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16 September 2021

Dear Ms Peter,

PLANNING ACT 2008
APPLICATION FOR A NON-MATERIAL CHANGE TO THE NORTH KILLINGHOLME (GENERATING STATION) ORDER 2014 (SI NO. 2014/2434), AS AMENDED BY S.I. (2015/1829)

1. I am directed by the Secretary of State for Business, Energy and Industrial Strategy ("the Secretary of State") to advise you that consideration has been given to the application ("the Application") which was made by WSP UK Limited on behalf of C.GEN Killingholme Limited ("the Applicant") on 13 August 2020 for a change which is not material to the North Killingholme (Generating Station) Order 2014 under section 153 of, and 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 2011 (as amended) ("the 2011 Regulations").

2. The original application for development consent under the 2008 Act was submitted to the Planning Inspectorate by the Applicant and granted development consent on 11 September 2014 by the Secretary of State for Energy and Climate Change. The North Killingholme (Generating Station) 2014 Order, gives development consent for the construction, operation, and maintenance of a new thermal generating station, generating up to 470MWe gross electrical output, with associated development, at North Killingholme, North Lincolnshire. The generating station as consented in the 2014 Order would operate either as a Combined Cycle Gas Turbine ("CCGT") plant or as an Integrated Gasification Combined Cycle ("IGCC") plant ("the Authorised Development"). The North Killingholme (Generating Station) 2014 Order was amended by the Correction Order dated 26 October 2015 (SI 2015/1829) (the "2015 Correction Order").

3. The Applicant is seeking consent for changes to the North Killingholme (Generating Station) 2014 Order (as amended) (the "2014 Order") to allow:

- an amendment to Part 3 (Requirements) of Schedule 1 (Authorised development) to the 2014 Order to extend the time limit for commencing the Authorised Development, which currently expires on 1 October 2021, by five years to 1 October 2026 (the "extension provisions"); and
- amendments to:
    - Article 2 (Interpretation);
    - Article 34 (Certification of plans, etc.); and
    - Part 3 (Requirements) of Schedule 1 (Authorised development);

of/to the 2014 Order allowing for the potential delivery of an alternative, post-combustion, carbon capture and storage (CCS) proposal for the CCGT mode of operation without requiring development of the IGCC generating station (the "CCS provisions").

Summary of the Secretary of State's decision

4. The Secretary of State has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make non-material changes to the 2014 Order and he has decided to authorise most of the changes detailed in the Application. However, several minor changes have been made to the Amendment Order to reflect the Secretary of State's drafting preferences. Additionally, for the reasons set out in this document, the Secretary of State has rejected the proposed amendment to paragraph 36 of Part 3 (Requirements) of Schedule 1 (Authorised development; and the proposed omission of paragraph (1)(g) of article 34 (Certification of plans, etc.) from the 2014 Order. This letter is the notification of the Secretary of State's decision in accordance with regulation 8 of the 2011 Regulations.

Consideration of the materiality of the proposed change

5. 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 2008 Act which requires the Secretary of State to consider the effect of the change on the development consent order as originally made. The Secretary of State notes that the changes do not relate to the parameters of the generating station.

6. The proposed changes do not entail any alteration of the physical development granted consent by the 2014 Order nor to any of the controls regulating its effect.

7. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the 2008 Act and Part 1 of the 2011 Regulations.

8. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the Department for Communities and Local Government (now the Ministry of Housing, Communities and Local Government), the "Planning Act 2008: Guidance on Changes to Development Consent Orders" (December 2015) ("the Guidance")[1], which makes the following points:

- 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 types of change would be material or non-material;

[1] https://www.gov.uk/government/publications/changes-to-development-consent-orders

- Despite this, there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material change. Four examples are given in the Guidance as a starting point for assessing the materiality of a proposed change, these examples have been applied to the 2014 Order in the following paragraphs:

    a) whether an update would be required to the Environmental Statement ("ES") (from that at the time the 2014 Order 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 2014 Order; and

    d) whether the proposed change would have a potential impact on local people and business (for example, in relation to visual amenity from changes to the size and height of buildings; impacts on the natural and historic environment; and impacts arising from additional traffic).

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.

9. The Secretary of State has considered the materiality of the change proposed by the Applicant against the four matters given in (a), (b), (c) and (d) above:

    (a) The Secretary of State notes that the Environmental Report supplied with the Application in August 2020 supports the Applicant's conclusions that there are no new, or materially different, likely significant effects from those assessed in the ES. In light of the analysis supplied by the Applicant and responses to the consultation that have raised no concerns regarding new, or materially different, environmental issues, the Secretary of State has, therefore, concluded that no update is required to the ES as a result of the proposed amendment to the 2014 Order;

    (b) For the reasons set out in detail at paragraphs [20 to 21 below], the Secretary of State considers that there is not a need for a HRA based on the nature and impact of the change proposed. He is also satisfied that the proposed change does not bring about the need for a new or additional licence in respect of EPSs as the amendments sought are not anticipated to give rise to any new or different effects from an ecological perspective than those assessed for the original application;

    (c) in respect of compulsory acquisition, the Secretary of State notes that the proposed changes do not require any additional compulsory purchase of land; and

    (d) in respect of impacts on local people and businesses, the Secretary of State notes that no changes are anticipated by the Applicant to the impacts already assessed in the ES.

10. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance, or other relevant considerations, suggest that the changes considered in this letter is a material change. He has also had regard to the effect of the changes on the 2014 Order, together with the previous changes made by the 2015 Correction Order, and considered whether there are any other circumstances in this particular case which would lead him to conclude that the changes considered in this letter are material but he has seen no evidence to that effect.

11. The Secretary of State is therefore satisfied that the changes considered in this letter are not material and should be dealt with under the procedures for non-material changes.

Consultation and responses

12. In accordance with the requirements of regulation 7(1) of the 2011 Regulations, parties required to be notified by that regulation were notified of the Application on 13 August 2020. Consultation ran until 25 September 2020.

13. The Applicant published the Application in accordance with regulation 6 (*Publicising the application*) of the 2011 Regulations (the "Regulation 6 notice") for two successive weeks in the local press and made publicly available on the Planning Inspectorate's website, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate The Applicant provided on the Regulation 6 notice: the website and specific website location where the relevant documents, plans and maps may be inspected; and, telephone number which can be used to contact the applicant for enquiries in relation to the documents, plans and maps. This was free of charge on a website maintained by the Planning Inspectorate on behalf of the Secretary of State.

14. Representations were received from: Anglian Water Services Limited, the Environment Agency, Historic England, North East Lindsey Drainage Board, Public Health England, and Virgin Media, none of whom raised objections to the extension provisions nor to the CCS provisions. No relevant planning authorities, or statutory consultees, objected to the extension provisions or to the CCS provisions. No representations were received from private individuals. Highways England noted that whilst they do not object to the proposal, they request that consideration be given, and further details should be presented, as to how peak spreading of trips during construction will be achieved and monitored. They consider this not to be overly onerous or insurmountable and could be presented within the Construction Environmental Management Plan or Travel Plan.

15. Due to the high probability of flooding in the area surrounding the Authorised Development, the Environment Agency have recommended that the Applicant reviews the most recent Humber water levels data, available on their website, prior to construction, to check critical infrastructure construction levels.

16. The Secretary of State has considered all the representations received during the consultation and does not consider that any further information needs to be provided by the Applicant or that further consultation of those already consulted is necessary.

Application Considerations

<u>Environmental Impact Assessment</u>

17. The Secretary of State has considered whether the Application would give rise to any new significant effects or materially different effects when compared to the effects set out in the ES for the development authorised by the 2014 Order.

18. The Secretary of State is satisfied that the Supporting Statement provided by the Applicant is sufficient to allow him to make a determination on the Application.

19. The Secretary of State has considered the information provided and the views of consultees. The Secretary of State agrees with the Applicant's conclusions that there will not be any new or materially different likely significant effects when compared to the effects set out in the ES for the development authorised by the 2014 Order and as such considers that there is no requirement to update the ES.

20. As there are no new significant environmental impacts as a result of the proposed change, the Secretary of State does not consider that there is any need for consultation on likely significant transboundary effects in accordance with regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

Habitats

21. The Secretary of State has considered the relevant and important policies in respect of the United Kingdom's obligations as set out in the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"). The Habitats Regulations require the Secretary of State to consider whether the Authorised Development would be likely, either alone or in combination with other plans and projects, to have a significant effect on any sites within the National Site Network, as defined in the Habitats Regulations (a "protected site"). If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State, pursuant to regulation 63(1) of the Habitats Regulations, to address potential adverse effects on site integrity. The Secretary of State may only agree to the Application (and subject to regulation 64) if he has ascertained that it will not adversely affect the integrity of a protected site.

22. The Secretary of State has considered the Supporting Statement and Environmental Report submitted with the Application and notes that the updated baseline surveys established that there have been no significant changes to environmental baseline conditions. The Secretary of State is satisfied that the Application will not have a likely significant effect on any protected site and therefore no Appropriate Assessment is needed.

Extension of Time

23. The proposed extension of five years for commencing the Authorised Development in the 2014 Order has been requested to enable the Applicant to participate in Capacity Market Auctions ("CMAs") over the period 2021-2023/24, and to allow sufficient time for the pre-implementation steps to be concluded that they have so far been unable to implement due to low CMA clearing prices in recent auctions (which have not reflected the capital expenditure requirements for larger new build projects). Furthermore, the cancellation of the 2019 T-4 CMA has impacted the Applicant's ability to implement the Order by the time limit of October 2021. The Applicant has advised that: the CMA prices are expected to improve in the near-term due to the planned retirement of several large generating plants; and the programme for implementation, construction and commissioning of the Authorised Development following successful participation in the CMA would last approximately 46 to 66 months.

Integrated Gasification Combined Cycle (IGCC) Mode of Operation

24. As consented in the North Killingholme (Generating Station) 2014 Order, under specific circumstances the Authorised Development would be permitted to operate as an IGCC plant. The IGCC mode of operation could use a range of fuels for operation; including various combinations of biomass, coal or other fossil fuels but the fuel would undergo gasification prior to entering the plant turbine. The process of gasification allows components of the fuel to be separated and, subsequently, allows for the pre-combustion removal of carbon dioxide.

Carbon Capture Readiness/Carbon Capture and Storage

25. The Applicant is seeking to make the CCS provisions to enable carbon capture and storage solutions for the CCGT mode of operation. To facilitate this, an updated Carbon Capture Readiness ("CCR") Feasibility Study, CCS Design Concept Report and Works Plan were submitted with the application that address both pre-combustion carbon capture for IGCC and post-combustion carbon capture for CCGT. The Secretary of State consulted with his

statutory adviser, the Environment Agency, to undertake a technical assessment of the updated CCR Feasibility Study and CCS Design Concept Report. Following an initial assessment, the Environment Agency informed the Secretary of State that they required further information from the Applicant to complete the assessment. The Secretary of State wrote to the Applicant, and subsequently, updated versions of the CCR Feasibility Study and CCS Design Concept Report were provided. After receiving the requested information, the Environment Agency confirmed to the Secretary of State that there are no foreseeable barriers to carbon capture retrofit for CCGT, and that as there has been no change to the IGCC plant and associated site plans have not changed, the technical assessment was completed satisfactorily with no issues outstanding. The updated CCR Feasibility Study and CCS Design Concept Report has also been considered by Department of Business Energy and Industrial Strategy (BEIS) economists and they have confirmed that the proposals outlined within the CCR Feasibility Study would be economically feasible, based on an analysis of multiple scenarios of predicted future carbon prices.

26. As a result of the updates to the CCR Feasibility Study and CCS Design Concept Report requested by the Environment Agency, minor revisions were subsequently requested by the Applicant to the wording of the Amendment Order.

27. The Applicant proposed an amendment which would alter the period in which paragraph 36 of the CCS requirements (in Part 3 (Requirements) of Schedule 1 (Authorised development) to the 2014 Order) would be applicable and remove the requirement for 'written' consent to be obtained from the Secretary of State—if changes affecting the land required for the CCS capture equipment were necessary.

General Considerations

Equality Act 2010

28. The Equality Act 2010 includes a public sector equality duty. This requires a public authority, in the exercise of its functions, to have due regard to the need to (a) eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age; sex and sexual orientation; gender reassignment; disability; marriage and civil partnerships;[2] pregnancy and maternity; religion or belief; and race) and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

29. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in section 149 of the Equality Act 2010 and is satisfied that there is no evidence that granting the changes considered in this letter will affect adversely the achievement of those objectives.

Human Rights Act 1998

30. The Secretary of State has considered the potential for the proposed changes to the Authorised Development to infringe upon human rights in relation to the European Convention on Human Rights. The Secretary of State considers that the grant of the changes considered in this letter would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

Natural Environment and Rural Communities Act 2006

31. 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

[2] In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

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

32. The Secretary of State has considered the ongoing need for the development and notes that the Overarching National Policy Statement for Energy (EN-1)[3] (July 2011) and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2)[4] (July 2011) both specify that for the UK to meet its energy and climate change objectives, there is a continuing need for new generating stations, such as the one proposed by the Applicant, to support intermittent renewables and to ensure that the UK has a secure and reliable energy mix. The Energy White Paper[5], published on the 14 December 2020, further reiterates this need, stating that in aiming to achieve a fully decarbonised, reliable and low-cost power system by the net zero target, intermittent renewables will need to be complemented by technologies which ensure security of supply, such as 'gas with carbon capture and storage'.

33. The Secretary of State has considered that the UK's sixth Carbon Budget was enshrined into law on 22 June 2021 and requires a 78% reduction of emissions by 2035 compared to 1990 levels. Following the Secretary of State's review of the CCR report supplied by the Applicant, and assessments on the report completed by the Secretary of State's statutory advisors (full details of which are provided in the Carbon Capture Readiness/ Carbon Capture and Storage section below), the Secretary of State is content that the necessary steps have been taken by the Applicant to ensure that the Authorised Development is carbon capture ready. The Secretary of State is therefore satisfied that the operational emissions of the Authorised Development could be addressed in a managed, economy-wide manner, which would ensure consistency with carbon budgets, net zero and our international climate commitments. The Secretary of State does not, therefore, need to assess the Application for planning consent against operational carbon emissions and its contribution to carbon budgets, net zero and our international climate commitments.

34. The Secretary of State notes that the energy National Policy Statements continue to form the basis for decision-making under the 2008 Act. The Secretary of State considers, therefore, that the ongoing need for the Authorised Development is established and that granting the non-material change would not be incompatible with the 2035 sixth Carbon Budget target or the 2050 Net Zero target—as specified in The Carbon Budget Order 2021 and The Climate Change Act 2008 (2050 Target Amendment) Order 2019 respectively.

Carbon Capture Readiness/ Carbon Capture and Storage

35. The Secretary of State has reviewed the assessments produced by the Environment Agency and BEIS economists of the CCGT carbon capture proposal. The proposal has been assessed by the Environment Agency against the Department for Energy and Climate Change (DECC) (now BEIS) Carbon Capture Readiness guidance (November 2009)[6] to determine whether the Applicant has demonstrated that they propose to retain sufficient space to accommodate the carbon capture plant. The Environment Agency concluded that

[3] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/47854/1938-overarching-nps-for-energy-en1.pdf

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/37047/1939-nps-for-fossil-fuel-en2.pdf

[5] https://www.gov.uk/government/publications/energy-white-paper-powering-our-net-zero-future

[6] 'Carbon Capture Readiness (CCR) A guidance note for Section 36 of the Electricity Act 1989 consent applications.
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/43609/Carbon_capture_readiness_-_guidance.pdf

there are no foreseeable barriers to the carbon capture retrofit. BEIS economists reviewed the carbon capture proposal to determine whether it would be economically feasible based on the predicted range of carbon price appraisal values out to 2050 and concluded that the required carbon price submitted by the developer to make the proposal economically viable is within the appraisal values in the Green Book supplementary guidance[7]. Taking the results of these assessments into account, the Secretary of State is content that the carbon capture proposal meets the requirements for economic and technical feasibility and agrees to the CCS provisions made to the 2014 Order.

36. The Secretary of State has rejected the proposed amendment to paragraph 36 of Part 3 (Requirements) of Schedule 1 (Authorised development). This amendment would remove the Applicant's obligation to comply with requirements intended to protect land set aside for future CCS proposals during the pre-commencement period of the Authorised Development; and would remove the requirement for the Applicant to obtain 'written' consent from the Secretary of State during the relevant period. The Secretary of State is of the opinion that this would be in breach of the requirements detailed in paragraph 4.7.17 of NPS EN-1[3] which states: *"If granted consent, operators of the power station will be required to: retain control over sufficient additional space on or near the site on which to install the carbon capture equipment and the ability to use it for that purpose".*

Integrated Gasification Combined Cycle (IGCC) Mode of Operation

37. Due to the request for an extension of time in the non-material change application, the Secretary of State deemed it necessary to review the IGCC mode of operation consented by the North Killingholme (Generating Station) 2014 Order. Although the Authorised Development would be permitted to use coal as a pre-gasification fuel source, under the requirements set out in NPS EN-1[3], if any amount of coal were to be used in the operation of the Authorised Development, carbon capture equipment would need to be fitted. In addition to this, no objections were received concerning the IGCC mode of operation and, if the IGCC mode was progressed, Requirement 38 in Part 3 (Requirements) of Schedule 1 (Authorised development) to the 2014 Order, requires that the Applicant seek further written consent from the Secretary of State. As a result, the Secretary of State is satisfied that with the pre-combustion carbon capture proposal set out in the Applicant's CCR report installed, the Authorised Development could be compliant with the UK's Carbon Budget and Net Zero targets.

Environmental Effects

38. The Secretary of State has considered the nature of the proposed change, noting that it would have no additional significant environmental effects. He notes that the proposed change to the Authorised Development would not result in any further environmental impacts and will remain within the layout parameters consented by the 2014 Order. He concludes that the proposed change is not material. Having considered the effects of any change and the benefits of the change in facilitating the deployment of the Authorised Development, the Secretary of State has concluded that it would be appropriate and advantageous to authorise the proposed change predominantly as detailed in the Application.

39. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed change to the 2014 Order as set out in the Application. The Secretary of State is satisfied that the change requested by the Applicant is not a material change to the 2014 Order and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make a non-material change to the 2014 Order so as to authorise the change detailed in the Application.

[7] https://www.gov.uk/government/publications/valuation-of-energy-use-and-greenhouse-gas-emissions-for-appraisal.

Extension of Time

40. In considering the justification for the five-year extension for commencing the Authorised Development under the 2014 Order, the Secretary of State has taken into account the ongoing need for the Authorised Development outlined above, and the Applicant's statement that CMA prices may increase as older generating stations are decommissioned. Furthermore, the Secretary of State accepts that the timeframe for the pre-implementation steps set out by the Applicant is typical for developments such as the Authorised Development.

    In light of the above, and in the absence of any objections to the extension provisions, the Secretary of State agrees to extend the time limit for commencing the Authorised Development by five years to 1 October 2026 to enable the construction and operation of the Authorised Development.

Modifications to the draft Order proposed by the Applicant

41. The Secretary of State has considered the Applicant's proposed modifications to Article 2 (Interpretation), Article 34 (Certification of plans, etc.) of the 2014 Order and Part 3 (Requirements) of Schedule 1 (Authorised development) to the 2014 Order and also in respect to an additional amendment to Article 34 (Certification of plans, etc.).

42. Following discussions with the Environment Agency in May 2021 and subsequent amendments to the CCR Feasibility Study and CCS Design Concept Report, amendments to Article 34 to the 2014 Order were also included in the non-material change application. The Applicant proposed minor amendments to the drafting of the new paragraph (1A) of Article 34 of the 2014 Order in the Amendment Order. The Secretary of State has considered the Applicant's proposed revisions to Article 34 and has accepted the points in principle but has made the changes using his own drafting preferences. These changes do not materially alter the terms of the draft Order.

Challenge to decision

43. 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

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

Yours sincerely,

Gareth Leigh

Gareth Leigh
Head of Energy Infrastructure Planning

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 Amending 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/yorkshire-and-the-humber/north-killingholme-power-project/?ipcsection=docs

These notes are provided for guidance only. A person who thinks they may have grounds for challenging the decision to make the 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 (0207 947 6655)