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Dear Mr Bullock

PLANNING ACT 2008

APPLICATION FOR A NON-MATERIAL CHANGE TO THE IMMINGHAM OPEN CYCLE GAS TURBINE ORDER 2020

1. I am directed by the Secretary of State for Business, Energy and Industrial Strategy (“the Secretary of State”) to advise you that consideration has been given to the application made by VPI Immingham B Limited (“the Applicant”) on 12 October 2022 for a change which is not material to the Immingham Open Cycle Gas Turbine Order 2020 (“the 2020 Order”) under section 153 of, and Schedule 6 to, the Planning Act 2008 (“the 2008 Act”). This letter is the notification of the Secretary of State’s decision in accordance with regulation 8 of the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011 (as amended) (“the 2011 Regulations”).
2. Development consent was granted for the construction and operation of the Immingham Open Cycle Gas Turbine (OCGT) by the Secretary of State for BEIS on 7 August 2020 and came into force on 1 September 2020 (“the Development”). The 2020 Order was subsequently corrected by the Immingham Open Cycle Gas Turbine (Correction) Order 2021.
3. The Applicant is seeking consent for a change to:
 - The inclusion of a Synchronous Condenser under Work No. 1 at Schedule 1 ‘Authorised Development’ of the Order.
 - The amendment of Requirement 11(3) ‘Flood Risk’ at Schedule 2 of the Order which would mean that approval of the operational flood risk mitigation scheme was not required until prior to operation, rather than before construction commenced as provided for under the original DCO;
 - a clarification to the definition of commissioning.

4. The buildings and structures of the generating station will remain within the parameters used for the Environmental Impact Assessment which supported the 2020 Order, the overall footprint of the generating station will not increase, no additional land outside the DCO limits would be required, and the capacity of the generating station would not be changed.

Summary of the Secretary of State's decision

5. The Secretary of State has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make non-material changes to the 2020 Order and he has decided to authorise most of the changes detailed in the Application. However, several minor changes have been made to the Amendment Order to reflect the Secretary of State's drafting preferences. This letter is the notification of the Secretary of State's decision in accordance with regulation 8 of the 2011 Regulations.

Consideration of the materiality of the proposed change

6. The Secretary of State has given consideration to whether the Application is for a material or non-material change. In doing so, he has had regard to paragraph 2(2) of Schedule 6 to the 2008 Act which requires the Secretary of State to consider the effect of the change on the development consent order as originally made.
7. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the 2008 Act and Part 1 of the 2011 Regulations.
8. So far as decisions on whether a proposed change is material or non-material, guidance has been produced by the Department for Communities and Local Government¹, the "Planning Act 2008: Guidance on Changes to Development Consent Orders" (December 2015) ("the Guidance")², which makes the following points:
 - First, given the range of infrastructure projects that are consented through the 2008 Act, and the variety of changes that could possibly be proposed for a single project, the Guidance cannot, and does not attempt to, prescribe whether any particular types of change would be material or non-material.
 - Second, there may be certain characteristics that indicate that a change to a consent is more likely to be treated as a material change, namely:
 - (a) whether an update would be required to the Environmental Statement (from that at the time the original DCO was made) to take account of likely significant effects on the environment;
 - (b) whether there would be a need for a Habitats Regulations Assessment, or a need for a new or additional licence in respect of European Protected Species;
 - (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the existing DCO; or
 - (d) whether the proposed changes have a potential impact on local people and businesses.
9. Third, that although the above characteristics indicate that a change to a consent is more likely to be treated as a material change, these only form a starting point for assessing the materiality of a change. Each case must depend on thorough consideration of its own circumstances.
10. The Secretary of State began his consideration of the materiality of the proposed variation by considering the 4 matters lettered (a), (b) (c) and (d) above:
 - (a) The Applicant supplied a document entitled 'VPI 'B' - NMC Application Supporting Letter' ("the Supporting Statement") providing further environmental information which concludes that the addition of the Synchronous Condenser and amendment of

¹ Now the Department for Levelling Up, Housing and Communities.

² <https://www.gov.uk/government/publications/changes-to-development-consent-orders>

Requirement 11(3) will not have any new significant effects or materially different effects from those already assessed in the original Environmental Statement for the 2020 Order. In the light of the analysis supplied by the Applicant and the responses to the consultation, the Secretary of State concludes that an update to the Environmental Statement is not required.

- (b) For the reasons set out in paragraphs 23 and 24 below, the Secretary of State has concluded that, given the nature and impact of the change proposed, there is not likely to be a significant effect greater than those originally identified. Therefore, the Secretary of State is satisfied that a Habitats Regulations Assessment is not required. Furthermore, in respect of European Protected Species, the Secretary of State is satisfied that the proposed change does not bring about the need for a new or additional licence as the amendments sought are not anticipated to give rise to any new or different effects from an ecological perspective.
 - (c) The Secretary of State notes that the proposed change does not entail any new compulsory acquisition of land.
 - (d) The Secretary of State notes that the potential impacts on local people and businesses are no greater than those that arise from the development permitted by the 2020 Order.
11. The Secretary of State therefore concludes that none of the specific indicators referred to in the Guidance, or other relevant considerations, suggest that this proposed change is a material change. He has had regard to the effect of the changes on the 2020 Order, together with the changes made by the Correction order in 2021 and also considered whether there are any other circumstances in this particular case which would lead him to conclude that the proposed change is material, but has seen no evidence to that effect.
12. The Secretary of State is therefore satisfied that the change proposed in the Application is not material and should be dealt with under the procedures for non-material changes.

Consultation

13. The Applicant publicised this Application in accordance with regulation 6 of the 2011 Regulations on 25 October 2022 and consulted the persons required by regulation 7 of the 2011 Regulations, in the manner prescribed. The deadline for receipt of representations on the Application was 17 November 2022. The Application was made publicly available on the Planning Inspectorate's website on 14 October 2022, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate.
14. Representations were received from North East Lindsey Drainage Board, North Lincolnshire Council, and the Environment Agency. North East Lindsey Drainage Board confirmed that they had no comment to make on the application.
15. North Lincolnshire Council considered the addition of a synchronous condenser would not materially alter the consented projects, or its environmental impacts. However, the Council questioned whether prior to commissioning is an appropriate trigger point for the submission of the flood mitigation scheme in relation to each part of the development, or whether this trigger point would be too late. The Council stated *"it would seem logical that the flood mitigation scheme and any necessary measures should be submitted and agreed for each part of the development prior to that part being constructed so that the agreed mitigation can be incorporated into construction. Should the trigger point be moved to pre-commissioning then the scheme of flood mitigation would potentially not be submitted or agreed until after the relevant part of the development has already been built/constructed."*
16. The Environment Agency also had no objection to the addition of a synchronous condenser, but with regards to Requirement 11 (3) stated *"Clauses (3) and (4) relate to the mitigation of flood risk for the built development, to protect both the critical elements of operational equipment and the lives of workers during operation. It is sensible that this is submitted and*

approved before the commencement of development to ensure that the built-in (construction) measures included are appropriate to mitigate the identified risks” and concludes: “In summary, it is the Environment Agency’s view that (regardless of the wording of the other DCOs cited by the Applicant) the requested amendment will not facilitate approval of the mitigation scheme at the appropriate point in time.”

17. The Secretary of State invited the Applicant to respond to the consultation responses received from North Lincolnshire Council and the Environment agency. The Applicant replied on 13 January 2023 by suggesting that the concerns raised would be met by retaining the requirement that the authorised development could not be commenced before the flood risk mitigation scheme was approved but that some works, specifically “*permitted preliminary works*” would be allowed so that the requirement would be:

“No part of the authorised development may commence, save for permitted preliminary works, until a scheme for the mitigation of flood risk during operation has, for that part, been submitted to and, after consultation with the Environment Agency and North East Lindsey Internal Drainage Board, approved by the relevant planning authority.”

18. The definition of permitted preliminary works in the 2020 order is: “*operations consisting of environmental surveys and monitoring, investigations for the purpose of assessing ground conditions, archaeological investigations, receipt and erection of construction plant and equipment, erection of any temporary means of enclosure, the temporary display of site notices or advertisements.*”
19. The Secretary of State notes that including permitted preliminary works but not all construction works would allow the Applicant to take the necessary surveys and site preparation works to inform the preparation of the operational flood risk mitigation scheme. The Secretary of State is content that an amendment allowing permitted preliminary works only, addresses the concerns raised by the Environment Agency and the Council by retaining the requirement that the flood mitigation scheme be finalised and approved before construction.
20. The Secretary of State has considered the representations received in response to the consultation and does not consider that any further information needs to be provided by the Applicant or that further consultation is necessary.

Environmental Impact Assessment

21. The Secretary of State has considered whether the Application would give rise to any new significant effects or materially different effects when compared to the effects set out in the Environmental Statement for the development authorised by the 2020 Order.
22. The Secretary of State is satisfied that the Supporting Statement provided by the Applicant is sufficient to allow him to make a determination on the Application.
23. The Secretary of State has considered the information provided and the views of consultees. The Secretary of State agrees with the Applicant’s conclusions that there will not be any new or materially different likely significant effects when compared to the effects set out in the environmental statement for the development authorised by the 2020 Order and as such considers that there is no requirement to update the Environmental Statement.

Habitats

24. The Secretary of State has considered the relevant requirements as set out in the Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”). The Habitats Regulations require the Secretary of State to consider whether the Development

would be likely, either alone or in combination with other plans and projects, to have a significant effect on any site within the national site network, as defined in the Habitats Regulations (a “protected site”). If likely significant effects cannot be ruled out, then an Appropriate Assessment must be undertaken by the Secretary of State, pursuant to regulation 63(1) of the Habitats Regulations, to address potential adverse effects on site integrity. The Secretary of State may only agree to the Application (subject to regulation 64) if he has ascertained that it will not adversely affect the integrity of a European site.

25. The Secretary of State has considered the Supporting Statement submitted with the Application and is satisfied that there is sufficient evidence to conclude that allowing the change set out in the Application to the development authorised by the 2020 Order will not have a likely significant effect upon any protected site; and a further Habitats Regulations Assessment is therefore not required.

General Considerations

Transboundary Impacts

26. Under Regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (as amended), the Secretary of State has considered whether the proposed development is likely to have a significant effect on the environment in an European Economic Area (“EEA”) State. In making his decision on whether to grant the 2020 Order, the Secretary of State concluded that there would be no likely significant effects on the environment of an EEA State. The Secretary of State has considered whether the change sought through this Application will have any potential impacts on an EEA State and has concluded that there is no change in the environmental impacts considered within the existing environmental statement for the project. Consequently, the Secretary of State has concluded that there would not be likely significant effects on the environment of any EEA state whether the Application is considered of itself or cumulatively with the environmental effects already considered for the 2020 Order.
27. The Secretary of State has also considered whether there may be potential impacts on European sites in EU Member States, known as transboundary sites, from this Application. Noting that the Secretary of State has reached a conclusion that there will be no Likely Significant Effects on protected sites (over and above those already assessed in the Habitats Regulation Assessment for the 2020 Order), the Secretary of State has also concluded that there is no route whereby sites in EU Member states may be impacted by this Application.
28. The Secretary of State therefore concludes there is no need for transboundary consultation with EEA States.

Equality Act 2010

29. The Equality Act 2010 includes a public sector equality duty. This requires a public authority, in the exercise of its functions, to have due regard to the need to (a) eliminate discrimination, harassment and victimisation and any other conduct prohibited by or under the Act; (b) advance equality of opportunity between persons who share a relevant protected characteristic (e.g. age; gender; gender reassignment; disability; marriage and civil partnerships;³ pregnancy and maternity; religion and belief; and race) and persons who do not share it; and (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.
30. The Secretary of State has had due regard to the need to achieve the statutory objectives referred to in s149 of the Equality Act 2010, and is satisfied that there is no evidence that granting this Application will affect adversely the achievement of those objectives.

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

Human Rights Act 1998

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

Natural Environment and Rural Communities Act 2006

32. The Secretary of State, in accordance with the duty in section 40(1) of the Natural Environment and Rural Communities Act 2006, has to have regard to the purpose of conserving biodiversity, and in particular to the United Nations Environmental Programme Convention on Biological Diversity of 1992, when granting amended development consent. The Secretary of State is of the view that biodiversity has been considered sufficiently in this application for an amendment to accord with this duty.

Secretary of State's conclusions and decision

33. The Secretary of State has considered the ongoing need for the development. The Secretary of State notes the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Fossil Fuel Electricity Generating Infrastructure (EN-2) both set out that for the UK to meet its energy and climate change objectives there is a continuing need for new electricity generating plants of the type proposed by the Applicant given the contribution it will make to securing energy supply.
34. On 27 June 2019, following advice from the Committee on Climate Change, the UK Government announced a new carbon reduction 'net zero' target for 2050 which resulted in an amendment to the Climate Change Act 2008 (the target for the net UK carbon account for 2050 changed from 80% to 100% below the 1990 baseline).
35. The Secretary of State notes that consultation on the review of the energy National Policy Statements commenced on 6 September 2021 and closed on 29 November 2021. Although the National Policy Statements are in draft form and have not been designated, the Secretary of State considers them to be relevant and important matters in considering applications for non-material changes. As such, he has had regard to the draft energy National Policy Statements in deciding the Application but does not consider that there is anything contained within the drafts of the relevant National Policy Statement documents that would lead him to reach a different decision on the Application. The Secretary of State notes that the draft Overarching National Policy Statement for Energy (EN-1, the draft National Policy Statement for Natural Gas Energy Generating Infrastructure (EN-2), and the Net Zero Strategy (19 October 2021), recognise that some unabated natural gas-fired generation may be required for affordable reliability and to assist the transition to a net zero economy in 2050.
36. In his consideration of the planning balance, the Secretary of State has weighed the benefits of the Application against the harms associated with it. The Secretary of State notes that the addition of the synchronous condenser will serve the benefit of making the development more responsive and resilient to fluctuations in energy supply and will facilitate renewable energy supply nationally, through the provision of grid stability services that allow greater deployment of renewable electricity. Synchronous condensers and the services they provide are becoming increasingly important as the UK becomes more reliant on renewable technologies that generate power intermittently.

37. In conclusion, the Secretary of State considers that the ongoing need for the Varied Development is established and that granting the requested variation would not be incompatible with the amended Climate Change Act 2008 nor the draft revisions to the National Policy Statements and the published Net Zero Strategy. The Secretary of State notes that the 2022 British Energy Security Strategy also recognises that gas continues to be important for our energy system, it will be an important transition fuel, and that the flexibility of gas generating stations assists in the ongoing deployment of renewable generation capacity

Modifications to the draft Order proposed by the Applicant

38. Minor drafting improvements have been made by the Secretary of State to the draft proposed by the Applicant, in addition to the changes made to reflect the decision of the Secretary of State in relation to the amendment requested to Requirement 11(3) in Schedule 2 of the Order regarding the submission of the flood risk mitigation scheme. The amendment allows for permitted preliminary works to commence prior to submission of the flood risk mitigation scheme.

Challenge to decision

39. The circumstances in which the Secretary of State's decision may be challenged are set out in the note attached at the Annex to this letter.

Publicity for decision

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

Yours sincerely,

David Wagstaff
Head of Energy Infrastructure Planning

LEGAL CHALLENGES RELATING TO APPLICATIONS FOR DEVELOPMENT CONSENT ORDERS

Under section 118 (5) of the Planning Act 2008, a decision under paragraph 2(1) of Schedule 6 to the Planning Act 2008 to make a change to an Order granting development consent can be challenged only by means of a claim for judicial review. A claim for judicial review must be made to the Planning Court during the period of 6 weeks beginning with the day after the day on which the Order is published. The Amending Order as made is being published on the date of this letter on the Planning Inspectorate website at the following address:

<https://infrastructure.planninginspectorate.gov.uk/projects/north-east/vpi-immingham-ocgt/>

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)