 5 year period in respect of which period time shall be of the essence.

1.10 Not to pay any monies to the Tees Valley Local Nature Partnership pursuant to paragraph 1.6 above until the Partnership has committed to utilise the monies solely for the production and implementation of the Tees Estuary Habitat Strategy and committed to repay to the Owner any unexpended monies paid to the Partnership by RCBC pursuant to the obligation in paragraph 1.6 of Schedule 1 along with interest thereon at the expiration of 5 years from the date of payment to RCBC such repayment to be within two months of the expiry of the aforesaid 5 year period in respect of which period time shall be of the essence.

IN WITNESS whereof the parties hereto have executed this Agreement as a Deed on the date first above written

THE COMMON SEAL OF **THE COUNCIL
OF THE BOROUGH OF REDCAR AND
CLEVELAND** was hereunto affixed)
)
)

in the presence of: -

Authorised Signatory

Authorised Signatory

THE COMMON SEAL OF **THE HOMES
AND COMMUNITIES AGENCY**
was hereunto affixed in the presence of: -)
)
)

Authorised Signatory

Print Name:

SIGNED AS A DEED on behalf of)
YORK POTASH PROCESSING & PORTS)
LIMITED by two directors or one director)
and its company secretary)

Director

Director/Secretary