

**6 DECEMBER 2025**

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**DOGGER BANK SOUTH OFFSHORE WIND FARM PROJECTS (DBS PROJECTS)**

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**RESPONSE TO THE SECRETARY OF STATE'S FIRST CONSULTATION DATED 6  
NOVEMBER 2025**

on behalf of

**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**

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## **DOGGER BANK SOUTH OFFSHORE WIND FARM PROJECTS (DBS PROJECTS)**

### **SECRETARY OF STATE'S FIRST CONSULTATION**

#### **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**

## **1. INTRODUCTION**

- 1.1 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**).
- 1.2 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.
- 1.3 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**).
- 1.4 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.
- 1.5 DBA Projco, DBB Projco and DBC Projco (together the **Projco IPs**) are making this submission in response to the Secretary of State's letter dated 6 November (the **First Consultation Letter**).

## **2. EXECUTIVE SUMMARY**

- 2.1 In respect of wake matters, the Projco IPs' position remains as summarised in the Projco IPs' closing statement at Deadline 8 (REP8-059) (the **Projcos' Closing Statement**) and its response to the rule 17 letter submitted at Deadline 9 (REP9-033) (the **Projcos' D9 Response**).
- 2.2 The Projco IPs' position remains that protective provisions are the appropriate mechanism to address the adverse effect of the wake impacts caused by the Projects on DBA, DBB and DBC. The Applicant has not engaged on the protective provisions and (in spite of multiple requests), has not provided its own drafting. The Projco IPs' position on the protective provisions is summarised in section 4 of this response and the protective provisions are set out at Appendix 1 to this response.
- 2.3 The Projco IPs' comments in this consultation response demonstrate why a requirement is inappropriate and why the protective provisions are more precise and certain. In particular, this response demonstrates the fundamental challenge in having reference to monitoring included in the requirement and the problem of having an appeal route that could lead to determination of wake effect matters by the Planning Inspectorate.

- 2.4 On a without prejudice basis, the Projco IPs' position on the proposed requirement in the First Consultation Letter is set out in section 5 of this response. A tracked change version of the proposed requirement is set out at Appendix 2 to this response.
- 2.5 During the examination the Applicant appeared to accept that as a matter of law and policy protective provisions could be included in the DCO. However, the Applicant's position has been that such protective provisions are unjustified and unprecedented. The Projco IPs' position is that the protective provisions are justified and appropriate in this case.
- 2.6 We include at Appendix 3 a legal opinion from Richard Turney KC (the **Counsel's Opinion**). Applying the Counsel's Opinion to this case, the Projco IPs' position is that:
- 2.6.1 the principle of consistent decision making is important and that there is precedent which means that wake loss caused to DBA, DBB and DBC must be mitigated through the DCO for DBS;
  - 2.6.2 pursuant to the current NPS (which DBS must be determined in accordance with) and the draft NPS (which is a material consideration for DBS) it is appropriate for the DCO for DBS to secure compensation for the benefit of DBA, DBB and DBC. In particular, applying the Opinion to this case the Projco IPs position is that:
    - (a) compensation should be secured given that DBS is likely to affect the future viability of DBA, DBB and DBC such that the policy test in Para 2.8.346 is engaged; and
    - (b) paragraph 2.8.233 of the draft EN-3 does not preclude mitigation of economic loss through compensation on the face of the DCO, even if the Secretary of State concludes that there is an effect which falls short of an effect on the future viability of DBA, DBB or DBC.
  - 2.6.3 protective provisions can be included in a DCO to secure mitigation and compensation in respect of wake loss, and that this is lawful notwithstanding that previously this matter has been addressed via requirements;
  - 2.6.4 protective provisions should be included in the DCO for DBS, and that this is justified in the circumstances of DBS and the impacts on DBA, DBB and DBC; and
  - 2.6.5 the protective provisions are appropriate as opposed to the requirement.

### 3. **CONSISTENCY OF DECISION MAKING**

- 3.1 The Projco IPs have set out the importance of consistency of decision making in responses throughout the examination of the Project.
- 3.2 The same principle of consistency also applies to the Secretary of State's consideration of wake loss matters and how best to secure the adequate protection for affected projects as part of any consultation that the Secretary of State undertakes.
- 3.3 In respect of the Outer Dowsing Offshore Wind Farm project, the Secretary of State's consultation dated 21 October 2025 included the following:

*"The Secretary of State notes that following the first information request, the Ørsted and Equinor IPs provided their preferred protective provisions as part of their response. The Ørsted and Equinor IPs and the Applicant are therefore invited to provide an update on whether any further engagement has been had on this matter and if any agreement has been reached on the most recent protective provisions".*

- 3.4 In applying a consistent approach to the consideration of the issues, the Projco IPs' position is that the Secretary of State's consideration on this Application: 1) should extend to protective provisions (as it has on the consultation in respect of the Outer Dowsing Offshore Wind Farm; and 2) should also extend to the engagement by the Applicant in respect of those protective provisions (as it has on the consultation in respect of the Outer Dowsing Offshore Wind Farm).
- 3.5 In respect of applications for DCOs other offshore wind projects which have recently been determined or which are pending determination, it is important to note that on the:
- 3.5.1 Mona Offshore Wind Farm, it has been reported that an agreement has been reached between the relevant applicant and the affected parties;
  - 3.5.2 Morgan Offshore Wind Farm, it has been reported that an agreement has been reached between the relevant applicant and the affected parties;
  - 3.5.3 Morecambe Offshore Wind Farm, the relevant applicant engaged with the affected parties and submitted an agreed form of requirement to the Secretary of State's consultation which was subsequently included in the made DCO; and
  - 3.5.4 Outer Dowsing Offshore Wind Farm, the relevant applicant is being asked for updates on protective provisions.
- 3.6 Unlike the engagement undertaken by applicants on Mona, Morgan and Morecambe, the Applicant has not reached agreement with the Projco IPs on the manner in which mitigation is to be secured.
- 3.7 The above demonstrates that a different form of wording has been included in all made DCOs; this risks uncertainty and inconsistency in the approach to discharge. Contrary to this, the protective provisions provide a clear process.

#### **4. THE PROTECTIVE PROVISIONS**

- 4.1 The Projco IPs' position remains that protective provisions should be included within the Order (as opposed to the imposition of a requirement) in order for there to be appropriate protection for DBA, DBB and DBC. In the Mona and Morgan Decisions, it is important to note that protective provisions were not before the Secretary of State and had not been suggested by either the applicant or any of the affected projects. As identified above, in one other DCO examination there have been protective provisions in front of the examination, and the Secretary of State has issued consultations in respect of those protective provisions. This gives rise to a legitimate expectation that consultation on those protective provisions will be undertaken in this examination.
- 4.2 The Projco IPs' position is that the protective provisions satisfy – with greater precision given the process employed and the terms and definitions used and through the use of a third-party expert – the impacts that the Secretary of State is seeking to address through the inclusion of a requirement. They also avoid the need for the Secretary of State to be involved in the decision-making process in respect of wake loss, by allowing for an independent third party to address matters.
- 4.3 At section 4.89 of the Mona Decision, the Secretary of State confirmed that with the inclusion of Requirement 29 he: *“is content that any further reasonable steps that can be taken to mitigate the severity of the impact of wake effects will be taken”*. Without protection in favour of DBA, DBB and DBC in this examination, which the Projco IPs have identified would be best secured through the protective provisions, the Secretary of State cannot reach the same conclusion.

- 4.4 The Projco IPs' position is that the protective provisions allow for a re-quantification of the wake loss impacts based on the final project design and any mitigation which may have been included.
- 4.5 In terms of timing, the Projco IPs note that the Requirement must be discharged before any development may commence. The protective provisions are also pre-installation requirements, but allow for greater time in advance of the installation of a wind turbine generator as they allow for the necessary steps to be taken 12 months and six months (respectively) in advance of the first installation. This should allow for the discharge to be programmed suitably in advance of installation to avoid potential delays.
- 4.6 The protective provisions provide a clear process to address a significant issue and do not give rise to the same concerns as the requirement. The protective provisions were subject to the examination process (unlike the requirement) and have been tested through that process and the Projco IPs and the Orsted IPs are aligned on the drafting of the protective provisions.
- 4.7 The Projco IPs' preferred form of protective provisions (as submitted at Deadline 5 of the examination, REP5-071) are appended at Appendix 1.
- 4.8 The Counsel's Opinion confirms that as a matter of law and policy:
  - 4.8.1 protective provisions can be included in the DCO for DBS to address the impacts of wake loss on DBA, DBB and DBC, and that this is lawful notwithstanding that previously this matter has been addressed via requirements; and
  - 4.8.2 the protective provisions are appropriate as opposed to the requirement.

## 5. THE DRAFT REQUIREMENT

- 5.1 The Projco IPs' preference remains for the protective provisions to be included, and it has set out its justification for this position throughout the examination of the Projects. The Projco IPs' consider that its wording is more precise, as it sets out the requirements for a wake loss assessment and a wake loss mitigation scheme (which are well defined, unlike the wake effects plan), and that it provides a clear process for the Applicant to follow.
- 5.2 Notwithstanding the above, the Projco IPs have provided a proposed mark-up of the requirement (the **Updated Requirement**) that the Secretary of State consulted on (the **Secretary of State's Draft Requirement**). The Updated Requirement is included at Appendix 2, and this comprises the following amendments:

### Consistency

- 5.2.1 Amendments to the requirement to refer to each of the owners in the appropriate places (to be consistent with Para 2(a) of the Secretary of State's Draft Requirement) is captured at Para 1(a), Para 1(b) and Para 2(b) of the Updated Requirement. This is particularly important in this case given that there are assets owned by the Projco IPs and the Orsted IPs.

### Consistency with The Morecambe Offshore Windfarm Generation Assets Order 2025 (the Morecambe DCO)

- 5.2.2 Para 3(b) of the Updated Requirement includes reference to the design changes and operational measures which are included in the drafting of the Morecambe DCO. Linked to the comment at section 5.2.6 and section 5.2.7, the qualification of reasonable measures has been removed.

- 5.2.3 Para 3(g) of the Updated Requirement includes the requirement from the Morecambe DCO for there to be consultation with each of the affected owners regarding the design changes and operational measures that can be addressed.

**Para 3(b): Compensation**

- 5.2.4 The amendment at Para 3(b) of the Updated Requirement is included to make it expressly clear that mitigation includes compensation.
- 5.2.5 In this respect, it is important to note that in respect of the Mona Project it has been reported that the promoter reached a private agreement with the operator of the affected wind farms in order to discharge the equivalent requirement (requirement 29) pursuant to the Mona DCO. Whilst it is implicit in the wording, there is benefit in making this explicit.

**Para 3(b): Reasonable Steps v All Steps**

- 5.2.6 Under the Secretary of State's Draft Requirement, the wake effects plan is a plan that captures steps taken and identifies those steps to be secured and taken in the future. If a document is to be submitted then the undertaker should be required to identify all steps that it has considered, and a justification for those which it has discounted. Given that this document will be submitted after the event, this will protect the undertaker by ensuring that the process is robust and precise and that the undertaker does not "fail" in discharging the requirement on the basis of a dispute or a failure as to what is reasonable.
- 5.2.7 Subject to this change in the Updated Requirement and the changes identified above for consistency with the Morecambe DCO, the wording is generally acceptable given that it obliges the undertaker to set out all steps that it has considered and that the obligation is to minimise the impacts on the Projco IP's projects.

**New Para 3(c)**

- 5.2.8 The previous wording regarding maximising output does not sit neatly within Para 3(b) of the Secretary of State's Draft Requirement; the wording appears to be a qualifier for what the Applicant will consider to be reasonable (i.e. it is expressed as an input, but forms part of a paragraph which provides what the output of a wake effects plan should be).
- 5.2.9 To address this and ensure that this matter is properly considered, we have suggested adding a new Para 3(c) in the Updated Requirement and changing the emphasis so that the implications in terms of capacity (to be consistent with the Morecambe DCO) are expressed as an output of the wake effects plan so that there is a clear reporting mechanism which captures both: 1) the saving afforded to DBA, DBB and DBC through all steps considered; and 2) the associated loss in respect of the Projects through all steps considered. By requiring this to be reported on, as opposed to incorporating a vaguer reference to the output of the Projects, this ensures that the Secretary of State is fully informed of the overall picture in respect of output for all steps considered by the Applicant.

**Monitoring**

- 5.2.10 Whilst the Secretary of State's Draft Requirement provides that a wake effects plan must set out "*details of any necessary monitoring of the wake effect mitigation measures*" it does not set out the steps that will be taken in the event that such monitoring demonstrates that the wake effect mitigation measures do not have the

required effect and do not mitigate (in part or in whole) the effect that they are designed to mitigate. The Secretary of State's Draft Requirement does not set out the remedial steps that must be taken to remedy this or the further monitoring that would be appropriate.

- 5.2.11 Where mitigation of an environmental effect may be uncertain, which is likely to be the case in respect of wake loss, securing measures to address ineffective mitigation identified through monitoring is even more important. The obligation in respect of monitoring places a potentially onerous ongoing obligation on the developer.
- 5.2.12 At this stage, we do not consider that wording which does not incorporate compensation can address this and this is another reason to prefer the protective provisions which allow for resolution of all matters prior to commencement and which do not provide for continued uncertainty into the operational phase through monitoring. By imposing monitoring requirements there is uncertainty for the Applicant and the affected parties for a substantial period of time.

### **Appeal**

- 5.2.13 Any form of the requirement would be subject to the appeal mechanism set out in the draft DCO. This would involve a situation where, in the event of non-determination or refusal of the requirement by the Secretary of State for Energy Security and Net Zero, the Applicant may need to submit an appeal. This appeal would then be determined through the planning appeals process, and the appointment of a Planning Inspector. Given the specialist nature of this matter, we consider it unlikely that there would be a Planning Inspector available with the specialism to determine any such appeal and it would be contrary to good planning for a matter that has been subject to Secretary of State consideration to be appealed to an individual Planning Inspector.
  - 5.2.14 We do not consider it appropriate that such a technical matter could be subject to such an appeal process, and we consider that any such appeal process would likely be lengthy given the potential for complex material to be in front of the relevant Planning Inspector. This cannot be overcome by drafting changes to the requirement.
  - 5.2.15 On the contrary, the protective provisions provide for the appointment of an expert to determine any relevant disputes.
- 5.3 In practice, with or without these amendments and taking the government's statement in the Consultation Response in respect of physical mitigation at face value, it is very likely that the only way the Applicant will ever be capable of adequately discharging this requirement will be through an agreement that secures the necessary compensation. Recognising this explicitly is appropriate, and this is what the protective provisions achieve.
  - 5.4 The Counsel's Opinion confirms that, notwithstanding the precedent of requirements having been imposed on previous DCOs, a requirement is not the most appropriate way to address the impacts of DBS on DBA, DBB and DBC and that protective provisions are the most appropriate way to address these impacts.

## **6. NATIONAL PLANNING POLICY**

- 6.1 The Projco IPs' position in respect of the current NPS, including in relation to the requirement for compensation in this case, was set out in detail in its submissions to the examination and summarised in its Closing Submission (REP8-059). However, since: 1) the Secretary of State has issued the updated draft NPS since issuing the First Consultation Letter; and 2) the updated draft



NPS is likely to be designated in December 2025, the Projco IPs' position on the updated draft NPS is set out below.

- 6.2 An updated draft of NPS EN-3 was issued on 13 November. This accompanied the government's Consultation Response Planning for New Energy Infrastructure 2025 revisions to National Policy Statements for energy infrastructure (the **Consultation Response**).
- 6.3 Whilst Paragraph 1.6.2 of draft NPS EN-3 makes it clear that the 2024 suite of NPSs should have effect for the determination of this Application, the draft NPS is emerging policy which may attract weight in the determination of this Application (particularly once designated). In respect of:
- 6.3.1 Policy 2.8.176 of the draft NPS, the Projco IPs' position is that:
- (a) at the design stage (and until it changed its position at Deadline 4 of the examination), the Applicant did not undertake an assessment of inter-array wake effects in respect of the Projco IPs' projects; and
  - (b) the Applicant had not considered wake effects or made reasonable endeavours to address these prior to the commencement of the examination of the Projects, or prior to its change of position at Deadline 4. Even after Deadline 4, the Applicant has not used reasonable endeavours to address wake effects.
- 6.3.2 Policy 2.8.232 of the draft NPS, the Projco IPs' position is that the Applicant cannot demonstrate that it has made reasonable endeavours to mitigate the impact of the Projects on DBA, DBB or DBC.
- 6.3.3 Policy 2.8.233 of the draft NPS, the Projco IPs' position is that because the Applicant cannot: 1) demonstrate compliance with the current NPS (which provides a different policy framework in respect of wake loss); or 2) demonstrate compliance with the draft NPS in spite of the draft being in substantially the same form as that issued in April 2025, and given the significance of the impacts on DBA, DBB and DBC and the weight that should be attached to those impacts, compensation is appropriate in this case. If the draft NPS applied there would be a particular justification for compensation in cases such as this where the Applicant cannot demonstrate compliance with requirements of the new NPS in the formulation of its proposals.
- 6.3.4 Policy 2.8.316 of the draft NPS, the Projco IPs' position is that the Applicant cannot demonstrate that it has made reasonable efforts to work collaboratively with those who may potentially be impacted to mitigate impacts. It did not engage with the Projco IPs prior to or during the examination of the Application or during the recommendation phase.
- 6.4 The NPS does not state that compensation is not appropriate (which it could have done). It states that it is not necessarily expected, and this is an assessment which must be based on compliance with the terms of the policy. It is implicit in this wording that there may be circumstances even under the new policy where compensation may be appropriate. There is no such qualification on compensation under the current NPS.
- 6.5 In its Consultation Response, the government states in making its amendments to the current national planning policy which applies in respect of wake loss that: "*the planning system is not expected to adjudicate on compensation arrangements for wake effects*". For the reasons set out in the Projco IPs' submissions and summarised in the Closing Submission, under the current

national policy framework compensation is an appropriate means of addressing the wake loss impacts caused by the Projects to DBA, DBB and DBC.

- 6.6 The Consultation Response and supplementary guidance also makes it clear that the purpose of the wording is not to avoid compensation, but is to avoid adjudicating on compensation. The protective provisions address this by providing a clear process which allows for expert determination.
- 6.7 This makes it clear that compensation is appropriate under the current NPS.
- 6.8 The fact that the government has felt the need to include specific wording in the draft NPS stating that there is no expectation for compensation (always subject to policy compliance) and has specifically addressed this planning policy change in the Consultation Response demonstrates that it is implicit that under the current NPSs compensation can be secured as a relevant measure. There is not the same stated exception from the requirement for compensation and not the same express exclusion of compensation as an expected matter under the current NPS. On the contrary, and as set out in the Closing Submission, the mitigation hierarchy applies and so compensation is the step to be secured where mitigation cannot be secured.
- 6.9 The Counsel's Opinion confirms that this is the correct interpretation of the NPS and the draft NPS. Applying the Counsel's Opinion to this case, the Projco IPs' position is that it is appropriate for the DCO for DBS to secure compensation in the form of the protective provisions.

#### **Reduction in Capacity**

- 6.10 The Applicant's position in respect of mitigation and compensation has been that any mitigation has to take into account the context of the advice in EN-3 to maximise generation. The Applicant has discounted measures which would result in a reduction in generating capacity against that backdrop, and the Applicant relies on the CNP policy in the suite of energy NPSs.
- 6.11 Paragraph 4.2.24 of NPS EN-1 has been updated in the draft NPS and now states as follows: *"Measures that result in a significant reduction in generation capacity for CNP infrastructure are unlikely to be considered to be appropriate as mitigation. There may be exceptional circumstances where the mitigation could have a significant benefit and warrant a small reduction in generation capacity and function. In these circumstances, the Secretary of State may decide that the benefits of the mitigation to reduce the effects outweigh the marginal loss of function"*.
- 6.12 This text aligns with the Projco IPs' consistent position on mitigation which has been to apply the mitigation hierarchy and to note that whilst there is policy which references the need to maximise output this is subject to constraints and subject to the mitigation hierarchy. The Projco IPs' position is that the impact of the Project on DBA, DBB and DBC is such an exceptional circumstance given the non-compliance with policy and the significant benefit that such mitigation could have for DBA, DBB and DBC which are committed projects and which will deliver the renewable energy benefits that the NPSs support. This new text supports the Projco IPs' position on the application of the mitigation hierarchy and CNP policy and the benefits for DBA, DBB and DBC outweigh any marginal loss to the Projects.

## **7. CONCLUSION**

- 7.1 The Projco IPs' position remains that there is an adverse effect on DBA, DBB and DBC which policy directs attracts substantial weight in the decision-making process and which is far more significant than the impact identified in the Mona decision and the Awel y Mor decision where the Secretary of State considered mitigation necessary. The Applicant's position throughout the

examination has been that there is no mitigation that can be imposed now although the Projco IPs' position is that the Applicant has not taken all reasonable steps to mitigate the effect. Should the Applicant be unable to identify suitable mitigation through the design of the Project, having already made the point that the Projco IPs consider it very likely to be the case, then applying the mitigation hierarchy this only leaves compensation as a means of addressing this issue.

- 7.2 The Projco IPs' position is that whatever form the protection afforded to DBA, DBB and DBC takes it must be recognised that this extends to compensation given the current national planning policy framework and that the Projco IPs have demonstrated that the Projects are likely to affect the future viability of DBA, DBB and DBC.
- 7.3 The Projco IPs' position is that the protective provisions are more precise than the proposed requirement and allow for resolution of matters by a third party expert as opposed to the Secretary of State. The Projco IPs are aligned with the Orsted IPs on the form of protective provisions but not on the form of a requirement.
- 7.4 The Projco IPs' position is that the protective provisions do not give rise to the same uncertainty in respect of monitoring as the requirement, as the protective provisions allow for resolution prior to the operational phase. The requirement does not address in any detail how any monitoring which demonstrates that the measures secured by a wake effects plan are ineffective will be addressed.
- 7.5 The Projco IPs do not consider that the form of a requirement, either with or without the changes proposed in Appendix 2, adequately secures mitigation or compensation for the significant impacts on their assets due to wake effects. Neither does it provide for an appropriate process for the onward assessment of those effects and for the agreement of suitable mitigation or compensation measures. Should the Secretary of State disagree with the Projco IPs in this regard, the Projco IPs' preferred form of a requirement is provided on a without prejudice basis in Appendix 2
- 7.6 The inclusion in the DCO of the protective provisions in the form submitted by the Projco IPs would provide for a suitable level of protection for the Projcos' assets in accordance with the mitigation hierarchy and through a robust process involving the appointment of an independent expert to adjudicate on suitable mitigation or compensation. The Projco IPs request that the protective provisions are included in the DCO in this form. Such inclusion would enable the Projco IPs to be in a position to withdraw their objection to the Application.

**CMS CAMERON MCKENNA NABARRO OLSWANG LLP**

**6 DECEMBER 2025**

## APPENDIX 1

### PART [X]

#### **For the protection of 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**

1. The provisions of this Part of this Schedule have effect, unless otherwise agreed in writing between the undertaker and the relevant DB Projco.
2. In this Part of this Schedule—
  - “AEP” means annual energy production;
  - “authorised project” has the meaning defined at article 2(1);
  - “DBA” means the Dogger Bank A Offshore Wind Farm consented by The Dogger Bank Croyke Beck Offshore Wind Farm Order 2015 (as amended);
  - “DBA Projco” means Dogger Bank Offshore Wind Farm Project 1 Projco Limited;
  - “DBB” means the Dogger Bank B Offshore Wind Farm as consented by The Dogger Bank Croyke Beck Offshore Wind Farm Order 2015 (as amended);
  - “DBB Projco” means Dogger Bank Offshore Wind Farm Project 2 Projco Limited;
  - “DBC” means the Dogger Bank C Offshore Wind Farm as consented The Dogger Bank Teesside A and B Offshore Wind Farm Order 2015 (as amended);
  - “DBC Projco” means Dogger Bank Offshore Wind Farm Project 3 Projco Limited;
  - “relevant DB Projco” means all or either DBA Projco, DBB Projco and/or DBC Projco as the context requires;
  - “relevant project” means all or either of DBA, DBB and/or DBC as the context requires;
  - “Wake Loss” means the total modelled impact of the reduction in AEP at a relevant project as a result of wake impacts from the authorised project;
  - “Wake Loss Agreement” means an agreement between the undertaker and the relevant DB Projco to address the impacts of Wake Loss caused by the authorised project in respect of the relevant project;
  - “Wake Loss Assessment” means an assessment of the wake loss on the relevant project by the authorised project that is commissioned and agreed between the undertaker and the relevant DB Projco pursuant to paragraph 4(1);
  - “Wake Loss Mitigation Scheme” means a scheme agreed between the undertaker and the relevant DB Projco, or in the absence of such agreement, determined by an independent third party expert appointed under paragraph 4, to provide mitigation in accordance with paragraph 4(2); and
  - “wind turbine generator” has the meaning defined at article 2(1).
3. The undertaker may enter into a Wake Loss Agreement with each relevant DB Projco in respect of its relevant project. If a Wake Loss Agreement has been entered into and remains in force with the relevant DB Projco, then paragraphs 4 to 8 of this Part of this Schedule will not apply.
4. —(1) No less than one year prior to first installation of a wind turbine generator, the undertaker and the relevant DB Projco shall agree the appointment of one or more independent third party expert(s) to undertake a Wake Loss Assessment, which shall—
  - (a) take account of any design, technical or operational mitigations that have been, or that will be, implemented in the final design of the authorised project to reduce Wake Loss; and
  - (b) determine the Wake Loss in respect of each relevant project.
- (2) No less than six months prior to first installation of a wind turbine generator, the undertaker and the relevant DB Projco shall agree the Wake Loss Mitigation Scheme, which shall include, but not be limited to—
  - (a) the mechanism for quantifying the financial loss caused to each relevant project as a consequence of the Wake Loss identified in the Wake Loss Assessment;
  - (b) the financial loss per annum caused to each relevant project; and
  - (c) the payment mechanism and timescales for mitigating such financial loss.

(3) In the absence of agreement under sub-paragraph (2), the undertaker and the relevant DB Projco shall agree the appointment of an independent third party expert to approve or determine such Wake Loss Mitigation Scheme. That expert shall not approve or determine such Wake Loss Mitigation Scheme without first consulting with the relevant DB Projco and taking into account any written representations made by the relevant DB Projco provided that any written representations are provided to that expert by the relevant DB Projco within 40 working days.

5. The Wake Loss Mitigation Scheme must be implemented as approved for the lifetime of the authorised project.

6. In the event that a relevant project ceases to be operational earlier than accounted for in the Wake Loss Assessment and the Wake Loss Mitigation Scheme, the obligation under paragraph 5 in respect of that relevant project shall no longer be in effect.

7. —(1) The undertaker must not commence installation of any wind turbine generator unless a guarantee or alternative form of security in respect of the total liabilities of the undertaker under the Wake Loss Mitigation Scheme is in place.

(2) The form of guarantee or security referred to sub-paragraph (1), and the amount guaranteed or secured, must be approved by the relevant DB Projco (such approval not to be unreasonably withheld) and deposited with the Secretary of State.

(3) A guarantee or other security in accordance with this paragraph 7 that guarantees or secures the undertaker's payment to mitigate the effects of Wake Loss in accordance with the relevant Wake Loss Mitigation Scheme is to be treated as enforceable against the guarantor or provider of security by any person to whom such mitigation is properly payable and must be in such a form as to be capable of enforcement by such a person.

8. Paragraphs 4 to 7 of this Part of this Schedule shall cease to have effect if a national scheme for assessment and compensation of Wake Loss effects prescribing a scale for calculation of Wake Loss impacts and a mechanism for the payment of any compensation and/or mitigation caused by such Wake Loss impacts has legal effect provided that—

- (a) the authorised project and the relevant project are within the scope of the relevant national scheme;
- (b) the undertaker has complied with the requirements of the relevant national scheme; and
- (c) the undertaker and the relevant DB Projco, following review of any such national scheme and acting reasonably, agree to paragraphs 4 to 7 ceasing to have effect.

9. Any difference under the provisions of this Part of this Schedule must be, unless otherwise agreed in writing between the undertaker and the relevant DB Projco, determined by arbitration in accordance with article 47 (arbitration).

## APPENDIX 2

### Wake effects ~~plan~~

(1) Work No. 1A must not be commenced until either—

(a) A wake effects plan relating to that part of the authorised project has been submitted to and approved by the Secretary of State following consultation with each of the owners of the relevant offshore wind farm(s); or

(b) The undertaker has provided evidence to the Secretary of State that alternative mitigation for wake effects (including compensation for economic loss) has been agreed with each of the owners of the relevant offshore wind farm(s); or

(c) A combination of (1)(a) and (1)(b) is provided to and agreed by the Secretary of State to ensure that the wake effects of the authorised project on each of the relevant offshore wind farm(s) ~~is considered~~are mitigated

(2) Work No. 1B must not be commenced until either—

(a) A wake effects plan relating to that part of the authorised project has been submitted to and approved by the Secretary of State following consultation with each of the owners of the relevant offshore wind farm(s); or

(b) The undertaker has provided evidence to the Secretary of State that alternative mitigation for wake effects (including compensation for economic loss) has been agreed with each of the owners of the relevant offshore wind farm(s); or

(c) A combination of (2)(a) and (2)(b) is provided to and agreed by the Secretary of State to ensure that the wake effects of the authorised project on each of the relevant offshore wind farm(s) ~~is considered~~are mitigated.

(3) Any wake effects plan(s) provided in accordance with paragraphs (1)(a), (1)(c), (2)(a) or (2)(c) must include:

(a) the wake effects from the approved development on the annual energy production of the relevant offshore wind farm(s);

(b) details of ~~reasonable~~all steps that have been taken ~~or are proposed to be taken by the undertaker in the final design of the authorised development or measures which will be applied during the operation of the authorised development (or both)~~ to minimise wake effects on the relevant offshore wind farm(s) (including compensation for economic loss); whilst maximising the capacity and energy output of the authorised development within the identified technical, environmental and other constraints of the authorised development;

(c) details of the impact on the reduction of the capacity of the authorised development as a consequence of the steps taken or proposed to be taken pursuant to paragraph 3(b);

~~(d)~~ the timescales for implementation of any wake effect mitigation measures;

~~(e)~~ any time limits for wake effect mitigation measures; ~~and~~

~~(f)~~ details of any necessary monitoring of the wake effect mitigation measures; ~~and~~

~~-(g) details of consultation with each of the owners of the relevant offshore wind farms and the extent of any agreement or disagreement with them regarding:~~

(i) whether any design changes or operational measures could further reduce the wake effect impacts; and

~~+~~(ii) (ii) the conclusions of the wake effects assessment under paragraphs (1)(a) and (2)(a).

- (4) The layout plan submitted to the MMO under condition 15(1)(a) of schedule 10 of this Order must be in accordance with any approved wake effects plan submitted in accordance with sub-paragraph (1) above.
- (5) The layout plan submitted to the MMO under condition 15(1)(a) of schedule 11 of this Order must be in accordance with any approved wake effects plan submitted in accordance with sub-paragraph (2) above.
- (6) Each approved wake effects plan submitted under this requirement must be implemented as approved.
- (7) For the purposes of this requirement—“relevant offshore wind farms” means the two offshore wind farms consented under the Dogger Bank Creyke Beck Offshore Wind Farm Order 2015 (SI2015/318) as amended at the date of this Order and known as Dogger Bank A and Dogger Bank B, the offshore wind farm consented under the Dogger Bank Teesside A and B Offshore Wind Farm Order 2015 (SI2015/1592) as amended at the date of this Order and known as Dogger Bank C, the offshore wind farm consented under the Hornsea One Offshore Wind Farm Order 2014 (SI2014/3334) as amended at the date of this Order, the offshore wind farm consented under the Hornsea Two Offshore Wind Farm Order 2016 (SI2016/844) as amended at the date of this Order and the offshore wind farm consented under the Hornsea Three Offshore Wind Farm Order 2020 as amended at the date of this Order

## **APPENDIX 3**



## DOGGER BANK SOUTH OFFSHORE WINDFARMS

### WAKE LOSS

#### OPINION

1. I am asked to advise 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 (“the Projco IPs”) in respect of the application for development consent for the Dogger Bank South Offshore Wind Farms (DBS). Specifically, I am asked to advise in respect of matters relating to wake loss.

#### Factual background

##### *(i) The DBS application*

2. The Projco IPs are statutory undertakers in respect of the Dogger Bank A, B and C offshore wind farms, respectively. Each of those wind farms benefits from development consent under the Planning Act 2008. RWE Renewables UK Dogger Bank South (West) Ltd and RWE Renewables UK Dogger Bank South (East) Ltd’s (“the Applicants”) are seeking development consent for DBS. The examination into the DBS application has closed, and the Secretary of State for Energy Security and Net Zero (“the SoS”) has now written to the Projco IPs seeking further representations on matters relating to wake loss and my opinion is sought to inform that response.
3. Wake loss is the phrase used to describe the effect of the construction of another wind farm on the amount of energy generated at an existing or proposed wind farm. In essence, the presence of a wind farm even at a considerable distance from another may interfere with the flow of air and thus the amount of energy which can be generated.
4. The DBS application initially considered wake loss in relation to impacts on Dogger Bank A only. However, that assessment was removed from the application at Deadline 1. A further wake loss assessment, considering Dogger Bank A, B and C, was introduced at Deadline 4. The Projco IPs submitted their own wake loss assessment. Likely losses have been identified by both the Applicants and the IP Projcos, although the quantum is disputed. On the Projco IP’s assessment, the

losses are estimated to be £23m per annum. The Projco IPs' position is that, even on the Applicant's wake loss assessment, wake loss impacts from DBC are likely to affect the future viability of the Dogger Bank A, B and C.

5. During the examination, the Projco IPs proposed protective provisions in respect of wake loss impacts which would include both mitigation measures to reduce losses to the Projco IPs, and also the payment of compensation for annual losses. The Applicants did not engage with the drafting of the protective provisions during the examination.
6. In their Closing Submissions, the Projco IPs set out their final examination position on wake loss matters. They contended that the adverse impacts on Dogger Bank A, B and C should be given substantial adverse weight in the decision-making on DBS, applying paragraph 2.8.347 of NPS EN-1 (2024). They submitted that since the Applicants said that no mitigation could be applied now, it was necessary to consider compensation (in accordance with the mitigation hierarchy). Accordingly, they said that this should be secured through the proposed protective provisions.
7. In their Closing Statements on Wake Effects, the Applicants contended that limited weight should be given to wake effects. The key mitigation was said to be compliance with the 7.5km buffer applied in the Crown Estate sea bed leasing process. They contended that the protective provisions were unreasonable, unjustified and unworkable. They suggested that the application of financial compensation measures may be *Wednesbury* unreasonable. They further contended that no DCO requirement was necessary.
8. On 6 November 2025, the Secretary of State wrote to the Projco IPs (and others) requesting further information. In respect of wake effects, the Projco IPs were invited to comment on the proposed insertion of a requirement, the form of which was set out in the letter. The proposed requirement is as follows:

“Wake effects plan

(1) Work No. 1A must not be commenced until either—

(a) A wake effects plan relating to that part of the authorised project has been submitted to and approved by the Secretary of State following consultation with owners of the relevant offshore wind farm(s); or

(b) The undertaker has provided evidence to the Secretary of State that alternative mitigation for wake effects has been agreed with the owners of the relevant offshore wind farm(s); or

(c) A combination of (1)(a) and (1)(b) is provided to and agreed by the Secretary of State to ensure that each of the relevant offshore wind farm(s) is considered.

(2) Work No. 1B must not be commenced until either—

(a) A wake effects plan relating to that part of the authorised project has been submitted to and approved by the Secretary of State following consultation with each of the owners of the relevant offshore wind farm(s); or

(b) The undertaker has provided evidence to the Secretary of State that alternative mitigation for wake effects has been agreed with the relevant offshore wind farm(s); or

(c) A combination of (2)(a) and (2)(b) is provided to and agreed by the Secretary of State to ensure that each of the relevant offshore wind farm(s) is considered.

(3) Any wake effects plan(s) provided in accordance with paragraphs (1)(a), (1)(c), (2)(a) or (2)(c) must include:

(a) the wake effects from the approved development on the annual energy production of the relevant offshore wind farm(s);

(b) details of reasonable steps that have been taken or are proposed to be taken by the undertaker to minimise wake effects on the relevant offshore wind farm(s) whilst maximising the capacity and energy output of the authorised development within the identified technical, environmental and other constraints of the authorised development;

(c) the timescales for implementation of any wake effect mitigation measures;

(d) any time limits for wake effect mitigation measures; and

(e) details of any necessary monitoring of the wake effect mitigation measures.

(4) The layout plan submitted to the MMO under condition 15(1)(a) of schedule 10 of this Order must be in accordance with any approved wake effects plan submitted in accordance with sub-paragraph (1) above.

(5) The layout plan submitted to the MMO under condition 15(1)(a) of schedule 11 of this Order must be in accordance with any approved wake effects plan submitted in accordance with sub-paragraph (2) above.

(6) Each approved wake effects plan submitted under this requirement must be implemented as approved....”

9. The “relevant offshore wind farms” would be defined to include Dogger Bank A, B and C. Those instructing me have prepared a detailed response to this request, which I have reviewed. This includes both a restatement of the case for the use of the proposed protective provisions, and suggested amendments to the proposed requirement including an express reference to compensation for economic loss as part of the “alternative mitigation for effects”.

(ii) *Previous decision-making in DCOs relating to wake loss*

10. Those instructing me refer to four decided DCO applications:

- a. Awel y Mor Offshore Wind Farm, where a requirement was included in the DCO;
- b. Mona Offshore Wind Farm, where a requirement was included in the DCO and it has been reported that an agreement has been reached between the relevant applicant and the affected parties;
- c. Morgan Offshore Wind Farm, where it has been reported that an agreement has been reached between the relevant applicant and the affected parties and a requirement was not imposed because that agreement was reached prior to the DCO decision; and
- d. Morecambe Offshore Wind Farm, where the relevant applicant engaged with the affected parties and submitted an agreed form of requirement to the Secretary of State’s consultation. This was included in the relevant DCO.

11. In the Awel y Mor decision, the Secretary of State gave the matter of wake loss “moderate” adverse weight in the planning balance, albeit the predicted impact there on the Rhyl Flats offshore wind farm was considerably less. The requirement imposed there was:

**“Wake effects**

25.—(1) No part of any wind turbine generator shall be erected as part of the authorised development until an assessment of any wake effects and subsequent design provisions to mitigate any such identified effects as far as possible has been submitted to and approved in writing by the Secretary of State, in order to mitigate the impact of the authorised development on the energy generation of Rhyl Flats Wind Farm. The assessment must be based on the scope of this Order as granted.

(2) The authorised development shall be carried out in accordance with the approved details.”

### Policy

12. NPS EN-3 (2024) does not expressly address wake loss but provides:

“2.8.342 Where a proposed offshore wind farm potentially affects other offshore infrastructure or activity, a pragmatic approach should be employed by the Secretary of State.

2.8.343 Much of this infrastructure is important to other offshore industries as is its contribution to the UK economy.

2.8.344 In such circumstances, the Secretary of State should expect the applicant to work with the impacted sector to minimise negative impacts and reduce risks to as low as reasonably practicable.

2.8.345 As such, the Secretary of State should be satisfied that the site selection and site design of a proposed offshore wind farm and offshore transmission has been made with a view to avoiding or minimising disruption or economic loss or any adverse effect on safety to other offshore industries...

2.8.347 Where a proposed development is likely to affect the future viability or safety of an existing or approved/licensed offshore infrastructure or activity, the Secretary of State should give these adverse effects substantial weight in its decision-making.

2.8.348 Providing proposed schemes have been carefully designed, and that the necessary consultation with relevant bodies and stakeholders has been undertaken at an early stage, mitigation measures may be possible to

negate or reduce effects on other offshore infrastructure or operations to a level sufficient to enable the Secretary of State to grant consent.”

13. The draft revisions to EN-3 would include express provision in respect of wake effects. In particular, it is proposed to include the following wording (paragraph 2.8.233):

“Disputes around compensation for wake effects are regarded to be a commercial matter to be managed between disputing developers. The planning system will not adjudicate on matters of compensation for wake loss.”

#### Instructions

14. I am asked to consider:

- a. The principles of consistent decision making and how they should be interpreted by the Secretary of State on the DBS project in light of other recent decisions.
- b. The interpretation of the relevant parts of the current NPS and the draft NPS in respect of the imposition of measures to secure compensation through protective provisions to the DCO for DBS.
- c. Whether paragraph 2.8.233 of draft EN-3 precludes mitigation of economic loss through compensation on the face of the DCO in the event that the Secretary of State concludes that there is an effect which falls short of an effect on the future viability of a waked project.
- d. The requirement for compensation if the Secretary of State adopts the Projco IPs’ position that DBS is likely to affect the future viability of any or all of Dogger Bank A, B and C such that the policy test in paragraph 2.8.347 of EN-3 is engaged.
- e. Whether the protective provisions can lawfully be included in the DCO for DBS to address the impacts of wake loss on Dogger Bank A, B and C, and whether this is justified in the circumstances of the case.
- f. Whether the matter is best addressed through protective provisions or a requirement.

## Analysis

### *Consistency*

15. It is a well-established principle of planning law that like cases should be decided in a like manner. Consistency does not, however, require the same decision to be made. Rather, if it is proposed to take a different approach it is necessary to have regard to the principle of consistency and to explain why it is proposed to take a different approach. The principle was first explained by Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137, and has been reaffirmed on multiple occasions since: see e.g. the Court of Appeal in *DLA Delivery Ltd v Baroness Cumberlege of Newick* [2018] PTSR 2063.
16. In the case of wake loss, it seems to me that there is a strong case for the Secretary of State taking a consistent approach to cases decided under the same policy framework when this issue arises. This includes the weight to be given to a particular issue. To the extent that different approaches are taken, the Secretary of State should nonetheless (a) consider the principle of consistency and (b) explain why an earlier decision has not been followed.

### *Interpretation of policy*

17. The critical question here is the extent to which the NPS either requires or permits the consideration of compensation for wake loss. In my opinion, on a proper construction of the policy, the NPS indicates that compensation may be required, but does not require it in all cases. I reach that view for the following short reasons:
- a. In demonstrating compliance with the NPS, the mitigation hierarchy should be applied (2.1.4).
  - b. The applicant is expected to minimise negative impacts on other projects (2.8.344), which may include negative economic impacts from wake loss.
  - c. The Secretary of State should be satisfied that the site selection and site design has been made with a view to avoiding or minimising economic loss (2.8.345).
  - d. Any residual effects on future viability of other projects should be given substantial weight (2.8.347).
18. Given the weight to be given to future viability of other projects, and the express requirements to seek to avoid or minimise economic loss, in my view it is clear that compensation for economic loss *may* be required in any particular case.

19. The proposed terms of the draft NPS are surprising in this respect for a number of reasons. Whilst economic viability may often be irrelevant in the planning system, it is clearly capable of being a material consideration: see e.g. *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437, paragraph 59. Impacts on viability of other schemes may, in particular, be relevant where those impacts will have adverse planning consequences. A good example of this is the retail impact test in the NPPF, where it is necessary to consider the impact of some proposals on existing and future investment in existing town centres. In the offshore wind context, if the effect of consenting one wind farm was to prevent the delivery of another, then this would in my view be an obviously material planning consideration (not least because any benefit of delivering the second would have to be offset by the disbenefit of losing the first wind farm).
20. Further, in the context of an NPS which is relevant to a decision to grant development consent, and not solely planning permission, there is an obvious relevance of matters of compensation since a DCO will routinely include provisions to acquire land or rights. This often includes provisions to grant statutory authority to interfere with rights or cause nuisance, coupled with provisions to ensure that compensation is payable in cases where such matters could no longer be enforced under private law. Whilst the quantum of compensation is not fixed in DCOs, they invariably make provision for the application of compensation provisions, thus ensuring that the measures are compatible with both common law principles and Article 1 of the First Protocol to the ECHR. I return to these principles below.
21. For those reasons, I do not think that proposed paragraph 2.8.233 of draft EN-3 should be read as precluding mitigation of economic loss through compensation, since that would make an assumption that those losses were irrelevant for planning purposes (which they may not be); and would make an assumption that compensation for losses is not part of the framing of the DCO (which it invariably is).

#### *Requirement for compensation*

22. The difficulty on the present facts is that it is not established that the financial losses from wake loss would be recoverable under the general law if the new wind farm did not benefit from statutory authority; and therefore absent specific provisions in the DCO, it is unclear whether the authorisation granted by the DCO would result in any or any adequate compensation being achieved. Simply saying, as the draft NPS does, that it is a matter to be managed between disputing developers suggests that there is some way in which that dispute can be managed



and adjudicated upon. For present purposes it is unnecessary to seek to resolve this question, and it seems to me unlikely that it could be resolved definitively without a ruling by the appellate courts.

23. The particular problem with this uncertainty is that it means that the Secretary of State cannot make assumptions about how wake loss issues will ultimately affect each relevant development, and therefore whether they amount to a good reason to withhold development consent for a proposed scheme such as DBS. Put another way, if no provision is made in the DCO, the Secretary of State does not know whether and to what extent the Applicants and the Projco IPs will be able to resolve matters by commercial agreement, and what impact this will have on the financial viability of each respective project. The Secretary of State cannot assume that compensation will be recovered to address any impacts on viability, and thus cannot assume whether particular projects will be delayed or diminished as a result of wake effects from the scheme under consideration.

24. It follows that in my view there is a clear case for expressly addressing compensation for wake loss in the DCO. This will allow the Secretary of State to conclude that those effects can be addressed such that an impact on viability of other projects is avoided. Without such a provision, it is unclear how a conclusion can be reached either way on the policy question of whether the development of DBS will be likely to affect the future viability of the Dogger Bank A, B and C wind farms, and thus whether there is a matter which should be given “substantial weight” in the decision-making process.

25. In assessing the consequences for the viability of other projects, the Secretary of State must have regard to the terms on which development consent would be granted, but also the consequences of granting development consent without provision for the payment of compensation for losses. If, as the Projco IPs suggest, the effect of constructing DBS and not compensating for losses is that Dogger Bank A, B and C may be decommissioned earlier than is otherwise expected, then it seems clear that this is an effect on future viability. The provision of a compensation mechanism is capable of addressing the likely residual wake loss after all reasonable steps have been taken to avoid the losses through scheme design, therefore according with the mitigation hierarchy.

#### *Requirement or protective provision*

26. As I see it, the difficulty with a requirement is that it does not give clarity as to how these issues will ultimately be resolved. The Awel y Mor requirement does not resolve these matters, although it does impose a “check” on ensuring that the

project does not proceed until they have been reconsidered. However, it neither secures nor excludes the payment of compensation.

27. There is a general question as to whether a requirement can secure the payment of compensation. Section 120(2) Planning Act 2008 states that requirements may *in particular* correspond to what could be imposed as a planning condition. A planning condition cannot require the payment of compensation: DB Symmetry v Swindon BC [2022] UKSC 33. However, the fact that a requirement *may* fulfil the role of a planning condition does not mean that all requirements must fulfil that role. Further, s 120(3) read with paragraph 36 of Part 1 of Schedule 5 makes clear that a development consent order may make provision for the payment of compensation, without providing how that should be secured. In my view, therefore, a requirement may require the payment of compensation.
28. It is however entirely clear that a protective provision secured by a DCO may require the payment of compensation or provide for an indemnity. This is a common form of drafting, and appears in the DBS draft DCO in respect of protective provisions for Network Rail Infrastructure Limited (see paragraph 15 of Part 5 of Schedule 15 to the draft DCO).
29. A further advantage of a protective provision is that it can be enforced directly between the parties, without the need for enforcement action in respect of a breach of requirements by an enforcing authority. Protective provisions may also be modified through agreement. Where necessary disputes can be resolved under arbitration provisions where applied to a DCO (see article 47 of the draft DCO).
30. In those circumstances, it seems to me that the desire (in the draft NPS) for such matters to be resolved between developers is better achieved by protective provisions, rather than through a requirement which will necessarily have to be determined and enforced by the enforcing authority. I do not think that the absence of precedent for the use of protective provisions is a determinative, or even important, factor in deciding whether or not they should be imposed here.

Richard Turney KC  
Landmark Chambers

5 December 2025