



Department  
of Energy &  
Climate Change

3 Whitehall Place  
London  
SW1A 2AW

Telephone : +44 (0) 300 068 5770  
e-mail: [giles.scott@decc.gsi.gov.uk](mailto:giles.scott@decc.gsi.gov.uk)  
Web: [www.decc.gov.uk](http://www.decc.gov.uk)

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To all Interested Parties

Your Ref:

Our Ref: EN010053

Date: 12 July 2016

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Dear Sir/Madam

**Planning Act 2008 and the Infrastructure Planning (Examination Procedure) Rules 2010**

**Application by SMart Wind Limited for an Order Granting Development Consent for the Hornsea Offshore Wind Farm (Zone 4) – Project Two**

**REQUEST FOR COMMENTS ON THE APPLICATION FOR THE PROPOSED HORNSEA PROJECT TWO OFFSHORE WIND FARM- EN010053**

Following the completion of the examination on 16 December 2015, the Examining Authority submitted a Report and Recommendation in respect of its findings and conclusions on the above application to the Secretary of State for Energy and Climate Change on 16 March 2016. In accordance with section 107 of the Planning Act 2008, the Secretary of State has until 16 August 2016 to determine the application.

There are outstanding issues on which the Secretary of State would be grateful if parties identified in bold could provide an update or further clarification. The issues are grouped by topic heading.

**1. Compulsory acquisition**

There are several issues in respect of the compulsory acquisition rights sought by the applicant in respect of Crown land on which the Secretary of State would be grateful if parties identified in bold could provide an update or further clarification. The issues are grouped by topic heading:

**Section 135(1) of the Planning Act 2008 and article 39 of the draft DCO**

Section 135(1) of the Planning Act 2008 provides that an order granting development consent "may include provision authorising the compulsory acquisition of an interest in Crown land only if (a) it is an interest which is for the time being held otherwise than by or on behalf of the Crown; and (b) the appropriate Crown authority consents

to the acquisition”.

The Secretary of State takes the view that section 135(1) prevents the Secretary of State making a development consent order which includes provision authorising the compulsory acquisition of a known interest in Crown land, being an interest held otherwise than by or on behalf of the Crown, unless the “appropriate Crown authority” has consented to the acquisition. Whilst previous practice may have varied, the Secretary of State now considers that DCLG guidance on the operation of section 135 sets out the correct approach. The guidance is available at:

- <https://www.gov.uk/government/publications/planning-act-2008-procedures-for-the-compulsory-acquisition-of-land>,

The Secretary of State does not consider that a provision, such as paragraph (1)(b) of article 39 of the applicant’s draft DCO (the “draft DCO”), which enables the “appropriate Crown authority” to give consent after the making of a development consent order, is consistent with the requirements of section 135(1)<sup>1</sup>. The draft DCO is available at:

- <https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/projects/EN010053/EN010053-001252-Dong%20-%20H2%20-%20D7%20-%20appendix%20F%20-%20Schedule%20of%20Changes%20to%20V8%20of%20dDCO.pdf>,

The Secretary of State therefore proposes to remove paragraph (1)(b) from article 39 and add the following additional paragraph to make the position clear:

“(2) Paragraph (1) does not apply to the exercise of any right under this Order compulsorily to acquire an interest in any land that is Crown land (as defined in the 2008 Act) which is for the time being held otherwise than by or on behalf of the Crown”.

The Secretary of State requests the observations of the **applicant** and the **Crown Estate**, the **Defence Infrastructure Organisation** and **Highways England** (being “appropriate Crown authorities” for the purpose of section 135(1)) on the above.

### **The Crown Estate - plots 1-15, 17, 19, 20, 22-29 and 32**

Article 19 of (and Schedule E to) the draft DCO provides for the creation and compulsory acquisition of new rights in plots 1-15, 17, 19, 20, 22-29 and 32, in respect of which the Crown Estate is the “appropriate Crown authority” for the purpose of section 135(1). (The Secretary of State’s letter of 7 April 2016 asked about these plots, and the Secretary of State notes the information provided by the applicant in its response of 21 April 2016.)

It appears from the Crown Estate’s letter of 20 October 2015, that consent to include interests in those plots in Schedule E is conditional on the inclusion of article 39(1)(b) in any development consent order made. The Secretary of State would be grateful to learn if the **applicant** is now able to provide unconditional consent from the Crown Estate to the compulsory acquisition of the interests in plots 1-15, 17, 19, 20, 22-29

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<sup>1</sup> Article 39(1)(b) of the draft DCO provides that “nothing in this Order authorises the undertaker or any licensee...to exercise any right under this Order compulsorily to acquire an interest in any land which is Crown land (as defined in the 2008 Act) which is for the time being held otherwise than by or on behalf of the Crown without the consent in writing of the appropriate Crown authority (as defined in the 2008 Act)”.

and 32 for the purpose of section 135(1), as she considers that she cannot include them in Schedule E to the draft DCO unless unconditional consent is provided. The Crown Estate's letter is available at:

- <https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/projects/EN010053/EN010053-001117-The%20Crown%20Estate.pdf>

### **Defence Infrastructure Organisation - plots 35, 37, 38 and 39**

Article 19 of (and Schedule E to) the draft DCO provides for the creation and compulsory acquisition of new rights in plots 35, 37, 38 and 39, in respect of which the Secretary of State for Defence is the "appropriate Crown authority" for the purposes of section 135(1). By letter dated 6 August 2015 (Appendix B to the Response submitted for Deadline II Application Reference: EN010053) the Defence Infrastructure Organisation ("DIO") confirmed that consent is provided for the "compulsory acquisition of interests other than those held by or on behalf of the Crown in the land referred to above".

(The Secretary of State notes that the "land referred to above" in the letter is "plots 34 to 44". However, only plots 35, 37, 38 and 39 are included in Schedule E to the draft DCO. Plots 34, 36, 40, 41, 42 and 43 are included in Schedule G and are to be subject to temporary use in accordance with article 26. By virtue of article 26(10) of the draft DCO powers of compulsory acquisition may not be exercised in respect of these plots.)

Because the letter refers also to article 39 of the draft DCO, it is not clear to the Secretary of State whether the consent given to compulsory acquisition by DIO is unconditional or conditional (i.e., dependent on the inclusion of article 39(1)(b) in the draft DCO). The Secretary of State requests confirmation from the **applicant** and the **DIO** of the position, as she considers that she cannot include the interests in plots 35, 37, 38 and 39 in Schedule E to the draft DCO unless unconditional consent is provided.

### **Highways England - plot 168**

Article 19 of the draft DCO provides for the creation and compulsory acquisition of new rights in plot 168 in respect of which the Secretary of State for Transport is the "appropriate Crown authority" for the purposes of section 135(1). By letter dated 19 August 2015 (Appendix J to the Response submitted for Deadline IIA Application Reference: EN010053) Highways England confirmed that consent is provided to the "compulsory acquisition of interests other than those held by or on behalf of the Crown" in plot 168.

Because the letter refers also to article 39 of the draft DCO, it is not clear to the Secretary of State whether the consent given to compulsory acquisition by DIO is unconditional or conditional (i.e., dependent on the inclusion of article 39(1)(b) in the draft DCO). The Secretary of State requests confirmation from the **applicant** and **Highways England** of the position, as she considers that she cannot include the interest in plot 168 in Schedule E to the draft DCO unless unconditional consent is provided.

### **Article 18 of the draft DCO**

Where a plot of land is included in Schedule E to the draft DCO, the effect of article 19(3) is that compulsory acquisition rights are limited to the creation and acquisition of new rights. Accordingly, if the Secretary of State does not include a plot in Schedule E, it will be necessary to amend article 18 of the draft DCO so that any plot not included in Schedule E does not become subject to the general powers of compulsory acquisition in article 18.

The Secretary of State proposes to add the following paragraph to article 18 to make the position clear:

“(5) Despite paragraphs (1) and (2), no powers of compulsory acquisition under this article may be exercised in respect of plots [numbers of plots removed from Schedule E].”

The Secretary of State requests the observations of the **applicant** and the **Crown Estate**, the **Defence Infrastructure Organisation** and **Highways England** on the above.

## **2. Harbour Porpoises**

Since the close of the examination of Hornsea Project Two Offshore Wind Farm, Government launched a consultation into a possible Special Area of Conservation (“pSAC”) for Harbour Porpoise: the Southern North Sea pSAC:

- <http://jncc.defra.gov.uk/SACconsultation>

On 29 March 2016, the Secretary of State invited comments from Natural England (“NE”) and the Joint Nature Conservation Committee (“the JNCC”) on the latest conservation advice for the Southern North Sea pSAC. The response from NE and JNCC, can be viewed at:

- <http://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/hornsea-offshore-wind-farm-zone-4-project-two/?ipcsection=docs&stage=5&filter=DECC+Consultation>

In light of the response, the Secretary of State invited the Applicant to provide any additional information for the purposes of a Habitats Regulations Assessment of the likely significant effects of the Project, both alone and in-combination with other plans and projects, on the Harbour Porpoise feature of this site. The Applicant’s response of 21 April 2016 can be viewed at:

- <http://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010053/2.%20Post-Submission/DECC%20Consultation/Dong%20-%20Hornsea%20Project%202%20-%204.pdf>

Following the Applicant’s response, the Secretary of State invited comments from NE, the JNCC and any other Interested Party on the Applicant’s response of 21 April 2016. The responses can be viewed at:

- <http://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/hornsea-offshore-wind-farm-zone-4-project-two/?ipcsection=docs>

In light of the responses from NE, the JNCC and other Interested Parties the Applicant provided a further response on the 24 May 2016. This response can be viewed at:

- <http://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010053/2.%20Post-Submission/DECC%20Consultation/Response%20to%20the%20Department%20of%20Energy%20and%20Climate%20Change.pdf>

In light of the information received from the Applicant on the 24 May 2016, the Secretary of State invited comments from NE, the JNCC and any other Interested Party. The responses can be viewed at:

- <https://infrastructure.planninginspectorate.gov.uk/projects/yorkshire-and-the-humber/hornsea-offshore-wind-farm-zone-4-project-two/?ipcsection=docs>

In the responses above the Applicant and NE have both provided suggested conditions such that should mitigation be required it is secured to ensure no adverse effect on integrity of the Southern North Sea pSAC. Should the Secretary of State decide to make an order granting development consent, she is minded to add the following additional provisions to condition 8 (pre-construction plans and documentation) of each proposed deemed marine licence:

(6) In the event that driven or part-driven pile foundations are proposed to be used, the MMO must not approve the plan referred to in sub-paragraph (1) or the Code referred to in sub-paragraph (2) unless the MMO is satisfied that either the plan or Code (or both of them) provide such mitigation as is necessary to avoid adversely affecting the integrity (within the meaning of the 2007 Regulations) of a relevant site, to the extent that marine mammals are a protected feature of that site.

(7) The mitigation referred to in sub-paragraph (6) may include (without limitation)-

- seasonal restrictions to piling;
- scheduling of piling, having regard to previous, ongoing and future piling associated with other offshore developments, based on an updated assessment of cumulative impacts;
- changing the location of wind turbine generators;
- the use of alternative foundation methodologies, such as jacket foundations (suction piles) or gravity base foundations;
- the use of noise reduction at source technologies;
- the use of other relevant technologies or methodologies that may emerge in the future.

(8) In sub-paragraph (6), "relevant site" means-

- a European offshore marine site;
- a European site;

(9) For the purpose of sub-paragraph (6)-

- the Southern North Sea possible special area of conservation must be treated as a European offshore marine site until-
  - that area (or any part of it) becomes a European offshore marine site or a European site; or
  - it is decided that no part of that area should be a European offshore marine site or a European site; and
- harbour porpoise must be treated as a protected feature of the Southern North sea possible special area of conservation.

(10) In this condition-

- "2007 Regulations" means the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007;
- "European offshore marine site" has the meaning given in regulation 15 of the 2007 Regulations;
- "European site" has the meaning given in regulation 24 of the 2007 Regulations;
- "Southern North Sea possible special area of conservation" means the Southern North Sea possible special area of conservation as set out in the JNCC 2016 Harbour Porpoise Possible Special Area of Conservation Consultation dated January 2016.

The Secretary of State is also minded to add the following underlined words to subparagraph (2)(e) of condition 8 of each proposed deemed marine licence, which reflects provision made in other development consent orders, such as the Dogger Bank Teesside A and B Offshore Wind Farm Order 2015:

(e) in the event that driven or part-driven pile foundations are proposed to be used, a marine mammal mitigation protocol, the intention of which is to prevent injury or disturbance to marine mammals, following current best practice as advised by the statutory nature conservation agencies, which may include, but is not limited to...

The Secretary of State requests the observations of the **Applicant, NE, the JNCC, the Marine Management Organisation** and **any other interested party** on the above requirement.

### **3. Fulmar Displacement Mortality**

The Secretary of State wrote to Interested Parties on 26<sup>th</sup> May 2016 regarding the Applicant and NE's assessment of displacement of fulmar at the Flamborough and Filey Coast pSPA, the Forth Islands SPA and the Fowlsheugh SPA:

- [https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010053/EN010053-001315-DECC%20consultation%20letter%20Hornsea%20Offshore%20Windfarm%20\(Zone%204\)%20-Project.pdf](https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010053/EN010053-001315-DECC%20consultation%20letter%20Hornsea%20Offshore%20Windfarm%20(Zone%204)%20-Project.pdf)

In this the Secretary of State sought clarification on figures from the Applicant's Habitats Regulations Assessment Report and requested the Applicant revisit a number of specified areas of the report in order to provide the necessary clarity required for her to fully assess the implications of the Project. The Secretary of State also requested that NE provide clarity on its conclusions, as referenced in the Applicant's HRA report.

The Applicant provided a response on 27 June 2016:

- <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010053/EN010053-002009-Hornsea%20Project%202-%20Response%20to%20Topic%202%20-%20Fulmar%20Displacement%20Mortality.pdf>

NE provided a response on 27 June 2016:

- <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010053/EN010053-002001-186857%20-%20NE%20Response%20to%20Fulmar%20displacement.pdf>

RSPB provided a response on 27 June 2016:

- <https://infrastructure.planninginspectorate.gov.uk/wp-content/ipc/uploads/projects/EN010053/EN010053-002000-RSPB%20Response%20to%20Request%20for%20Comments%20on%20the%20Application%20for%20the%20Proposed%20Hornsea%202%20Of%20shore%20Wind%20Farm.pdf>

The Secretary of State requests **any observations** on the Applicant's submission of 27 June 2016, in particular on the adequacy of the revised figures:

- from **NE** with regard to the Flamborough and Filey Coast pSPA; and
- from **Scottish Natural Heritage** with regards to the Forth Islands SPA and the Fowlsheugh SPA.
- **Other interested parties** where they may wish to comment.

**The deadline for a response is 19 July 2016.**

The response should be submitted by email to [Hornsea2@pins.gsi.gov.uk](mailto:Hornsea2@pins.gsi.gov.uk) Please send any hard copy response to Hornsea Two Offshore Wind Farm Project Team, Secretary of State for Energy and Climate Change, c/o the Planning Inspectorate, 3B Eagle, Temple Quay House, Temple Quay, Bristol, BS1 6PN. If you will have difficulty in submitting a response by the consultation deadline, please inform the Project Team.

Your response will be published on the Hornsea Two Offshore Wind Farm project page of the Planning Inspectorate website as soon as possible after 19 July 2016.

This letter is without prejudice to the Secretary of State's decision whether or not to grant development consent for the Hornsea Two Offshore Wind Farm project, and nothing in this letter is to be taken to imply what that decision might be.

Yours faithfully

***Giles Scott***

Giles Scott  
Head of Energy Infrastructure Planning and Coal Liabilities