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Mr Jake Barnes-Gott
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Our ref EN010061
Your ref 3260R

19 September 2018

Dear Mr Barnes-Gott

PLANNING ACT 2008

**APPLICATION FOR A NON-MATERIAL CHANGE TO THE FERRYBRIDGE MULTIFUEL 2
POWER STATION 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 Ferrybridge MFE 2 Limited ("the Applicant") on 11 January 2018 for a non-material change to The Ferrybridge Multifuel 2 Power Station Order 2015 ("the 2015 Order") under paragraph 2 of Schedule 6 to the Planning Act 2008 (the "2008 Act").
2. The original 2015 Order application for development consent under the 2008 Act was submitted to the Planning Inspectorate by the Applicant. Examination of that application began on 5 December 2014 and development consent was granted on 28 October 2015 (and came into force on 19 November 2015). The 2015 Order, as granted, gives development consent for the construction and operation of a multifuel power station with a generating capacity of up to 90 MWe, fuelled by waste derived fuels from various sources of processed municipal waste, commercial and industrial waste and waste wood, on land at the existing Ferrybridge Coal-Fired Power Station site, north-west of Knottingley, West Yorkshire ("the Development"). The 2015 Order also includes a commitment to provide an area of landscaping and biodiversity enhancement on land previously used for construction laydown ("the Approved Area") immediately north of the Ferrybridge Multifuel 2 power station now under construction.
3. The Applicant has since identified a need to utilise the Approved Area for the development of an independently operated ash processing facility. It considers locating the ash processing

plant at the Approved Area would provide an opportunity take ash from Ferrybridge Multi Fuel 1 and 2 power stations. The Secretary of State notes that the ash processing facility does not form part of the Application and is the subject of a separate planning application (Reference 18/00347/FUL) under the Town and Country Planning Act 1990, which will fall to be determined by Wakefield Metropolitan District Council (“the Council”) in due course.

4. Any environmental impact, mitigation or enhancement associated with the ash processing facility will need to be assessed and secured separately as part of that planning application and is not a relevant consideration in the Secretary of State’s determination of the Application. However, in order to utilise the Approved Area for the proposed ash processing facility, the Applicant has applied for amendments to the 2015 Order to replace the Approved Area with an alternative area of landscaping and biodiversity enhancement on land to the west of the A1(M) immediately adjacent to the Ferrybridge Golf Course (“the Replacement Area”), which is approximately 300 metres to the north-west of the Approved Area. The Replacement Area is outside the 2015 Order limits and is owned by SSE Generation Limited, a joint venture partner of the Applicant. Use of the land has been secured by a planning obligation between the Applicant, SSE Generation Limited and the Council dated 26 July 2018 under section 106 of the Town and Country Planning Act 1990.

Summary of the Secretary of State’s Decision

5. 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 (“the 2011 Regulations”).

Consideration of the materiality of the proposed change

6. The Secretary of State has given consideration as to whether the Application is for a material or a non-material change.
7. There is no statutory definition of what constitutes a “material” or “non-material” change for the purposes of Schedule 6 to the 2008 Act. 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 changes do not relate to the generating station, but to an area of land set aside for landscaping and biodiversity enhancement that was previously used as the construction laydown area. It is also noted from Volume 1, Chapter 11 ‘Landscaping and Visual’ of the Environmental Statement forming part of the 2015 Order application that, given its size and scale, the primary objective of the Approved Area is habitat enhancement rather than landscaping that would seek to visually screen the development or integrate it within the landscape. It is therefore not an area of land specifically allocated to mitigate landscaping effects of the Development and the effect of the changes are considered to be relatively small on the 2015 Order as originally made.
8. In addition, so far as decisions on whether a proposed change is material or non-material, the then Department of 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 2015 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 2015 Order; 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).

9. The Secretary of State has considered the 4 matters in (a), (b), (c) and (d) above:

a) The Secretary of State considers that 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 project.

The Secretary of State notes that the Applicant has carried out a review of the ES, as set out in section 5 and Appendix 1 of the Application Statement Dated: January 2018, which was provided in support on the Application. The Applicant has also considered whether the proposed change would constitute ‘EIA Development’ for the purposes of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 and considers it does not constitute either Schedule 1 or Schedule 2 development. The Applicant has considered all the environmental matters submitted with the 2015 Order application, particularly in respect of landscape and biodiversity and the Secretary of State notes that the ES produced did not identify any significant adverse impacts on ecology. This is based on the generating station being designed such that significant adverse impacts on ecological receptors have been avoided or reduced through embedded mitigation and appropriate design. The Approved Area provided for landscape and biodiversity enhancement only and was not intended to mitigate any significant adverse effects. The Applicant considers the Replacement Area is capable of providing equivalent habitat enhancement, with potential for some additional benefit (not significant) from the proposed hedgerows. The Applicant has also considered in the Application Statement the environmental effects of the proposed change, which indicate they would be within the scale of effects reported in the ES and would create no materially different or new significant effects.

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

The Secretary of State is satisfied 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 and concludes that no update is required to the ES as a result of the proposed amendments to the 2015 Order. This is supported by the representations received. Natural England ("NE") had no specific comments to make. The Council also has no principle objections to the relocation of the landscaping and biodiversity enhancement area as proposed and is content to maintain its position as long as West Yorkshire Ecology Service and Yorkshire Wildlife Trust (who the Council indicated it had not consulted direct) raised no objections. The Secretary of State notes that neither West Yorkshire Ecology Service or Yorkshire Wildlife Trust have any objections to the Application.

b) In respect of the need for an HRA, the Secretary of State notes that NE previously confirmed during its consideration of the 2015 Order application that there are no European Sites, Ramsar sites or nationally designated landscapes located within the vicinity of the project (the Applicant has also highlighted in the Application that there are none within 20km) and it had no objection to the project. NE also considered the project currently supports habitats of negligible ecological interest and all issues relating to protected species (including any licensing requirements under the Habitats Regulations and Wildlife and Countryside Act 1981) had been addressed. NE welcomed the ecological enhancement measures proposed by the Applicant (Requirement 17 (Biodiversity Enhancement and Management Plan) included in 2015 Order, which it considered would have a positive effect on the natural environment by providing a range of biodiverse habitats on the site. In conclusion, the Secretary of State was satisfied that the Development was not likely to have a significant effect on any European Site, or any other site to which the same protection is applied as a matter of policy, either alone or in combination with other plans or projects. The Secretary of State was also content that sufficient information has been provided to determine that an AA under the Habitats Regulations was not required. As the Applicant has confirmed that there are also no protected species within the Replacement Area and also given its close proximity to the approved Development site, the Secretary of State is satisfied that an HRA is not required and the proposed changes to the Development are not likely to have a significant effect on any European Site either alone or in combination with other plans or projects.

c) In respect of compulsory acquisition, the Secretary of State notes that the proposed changes do not require any compulsory purchase of land.

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. The Applicant has highlighted that no buildings or structures are associated with the proposed change which is very limited when judged in the context of the overall authorised Development. The Applicant considers that the environmental effects of the proposed changes do not change the conclusions of the ES and would not create any materially different or new significant effects. The proposed change also does not introduce any change in design, construction or operation, nor any changes to traffic movements. The Secretary of State notes that three objections were received during the consultation on the proposed changes from local residents in respect of: i) the visual and dust impacts of the proposed ash processing facility on residents of Brotherton and the materiality of changes applied for to relocate the landscape and biodiversity enhancement area; ii) the timing of demolition of existing Ferrybridge C Power Station and potential visual impact of any new development on a property at Hillcrest Road, Townville; and iii), the conflict with, and confusion caused by, a recent [unspecified] announcement regarding the demolition of the Ferrybridge C Power Station and indication that there was to be a move to gas.

The Secretary of State notes the Applicant's consideration of the specific concerns raised by the three local residents in its 'Consultation Response Tracker' document provided after the end of the consultation period on the Application. The Applicant has indicated that Ferrybridge C Power Station ceased operations in March 2016 and demolition is expected to commence later in 2018 and would not conflict with the construction and operation of the Development, which is now substantially constructed. The Secretary of State sees no reason to disagree.

10. In respect of the concerns raised by a local resident at Hillcrest Road, although the Development is now substantially constructed, the Secretary of State notes that this resident suggests only the very tops of the stacks associated with Ferrybridge C Power Station are currently visible from his property in the winter months when there are no leaves on the trees. It is further noted that the Applicant has clarified that its original 2015 Ferrybridge Multifuel 2 Power Station Order application included a landscape and visual amenity assessment and the Non-Technical Summary concluded that the only significant effect identified on visual amenity was a moderate adverse visual effect on residential properties around the northern end of Darkfield Lane, Pontefract. The proposed further development of the ash processing facility does not form part of the Application and is currently the subject of a separate planning application to the Council under the Town and Country Planning regime. Consideration of the potential impacts of the ash processing facility are therefore matters for the Council and are not relevant to the Secretary of State's consideration of the Application. Similarly, the Secretary of State understands that proposals on parts of the former coal-fired power station site for the Ferrybridge D Combined Cycle Gas Turbine Power Station Project are still at the pre-application stage. An application for development consent under the Planning Act 2008 is expected to be submitted to the Planning Inspectorate in early 2019 and, if accepted, would then be subject to a separate examination process.
11. 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

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 9 January 2018. Consultation ran until 16 February 2018.
13. The Application was also published for two consecutive 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.
14. In addition to the three objections from local residents considered above, representations were received during the consultation and considered from: the Council, NE, Environment Agency, Highways Agency, West Yorkshire Ecology Service (see also paragraph 15 below), Yorkshire Wildlife Trust, Network Rail and the Coal Authority. All raise no objections.
15. Following the consultation period, the Secretary of State sought clarification from the Applicant in relation to: i) the current status of the then draft section 106 agreement between the Applicant, the Council and SSE Generation Limited for the alternative landscape and biodiversity site that was provided with the Application and has since been agreed and

signed; ii) West Yorkshire Ecology Service's representation, which raised some concerns in relation to the Revised Landscape/Biodiversity Strategy that have since been clarified and they have no further objections; and iii) apparent typographical and drafting errors in the Applicant's draft Amendment Order that have since been taken into account in the changes now made by the Secretary of State to the 2015 Order.

16. The Secretary of State has considered all the representations received during and after 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 or wider consultation is necessary before determining the Application.

General Considerations

Equality Act 2010

17. 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. 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

18. 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 changes would not be incompatible with any Convention right protected by the Human Rights Act 1998.

Natural Environment and Rural Communities Act 2006

19. 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.
20. The Secretary of State is of the view that the application considers biodiversity sufficiently to inform him in this respect. In reaching the decision to give consent to the development, the Secretary of State has had due regard to conserving biodiversity.

Secretary of State's conclusions and decision

21. The Secretary of State is satisfied that the Approved Area provided for landscape and biodiversity enhancement and was not intended to mitigate any significant adverse effects. The Replacement Area is considered capable of providing equivalent habitat enhancement

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

and the Secretary of State is content there are no new significant effects not identified in the ES or materially different effects when compared with the environmental effects set out in the ES for the project. As such, he is content that an updated ES is not required. Further, the Secretary of State also notes there have been no objections to the proposed changes from either Natural England, Environment Agency, the Council, West Yorks Ecology or Yorkshire Wildlife Trust.

22. The Secretary of State is also satisfied that an HRA is not required and the proposed changes to the Development are not likely to have a significant effect on any European Site either alone or in combination with other plans or projects. The proposed changes do not require any compulsory purchase of land and the Secretary of State notes that the Replacement Area Land has been secured by the planning obligation referred to in paragraph 4 above. The Secretary of State's consideration of the impact on local people and businesses is set out in paragraph 9(d) above. However, whilst also noting the objections raised by the three local residents in relation to the proposed ash processing facility and Ferrybridge D Combined Cycle Gas Turbine Power Station projects and the demolition of the existing Ferrybridge C Power Station, these are outside the scope of the Application.
23. The Secretary of State is therefore content to authorise the proposed changes to the 2015 Order as set out in the Application and to make the Amendment Order requested by the Applicant subject to a number of minor modifications and drafting changes set out below.

Modifications to the draft Amendment Order proposed by the Applicant

24. As indicated in paragraph 15 above, the Secretary of State sought clarification from the Applicant regarding apparent typographical and drafting errors in the changes sought. Following the response received from the Applicant, the Secretary of State has decided that it would be appropriate to modify the draft Amendment Order as submitted by the Applicant. However, further minor drafting changes have also been made to improve and simplify the drafting of the Amendment Order and make provision for the certification of the revised documents. These changes do not alter the effect of the draft Amendment Order as submitted.

Challenge to decision

25. 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

26. 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
Head of Energy Infrastructure Planning

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, an Order granting development consent, or anything done, or omitted to be done, by the Secretary of State in relation to an application for such an Order, 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 decision documents are 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/ferrybridge-multifuel-2-fm2-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)