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To: The Applicant

Your Ref:

Our Ref: EN010120

By email only

Date: 23 September 2022

Dear Sir/ Madam

The Planning Act (2008) (as amended)

Application by Drax Power Limited for an Order Granting Development Consent for the Drax Bioenergy with Carbon Capture and Storage project

Examining Authority's comments on Applicant's notification of potential change request, timetabling considerations, submission of environmental information and question in relation to use of section 106 agreements

I write to you following my appointment by the Secretary of State as the lead member of the Examining Authority (ExA) to carry out an examination of the above application. I am Caroline Jones and the other member of the ExA is Ben Northover. A copy of the [appointment notice](#) can be viewed under the '[Documents](#)' tab on the project webpage¹ of the National Infrastructure Planning website.

I write in response to a [letter dated 12 September 2022](#) from Drax Power Limited (the Applicant), a copy of which can also be viewed under the '[Documents](#)' tab on the project webpage.

The Applicant's letter gives advance notice of its intention to submit a change request consisting of two components, requesting a delay to the start of the Examination and notification of the submission of updated environmental information. The letter also includes a proposed draft timetable for the change request and the proposed programme to Examination, suggesting that the Preliminary Meeting is arranged for January 2023.

Timetabling of the Preliminary Meeting

The application for a Development Consent Order (DCO) for the proposed Drax Bioenergy with Carbon Capture and Storage project (the DCO Application) was submitted to the

¹ Project webpage: <https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/drax-bioenergy-with-carbon-capture-and-storage-project/>

Planning Inspectorate on 23 May 2022 and accepted for examination on 20 June 2022. Following acceptance, the Relevant Representation period did not open until 5 August 2022 and initially closed on 5 September 2022. For various reasons, the Applicant then re-sent further notifications to parties who did not receive the original notification of the accepted application and opening of the period for parties to register to participate in the Examination and make a Relevant Representation. This resulted in three further deadlines for Relevant Representations of 16 September 2022, 30 September 2022 and 12 October 2022. The extensions to this period were beyond the control of the Planning Inspectorate.

The (former) Department for Communities and Local Government's (DCLG) Examination Guidance² states that "*There is not a specified timeframe for when the preliminary meeting is to be held, however, the Secretary of State's expectation is that, in most cases, it should take place within a period from six weeks to two months from receipt of the relevant representations*" (paragraph 40).

Additionally, paragraph 45 of the DCLG Examination Guidance states that "*Rarely, applicants may wish to delay the start of the examination of an accepted application. Such a delay may be appropriate, depending on the circumstances, but should be kept to the minimum period necessary. This will limit the risk that the application, including pre-application consultation and environmental information, will no longer be sufficiently current to form the basis of an examination. The Secretary of State's expectation is that Examining Authorities will not normally agree to postpone the start of the examination for longer than three months.*"

Delaying the Preliminary Meeting until January 2023, as suggested by the Applicant, would mean that it would take place some seven months after the DCO Application was accepted. Having regard to the DCLG Examination Guidance and to the limited information submitted by the Applicant, the ExA has concerns about the proposed delay and is currently minded to progress the Examination as planned. On the basis of the information before it, and subject to the consultation steps set out below, the ExA considers that there would be sufficient time for notice, consultation and responses to the proposed changes to be submitted into the Examination and examined within the statutory six-month period.

Considering the view above the ExA would ask that, should the Applicant wish to comment further on the above, it clarifies its position by responding to the following questions:

- Is the proposed delay to the commencement of the examination of the DCO Application until January 2023 justified in the context of paragraphs 40 and 45 of the DCLG Examination Guidance?
- Does the Applicant consider that the proposed delay is the minimum required despite being around four months longer than the indicative maximum in paragraph 45 of the DCLG Examination Guidance, and if so, why?
- What implications would there be for the Examination Timetable if the Examination commenced while the Applicant is progressing the proposed change request?
- How does the Applicant intend to ensure that any new or different environmental effects have been adequately assessed and consulted upon?

² [Planning Act 2008: Guidance for the examination of applications for development consent](https://publishing.service.gov.uk), March 2015 (publishing.service.gov.uk)

- Can the Applicant provide more information about the exact status and rights of the agricultural tenant affected by Proposed Change 1?

Please respond to these questions by **5pm on 30 September 2022**.

Consultation on potential change request

In its letter of 12 September 2022, the Applicant states that Proposed Change 2 will mean that the Applicant will need to make a 'proposed provision' for additional land as defined in the Infrastructure Planning (Compulsory Acquisition) Regulations 2010 (the CA Regulations). The Applicant considers that it would be simplest if both proposed changes were notified and publicised in line with the requirements of Regulations 7 and 8 of the CA Regulations. The ExA does not agree with this approach. Any representation made in response to a notice under Regulation 7(1) can only be treated as a Relevant Representation if it relates to the proposed provision (Regulation 10(a) of the CA Regulations). As Proposed Change 1 does not involve a proposed provision, it cannot be notified and publicised in line with Regulations 7 and 8 of the CA Regulations. On this basis the ExA requests that the two components of the change request are dealt with separately.

In addition, the ExA considers that, in order to ensure fairness and in line with [the Planning Inspectorate's Advice Note 16](#) (AN 16), appropriate and proportionate non-statutory consultation should be carried out before the change request is submitted.

The consultation must engage all those persons identified in the Planning Act 2008 under section 42 (a) to (d) who would be affected by the proposed changes (giving a minimum of 30 days) including any section 42 persons not originally consulted on the application but who may now be affected by the proposed changes. The Applicant should also consider whether or not persons not already registered to participate in the Examination and not falling within section 42 might need an opportunity to comment (such as persons living, or commercial entities operating, outside the Order Limits). When submitting the change request, the ExA requests that the Applicant submits a statement encompassing a non-statutory consultation report, and that:

- lists the persons (affected by the changes) under section 42 (a) to (d) who have been consulted (identifying particularly any new persons, ie those who were consulted in relation to the proposed change but not in relation to the original application);
- identifies (within the above list) those section 42 (d) persons who are 'Affected Persons', meaning those persons over whose land Compulsory Acquisition powers will be exercised;
- provides justification as to why any person under section 42 (a) to (d) is not affected by the proposed changes and has not therefore been consulted (if any);
- lists the persons not already registered to participate in the Examination and not falling within section 42 who have been consulted (if any);
- provides copies of any newspaper notices or site notices; and
- appends as an annex any consultation responses received.

Please ensure that consultation responses are sent to you as the Applicant and not to the Planning Inspectorate. If the ExA decides to accept the proposed changes into the Examination (irrespective of whether or not they are material) all Interested Parties will have an opportunity to make representations on the changed application, in writing or orally at hearings, when the Examination commences.

The ExA considers that the non-statutory consultation should begin as soon as possible and would be grateful if the Applicant could provide an indication of likely timescales or, if it is not possible to begin such consultation now, an explanation as to why this is not possible.

Please provide a response by **5pm on 30 September 2022**.

Submission of environmental information pertaining to air dispersion model and assessment assumptions for amines

The Applicant has indicated that since the submission of the Environmental Statement (ES), further information has been received from the suppliers of the Carbon Capture and Storage plant which has necessitated the updating of the air dispersion model and assessment assumptions for amines. As such, the Applicant intends to submit a technical note outlining how these changes impact upon the information submitted in the ES. Could the Applicant please respond to the following questions:

- When does the Applicant intend to submit the technical note?
- Will the Applicant be reviewing the new information and reporting on whether there would be any changes to all relevant ES aspect chapters and/ or to the conclusions of the Habitats Regulations Assessment (HRA)?
- Does the Applicant consider that this new information would require updates to the ES constituting Further Environmental Information that would necessitate publicity in line with the requirements of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (the EIA Regulations)? Should consultation not be undertaken, this approach should be fully justified.

Please respond to these questions by **5pm on 7 October 2022**.

Question from the ExA in relation to Off-site Habitat Provision Area

The ExA would like the Applicant to provide information on the approach taken to securing the Off-site Habitat Provision Area shown on Figure 1.3 [[APP-058](#)]. This land is not within the Order Limits and the provision of these works would be secured by way of a planning obligation under section (s) 106 of the Town and Country Planning Act 1990. Could the Applicant please respond to the following questions:

- What was the rationale in securing the provision of these works by way of a s106 agreement and not including this land within the Order Limits?
- Would it be more appropriate for this land to be included within the Order Limits including any Compulsory Acquisition of land and/ or rights and securing the works through the DCO?

- Would a s106 agreement satisfactorily secure the provision of the works and any maintenance?
- Does the use of a s106 agreement to secure the provision of these works accord with paragraphs 55 and 57 of the National Planning Policy Framework?
- When does the Applicant intend to submit a draft s106 agreement into the Examination?

Please respond to these questions by **5pm on 7 October 2022**.

If you have any questions about any of the matters raised in this correspondence, please contact the Case Team using the details provided in this letter.

Yours faithfully

Caroline Jones

Caroline Jones
Lead Member of the Examining Authority

This communication does not constitute legal advice.

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