



**Deadline 5: Applicant's Response to the Examining Authority's Further Written Questions (ExQ3)**

**Appendix F – Ferrybridge Multifuel 2 (FM2) Secretary of State Decision**

**Wheelabrator Kemsley (K3 Generating Station) and Wheelabrator Kemsley North (WKN) Waste to Energy Facility Development Consent Order**

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of Energy &  
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Dear Sirs

## **PLANNING ACT 2008**

### **APPLICATION FOR THE FERRYBRIDGE MULTIFUEL 2 (FM2) POWER STATION ORDER**

#### **1. Introduction**

1.1 I am directed by the Secretary of State for Energy and Climate Change (“the Secretary of State”) to advise you that consideration has been given to the report dated 29 July 2015 of the Examining Authority (“the ExA”), Dr Michael Ebert, who conducted an examination into the application (“the Application”) dated 30 July 2014 by Multifuel Energy Limited (“the Applicant”) for a Development Consent Order (“the Order”) under section 37 of the Planning Act 2008 (“the 2008 Act”) for the Ferrybridge Multifuel 2 Power Station (“the Development”).

1.2 The Application was accepted for examination on 29 April 2014. A Preliminary Meeting was held on 4 December 2014 with the examination beginning the following day, 5 December 2014. It was completed on 29 April 2015.

1.3 The Order, as applied for, would grant 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.

1.4 The Development would comprise the following principal elements:

- a multifuel power station and its components, including fuel reception and storage facilities, combustion system, steam turbine and emissions stack (“*Work No.1*” in the Order); and
- associated development.

The associated development mentioned above, which would support the operation of the power station is:

- a new electrical connection (“*Work No.2*” to the Order) to export electricity from the power station to the electricity grid network (Note: three options were applied for and assessed in the Environmental Statement: “*Work No.2A*”, “*Work No.2B*” and “*Work No.2C*” with the Applicant’s selected option requiring approval by the “*planning authority*” pursuant to Requirement 4(2) in the Order);
- improvements to an existing access road to provide an alternative means of access for cars and light goods vehicles to access the power station from Stranglands Lane (“*Work No.3*” in the Order);
- a new foul water connection between the power station and the existing foul water drainage network (“*Work No.4*” in the Order) (Note: two options were applied for and assessed in the Environmental Statement: “*Work No.4A*” and “*Work No.4B*” with the Applicant’s selected option requiring approval by the “*planning authority*” pursuant to Requirement 4(4) in the Order); and
- other associated development relating to Works 1, 2, 3 and 4 in the Order.

1.5 Published alongside this letter on the Planning Inspectorate’s website<sup>1</sup> is a copy of the ExA’s Report of Findings and Conclusions and Recommendation to the Secretary of State (“the ExA Report”). The ExA’s findings and conclusions are set out in chapters 4, 5 and 6 of the ExA Report, and the ExA’s summary of conclusions and recommendation is at chapter 7.

## 2. Summary of the ExA’s Report and Recommendation

2.1 The principal issues considered during the examination on which the ExA has reached conclusions on the case for development consent [ExA Report Chapter 5, pages 93-96] were:

- conformity with National Policy Statements and local plan policies;
- the Development;
- design approach;
- air quality and pollution;
- landscape and visual amenity;

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<sup>1</sup><http://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/ferrybridge-multifuel-2-fm2-power-station/>

- transport and traffic;
- noise, disturbance, and vibration;
- flood risk;
- biodiversity and protected wildlife conservation sites;
- waste management;
- historic environment;
- combined heat and power;
- grid connection;
- health, safety and security; and
- socio-economic impact.

2.2 The ExA has also considered the terms of the draft Order sought. For the reasons set out in the ExA Report, the ExA recommends that the Order be made, as set out in Appendix A to the ExA Report [ER 7.2.1].

### **3. Summary of the Secretary of State’s Decision**

3.1 The Secretary of State has decided under section 114 of the 2008 Act to make, with modifications, an Order granting development consent for the proposals in the Application. This letter is a statement of reasons for the Secretary of State’s decision for the purposes of section 116 of the 2008 Act and the notice and statement required by regulation 23(2)(c) and (d) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 (“2009 Regulations”).

### **4. Secretary of State’s Consideration of the Application**

4.1 The Secretary of State has considered the ExA Report and all other material considerations. The Secretary of State’s consideration of the ExA Report is set out in the following paragraphs. All numbered references, unless otherwise stated, are to paragraphs of the ExA Report.

4.2 The Secretary of State has had regard to the Local Impact Reports (“LIR”) submitted by Wakefield Metropolitan District Council (“WMDC”) and jointly by Selby District Council (“SDC”) and North Yorkshire County Council (“NYCC”) [ER 3.2 & 4.2], the Development Plan [ER 3.9 & 4.3], environmental information as defined in Regulation 2(1) of the 2009 Regulations and to all other matters which are considered to be important and relevant to the Secretary of State’s decision as required by section 104 of the 2008 Act. In making the decision, the Secretary of State has complied with all applicable legal duties and has not taken account of any matters which are not relevant to the decision.

4.3 Except as indicated otherwise in the paragraphs below, the Secretary of State agrees with the findings, conclusions and recommendations of the ExA as set out in the ExA Report, and the reasons for the Secretary of State’s decision are those given by the ExA in support of its conclusions and recommendations.

## Need for the Proposed Development

4.4 After having regard to the comments of the ExA set out in Chapter 4 of the ExA Report, and in particular the conclusions on the case for development consent in Chapter 5, the Secretary of State is satisfied that in the absence of any adverse effects which are unacceptable in planning terms, making the Order would be consistent with energy National Policy Statements EN-1 (the Overarching NPS for Energy) and EN-3 (the NPS for Renewable Energy) and that taken together, these NPSs set out a national need for development of new nationally significant electricity generating infrastructure of the type proposed by the Applicant.

## **5. Biodiversity and Habitats**

5.1 Regulation 61 of the Conservation of Habitats and Species Regulations 2010 (as amended) (“the Habitats Regulations”) requires the Secretary of State to consider whether the proposed Development would be likely, either alone or in-combination with other plans and projects, to have a significant effect on a European site or European offshore marine site as defined in the Habitats Regulations and the Offshore Habitats Regulations. If likely significant effects cannot be ruled out, then the Secretary of State must undertake an Appropriate Assessment (“AA”) addressing the implications for the European Site in view of its conservation objectives. In light of any such assessment, the Secretary of State may grant development consent only if it has been ascertained that the project will not, either on its own or in-combination with other plans and projects, adversely affect the integrity of such a site, unless there are no feasible alternative or imperative reasons of overriding public interest apply.

5.2 In the case of the Development, it is noted that the Secretary of State’s statutory nature conservation advisor, Natural England (“NE”) has confirmed that there are no European Sites, Ramsar sites or nationally designated landscapes located within the vicinity of the project and it has no objection to the project [ER 4.12.13]. NE considers 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) have been addressed [ER 4.12.14]. The Secretary of State also notes that NE welcomes the ecological enhancement measures proposed by the Applicant (Requirement 17 (Biodiversity Enhancement and Management Plan) included in the draft Order at Appendix A to the ExA’s Report), which it considers would have a positive effect on the natural environment by providing a range of biodiverse habitats on the site [ER 4.12.15]. In conclusion, the Secretary of State is satisfied that the Development is 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 is also content that sufficient information has been provided for the Secretary of State to determine that an AA under the Habitats Regulations is not required.

## 6. Other Matters

### Environmental Permit

6.1 The Secretary of State notes that the Applicant submitted an Environmental Permit application to the Environment Agency (“EA”) on 14 January 2015 to cover operational emissions from the proposed development. Although the ExA’s Report states the EA had confirmed that the application was of a ‘high quality’ and that the ExA is satisfied that emissions can be regulated through the Environment Permit and is not aware of any reasons why it would not be granted, the application was still undetermined by the EA at the close of the examination [ER 4.6]. The Secretary of State understands that the EA are minded to issue the permit, although no final decision has yet been made. In the circumstances, the Secretary of State considers there are no reasons to be believe the Environmental Permit will not be granted in due course.

## 7. Modifications to the Order by the Secretary of State

### Paragraph 3(2)(b) of Schedule 7(Procedures for Approvals Etc. Required by the Requirements)

7.1 The Secretary of State notes that there was an unresolved issue at the close of the ExA’s examination [ER 6.4.8], that related to a disagreement between the Applicant and WMDC on the terms of paragraph 3(2)(b) of *Schedule 7: (Procedure for Approvals etc. Required by the Requirements)* to the draft Order at Appendix A to the ExA Report. It is noted that the Applicant rejected the WMDC’s proposed 35 business days for paragraph 3 (2)(b) on the grounds that 18 business days was considered a reasonable and achievable period for consultees to notify WMDC that further information was required in respect of a planning requirement that they had been consulted upon [ER6.4.9]. The ExA’s considered opinion is that 18 business days is adequate for paragraph 3(2) (b) and this is therefore unchanged in the draft Order at Appendix A of the ExA Report [ER 6.4.9]. The Secretary of State agrees with the ExA’s view that 18 business days is a reasonable period for consultees to notify WMDC that further information was required and has therefore included 18 business days in the Order.

### Paragraph 5(5) of Schedule 7 (Procedures for Approvals Etc. Required by the Requirements)

7.2 Paragraph 5(5) of Schedule 7 to the draft Order similarly imposes a response time on the Secretary of State in respect of the appointment of a person to determine an appeal on behalf of the Secretary of State following receipt of documents received pursuant to paragraph 5(2). The Secretary of State agrees with the ExA that 10 business days is an unreasonably short period for the Secretary of State to appoint a person to determine an appeal. The Secretary of State does not believe it is reasonably practicable to appoint a person to determine an appeal in 10 business days. Accordingly, the Secretary of State is content with the ExA’s recommendation that the Order be amended to require this to be done “as soon as reasonably practicable” [ER 6.4.10] and has therefore included this wording in the Order.

7.3 In considering the draft Order submitted with the ExA Report, the Secretary of State also identified a number of other issues in respect of which modifications to the Order have been made:

Work No. 1 in Schedule 1 (*The Authorised Development*)

7.4 The description of Work No.1 has been amended to reflect the fact that only waste derived fuel may be combusted (apart from for the purposes of the start-up or support firing of a boiler). The description of Work No.1 has also been amended to clarify that the 90MWe generating capacity referred to is the 'gross combined installed generating capacity'. This is consistent with previous Orders.

Definition of "maintain" in Article 2 of the Order

7.5 The definition of "maintain" has been amended to ensure clarity and consistency with previous Orders.

Definition of "undertaker" in Article 2 of the Order

7.6 The definition of "undertaker" has been amended to make clear that this is subject to Article 8 (transfer of the benefit of the Order).

Article 8 (*Transfer of the benefit of the Order*)

7.7 The grounds when the Secretary of State's consent to transfer or lease the benefit of the Order is not required have been amended so that the Secretary of State's consent is needed unless the transferee or lessee is a licence holder under section 6 of the Electricity Act 1989 or the time limits for all claims for compensation in respect of effects upon land under the Order have elapsed. This is consistent with previous Orders.

Article 23 (*Certification of documents*)

7.8 This article has been amended to clarify that printed copies are required for certification (given that Article 2(3) otherwise provides for copies referred to in the Order to include those in electronic form).

Article 24 (*Arbitration*)

7.9 This article has been amended to provide for an arbitrator to be appointed by the Secretary of State where necessary.

Schedule 2 (*Requirements*)

7.10 Amendments have been made to the Requirements to make clear that where details or schemes are required to be submitted to and approved by relevant bodies, they are to be submitted in writing.

7.11 In paragraph 49 (*Interpretation*) of Schedule 2 (*Requirements*), the definition of “commencement of the authorised development” has been amended in the interests of clarity and consistency. The definition of “permitted preliminary works” has also been amended to remove the reference to ‘any other works agreed by the planning authority’ to ensure certainty of consent.

#### Other Drafting Changes

7.12 In addition to the above, the Secretary of State has made various changes to the draft Order which do not materially alter its effect, including changes to conform with the current practice for statutory instruments (for example, modernisation of language), changes in the interests of clarity and consistency and changes to ensure that the Order has the intended effect.

## **8. General Considerations**

### Equality Act 2010

8.1 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 partnerships<sup>2</sup>; pregnancy and maternity; religion and belief; and race. This matter has been considered by the Secretary of State who has concluded that there was no evidence of any harm, lack of respect for equalities, or disregard to equality issues.

### Human Rights Act 1998

8.2 The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights by the Development and compulsory purchase powers. It is noted that infringement of human rights has not been raised in respect of any of issues considered by the ExA in relation to the Development. Furthermore, it is also noted that the Applicant is not seeking compulsory acquisition powers in the Order [ER 4.36.2]. The Secretary of State therefore takes the view that the grant of development consent would not violate any human rights protected by the Human Rights Act 1998.

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



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

8.3 The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, must 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 ExA Report considers biodiversity sufficiently to accord with this duty.

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

9.1 For the reasons given in this letter, the Secretary of State considers that there is a compelling case for granting consent. Given the national need for the proposed Development, as set out in the relevant National Policy Statements referred to above, the Secretary of State does not believe that this is outweighed by the Development's potential adverse local impacts, as mitigated by the proposed terms of the Order.

9.2 The Secretary of State has therefore decided to accept the ExA's recommendation to make the Order granting development consent [ER 7.2.1]. In reaching this decision, the Secretary of State confirms regard has been given to the ExA Report, the LIRs submitted by WMDC and jointly by SDC and NYCC and to all other matters which are considered important and relevant to the Secretary of State's decision as required by section 104 of the 2008 Act. The Secretary of State confirms for the purposes of regulation 3(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 that the environmental information as defined in regulation 2(1) of those Regulations has been taken into consideration.

### **10. Challenge to decision**

10.1 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.

### **11. Publicity for decision**

11.1 The Secretary of State's decision on this Application is being publicised as required by section 116 of the 2008 Act and regulation 23 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

Yours sincerely

**Giles Scott**

**Head of National Infrastructure Consents and Coal Liabilities**

**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 former Infrastructure Planning Commission or 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 on the website below. The Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<http://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)**