

## **YORK POTASH LIMITED**

### **PROPOSED APPLICATION FOR A POTASH MINE**

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#### **OPINION**

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#### **INTRODUCTION**

1. YPL is seeking to build a new mine which will require a Mine Head to be within the boundaries of the North York Moors National Park. The proposal envisages the sinking of shafts within the boundaries of the National Park, extraction from between one and three seams of potassium salts both onshore and offshore, the transport of that ore via a new pipeline to a remote processing plant situated at Teesside and the subsequent distribution of the unrefined and refined products including various potassium and magnesium fertilizer products and plaster grade gypsum.
2. There is currently one mine in the UK which produces potassium salts, the Boulby Mine. According to the British Geological Survey

and the Minerals Yearbook 2011, the Boulby Mine sells approximately half of its production in the UK whilst the other half is exported. The remaining demand in the UK is met by imports from abroad (Germany and Canada).

3. It is without doubt an important project for a number of reasons.
4. I am asked to advise both generally and in respect of specific questions which arise from the Development Plan and the National Planning Policy Framework (“the Framework”).
5. I deal with the Development Plan and the Framework generally, then turn to the particular questions which are set out at 20.4.1 to 20.4.7 in my Instructions.

#### **THE DEVELOPMENT PLAN**

6. The Development Plan comprises the Yorkshire and Humber Regional Strategy to 2026 and the North York Moors National Park Authority Core Strategy Development Policies (November 2008).
7. The Development Plan is to be read as a whole. It is inappropriate, and indeed unlawful, to alight upon one or two particular policies, to

the complete exclusion of the remainder of the Plan. However, it is plain that two policies in the Development Plan have some particular relevance in the context of minerals development.

8. The minerals policy for the region is set out in Policy ENV4 of The Yorkshire and Humber Plan Regional Spatial Strategy to 2026 :

*“A. Plans, strategies, investment decisions and programmes should safeguard mineral deposits in the region, including aggregates (sand, gravel, limestone and sandstone), silica sand, coal, clay, brick earth, chalk and potash, from sterilisation by other types of development and provide for an adequate and steady supply of minerals.*

*B. The Region will maximise the use of secondary and recycled aggregates to reduce dependency on primary extraction.*

*C. Mineral Planning Authorities should:*

*1. Maximise the contribution by substitute and secondary materials wherever possible, and facilitate sites and operations (including those to blend secondary and primary aggregates, reprocessing and the transfer of materials), especially in West Yorkshire*

2. *Make provision for the sub regional apportionments as set out in Table 10.1 and endeavour to maintain a landbank for all nationally and regionally significant minerals*
  3. *Seek a progressive reduction in aggregate production from National Parks and Areas of Outstanding Natural Beauty, noting that there is no strategic justification for the provision of any new crushed rock sites within these areas within the Plan period”*
9. So far as the Core Strategy is concerned, Core Policy E addresses minerals development. It admits of mineral extraction to enable the provision of materials necessary for preserving traditional buildings and for maintaining and enhancing the character of settlements. Plainly, the application proposal does not fall within the ambit of that approach. The policy goes on to state:
- “All other minerals developments will be considered against the major development tests. The continued extraction of potash at Boulby will be permitted provided that any detrimental effect on the environment, landscape or residential or visitor amenity is not unacceptable in the context of any overriding need for the development.”*

10. As those instructing point out, the explanatory text goes on to state:

*“The policy approach for Boulby is established out of the recognised national need for potash. Proposals in respect of potash extraction at Boulby will therefore be dealt with differently and will be considered against the general policies within the Core Strategy and Development Policies.”*

11. The reference to major development tests is a reference to Circular 12/96. It is now effectively incorporated into the Core Strategy<sup>1</sup>:

*“Government planning policy towards the National Parks, as well as the Broads and the New Forest, is that major development should not take place in these areas save in exceptional circumstances. Because of the serious impact the major development may have on their natural beauty, applications for such developments must be subject to the most rigorous examination and should be demonstrated to be in the public interest before being allowed to proceed. Consideration of such applications should therefore normally include an assessment of:*

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<sup>1</sup> § 49 of Circular 12/96: *Environment Act 1995, Part 3, National Parks*, 11<sup>th</sup> September 1996; now substantially replicated in *“English National Parks and the Broads” UK Government Vision and Circular 2010* at § 31 - not cancelled by the Framework

*The need for the development, in terms of national considerations, and the impact of permitting it or refusing it upon the local economy;*

*The cost of and scope for developing elsewhere outside the area or meeting the need for it in some other way;*

*Any detrimental effect on the environment and the landscape, and the extent to which it should be moderated.”*

12. The previous and current Circular is very much reflected in paragraph 116 of the Framework.

*Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:*

- *the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;*
- *the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and*

*any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.”*

13. The upshot is that the Development Plan incorporates paragraph 49 of the former Circular, which is itself replicated within the Framework. Therefore, the Development Plan incorporates what is effectively set out at paragraph 116 of the Framework. Hence, on an analysis of the decision making framework pursuant to Section 38(6) of the 2004 Act, paragraph 116 of the Framework becomes a part of the Development Plan. Further, and slightly confusingly, the policies set out generally in the Framework are material considerations, within the meaning of Section 38(6).

14. However, as I have already observed and as I emphasise, the Development Plan is to be read as a whole. The same observation applies to the Framework as is made plain on the face of the document, at paragraph 6:

*“The policies in paragraphs 18 to 219, **taken as a whole**, constitute the government’s view of what sustainable development in England means in practice for the planning system”.* (emphasis added)

15. The Framework then goes on to identify the three roles which constitute sustainable development, namely economic, social and environmental. In the same way that the Framework is to be read as a whole, having regard to its purpose in achieving sustainable development, so must the Development Plan also be construed having regard to its policies addressing the economic, social and environmental roles of the planning system. If one fails to take this approach and alights upon one particular policy, inappropriately excluding other policies and objectives, one skews the intended purpose of both the Development Plan and of the Framework. It is for this reason that I am of the clear view that it is necessary to read together the policies which address the economy, social objectives, environmental objectives seeking to protect the National Park and the specific policies which address minerals development, at paragraph 144, in an integrated manner.
16. I turn now to address some of the particular policy questions which arise in the instructions.



**THE APPROACH TO PARAGRAPH 116 OF THE FRAMEWORK<sup>2</sup>**

17. In my opinion it is unfortunate that the Core Strategy refers to paragraph 49 of Circular 12/96 as “*major development tests*”. This is a term which has crept into the lexicon of National Park policy, but is plainly not justified on the basis of paragraph 49 of the Circular.
  
18. What is required is an assessment of an application by reference to the public interest and those matters which are set out within the three bullet points to paragraph 116. Those matters are by no means exclusive and are not to be regarded as tests. The obvious point is that nowhere in either the Circular nor in the Framework is the phrase “*major development test*” used<sup>3</sup>.
  
19. Paragraph 116 of the Framework seeks to protect National Parks, in accordance with parliament’s expressed intention, and to do so having regard to their natural beauty and the potential for major developments to have detrimental effects on the environment and the

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<sup>2</sup> The questions at 20.4.1 and 20.4.2 of the Instructions

<sup>3</sup> So far as the word ‘test’ appears in §31 of the DEFRA Circular, I read this to be a reference to the requirement to show that the development is in the public interest, not that there is a series of tests, per the bullet points in § 116 of the Framework

landscape. Necessarily, therefore, an assessment has to be made as to the nature and extent of the impact of any major development and for that to be weighed against the other material factors which arise in the context of the particular proposal, particularly as to need and as to opportunities to satisfy that need other than by development at the particular location proposed. It is a matter of planning judgment to be made on the particular facts and merits of an application, but which necessarily attracts the weight prescribed by the policy document.

20. Further to the question of weight, it is plain that there is tension between the policies which fall to be considered. Great weight is to be given to the protection of National Parks and great weight is to be given to the benefits of mineral extraction, including to the economy<sup>4</sup>.
  
21. This feature of the policy framework immediately discloses the inappropriateness of taking one policy and using it as an isolated decision making tool in the character of a definitive test. Paragraph 116 of the Framework is plainly not a test because the Framework is expressly required to be understood as a whole, as discussed above, and because the issue of whether or not a proposal is sustainable

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<sup>4</sup> §§ 115 and 144 of the Framework

development necessarily requires an investigation of all three aspects, namely economic, social and environmental.

22. Having set out the essence of my opinion in this regard, I turn now to consider the approach taken in advice to the Park Authority. Reference is made to *Tesco Stores Limited v. Dundee City Council* [2012] UKSC 13. That is an appropriate starting point in directing oneself as to the approach to interpreting a planning policy. However, it is not to be forgotten that such considerations only arise when there is dispute as to the meaning of a policy. I do not consider that the words of paragraph 116 are in any way unclear. I do not detect that there are conflicting arguments as to what the policy means. Rather, the issue which arises from the advice given to the Park Authority is as to the extent to which the policy set out in paragraph 116 is to be read in association with the remainder of the Framework; likewise the extent to which Core Policy E is to be read in the context in the remainder of the Development Plan.
23. It seems to me that the advice provided to the Park Authority rather misses that point. In short, the policy means what it says, but is to be read in the context of the other policies, as I have explained above. I would not expect that proposition to be in any way controversial.

24. The difficulty with the advice which the Park Authority have received is that it misunderstands the impact of the *Tesco* decision, and takes an overly legalistic approach to the interpretation of paragraph 116. There is ample authority for the proposition that planning policies are neither statutes nor to be read like contracts. The fact that *Tesco* brings matters of interpretation before the court rather than the reasonable decision maker does not mean that policies have become legal texts, the *Tesco* decision itself makes that clear
25. The approach taken in the advice is to isolate particular terms and to seek to find authority which explains the meaning of those terms. There is nothing objectionable in principle in seeking to find assistance in other cases, however, those who drafted the advice have fallen into some significant errors.
26. It is evident that the author of the advice has not appreciated the difference between law and policy. By way of further example, several appeal decisions are cited in the advice, such as *Netherwater Environmental Limited v. Peak District National Park Authority* [2011] PAD 6. This and other appeal decisions are repeatedly cited in

the advice as being the decision of a court. They plainly are not. They are decisions of inspectors in respect of Section 78 appeals.

27. Further, in the context of analysing terms such as “*public interest*”, which here is a feature of planning policy, those advising the Park Authority have alighted upon the Habitats Directive as a source of learning. It is inappropriate to use a legal framework, namely a European Directive and the decisions thereunder, to interpret a piece of planning policy.
28. The effect of these rather curious approaches to advising the planning authority is to skew and distort the proper planning policy framework. In fact, the position is fairly straightforward. The matters set out in paragraph 116 of the Framework, and as incorporated into the Development Plan are to be given substantial weight, as indeed are significant other features of the Development Plan as I detail below.

#### **NEED FOR THE DEVELOPMENT**

29. I am particularly asked to advise whether or not the reference to “*need for the development*” in the first bullet point of paragraph 116 of the

Framework is to be confined to the need for the mineral or should be understood more widely.

30. In the context of my advice above, I am quite sure that paragraph 116 must be read widely in the context of the policies set out throughout the Framework. Paragraph 116 is not specific to mineral development. The matters which fall to be considered in respect of need will vary between types of development. Hence, it is appropriate to consider each application individually and on its merits and having regard to the wide variety of both benefits and potential adverse impacts which might arise.
31. In this case, it seems to me from both the predicted turnover and from the various requirements to employ people to construct and operate the mine, that economic policies are strongly engaged. The benefits to local, regional and national economy fall to be assessed and taken into the balance. There is plainly a need for economic activity, as the Framework explains, both generally and in light of continued national economic difficulty.

32. Moreover, in the context of the National Park, the fact of both direct and indirect employment opportunities is a matter which goes to the question of need.

**“MEETING THE NEED IN SOME OTHER WAY”**

33. Next I am asked to advise specifically on the second bullet point in paragraph 116.
34. Those Instructing draw attention to the current position in the UK for the supply of potash. There is one permitted operation, namely the Boulby mine. It supplies both the UK market and exports material. The UK imports the balance of its requirements. It is unclear from the information presently available quite why the UK both exports and imports potash. On first impression, that is illogical, but I can see that there may be a variety of commercial explanations for that outcome.
35. It is important to be clear as to the role of the planning system. Its purpose is not to create a regulated market. Indeed, the planning system avoids issues which are properly the concern of the developer, as seen for example in the question of need and efficiency for

renewable energy proposals, which is not material to planning decisions.

36. In the sphere of minerals development, the policy is one which notes the national need and importance of certain minerals because “*Minerals are essential to support sustainable economic growth and our quality of life.*”<sup>5</sup> The policy is one which is concerned with facilitating<sup>6</sup> the development of mineral resources in order that their associated benefits may be deployed, including their economic benefits<sup>7</sup>.

37. It follows from these aspects of long established principle that the objective is to ensure that sufficient mineral resources are permitted in order to meet, in a secure fashion, the need for mineral resources. Hence, major development for the winning of nationally important minerals is, by definition, necessary to meet society’s needs<sup>8</sup> unless it can be shown that there is such an over supply as to result in there being no need for the development proposal. I note that this feature of

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<sup>5</sup> § 142 of the Framework

<sup>6</sup> The title to the minerals policies in the Framework is “Facilitating the Sustainable Use of Minerals”

<sup>7</sup> § 144, first bullet

<sup>8</sup> See the Framework’s Glossary at p53.



the Framework has not been alighted upon in the advice received by the Park Authority.

38. It is unsound to argue that importation of minerals which are necessary to meet society's needs is a proper alternative to indigenous production. Such an approach would lead to an externalisation of the environmental impacts of the nations use of natural resources.
39. This does not mean that there is some sort of presumption that permission should be granted on an application to win minerals of national importance. Rather, it leaves the main issue as the balancing of the benefits of the proposal against such harm as may be identified.

#### **EXPLANATORY TEXT TO CORE POLICY 'E'**<sup>9</sup>

40. I refer to the policy and supporting text at §§ 9 and 10 above.
41. The reference to Boulby is contained in the policy. There is further explanation for the reasons for the policy in the supporting text. I do not consider this to be at all unclear nor to require that the supporting text be interpreted as policy. It is plain that the policy admits of a

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<sup>9</sup> §20.4.7 of the Instructions

particular approach to Boulby. The supporting text explains why - potash is of national importance.

42. There is no need to try to rely on the supporting text as development plan policy. The Core Strategy was drafted to be in accordance with national policy on minerals development and potash has remained for many years as a mineral for which there is a recognised national need. The policy simply reflects this.
  
43. Core Policy 'E' is clear about the overriding need for the development at Boulby. That is an expression of the acknowledged national need for the mineral. If I were wrong in that regard, and it was found not to be clear from the policy itself, then the supporting text may be used to aid understanding and makes the policy crystal clear<sup>10</sup>.

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<sup>10</sup> *Cooper v Secretary of State for the Environment* [1996] JPL 945; *Friend v National Assembly for Wales* [2000] unreported

## **CONCLUSIONS**

44. I advise accordingly.

45. Overall, I take a rather different view of the development plan, the construction of the key policies and the correct approach to the Framework than those advising the Park Authority. I consider that there are material errors in the advice which the Park Authority has received, which, if left uncorrected, will misdirect the outcome.

**Martin Kingston QC**

11<sup>th</sup> December 2012

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MINE**

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**OPINION**

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