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8 April 2020

Dear Mr Doyle

## **PLANNING ACT 2008**

### **APPLICATION FOR A NON-MATERIAL CHANGE TO THE MILLBROOK GAS FIRED GENERATING STATION ORDER 2019**

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 which was made by Millbrook Power Limited (“the Applicant”) on 23 September 2019 for a change which is not material to The Millbrook Gas Fired Generating Station Order 2019 (“the 2019 Order”) 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 Planning Act 2008 was submitted to the Planning Inspectorate by the Applicant on 23 October 2017 and was granted development consent on 13 March 2019. Consent was granted for the construction and operation of an Open Cycle Gas Turbine (“OCGT”) ‘peaking’ generating station of up to 299 MW on land located at and in the vicinity of Rookery South Pit near Stewartby, Bedfordshire (“the Development”).
3. The Applicant is seeking consent for a change to:
  - allow for the construction of a gas insulated switchgear (“GIS”) substation and amend the parameters and location of various works to enable the construction of the GIS substation;

- remove references to works relating to the air insulated switchgear (“AIS”) substation which is no longer required;
  - allow for the relocation of the substation within Rookery South Pit to an area adjacent to the electricity transmission line; and
  - amend the extent of the works for the low level restoration scheme baseline works to reflect that the platform for the Development and the creation of drainage ditches can be completed without the need to excavate material in the southern permitted extraction zone.
4. The Applicant is requesting these changes following a construction review and following National Grid Electricity Transmission’s contractor tender exercise which identified that a GIS substation is a more efficient and economic substation solution.

### **Consideration of the materiality of the proposed change**

5. The Secretary of State has given consideration 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 Planning Act 2008 which requires the Secretary of State to consider the effect of the change on the 2019 Order.
6. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations.
7. So far as decisions on whether a proposed change is material or non-material, guidance produced by the then Department for Communities and Local Government, the “Planning Act 2008: Guidance on Changes to Development Consent Orders” (December 2015) (“the Guidance”)<sup>1</sup>, 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. Second, 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 was made) to take account of 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 development consent order; or
  - (d) whether the proposed change would have a potential impact on local people and businesses.
8. Third, 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.

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

9. The Secretary of State began his consideration of the materiality of the proposed variation by considering the 4 matters lettered (a), (b) (c) and (d) above:
  - (a) The Applicant supplied a document entitled 'Millbrook Power Project, Non-material Change Application – Environmental Report' ("the Supporting Statement") providing further environmental information which concludes that the changes will not have any new significant effects or materially different effects from those already assessed in the original Environmental Statement for the 2019 Order. In the light of the analysis supplied by the Applicant and the responses to the consultation, the Secretary of State concludes that an update to the Environmental Statement is not required.
  - (b) The Secretary of State has concluded that, given the nature and impact of the change proposed and the advice of Natural England, he is satisfied that there will be no likely significant effects on any Natura 2000 site. Therefore, the Secretary of State is satisfied that an Appropriate Assessment is not required. Furthermore, in respect of European Protected Species, the Secretary of State is satisfied that the proposed change does not bring about the need for a new or additional licence as the amendments sought are not anticipated to give rise to any new or materially different effects from an ecological perspective.
  - (c) The proposed change does not entail any new compulsory acquisition of land.
  - (d) The potential impacts on local people and businesses are no greater than those that arise from the development permitted by the 2019 Order.
10. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance, or other relevant considerations, suggest that this proposed change is a material change. He has also considered whether there are any other circumstances in this particular case which would lead him to conclude that the proposed change is material, but has seen no evidence to that effect.
11. The Secretary of State is therefore satisfied that the change proposed in the application is not material and should be dealt with under the procedures for non-material changes.

## **Consultation**

12. The Applicant publicised the application in accordance with regulation 6 of the 2011 Regulations and on 26 September 2019 consulted the persons required by regulation 7 of the 2011 Regulations, in the manner prescribed. The deadline in the newspaper notice for receipt of representations on the application was 28 October 2019. However, the Secretary of State granted an extension to this deadline to 4 November 2019 due to an incorrect deadline for responses being included in the notice. The extended deadline for responses was publicised on the Planning Inspectorate project pages and the application documents were made available until 4 November 2019 at the inspection point venues identified in the newspaper notice.
13. The application was made publicly available on the Planning Inspectorate's website on 26 September 2019, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate.
14. Representations were received from Natural England, Rookery South Limited, Telent Technology Services Limited, Energy Assets Group Limited, Harlaxton Energy Networks Limited, Wellingborough Council, National Grid Electricity Transmission and National Grid Gas Plc, Aylesbury Dale District Council, The Coal Authority, St Albans City and District Council, The Chilterns Conservation Board, Health and Safety Executive, ESP Utilities

Group Limited and Southern Gas Networks Plc who did not raise any objection to the change being sought.

#### Central Bedfordshire Council

15. While Central Bedfordshire Council (“CBC”) did not object to the proposed change, it raised concerns regarding potential visual and landscape impacts due to the increase in the height of the substation and the potential loss of established woodland. However, CBC also noted that the proposed change would result in improvements in visual amenity due the reduction in the length of the substation by 100 metres and the width by 90 metres, additional planting would be in place to lessen visual impact and the removal of large elements such as a temporary transmission tower. CBC therefore concluded that, considering all of these factors together, the proposed change is acceptable. The Secretary of State agrees with CBC and is of the view that the change would result in a development that would be less visually intrusive.

#### Environment Agency

16. The Environment Agency did not respond to the consultation on the non-material change application, but confirmed in correspondence with the Secretary of State that it maintained the position it shared with the Applicant at the pre-application stage of the application that as the changes were within the limits of the 2019 Order, it had no comments on the proposed change.
17. The Secretary of State has considered the representations received in response to 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.

### **Environmental Impact Assessment**

18. 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 Environmental Statement for the development authorised by the 2019 Order.
19. 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.
20. 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 environmental statement for the development authorised by the 2019 Order and as such considers that there is no requirement to update the Environmental Statement.
21. As there are no new significant effects or materially different environmental effects as a result of the proposed change, the Secretary of State does not consider that there is any need for consultation on transboundary effects.

#### Habitats

22. 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”), 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 Natura 2000 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 63(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 Natura 2000 site.

23. The Secretary of State has considered the Supporting Statement submitted with the application, alongside the advice of Natural England, and is satisfied that the application will not have a likely significant effect on any Natura 2000 site. The Secretary of State is satisfied that there is sufficient evidence to conclude that allowing the change set out in the application to the development authorised by the 2019 Order will not have a likely significant effect upon any Natura 2000 site; and an Appropriate Assessment is therefore not required.

## **General Considerations**

### Transboundary Impacts

24. Under Regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (as amended), the Secretary of State has considered whether the Development is likely to have a significant effect on the environment in a European Economic Area (“EEA”) State. In making his decision on whether to grant the 2019 Order, the Secretary of State concluded that there would be no likely significant effects on the environment of an EEA State. The Secretary of State has considered whether the change sought through this application will have any potential impacts on an EEA State and, as set out above, has concluded that there is no change in the environmental impacts considered within the existing environmental statement for the project. Consequently, the Secretary of State has concluded that there would not be likely significant effects on the environment of any EEA state whether the application is considered of itself or cumulatively with the environmental effects already considered for the 2019 Order.
25. The Secretary of State has also considered whether there may be potential impacts on European sites in EU Member States, known as transboundary sites, from this application. Noting that the Secretary of State has reached a conclusion that there will be no Likely Significant Effects on Natura 2000 sites, the Secretary of State has also concluded that there is no route whereby sites in EU Member states may be impacted by this application.
26. The Secretary of State therefore concludes there is no need for transboundary consultation with EEA States.

### Equality Act 2010

27. 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 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; gender; gender reassignment; disability; marriage and civil partnerships;<sup>2</sup> pregnancy and maternity; religion and 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.
28. 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 this application will affect adversely the achievement of those objectives.

### Human Rights Act 1998

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

29. The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights, by the amended development. The Secretary of State considers that the grant of development consent would not violate any human rights as enacted into UK law by the Human Rights Act 1998.

#### Natural Environment and Rural Communities Act 2006

30. 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 amended development consent. The Secretary of State is of the view that biodiversity has been considered sufficiently in this application for an amendment to accord with this duty.

#### Climate Change Act 2008

31. On 27 June 2019, following advice from the Committee on Climate Change, the UK Government announced a new carbon reduction 'net zero' target for 2050 - resulting in an amendment to the Climate Change Act 2008 (reducing the net UK carbon account for 2050 from 80% to 100% below the 1990 baseline). The Secretary of State notes that the energy NPSs continue to form the basis for decision-making under the Planning Act 2008. He further noted that in the original examination the Examining Authority concluded that the principle of the Development is in line with the national need for secure and reliable supplies of electricity as part of the transition to a low carbon economy, and that this non-material change application does nothing to change this. The Secretary of State therefore considers that granting the non-material change would not be incompatible with the amendment to the Climate Change Act 2008.

#### **Secretary of State's conclusions and decision**

32. The Secretary of State notes that in order that the Applicant can construct and operate the Development efficiently and effectively, it has concluded that it is necessary to construct a GIS substation instead of an AIS substation.
33. The Secretary of State has considered the ongoing need for the Development. The Secretary of State notes that the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2) both set out that for the UK to meet its energy and climate change objectives, there is an urgent need for new electricity generating plants of the type proposed by the Applicant given the contribution it will make to securing energy supply. The Secretary of State considers, therefore, that the ongoing need for the Development is established.
34. 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 Development would not result in any further environmental impacts and will remain within the parameters consented by the 2019 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 Development, the Secretary of State has concluded that it would be appropriate and advantageous to authorise the proposed change as detailed in the application.
35. 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 2019 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 2019 Order, and has decided under paragraph 2(1) of Schedule 6 to

the 2008 Act to make a non-material change to the 2019 Order so as to authorise the change detailed in the application.

### **Modifications to the draft Order proposed by the Applicant**

36. Minor drafting corrections have been made by the Secretary of State to the draft Order proposed by the Applicant. These changes do not materially alter the terms of the draft Order.

### **Challenge to decision**

37. 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**

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

Yours sincerely,

A solid black rectangular box used to redact the signature of the sender.

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/eastern/millbrook-power/?ipcsection=overview>

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)