

Insights

STAYING ALIVE: EXTENDING THE LIFE OF A DCO

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SUMMARY

The regime for Nationally Significant Infrastructure Projects (NSIPs) allows for Development Consent Orders (DCOs) to be granted for a set period of time (often 5 years), but only recently has it become clear that time limits can be extended to keep DCOs alive.

The Department for Business, Energy and Industrial Strategy (BEIS) recently (16 September 2021) [granted](#) a non-material change to extend the timescale for implementation of a DCO for a period of 5 years for a proposed gas-fired power station. This is the first time such a significant extension has been granted and in this blog we explore how it was pursued.

The applicant, C.GEN, secured a DCO in 2014 for a gas-fired power station in North Killingholme, which had an original lifespan of 7 years. Due to a variety of commercial factors in the intervening years, implementation of the consent was ultimately not possible within the original 7 year time frame. However, there was a keenness to preserve the consent and deliver the project given the role of gas-fired power stations in the future national energy generation mix (as recognised in the [2020 Energy White Paper](#)), to complement the move to renewables and support the targets for net zero and 40GW offshore wind capacity by 2030.

As a result, an application for a non-material change was submitted to BEIS in August 2020 to extend the time for implementation of this DCO, with BCLP advising C.Gen since 2018.

PROCESS

There are two types of change that may be made to a DCO - these are non-material or material. Separate procedures are prescribed in legislation^[1] and in non-statutory [Government Guidance](#) for handling each type of application.

The C.GEN application was for a non-material change and required consideration of the interplay between the proposed changes and the Environmental Statement, the Habitats Regulations Assessments, compulsory acquisition powers, and the effects on businesses and residents. The

Guidance also sets out the various steps which need to be taken and procedure to be followed and is a useful starting point for applicants considering post-grant changes.

The alternative mechanism, where material changes are sought, involves a more costly and detailed process (potentially including an 'examination' – akin to a public inquiry). There is no legal definition of a material and non-material change so careful consideration is necessary as to which approach is appropriate in each case, and an awareness of the risk and cost profiles which vary depending on which route is pursued.

In both cases an application must be prepared setting out the changes, and even the non-material process can require an environmental report, as well as high quality consultation and comprehensive engagement. In either case, the application must be supported by a draft Statutory Instrument, compliant with the salient rules and regulations, as it is creating 'new law'.

CARBON CAPTURE READINESS

In light of the time since the original DCO grant in this case, the applicant wanted to ensure that the scheme complies with the latest position on carbon capture, and this was reflected in the application. The decision by BEIS to extend the DCO also included provisions to incorporate current carbon capture technologies that enable either the pre-combustion removal of carbon dioxide (IGCC mode), or post-combustion capture (CCGT mode) within the project

TIMESCALE

Applications to change DCOs can take some time – both to corral the necessary information for the application, carry out engagement, and also to allow time for the decision-making process (where, in the case of non-material change applications, there is no statutory timescale). In this case the application was made in August 2020 and a decision was made in September 2021.

COMMENT

The only other DCO extension we are aware of was for a 12 month extension and was granted in July 2020, during the height of the Covid-19 pandemic and associated lockdowns. That application was made at a time when planning rules were temporarily relaxed to allow extensions to conventional TCPA consents (which are usually prohibited) but DCO projects had to follow the pre-existing route pursuant to Schedule 6 of the 2008 Planning Act, and seek a non-material or material change in order to secure a similar extension. That application for a 12-month extension was based firmly and solely on the extraordinary circumstances produced by the pandemic in 2020, and hence was for a relatively short period.

The C.GEN North Killingholme project DCO extension is the first time that an extension has been sought for a substantial period of time – in this case 5 years – which is of course reflective of the standard timescale for an entirely new DCO.

If you are facing issues similar to those raised in this blog, please contact James Parker, one of the DCO leads in the market-leading tier 1 team at law firm BCLP.

[1] Planning Act 2008, Schedule 6 and the Infrastructure Planning (Changes to, and Revocation of, Development Consent Orders) Regulations 2011

RELATED CAPABILITIES

- Planning & Zoning
- Energy Transition
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- Infrastructure

MEET THE TEAM



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