



Department for
Business, Energy
& Industrial Strategy

Department for Business,
Energy & Industrial Strategy

1 Victoria Street
London
SW1H 0ET

Graham Appleby
DS Smith Paper Limited
350 Euston Road
London
NW1 3AX

T: +44 (0) 300 068 5677
E: gareth.leigh@beis.gov.uk
W: www.gov.uk

Our Ref: EN010090

5 July 2019

Dear Mr Appleby

PLANNING ACT 2008

APPLICATION FOR THE KEMSLEY MILL K4 COMBINED HEAT AND POWER GENERATING STATION ORDER

1. Introduction

1.1 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 report dated 8 April 2019 of the Examining Authority (“the ExA”), Kevin Gleeson BA MCD MRTPI, who conducted an examination into the application (“the Application”) submitted on 6 April 2018 by DS Smith Paper Limited (“the Applicant”) for a Development Consent Order (“the Order”) under section 37 of the Planning Act 2008 (“the 2008 Act”) for the Kemsley Mill K4 Combined Heat and Power Generating Station (“the Development”).

1.2 The Application was accepted for examination on 26 April 2018. The examination began on 17 July 2018 and was completed on 8 January 2019. A number of changes were made to the Application during the examination. The details of these changes were made available to interested parties and examined by the ExA.

1.3 The Order, as applied for, would grant development consent for the construction and operation of a gas fired Combined Heat and Power (“CHP”) generating station with a gross electrical generating capacity of up to 73MW and a

steam generating capacity of 105MWth situated on land within the boundary of the Kemsley Paper Mill located near Sittingbourne in Kent. The Development would comprise:

- Work No. 1 – the construction of one combined cycle generating station including one gas turbine and a heat recovery steam generator and additional plant components;
- Work No. 2 – the retention, connection into and continued use of a range of on-site existing infrastructure systems within the Mill complex including water pipework, water treatment plants, six package boilers and surface water outfalls, electricity and gas grid connections, a control room and fire pumps;
- Work No. 3 – a construction compound and laydown area;
- Work No. 4 – the retention and continued use of internal access and haulage road;
- Work No. 5 – the decommissioning (though not the removal) of the existing gas-fired, CHP generating station (K1); and
- miscellaneous works such as site clearance, temporary vehicle parking, construction fencing and the relocation of existing below ground apparatus (for example, drains and cabling).

1.4 Published alongside this letter on the Planning Inspectorate’s website¹ is a copy of the ExA’s Report of Findings and Conclusions and Recommendation to the Secretary of State (“the ExA’s Report”). The ExA’s findings and conclusions are set out in Chapters 4 - 6 of the ExA’s Report, and the ExA’s summary of conclusions and recommendation is at Chapter 8.

2. Summary of the ExA’s Report and Recommendation

2.1 The ExA assessed and tested a range of issues during the Examination, which are set out in the ExA’s Report under the following broad headings:

- Legal and Policy context, including consideration of the relevant National Policy Statements, European, National and Local Law and policy (Chapter 3);
- Main planning issues arising from the Application and during Examination (Chapter 4) which includes consideration of the Environmental Impact Assessment (“EIA”); air quality; ecology; Habitats Regulations Assessment (“HRA”); archaeology and cultural heritage; ground conditions; landscape and visual; noise and vibration; traffic and transport; and, water environment;

<https://infrastructure.planninginspectorate.gov.uk/projects/south-east/kemsley-paper-mill-k4-chp-plant/>

- Findings and Conclusions in relation to the Habitats Regulations Assessment (Chapter 5);
- Conclusions on the case for Development Consent (Chapter 6); and
- Draft Development Consent Order and related matters;

2.2 For the reasons set out in the Summary of Findings and Conclusions (Chapter 8) of the ExA's Report, the ExA recommends that the Order be made in the form set out in Appendix D to the ExA's Report.

2.3 The Secretary of State notes that the ExA drew to his attention the fact that the Applicant made changes to the Application during Examination. The changes were primarily to the draft DCO and an amendment to the height of the gas turbine building. The ExA concluded that the changes did not result in any material difference in the project that was applied for. The Secretary of State agrees with the ExA in respect of this matter.

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 31(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 ("the 2017 Regulations").

4. Secretary of State's Consideration of the Application

4.1 The Secretary of State has considered the ExA's Report and all other material considerations. The Secretary of State's consideration of the ExA's Report is set out in the following paragraphs. All numbered references, unless otherwise stated, are to paragraphs of the ExA Report (in the form "[ER X.X.X]").

4.2 The Secretary of State has had regard to the Local Impact Reports ("LIR") submitted by Swale Borough Council [ER 3.10 and ER 4.3], the Development Plan [ER 3.11], environmental information as defined in Regulation 3(1) of the 2017 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 The Secretary of State notes eight relevant representations were made by statutory authorities, non-statutory authorities and a local resident. Written Representations, responses to questions and oral submissions made during the Examination were also taken into account by the ExA. 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 his conclusions and recommendations.

National Policy Statements, Need for the Development and Examination of Alternatives

4.4 After having regard to the comments of the ExA set out in Chapter 6 [ER 6.2.6] of the ExA's Report, and in particular the conclusions both on the need for the Development and examination of alternatives and the case for development consent in Chapters 4 and 6, 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 ("NPS") EN-1 (the Overarching NPS for Energy) and EN-2 (the NPS for Fossil Fuel Electricity Generating Infrastructure). 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. The Secretary of State notes that the ExA is satisfied that the Applicant has given consideration to design and to alternatives to the proposed Development, and that the requirements of NPS EN-1 in this regard have been met [ER 4.4.7 – 4.4.14].

Carbon Capture Readiness

4.5 As set out in NPSs EN-1 and EN-2, all commercial scale fossil fuel generating stations with a gross generating capacity of 300MW or more have to be 'Carbon Capture Ready' ("CCR"). Applicants are required to demonstrate that their proposed development complies with guidance issued by the Secretary of State in November 2009² or any successor to it.

4.6 As this Application seeks consent for a generating station with an output of up to 73MW, the Secretary of State is satisfied that this is not a development to which the CCR requirement applies.

Combined Heat and Power ("CHP")

4.7 NPS EN-1 requires that applications for thermal generating stations under the Planning Act 2008 should either include CHP or evidence that opportunities for CHP have been fully explored where the proposal is for a generating station without CHP. The Secretary of State notes that the proposed Development is designed as a CHP project to provide steam to a local paper mill facility.

4.8 The Secretary of State notes that the ExA records that CHP is recognised as being particularly suited to paper mills [ER 6.3.5] and that EN-1 indicates significant weight should be given to these projects. Further, the ExA records that a new CHP plant would result in lower Greenhouse Gas emissions than would arise if the existing plant was upgraded. The Secretary of State is satisfied that the use of CHP in this case would provide significant benefits.

² Carbon Capture Readiness A guidance note for Section 36 Applications URN09D/810
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/43609/Carbon_capture_readiness_-_guidance.pdf

Other Matters

4.9 EN-1 acknowledges the potential impact of electricity generating developments but notes that a balancing exercise must be carried out to weigh the public benefits of those developments and any harm caused. As noted by the ExA, EN-1 indicates that the Secretary of State should start with a presumption in favour of granting consent to applications for energy Nationally Significant Infrastructure Projects unless any more specific and relevant policies set out in the relevant National Policy Statements clearly indicate that consent should be refused. The ExA concludes that given the substantial positive benefits by meeting national need for additional electricity generation capacity identified in EN-1, the benefits of granting the Development outweigh any localised adverse effects and recommends that development consent should be granted. The Secretary of State agrees with the ExA's conclusion.

Landscape and Visual Impacts

4.10 The ExA notes [ER 4.12.2] that EN-1 sets out that “virtually all nationally significant energy infrastructure projects will have effects on the landscape” and that the aim of developers should be to “minimise harm, providing reasonable mitigation where possible and appropriate”. The ExA continues [ER 4.12.3] that it is “necessary to judge whether the [landscape and visual] effects outweigh the benefit of the project”.

4.11 The Applicant assessed that while there would be no significant adverse visual or landscape impacts from individual locations in the vicinity of the Development, a person walking along the Saxon Shore Way designated footpath would encounter a much greater degree of impact. The Applicant did not offer any mitigation as it felt that it would not be possible to achieve a meaningful reduction in impact.

4.12 The ExA [ER 4.12.18] notes that the Local Impact Report prepared by Swale Borough Council concludes that the Development would not add any adverse visual or landscape effects to the existing industrial cluster of building. The ExA also notes that the design features of the Development – including the colour scheme – would be subject to approval by Swale Borough Council and that the final agreed design might lead to mitigation of the impacts. The ExA concluded [ER 4.12.24] that “given the nature and magnitude of that impact it is not considered that the visual and cumulative effects would outweigh the benefits of the Project”. The Secretary of State agrees with that assessment.

Amended Application

4.13 During the course of the examination of the Application, the Applicant identified a discrepancy with one of the parameters included in a table in the draft Order which required an increase in the height of the gas turbine building from 9.9 metres to 14.5 metres.

4.14 The ExA [ER 4.2.7] records an objection to the proposed Development submitted during the examination on the basis that the changes to the Proposed

Development meant that it was no longer a replacement for an existing installation but one which would be much larger and have greater impacts than that originally proposed. However, the ExA concluded that the extent of revisions would not result in a change of any material significance. The Secretary of State agrees with the ExA's assessment.

Electrical Generating Capacity

4.15 The Secretary of State considered that it was not clear from reading the ExA's Report whether the figures stated for the electrical generating capacity of the Development were gross or net and what the maximum capacity would be. The Applicant was, therefore, asked to clarify these points. In response, the Applicant confirmed that the maximum generating capacity of the proposed Development would be 73MW gross.

Construction Hours

4.16 The Secretary of State notes that one section of Requirement 10 of the draft Order submitted to the Secretary of State by the ExA provides that, save in emergencies, construction works can only take place within specified hours unless agreed by Swale District Council. However, the draft DCO as submitted also included a provision that permits construction works which do not cause noise that is audible at the boundary of the Order limits – the geographical extent of the proposed Development – to take place outside these times. These works were not specified in the draft Order provided to the Secretary of State by the ExA and did not require prior approval before being carried out. The Secretary of State considered that the wording of the Requirement as drafted by the ExA did not provide sufficient assurance that the noise impacts of the construction of the proposed Development could be properly controlled. The Secretary of State, therefore, asked the Applicant and Swale District Council for their views on whether it was necessary to amend the Requirement to provide for suitable controls to be put in place.

4.17 The Applicant and Swale District Council responded with an agreed proposed amendment to Requirement 10 that removed the wording which would have permitted works outside the specified construction times without consent. In light of the responses received, the Secretary of State is content with the proposed change and has incorporated it into the Order that he is approving.

The Planning Balance

4.18 The Secretary of State notes that the ExA considered the planning balance in drawing his conclusion on whether the Application should be granted [ER 6.3.1.-6.3.9]. The Secretary of State further notes, in particular, that the ExA highlighted the potential adverse visual and landscape impacts of the proposed Development when viewed from certain vantage points along the Saxon Shore Way which cannot be entirely mitigated.

4.19 The Secretary of State is aware that the ExA also notes the benefits of the scheme and its conformity to the main principles of EN-1 and EN-2 and that the ExA's

overall conclusion is that the proposed Development is acceptable. The Secretary of State accepts the ExA's conclusions in respect of the proposed Development.

5. Biodiversity and Habitats

5.1 The proposed Development is not directly connected with, or necessary to, the management of a European site. Therefore, under Regulation 63 of The Conservation of Habitats and Species Regulations 2017 and Regulation 28 of the Conservation of Offshore Marine Habitats and Species Regulations (as amended) ("the Habitats Regulations"), the Secretary of State is required (as competent authority) 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 European site. 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. This process is collectively known as a Habitats Regulations Assessment ("HRA"). In light of any such assessment, the Secretary of State may grant development consent only if it has been ascertained that the Development will not, either on its own or in combination with other plans or projects, adversely affect the integrity of such a site unless there are no feasible alternatives or imperative reasons of overriding public interest apply.

5.2 The Secretary of State notes the ExA records that the Applicant used a 10km radius from the proposed Development to identify European sites for consideration of potential impacts based on air emission guidance published by the Environment Agency and the Department for the Environment, Food and Rural Affairs. Eight sites were identified within this radius and assessed against a number of 'impact pathways':

- Medway Estuary and Marshes Special Protection Area ("SPA");
- Medway Estuary and Marshes Ramsar site;
- Thames Estuary and Marshes SPA;
- Thames Estuary and Marshes Ramsar site;
- Queendown Warren Special Area of Conservation;
- Outer Thames Estuary SPA;
- Swale SPA; and
- Swale Ramsar site

5.3 The Secretary of State notes that, after these assessments had been carried out, only two of the sites – the Swale SPA and the Swale Ramsar site – were deemed by the Applicant to be potentially subject to likely significant effects when considered alone and in-combination with other plans or projects.

5.4 The ExA records [ER 5.4.7] the Applicant's conclusion that the proposed Development would not adversely affect the integrity of the Swale SPA and the Swale Ramsar sites. The ExA, in turn, noted [ER 5.4.8] that the Applicant and Natural England had signed a Statement of Common Ground which, among other things, supported the Applicant's conclusion of no likely significant effect on any designated sites. In light of information provided by the Applicant, including measures to mitigate any potential impacts on site integrity to be included in any Order that might be made, the ExA concluded [ER 5.5.1] that the proposed Development would "not have any likely significant effects on European sites".

5.5 As competent authority, the Secretary of State needs to be satisfied that the proposed development will not have an adverse impact on any sites designated under the Habitats Directive. In view of the Applicant's assessment of likely significant effects, the Secretary of State undertook an AA to consider whether there would be an adverse impact on the Swale SPA and Ramsar sites. The HRA considered the potential impacts of increases in dust emissions, changes to water quality and increased bird disturbance from the proposed Development on the integrity of the Swale SPA and Ramsar sites. The impacts of the proposed Development were assessed alone and in combination with other plans and projects and for construction and operational phases of Development.

5.6 The conclusion of the AA was that the proposed Development, alone and in combination with other plans or projects would not have an adverse effect on any European site. The conclusion is consistent with the advice of Natural England which was provided during the Examination. The Secretary of State's HRA, including the AA, is published alongside this letter.

6. Other Matters

Environmental Permit

6.1 The Secretary of State notes that the proposed Development would be subject to the Environmental Permitting regime under the Environmental Permitting Regulations 2016 ("EPR") covering operational emissions from the generating station - [REP4-003] in the Environment Agency's Statement of Common Ground submitted at Examination.

6.2 The Secretary of State must be satisfied that potential emissions from the Proposed Development can be adequately regulated under the EPR, as outlined in paragraph 4.10.7 of NPS EN-1. The Secretary of States notes that the ExA records [ER 6.2.12] the EA as confirming that the existing Environmental Permit for the existing K1 Kemsley plant could be varied to include the proposed Development. The Secretary of State also notes the ExA records [ER 6.2.13] that the EA is "comfortable with the proposal and the programme". Finally, the Secretary of State notes the ExA's conclusion that there are no impediments to the implementation of the proposed Development.

6.3 In the circumstances, the Secretary of State considers there are no reasons to believe the Environmental Permit will not be granted in due course.

Human Rights Act 1998

6.4 The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights by the proposed Development and notes there were no human rights concerns raised during the Examination. He has no reason to believe, therefore, that the grant of the Order would give rise to any unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998.

7. General Considerations

Equality Act 2010

7.1 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 partnerships³; 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.

Natural Environment and Rural Communities Act 2006

7.2 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.

7.3 The Secretary of State is of the view that the ExA’s report, together with the environmental impact analysis, considers biodiversity sufficiently to inform him in this respect. In reaching the decision to give consent to the Development, the Secretary of State has had due regard to conserving biodiversity.

8. Secretary of State’s conclusions and decision

8.1 For the reasons given in this letter, the Secretary of State considers that there is a compelling case for granting development consent. Given the national need for such 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 impacts, as mitigated by the proposed terms of the Order.

8.2 The Secretary of State has therefore decided to accept the ExA’s recommendation to make the Order granting development consent [ER 8.2] to include modifications set out in paragraph 9.1 below. In reaching this decision, the Secretary of State confirms regard has been given to the ExA’s Report, the LIR submitted by SBC 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 4(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 that the environmental information as defined in regulation 3(1) of those Regulations has been taken into consideration.

³ In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

9. Modifications to the Order by the Secretary of State

9.1 The Secretary of State has made the following modifications to the Order recommended by the ExA:

- (i) the description of the authorised project has been clarified to refer to the maximum capacity of the generating station (see paragraph 4.15 above);
- (ii) Article 7 (Consent to Transfer Benefit of Order) has been amended to ensure that the Secretary of State and the relevant planning authority are notified of any transfer of the benefit of the Order for which the consent is not required. This is consistent with similar provisions that have been included in Orders made by the Secretary of State recently in respect of other similar generating stations;
- (iii) Requirement 10 (Construction Hours) has been modified following consultation with so as to limit the works which may take place outside of the approved construction hours to emergency works (see paragraphs 4.16 – 4.17 above); and,
- (iv) Requirement 12(3) has been modified to include consultation with the Environment Agency in respect of groundwater protection. This reflects the ExA's comments at paragraph 7.4.39 of the ExA's Report.

9.2 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.

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 31 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

Yours sincerely

GARETH LEIGH
Head of Energy Infrastructure Planning

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 of the Planning Act 2008, an Order granting development consent, or anything done, or omitted to be done, by the Secretary of State in relation to an application for such an Order, can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The decision documents are being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/south-east/kemsley-paper-mill-k4-chp-plant/>

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)