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Dear Mr Leary,

**PLANNING ACT 2008
APPLICATION FOR A NON-MATERIAL CHANGE TO THE PROGRESS POWER (GAS
FIRED POWER STATION) ORDER 2015 (SI NO. 2015/1570)**

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 (“the Application”) which was made by Pinsent Masons LLP on behalf of Progress Power Limited (“the Applicant”) on 29 May 2020 for a change which is not material to the Progress Power (Gas Fired Power Station) Order 2015 (“the 2015 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. The original application for development consent under the Planning Act 2008 was submitted to the Planning Inspectorate by the Applicant and granted development consent on 23 July 2015 by the Secretary of State. The 2015 Order as granted, gives development consent for the construction, operation and maintenance of a generating station with a gross electrical output of up to 299MW comprising up to five gas turbine generators, up to five exhaust gas emission flue stacks and other development that is part of the generating station (“the Development”). The 2015 Order was amended by the Progress Power (Gas Fired Power Station) (Amendment) Order 2016 (“the Amendment Order”) which was made on 11 November 2016. The Amendment Order authorised non-material changes to the parameters for the generating station to accommodate changes to the design and consequent amendments to the requirements in Schedule 2 of the Order.
3. The Applicant is seeking consent for a change to the 2015 Order (as amended) to allow:
 - An amendment to Requirement 1 in the 2015 Order that imposes a five-year time limit for the commencement of the authorised development to be extended by 12 months to 13 August 2021.

Summary of the Secretary of State's decision

4. The Secretary of State has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make non-material changes to the 2015 Order, so as to authorise the changes as detailed in the Application. This letter is the notification of the Secretary of State's decision in accordance with regulation 8 the 2011 Regulations).

Consideration of the materiality of the proposed change

5. The Secretary of State has given consideration as 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 Planning Act 2008 which requires the Secretary of State to consider the effect of the change on the development consent order ("DCO") as originally made. The Secretary of State notes that the changes do not relate to the parameters of the generating station. This change is proposed by the Applicant in response to the unprecedented and exceptional restrictions and uncertainties caused by the COVID-19 pandemic. In particular, the Applicant has found that COVID-19 restrictions during lockdown have caused severe disruption to the Applicant's ability to conclude construction activities. Contractors have been required to stay at home and therefore being unable to complete works, work sites have been closed down and there remains a considerable amount of uncertainty as to the ability across the supply chain for the materials and expertise required to be able to deliver the commencement of the Development before expiry of the commencement deadline. The Applicant is concerned also, that if any restrictions are re-imposed, potentially at short notice, this may cause further delays. The Applicant is therefore requesting the consent is extended by 12 months to 13 August 2021.
6. The proposed change does not entail any alteration of the physical development granted consent by the 2015 Order nor to any of the controls regulating its effect.
7. There is no statutory definition of what constitutes a 'material' or 'non-material' amendment for the purposes of Schedule 6 to the Planning Act 2008 and Part 1 of the 2011 Regulations.
8. So far as decisions on whether a proposed change is material or non-material, guidance produced by the then Department for Communities and Local Government, the "Planning Act 2008: Guidance on Changes to Development Consent Orders" (December 2015) ("the Guidance")¹, 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. Four examples are given in the Guidance as a starting point for assessing the materiality of a proposed change, namely:
 - (a) whether an update would be required to the Environmental Statement (from that at the time the Development Consent Order was made) to take account of new, or materially different, likely significant effects on the environment;
 - (b) whether there would be a need for a Habitats Regulations Assessment ("HRA"), or a need for a new or additional licence in respect of European Protected Species ("EPS");

¹ <https://www.gov.uk/government/publications/changes-to-development-consent-orders>

- (c) whether the proposed change would entail compulsory acquisition of any land that was not authorised through the Development Consent Order; and
- (d) the potential impact of the proposed changes on local people and business (for example, in relation to visual amenity from changes to the size and height of buildings; impacts on the natural and historic environment; and impacts arising from additional traffic).

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.

9. The Secretary of State has considered the change proposed by the Applicant against the four matters given in (a), (b), (c) and (d) above.

(a) The Secretary of State considers that in respect of the Environmental Statement the Applicant has given consideration to whether the proposed changes would give rise to any environmental effects that:

(i) are new significant effects not identified in the Environmental Statement for the consented project; or

(ii) are materially different effects when compared with the environmental effects set out in the Environmental Statement for the project.

The Secretary of State notes that the environmental information report supplied with the Application supports the Applicant's conclusions that there are no new, or materially different, likely significant effects from those assessed in the Environmental Statement. In light of the analysis supplied by the Applicant and responses to the consultation that have raised no concerns regarding environmental issues, the Secretary of State has, therefore, concluded that no update is required to the ES as a result of the proposed amendment to the 2015 Order.

(b) In respect for the need for a HRA, the Secretary of State has considered the nature and impact of the change proposed and is satisfied that there is not likely to be a significant effect on any Natura 2000 site either alone or in combination with any other plans or projects as a result of the proposed change and therefore an Appropriate Assessment is not required. He is also satisfied that the proposed change does not bring about the need for a new or additional licence in respect of EPSs as the amendments sought are not anticipated to give rise to any new or different effects from an ecological perspective than those assessed for the original application.

(c) In respect of compulsory acquisition, the Secretary of State notes that the proposed changes do not require any additional compulsory purchase of land.

(d) In respect of impacts on local people and businesses, the Secretary of State notes that no changes are anticipated by the Applicant to the impacts already assessed in the ES.

10. The Secretary of State therefore concludes that none of the specific indicators referred to in the guidance, or other relevant considerations, suggest that the changes considered in this letter is a material change. He has also had regard to the effect of the changes, together with the previous changes made to the 2015 Order through the 2016 Amendment Order, and considered whether there are any other circumstances in this particular case which would lead him to conclude that the changes considered in this letter are material but has seen no evidence to that effect.

11. The Secretary of State is therefore satisfied that the changes considered in this letter are not material and should be dealt with under the procedures for non-material changes.

Consultation and responses

12. In accordance with the requirements of regulation 7(1) of the 2011 Regulations, parties required to be notified by that regulation were notified of the Application on 29 May 2020. Consultation ran until 10 July 2020.
13. The Application was also published for two successive weeks in the local press and made publicly available on the Planning Inspectorate's website, such that there was opportunity for anyone not notified to also submit representations to the Planning Inspectorate.
14. Representations were received from: Anglian Water, Breckland Council, Councillor Guy McGregor, Environment Agency, Eye Town Council, Historic England, National Grid (National Grid Electricity Transmission and National Grid Gas), NATS Safeguarding, Natural England, NHS Digital, Norfolk County Council, Public Health England, South Norfolk Council, Suffolk District Council, Babergh and Mid Suffolk District Council and The Coal Authority raising no concerns or objections to the time extension. An objection was received from Yaxley Parish Council which considered the current pandemic does not warrant an extension to the time allowed to formally commence construction work and questioned the demand for electricity from this power station. The Secretary of State has considered these representations and other responses to the consultation in coming to his conclusion as set out below.
15. The Secretary of State has considered all the representations received during and after the consultation and does not consider that any further information needs to be provided by the Applicant or that further consultation of those already consulted is necessary.

Environmental Impact Assessment

16. 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 2015 Order.
17. 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.
18. 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 2015 Order and as such considers that there is no requirement to update the Environmental Statement.
19. As there are no new significant environmental impacts as a result of the proposed change, the Secretary of State does not consider that there is any need for consultation on likely significant transboundary effects in accordance with regulation 32 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

Habitats

20. The Secretary of State has considered the relevant and important policies in respect of the United Kingdom's obligations as set out in the Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations"), which transpose the Habitats Directive (92/43/EC) into UK law. 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 a European site, as defined in the Habitats Regulations. 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 if he has ascertained that it will not adversely affect the integrity of a Natura 2000 site.
21. The Secretary of State has considered the Supporting Statement submitted with the Application, and is satisfied that the Application will not have a likely significant effect on any Natura 2000 site and therefore no Appropriate Assessment is needed.

General Considerations

Equality Act 2010

22. 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;² 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.
23. 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 the changes considered in this letter will affect adversely the achievement of those objectives.

Human Rights Act 1998

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

Natural Environment and Rural Communities Act 2006

25. 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 development consent. The

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

Secretary of State is of the view that the Application considers biodiversity sufficiently to accord with this duty.

Secretary of State's conclusions and decision

26. The Secretary of State notes that in light of the exceptional restrictions and uncertainties caused by the COVID-19 restrictions there has been severe disruption to the Applicant's ability to commence development as anticipated. The Secretary of State also notes that there is the possibility of further restrictions being imposed, potentially at short notice, which may cause uncertain further delays and may mean that the Development would not be commenced in accordance with the 2015 Order and the consent would expire.
27. The Secretary of State has considered the ongoing need for the Development. The Secretary of State notes that 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 they would make to securing energy supply as part of the transition to a low carbon economy. 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). The Secretary of State notes that the energy National Policy Statements continue to form the basis for decision-making under the Planning Act 2008. The Secretary of State considers, therefore, that the ongoing need for the Development is established as it is inline with the national need for secure and reliable supplies of electricity as part of the transition to a low carbon economy, and that granting the non-material change would not be incompatible with the amendment to the Climate Change Act 2008.
28. The Secretary of State has considered the nature of the proposed change, noting that it would have no additional significant environmental effects. He notes that the proposed change to the authorised development would not result in any further environmental impacts and will remain within the parameters consented by the 2015 Order. He concludes that the proposed change is not material. Having considered the effects of any change and the benefits of the change in facilitating the deployment of the authorised development, the Secretary of State has concluded that it would be appropriate and advantageous to authorise the proposed change as detailed in the Application. He concludes that the benefits of authorising the change to ensure that the 2015 Order does not expire before 13 August 2021, thereby increasing the likelihood of the Development being completed, outweigh any adverse effects.
29. For the reasons given in this letter, the Secretary of State considers that there is a compelling case for authorising the proposed change to the 2015 Order as set out in the Application. The Secretary of State is satisfied that the change requested by the Applicant is not a material change to the 2015 Order, and has decided under paragraph 2(1) of Schedule 6 to the 2008 Act to make a non-material change to the 2015 Order so as to authorise the change detailed in the Application.

Modifications to the draft Order proposed by the Applicant

30. The Secretary of State has decided to make minor drafting improvements to the draft Order proposed by the Applicant. These changes do not materially alter the terms of the draft Order.

Challenge to decision

31. 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

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

Yours sincerely,

Gareth Leigh

Gareth Leigh
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/eastern/progress-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)