

Hornsea Two Offshore Wind Farm Project Team
Secretary of State for Business, Energy &
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c/o The Planning Inspectorate
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AND BY EMAIL: Hornsea2@pins.gsi.gov.uk

Dear Sir

**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**

I refer to Giles Scott's letter of 12 July in which he invited observations from the Crown Estate Commissioners on the proposed removal of article 39(1)(b) from the draft development consent order (the draft DCO) and the inclusion of a new article 39(2).

Background

As you know, the effect of article 39(1)(b) in the draft DCO is to authorise the compulsory acquisition of inter alia third party interests in land forming part of the Crown Estate subject to a requirement to obtain the consent of the Crown Estate Commissioners before the acquisition of those interests.

We understand that the reason for the proposed removal of article 39(1)(b) is the Secretary of State's view that under section 135(1) Planning Act 2008 any provision authorising the acquisition of third party interests in Crown land can only be included in a DCO if the unconditional consent of the appropriate Crown body to the acquisition is obtained before the DCO is made.

In your letter you also indicate that the Secretary of State proposes to add a new article 39(2); the effect of this would be to make clear that the powers of compulsory acquisition under the DCO extend to third party interests in Crown land.

Summary of The Crown Estate Commissioners' position

The Crown Estate Commissioners are strongly of the view that:

- giving unconditional consent to the acquisition of third party interests in Crown land before a DCO is made - which could potentially be years before those third party interests are acquired - would be inconsistent with and contrary to the duties of the Crown Estate Commissioners under the Crown Estate Act 1961;
- article 39(1)(b) of the draft DCO is consistent with section 135 Planning Act 2008 and should be reinstated; and
- article 39(2) would not be compatible with the duties of the Crown Estate Commissioners under the 1961 Act.

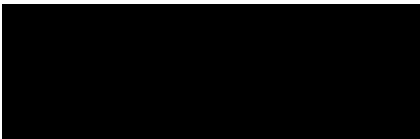
Explanation of The Crown Estate Commissioners' position

- 1 Under section 1(3) of the Crown Estate Act 1961 it is the general duty of the Crown Estate Commissioners to maintain and enhance the value of the estate and the return obtained from it with due regard to the requirements of good management.
- 2 Under section 3(1) of the 1961 Act the Commissioners are obliged to achieve best consideration when selling leasing or otherwise disposing of any land or rights.
- 3 Such duties cannot be discharged if the Commissioners consent to the acquisition of third party interests in Crown land before the DCO is made because the interests may not be acquired for several years. At that point in time, different circumstances may apply and have a bearing on how the Commissioners would have discharged their statutory duties in relation to the relevant land.
- 4 Article 39(1)(b) is a practical way of ensuring the Commissioners are able to comply with their duties. It provides the applicant with certainty of having powers of compulsory purchase over third party interests in Crown land but also gives the Commissioners a right of approval to the subsequent exercise of the compulsory purchase powers - thereby allowing the Commissioners to discharge their statutory duties under the 1961 Act at the appropriate time.
- 5 We are also of the strong view that article 39(1)(b) is consistent with section 135 Planning Act 2008. Section 135(1) permits the inclusion in a DCO of a provision which authorises the acquisition of an interest in Crown land only if the interest is held by a third party and the appropriate Crown body consents to the acquisition. Section 135(2) also envisages the inclusion of any other provision relating to Crown land but again only if the relevant Crown body agrees. This reflects the constitutional principle that interests in Crown land cannot be compulsorily acquired and the presumption that the Crown will not be bound by legislation.
- 6 It is clear that a provision authorising the acquisition of a third party interest in land forming part of the Crown Estate can only be included in a DCO if the Commissioners consent to such acquisition. However, there is nothing in Section 135 which:
 - (a) provides when the Commissioners must give their consent;
 - (b) restricts the form in which the Commissioners' consent may be given; or
 - (c) prevents conditions or qualifications being attached to any consent.

To read in limitations of such nature into Section 135 would be contrary to the presumption that the Crown is not bound by legislation. To be effective, such limitations would have to be expressed clearly in the Planning Act and applied specifically to Crown bodies – they are not.

- 7 Article 39(1)(b) is, therefore, within the scope of section 135(1) because it provides for the acquisition of third party interests in Crown land and that acquisition has the qualified or conditional consent of the appropriate Crown body.
- 8 In the alternative, we consider that the requirement in article 39(1)(b) for further approval from the appropriate Crown body is permissible under section 135(2) in that it falls into the category of “any other provision” relating to Crown land.
- 9 It follows that article 39(1)(b) is permitted by section 135 Planning Act 2008 and may be included in the final DCO. Indeed, this would be entirely consistent with the approach on at least 10 previous DCOs where the same article has been included based on the same reasoning.
- 10 If article 39(1)(b) is not included, the Crown Estate Commissioners will be unable to agree to the inclusion of any provision in the DCO authorising the acquisition of third party interests in land forming part of the Crown Estate as this would fetter the exercise of their discretion in the discharge of their statutory duties under the 1961 Act. Consequently, if the new article 39(2) is included in the DCO it must not apply to interests in land forming part of the Crown Estate.

Yours sincerely



Rob Booth
General Counsel & Company Secretary
For and on behalf of the Crown Estate Commissioners

cc: Giles Scott, Head of Energy Infrastructure Planning and Coal Liabilities, Department for Business, Energy & Industrial Strategy - by email