From:	Abigail Walters
To:	Norfolk Vanguard
Cc:	[redacted]
Subject:	Cadent - Correspondence and Written Representation
Date:	16 January 2019 16:46:19
Attachments:	image002.png Cadent Letter to PINS with WR 16.01.19.pdf Cadent Norfolk Vanguard Written Representation.pdf Cadent response to ExA"s 1WQ"s .pdf

Dear Sirs,

Please find enclosed correspondence on behalf of Cadent Gas Limited and an accompanying Written Representation and Response to ExA's first round of questions.

Kind regards

Abigail Walters
Partner

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M [redacted]
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Main T 0116 254 5454 ext 6968

Shakespeare Martineau
Two Colton Square, Leicester, LE1 1QH
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SHAKESPEAREMARTINEAU

This matter is being dealt with by
Abigail Walters

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DX 744174 Leicester 41
T +44 (0)116 254 5454

Our ref: 975110.13.AW.
Your ref:

16 January 2019

National Infrastructure Planning
Temple Quay House
2 The Square Bristol,
BS1 6PN

By e-mail to: - NorfolkVanguard@pins.gsi.gov.uk

Dear Sirs,

Norfolk Vanguard Development Consent Order Application

Please find enclosed a copy of the Written Representation by Cadent Gas Limited and a response to the ExA's first round question addressed to Cadent Gas Limited.

We have prepared a Statement of Common Ground with the promoter and understand that they will be submitting a copy of the same to PINS.

Cadent Gas Limited would like to reserve their right to attend and appear at either the Compulsory Acquisition Hearings or the Issue Specific Hearings on the drafting of the DCO on either 7th February or 28th March or both as necessary, in the event that negotiations with the Promoter do not come to an agreed conclusion in the near future.

Yours sincerely

[redacted]

Abigail Walters

Direct Line: 0116 281 6968
Direct Fax: 0116 254 5454
E: abigail.walters@shma.co.uk

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THE INFRASTRUCTURE PLANNING (EXAMINATIONS PROCEDURE) RULES 2010

NORFOLK VANGUARD OFFSHORE WINDFARM

WRITTEN REPRESENTATION ON BEHALF OF CADENT GAS LIMITED

SHAKESPEAREMARTINEAU

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LE1 1QH

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Objector Registration No. 20011728

Ref: AW/975110-13

WRITTEN REPRESENTATION ON BEHALF OF CADENT GAS LIMITED

1. INTRODUCTION

1.1 Cadent Gas Limited have made a relevant representation in this matter on 20th August 2018 in order to protect apparatus owned by Cadent Gas Limited. Cadent Gas Limited does not object in principle to the development proposed by the Promoter.

1.2 Cadent does, however, object to the Authorised Works being carried out in close proximity to their Apparatus in the area unless and until suitable protective provisions and related agreements have been secured to their satisfaction, to which see further at paragraph 4. They also object to any compulsory acquisition powers for land or rights or other related powers for survey, temporary acquisition powers or to override easements or rights or the stopping up public or private rights of access being invoked which would affect their Apparatus, or right to access and maintain their Apparatus. This is unless and until suitable protective provisions and any necessary related amendments to the wording of the DCO have been agreed and included in the Order. Cadent wish to ensure appropriate land rights are available for any diversion of their assets, where applicable, and will require crossing agreements where there are proposals to work within the easement strip of any of Cadent's Apparatus, to which see further at paragraph 2.

1.3 Cadent is holder of a licence under section 7 of the Gas Act 1986 and operates four gas distribution networks in North London, Central England (West and East) and the North West.

1.4 Cadent is required to comply with the terms of its Licence in the delivery of its statutory responsibilities. It is regulated by the Network Code which contains relevant conditions as to safe transmission of gas and compliance with industry standards on transmission, connection and safe working in the vicinity of its Apparatus, to which see paragraph 3.

2 CADENT ASSETS – INTERMEDIATE AND HIGH PRESSURE GAS PIPELINES

2.1 The Order seeks powers to do works (Work 5 to 7(A to D)) to bring an onshore cable route to the National Grid Sub Station at Necton. Cadent has assets within the Order Limits as follows:

- Intermediate Pressure Pipeline – Land Plan 9 – Plot 9/15, 9/16
- Intermediate Pressure Pipeline – Land Plan 10 – Plot 10/2
- Intermediate Pressure Pipeline – Land Plan 14 – Plot 14/13, 14/15, 14/18, 14/20, 14/21
- High Pressure Pipeline – Land Plan 35 – Plot 35/15, 35/16
- High Pressure Pipeline – Land Plan 9 – Plot 9/03, 9/04, 9/05

2.2 The Intermediate Pressure Pipelines and High Pressure Pipelines are essential parts of the gas distribution network supplying the local area. The Cadent High Pressures Assets will be crossed in 3 locations by the Applicants Onshore Cable Route. Cadent's Intermediate Pressure Assets will be crossed in 2 locations by the Onshore Cable Route.

2.3 Cadent object to work in the vicinity of a high pressure main of this nature or any of their other assets unless and until suitable protective provisions and related agreements have been secured to their satisfaction, to which see paragraph 4.

2.2 The Order as currently drafted allows for compulsory acquisition of rights for the On Shore Cable Route which could affect Cadents Intermediate Pressure and High Pressure Mains and related land rights. The rights acquired may need to be modified to ensure that they do not affect, override or contradict with Cadent's existing rights and easements for the Gas Mains. Additionally Crossing Agreements/Deed of Consent will be required to be entered into prior to any work being carried out in the easement strip of any Cadent easement. The Protective Provisions will ensure that this is required before any works in proximity to their assets are started and as such Cadent wish to ensure that appropriate Protective Provisions are in place along with appropriate amendments to the wording of the Order.

3. CADENT - REGULATORY PROTECTION FRAMEWORK

3.1 Major Accident Hazard pipelines are regulated by the Pipeline Safety Regulations 1996. Under Regulation 15, it is an offence to cause damage to a pipeline as may give rise to a danger to persons and could result in enforcement action by the HSE.

3.2 The Pipeline Safety Regulations 1996 requires that pipelines are designed, constructed and operated so that the risks are as low as is reasonably practicable. In judging compliance with the Regulations, the HSE expects duty- holders to apply relevant good practice as a minimum.

3.3 Well established national standards and protocols for major accident hazard pipelines assist the HSE in ascertaining whether the risks incurred in working with such pipelines have been mitigated as much as reasonably practicable. The following standards are relevant to the HP main:

3.3.1 IGEM/TD/1: Steel Pipelines for High Pressure Gas Transmission (Pipeline over 16 bar).

(a) This Standard applies to the design, construction, inspection, testing, operation and maintenance of pipelines and associated installations, designed after the date of publication. It sets out engineering requirements "for the safe design, construction, inspection, testing, operation and maintenance of pipelines and associated installations, in accordance with current knowledge."

(b) This Standard is intended to protect from possible hazards members of the public and those who work with pipelines and associated installations, as well as the environment, so far as is reasonably practicable. It is also intended to ensure that the security of gas is maintained.

3.3.2 TSP/SSW/22 'Safe Working in the Vicinity of Cadent HP pipelines'

(a) This specification manages industry protection of plant.

(b) It is aimed at third parties carrying out work in the vicinity of Cadent high pressure gas pipelines (above 7 bar gauge) and associated installations and is provided to ensure that individuals planning and undertaking work take appropriate measures to prevent damage.

(c) It states that "*any damage to a high pressure gas pipeline or its coating can affect its integrity and can result in failure of the pipeline with potential serious hazardous consequences for individuals located in the vicinity of the pipeline if it were to fail*". The requirements in this document are in line with the requirements of the IGE (Institution of Gas Engineers) recommendations IGE/SR/18 Edition 2 - Safe Working Practices To Ensure The Integrity Of Gas Pipelines And Associated Installations, and the HSE's guidance document HS(G)47 Avoiding Danger from Underground Services.

3.4 The Industry Standards referred to above have the specific intention of protecting:

(a) The integrity of the pipelines and thus the transmission of gas;
(b) The safety of the area surrounding a major accident hazard pipeline;
(c) The safety of personnel involved in working with major accident hazard pipelines.

3.5 Cadent has a statutory duty under its Licence to ensure that these Regulations and protocols are complied with. Cadent requires specific provisions in place for an appropriate level of control and assurance that the industry regulatory standards will be complied with in connection with works to connect to and in the vicinity of the Gas mains.

4. PROTECTIVE PROVISIONS

Background to Protective Provisions

4.1 Cadent is required to comply with the terms of its gas distribution licence and is regulated by OfGEM, the Office of the Gas and Electricity Markets. As money spent and costs incurred by Cadent is ultimately passed on to consumers in their energy bills, one of Cadent's duties is to ensure that it conducts itself in an efficient and cost effective way. Cadent is therefore also concerned to ensure that it is suitably protected and indemnified by promoters from the financial implications of their schemes.

4.2 Any damage to gas assets or their coating can affect its integrity and can result in failure of the gas pipeline or main with potential serious, hazardous consequences for individuals and/or property located in the vicinity of the gas pipelines or mains if they were to fail. It could also lead to loss of supply for individuals and business premises in the vicinity of the pipeline.

4.3 Cadent is required to comply with a number of Industry Safety Standards and legal requirements in fulfilment of its licence responsibilities further details of which are set out in paragraph 3. Cadent is required to ensure that its network is maintained in an efficient state, in efficient working order and in good repair. Cadent is therefore required to keep its network whole and to maintain safety standards. This includes addressing the adverse impacts of third party development on its network.

4.4 Cadent therefore reasonably expects to be kept or made whole again, during and following the carrying out and operation of any third party development either by way of the physical replacement of alternative apparatus or, where acceptable, in monetary compensation. As part of measures designed to meet this objective, Cadent requires adequate protection which includes a means of recovering of all of its properly incurred costs, expenses and losses caused by or on behalf of the third party promoter. This follows the widely understood and accepted principle of 'equivalence' but for which those costs, expenses and losses will be incurred by Cadent

4.5 Section 138 of the Planning Act 2008 provides that a development consent order may include provision for the extinguishment of a relevant right, or removal of relevant apparatus of a statutory undertaker, only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates. The Secretary of State will balance the need for and national benefits of the Applicant's project against the impact on the statutory undertakers ability to retain and operate a safe network in an efficient manner. Part of that determination considers the provision of measures for the benefit of the undertaker to be properly made whole again and properly compensated It is expected that the Secretary of State will weigh heavily in this balance, instances where the third party project does not provide equivalence for the undertaker

General

4.6 Cadent seeks to protect its statutory undertaking, and insists that in respect of crossing and work in close proximity to their Apparatus as part of the authorised development the following procedures are complied with by the Applicant:

(a) Cadent is in control of the plans, methodology and specification for works within 15 metres of any Apparatus,

(b) DCO works in the vicinity of Cadent's apparatus are not authorised or commenced unless protective provisions are in place preventing compulsory acquisition of Cadent's land or rights and including appropriate insurance and indemnity provisions to protect Cadent and a requirement to enter into a Crossing Agreement/Deed of Consent in respect of any works within Cadent's easement strips.

4.7 Cadent maintain that without an agreement or qualification on the exercise of unfettered compulsory powers or work in proximety to its apparatus the following consequences will arise:

4.7.1 Failure to comply with industry safety standards, legal requirements and Health and Safety Executive standards create a health and safety risk;

4.7.2 Any damage to apparatus has potentially serious hazardous consequences for individuals located in the vicinity of the pipeline/apparatus if it were to fail.

4.8 The proposed Order does not yet contain fully agreed protective provisions expressed to be for the protection of Cadent to Cadent's satisfaction, making it currently deficient from their perspective. Cadent contend that it is essential that these provisions are addressed to their satisfaction to ensure adequate protection for their Assets and that protective provisions on their standard terms are provided for in the Order. Negotiations between the parties in respect of the form of the Protective Provision to be included within the Order are not concluded and there remain a number of outstanding issues, these relate to the indemnity provisions and insurance/surety requirements of Cadent as well as some more minor issues around notice periods.

Indemnity and Insurance and Surety Provisions within the Protective Provisions

4.9 The current dDCO contains protective provisions for the protection of Cadent at Schedule 16 Part 3 which include at Paragraph 22(1) to 22(4) (excluding sub paragraph (5) on compensation/indemnity provisions which are broadly acceptable to and in accordance with Cadent's template provisions. However, we understand in discussion with the Applicant that it also desires a cap on this indemnity to Cadent, the reasons for which are not clear.

4.10 Cadent contends that a cap on the Applicant's indemnity is inconsistent with the principle of equivalence and is therefore not appropriate for the following reasons:

- Cadent is receiving no direct benefit from the proposed development and therefore should not be put to any cost in respect of it;
- Cadent is a statutory undertaker with responsibilities and a duty to its regulator and the general public to conduct itself in an efficient and cost effective way. It therefore requires equivalence in monetary terms arising from the impact of the proposed development, where it is not otherwise compensated in physical terms by virtue of the reprovision of alternative apparatus;

- It is therefore entirely reasonable for the Applicant to be responsible to Cadent for the full extent of any losses (including consequential losses and any losses to its customers) to which Cadent is put by reason of execution of works which are entirely within the Applicant's control; and

- As a means to properly and appropriately incentivise the Applicant to adhere to all appropriate standards, codes and details relevant to the execution of its development in the proximity of and in relation to Cadent's apparatus. The protective provisions are of equal benefit to the Applicant in that they provide a mechanism within which to work with Cadent to mitigate the potential for damage to Cadent's Assets and consequential losses through appropriate design, working arrangements and monitoring.

4.11 The principle of equivalence was recognised and accepted in the recent decision to grant development consent for Eggborough CCGT (EN010081), where both the Examining Authority and the Secretary of State supported the Canal and River Trust (CRT) on the issue of indemnity caps and consequential losses.

4.12 The Examining Authority's conclusion at paragraph 8.5.30 of it's recommendation report dated 27 June 2018 (attached as Appendix 2) was that such a cap *"placed an unreasonable and unjustified burden on CRT, who face a risk of meeting potential costs and losses through no fault of its own"*. It was also concluded at paragraph 8.5.31 that the CRT should be *"within its reasonable rights to claim for foreseeable consequential losses as a result of the construction of the Proposed Development"*. This reasoning was agreed with by the Secretary of State in his Decision Letter dated 20 September 2018 (attached as Appendix 2).

4.13 As set out in the Examining Authority's Report and Recommendation at paragraph 8.5.26 (attached as Appendix 2), set out the CRT's case that such an indemnity cap would be unacceptable *"because, amongst other things, it is a registered charity with finite resources, that it is receiving no benefit from the Proposed Development, and its statutory function as a navigational authority warrants protection from any such financial cost"*. (our emphasis added).

4.14 Whilst the Examining Authority noted the charitable status of the CRT, in our view there is nothing in its Report and Recommendation or in the Secretary of State's Decision Letter which indicates that this status was the key material consideration or a determinative factor in the decision not to impose indemnity caps. Rather, it is clear from the rationale that the statutory undertaker status of the CRT was a material factor in the Secretary of State's decision that the CRT warrants protection from any financial costs of the third party project. There is therefore no reason why the same principle should not apply in the case of Cadent, as statutory undertaker with statutory functions in relation to a gas network.

4.15 The statutory and licence requirements on Cadent to maintain their network in an efficient state, in efficient working order and in good repair, mean that losses can arise from damage caused to Cadent's assets. Safety is therefor a paramount consideration and a requirement that Cadent must be able to address to meet its statutory obligations. These requirements will clearly have an impact on its financial outlay for which its regulator requires Cadent to act responsibly and to recover its losses from third parties as part of its obligations to provide an efficient distribution network. Cadent must seek to discharge its obligations in an efficient way which includes the avoidance or minimisation of costs and losses that it might incur in operating and maintaining its network and delivering services to customers. A cap on recovery under an indemnity to Cadent from the Applicant would expose Cadent to irrecoverable losses that would not otherwise be incurred by it in the ordinary course of its operations. In other words, but for the Applicant's development, Cadent would not be put to such loss. It should not be for Cadent to bear liabilities in excess of an indemnity cap where such liabilities are caused by commercial schemes.

4.16 Cadent also require their standard Insurance and Surety provisions to be included in the Protective Provisions as a way to secure the performance with the indemnity. The principle generally is common place. Insurance/Surety provisions ensure that the Indemnity Provisions

are meaningful where for instance the promoter is currently a paper company or a company with a limited funds/covenant strength particularly at early stages of construction. This is also relevant where there is a risk of transfer of the undertaking before completion of works. In this case the Promoter's covenant strength is addressed in the Funding Statement. The Funding Statement relies predominantly upon Vattenfall Wind Power Limited, rather than the Applicant to secure the funding for the necessary land assembly and funding of the project. Liability arising from accidental damage is a potentially wider issue and larger liability not specifically addressed in the Funding Statement. It is nevertheless appropriate that the promoter is in a financial position to back up/deliver on any liability arising under the Indemnity Provision. The best way of ensuring this is through surety from an appropriate company with appropriate covenant strength and by ensuring that appropriate insurance is in place. At this stage it is not clear whether or not this issue is in dispute between the parties and negotiations over securing appropriate drafting in this respect have been on going between the parties. As such at this stage Cadent merely flag that they have this requirement. Should negotiations between the parties not reach an appropriate conclusion in the near future, Cadent reserve the right to expand on this issue in accordance with paragraph 4.17 below.

4.17 The parties intend to continue negotiating to resolve the remaining outstanding issues. However should this not be possible and attendance at a Compulsory Acquisition Hearing or Issue Specific Hearing is necessary then Cadent reserve the right to provide further written information in advance in support of any detailed issues remaining in dispute between the parties at that stage. If this is necessary any submission made at this point will include a version of the Protective Provisions required by Cadent at that stage in light of any outstanding issues between the parties.

5. PROPERTY ISSUES

5.1 Insufficient property rights have the following safety implications:

5.1.1 Inability for qualified personnel to access apparatus for its maintenance, repair and inspection.

5.1.2 Risk of strike to pipeline if development occurs within the easement zone which seeks to protect the pipeline from development.

5.1.3 Risk of inappropriate development within the vicinity of the pipeline increasing the risk of the above.

5.2 Cadent require assurance in the form of the Protective Provisions that existing land interests and rights and rights of access will be retained during and post construction and also physically maintained. Cadent also require that the Promoter enters into a Deed of Consent/Crossing Agreement prior to carrying out any work within Cadent Easement Strips. These documents will be entered into in future once the detailed design of the Promoters works are known. The requirement to enter into a Crossing Agreement/Deed of Consent will be secured within the Protective Provisions once an agreed version are included in the Order. Cadent wish to ensure through the agreement of the Protective Provisions that their property rights are not affected and the issues flagged in paragraph 5.1 above do not arise.

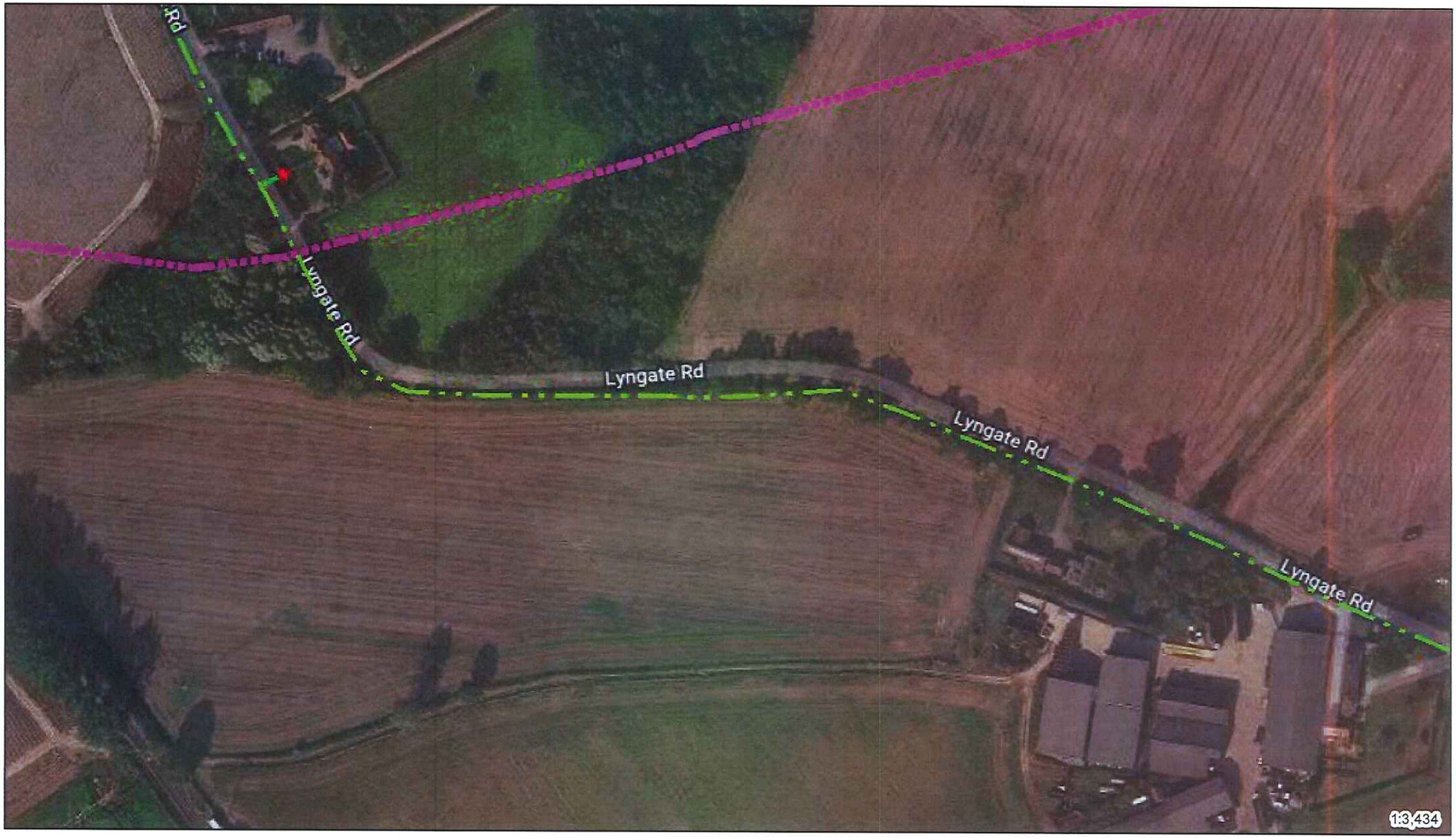
5.3 List of Appendices:

Appendix 1 – Cadent Asset Plans

Appendix 2 – SoS's Decision Letter Eggborough CCGT 20th September 2018 and extracts from the ExA's Report dated 27th June 2018

Appendix 1 – Cadent Asset Plans

LP Sheet 10 - IP



January 8, 2019

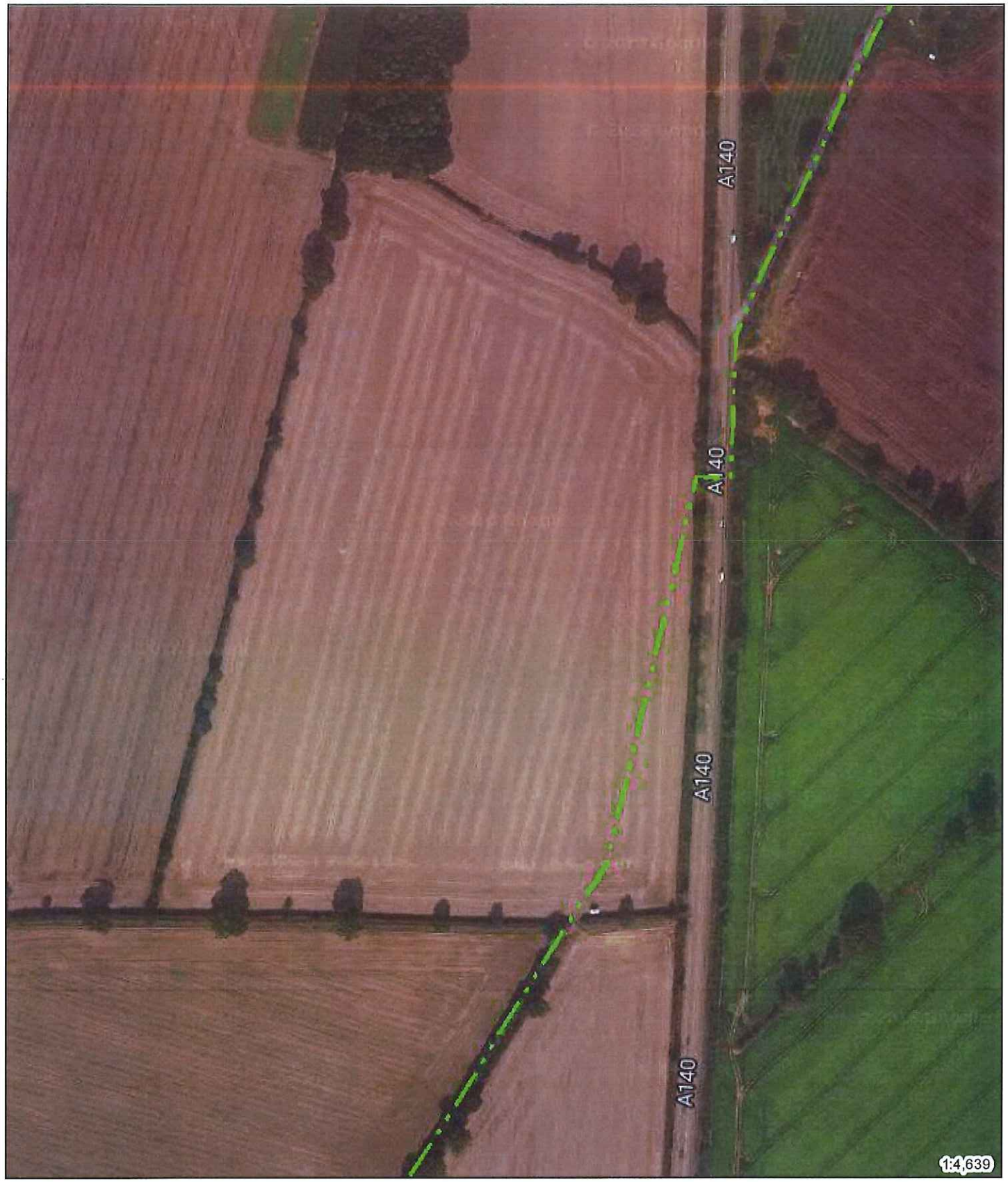
Potential Site Point

- In Boundary
- In Archived Boundary
- Outside Boundary

0 45 90 180 m

Advisian
WorleyParsons Group

LP Sheet 14 - IP



January 8, 2019

0 60 120 240 m

Potential Site Point

- In Boundary
- In Archived Boundary
- Outside Boundary

Advisian
WorleyParsons Group

LP Sheet 135 - HP

January 8, 2019

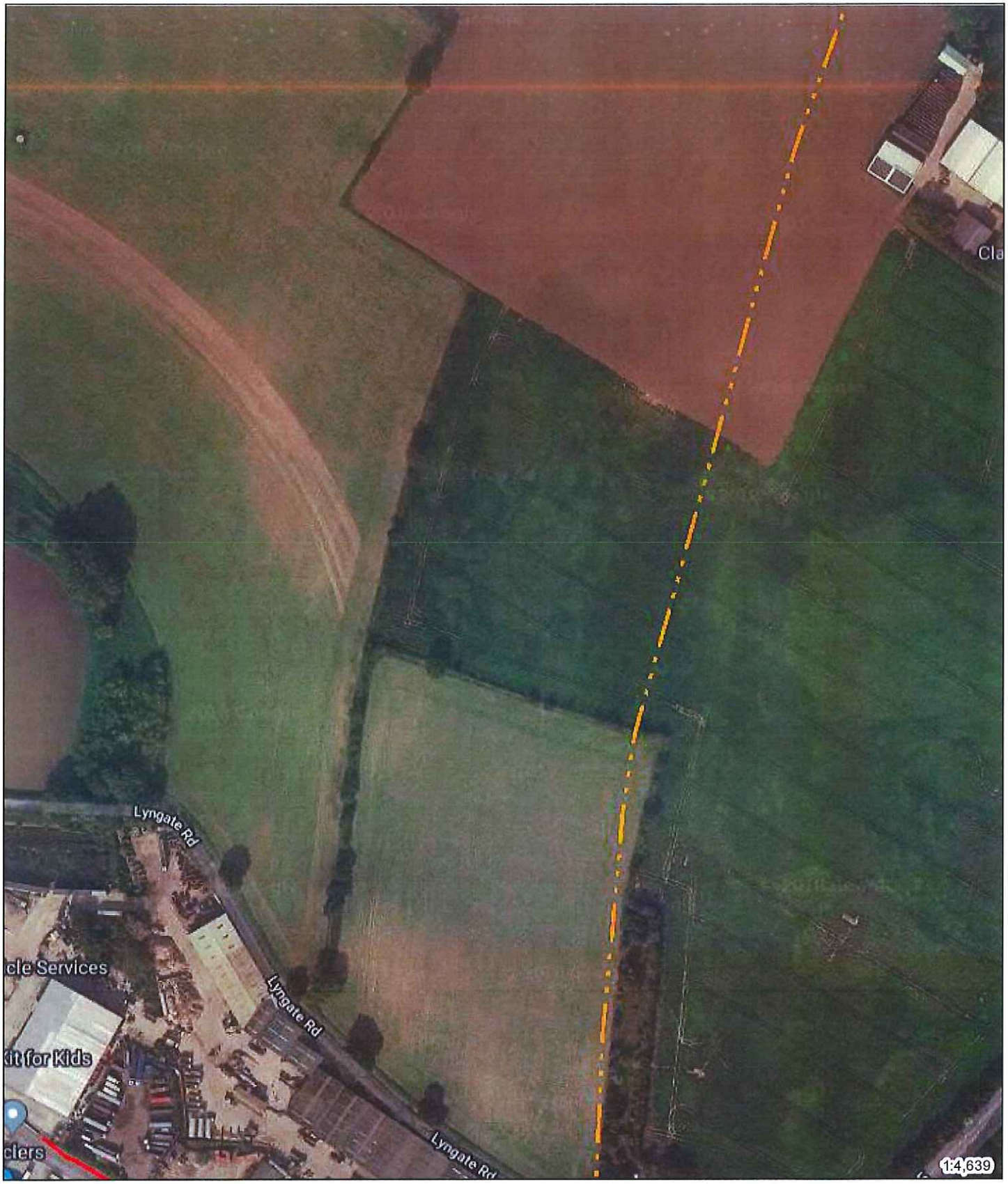
0 60 120 240 m

Potential Site Point

- In Boundary
- In Archived Boundary
- Outside Boundary

Advisian
WorleyParsons Group

LP Sheet 9 - HP



January 8, 2019

0 60 120 240 m

Potential Site Point

- In Boundary
- In Archived Boundary
- Outside Boundary

Advisian
WorleyParsons Group

Appendix 2

SoS's Decision Letter Eggborough CCGT 20th September 2018; and

Extracts from the ExA's Report dated 27th June 2018

Department for
Business, Energy
& Industrial Strategy

**Department for Business,
Energy & Industrial Strategy**

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E gareth.leigh@beis.gov.uk

W www.gov.uk

Our Ref: EN010081

20 September 2018

Dear Sir or Madam,

PLANNING ACT 2008

APPLICATION FOR THE EGGBOROUGH COMBINED CYCLE GAS TURBINE (GENERATING STATION) ORDER

I. 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 27 June 2018 of the Examining Authority ("the ExA"), Richard Allen B.Sc(Hons) PGDip MRTPI, who conducted an examination into the application ("the Application") submitted on 30 May 2017 on behalf of Eggborough Power Limited ("the Applicant") for a Development Consent Order ("the Order") under section 37 of the Planning Act 2008 ("the 2008 Act") for the Eggborough Combined Cycle Gas Turbine ("CCGT") Generating Station ("the Development").

1.2 The Application was accepted for examination on 27 June 2017. The examination began on 27 September 2017 and was completed on 27 March 2018.

1.3 The Order, as applied for, would grant development consent for the construction and operation of a CCGT generating station of up to 2,500 megawatts ("MW") on land located at the existing Eggborough Coal-Fired Power Station site near Selby in North Yorkshire.

1.4 The Development would comprise:

- An electricity generating station located on land at the existing Eggborough Power Station site, fuelled by natural gas and with a gross output of up to 2500 MW; a peaking and black start plant with a combined gross output of up to 299 MW; and cooling infrastructure;

- Temporary construction and laydown area involving the infilling of an existing on-site lagoon, and reserve space for carbon capture readiness;
- Works to the existing National Grid Electricity Transmission ("NGET") sub-station including underground and overground electrical cables, replacement equipment and connections to busbars;
- Works to replace the existing cooling water intake and discharge infrastructure from the River Aire;
- Works to replace the existing groundwater and towns water supply connections;
- Installation of a high-pressure gas supply pipeline to link the proposed CCGT to the National Grid Gas Feeder pipeline;
- Installation of an above-ground installation for both the Applicant and National Grid Gas at the gas pipeline connection point;
- Landscaping and biodiversity enhancements;
- Surface water drainage works from the site to Hensall Dyke utilising an existing connection; and
- Vehicular, pedestrian and cycle access works.

1.5 Published alongside this letter on the Planning Inspectorate's website[1] is a copy of the ExA's Report of Findings and Conclusions and Recommendation to the Secretary of State ("the ExA Report"). The ExA's findings and conclusions are set out in Chapters 4 to 8 of the ExA Report, and the ExA's summary of conclusions and recommendation is at Chapter 9.

II. Summary of the ExA's Report and Recommendation

2.1 The principal issues considered during the Examination on which the ExA has reached conclusions on the case for development consent are set out in the ExA Report under the following broad headings:

- Legal and Policy Context, including the relevant National Policy Statements, European and Local planning policy (Chapter 3);
- Finding and Conclusions in relation to policy and factual issues, which includes consideration of: Sources of Information; Environmental Impact Assessment ("EIA") Methodology; the need for the proposed development and examination of alternatives; Agriculture and Socio-Economics; Air Quality and Emissions; Archaeology and Historic Environment; Biodiversity and Ecology; Carbon Capture Storage Readiness; Combined Heat and Power Readiness; Flooding and Water; Land Contamination and Ground Conditions; Landscape and Visual; Noise and Vibration; Statutory Nuisance and Human Health; Sustainability and Climate Change; Traffic and Transport; Waste Management; Cumulative and Combined Effects; and the existing Coal-fired Power Station (Chapter 4);
- Findings and Conclusions in Relation to the Habitats Regulations (Chapter 5);

[1] https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/eggborough-ccgt/

- The ExA's Conclusion on the Case for Development Consent (Chapter 6);
- Compulsory Acquisition and Related Matters (Chapter 7); and
- Draft Order and Related Matters, including the Deemed Marine Licence ("DML") and other Legal Agreements and related documents (Chapter 8).

2.2 For the reasons set out in the Summary of Findings and Conclusions (Chapter 9) of the ExA Report, the ExA recommends that the Order be made, as set out in Appendix D to the ExA Report [ER 9.1.10].

III. 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 the statement of reasons for the Secretary of State's decision for the purposes of section 116 of the Planning Act 2008 and regulation 23(2)(d) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 ("the 2009 Regulations") – which apply to this application by operation of regulation 37(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.

IV. Secretary of State's Consideration of the Application

4.1 The Secretary of State has considered the ExA Report and all other material considerations, including the further representations received after the close of the ExA's examination from the Applicant and the Crown Estate both dated 20 August 2018 in response to BEIS's consultation letter dated 9 July 2018[2]. The Secretary of State's consideration of the ExA Report and further representations is set out in the following paragraphs. All numbered references, unless otherwise stated, are to paragraphs of the ExA Report.

4.2 The Secretary of State has had regard to the joint Local Impact Report ("LIR") as submitted by North Yorkshire County Council ("NYCC") and Selby District Council ("SDC") [ER 3.10 and ER 4.2.5 – ER 4.2.6], the Development Plan [ER 3.11 and ER 4.2.7 – ER 4.2.9], environmental information as defined in Regulation 2(1) of the 2009 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 nineteen relevant representations were made by statutory and non-statutory authorities, utility providers, NYCC and SDC, Hensall Parish Council and local residents [ER 4.2.1]. 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

[2] https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010081/EN010081-001480-Eggborough%20CCGT%20Consultation%20Letter%20Dated%209%20July%202018%20(2).pdf

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.

Need for the Proposed Development and Examination of Alternatives

4.4 After having regard to the comments of the ExA set out in Chapter 3 (ER 3.3] of the ExA Report, and in particular the conclusions on the case for development consent in Chapter 4.5, 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), EN-2 (the NPS for Fossil Fuel Electricity Generating Infrastructure), EN-4 (the NPS for Gas Supply Infrastructure and Gas and Oil Pipelines) and EN-5 (the NPS for Electricity Networks 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 alternative options for the siting of the proposed CCGT and route corridor for Work No.6 (gas pipeline) were rigorously tested by the Applicant and that the requirements of NPS EN-1 and the EIA Regulations in this regard have been met [ER 4.5.13].

Carbon Capture Readiness ("CCR")

4.5 As set out in NPSs EN-1 and EN-2, all commercial scale fossil fuel generating stations with a generating capacity of 300MW or more have to be 'Carbon Capture Ready'. Applicants are required to demonstrate that their proposed development complies with guidance issued by the Secretary of State in November 2009[3] or any successor to it.

4.6 The Secretary of State notes that the Application was accompanied by a Carbon Capture Storage and Carbon Capture Readiness Statement, which also included an economic assessment and information on Carbon storage and transport. It is also noted that the Environment Agency ("EA") were consulted and concluded there are no foreseeable barriers to carbon capture with regard to space and, following clarification by the Applicant during the Examination, confirmed that it had no concerns in respect of CCR matters and that provision for CCR is adequately secured through Requirements 31 and 32 of the Order. The Statement of Common Ground between the Applicant and NYCC/SDC also agrees that the Development complies with the relevant regulations and guidance [ER 4.10.3 -4.10.4]. No written questions where posed by the ExA during the Examination on this matter [ER 4.10.5].

4.7 The Secretary of State is satisfied with the ExA`s assessment of this particular issue, and conclusion that the Development adequately makes provision for CCR,

[3] 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

accords with all legislation and policy requirements, and that CCR is adequately provided for and secured in its recommended Order [ER 4.10.6].

Combined Heat and Power ("CHP")

4.8 NPS EN-1 requires that applications for thermal generation stations under the Planning Act 2008 should either include CHP, or evidence that opportunities for CHP have been explored where the proposal is for a generating station without CHP. The Secretary of State notes that the Application was accompanied by a CHP Assessment which concludes that the provision of heat or steam is not viable at this stage. However, the CHP assessment demonstrates that the proposed Development meets the "Best Available Techniques" tests and will be designed and built as CHP Ready to supply any identified viable heat load up to a potential maximum of 33MWth and sufficient to meet the identified load of 21MWth [ER 4.11.3]. The Statements of Common Ground between the Applicant and the Environment Agency ("EA") and the Applicant and NYCC/SDC agree that the proposed Development would be CHP ready, which would be secured by Requirement 28 of the recommended Order [ER 4.11.5].

4.9 The Secretary of State is satisfied with the ExA's conclusion that the proposed Development adequately makes provision for CHP, accords with all legislation and policy requirements and CHP is adequately provided for and secured in the recommended Order [ER 4.11.7].

V. Biodiversity and Habitats

5.1 The Development is not directly connected with or necessary to the management of any European Site. Therefore, under Regulation 63 of The Conservation Of Habitats And Species Regulations 2017 ("the Habitats Regulations"), the Secretary of State is required 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. 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 and projects, adversely affect the integrity of such a site, unless there are no feasible alternative or imperative reasons of overriding public interest apply. The complete process of assessment is commonly referred to as a Habitats Regulations Assessment ("HRA").

5.2 In undertaking the HRA, the Secretary of State considered the following European Sites:

- Skipwith Common Special Area of Conservation (SAC);
- Thorne Moor SAC;
- Hatfield Moor SAC;
- Humber Estuary SAC;

- Humber Estuary Special Protection Area (SPA);
- Humber Estuary Ramsar;
- Strensall Common SAC; and
- North York Moors SAC.

5.3 All of the above listed sites were thought to either have the potential to be impacted by the Development through changes to surface water or changes to air quality. However, on the basis of the information submitted as part of the Application, the Secretary of State has concluded that the Development, alone and in-combination is not likely to have a significant effect on the on the above listed sites. This is with the exception of the Thorne Moor SAC; at this site air emissions from the operational Development are expected to contribute to increased Nutrient Nitrogen Deposition.

5.4 To assess this effect further, the Secretary of State undertook an Appropriate Assessment. This assessment focused on the effect of the increase in Nutrient Nitrogen Deposition on the site's qualifying feature ('degraded raised bogs still capable of natural regeneration'). The assessment noted that the level of Nutrient Nitrogen Deposition at this site (and many other European Sites) already exceeds the measures established for the protection of vegetation, known as Critical Loads or Critical Levels. However, on the basis that the contribution from the Development, in-combination with other plans and projects, would result in no measurable change to the protected bog habitat, the Secretary of State has concluded that the Development, alone and in-combination with other plans and projects, will not have an adverse effect on the protected bog feature, and therefore the integrity of the Thorne Moor SAC. This conclusion is supported by Natural England, the Government's Statutory Nature Conservation Advisor.

VI. Other Matters

Deemed Marine Licence Environmental Permit, and other consents, licences and permits

6.1 The Secretary of State notes that Schedule 13 of the Order is the Deemed Marine Licence ("DML") under the Marine and Coastal Act 2009 for cooling water and gas connections within the tidal section of the River Aire. The Marine Management Organisation ("MMO") submitted a number of written representations during the examination. It is understood that the MMO's principal concern had been in relation to the wording of part 2, paragraph (3)(4)(b) of the Applicant's draft DML, which they considered would have allowed the Applicant to undertake the proposed Development over a wider (and unassessed) area than indicated in the indicative DML Co-Ordinates [ER 8.8.3]. However, it is noted that revised wording was subsequently agreed within the Statement of Common Ground between the Applicant and the MMO [ER 8.8.5]. The revised wording has been included in the recommended Order and the Secretary of State agrees with the ExA that its inclusion in the Order adequately protects the interests and functions of the MMO [ER 8.8.6].

6.2 It is noted from the EA's Statement of Common Ground [REP3-008] submitted at Examination Deadline 3 that it was agreed that the proposed Development would

be subject to the Environmental Permitting regime under the Environmental Permitting Regulations 2010 ('EPR') covering operational emissions from the generating station. It was further agreed that the preferred approach to permitting the Proposed Development is to apply for a substantial variation to the existing Environmental Permit for the power station site (reference EPR/VP3930LH/V007).

6.3 The Statement of Common Ground agrees that the Secretary of State must be satisfied that potential emissions from the Development can be adequately regulated under the EPR, as outlined in paragraph 4.10.7 of NPS EN-1. It is noted, having considered the general content of the ES for the Development, the EA is satisfied and agrees that it is of a type and nature that should be capable of being adequately regulated under EPR. Further, the EA is not aware of anything that would preclude the granting of an Environmental Permit. The EA will examine information on air quality (including the air dispersion modelling), noise and other emissions to the environment which will be provided by the Applicant as part of the Environmental Permit application, but at this point in time they are not aware of any reason why it would not be possible to address these matters as part of the EPR application process and issues that may arise.

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

6.5 Similarly, the Secretary of State notes there are various other consents, licences and permits that are likely to be required to construct and operate the proposed Development [ER 1.9.1] and has no reason to believe that the relevant approvals would also not be forthcoming.

VII. Consideration of Compulsory Acquisition and Related Further Representations

7.1 The Secretary of State notes that some issues relating to Compulsory Acquisition ("CA") and Temporary Possession ("TP") powers sought by the Applicant were unresolved at the close of the ExA's examination. As a result, the ExA recommended that the Secretary of State might wish to further consult the relevant interested parties [ER 7.6.25 and ER 7.6.29]. The BEIS consultation letter to the relevant interested parties (i.e. the Applicant, Crown Estates Commissioners and Northern Gas Networks) was issued on 9 July 2018. The outstanding issues and subsequent representations received by the Planning Inspectorate since the close of the ExA's examination are considered further below. The representations received in response to the consultation letter were:

- Dalton Warner Davis' letter of 23 July 2018 on behalf of the Applicant;
- The Crown Estate's letter of 20 July 2018;
- The Crown Estate's letter of 20 August 2018; and
- Dalton Warner Davis' letter of 20 August 2018 on behalf of the Applicant.

Crown Land/Section 135 Test

7.2 Section 135 of the Planning Act 2008 states that a DCO may include a provision authorising CA of an interest in Crown land only if: i) it is an interest which is for the time being held otherwise than by or on behalf of the Crown; and ii) the appropriate Crown authority consents to the CA. The Secretary of State notes that the Applicant is seeking powers to compulsorily acquire new rights over land that falls within the Crown interest (Plots 245, 255 and 690). Although the Applicant had been engaged with the Crown Estate's agents during the Examination to reach an agreement and stated in its submission at Deadline 9 that it had been signed, no further communication was received from the Crown Estate to confirm this or to state that it had authorised Crown land to be used. Without this confirmation, the ExA was unable to recommend that the Section 135 test has been passed and recommended that the Secretary of State seek confirmation from the Crown Estate that it has consented for Crown land to be used [ER 7.6.24 – ER 7.6.25]. Accordingly, the Crown Estate Commissioners were further consulted on this matter and confirmed by letter dated 20 August 2018 that it has reached a separate agreement with the Applicant which provides the Commissioners with sufficient assurance as to the way in which compulsory acquisition powers may be exercised and as a result confirmed their consent to the compulsory acquisition of third party interests in the relevant plots of land. This was subject to the inclusion of its suggested revised wording for Article 42 of the Order dealing with Crown rights. The Applicant has confirmed its agreement to the revised wording in the Order. The Secretary of State is also content with the Crown Estate's proposed revisions and is therefore satisfied that the Section 135 test in respect of Crown land is passed.

Northern Gas Networks Protective Provisions/Section 127 &138 Tests

7.3 Section 127 of the Planning Act 2008 relates to statutory undertakers' land. Section 127(5) and (6) states that a DCO may include provision authorising CA of a right over their land providing it can be done so without serious detriment to the carrying out of the undertaking, or that any detriment can be made good. Section 138 relates to the extinguishment of rights and section 138(4) states that a DCO may include a provision for the extinguishment of the relevant rights, or the removal of the relevant apparatus only if the Secretary of State is satisfied that the extinguishment or removal is necessary for the purposes of carrying out the development to which it relates. Both provisions are relevant to the statutory undertakers with land and equipment interests within the Order interests.

7.4 The Secretary of State notes that the Applicant and Northern Gas Networks had agreed to sign a private Asset Protection Agreement to protect the undertaker's interests. However, this was not signed by the close of the Examination [ER 7.6.27]. The ExA was content that the Section 127 and 138 tests are satisfied and there would be no serious detriment to Northern Gas Networks (or other statutory undertakers), but suggested the Secretary of State may want to seek confirmation from the Applicant that the private Asset Protection Agreement has been signed. Accordingly, the Applicant and Northern Gas Networks were further consulted on this matter and have

confirmed that an Asset Protection Agreement was signed on 12 July 2018. The Secretary of State is therefore satisfied that Northern Gas Networks' undertakings would be preserved and protected [ER 7.6.26 – ER 7.6.29].

Canal & River Trust ("CRT") Protective Provisions

7.5 The Secretary of State notes that CRT had also maintained an objection to the protective provisions in Schedule 12, Part 3 of the Applicant's draft Order. The objection related to an indemnity cap and also the Applicant's exclusion from liability for any consequential loses experienced by CRT as a result of the Development [ER 8.5.23-8.5.36]. The ExA reached a preliminary conclusion that both provisions placed an unreasonable and unjustified burden on CRT and as a result, recommended amendments to the draft Order. It is noted that the ExA's suggested modifications to the Applicant's final version of the draft Order, which are in line with the CRT's suggested wording, were not agreed before the close of the Examination. However, as both parties were given adequate opportunity to make their cases on this disagreement and their positions are clear, the Secretary of State considers nothing would have been gained by further consulting on the ExA's suggested modifications to Schedule 12, Part 3 of the Order. Further, the Secretary of State agrees with the ExA that the Applicant's suggested wording would place an unreasonable and unjustified burden on CRT, which would face a risk of potential costs and losses through no fault of its own [ER8.5.30] and is therefore satisfied with the ExA's recommendations on this matter [ER 8.5.32 - ER 8.5.36].

Human Rights Act 1998

7.6 The Secretary of State has considered the potential infringement of human rights in relation to the European Convention on Human Rights by the Development and the compulsory purchase powers contained in the draft Order. The Secretary of State notes the ExA's conclusion that: the Examination ensured a fair and public hearing; any interference with human rights arising from implementation of the Development is proportionate and strikes a fair balance between the rights of the individual and the public interest; and that compensation would be available in respect of any quantifiable loss. He agrees that there is no disproportionate or unjustified interference with human rights so as to conflict with the provisions of the Human Rights Act 1998 [ER 7.7.6].

Conclusion on CA [ER 7.7.1 – ER 7.7.6 and ER 9.1.5 – ER 9.1.9]

7.7 Having considered the ExA's analysis of CA and TP including the examination and also the further representations received, the Secretary of State agrees that the Development for which the land and rights are sought would be in accordance with national policy as set out in the relevant NPSs and that there is a national need for electricity generating capacity, including capacity from gas combustion. He is satisfied that the need to secure the land and rights required, and to construct the Development within a reasonable commercial timeframe represent a significant public benefit. The Secretary of State is content that the private loss to those affected is mitigated through

the choice of the Application land, and the limitation to minimum extent possible of the rights and interests proposed to be acquired. He agrees that the Applicant has explored all reasonable alternatives to the CA of the land, rights and interests sought and there are no better alternatives. The Secretary of State is content that adequate and secure funding would be available to enable CA within the statutory period following the Order being made and there would be no disproportionate or unjustified interference with human rights of individuals. In conclusion, the CA powers are justified and there is a compelling case in the public interest for land and interests to be compulsorily acquired and the Development would comply with the relevant sections of the Planning Act 2008.

VIII. Other Legal Agreements and Related Documents

8.1 The Secretary of State notes that, following concerns from the ExA during the Examination, no secure method for the demolition of the existing coal-fired power station existed. A signed Planning Agreement was therefore put in place under section 106 of the Town and Country Planning Act 1990 to secure its demolition in a timely manner if the Secretary of State makes the Order and the Development commences.

8.2 The Secretary of State understands that some loss of habitats on the Application site would occur through tree and existing lagoon removal, which the Applicant proposed would be mitigated through an agreed Landscape and Biodiversity Strategy secured by Requirement 6 of the Order. However, it is noted that there was a disagreement between the Applicant, Yorkshire Wildlife Trust and NYCC/SDC during the Examination over the Applicant's predicted onshore biodiversity offsetting calculations set out in the Indicative Landscape and Biodiversity Strategy. The Applicant subsequently recognised that its biodiversity offsetting calculations showed only a very small biodiversity gain, and on reflection it accepted more needed to be done. Yorkshire Wildlife Trust highlighted that an opportunity existed for the Applicant to contribute towards an off-site project in the Lower Aire Valley following a study on how natural processes could best be utilised to reduce flooding. This was one of two locations in the River Aire catchment (and the only one in the Lower Aire) which has high potential for habitat creation to be undertaken to reduce flood risk. As a result, a section 106 Planning Agreement was agreed to secure a financial contribution from the Applicant payable to SDC towards off-site wetland habitat creation in the Lower Aire Valley (ER 4.9].

8.3 The Secretary of State notes that in the ExA's judgement, both agreements are essential to the recommendation to make the Order [ER 8.9.2]. The Secretary of State is aware that a new National Planning Policy Framework was published in July 2018 (i.e. after the close of the ExA's Examination). However, the Secretary of State is content that there are no significant dissimilarities in the approach taken to sustainable development or to nationally significant infrastructure in the new National Planning Policy Framework [ER 3.12.2]. The Secretary of State is also satisfied the same tests set out for planning obligations still apply [ER 3.12.2] and that both of the above agreements meet the tests in that they are: necessary to make the Development acceptable in planning terms; directly related to the Development; and fair and reasonably related in scale and kind to the Development [ER 4.9.26 and ER 4.21.13].

8.4 In addition, the Secretary of State notes an Agreement under section 111 of the Local Government 1972, section 1 of the Localism Act 2011 and section 93 of the Local Government Act 2003 has also been signed to ensure parties will adopt a collaborative and constructive approach to discharge the Requirements in the Order.

IX. General Considerations

Equality Act 2010

9.1 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 partnerships[4]; 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

9.2 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.

9.3 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.

X. Secretary of State's conclusions and decision

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

[4] In respect of the first statutory objective (eliminating unlawful discrimination etc.) only.

10.2 The Secretary of State has therefore decided to accept the ExA's recommendation to make the Order granting development consent [ER 9.1.10]. In reaching this decision, the Secretary of State confirms regard has been given to the ExA Report, the joint LIR submitted by NYCC/SDC 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 3(2) of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 that the environmental information as defined in regulation 2(1) of those Regulations has been taken into consideration.

XI. Modifications to the Order by the Secretary of State

11.1 The Secretary of State has made the following modifications to the Order:

- Renaming the Order applied for from *'The Eggborough CCGT (Generating Station) Order'* to *'The Eggborough Gas Fired Generating Station Order 2018'* for consistency with other recent Orders for CCGT generating stations made by the Secretary of State;
- Amendments to Article 6 to clarify the entity having the benefit of the provisions of the Order; and
- Amendments to Article 42 (Crown rights) to reflect the revisions agreed by the Crown Estate and Applicant.

Other Drafting Changes

11.2 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.

XII. Challenge to decision

12.1 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.

XIII. Publicity for decision

13.1 The Secretary of State's decision on this Application is being publicised as required by section 116 of the 2008 Act and regulation 23 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009.

13.2 Section 134(6A) of the Planning Act 2008 provides that a compulsory acquisition notice shall be a local land charge. Section 134(6A) also requires the compulsory acquisition notice to be sent to the Chief Land Registrar, and this will be the case where the order is situated in an area for which the Chief Land Registrar has given notice that he now keeps the local land charges register following changes made by Schedule 5 to the Infrastructure Act 2015. However where land in the order is situated in an area for which the local authority remains the registering authority for

local land charges (because the changes made by the Infrastructure Act 2015 have not yet taken effect), the prospective purchaser should comply with the steps required by section 5 of the Local Land Charges Act 1975 (prior to it being amended by the Infrastructure Act 2015) to ensure that the charge is registered by the local authority.

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/yorkshire-and-the-humber/eggborough-ccgt/

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)

Applicant and NYCC/SDC stated that they were unable to agree the wording.

8.5.19 The matter became a main agenda item at the ISH on Environmental Matters held on Wednesday 22 November 2017 [EV-007 to EV-010]. At this event, I asked the parties for an outline of their respective positions. The Applicant explained that work had been undertaken to see if the rating levels of 0 dB during the daytime and 3 dB during the night time could be achieved, as required by NYCC/SDC. The Applicant confirmed that 0 dB could be achieved during the daytime, but it was not in a position to commit to a 3 dB level tolerance at this early concept design stage. It could however achieve a rating level of 5 dB at night, which was in line with the parameters assessed in the ES [APP-047].

8.5.20 On that basis, I asked the Applicant why Requirement 24(2) could not include the provision to restrict daytime noise levels to 0 dB, and it agreed. I also asked whether the 5 dB night time rating could be retained but whether an additional provision could be made in which the Applicant could commit to a lower night time tolerance level once it had established the final design. This was also accepted by the Applicant and NYCC/SDC.

8.5.21 Requirement 24 was subsequently updated at DL 3 [REP3-003]. NYCC/SDC confirmed in their response [REP5-012] to my FWQ NV 2.1 [PD-011] that subject to very minor modifications, they were content with the revised wording. The agreed wording is set out in the Recommended DCO.

8.5.22 This is no longer a contentious matter, and I am satisfied with the wording of Requirement 24 in the Recommended DCO.

Schedule 12, Part 3 (Protected Provisions in relation to the Canal & River Trust)

8.5.23 The draft DCO which accompanied the Application [APP-005] made no Protected Provision for CRT, and CRT requested in its WR [REP2-031] that such provisions should be added. I asked for an update on this matter at the CAH held on Thursday 23 November 2017 [EV-012]. The Applicant stated that wording would be added to the updated version of the DCO which was submitted at DL 3 [REP3-003].

8.5.24 Notwithstanding, CRT expressed objections to the forthcoming wording in the updated draft DCO [REP3-003] on two grounds.

8.5.25 The first concerns paragraph 32(6). This stated that "*The aggregate cap of the undertaker's gross liability shall be limited to £1,000,000 (one million pounds) for any one occurrence or all occurrences of a series arising out of one original cause*".

8.5.26 CRT stated at the CAH held on Thursday 23 November 2017 [EV-012], also confirmed in its responses at DL 3 [REP3-020] that such an indemnity cap placed upon it would be unacceptable because,

amongst other things, it is a registered charity with finite resources, that it is receiving no benefit from the Proposed Development, and its statutory function as a navigational authority warrants protection from any such financial costs. I asked the Applicant to justify the paragraph in my FWQ [PD-011].

8.5.27 The Applicant responded [REP5-005] that it was raising the cap figure to £5,000,000 and that there would be no risk or liability on CRT. It further stated that an uncapped liability would raise financial risk of the project and may have detrimental economic impacts on the Proposed Development as it would be unable to control the costs of indirect losses. The Applicant also stated that it had received an alternative wording for CRT's Protected Provisions which it will consider.

8.5.28 At DL 6, the updated draft DCO [REP6-003] made some revisions to paragraphs 18(5) and 18(7), but retained Paragraphs 32(6) in respect to the indemnity cap.

8.5.29 CRT's second objection is in relation to paragraph 32(2)(b) of the draft DCO [REP3-003], which excludes the Applicant from liability for any consequential losses experienced by CRT as a result of the Proposed Development. In its response at DL 6, CRT further explained [REP6-008] that it would only accept consequential losses which are reasonably foreseeable.

8.5.30 Having considered the matter further, I reached a preliminary conclusion that both paragraphs 32(2)(b) and 32(6) of the updated DCO [REP6-003] placed an unreasonable and unjustified burden on CRT, who face a risk of meeting potential costs and losses through no fault of its own. In my draft DCO [PD-013] I recommended paragraph 32(2)(b) be amended in line with the CRT's draft wording set out in its response to DL 6 [REP6-008] to allow it to claim for consequential losses if reasonably foreseeable, and the liability cap set out in paragraph 32(6) be deleted. This was not accepted by the Applicant in its response [REP8-005], for reasons previously given in its response to my FWQs [PD-011] at DL 5 [REP5-005].

8.5.31 I have considered the Applicant's response carefully. However, I do not find that the Applicant has reasonably justified why CRT should be financially burdened with an indemnity cap if damages caused by the Applicant exceed £5,000,000, which the Applicant states is highly unlikely in any event. I also find that CRT should be within its reasonable rights to claim for foreseeable consequential losses as a result of the construction of the Proposed Development.

8.5.32 I therefore recommend to the SoS that he amend paragraph 32(2)(b) of the final version of the DCO [REP9-003] from:

- *"(b) By reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon the construction of a specified work or protective work; and*

subject to sub-paragraph (4) the undertaker shall effectively indemnify and hold harmless CRT from and against all claims and demands arising out of or in connection with any of the matters referred to in paragraphs (a) and (b) (provided that CRT shall not be entitled to recover any consequential losses from the undertaker)."

To:

- "*(b) By reason of any act or omission of the undertaker or of any person in its employ or of its contractors or others whilst engaged upon the construction of a specified work or protective work; and subject to sub-paragraph (4) the undertaker shall effectively indemnify and hold harmless CRT from and against all claims and demands arising out of or in connection with any of the matters referred to in paragraphs (a) and (b) (provided that CRT shall not be entitled to recover any consequential losses* <u>which are not reasonably foreseeable from the undertaker</u>*).*"

8.5.33 I also recommend that the SoS remove the indemnity cap on CRT by deleting paragraph 32(6) of the final version of the DCO [REP9-003].

8.5.34 CRT in its response to DL 6 [REP6-008] recommended a number of other changes to its Protected Provision Schedule in the draft DCO [REP6-003]. It stated that paragraphs 30(2)(3) and (4) were unnecessary because paragraph 30(1) contained similarly restricted wording in respect to the repayment of CRTs fees. CRT also recommended wording changes to paragraph 30(1).

8.5.35 In my draft DCO [PD-013], I put it to the Applicant that these paragraphs should be removed and amended as recommended by CRT. The Applicant responded [REP8-005] stating that the deletion and amendment of the paragraphs would deny a negotiation process for the Applicant to examine a case to be put by CRT in the event of repayment of fees, and for those costs to be mitigated before they are demanded. CRT's interests, the Applicant says, would be protected. I am satisfied with the response and am content to recommend the paragraphs in the final DCO [REP9-003] remain unchanged.

8.5.36 CRT in its response to DL 6 [REP6-008] also recommended paragraph 17(3) of the draft DCO [REP5-002 but which remained unchanged for within the draft DCO submitted at DL 6 [REP6-003] be amended. However in my draft DCO [PD-013], I considered that the revised wording would allow CRT's Code of Practice to override the DCO which would be a statutory instrument, and not provide the SoS with any certainty as to what the DCO would be permitting. I do not recommend therefore this change is made. CRT's other suggested amendments to the Schedule were accepted by the Applicant [REP8-005] and included for the final draft DCO [REP9-003].