



The Kemsley Mill K4 Combined Heat and Power Generating Station Development Consent Order

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Explanatory Memorandum

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EXPLANATORY MEMORANDUM

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CONTENTS

| Clause | Heading | Page |
|---------------|---------------------------|-------------|
| 1 | SUMMARY | 1 |
| 2 | PURPOSE OF THE ORDER..... | 1 |
| 3 | THE DRAFT ORDER | 2 |
| 4 | SCHEDULES..... | 7 |

1 SUMMARY

This memorandum explains the purpose and effect of each article of, and each Schedule to, the draft Kemsley Mill K4 Combined Heat and Power Generating Station Development Consent Order (the "**Order**"), as required by Regulation 5(2)(c) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009¹.

2 PURPOSE OF THE ORDER

2.1 DS Smith Paper Limited (the "**Applicant**") is applying to the Secretary of State for a development consent order to construct the Kemsley K4 combined heat and power generating station (the "**Scheme**").

2.2 The Scheme consists of the decommissioning of the existing K1 combined heat and power ('CHP') plant and the construction, commissioning and operation of the new gas-fired K4 CHP plant. K1 will be decommissioned once the new K4 plant becomes fully operational. There will be a temporary period where the two plants operate simultaneously in order to ensure that the continuous needs of the paper mill can be met. The new K4 plant will comprise gas turbine technology of approximately 52-57MW nominal power output; waste heat recovery boilers capable of supplementary firing, sized to provide an output of approximately 105 MWth steam; and steam turbine technology of around 16MW nominal power output. The plant will require a number of tie-ins to existing onsite facilities.

2.3 A detailed description of the Scheme is included in Chapter 2 of the Environmental Statement.

Nationally Significant Infrastructure Project – construction of a generating station

2.4 The Scheme is a nationally significant infrastructure project ("**NSIP**") within Sections 14(1)(a) and 15(2) of the Planning Act 2008 (the "**2008 Act**") as it involves the construction of an onshore generating station in England with a capacity in excess of 50MW and it does not involve the generation of electricity from wind.

2.5 As the Scheme is an NSIP, development consent must be obtained from the Secretary of State to authorise it, and an application for a development consent order must be made to the Secretary of State, care of the Planning Inspectorate ("**PINS**"), under section 37 of the 2008 Act.

2.6 Schedule 1 (authorised development) to the draft Order contains a list of numbered works comprising the Scheme.

¹ S.I. 2009/2264

3 THE DRAFT ORDER

3.1 The purpose and effect of the provisions of the draft Order are now explained in sequence. Whilst the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (S.I. 2009/2265) has been repealed, the draft Order is based on the model provisions as well as other development consent orders that have been made to date.

Part 1 – Preliminary

Article 1 - Citation and commencement

3.2 Article 1 sets out the name of the Order and the date on which it comes into force.

3.3 This article did not appear in the model provisions. However, it is a standard article that is included in all development consent orders.

Article 2 - Interpretation

3.4 Article 2(1) defines terms used in the Order. It is a standard article and was included in the model provisions.

3.5 Definitions to note include:

- (a) "Commence" which makes clear that a number of works that would constitute a 'material operation' under the Town and Country Planning Act 1990 do not mean that the authorised development has been 'commenced'. This enables the undertaker to undertake certain preparatory works prior to the submission of relevant details for approval under the requirements, which the Applicant considers proportionate considering the nature and scale of the authorised development. The works that are excluded from the definition of commencement are either de minimis or have minimal potential for adverse impacts. They may in some cases need to be carried out in order to comply with the pre-commencement requirements (for example, to inform assessments and proposals required to be submitted for approval). The undertaker should be permitted to carry out low impact preparatory works following the grant of the DCO, while it is working to discharge the pre-commencement requirements, thereby helping to minimise the construction timetable.

In the event of a conflict with the requirements, it would be up to the undertaker to decide whether to carry out the relevant works in advance of the relevant plan being approved. Any works carried out in advance would be at risk of the approval process determining that additional, or different, works are required. The undertaker would still be required to secure the approval of the relevant plan prior to commencement of the substantive works.

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- (b) "Maintain" which includes inspect, repair, adjust, alter, remove, reconstruct and replace, provided such works do not give rise to any materially new or different environmental effects to those identified in the Environmental Statement. Maintenance activities are unlikely to result in significant environmental effects and limiting the scope of maintenance activities by reference to the Environmental Statement is considered to provide an appropriate limit to the permitted extent of maintenance activities. This wording has appeared in previous orders (e.g. the Port Talbot Steelworks Generating Station Order 2015) and is aligned with the underlying purpose of the EIA Regulations.
- 3.6 Article 2(2) expands the definition of rights over land. This was included in the model provisions.
- 3.7 Article 2(3) defines measurements as approximate. The purpose of this is to ensure that if, upon construction of the works, it transpires that the distances are marginally different to those listed in the Order, there is no issue over whether the works are permitted by the Order. Thus this provision allows for a small tolerance with respect to any distances and points, although all works will take place within the limits of deviation. It is now common practice to include such provision in development consent orders and the model provisions included similar wording.
- 3.8 Article 2(4) provides that the word 'includes' is to be interpreted as being without limitation (i.e. a list that follows the word is not to be considered exhaustive). This was not included in the model provisions, but is considered to be a sensible addition to avoid any potential for disagreement about whether or not a particular list is exhaustive.
- 3.9 Article 2(5) confirms that references in the Order to a statutory body include that body's successors. Again, this was not included in the model provisions, but is considered to be a sensible addition to avoid potential disagreement about whether or not the Order relates to a party that succeeds a party referred to in the Order.

Part 2 - Principal Powers

Article 3 - Development consent etc. granted by the Order

- 3.10 Article 3 provides the principal power to construct and operate the authorised development. Schedule 1 describes the authorised development.
- 3.11 Development consent is subject to the provisions of the Order, including the requirements listed in Schedule 2. This is based on the model provisions.
- 3.12 Article 3(2) confirms that in constructing or maintaining a work the undertaker may deviate laterally from the lines or situations shown on the works plans, provided that such deviation is within the limits of deviation for that work. This wording was not

included in the model provisions, but has become common wording in development consent orders². The ability to deviate laterally within the prescribed limits of deviation is important to ensure that, if the precise 'as built' alignment is slightly different to that shown on the application plans, no question arises as to whether or not the works are permitted by the Order. The detailed design of the scheme will take place following the grant of the Order (see Requirement 5) and the limits of deviation therefore ensure that the undertaker and its contractor have sufficient flexibility to design and construct the authorised development post consent.

Article 4 – Maintenance of authorised development

- 3.13 This article sets out the scope within which the undertaker may maintain the development. The definition of "maintain" is contained in article 2(1). Article 4(1) was included in the model provisions.
- 3.14 Under article 4(2) maintenance may only take place within the Order limits. This was not included in the model provisions, but has been included in the Order following pre-application feedback from PINS.
- 3.15 Powers of maintenance are subject to the other provisions in the Order and any agreements made under the Order.

Article 5 – Operation of generating station

- 3.16 This article authorises the undertaker to operate the authorised development. Article 5(2) clarifies that the undertaker is not relieved of the need to obtain any other permit or licence that may be required for the operation of a generating station.
- 3.17 This article was not included in the model provisions, but is considered to be a sensible addition to avoid any potential disagreement about whether the undertaker is authorised to operate, as well as construct, the authorised development under the Order. It has become common wording in development consent orders³.

Article 6 - Benefit of Order

- 3.18 Article 6 overrides section 156(1) of the 2008 Act (as permitted by section 156(2)) to give the benefit of the Order to the undertaker rather than anyone with an interest in the land. It would be impracticable for a variety of landowners to implement parts of the Order in an uncoordinated manner, which might be the case if section 156(1) were to apply.
- 3.19 This article is based on article 4 of the model provisions.

² Recent examples for similar schemes include The Wrexham Gas Fired Generating Station Order 2017 (art. 3(3)); The North London Heat and Power Generating Station Order 2017 (art. 4); and The Meaford Gas Fired Generating Station Order 2016 (art. 3(3)).

³ Articles 5, 6 and 5 of the above orders respectively.

Article 7 - Consent to transfer benefit of Order

- 3.20 This article allows the benefit of the Order to be transferred or leased to others by the undertaker. The exercise of any transferred benefits or rights is subject to the same restrictions, liabilities and obligations as would apply under the Order if those benefits or rights were exercised by the undertaker. The consent of the Secretary of State is required for a transfer or grant, except where it is made to a specified company (Kemsley CHP Limited, a wholly owned subsidiary company of E.ON) or to a licence holder within the meaning of the Electricity Act 1989.
- 3.21 This article is based on article 5 of the model provisions. It differs in that it allows a transfer or grant to Kemsley CHP Limited or a licence holder to take place without the Secretary of State's consent, on the basis that it is common commercial practice for a company other than that which applies for permission/consent to operate a generating station following construction⁴.

Article 8 – Defence to proceedings in respect of statutory nuisance

- 3.22 Section 158 of the 2008 Act confers statutory authority for the purposes of a defence in civil or criminal proceedings for nuisance. This article provides a defence to proceedings brought in a magistrates' court under s.82(1) of the Environmental Protection Act 1990 in relation to a variety of nuisances set out in paragraph 79(1) of that Act.
- 3.23 The defence is available if the nuisance relates to:
- (a) the use of premises by the undertaker for the purposes of or in connection with the construction or maintenance of the authorised development and is attributable to the carrying out of the authorised development in accordance with a notice served, or consent given, under the Control of Pollution Act 1974; or
 - (b) the construction, maintenance or use of the Scheme and cannot reasonably be avoided.
- 3.24 The article provides a defence to a variety of possible nuisances on the basis that it is logical for it to mirror the breadth of application of section 158. Only those nuisances which may be of relevance to the authorised development, as set out in the Statutory Nuisances Statement accompanying the application, have been included in the Order.
- 3.25 This article is based on article 7 of the model provisions.

Part 3 – Supplemental powers

⁴ See Articles 7(4), 8(4) and 7(4) of the above orders respectively.

Article 9 - Discharge of water

- 3.26 This article sets out the circumstances in which the undertaker is entitled to discharge water into a sewer, watercourse or drain, and its purpose is to establish statutory authority for doing so.
- 3.27 The effect of article 9(3) is that this can only be done with the consent of the owner, but consent cannot be withheld unreasonably and may be given subject to reasonable terms and conditions.
- 3.28 Other than article 9(9), this article is based on article 14 of the model provisions. Article 9(9) provides that if an owner fails to respond to an application for consent within 28 days then they are deemed to have granted consent. This is considered to be appropriate as the owner should be able to notify the undertaker of their decision within 28 days of receiving an application. As a nationally significant infrastructure project, the authorised development should not be at risk of being held up by a failure to reply to a request for consent. The owner will be at liberty to refuse consent within the 28 day period should that refusal be reasonable.
- 3.29 Under article 9(6) the undertaker must take reasonably practicable steps to ensure that any water discharged into a watercourse, public sewer or drain is as free as practicable from gravel, soil or other solid substance, oil or suspended matter.

Part 4 – Miscellaneous and general

Article 10 - Procedure in relation to certain approvals, etc. under requirements

- 3.30 This article relates to the approvals required by the requirements contained in Schedule 2 to the Order. The article seeks to replicate the procedure for the discharge of planning conditions contained in the Town and Country Planning Act 1990 (as amended), with particular reference to the ability for the undertaker to appeal against either the refusal or non-determination of any application for approval under the requirements.
- 3.31 This article was not included in the model provisions. It is however considered to be a useful addition in clarifying the process by which the requirements are to be discharged. It is a common inclusion in development consent orders, which typically either include an article such as this applying the provisions of the Town and Country Planning Act 1990⁵ or a bespoke process that is set out in a schedule⁶.

Article 11 - Operational land for purposes of the 1990 Act

⁵ See for example The Palm Paper Mill Generating Station Order 2016 (art. 4) and The South Hook Combined Heat and Power Plant Order 2014 (art. 4).

⁶ See Articles 37, 37 and 35 respectively of the orders named in footnote 2 above.

3.32 This article confirms that the consent granted by the Order is to be treated as specific planning permission for the purposes of section 264(3)(a) of the Town and Country Planning Act 1990.

3.33 This article was included as article 36 in the model provisions.

Article 12 - Certification of plans, etc.

3.34 This article lists various plans and other documents that are to be certified by the Secretary of State as true copies of those documents referred to in the Order. It was included as article 41 in the model provisions.

Article 13 - Service of notices

3.35 This article governs the proper service of notices required to be given under the Order. In particular it allows service by email with the consent of the recipient, and deals with the situation of service on an unknown landowner.

3.36 This article was not included in the model provisions, but is considered to be a useful addition that is now a common article in development consent orders⁷.

Article 14 - Arbitration

3.37 This article governs what happens when two parties disagree about any provision of the Order. The matter is to be settled by arbitration except where otherwise expressly provided for, and if the parties cannot agree on who the arbitrator should be then this will be decided by the Secretary of State.

3.38 This article is based on article 42 of the model provisions.

4 SCHEDULES

Schedule 1 – Authorised development

4.1 Schedule 1 describes the authorised development.

4.2 The plans accompanying the application show two different possible locations for Work Nos. 1(e) (the 70m stack) and 1(g) (the CHP pipe bridge). As the application documents explain, the final choice of location will be informed by ongoing design work. At this stage the undertaker expects this to be completed during the examination. For this reason, the draft Order does not currently include any provisions relating to the two possible locations. The application documents confirm that the two locations have been assessed to the extent required in the Environmental Statement.

⁷ See for example The Wrexham Gas Fired Generating Station Order 2017 (art. 36) and The Meaford Gas Fired Generating Station Order 2016 (art. 34).

4.3 Work No. 2 comprises the retention, connection into and continued operation of a number of existing elements, the majority of which are currently used in association with the operational K1 generating station, which the authorised development is replacing. The intention is that these works will be retained on the site and where necessary new connections between them and the new generating station will be created to enable their continued use in association with the authorised development. A detailed description of these elements and how they will continue to be used is included in Chapter 2 of the Environmental Statement.

Schedule 2 - Requirements

4.4 The requirements in Schedule 2 are the equivalent of planning conditions. They apply to the carrying out and operation of the authorised development.

4.5 The requirements provide that the various schemes, details and plans to be approved must, where appropriate, reflect the measures included in the Environmental Statement. The requirements provide that the approved schemes, details and plans must be implemented as approved, unless further amendments to them are approved.

4.6 Requirement 1 contains a number of definitions used in the requirements. This was included in the model provisions as requirement 1.

4.7 Requirement 2 specifies the time limit for commencing the authorised development as being five years from the date on which the Order comes into force. This was included in the model provisions as requirement 2.

4.8 Requirement 3 requires the undertaker to give notice of commencement of the authorised development to the relevant planning authority within 7 days of it occurring. This was not included in the model provisions, but is considered to be a sensible addition given that a number of the requirements are linked to commencement.

4.9 Requirement 4 requires the undertaker to give notice of commissioning of the authorised development to the relevant planning authority within 7 days of the date on which commissioning is commenced. A further notice must be given within 7 days of completion of commissioning. Again, this was not included in the model provisions but is considered to be a sensible addition as the authorised development involves the decommissioning of the existing K1 generating station and the commissioning of the new K4 generating station.

4.10 Requirement 5 requires the design details for each part of the authorised development to be submitted to and approved by the relevant planning authority prior to commencement of that part. The details must include *inter alia* the layout, external appearance, dimensions and floor levels of all permanent buildings and structures. The submitted details must be in accordance with the design and access statement and

include appropriately scaled plans and drawings. Subject to the provisions of requirement 14 the authorised development must also be carried out in accordance with the parameters specified in Table 1 and the works plans, which show lateral limits of deviation for the majority of the main plant items.

- 4.11 Requirement 5 is based on requirement 5 of the model provisions, but goes into a greater level of detail in order to provide certainty about the details that the undertaker must submit to the relevant planning authority. The inclusion of Table 1 is based on similar tables included in previous orders⁸ and the purpose of its inclusion is to provide certainty about the maximum dimensions of the larger components of the authorised development.
- 4.12 Requirement 6 relates to the decommissioning of the existing K1 generating station. The existing generating station must cease generating electricity as soon as reasonably practicable following service of the commissioning notice. The undertaker is not required to demolish or remove any part of the existing generating station within that timeframe. This relates specifically to the authorised development and is not based on the model provisions.
- 4.13 Requirement 7 requires a construction environmental management plan (“CEMP”) to be submitted to and approved by the relevant planning authority prior to commencement of the relevant part of the authorised development. It specifies that the CEMP must be substantially in accordance with the outline CEMP. The outline CEMP is included in the application documents (ES Appendix 2.1) and specifies what the full CEMP is to include.
- 4.14 Requirement 7 is based on requirement 19 of the model provisions, which referred instead to a code of construction practice.
- 4.15 Requirement 8 requires a construction traffic management plan (“CTMP”) to be submitted to and approved by the relevant planning authority prior to commencement of the relevant part of the authorised development. It is based on requirements 19 and 22 of the model provisions as well as previous orders⁹. Rather than listing the matters that the CTMP is required to include, the requirement provides that the CTMP submitted for approval must be substantially in accordance with the details set out in section 4.8 of the Environmental Statement.
- 4.16 Requirement 9 requires an artificial light emissions scheme to be submitted to and approved by the relevant planning authority prior to commencement of the relevant part of the authorised development. It is based on requirement 21 of the model provisions.

⁸ See for example requirement 2 of The Wrexham Gas Fired Generating Station Order 2017 and requirement 5 of The North London Heat and Power Generating Station Order 2017.

⁹ See for example requirement 9 of The Wrexham Gas Fired Generating Station Order 2017.

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- 4.17 Requirement 10 specifies the permitted working hours for the construction of the authorised development. The hours sought in the draft DCO reflect those that were authorised by Kent County Council in granting planning permission for the K3 generating station in March 2012 (application ref. SW/10/444). The requirement is based on requirement 24 of the model provisions as well as previous orders, which have expanded on the model provisions to permit emergency works and works that do not cause audible noise at the Order limits outside of the permitted working hours¹⁰.
- 4.18 Requirement 11 requires written details of surface and foul water drainage to be submitted to and approved by the relevant planning authority prior to commencement of the relevant part of the authorised development. The details must include the plans and strategies that are referred to in table 9-17 of the Environmental Statement. This was included as requirement 14 in the model provisions.
- 4.19 Requirement 12 requires a piling risk assessment and details of ground gas protection measures to be submitted to and approved by the relevant planning authority in consultation with the Environment Agency prior to commencement of the relevant part of the authorised development. Paragraphs (3) and (4) prescribe the process to be followed if contaminated land not previously identified is found during construction of the authorised development.
- 4.20 Requirement 12 is based on requirement 15 of the model provisions as well as requirements included in previous orders, but tailored in this case to take into account the nature of the site and the areas that are considered to require further assessment prior to commencement of the authorised development.
- 4.21 Requirement 13 requires a written scheme of archaeological investigation to be submitted to and approved by the relevant planning authority prior to commencement of any part of the authorised development. It was included as requirement 16 in the model provisions.
- 4.22 Requirement 14 confirms that plans, details, schemes and other documents approved by the relevant planning authority pursuant to the requirements include any amendments that may subsequently be approved by the relevant planning authority. Any changes to the parameters specified in requirement 5 (detailed design) shall not be approved unless the relevant planning authority is satisfied that there will not be any materially new or different environmental effects beyond those identified in the environmental statement. Requirement 14(1) is based on requirement 37 of the model

¹⁰ See for example requirement 12 of The Palm Paper Mill Generating Station Order 2016.

provisions. Requirement 14(2) is based on the provisions of previous orders for similar schemes that have also included tables specifying dimensions for works¹¹.

¹¹ See for example requirement 19(2) of The Meaford Gas Fired Generating Station Order 2016 and requirement 22(2) of The Progress Power (Gas Fired Power Station) Order 2015.