

# The Eggborough CCGT Project

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## The Eggborough CCGT (Generating Station) Order

Land at and in the vicinity of the Eggborough Power Station site,  
near Selby, North Yorkshire, DN14 0BS

**Written Summary of Applicant's Oral Case - Issue Specific Hearing  
on Draft DCO 23 November 2017**

The Planning Act 2008

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**Applicant: Eggborough Power Limited**  
**Date: November 2017**

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## DOCUMENT HISTORY

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## GLOSSARY

<b>ABBREVIATION</b>	<b>DESCRIPTION</b>
Applicant	Eggborough Power Limited
CRT	Canal and River Trust
DCO	Development Consent Order
dDCO	draft Development Consent Order
DML	Deemed Marine Licence
EPL	Eggborough Power Limited
ExA	Examining Authority
ISH	Issue Specific Hearing
MMO	Marine Management Organisation
MW	megawatts
NSIP	Nationally Significant Infrastructure Project
NYCC	North Yorkshire County Council
PA 2008'	Planning Act 2008
PPA	Planning Performance Agreement
PPW	permitted preliminary works
Proposed Development	Eggborough CCGT Project
SDC	Selby District Council
SoS	Secretary of State
the Order	Eggborough CCGT (Generating Station) Order

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## 1.0 INTRODUCTION

- 1.1 This document (Document Ref. 9.5) has been prepared on behalf of Eggborough Power Limited ('EPL' or the 'Applicant') in respect of its application (the 'Application') for a Development Consent Order (a 'DCO') for the Eggborough CCGT Project (the 'Proposed Development'). The Application was submitted to the Secretary of State (the 'SoS') for Business, Energy and Industrial Strategy on 30 May 2017 and was accepted for examination on 27 June 2017.
- 1.2 The Proposed Development comprises the construction, operation and maintenance of a new gas-fired electricity generating station with a gross output capacity of up to 2,500 megawatts ('MW'), including electrical and water connections, a new gas supply pipeline and other associated development, on land at and in the vicinity of the existing Eggborough coal-fired power station, near Selby, North Yorkshire.
- 1.3 A DCO is required for the Proposed Development as it falls within the definition and thresholds for a 'Nationally Significant Infrastructure Project' (a 'NSIP') under Sections 14 and 15(2) of The Planning Act 2008 (the 'PA 2008'). The DCO, if made by the SoS, would be known as the 'Eggborough CCGT (Generating Station) Order' (the 'Order').
- 1.4 The document provides a written summary of the Applicant's oral case put at the Issue Specific Hearing ('ISH') on the draft DCO held on 23 November 2017. The document has been submitted for Deadline 3 of the Examination.

## 2.0 WRITTEN SUMMARY OF APPLICANT'S ORAL CASE

### Introductory Remarks

- 2.1 The Issue Specific Hearing ("ISH") on the draft Development Consent Order ("dDCO") and draft Deemed Marine Licence ("DML") was held on 23 November at Knottingley Town Hall, Hilltop, Headlands Lane, Knottingley, WF11 9DG.
- 2.2 The ISH concerns the application made by Eggborough Power Limited ("EPL" or the "Applicant") for an order granting development consent for the construction, operation and maintenance of a new gas fired electricity generating station with a gross output capacity of up to 2,500 megawatts ('MW') and associated works (the 'Proposed Development') on land at and in the vicinity of the existing Eggborough coal-fired power station, near Selby, North Yorkshire.
- 2.3 The ISH took the form of running through the Examining Authority's ("ExA") agenda, published on 15 November 2017.

### Introduction of Participating Parties

- 2.4 The ExA, Mr Richard Allen;
- 2.5 The Applicant;-
  - 2.5.1 Mark Westmoreland Smith; Barrister at Francis Taylor Building;
  - 2.5.2 Emma Cottam-Clough; Solicitor at Pinsent Masons LLP;
  - 2.5.3 Jonathan Riley; Partner at Pinsent Masons LLP; and
  - 2.5.4 Geoff Bullock; Partner at Dalton Warner Davis.
- 2.6 The following parties participated in the ISH;-
  - 2.6.1 Helen Robinson; Solicitor at Weightmans LLP on behalf of North Yorkshire County Council ("NYCC") and Selby District Council ("SDC") (the "Councils"), Michael Reynolds (NYCC), Ruth Hardingham (SDC),
  - 2.6.2 Melissa Flynn; Solicitor at Ward Hadaway LLP on behalf of the Canal and River Trust ("CRT");
  - 2.6.3 Heather Hamilton and Ed Walker, the Marine Management Organisation ("MMO"); and Mr Bob Tams, Hensall Parish Council.

### Main Discussion Points

#### Definition of "Commence" in Article 2 and Schedule 2

- 2.7 The ExA requested clarification from the Applicant on the inclusion of two differing definitions of "Commence" within the dDCO. The ExA asked the Applicant to explain whether in its view, this could lead to uncertainty of interpretation, and, whether this contravened the principles of the 'Office of the Parliamentary Counsel drafting guidance'.

- 2.8 The Applicant explained that, as identified by the ExA, there are two definitions of "Commence" in the dDCO, and that the reason for this is that they are intended to apply in different contexts depending on their placement within articles and schedules of the dDCO.
- 2.9 Both definitions, (in article 2 and schedule 2 respectively) are defined by reference to s155 of the Planning Act 2008. As explained by the Applicant in its response to the ExA's First Written Questions (DCO 1.2) (Document Reference 9.1), the alternate version of the definition in schedule 2 is justified in that it would enable the applicant to carry out the "permitted preliminary works" prior to the discharge of the relevant requirement. The Applicant explained that the approach taken was therefore appropriate on the basis that:-
- 2.9.1 "Commence" is used in articles 11 and 21 of the dDCO, in which it is not intended to carve out permitted preliminary works. In the context of these articles, it is therefore appropriate for "commence" to apply in its strictest sense, as these articles deal with the interference with rights (including private rights), by reference to the carrying out of a material operation; and
- 2.9.2 It is clear on the face of the dDCO where each definition applies. For example, the definition of "Commence" in schedule 2 is only intended to apply in the context of the discharge of requirements (which is clear by the inclusion of the words "*in this schedule*" prior to paragraph 1). The Applicant considers that this avoids any confusion in interpretation and application, as well as being in line with the drafting conventions applied throughout the dDCO, in which definitions that only apply to schedule 2 (or similarly in any other schedule). are defined in that schedule and are expressed as being for the purpose of that schedule only.
- 2.10 Following the Applicant's submission, the ExA recommended that the Applicant considers the drafting of "Commence" further.
- 2.11 On that basis, the Applicant refers the ExA to the revised dDCO submitted for Deadline 3, in which further amendments have been made. As per the ExA's recommendation, and in line with the principles of clarity set out in the drafting guidance, the Applicant has deleted the definition of "Commence" in schedule 2, and has sought to amalgamate both definitions in to one single definition in article 2. This amended definition makes it clear in which context(s) within the dDCO each definition should apply, so as to ensure there is no uncertainty as to application.

#### Permitted Preliminary Works

- 2.12 The ExA explained that its principal area of concern was that the definition of permitted preliminary works ("**PPW**") was too broad as currently drafted, most notably in that it permitted demolition of buildings prior to the discharge of requirements.
- 2.13 The Applicant explained that a justification for including the scope of works is set out in its response to the ExA's First Written Questions (DCO 1.24) (Document Reference 9.1). This explains that those works listed are works which, within their own right, would **not** constitute development pursuant to either the Planning Act 2008 or the Town and Country Planning Act 1990. Instead, these are works which would normally take place as Permitted Development (in accordance with the requirements of the General Permitted Development Order 2015) or would not constitute development at all. The inclusion of PPW is to enable the Applicant to start works on Site as soon as possible in the event that the Order is made.

- 2.14 The ExA questioned whether the PPW interferes with the operation of the Requirements. For example:-
- 2.14.1 Requirement 6 requires the submission of a Landscaping and Biodiversity Protection Plan, and if the PPW would permit the demolition of buildings and structures which may be required to be assessed as part of that Protection Plan, would this have environmental effects (for example, an effect on bats);
  - 2.14.2 Requirement 15 in the context of land contamination; and
  - 2.14.3 Requirement 10 in the context of fencing.
- 2.15 In response to these points, the demolition of buildings and removal of plant and machinery would take place within parts of the Site (e.g. the boundary of the existing coal-fired power station site and notably the main coal stockyard) that are already developed and where there are no significant landscape or biodiversity features. Furthermore, the PPW include 'environmental surveys' that would encompass pre-construction checks of buildings and structures so as to rule out the presence of protected species such as bats. Specifically with regard to bats, the Applicant notes that there is a separate regime (the Wildlife and Countryside Act 1981 and the Conservation of Habitats and Species Regulations 2010) which makes it a criminal offence to disturb, injure, kill etc protected species, including bats. This applies separately and in addition to controls within the dDCO.
- 2.16 With the exception of some geotechnical investigations that may involve limited borehole testing for the purpose of assessing ground conditions (in order to inform the preparation of the scheme required for the discharge of Requirement 15), none of the PPW would involve any earthworks or intrusive ground works. As such, the Applicant considers that there would be no conflict with them taking place in advance of the discharge of Requirement 15.
- 2.17 Any fencing comprised within the PPW would be temporary and associated with the establishment of facilities for the use of contractors in order to ensure that contractor compounds can be made safe and secure. This fencing would only be in place for the duration of the construction phase and sub-paragraph (1) of Requirement 10 prevents any work on Site until details of a programme for the removal of all temporary means of enclosure for any construction areas have been submitted to and approved by the relevant planning authority. As such, there is no conflict with Requirement 10.
- 2.18 The temporary display of site notices and advertisements would be for the purpose of identifying and directing contractors to contractor compounds and construction site. In their own right these are likely to benefit from deemed consent under the Town and Country Planning (Control of Advertisements) (England) Regulations 2007, and would have no implications for the discharge of any of the pre-commencement requirements.
- 2.19 The ExA referred the Applicant to the definition of PPW in the Wrexham Gas Fired Generating Station Order 2017 (the "**Wrexham Order**"), and asked the Applicant to consider whether the imposition of a similarly worded definition in the dDCO, which is narrower than that proposed by the Applicant, would detrimentally affect the deliverability of the Proposed Development, given that it is the ExA's view that the definition of PPW is too broad.
- 2.20 While the Applicant notes that the Wrexham Order is an example of a recently granted DCO, the Applicant is of the view that it is particularly narrow in terms of its definition of PPW compared to other generating station DCOs which have been granted, notably the Ferrybridge Multifuel 2 Power Station Order 2015 (Schedule 2, Requirement 49, 'Interpretation'). If such a narrow definition of

PPW was imposed (as per the Wrexham Order), this would prevent the Applicant from starting works on Site as soon as possible in the event that the Order is made and would delay the delivery of the significant benefits of the Proposed Development, not least its contribution to national energy security.

- 2.21 The MMO noted that, in the event that any PPW takes place within the UK Marine Area there may be a need to include these within the draft DML. The Applicant did not envisage that there would be any PPW taking place within the UK Marine Area, however accepted the MMO's position on the need for a revised DML if required.

#### Definition of "Maintain"

- 2.22 The ExA noted that, in its view, the current drafting of the definition of "maintain" is too broad and imprecise, with particular reference to the wording "*likely*" and "*materially new or materially different*". The ExA questioned whether the definition of "maintain" should be those works which are "*as/insofar as assessed in the Environmental Statement*" in order to ensure that any maintenance works are within the Rochdale Envelope.

- 2.23 At the end of this agenda item, the ExA requested that the Applicant consider the matter further. The following text includes both the summary of the Applicant's position expressed at the hearing and the Applicant's further submissions.

- 2.24 The Applicant responded by confirming that maintenance has been *implicitly* assessed in the Environmental Statement, based on the authorised development included at Schedule 1 and informed by the likely maintenance activities associated with a project of this nature, however that each and every activity is not *explicitly* listed in the Environmental Statement. On that basis, the Applicant considers that any maintenance activities would fall within the envelope of the assessment presented in the Environmental Statement.

- 2.25 The Applicant referred the ExA to examples of recently consented Orders in which the wording proposed by the Applicant has precedent; namely the North London Heat and Power Generating Station Order 2017 and the Keuper Underground Gas Storage Facility Order 2017. The Applicant explained that to impose the wording as suggested by the ExA would be unduly restrictive, on the basis that not all maintenance activities are listed in the Environmental Statement. Mr Westmoreland Smith, on behalf of the Applicant, provided further contextual information in that the wording in the North London Order (in respect of "materially new or materially different") was included to deal with any concerns regarding maintenance, and to put beyond doubt that those activities would **not** be permitted if the same *did* give rise to materially new or materially different environmental effects.

- 2.26 The ExA asked the Applicant to clarify whether (i) including the wording proposed would have a detrimental effect on the deliverability of the Proposed Development; noting that the Applicant had confirmed that the activities, whilst not explicitly listed, had been implicitly assessed and therefore were within the scope of the assessment of the Environmental Statement, and (ii) why the wording "materially new or materially different" was deemed necessary.

- 2.27 The Applicant explained that the rationale for the wording was as a result of the construction of the Environmental Statement, in that, for obvious reasons, not every single potential maintenance activity is listed. On that basis, to include wording as suggested, may pose an issue in the context of procuring finance and then operating the project (both of which go to delivery), in that if one



looks to the Environmental Statement, no explicit delineation of each and every conceivable maintenance activity has been provided. The Applicant also noted that, in the context of enforcement, the local planning authority would need to consider the effects of the activity, and therefore the end result of the "effect" would provide the local planning authority with the appropriate comfort that the maintenance works would not go beyond those assessed in the Environmental Statement.

- 2.28 The Applicant and the ExA considered the operation of the definition in practice, during which the Applicant confirmed that the initial judgment as to whether the activities were within the scope of the assessment would be the undertaker. That is no different to any person carrying on an activity on land, whether pursuant to a DCO, planning permission or otherwise – the first consideration as to whether the activity is lawful lies with that person, and the relevant legislation (here the Planning Act 2008) then provides the local planning authority with powers to investigate and enforce breaches of planning control.
- 2.29 The Applicant, in response to further questioning from the ExA explained that:
- 2.29.1 "materially new" was in respect of a new 'category' of effect, such as an effect which was scoped out of the Environmental Statement and therefore not assessed at all; and
- 2.29.2 "materially different" effect is a different significance of an effect already assessed in the Environmental Statement.
- 2.30 The ExA asked the Applicant to consider whether there could be any issues arising from effects of cumulative maintenance activities- arising as a result of the definition - the Applicant considers that the wording is sufficient to encompass the effects resulting from both individual and cumulative maintenance activities. However, in the event that the ExA disagrees, the Applicant considers that the definition could be amended to read "to the extent that such activities are not permitted if the same (whether individually or in combination with other such activities) are likely to give rise to any materially new or materially different environmental effects". Whilst the Applicant does not consider it necessary, it does consider that this puts beyond doubt that maintenance activities carried out at the same time, or combining to have cumulative effects, must together not have materially new or materially different environmental effects.
- 2.31 The ExA asked the Applicant to consider whether the wording adopted in the Wrexham Order (notably the reference to maintenance of any "part" as opposed to the "whole") should be applied in this context. The Applicant is content to include that wording and has proposed it in the updated dDCO submitted at Deadline 3.
- 2.32 In light of the discussions, Helen Robinson on behalf of the host Local Authorities confirmed that they would need to consider the wording and discuss the drafting in more detail with the Applicant.
- 2.33 The Applicant has considered the above following the hearing, and for the reasons set out above is of the view that the existing drafting (subject to the above points) is sufficient and robust. Key to the Applicant's view are the following points:
- 2.33.1 The Environmental Statement does not set out an express list of maintenance activities, so to define "maintain" by reference to the activities set out in the Environmental Statement could constrain the undertaker, or lead to a lack of clarity. The latter would not be a helpful potential situation for either the undertaker operating the Proposed

Development, nor the local planning authority responsible for ensuring and enforcing compliance with the development consent order;

- 2.33.2 The Applicant's drafting has precedence in very recent energy development consent orders made by the Secretary of State; and
- 2.33.3 The Secretary of State, in determining the Application, has to ensure that controls are imposed such that the environmental effects that may occur are no worse than those set out in the Environmental Statement. That is the case both from an EIA perspective and implicitly also from the Secretary of State considering whether the adverse impacts of the Proposed Development outweigh its benefits (as per Section 104(7) of the Planning Act 2008). In order to carry out that weighing up exercise robustly, the impacts must be 'known' and therefore controlled. The Applicant's proposed drafting does exactly this, ensuring that maintenance activities may only be carried out to the extent that the effects arising from them are no worse than those set out in the Environmental Statement.

#### The Wording of Requirement 39

- 2.34 The Applicant confirmed that it will amend Requirement 39 to remove the word "*unlikely*" and instead replace this with "*will not*". The Applicant also noted that it would amend sub-paragraph (2) to insert the words "*any such approval or agreement*" after "persons" to correct a typographical error.
- 2.35 In response to a question raised by the ExA in respect of the wording "*to the satisfaction of that authority*", the Applicant confirmed that in this context, this is in respect of amendments agreed by the relevant planning authority, specifically those requirements with the tailpiece wording "*unless otherwise agreed*". There is also a limit on the extent of those amendments, being that those amendments are non-material **and** will not give rise to materially new or materially different environmental effects. Given that the Councils are the arbitrator in this circumstance; this wording is therefore considered appropriate. This was confirmed as agreed by the Councils.

#### Requirements 16 and 24

- 2.36 The Applicant explained, for the benefit of those parties who did not attend the Environmental ISH, the progress which had been made in respect of the drafting of those Requirements. The Applicant refers to the Written Summary of Eggborough Power Limited's Oral Case put at the Environmental Issue Specific Hearing (Document Reference 9.4) in this respect.
- 2.37 The Applicant subsequently refers the ExA to the revised dDCO submitted at Deadline 3, which includes revisions to Requirement 16 and Requirement 24.

### **Draft Deemed Marine Licence ("DML")**

#### Update on Discussions on the DML

- 2.38 The Applicant provided the following update to the ExA in terms of the principal changes made to the draft DML following submission of the Application as a result of engagement with the MMO:-
- 2.38.1 the removal of Work No 6 from the DML on the basis that it would constitute an "exempt activity"; and
- 2.38.2 the addition of a number of conditions within Part 3 of the draft DML.

- 2.39 The MMO confirmed that the changes made to the draft DML take into account the requests that have been made, and which have arisen as a result of ongoing dialogue with the Applicant. The MMO noted that the only outstanding area to be agreed between the parties was in respect of paragraph (3)4(b) of Part 2 of the DML (in respect of the area within the Order limits but outwith the specified co-ordinates); the inclusion of which is not agreed by the MMO.
- 2.40 The MMO explained that it was concerned that the licensed activities (being Work No 4), could take place outside of the co-ordinates (but within the Order limits) and therefore that there could be unknown effects, which have not been assessed, as a result of extending the scope of the draft DML beyond those specified co-ordinates. However, the MMO noted that, following its submission made at Deadline 2, further discussions had taken place with the Applicant with a view to reaching a solution on this issue.
- 2.41 The MMO and the Applicant confirmed that a possible solution had been proposed to the Applicant, which had been agreed in principle subject to further consideration by the Applicant of the detail of the wording. The Applicant is awaiting sight of the proposed wording from the MMO.
- 2.42 The MMO confirmed to the ExA that it did not consider that these proposed changes would go beyond the scope of the assessment in the Environmental Statement, given that it is expected that the changes would be relatively minor based on the geomorphology of the area.

#### Definition of "River"

- 2.43 The Applicant confirmed that it agreed with the ExA that a definition of "River" would be appropriate in the context of the draft DML, and that it had put forward a definition for consideration to the MMO. The MMO has not responded to the Applicant at this stage and therefore the parties will continue to discuss this matter.

#### **Other Matters**

##### Horizontal Directional Drilling

- 2.44 The Applicant noted that requirement 5(8)(d) requires details of "the route and method of installation of the ~~high-pressure~~high-pressure steel pipeline and any electrical supply, telemetry and other apparatus" to be approved by the Councils, in consultation with the Environment Agency. On that basis the Applicant confirmed that it considered that the wording is sufficient to encompass within it the drilling techniques.
- 2.45 However, the Applicant confirmed that the reason behind the drafting is that technology can move on, and if available, this drafting would allow the Applicant to utilise and have the benefit of better construction techniques in the future. However, in practical terms, the options to the Applicant in terms of the approach are in fact narrow, (i.e. it can only go underneath the river).
- 2.46 On that basis, the drafting included in requirement 5 is considered suitable, without restricting the ability of the Applicant to take advantage of future technological advances.

##### Articles 18, 20 and 21

- 2.47 The Applicant confirmed that it was content to amend articles 18, 20 and 21 to make them explicitly subject to article 17(4), as per the ExA's request.

Articles 20, 21 and 28 (in response to National Grid)

- 2.48 The Applicant confirmed that the amendments proposed to articles 17, 20 and 21 by National Grid were included in the draft of the dDCO submitted for Deadline 2, and the Applicant was content with these revisions. The Applicant also confirmed that, in accordance with the request made by National Grid, the Applicant will amend Article 17(4) in the dDCO to include reference to article 28. The Applicant refers the ExA to the revised dDCO submitted for Deadline 3 which includes these changes.

Article 11, in respect of public rights of navigation as raised by the CRT

- 2.49 In response to questions raised by the ExA, Melissa Flynn on behalf of the CRT confirmed that the concerns of the CRT in respect of the public rights of navigation had been satisfactorily addressed by the Applicant in respect of its changes to article 11 of the revised dDCO submitted at Deadline 2. The CRT also confirmed that it did not require to be included as a defined body within the definitions listed schedule 2, as it noted that they were in fact defined in article 2, however that the definition should refer to the CRT's charitable status. The Applicant has updated the definition accordingly in the revised dDCO submitted for Deadline 3.

Schedule 11

- 2.50 Helen Robinson, on behalf of the Councils, confirmed that, following recent discussions with the Applicant, they were satisfied with the wording in schedule 11, and had discussed with the Applicant extending the scope of the existing Planning Performance Agreement ("PPA"). On this basis the Councils confirmed that their concerns have now been addressed.
- 2.51 It was agreed, following discussions, that an update on any extension to the PPA would be provided to the Examination at appropriate intervals. The Applicant confirmed that it was its intention to agree and conclude a new/amended PPA before the close of Examination.
- 2.52 The Applicant explained that it was in the best interests of the Councils, and the Applicant, that the stream of information put to the Council in the context of the discharge of Requirements is put forward in a consistent and steady manner to enable decisions to be made in a timely manner.
- 2.53 The Councils and the Applicant confirmed that there were no outstanding issues in respect of the wording of the discharge of a "part" of a requirement, and that no further amendments to the dDCO were required in this regard.

Schedule 9

- 2.54 The ExA noted that the decision of the Secretary of State in respect of the Silvertown DCO was awaited and would not be available during the Examination period for this project.
- 2.55 Mr Westmoreland Smith, on behalf of the Applicant, explained that the drafting included in schedule 9 of the dDCO had precedent in the High Speed Rail (London - West Midlands) Act 2017; however the drafting had not yet been tested in the context of DCOs. This is as a result of simple chronology, in that the provisions of the Housing and Planning Act 2016 require consequential legislative changes to be made to the compulsory purchase legislation in schedule 9, and that, as of yet, this had not been required to be considered in this context.

- 2.56 The Applicant confirmed that, in the event that the ExA required further information, it would provide in writing further legislative analysis as to the need for and the amendments to these provisions. The ExA confirmed that it would consider whether this is required and confirm the position to the Applicant accordingly.