



Department for
Business, Energy
& Industrial Strategy

**Department for Business, Energy
& Industrial Strategy**

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Chris McKerrow
Progress Power Limited
33 Cavendish Square
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(by email)

11 November 2016

Dear Mr McKerrow,

**PLANNING ACT 2008
APPLICATION FOR A NON-MATERIAL CHANGE TO THE PROGRESS
POWER (GAS FIRED POWER STATION) ORDER 2015 AS CORRECTED BY
THE PROGRESS POWER (GAS FIRED POWER STATION) (CORRECTION)
ORDER 2016**

THE APPLICATION

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 Progress Power Limited (the "Applicant") on 18 August 2016 for a change which is not material to the Progress Power (Gas Fired Power Station) Order 2015 ("the 2015 Order") as corrected by the Progress Power (Gas Fired Power Station) (Correction) Order 2016 (referred to together as "the 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 on 31 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 on the site of the former Eye airfields in Eye, Mid Suffolk with a gross electrical output of up to 299MWe (“the Development”). On 11 July 2016 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 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 Order. Therefore, the Applicant is seeking consent for changes to the Order to amend the description of authorised works in Schedule 1 of the Order, which describes the authorised development, and Table 2 in Requirement 3, Schedule 2 of the Order, which identifies the parameters which the authorised development must be carried out in accordance with.

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 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' amendment 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. With regards to the requested changes 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 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, guidance has been produced by the Department for Communities and Local Government, the “Planning Act 2008: Guidance on Changes to Development Consent Orders” (December 2015)¹ (“Guidance on Changes to DCOs”), which makes the following points. First, 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. Secondly, there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material 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 materially different, likely significant effects on the environment; (b) whether there would be a need for a Habitats Regulations Assessment, or a need for a new or additional licence in respect of European Protected Species; (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing DCO, and; (d) whether the potential impact of the proposed changes on local people and businesses (for example, in relation to visual amenity from changes to the size and height of buildings; impacts on natural and historic environment; and impacts arising from additional traffic) would be sufficient to indicate that the change should be considered as material. Thirdly, that 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 lettered (a), (b), (c) and (d) above:
 - (a) In respect of 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.

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

The Secretary of State notes that the Applicant considers this is not the case because the proposed amendments, all of which fall within the area of the Order limits assessed by the previous 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 not previously identified. The Secretary of State has therefore concluded that no update is required to the ES as a result of the proposed amendments to the existing Order. Following consultation on the proposed changes requested by the Applicant, no objections to the proposed changes to the Order were received and no challenge was made to the Applicant's position that the proposed changes are non-material in nature.

- (b) In respect of the original project consent, the Secretary of State, in light of advice from Natural England and the Environment Agency, concluded that there would be no likely significant effects either alone or in combination with other plans or projects on the Waveney and Little Ouse Valley Fens Special Area of Conservation ("SAC") and Redgrave and South Lopham Fens Ramsar site, and that an appropriate assessment ("AA") was therefore not required. The Secretary of State notes that Natural England and the Environment Agency have not revised their advice in the light of the proposed changes. In addition there is no need for a new licence in respect of European Protected Species in light of the proposed changes. Given the nature and impact of the changes now proposed, the Secretary of State remains of the view that there is no need for an AA to be undertaken.
 - (c) In respect of compulsory acquisition, the proposed changes do not require any compulsory purchase of land.
 - (d) In respect of impacts on local people and businesses, no changes are anticipated to the impacts originally assessed in the ES. Statutory consultees are content that the proposed changes with mitigation measures contained in the Order will not have an adverse impact on air quality and landscape and visual effects (all other potential impacts having already 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 25 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 Highways England, Breckland Council, Suffolk Coastal District Council, Waveney District Council and Cambridgeshire County 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 specified parties, such as local planning authorities, were notified of the application on 19 August 2016. Consultation ran until 25 September 2016. A response was received from Public Health England on 26 September 2016, which was accepted by the Secretary of State as the deadline (25 September) had been a non-working day.
12. The Application was also published for two consecutive weeks in the local press, the East Anglian Daily Times, 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: Public Health England; Suffolk Preservation Society; Yaxley Parish Council; Suffolk County Council; Babergh and Mid Suffolk District Councils; Mellis Parish Council; Environment Agency; Historic England; NATS Safeguarding; and Natural England. The Secretary of State notes that none of the representations raised objections or substantive comments.
14. However, following consultation, it was noted that Figure 6 (Overlay Gas Turbine Generator, Black Start Generator and Fin Fan Cooler Elevations) included in the change application documents related to the separate Hirwaun Power Project non-material change application, and not to the Progress Power Station change application. A copy of the correct Figure 6 (Overlay Gas Turbine Generator, Black Start Generator and Fin Fan Cooler Elevations) for the Progress Power Station change application was subsequently provided by the Applicant. The Secretary of State wrote out to the 10 consultees who responded to the consultation on the proposed

change request providing them with a copy of the correct Figure 6 and asking for any comments by COP Wednesday 26 October 2016. A copy of the Secretary of State's consultation letters and the correct Figure 6 was also published on the Planning Inspectorate's website on the Progress Power webpage, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate. Following a request, the deadline for Mellis Parish Council to respond to the consultation was extended to COP Friday 4 November 2016. No substantive comments were received on the correct Figure 6.

15. 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

16. 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, 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.

17. 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

18. 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.

19. Following consultation Natural England raised no objection to the Application and stated that the proposal is unlikely to affect any statutorily protected sites.
20. The Secretary of State has concluded that given the nature and impact of the changes now proposed and the advice of Natural England 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

21. The Equality Act 2010 introduced 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. The 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.

Human Rights Act 1998

22. 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 considers that the grant of the non-material changes would not be incompatible with any Convention right protected by the Human Rights Act 1998.

Section 40(1) of the Natural Environment and Rural Communities Act 2006

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

23. 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 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

24. The Secretary of State has considered the benefits of granting consent to the proposed changes to the Order (facilitating deployment of the Development in certain circumstances, the need for the Development having been established in the original application for the Order) and any possible adverse effects of the changes. For the reasons given in this letter, the Secretary of State considers that the proposed changes are non-material and that there is a compelling case for authorising the proposed changes to the description of authorised works in Schedule 1 of the Order, which describes the authorised development, and Table 2 in Requirement 3, Schedule 2 of the Order, which identifies the parameters which the authorised development must be carried out in accordance with, as set out in the Application. The Secretary of State is therefore today making the amending Order requested by the Applicant subject to a number of minor modifications which do not materially alter its effect.

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 2011 Regulations
 - (b) The external fin fan cooler is inserted as a separate item in Work No. 1B for the one GTG scenario only and the corresponding entry in Table 2 is re-ordered accordingly.
 - (c) 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

ANNEX

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/eastern/progress-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)