

Hornsea Offshore Wind Farm

Project Two

The Applicant's response to Request for Comments from the Secretary of State for Energy and Climate Change

Application Reference: EN010053

19 July 2016

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In response to the letter of 12 July 2016 (the “Letter”) from the Department for Energy and Climate Change on behalf of the Secretary of State for Energy and Climate Change (the “Secretary of State”) in relation to the Hornsea Offshore Wind Farm Project Two application (Application Reference: EN010053) (“the Project”), Smart Wind Limited (“SMart Wind”), as agent on behalf of the joint applicants Optimus Wind Limited and Breesea Limited (together “the Applicant”), has prepared the following response (the “Response”).

The Letter set out three separate topic headings on which the Secretary of State invited comments. The Applicant has responded to each of these topic headings in the same order set out in the Letter for ease of reference.

1. Compulsory Acquisition

- 1.1 The Secretary of State made a number of comments in the Letter in respect of the compulsory acquisition rights sought by the Applicant in relation to Crown land (as defined in the Planning Act 2008 (the “2008 Act”).
- 1.2 As noted in various submissions on this matter to date, the Applicant does not propose or intend to (and indeed cannot) exercise the compulsory acquisition rights against the freehold interest in the Crown land. Instead, such powers are only sought in so far as the undertaker is seeking to acquire, override or extinguish a right or interest in the Crown land, the benefit of which is vested in a person other than the Crown. This is consistent with the approach permitted by Section 135 of the 2008 Act and is reflected in Article 39 of Version 8 of the draft DCO (see Appendix A of the Applicant’s response to Deadline VII).
- 1.3 The Applicant notes that notwithstanding the agreement from the relevant Crown authorities as to the wording of Article 39, the Secretary of State is proposing to delete Article 39(1)(b) and replace with a new paragraph:
“(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.”
- 1.4 This revision is proposed on the basis that the Secretary of State does not consider that a provision, such as in Article 39(1)(b) of Version 8 of 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) of the 2008 Act.
- 1.5 The Applicant does not agree with the Secretary of State’s interpretation. Section 135(1) of the 2008 Act states that:
“(1) 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.”*
- 1.6 As noted above, the Applicant is only seeking compulsory acquisition powers in respect of an interest in Crown land which is for the time being held otherwise than by or on behalf of the Crown. Accordingly, the condition imposed by Section 135(1)(a) has been satisfied.
- 1.7 In relation to Section 135(1)(b), it is submitted that this provision does not stipulate that the appropriate Crown authority must consent to the exercise of the compulsory acquisition powers prior to the DCO being granted. Instead, this provision simply states that a DCO may only include a provision authorising the compulsory acquisition of an interest in Crown land if the appropriate Crown authority consents to the acquisition.
- 1.8 It is submitted that Section 135(1) requires that consent be given to the compulsory acquisition of the relevant interests and that this consent can follow after the grant of the DCO. Indeed it is submitted that providing a mechanism within a DCO for this consent better gives effect to the purpose of Section 135(1) - to ensure Crown land is not taken without the appropriate

Crown authority's consent is better effected by consideration of the particular acquisition at the time it is actually to take place, rather than at the time of the making of the DCO.

- 1.9 It is submitted that Article 39(1)(b) of Version 8 of the draft DCO proposes an appropriate mechanism for this purpose (and one which is consistent with Section 135(1)). The effect of this proposed Article is that were the relevant compulsory acquisition powers contained in the draft DCO sought to be exercised by the undertaker, the prior consent of the appropriate Crown authority will first be required.
- 1.10 The wording provided by Article 39 of Version 8 of the draft DCO has been approved by each of the relevant Crown authorities and is consistent with the approach taken, and drafting contained, in numerous development consent order applications to date, including those recently consented by the Secretary of State (e.g. the Thorpe Marsh Gas Pipeline and Dogger Bank Teesside A and B Offshore Wind Farm).
- 1.11 On this basis, the Applicant does not consider it appropriate to make the revisions proposed by the Secretary of State in the Letter to Articles 18 and 39 of the draft DCO.
- 1.12 Considering now the relevant Crown authorities, whilst The Crown Estate has consented to the content of Version 8 of the draft DCO they wish to retain the right to provide their consent to the exercise of any compulsory acquisition powers until a later date. As set out above this option is provided by the current drafting in Article 39 of Version 8 of the draft DCO. In the Applicant's submission, it is also consistent with the purpose of Section 135(1), namely to give the appropriate Crown authority the opportunity to consent to any compulsory acquisition of an interest in Crown land (the relevant time for identifying the Crown land (and the relevant interests) being at the time of the proposed exercise of the compulsory acquisition powers). The alternative interpretation would mean that the protections afforded by Section 135(1) are much more limited than, the Applicant submits, was the intention behind this statutory provision.
- 1.13 The Applicant notes the Secretary of State has queried whether the Defence Infrastructure Organisation ("DIO") and Highways England Historical Railways Estate ("HRE") (as the other appropriate Crown authorities) had provided their consent pursuant to Section 135 of the 2008 Act conditional on the existing wording of Article 39 of the draft DCO. To remove any ambiguity in view of the Secretary of State's proposed revision to Article 39, the Applicant sought to procure a further letter of consent from these bodies. The further letter of consent from HRE is included as Appendix A of the Response. The Applicant understands the DIO's further letter of consent has been provided directly to the Secretary of State in response to the Letter. Accordingly, on this basis, were the Secretary of State to consider it still necessary to make the proposed revision to Article 18 of the draft DCO in the manner set out in the Letter, the Applicant submits that the plots specific to the DIO and HRE should not be included in this proposed revision in any event.

2. Harbour Porpoise

- 2.1 The Applicant notes the Secretary of State has proposed additional provisions to Condition 8 of the draft DMLs to seek to ensure the Project will have no adverse effect on integrity (either alone, or in-combination with other plans or projects) of the Southern North Sea pSAC (the "SNS pSAC").
- 2.2 Whilst the Applicant maintains it is not necessary to list examples of the potential mitigation that could be employed on the face of the Condition (as contained in the Secretary of State's proposed provisions) and that appropriate mitigation should instead be discussed and agreed at the time of signing off the Code of Construction Practice (as proposed under Condition 8(2) of version 8 of the draft DMLs) in view of the known circumstances at that

point in time, the Applicant is content with the provisions, subject to the suggested revisions detailed below.

- 2.3 The Applicant notes the Secretary of State's proposed provisions link the mitigation to be secured under these new provisions to the approval of the plan to be approved under sub-paragraph (1) of Condition 8. The Applicant does not consider this link to be appropriate. The plan to be approved under Condition 8(1) is to be approved in consultation with Trinity House and the Maritime and Coastguard Agency and will predominantly be informed by navigational and health and safety considerations. Whilst the Marine Management Organisation ("MMO") will be the ultimate approving body under both of these proposed provisions, they will be obliged to consult with different bodies as part of their approval process and the Applicant considers it to be imperative that a situation does not arise whereby the MMO is faced with competing considerations, particularly in relation to offshore health and safety matters.
- 2.4 The Applicant considers it prudent in the circumstances to keep the sign-off process distinct between the respective provisions to avoid such potential conflict and the suggested amendments to the proposed provision below are designed to reflect this:

"(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)~~ provides 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)-

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

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

- a) a European offshore marine site;*
- b) a European site;*

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

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

(10) In this condition-

- a) "2007 Regulations" means the Offshore Marine Conservation (Natural Habitats, &c.) Regulations 2007;*
- b) "European offshore marine site" has the meaning given in regulation 15 of the 2007 Regulations;*
- c) "European site" has the meaning given in regulation 24 of the 2007 Regulations;*
- d) "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."

- 2.5 It should also be noted that in circumstances where alterations to the approved layout of the wind turbine generators was considered necessary to avoid an adverse effect on integrity of the SNS pSAC, this would remain possible under both the terms of the above amended Condition (as the list is not exhaustive in any case) and pursuant to Condition 10(2) and (3) of the draft DMLs, which permits alterations to the approved layout. Accordingly, no flexibility has been lost as a result of the Applicant's proposed amendment; it simply keeps processes distinct and avoids any scope for unnecessary project delays.
- 2.6 Separate to the proposed additional provisions in relation to the SNS pSAC detailed above, the Applicant further notes the Secretary of State is proposing to revise the wording of paragraph 2(e) of Condition 8 of Version 8 of the draft DMLs to insert the below underlined wording:

"(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..."

- 2.7 Whilst the Applicant does not object in principle to this insertion, the Applicant does not consider it to be appropriate to specify the prevention of disturbance in such an unqualified manner. The Applicant's HRA (and indeed EIA) recognises that a degree of disturbance to marine mammals is likely to occur, irrespective of the final Project design, but that such disturbance would remain within acceptable limits.
- 2.8 Accordingly, as the total avoidance of disturbance is unlikely to be possible, the Applicant has sought to further revise the Secretary of State's suggested drafting to refer to "significant disturbance" and to refer to the definition of 'disturbance' within Regulation 39(1)(b) of the Offshore Marine Conservation (Natural Habitats, & c.) Regulations 2007 (as amended). The Applicant has not repeated the full content of Condition 8(2)(e), but has underlined below the additional wording proposed to that contained in Version 8 of the draft DCO:

"(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 significant disturbance to marine mammals, following..."

...

"disturbance" has the same meaning as in Regulation 39(1)(b) of the Offshore Marine Conservation (Natural Habitats,&c.) Regulations 2007.

3. Fulmar Displacement Mortality

- 3.1 The Applicant would like to provide comment in response to the RSPB's submission to the Secretary of State on 24 June 2016.
- 3.2 The RSPB have noted they would like to see displacement values for the 2015 Flamborough and Filey Coast pSPA fulmar population estimate before being able to accept there are no serious concerns for fulmar. Although the Applicant stated in paragraph 1.3.4 of its submission on 24 June 2016 that a 2015 population count for the Flamborough and Filey Coast pSPA was available, this is not the case and it is the Applicant's understanding that there is currently no 2015 population count available for fulmar from this colony. The Applicant considers that the use of the 2012 count is appropriate for this colony as it is contemporaneous with the period in which baseline surveys were completed.
- 3.3 The Applicant notes that Natural England's submission to the Secretary of State on the 23rd of June states that Natural England considers that potential displacement impacts on fulmar from the Project alone and in-combination with other plans and projects are unlikely to be significant, and would

therefore not adversely affect the integrity of the breeding bird assemblage at FFC pSPA, of which fulmar is a named component.

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Further Letter of Consent from Highways England HRE

Appendix A to the Response submitted for 19 July 2016

Application Reference: EN010053

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14 July 2016

For the attention of Giles Scott

Dear Sirs

**HORNSEA TWO OFFSHORE WIND FARM ORDER ('THE DCO')
REQUEST FOR APPROVAL PURSUANT TO SECTION 135 OF THE PLANNING
ACT 2008 ('2008 ACT')**

Highways England Historical Railways Estate ("HRE"), on behalf of the Secretary of State for Transport, holds certain interests within land included in the proposed DCO, specifically plot 168, as referenced within Part 4 of the Book of Reference.

We refer to our previous letter addressed to SMart Wind Limited dated 19 August 2015 which gives certain approvals under section 135 of the 2008 Act in relation to the land referenced above. HRE notes the Secretary of State's proposed amendment to Article 39 of the proposed DCO as specified in the Secretary of State's letter dated 12 July 2016 and has no objection to make to it.

HRE confirms that, on behalf of the Secretary of State for Transport, its consent is given in accordance with section 135(1) and section 135(2) of the 2008 Act and that for the avoidance of doubt this consent is unconditional.

Yours faithfully

[REDACTED]
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