DOGGER BANK SOUTH OFFSHORE WIND FARM PROJECTS (DBS PROJECTS)
DEADLINE 2 SUBMISSION
DOGGER BANK OFFSHORE WIND FARM PROJECT 1 PROJCO LIMITED, DOGGER BANK OFFSHORE WIND FARM PROJECT 2 PROJCO LIMITED AND DOGGER BANK OFFSHORE WIND FARM PROJECT 3 PROJCO LIMITED

INTRODUCTION

1. Dogger Bank Offshore Wind Farm Project 1 Projco Limited (**DBA Projco**) is a statutory undertaker for the purposes of the Planning Act 2008. DBA Projco has the benefit of development consent for the Dogger Bank A Offshore Wind Farm (**DBA**) which was granted pursuant to The Dogger Bank Creyke Beck Offshore Wind Farm Order 2015 as amended (the **DBA/DBB DCO**).

2. Dogger Bank Offshore Wind Farm Project 2 Projco Limited (**DBB Projco**) is a statutory undertaker for the purposes of the Planning Act 2008. DBB Projco has the benefit of development consent for the Dogger Bank B Offshore Wind Farm (**DBB**) which was granted pursuant to the DBA/DBB DCO.

3. Dogger Bank Offshore Wind Farm Project 3 Projco Limited (**DBC Projco**) is a statutory undertaker for the purposes of the Planning Act 2008. DBC Projco has the benefit of development consent for the Dogger Bank C Offshore Wind Farm (**DBC**) which was granted pursuant to The Dogger Bank Teesside A and B Offshore Wind Farm Order 2015 as amended (the **DBC DCO**).

4. DBA, DBB and DBC are due to commence commercial operation between 2025 and 2027 and so will be operational before construction of the Dogger Bank South (**DBS**) Projects commence.

5. DBA Projco, DBB Projco and DBC Projco (together the **Projcos**) do not object in principle to the DBS Projects but are making this submission in respect of the Applicant's approach to wake loss in respect of DBA, DBB and DBC and the interaction with the DBA and DBB order limits. This submission builds off of the Projcos' relevant representation (RR-007) and Deadline 1 submission (REP1-071) and follows the Projcos' position as stated at Issue Specific Hearing 2 (**ISH2**) held on 16 January 2025.

6. The Applicant's position presented on wake loss at ISH2 was not credible and represented a substantive change in position in respect of wake loss from that presented throughout the pre-application process and the DCO application materials (including the Environmental Statement). This gives rise to concerns around legitimate expectation and procedural fairness. These concerns were set out in the Projcos' Deadline 1 submission, but these concerns have been compounded by the materials submitted by the Applicant at Deadline 1, notably:

   (a) The Applicant's Written Summaries of Oral Submissions made at CAH1, ISH1 and ISH2 (REP1-049);

   (b) The Applicant's Responses to Issue Specific Hearing 2 (ISH2) Supplementary Agenda Questions (REP1-050);

   (c) The Applicant's Responses to January 2025 Hearing Action Points (REP1-051); and

   (d) The updated draft of Chapter 16 of the Environmental Statement (AS-010).

7. Therefore, we have set out a fuller response as part of this response to the Applicant's submissions at Deadline 1 to assist the examination. We reserve our right to respond to any submissions made by the Applicant at Deadline 2.

8. We also note that the Applicant did not engage with this matter effectively at the ISH2. It has now submitted written responses to the agenda items. This is necessitating more time being spent on this matter than should have been necessary on behalf of the Projcos with associated time and costs consequences.

WAKE LOSS

9. The key focus of the Projcos' representations is on the potential effects on Annual Energy Production (**AEP**) and viability of other offshore wind farms (being DBA, DBB and DBC) which are within the vicinity of the DBS Projects. The Projcos' position remains that a specific assessment of the effect on AEP by the DBS Projects is required and that this should be provided to: 1) the Projcos to allow them to understand the impacts on their infrastructure; and 2) the Examining Authority and Secretary of State so that they can adequately discharge their duties under the EIA Regulations and the NPS. This information has been requested by the Projcos but has not been provided by the Applicant.

WAKE LOSS: THE APPLICANT'S POLICY INTERPETATION

10. The Applicant presents its policy analysis as if it is made in relation to a new issue. This has led to the Applicant changing its position at the outset of the examination of the application in spite of there being no material change in circumstances. It is important to contextualise this.

11. This is not a new issue; it has been known to the Applicant throughout the pre-application and pre-examination stage when the Applicant was preparing environmental information, liaising with the Projcos, responding to consultation materials, and preparing its DCO application submission and accompanying documentation on the basis that a wake loss assessment would be undertaken. However, in spite of this, the Applicant waited for the commencement of the examination and ISH2 to adopt its new position on wake loss, albeit that position was not clearly explained at ISH2 given the Applicant's resistance to address this and its stated intention to wait for written questions to address this.

12. Unfortunately, this has created numerous process issues in terms of consultation, environmental assessment and policy which, if not addressed through the examination and in the Secretary of State's decision, will give rise to grounds for legal challenge. These are set out in this response.

13. Having reviewed the extensive material submitted by the Applicant at Deadline 1, it is clear that there is no justification for the Applicant's policy position. The Applicant proceeds on a "hope" that the Secretary of State will not follow the precedent of a previous decision from June 2023. The Applicant adopts this position in spite of:

    (a) the previous Government having adopted new national policy statements including NPS EN-3 in January 2024 which did not address this issue in the manner that the Applicant would hope;

    (b) the current Government having issued a significant document (the Clean Power 2030 Action Plan) in December 2024 which expressly recognises the precedent set in the Awel y Mor DCO and makes no comment on: 1) Awel y Mor being "bad" precedent; or 2) an alternative interpretation to NPS EN-3; or 3); a change in policy; and

    (c) the current Government identifying within the Clean Power 2030 Action Plan that new projects (such as the Project) have "*even greater propensity to cause wake effects on*

existing downstream operational projects". This is a recognition by the current Government that wake loss is even more significant than historically and reflects the fact that there are now a significant number of offshore wind farms (such as DBA, DBB and DBC) which are high value receptors for new projects to consider.

14. The Applicant then proceeds to explain that if its "hope" is wrong the Secretary of State should proceed to take a pragmatic approach, which would be not to require a wake loss assessment. Notwithstanding the continued commitment by the Applicant to undertaking a wake loss assessment at the pre-application stage and in its application materials, this simply avoids the issue. The Applicant has provided no justification as to why the Secretary of State should, or indeed could, adopt this position and how this would be procedurally fair given the Applicant's position throughout the pre-application stage.

15. Even if the Applicant were right on the NPS (which it is not) it would have to adopt a position that wake loss is not a material consideration in this decision at all. This is clearly not the case, and, even if the Applicant were right on the NPS, wake loss would still be capable of being an adverse effect which would factor into the decision-making process and weigh into the balance under section 104(8) of the Planning Act 2008.

16. Ultimately, this is the Applicant's risk to adopt in its DCO application.

AWEL Y MOR

17. The Awel y Mor decision which the Applicant challenges was made on 20 September 2023, before the current NPSs were adopted. As noted above, if the intention had been to make a change to the policy as it had been applied in that decision then it would have been undertaken when the NPSs were subsequently designated.

18. The Applicant is, as pointed out in ISH2, controlled by the same ultimate entity as the entity which secured the Awel y Mor decision. It is important to note that, in spite of the Applicant's protestations around that decision, no legal challenge to the inclusion of the requirement in the Awel y Mor DCO was made and no application for a material change (or a non-material change) has subsequently been submitted to remove the requirement from the Awel y Mor DCO. The correct place to have challenged the Secretary of State's policy interpretation would have been through that decision.

CLOSENESS

19. The Applicant has now asserted that the Project is not close to DBA (and, we assume by reference, DBB and DBC). This is in spite of previous documentation referring to the Project as being in "close proximity" to DBA. No evidence is provided to support this further change in position.

EIA PROCESS

20. In respect of the Applicant's approach to the environmental statement and the EIA Regulations, this is confused and confusing. Again, a timeline here is helpful:

    (a) operational impacts on offshore wind infrastructure were scoped in by the Applicant in their own scoping report. Sections 2.13.3.1 and 2.13.3.2 of its Scoping Report clearly identify impacts on other wind farms and scope them in (and do so separately to subsea cables, which are identified as a separate impact). This is then set out in Table 2-38;

    (b) the PEIR identified wake loss as an environmental impact of the Projects;

    (c) within the Consultation Report that followed the PEIR, it was confirmed that potential impacts regarding wake loss are assessed in section 16.6.1.1 of the ES;

(d) within the first iteration of the Environmental Statement, there was a purported assessment of wake loss; and

(e) the Projcos have consistently raised in the pre-application and pre-examination stage the need for wake loss to be adequately assessed.

21. The EIA process is, of course, separate from the NPS. It applies to environmental effects, regardless of whether there is a specific policy within the NPS that applies to those environmental effects or not. Impacts on offshore wind infrastructure were rightly scoped in, and offshore wind infrastructure is a receptor which is capable of being subject to a significant effect as a high value receptor. This is not contingent on an interpretation of NPS EN-3.

22. Unfortunately, the Applicant appears to have allowed its hopeful interpretation of policy within NPS EN-3 to infiltrate its EIA process. We raise this now so that it can be addressed in the examination and does not give rise to a ground of legal challenge.

23. The Applicant had not gone beyond the EIA Regulations in assessing wake loss as it has sought to assert in its Deadline 1 submission. The Applicant has now compounded the errors in its assessment process that the Projcos had previously raised by removing wake loss from its environmental statement. As a consequence, the environmental statement now fails to comply with Regulation 14(3)(a) and Regulation 14(3)(b) of the EIA Regulations. This will give rise to a ground of legal challenge if not addressed.

24. Regulation 14(3)(a) of the EIA Regulations provides that the environmental statement **must**, where a scoping opinion has been adopted, be based on the most recent scoping opinion adopted (so far as the proposed development remains materially the same as the proposed development which was subject to that opinion). As noted above, impacts on offshore wind infrastructure were scoped in. The effect of the exclusion of the assessment is that this duty is not complied with.

25. Regulation 14(3)(b) of the EIA Regulations provides that the environmental statement **must** include the information reasonably required for reaching a reasoned conclusion on the significant effects of the development on the environment, taking into account current knowledge and methods of assessment. The effect of the exclusion of the assessment, and the previously flawed approach to the assessment raised in the Projcos' Relevant Representation, is that this duty is not complied with.

26. Under Regulation 21 of the EIA Regulations, when deciding whether to make an order granting development consent for EIA development the Secretary of State **must** (amongst other things):

(a) examine the environmental information; and

(b) reach a reasoned conclusion on the significant effects of the proposed development on the environment, taking into account the examination referred to in sub-paragraph (a) and, where appropriate, any supplementary examination considered necessary.

27. The Secretary of State is now in a situation whereby it cannot discharge this duty which it must comply with in decision making.

28. Therefore, we request that the ExA exercise their power under Regulation 20 of the EIA Regs to request further information.

29. This is particularly important, as the Applicant's refusal to engage and its changing position on this matter casts significant doubt on the reliability of the assessment that was previously purported to have been undertaken for DBA (and which was absent in respect of DBB and DBC). However, there is currently no evidence in front of the examination to allow a conclusion on this

matter. To support the examination, the Projcos have committed to commissioning and submitting an assessment. However, that can only go so far in assisting the examination and it cannot remedy the defects identified in the environmental statement.

EIA PROCESS - BENEFITS OF THE PROJECT

30. The Applicant's position on the benefits of the Project must be treated with caution.

31. At this stage, the contribution of the Project to renewable energy generation cannot be accurately identified or assessed without an assessment of the consequent downstream loss of renewable energy generation caused to DBA, DBB and DBC by the Project. The failure to undertake an assessment of the wake impacts of the Project has a direct impact on this assessment.

32. This is also relevant from an EIA perspective. The Environmental Statement Volume 7 Chapter 30 – Climate Change (APP-222) does not currently undertake an assessment of wake loss. It is relevant to note that the Examining Authority in respect of the Morecambe Offshore Windfarm Generation Assets DCO examination requested, at ISH2, that the Greenhouse Gas Assessment is updated to include consideration of wake loss (EV7-006 at Action 20).

33. Therefore, we request that the ExA similarly requests that Chapter 30 of the Environmental Statement is updated to consider the impacts of wake loss on other projects, including DBA, DBB and DBC.

CONSULTATION

34. The Applicant is under a legal duty to have regard to consultation under section 49 of the Planning Act 2008. When submitting its application, it was able to discharge this duty in respect of the Projcos' representations. However, its changed approach following acceptance of the application demonstrates that this regard may well have been superficial and/or misleading.

THE CROWN ESTATE

35. The Applicant's position is that the question of how close offshore wind farms should be to each other (without the specific agreement of the existing project) as regards wake effects and other matters is a judgement call for The Crown Estate (**TCE**) through the leasing process. This is correct in part in that TCE do consider wake effects (amongst numerous other matters) in setting a buffer distance, but this does not address the question of project specific wake effects.

36. The Projcos' position on this was clearly set out in its Deadline 1 submission. In the Outer Dowsing submission at Appendix 1 of that submission, TCE very clearly acknowledge that inter-farm wake effects can extend beyond these buffer distances.

37. The Applicant's position is that there should continue to be a TCE-led approach outside the planning system. This does not address the issue, as TCE does not undertake a project specific assessment and TCE has not undertaken any work to assess the impacts of the final design of this Project on DBA, DBB or DBC.

FRAZER NASH

38. The Applicant's response at ISH2.2.2 demonstrates the issue in relying on the Frazer Nash report. The Frazer Nash report cannot be relied upon as a project specific assessment of the implications of this Project as it is a generic assessment, and the Applicant seeks to respond with a technical response but without any project specific assessment in respect of DBA, DBB or DBC. This does not assist the examination of this Project.

RESOLUTION OUTSIDE OF THE PLANNING SYSTEM

39. The Applicant makes various references to the intention that wake loss is resolved outside of the planning system. Whilst this is not accepted, it is also telling that the Applicant has not made any attempt to resolve this issue outside of the planning system.

40. Throughout the pre-application process, attempts to address and resolve this issue have been driven by the Projcos. As the examination was informed at ISH2, the Applicant will not engage with the Projcos on this matter.

41. In the absence of any industry agreed approach, the onus is on the Applicant to resolve this.

REQUIREMENT AND INDEMNIFICATION

42. To date, the Projcos have not raised the prospect of indemnification through the DCO as the Projcos had expected there to be engagement from the Applicant on wake loss as committed to throughout the pre-application process. The Projcos note that the Applicant raised the prospect of such a requirement at ISH2 and in The Applicants' Written Summaries of Oral Submissions made at CAH1, ISH1 and ISH2.

43. The Projcos reserve their right to comment on the need for and wording of such a requirement in due course given the absence of an assessment by the Applicants.

COSTS

44. We note that the ExA has the ability to award costs pursuant to section 90(4) of the Planning Act 2008, and the ExA may make orders for costs pursuant to section 250 of the Local Government Act 1972.

45. Given the material change in position from the Applicant on wake loss post-acceptance (from both a policy and EIA perspective) in spite of no new circumstances justifying that change in position, and given the Applicant's lack of engagement with this issue at ISH2 and in subsequent submissions, the Projcos reserve their right to request an order for costs in respect of time incurred on this matter.

NEXT STEPS

46. The Projcos reiterate their request that the Applicant engage with the Projcos and provides the necessary information to allow the Projcos to understand the implications of the DBS Projects on DBA, DBB and DBC in respect of wake loss.

47. The Projcos expect individual agreements to be put in place between the Applicant and DBA Projco, DBB Projco and DBC Projco to regulate the interaction between the DBS Projects and the respective Projcos' project in respect of wake loss.

CMS CAMERON MCKENNA NABARRO OLSWANG LLP

14 FEBRUARY 2025