

Insights

LIVING IN A NON-MATERIAL WORLD: CHANGES TO DCOS

Mar 20, 2019 – Mar 20, 2019

SUMMARY

Since the launch of the DCO regime for major UK infrastructure projects, there have been numerous non-material change applications. The non-material change process has therefore become a well-trodden path. As yet, there has not been a single material change application, leaving that process as somewhat uncharted territory. However, a material change application may soon be submitted in respect of the proposed new nuclear power station at Hinkley Point C. Will this herald a new age of material changes and greater DCO flexibility?

INTRODUCTION TO CHANGING A DEVELOPMENT CONSENT ORDER

In this blog, we analyse substantive changes to development consent orders (DCOs) for nationally significant infrastructure projects (NSIPs), which can be sought by way of an “amendment order” – either:

- a “non-material amendment order”; or
- a “material amendment order”.

(For the purposes of this article, we will leave to one side the minor/correctional changes to DCOs which can be sought by way of a “correction order”.)

A legal mechanism which allows tolerances for delivery, is extremely important given that large-scale infrastructure projects frequently need to be changed in some way(s) between the planning stage and the end of construction. Although, in many instances, the DCO itself will build in flexibility to accommodate the changes between the planning stage and the end of construction, this is not always the case (please see our previous blog “[Varying development consent orders – a hurdle still better avoided than jumped?](#)”), or alternatively the changes later required may never have been envisaged at the original consenting stage. So, in these circumstances, an application will need to be made for an amendment to the DCO.

There are a number of procedural complexities to making an application for an amendment order (including publicity and consultation) and the procedure is significantly different depending on whether an application is for a non-material amendment order or a material amendment order.

Before moving forward with the procedural requirements for an application, potential applicants should carefully review whether the change being considered is non-material or material. Potential applicants should take legal advice on this point and should discuss the matter with the Planning Inspectorate.

Non-material or Material Change?

Nationally significant infrastructure projects come in a plethora of different forms – generating stations, harbours, electricity transmission lines, airports, roads, railways and many more. A vast array of different types of changes to these projects is imaginable. So, whether a change, in each case, is non-material or material, is a highly fact-specific matter requiring judgment and detailed analysis.

Non-statutory guidance indicates that there are some key characteristics which suggest that a change is more likely to be material:

- Where the change would require an updated Environmental Statement
- Where the change would require a Habitats Regulations Assessment
- Where the change would require a new or additional licence in respect of European Protected Species
- Where the change would authorise the compulsory acquisition of any land, or an interest in or rights over land, that was not authorised through the existing DCO

Although these characteristics are useful example indicators of materiality, it is important to highlight that the materiality of a change must be assessed on a case-by-case basis taking into account the unique facts of each infrastructure project.

Examples of non-material Changes

Since the launch of the DCO/nationally significant infrastructure projects regime, there has not been a single material change application. There have, however, been a relatively significant number of non-material change applications for various different types of changes:

- Increasing electricity output limits
- Amending listed plans
- Amending the description of the authorised development

- Amending the type and quantities of power cables and convertor stations
- Expanding the quantities of waste permitted to be imported to a treatment facility

THE FIRST MATERIAL CHANGE APPLICATION?

However, there may soon be an application for a material change to the Hinkley Point C (Nuclear Generating Station) DCO. The proposed change would be to remove the requirement to install an Acoustic Fish Deterrent System (associated with cooling water intake heads).

The Planning Inspectorate has indicated that this proposed change to the DCO would require a Habitats Regulations Assessment. As per the non-statutory guidance referred to above, this is likely to be one of the primary reasons that this particular change is being treated as material.

As it stands, there is very limited publicly available information regarding this potential application for a material change. The infrastructure planning industry will be watching the progression of this matter with great interest to assess how quickly the application moves forward and what, in practice, is required of the applicant at each procedural stage.

Material change applications are currently regarded as uncharted territory – so, if this application contributes to clarifying any of the uncertainties associated with material changes, then this will of course be a welcome development for UK infrastructure planning. One of the key uncertainties surrounds the question of examinations in respect of material change applications – in particular, whether an examination will need to be held in Hinkley Point’s case and, if so, what precisely this examination will entail. Given the costs and administrative burden in respect of examinations, infrastructure developers will be especially interested in monitoring the Hinkley Point application from an examination perspective.

If the application progresses efficiently, then more material change applications may come forward – using the Hinkley Point application as a model. This would be encouraging for infrastructure developers as it would pave the way for less uncertainty about the procedure, and arguably therefore greater flexibility in relation to DCO processes – thereby allowing crucial UK infrastructure projects to be changed in ways that, among other things, increase their deliverability, value and contribution to the UK economy.

In these ‘interesting times’, surely that can only be a good thing.

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