



Department for
Business, Energy
& Industrial Strategy

**Department for Business,
Energy & Industrial Strategy**
3 Whitehall Place,
London SW1A 2AW
T: +44 (0)300 068 5770
E: giles.scott@beis.gov.uk
www.gov.uk/beis

Murray Davies
Hirwaun Power Ltd

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(By e-mail)

Dear Mr Davies

PLANNING ACT 2008

APPLICATION FOR A NON-MATERIAL CHANGE TO THE HIRWAUN GENERATING STATION ORDER 2015 (AS CORRECTED BY THE HIRWAUN GENERATING STATION (CORRECTION) ORDER 2015)

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 Hirwaun Power Limited ("the Applicant") on 18 August 2016 for a non-material change to The Hirwaun Generating Station Order 2015, as corrected by The Hirwaun Generating Station (Correction) Order 2015 (collectively referred to herein as "the 2015 Order") under paragraph 2 of Schedule 6 to, the Planning Act 2008 (the "2008 Act").
2. The original application for development consent under the 2008 Act was submitted to the Planning Inspectorate by the Applicant in March 2014 and was granted consent on 23 July 2015. Consent was granted for the construction and operation of a simple cycle gas fired peaking power generating station with a gross electrical output of up to 299 MWe at Hirwaun Industrial Estate, Rhonda Cynon Taf, Wales ("the Development"). On 21 December 2015, the Secretary of State issued a correction order to correct errors in the 2015 Order.
3. Although the Secretary of State notes the Applicant has not yet concluded the exact number of Gas Turbine Generators ("GTGs") that will be constructed (the 2015 Order permits up to five GTGs), they have made the non-material change application because it has become apparent to them, through the procurement process for the purchase of the necessary equipment, that in order to construct the single GTG scenario (and some of the works required in the alternative GTG scenarios), alterations would need to be made to some of the parameters and locations of various structures consented by the 2015 Order. Therefore the Applicant is seeking consent for changes to the 2015 Order to amend the description of the authorised

development in Schedule 1 to the Order, to amend Tables 1 and 2 in Requirement 4, Schedule 2 to the Order (which identify the plans and parameters which the authorised development must be carried out in accordance with) and to provide for certification of the revised works plans submitted with the Application.

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 2015 Order, so as to authorise the changes as detailed in the Application. 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").

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 a non-material change.
6. There is no statutory definition of what constitutes a "material" or "non-material" change for the purposes of Schedule 6 to the 2008 Act and Part 1 of the 2011 Regulations. Paragraph 2(2) of Schedule 6 to the 2008 Act requires the Secretary of State, when deciding whether a change is material, to have regard to the effect of the changes on the development consent order as originally made. The Secretary of State notes that the original proposal was assessed on a worst case scenario of 5 GTGs. The Applicant has screened out a number of potential impacts, with only air quality and landscape identified as having the potential to result in any different effects. However, the outcome of the Applicant's updated assessments relating to air quality and landscape confirm that the proposed changes would not result in new or materially different likely significant environmental effects to those previously assessed.
7. In addition, so far as decisions on whether a proposed change is material or non-material, the Department for Communities and Local Government's "Guidance on Changes to Development Consent Orders" (December 2015)¹ document makes the following points. Given the range of infrastructure projects that are consented through the Planning Act 2008 and variety of changes that could possibly be proposed for a single project, it is not possible to attempt to prescribe whether any particular types of change would be material or non-material. Such decisions will inevitably depend on the circumstances of the specific case. However, the guidance states that 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, namely (a) whether an update would be required to the Environmental Statement (from that at the time the original development consent order ("DCO") was made) to take account of new, or

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485064/Making_changes_guidance_to_Development_Consent_Orders.pdf

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 existing DCO; and (d) the potential impact of the proposed changes 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.

8. The Secretary of State therefore began his consideration of the materiality of the proposed amendment by considering the 4 matters in (a), (b), (c) and (d) above:
 - a) The Secretary of State considers that in respect of the need to update the Environmental Statement (“ES”), the Applicant has given consideration to whether the proposed changes would give rise to any environmental effects that:
 - i. are new significant effects not identified in the ES for the consented project; or
 - ii. are materially different effects when compared with the environmental effects set out in the ES for the consented project.

The Secretary of State notes the Applicant considers this is not the case because the proposed amendments, all of which fall within the area of the 2015 Order limits assessed by the ES, also fall within the original parameters of the ES which assessed a worst case scenario of five GTGs. The Secretary of State considers that the environmental information supplied with the application supports the Applicant’s conclusions that there are no new or materially different likely significant effects from those set out in the ES and concludes that no update is required to the ES as a result of the proposed amendments to the 2015 Order. The Secretary of State has therefore concluded that no update is required to the ES as a result of the proposed amendments to the 2015 Order. Following consultation on the proposed changes requested by the Applicant, no objections to the proposed changes to the 2015 Order were received and no challenge made to the Applicant’s position that the proposed changes are non-material in nature.

- b) In respect of a need to undertake a Habitats Regulations Assessment (“HRA”), the Applicant’s Environmental Report (Appendix 2 of the Application) has concluded that no update to the HRA produced for the original consent is required. The HRA for the original consent, which was undertaken by the Secretary of State for Energy and Climate Change, concluded that likely significant effects (“LSE”) on the European sites considered (Coedydd Nedd a Mellte Special Area of Conservation (“SAC”)),

Cwm Cadlan SAC and Blaen Cynon SAC) would not result from the development alone and in-combination with other plans and projects. The conclusions on LSE were underpinned by the air and water quality assessments presented in the ES. The Secretary of State notes that none of the proposed changes are relevant to water quality and the Applicant's updated air quality assessment has concluded that the changes would not result in new or materially different likely significant environmental effects to those previously assessed. The Secretary of State also notes that NRW has no objection to the proposed changes and has not suggested that an update to the original HRA is necessary. Given the nature and impact of the changes now proposed, the Secretary of State concludes that an update to the original HRA is not necessary. The Secretary of State also concludes that there is no need for a new or additional licence in respect of European Protected Species ("EPS"). The Applicant is already required to obtain an EPS licence from NRW in relation to bats using the development site. In relation to other species, the Secretary of State notes that no changes to the areas of permanent and/or temporary habitat loss will occur as a result of the proposed changes. The original assessment assumed temporary land-take of all areas within the redline boundary. As the redline boundary remains the same, no changes to habitat fragmentation or incidental mortality of species is likely to occur.

- c) In respect of compulsory acquisition, the Secretary of State notes the proposed changes do not require any compulsory purchase of land.
 - d) The Secretary of State notes no changes are anticipated to impacts on local people and businesses already assessed in the ES and that statutory consultees are content that the proposed changes with mitigation measures contained in the 2015 Order will not have an adverse impact on air quality and landscape. The Secretary of State also notes all other potential impacts have been screened out. The Secretary of State notes that no objection was received from any local person or business to the proposed changes.
9. On the basis of the above and because the Secretary of State considers that there are no other circumstances such that the changes should be considered material, the Secretary of State has concluded that the proposed changes are appropriately categorised as non-material changes (for the purposes of paragraph 2 of Schedule 6 to the 2008 Act). The Application has therefore been handled in accordance with Part 1 of the 2011 Regulations.

Consultation and Responses

10. On 22 July 2016, the Secretary of State consented to allow, in accordance with regulation 7(3) of the 2011 Regulations, the Applicant to only consult those consultees identified in an excel spreadsheet provided by the Applicant on 11 July 2016, as well as MOD Safeguarding, Powys County Council, Merthyr Tydfil County Borough and Caerphilly County Borough Council (who it is noted were listed in the

spreadsheet as a “relevant local authority” within the meaning given by section 102(5) of the 2008 Act). This consent was granted as the Secretary of State agreed with the Applicant that there were no other persons or bodies likely to be directly affected by the proposed non-material changes to the Order. The Secretary of State was therefore satisfied that it was not necessary to consult any other party.

11. 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 19 August 2016. Consultation ran until 25 September 2016.
12. The Application was also published for two consecutive weeks in the local press, South Wales Echo, 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.
13. Representations were received during the consultation and considered from: Natural Resources Wales; Neath Port Talbot County Borough Council; Rhondda Cynon Taf County Borough Council; Welsh Government; and Brecon Beacons National Park. The Secretary of State notes that none of the representations raised objections or substantive comments.
14. The Secretary of State has considered all the representations received and does not consider that any further information needs to be provided by the Applicant or that further consultation of those already consulted or wider consultation is necessary before determining the Application.

Environmental Impact Assessment

15. For the reasons already considered above, 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 Order. The Secretary of State notes that the original proposal was assessed on a worst case scenario of 5 GTGs. The Applicant has screened out a number of potential impacts, with only air quality and landscape and visual effects identified as having the potential to result in any different effects. However, the outcome of the Applicant’s updated assessments relating to air quality and landscape and visual effects state that the proposed changes would not result in new or materially different likely significant environmental effects to those previously assessed. The Secretary of State has considered the information provided and the views of consultees, including Natural Resources Wales, who it is noted have raised no substantive concerns. The Secretary of State agrees with the Applicant’s conclusions and as such has concluded that there is no requirement to update the ES.
16. As there are no new, or materially different, likely significant environmental impacts as a result of these proposed amendments, the Secretary of State does not consider that there is any need for consultation on likely significant transboundary effects.

Habitats Regulations Assessment

17. For the reasons already considered above the Secretary of State considered the relevant and important policies in respect of the United Kingdom's international obligations as set out in the Conservation of Habitats and Species Regulations 2010 (as amended) ("the Habitats Regulations") which transpose the Habitats Directive (92/43/EC) into UK law. The Habitats Regulations require the Secretary of State to consider whether the Development would be likely, either alone or in combination with other plans and projects, to have a significant effect on a European site, as defined in the Habitats Regulations. If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State pursuant to regulation 61(1) of the Habitats Regulations to address potential adverse effects on site integrity. The Secretary of State may only agree to the Application if he has ascertained that it will not adversely affect the integrity of a European site.
18. Following consultation, Natural Resources Wales raised no objection to the Application and stated that the proposal is unlikely to affect any statutorily protected sites.
19. The Secretary of State has concluded that given the nature and impact of the changes now proposed and the advice of Natural Resources Wales there will not be a likely significant effect on any European site. The Secretary of State is satisfied that an Appropriate Assessment is therefore not required.

General Considerations

Equality Act 2010

20. The Equality Act 2010 includes a public sector "general equality duty". This requires public authorities to have due regard in the exercise of their functions to the need to eliminate unlawful discrimination, harassment and victimisation and any other conduct prohibited under the Act; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not in respect of the following "protected characteristics": age; gender; gender reassignment; disability; marriage and civil partnerships²; pregnancy and maternity; religion and belief; and race. This Secretary of State is satisfied that there is no evidence of any harm, lack of respect for equalities, or disregard to equality issues in relation to this Application.

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

Human Rights Act 1998

21. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights by the Application. The Secretary of State notes that the proposed changes would not require compulsory purchase of land and is satisfied that the grant of the non-material changes would not be incompatible with any Convention right protected by the Human Rights Act 1998.

Secretary of State's conclusions and decision

22. The Secretary of State notes that no person has objected to the proposed non-material changes to the Development authorised by the 2015 Order. The Secretary of State notes that should the Applicant opt to proceed with the single GTG scenario, which is permitted under the 2015 Order, it requires the proposed changes to be made.

23. The Secretary of State considers that the changes are acceptable when considered in the context of the established need for the Development as consented under the 2015 Order. He considers it is appropriate to authorise the proposed changes as detailed in the Application.

24. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed non-material changes to the 2015 Order as set out in the Application. The Secretary of State is therefore making the amendment Order requested by the Applicant subject to a number of minor modifications set out below.

Modifications to the draft Order proposed by the Applicant

25. The following modifications have been made by the Secretary of State to the draft Order proposed by the Applicant:

- a) the pre-amble is amended to reflect the Secretary of State's role in the consultation and publicity process carried out under the 2011 Regulations;
- b) the external fin fan cooler is inserted as a separate item in Work No. 2B for the one GTG scenario only and the corresponding entry in Table 2 is re-ordered accordingly;
- c) the 2015 Order is amended to require the certification of the revised works plans submitted with the Application; and
- d) other minor drafting amendments which do not materially alter the terms of the draft Order.

Challenge to decision

26. 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

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

Yours sincerely

Giles Scott
Head of Energy Infrastructure Planning and Coal Liabilities

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 making the change 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/wales/hirwaun-power-station/>

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)