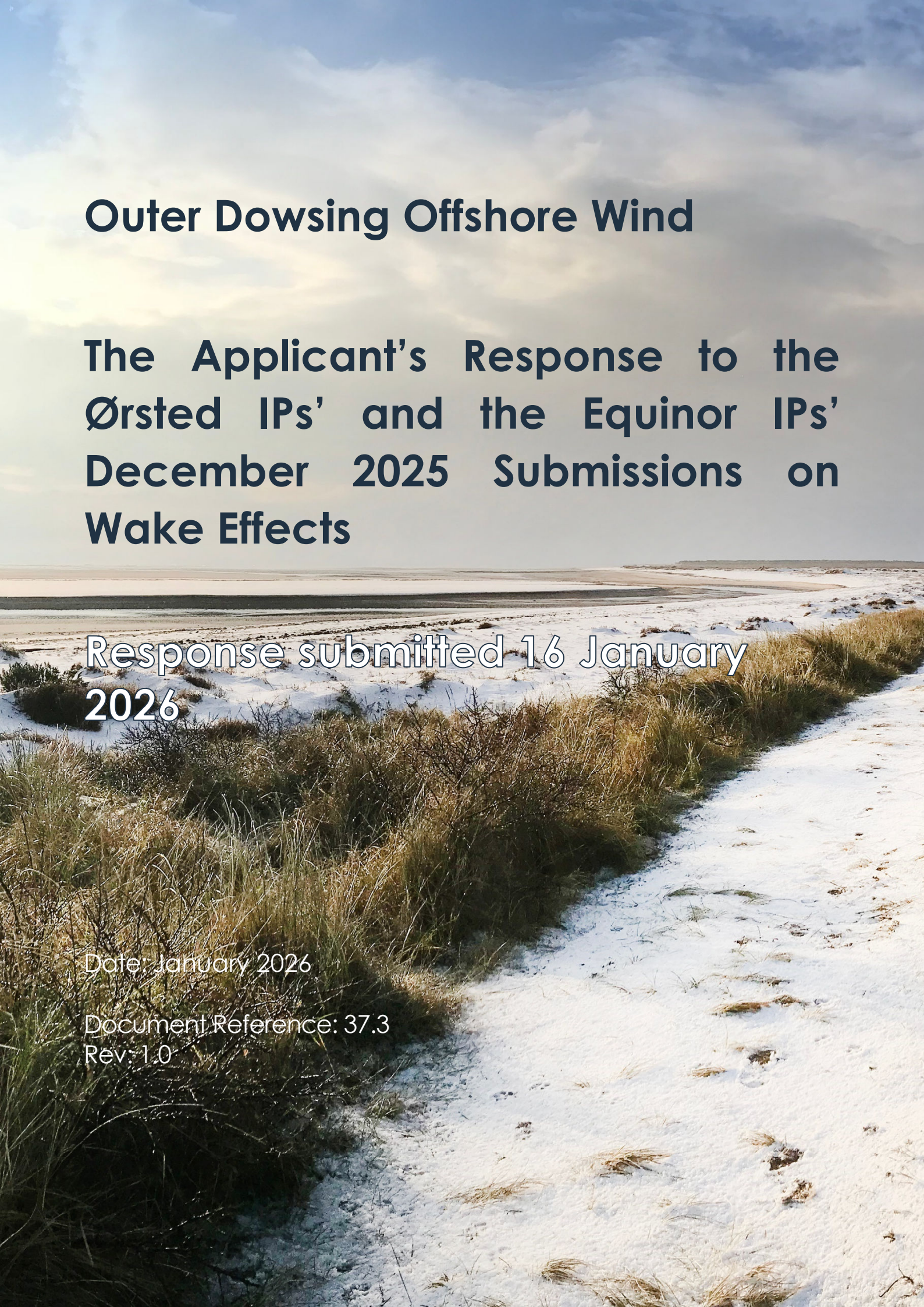

Outer Dowsing Offshore Wind

The Applicant's Response to the Ørsted IPs' and the Equinor IPs' December 2025 Submissions on Wake Effects

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Table of Contents

Acronyms & Definitions

Abbreviations / Acronyms

Abbreviation / Acronym	Description
AEP	Annual Energy Production
DCO	Development Consent Order
EIA	Environmental Impact Assessment
ExA	Examining Authority
IP	Interested Party
NPS	National Policy Statement
ODOW	Outer Dowsing Offshore Wind (The Project)
SoS	Secretary of State

Terminology

Term	Definition
The Applicant	GT R4 Ltd. The Applicant making the application for a DCO. The Applicant is GT R4 Limited (a joint venture between Corio Generation (and its affiliates), Total Energies and Gulf Development (GULF)), trading as Outer Dowsing Offshore Wind. The Project is being developed by Corio Generation, TotalEnergies and GULF.
Awel y Mor Decision	The Secretary of State's Decision to grant the development consent order for the Awel y Mor Offshore Wind Farm dated 20 September 2023.
Development Consent Order (DCO)	An order made under the Planning Act 2008 granting development consent for a Nationally Significant Infrastructure Project (NSIP).
EIA Regulations	Infrastructure Planning (Environmental Impact Assessment) Regulations 2017.
Environmental Impact Assessment (EIA)	A statutory process by which certain planned projects must be assessed before a formal decision to proceed can be made. It involves the collection and consideration of environmental information, which fulfils the assessment requirements of the EIA Regulations, including the publication of an Environmental Statement (ES).
Environmental Statement (ES)	The suite of documents that detail the processes and results of the EIA.
Five Estuaries Decision	The Secretary of State's Decision to grant the development consent order for the Five Estuaries Offshore Wind Farm dated 17 December 2025.
Mona Decision	The Secretary of State's Decision to grant the development consent order for the Mona Offshore Wind Farm dated 4 July 2025.
Morecambe Decision	The Secretary of State's Decision to grant the development consent order for the Morecambe Offshore Wind Farm Generation Assets dated 1 December 2025.
Morgan Decision	The Secretary of State's Decision to grant the development consent order for the Morgan Offshore Wind Farm Generation Assets dated 29 August 2025.

National Policy Statement (NPS)	A document setting out national policy against which proposals for Nationally Significant Infrastructure Projects (NSIPs) will be assessed and decided upon.
Outer Dowsing Offshore Wind (ODOW)	The Project.
The Project	Outer Dowsing Offshore Wind, an offshore wind generating station together with associated onshore and offshore infrastructure.

1 Introduction and Summary

1. The Applicant's position on the matter of wake effects is summarised as follows:
    a. the Applicant has undertaken the required assessment which demonstrates that the wake effects of the Project are very small, being less than 0.89%, and neither material in policy terms nor significant in EIA terms;
    b. those Interested Parties maintaining objections on the grounds of wake effects[1] have agreed with the methodology used by the Applicant's independent expert consultants to carry out the assessment of wake effects and the conclusions reached in relation to the quantification of wake effects in percentage terms; and
    c. the primary matter of substance between the parties is the consequence of the conclusions of the assessment for the Secretary of State's (**SoS**) decision making on the application for development consent for the Project. The Ørsted IPs and the Equinor IPs maintain that protective provisions ought to be imposed on the Development Consent Order (**DCO**) for the Project. The Applicant maintains its position that the imposition of any restriction on the Project's activities to deal with the matter of wake effects, either by way of requirement or protective provisions, would fail the legal and policy tests for imposing such restrictions and that there is no basis in law, policy, precedent or evidence for the financial compensation provisions requested by the Ørsted IPs and the Equinor IPs.
2. The Applicant maintains and reiterates its previous submissions on the matter of wake effects.
3. This submission responds to the representations by the Ørsted IPs and the Equinor IPs to the SoS's All Parties Consultation request dated 17 November 2025 (referred to as the **Ørsted IPs' December 2025 Submission** and the **Equinor IPs' December 2025 Submission**, respectively).
4. The Applicant has sought the opinion of Hereward Phillpot KC and Hugh Flanagan on the opinion of Richard Turney KC dated 17 December 2025 and appended to each of the Ørsted IPs' December 2025 Submission and the Equinor IPs' December 2025 Submission (the **RTKC Opinion**). A copy of the opinion of Hereward Phillpot KC and Hugh Flanagan (the **Counsel Opinion**) is appended to this submission at Appendix 1. The Counsel Opinion is supportive of the Applicant's position.
5. In particular, the Applicant highlights the following conclusions from the Counsel Opinion:

[1] Namely: (1) Hornsea 1 Limited; Breesea Limited, Soundmark Wind Limited, Sonningmay Limited and Optimus Wind Limited (the Hornsea 2 Companies); and Race Bank Wind Farm Limited (together, the Orsted IPs); and (2) Equinor New Energy Limited on behalf of Sheringham Shoal and Dudgeon Extensions ProjCo Limited (previously Scira Extension Limited) and Sheringham Shoal and Dudgeon Extensions HoldCo Limited (previously Dudgeon Extension Limited) (as developer of the Sheringham Shoal and Dudgeon Extension Offshore Wind Farm projects); Scira Offshore Energy Limited; and Dudgeon Offshore Wind Limited (the latter three known as the Equinor IPs).

a. *"It is well established that the planning system is concerned with land use in the public interest and does not exist to protect purely private interests*" (paragraph 14);

b. "*To the extent that ODOW may lead to reduced financial revenue for the Equinor and Orsted IPs and so affect their private commercial interests, this is not something that the planning system intends to protect"* (paragraph 20);

c. "*The policy* [NPS EN-3 paragraph 2.8.347] *needs to be interpreted correctly, having regard to its context and purpose. The policy refers to the "viability" – not profitability – of an activity. Nor is it concerned with a mere risk to viability, or some effect on viability, but it is only engaged when the proposed development is likely to affect future viability. On its plain meaning, the policy is concerned with a situation in which the activity is unlikely to remain viable."* (paragraph 22);

d. "*For the same reasons as set out above in respect of the Equinor IPs, we do not consider that this evidence presented by the Orsted IPs provides sufficient evidence for the Secretary of State to reasonably conclude that the policy test in NPS EN-3 (2024) para. 2.8.347 is met."* (paragraph 50);

e. "*The mitigation hierarchy and the requirement to mitigate and compensate only apply to likely significant effects. In the present case, the impacts on energy yield are all less than 1%. It does not seem possible to us to reasonably conclude that these could comprise likely significant effects for the purposes of the policy*." (paragraph 28);

f. "The legal and policy tests in respect of requirements logically apply to protective provisions also." (paragraph 30);

g. "It is important to stand back and appreciate what the Equinor and Orsted IPs are proposing. Their position is that development consent should be refused for ODOW (which is critical national priority infrastructure: NPS EN-1 Section 4.2) unless the developer is required, by legally binding protective provisions, to pay significant financial compensation to its commercial rivals for any commercial losses which they may suffer . It would involve one set of wind farm developers (the Orsted and Equinor IPs) being able to extract, through the planning system, a financial subsidy from another wind farm developer (the Applicant). That is contrary to the law and policy set out above and it has no precedent. It would be a misuse of the planning system. National policy now recognises as much in para. 2.8.233 of NPS EN-3 (2025), which confirms that any such arrangements should sit "outside the planning process"." (paragraph 39); and

h. "In summary, we agree with the Applicant's position that the protective provisions proposed by the Equinor and Orsted IPs have "no basis in law, policy or precedent" and we disagree with the contrary view advanced by RTKC (para. 40 of his opinion)…The approach proposed by the Equinor and Orsted would be wholly unprecedented and there is no lawful basis to adopt it." (paragraph 62).

2 The Applicant's Responses to Submissions by Interested Parties

6. The Applicant maintains its position that the protective provisions sought by the Ørsted IPs and the Equinor IPs are entirely inappropriate and have no basis in law, policy or precedent. The Applicant rejects the Ørsted IPs' and the Equinor IPs' characterisation of the Applicant's position as being "entirely false"[2] or "wholly inaccurate"[3] for the reasons set out in this submission and its earlier submissions on this issue.

Engagement

7. The Ørsted IPs and the Equinor IPs refer to the Applicant's previous comments[4] that the Ørsted IPs and the Equinor IPs have not engaged with the substantive points made by the Applicant on wake loss issues, particularly in relation to financial viability[5]. The Equinor IPs then go on to state that they have "*consistently presented evidence*" that the proposed development will affect the viability of their projects due to the impact of wake effects on AEP. Appendix 1 of the Equinor IPs' December 2025 Submission refers back to the Wake Loss Financial Impact Assessment appended to their Wake Effects Position Statement (REP6-143). Similarly, the Ørsted IPs refer back to the Ørsted IPs' Updated Financial Analysis in Appendix 1 of the Ørsted IPs' Submission between Deadlines 5 and 6 (AS-037) as being the source of the evidence that the Project would be likely to affect viability of their respective assets.

8. In paragraphs 73 to 102 of the Applicant's Submissions on Wake Loss Matters (REP6-120), the Applicant identified fundamental deficiencies in the adequacy and sufficiency of the evidence that has been put forward by the Ørsted IPs and the Equinor IPs. The Ørsted IPs and the Equinor IPs have not, at any stage in the months that have passed since the close of Examination, specifically responded to or addressed these deficiencies, instead they have simply referred back to the evidence which is the subject of criticism by the Applicant. The Applicant's criticism is not of the form of submissions that the Ørsted IP and the Equinor IPs have chosen to make, in cross referring back to previous submissions to avoid repetition, but rather that they have entirely failed to provide any substantive response to those points. The Applicant maintains its position that it would be reasonable for the SoS to infer that, if the Ørsted IPs or the Equinor IPs possessed any such evidence or had identified any such arguments, they would have put them before the SoS.

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2 Page 6, Ørsted IPs' December 2025 Submission

3 Page 7, Equinor IPs' December 2025 Submission

4 In particular, at paragraphs 20 and 21 of the Applicant's Response to RfI 2 – Wake Effects (C3-028)

5 Paragraph 2.2 of the Equinor IPs' December 2025 Submission and page 2 of the Ørsted IPs' December 2025 Submission

9. The Applicant notes the offer from the Ørsted IPs at the end of page 3 of the Ørsted IPs' December 2025 Submission that they would be happy to engage with the Applicant to develop a realistic range of figures for losses of operating margins. The burden is squarely on the Ørsted IPs to submit evidence to the SoS that demonstrates any claimed likely effect on viability. They have failed to do so.

Wake effects: the correct unit of measurement for decision-making

10. The Ørsted IPs and the Equinor IPs have repeated their misconceived suggestion that there is a contradiction in the Applicant's position that the wake effects from the Project are very small (being 0.89% or less) but that the protective provisions would require the payment of very large compensatory sums. There is no contradiction.
11. In short, the distinction between the two issues lies in the extent to which they engage public interest considerations. A reduction in the amount of renewable electricity generated (i.e. the percentage wake effect) directly engages the public interest in the generation of renewable energy. If, as here, that reduction is very small, the implications for the public interest will be correspondingly limited. By contrast, a reduction in revenue for the operator (i.e. the sum of money for which a compensation payment is sought) does not in itself directly engage the public interest. As explained below, the public interest is only engaged by such a reduction in revenue in certain very specific circumstances where it leads to consequences which themselves have public interest implications.
12. The Equinor IPs have also stated that: "*An important distinction must be recognised between the percentage reduction energy yield and the resultant economic loss.*"[6]
13. Firstly, in relation to the decision of the SoS in relation to the Mona Offshore Wind Farm DCO (the **Mona Decision**) (where similar financial information was available to the SoS), the SoS considered it appropriate to reach his decision on the basis of the percentage wake effect and the resulting impact on the greenhouse gas assessment. The SoS accepted that there would be a financial impact on the relevant offshore wind farm operators but concluded that there was insufficient evidence that wake effects will be likely to affect the future viability of any of the relevant infrastructure.[7]
14. Furthermore, the consideration of any figure for the purpose of decision-making must be set in its policy context. As the Applicant set out in the Applicant's Submissions on Wake Loss Matters (REP6-120), the purported financial losses put forward by the Equinor IPs and the Ørsted IPs are relevant only insofar as:
    a. those lead to a conclusion that viability of the relevant project is likely to be affected; or

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6 Paragraph 3.2, Equinor IPs' December 2025 Submission

7 Paragraph 4.83, Mona Decision

b. the financial loss suffered would have potential implications for the UK economy,

and therefore engage the public interest which the planning system is designed to protect (see paragraphs 19 to 26 of the Counsel Opinion: "*To the extent that ODOW may lead to reduced financial revenue for the Equinor and Orsted IPs and so affect their private commercial interests, this is not something that the planning system intends to protect*"). It is therefore not the Applicant's position that all economic losses are irrelevant for planning purposes[8] but that one of the above two thresholds must have been met and that this is demonstrated through evidence.

15. As the Applicant has previously identified,[9] the evidence put forward to support the Ørsted IPs' and the Equinor IPs' respective positions that viability would be affected suffers from fundamental flaws, such that it cannot be relied upon to support a conclusion that viability would be likely to be affected. Nor has any IP asserted or demonstrated through evidence that any financial impact arising from wake effects would have a material effect on the UK economy.
16. Given the inadequacy and flaws in the evidence related to viability submitted by the Ørsted IPs and the Equinor IPs, including that the financial analysis is described as "indicative" and the statements that the analysis does not intend to represent even the relevant party's internal view of the financial impact, it would be inappropriate for a decision on the Project, for which there is an urgent, clear and established need, including any restrictions to be attached to it, to be based on the financial values presented, rather than the percentage wake effects set out in the Wake Effects Assessment undertaken in the Wood Thilsted Report (REP6-108), which has been agreed by all parties as representing the extent of the wake effect of the Project.
17. For the avoidance of doubt, the Applicant rejects the characterisation of the level of revenue loss set out in the Ørsted IPs' Financial Impact Analysis (AS-037) as "undisputed" for the reasons set out in paragraphs 88 to 102 of the Applicant's Submissions on Wake Loss Matters (REP6-120).

Viability

18. In relation to viability, for the Ørsted IPs' and the Equinor IPs' case to succeed, they must succeed on both of the following arguments:
    a. that the correct interpretation of the wording of policy 2.8.347 of NPS EN-3 is that "*likely to affect the future viability"* means "likely to impact future financial decision-making"; and
    b. the financial information submitted by each of the Ørsted IPs and the Equinor IPs robustly demonstrates that viability is likely to be affected.
19. Both arguments fail for the reasons below.

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[8] See page 5, Ørsted IPs' December 2025 Submission, paragraph 23 of the RTKC Opinion

[9] Paragraphs 88 to 102 of the Applicant's Submissions on Wake Loss Matters (REP6-120)

20. The Applicant refers to paragraph 22 of the Counsel Opinion which explains (emphasis added):

"22. The policy needs to be interpreted correctly, having regard to its context and purpose. The policy refers to the "viability" – not profitability – of an activity. ***Nor is it concerned with a mere risk to viability, or some effect on viability, but it is only engaged when the proposed development is likely to affect future viability****. On its plain meaning, the policy is concerned with a situation in which the activity* ***is unlikely to remain viable****. The policy evidently presents a high bar, which is only right in circumstances where should the policy apply, substantial weight would be given against the grant of development consent for critical national priority infrastructure for which there is an urgent need, as set out in NPS EN-1 and EN3. The high bar also accords with the general principle that the planning system does not exist to protect private commercial interests; it is only when the activity is unlikely to remain viable that the public interest is engaged."*

21. The Ørsted IPs have sought to characterise the Applicant's position as that the policy wording means that the Ørsted IPs' assets would need to "*be rendered completely and immediately unviable*"[10] in order for paragraph 2.8.347 of NPS EN-3 to be engaged. Whilst such scenarios, if demonstrated by the evidence, would likely engage this policy wording, there may be others. Neither the Ørsted IPs nor the Equinor IPs have demonstrated through evidence that sets out details of profits, costs and operating margins at what stage they consider that their assets would become unlikely to remain viable.

22. The evidence submitted by the Ørsted IPs and the Equinor IPs is not capable of allowing the SoS to reasonably conclude that the Project would be "likely to affect the future viability" of any of the Ørsted IPs' or the Equinor IPs' assets. This is consistent with the SoS's previous decisions on the matter of wake effects.[11]

[10] Page 4, Ørsted IPs' December Submission

[11] For example paragraph 4.169 of the Morgan Offshore Wind Farm decision letter, set out at paragraph 45 of the Opinion

23. The Applicant has previously identified the fundamental deficiencies in the evidence submitted by the Ørsted IPs and the Equinor IPs in this regard (REP6-120). The Applicant notes that Richard Turney KC (**RTKC**) was requested to comment on whether the imposition of the protective provisions would be justified in the circumstances of the Project.[12] That question would require the critical review of the strength of the evidence on the question of viability of the Ørsted IPs' assets and the Equinor IPs' assets. The Applicant notes that RTKC makes no comment on the strength of that evidence nor is the question of whether the imposition of the protective provisions would be justified in the circumstances of the Project expressly answered in the affirmative. The RTKC Opinion proceeds on the assumption that the evidence submitted by the Ørsted IPs and the Equinor IPs is accepted.[13] In light of the deficiencies in the evidence base previously identified by the Applicant and, considering that a similar evidence base was not accepted by the SoS as showing that the Mona Offshore Wind Farm was likely to affect the future viability of any of the relevant Ørsted assets in that case, that assumption cannot be relied upon.

24. The Equinor IPs state at paragraph 2.4 that:

"In summary, Leading Counsel's Opinion concludes:

2.4.1 That the Equinor IPs have submitted evidence that the impacts identified in the Wood Thilsted Report would affect the future viability of their assets, as the economic loss involved as a consequence of wake effects would be very substantial. The impact on future viability would arise both as a consequence of the loss itself and also the potential resultant earlier decommissioning"

This is an overstatement of the conclusions of the RTKC Opinion, for the reasons explained at paragraph 22 and 23 above.

25. By contrast, paragraphs 41 to 52 of the Counsel Opinion contain a detailed consideration of the evidence before the SoS in this case. At paragraph 50, the Counsel Opinion concludes:

"For the same reasons as set out above in respect of the Equinor IPs, we do not consider that this evidence presented by the Orsted IPs provides sufficient evidence for the Secretary of State to reasonably conclude that the policy test in NPS EN-3 (2024) para. 2.8.347 is met. First, the evidence is only as to lifetime extension decisions and decommissioning dates, once viability has become more marginal in any event. Secondly, no quantitative viability analysis of this risk has been supplied in any event."

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12 Paragraph 16 d., RTKC Opinion

13 Paragraph 29, RTKC Opinion (emphasis added): "***If*** *it is accepted, as the Equinor and Ørsted IPs suggest, that there will be an impact on the economic viability…*"

26. The Ørsted IPs state at page 4 of the Ørsted IPs' December 2025 Submission that "[i]*t is telling that the Applicant has failed to provide a quantitative assessment of the likely impact of mitigation (including compensation) upon the business case of the Outer Dowsing Project*". Such an analysis is not relevant to the question of whether the Project would be likely to affect the future viability of the Ørsted IPs' assets. As explained at paragraph 52 of the Counsel Opinion, the onus is on those seeking to rely on the argument that the policy at 2.8.347 of NPS EN-3 is engaged to demonstrate through evidence that the Project is likely to affect future viability.
27. The Equinor IPs state at paragraph 3.1 of the Equinor IPs' December 2025 Submission that "*There is no argument that wake effect is an impact on the economics and potential viability of a wind farm. This is recognised in policy…The debate centres on how to appropriately address that impact*." The Applicant disagrees with this position. The wake effects arising from the Project are not significant in EIA terms or material in policy terms and the Equinor IPs have not demonstrated that viability is likely to be affected. There is therefore no need to address that impact.

Justification for further controls on the DCO generally

28. At section 8 of the Equinor IPs' December 2025 response, the Equinor IPs set out their response to the points made by the Applicant on paragraphs 66-82 of the Applicant's Response to RfI 2 – Wake Effects (C3-028) that it would not be appropriate to impose a requirement in this case.
29. At paragraph 8.3.1, the Equinor IPs state that the wake effects of the Project are not vanishingly small but that "*the Applicant's own evidence demonstrates that the economic losses suffered across the impacted projects would potentially be in the order of £164million to the net present value of the Equinor IPs' assets and consented projects.*" The Applicant's evidence, which has been accepted by the Equinor IPs demonstrates that the wake effects on the Equinor IP's assets would be at most 0.89%. The £164 million figure quoted is derived from the Equinor IPs' Financial Impact Analysis (REP6-143) and which has been the subject of a detailed critique by the Applicant (the Applicant's Submissions on Wake Loss Matters (REP6-120)). In any event, for the reasons set out above, having not established that the Project would be likely to affect the viability of any Equinor asset or that the economic losses suffered would engage the public interest, the relevant figure for the purposes of decision-making is the percentage reduction in AEP, in line with all other recent decisions on this topic[14], as further explained at paragraphs 10 to 17 above.

[14] The Awel y Mor Decision, the Mona Decision, the Morgan Decision, the Morecambe Decision, the Five Estuaries Decision

30. At paragraphs 8.2 and 8.3.2, the Equinor IPs state that their position has been "mis-characterised" on the issue of mitigation. There has been no such "mis-characterisation". The Equinor IPs acknowledged: "[f]*rom a practical perspective, the Equinor IPs do not consider that any proposed operational mitigation measures will be effective in addressing the impact in any event*".[15] The Equinor IPs now simply seek to change their position.

31. At paragraph 8.3.3, the Equinor IPs argue that the Applicant cannot have considered mitigation when it previously sought to argue that the policies applying to "*other offshore infrastructure and activities*" do not apply to wake effects. As the Applicant explained in section 1 of the Applicant's Response to RfI 2 – Wake Effects (C3-028), the Applicant has consistently approached this matter acknowledging that there is the potential for the SoS to reach the conclusion that these policies do apply to wake effects, and its evidence and submissions to the Examination were therefore entirely focussed on addressing the implications of such a conclusion. Indeed, the Applicant had already carried out its initial assessment of wake effects (REP4-114) before the Equinor IPs engaged with this topic during the Examination.

32. The Applicant highlights that the Equinor IPs seek to apply the wrong test for whether mitigation ought to be implemented as part of a project in referring to whether or not mitigation is "possible".[16] The test is not whether mitigation is "possible" but whether it is necessary to reduce the likely significant environmental effects of a development or is necessary to make the development acceptable in the public interest. In this case, the level of effect predicted to arise from the Project is a maximum of 0.89%, below the level that could reasonably considered significant. Furthermore, the Applicant has presented evidence that shows that the wake losses between offshore wind developments are considerably smaller than those which take place within arrays and therefore adjustments that are made with the aim of further reducing wake effects are likely to have a disproportionate effect on the internal wake effects of the Project and the overall generation output.[17] That evidence is consistent with the conclusions shown by the evidence presented in other offshore wind farm examinations, as the Applicant set out on pages 14 and 15 of the Applicant's Response to the Second All Parties Consultation (C5-009).

15 Paragraph 32, The Equinor IPs' Deadline 5 Submission (REP5-157)

16 Paragraphs 8.3.4 and 8.3.5 of the Equinor IPs' December 2025 Submission.

17 See Array Layout Yield Study (REP2-056)

Justification for compensation

33. The Ørsted IPs and the Equinor IPs submit that, in respect of the Morecambe Offshore Wind Farm Order 2025, the SoS saw fit to include a requirement to protect against wake impacts that ranged between 0.32% and 1.37% for the impacted assets. They go on to state that "[p]recedent has clearly been set"[18] that wake effects akin to those which are predicted to arise as a result of the Project warrant further control in the DCO.

34. The Applicant highlights that the wording of the requirement in the Morecambe Offshore Wind Farm Order 2025 was agreed between the parties, which is distinguishable from the current case. As a result of the requirement being common ground between the relevant parties, the rationale for its inclusion on the face of the DCO is dealt with lightly in the Morecambe Decision, without a fully articulated assessment of the conclusions reached on each of the six tests. It cannot therefore form a clear precedent as suggested by the Ørsted IPs and the Equinor IPs.

35. The Ørsted IPs also acknowledge at page 7 of the Ørsted IPs' December 2025 Submission that the relevant Ørsted entities for the Morecambe DCO "*did not submit protective provisions (as the facts and circumstances were different to those of the Outer Dowsing Project)*".

36. Furthermore, in Five Estuaries Decision, the SoS concluded that the wake effects of 1.3% (i.e. a greater percentage effect than for the Project) would result in generating losses to third party assets that are "*relatively modest and therefore marginal*". No controls were considered to be required on the DCO to further regulate the matter of wake effects and the SoS ascribed the matter very little negative weight in the planning balance. It therefore cannot be said that precedent has clearly been set that controls are required for wake impacts that are as low as 0.32%. The Applicant also notes that the predicted wake effect on the Sheringham Shoal Extension Project as set out in Table 3 of the Wood Thilsted Report (REP6-108) is 0.30%.

37. The Equinor IPs then go on to state: "*Draft EN-3 2025 requires that an applicant must have "taken all reasonable steps to minimise as far as possible the impact of wake effects and shown that they have made reasonable efforts to work collaboratively with those who are likely to be impacted""*[19] and assert that "[i]*t is reasonable to assume that a natural collaborative step is to reach agreement with a third party operator to regulate wake effects*" and that this is what is meant by the policy wording in the 2025 NPS.[20]

38. The Equinor IPs appear to have quoted a previous draft of the 2025 NPS, rather than the, now published, 2025 NPS EN-3. The actual, finalised wording of paragraph 2.8.316 is as follows:

"Where an applicant has demonstrated that they have made an assessment of inter-array wake and shown that they have made reasonable efforts to work collaboratively with those who may potentially be impacted to mitigate impacts, then the existence of a residual wake effect impact is unlikely to carry more than limited weight against a project in the planning process."

[18] Page 4, Ørsted IPs' December 2025 Submission and paragraph 3.6, Equinor IPs' December 2025 Submission

[19] Paragraph 3.7, Equinor IPs' December 2025 Submission

[20] Paragraph 3.8, Equinor IPs' December 2025 Submission

39. The Applicant has carried out an assessment of the inter-array wake effects as required by the policy and has continued discussions with the Equinor IPs and the Ørsted IPs throughout the consenting process. At no point has either party proposed a form of mitigation that they believe would be appropriate to mitigate wake effects for the Applicant to consider[21]. The Equinor IPs have previously acknowledged "[f]*rom a practical perspective, the Equinor IPs do not consider that any proposed operational mitigation measures will be effective in addressing the impact in any event*".[22] This supports the Applicant's position that the evidence before the SoS indicates that there is no further mitigation likely to be available that would address the issue. Again, this is a point that has been made repeatedly by the Applicant both during the six month examination and subsequently in representations to the SoS. Despite that, no evidence to the contrary has been submitted by either the Ørsted IPs or the Equinor IPs.

40. Contrary to the position advanced by the Equinor IPs, paragraph 2.8.316 of the 2025 NPS EN-3 does not require the Applicant to agree that wake effects require regulation in the DCO and the method of doing so. This is not the ordinary and natural meaning of "work collaboratively". Whilst the 2025 NPS EN-3 does not have effect for the purposes of the Planning Act 2008 in relation to the determination of the application for development consent for the Project, the Applicant maintains that it has satisfied the requirements of paragraph 2.8.316 of the 2025 NPS EN-3 and therefore the existence of the residual wake effects predicted to arise as a result of the Project should carry no more than limited weight in the planning process. The limited weight to be afforded to this issue in the planning process certainly does not justify the protective provisions being proposed by the Equinor IPs and the Ørsted IPs.

41. The Ørsted IPs and the Equinor IPs submit, relying on the RTKC Opinion, that the 2025 versions of NPS EN-3 should be interpreted as meaning that compensation may be required for cases of wake loss but not necessarily in all cases. The Applicant firmly disagrees with this position.

42. As highlighted at paragraph 32 of the Counsel Opinion, the approach of the Ørsted IPs and the Equinor IPs is "*directly contrary to that adopted in the revised policy*". Whilst the revised 2025 version NPS EN-3 does not have effect for the purposes of section 104 of the Planning Act 2008, it is clearly now an important and relevant consideration in the decision-making process in respect of this issue. As explained in paragraph 31 of the Counsel Opinion, the fact that the 2025 NPSs have now come into force means the SoS can reasonably apply greater weight to them than they were in draft.

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[21] The Ørsted IPs assert, at page 6 of the Ørsted IPs' December 2025 Submission that the protective provisions provide for that mitigation. The Applicant refers to its comments at paragraphs 59 and 60 and 77 to 79 of the Applicant's Response to RfI 2 – Wake Effects (C3-028).

[22] Paragraph 32, The Equinor IPs' Deadline 5 Submission (REP5-157)

Requirement or protective provisions

43. The Applicant notes that neither the Ørsted IPs nor the Equinor IPs have sought to argue that the protective provisions they are proposing to include do meet the tests for the imposition of a requirement in paragraph 4.1.16 of NPS EN-1 (necessary, precise, relevant to planning, relevant to the development, enforceable and reasonable in all other respects). The Applicant submits that the SoS can reasonably conclude from this that the Equinor IPs and the Ørsted IPs accept that the form of protective provisions they propose do not meet these tests.

44. Instead, the Equinor IPs argue that protective provisions serve an entirely different purpose and therefore the tests for the imposition of requirements do not apply to protective provisions.

45. The Applicant firmly disagrees with this position. The Applicant highlights paragraph 30 of the Counsel Opinion which states:

"The legal and policy tests in respect of requirements logically apply to protective provisions also. A set of protective provisions has the same legal and practical effect as a requirement of restricting the development consent, and criminal sanctions for breach would apply equally in respect of both, such that they need to be justified in the same way. The six tests for the imposition of a requirement in paragraph 4.1.16 of NPS EN-1 (necessary, precise, relevant to planning, relevant to the development, enforceable and reasonable in all other respects) appear to us to be equally apposite when determining whether it would be appropriate to impose a legal obligation on an undertaker in a DCO by means of protective provisions. Indeed, we consider it hard to conceive how it could be lawful for such provisions to be imposed in a DCO unless the Secretary of State concluded that all those tests had been met. The RTKC Opinion does not grapple with this issue."

46. The Equinor IPs and the Ørsted IPs emphasise that protective provisions are an established mechanism to safeguard existing assets, licensable activities and operations of statutory undertakers. [23] The Equinor IPs and the Ørsted IPs cite a number of examples where compensation provisions are included in the relevant protective provisions as precedent for their proposed form of protective provisions. These examples all concern instances where the grant of the DCO interferes with an established legal right which would give rise to a claim for compensation or damages under a separate legal regime, such as interference with a property right or compensation for damage under tort. As highlighted at paragraphs 35 to 37 of the Counsel Opinion, the development of the Project does not result in such an interference.

[23] Page 9, Ørsted IPs' December 2025 Submission, paragraph 4.5, Equinor IPs' December 2025 Submission

47. The Equinor IPs state that "*It is relevant…that no examining authority has previously deliberated on whether protective provisions are the effective means to properly address economic loss arising from wake effects*."[24] A similar statement is made in section 7 and at page 5 of the Ørsted IPs' December 2025 Submission, relying on the RTKC Opinion. This is incorrect. As noted at paragraph 61 of the Counsel Opinion, the Awel y Mor decision did involve the rejection of a suggestion by an Interested Party[25] that either a requirement or protective provisions should be imposed to secure compensation for wake loss[26]. The fact that it has been reported that developers have reached commercial agreements in relation to wake loss for the Mona and Morgan Offshore Wind Farms[27] does not justify the imposition of protective provisions in this case. Firstly, clear distinctions can be drawn between the circumstances in the Mona and Morgan Offshore Wind Farms and the current case. These are set out at paragraphs 38 to 47 of the Applicant's Response to RfI 2 – Wake Effects. Secondly, the fact that a commercial agreement has been reached outside of the planning process does not justify the imposition of further restrictions within the DCO, as set out in paragraph 2.8.233 of 2025 NPS EN-3. Thirdly, the Five Estuaries decision makes clear that there will be cases where the degree of wake effect, being greater in that case than anticipated for the Project, justifies no further controls on the DCO at all.

48. The Ørsted IPs and the Equinor IPs, relying on the RTKC Opinion, state that it is an advantage of a protective provision over a requirement 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.[28] It is unclear for whom this is considered to be an advantage given the recourse to expert determination and arbitration takes the decision away from a decision-maker who is obliged to act in the public interest and the protective provisions proposed do not give any guidance as to how such disputes are to be resolved other than by reference to what is reasonable.

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[24] Paragraph 4.1, Equinor IPs' December 2025 Submission

[25] Rhyl Flats Wind Farm Ltd.

[26] See the Awel y Mor ExAR at para. 5.14.83, commenting on Appendix A of [REP7-058] and [REP8-109] (see ExAR paras. 5.14.65 and 5.14.74), and DL para. 4.178. In section 12 of [REP8-109] Rhyl Wind Farm Ltd. requested that compensation provisions should be included by way of an additional protective provision.

[27] As stated at pages 6 and 7 of the Ørsted IPs' December 2025 Submission and at paragraph 7.2 of the Equinor IPs' December 2025 Submission

[28] Page 5, Ørsted IPs' December 2025 Submissions, paragraph 4.3, Equinor IPs' December 2025 Submission paragraph 35, RTKC Opinion

49. Similarly, the Ørsted IPs and the Equinor IPs, relying on the RTKC Opinion, state 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*".[29] As highlighted at paragraphs 32 to 34 of the Counsel Opinion, this is the opposite of what the policy and the accompanying supplementary guidance says. Up to date policy in NPS EN-3 (2025) para. 2.8.233 is clear that "*there is no expectation that … inter-project compensation arrangements are a necessary means to mitigate the impact of wake effects".* The supplementary guidance similarly provides that "*The planning system will not adjudicate on matters of compensation for wake loss"*[30]. Policy and guidance are clear that the protective provisions should not be included in the DCO.

Draft protective provisions

50. In section 5 of the Equinor IPs' December 2025 Submission, the Equinor IPs respond to the Applicant's comments on the draft protective provisions. The Applicant reiterates its position that the protective provisions of the nature sought by the Ørsted IPs and the Equinor IPs are inappropriate. The Applicant responds to each of the points made below.
51. At section 5.2.1, the Equinor IPs make comment on the appropriateness of the threshold set by a benchmark requiring "all reasonable measures" to "minimise" an impact. Following the submission of the updated form of protective provisions in the Equinor IPs' Responses to Secretary of State's Consultation 1 (C1-009), that wording no longer appears in the form of protective provisions being sought by the Equinor IPs. The point the Equinor IPs are seeking to make in this paragraph is therefore unclear. In addition, as noted at paragraph 38 above, the Equinor IPs appear to have quoted a previous draft of the 2025 NPS. The wording on which the Equinor IPs seek to rely to support their case has been removed in the, now published, 2025 NPS EN-3.
52. The points made by the Equinor IPs in paragraphs 5.2.2 and 5.3 of the Equinor IPs' December 2025 have been responded to by the Applicant at paragraphs 43 to 47 above.

[29] Page 5, Ørsted IPs' December 2025 Submission, paragraph 2.4.6, Equinor IPs' December 2025 Submission paragraph 36, RTKC Opinion

[30] Paragraph 1.4, Supplementary Guidance on Wake Effects in relation to 2025 NPS EN-3

53. The Equinor IPs state at paragraph 5.4 that the need to take account of the impacts of a proposed development on the future viability of existing offshore infrastructure supports the Equinor IPs' position that it is not the degree of wake loss effects that is relevant to consider but the need to mitigate those effects. This position is not supported by policy. Firstly, as explained in paragraph 28 of the Counsel Opinion, the mitigation hierarchy is concerned with likely significant effects, i.e. the degree of wake loss effects is relevant. Secondly, taken to its logical conclusion, the Equinor IPs' position is that decision-making should treat the circumstances in which wake effects which are likely to render a project unviable in the same way as those which do not. That is contrary to the wording of policy 2.8.347 of NPS EN-3 which provides that substantial weight should be given to the former scenario but not the latter. Thirdly, the 2025 NPS EN-3 confirms at paragraph 2.8.233 that "*there is no expectation that wake effects can be wholly removed between developments, or that inter-project compensation arrangements are a necessary means to mitigate the impact of wake effects*" – the degree of effect is therefore also relevant. The Five Estuaries decision makes clear that there will be cases where the degree of wake effect, being greater in that case than anticipated for the Project, justifies no further controls on the DCO at all. Fourthly, the Equinor IPs' draft protective provisions do not require mitigation of the effects, they require financial compensation. Fifthly, the Applicant submits that it is not possible to determine whether an impact has been adequately mitigated unless one considers the degree of the remaining wake loss effect. In this case, that remaining effect is very small, being 0.89% or less in each case and no further mitigation is required.

54. The Equinor IPs[31] and the Ørsted IPs,[32] respond to the comments made by the Applicant in paragraph 27 of the Applicant's Response to RfI 2 – Wake Effects (C3-028). In that submission, the Applicant highlighted the imbalance in the respective positions of the parties that would occur in the event of disagreement between the parties were the protective provisions sought by the Ørsted IPs and the Equinor IPs to be imposed. The Applicant maintains its position in this regard. The Equinor IPs and the Ørsted IPs state that the recourse to arbitration is objective and therefore does not put control in the hands of the protected party but instead the parties would be on equal footing. This submission ignores the realities of commercial offshore wind farm development. During the period of resolution of any dispute, the Applicant would be under pressure to make key project development decisions, such as finalising project layout, preparing material for discharge of conditions and requirements and taking key financial decisions. None of these can progress effectively until a resolution is reached on the Wake Loss Mitigation Scheme. By contrast, the Equinor IPs and the Ørsted IPs would be under no such time constraint. The Ørsted IPs state that there would be a "non-existent" commercial benefit to their delay in reaching agreement. The wider programme implications for the Project mean that a commercial benefit to the Ørsted IPs of extracting greater value from the negotiations would be likely. In addition, no guidance is given in the protective provisions as to how the arbitrator is to reach a decision on what is "reasonable" and it is possible for a wide range of figures to be considered "reasonable". The uncertainty of quantum of compensation would be felt more heavily by the Project, given its development stage, than any of the Ørsted IPs' or Equinor IPs' assets.

55. The Ørsted IPs have also stated that they consider the arbitration provisions in the protective provisions to be supported by policy.[33] The Applicant refers to its comments at page 13 of the Applicant's Response to the Second All Parties Consultation (C5-009). The wording of paragraph 2.8.262 of NPS EN-3 is far from a direction to the SoS that he must provide for dispute resolution where there are adverse impacts on commercial activities (emphasis added): "***In some circumstances****, the Secretary of State* ***may wish to consider*** *the* ***potential*** *to use requirements involving arbitration as a means of resolving how adverse impacts on other commercial activities will be addressed.*" This policy also needs to be seen in light of the specific policy on wake loss compensation arrangements not being necessary, now set out in NPS EN-3 (2025) para. 2.8.233.

31 Paragraph 6.4, Equinor IPs' December 2025 Submission

32 Page 9, Ørsted IPs' December 2025 Submission

33 Page 6, Ørsted IPs' December 2025 Submission

56. The Ørsted IPs assert that the protective provisions do not require a financial compensation payment to be made.[34] This is not reflected in the drafting proposed in the latest form of protective provisions proposed by the Ørsted IPs in the Ørsted IPs' Response to the SoS's Consultation 1 (C1-003). Paragraph 4(4) of those protective provisions only carve out the need for a payment mechanism in the Wake Loss Mitigation Scheme in circumstances where the wake effects are reduced "to zero".

57. The Ørsted IPs and the Equinor IPs make no attempt to respond to the points of detail made by the Applicant at paragraphs 58 to 61 and 63 of the Applicant's Response to the Second RfI – Wake Effects (C3-028).

Cooperation

58. At paragraph 6.1 of the Equinor IPs' December 2025 Submission, the Equinor IPs set out their position that: "[w]*here operators of proximate schemes might have competing interests, it is sensible, reasonable and in the interests of progress and development that a framework for cooperation and, where appropriate, compensation is established*."

59. As support for this position, the Equinor IPs cite two examples where interface arrangements have been established, namely the standard National Grid Electricity Transmission (**NGET**) protective provisions that seek to protect the delivery of future schemes[35] and the similar approach adopted on proximate solar farms.[36]

60. Neither example aids the Equinor IPs' case as:

    a. Both the NGET and the solar farm examples relate to circumstances where there is a physical area of land that is required to be used both for the construction of the assets which are the subject of the relevant Order and the future assets and there is therefore a desire to manage that interface in the interests of both parties;

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34 Page 6, Ørsted IPs' December 2025 Submission

35 The Equinor IPs cite The Awel y Mor Offshore Wind Farm Order 2023 Schedule 9, Part 3 paragraph 22

36 The Equinor IPs cite The Heckington Fen Solar Farm Order 2025, Schedule 13 Part 11 (For the Protection of Beacon Fen Energy Park Limited)

b. The terms of the NGET protective provisions cited require the undertaker to use reasonable endeavours to avoid any conflict arising between the construction, maintenance and operation of the authorised development and the future development. "Reasonable endeavours" is defined as undertaking consultation to ensure that the design and programme for the relevant works does not unreasonably impede or interfere with the future project, having regard to the proposed programme and facilitating a coordinated approach, providing a point of contact for continuing liaison and keeping NGET informed of programme of works for the authorised development. There is no reference to payment of compensation, provision of security or indeed any absolute obligation to avoid interfering with the future works. The cited provisions bear no relation to those being sought by the Equinor IPs; and

c. Similarly the relevant provisions of the Heckington Fen Solar Park Order 2025 require, broadly, consultation in the formulation of methods of working and timing of works within the relevant interface area, working in good faith, the need to have regard to reasonable representations of the developer of the third party project, giving notice of the start and end of works in the interface area and allowing inspection. Again, there is no reference to payment of compensation, provision of security or an absolute obligation to avoid interfering with the future works. These provisions cannot be relied on in support of the protective provisions proposed by the Equinor IPs.

61. On the matter of collaboration generally, and in response to paragraph 6.2 of the Equinor IPs' December 2025 submission, the Applicant refers to its submissions at paragraphs 37 to 40 of the Applicant's Submissions on Wake Loss Matters (REP6-120) and 29 and 30 of the Applicant's Response to RfI2 – Wake Effects (C3-028). The Applicant disagrees that it has "refused to recognise the findings" of the Wood Thilsted Report (REP6-108) that there will be an adverse impact on existing infrastructure by putting in place mitigation and compensation measures. The Applicant reiterates that the conclusions of the Wood Thilsted Report demonstrate that the wake effects from the Project are very small (being at most 0.89%) and therefore there is no need for mitigation or compensation. As set out at paragraphs 33 to 42 above and paragraphs 32 to 34 of the Counsel Opinion, the requirement for compensation is not supported by policy.

3 Comments on the Interested Parties' draft without prejudice DCO requirement

63. The Applicant maintains its position that the imposition of any controls on the DCO to regulate the matter of wake effects is not justified in this case for the reasons set out in detail at section 3 of the Applicant's Response to RfI 2 – Wake Effects (C3-028) and section 5 of the Applicant's Submissions on Wake Loss Matters (REP6-120).

64. If, however, the SoS takes a different view, the Applicant maintains that the without prejudice requirement in the form proposed by the Applicant should be preferred. An updated formulation of the Applicant's without prejudice requirement is appended at Appendix 2.

65. The Applicant responds to the adjustments made by the Equinor IPs and the Ørsted IPs in their draft without prejudice requirement below.

66. The Applicant notes that the Equinor IPs and the Ørsted IPs have identified similarities between their proposed without prejudice requirements and Requirement 13 of the Morecambe Offshore Wind Generation Assets Order 2025. The Applicant notes that the Requirement 13 of the Morecambe Offshore Wind Generation Assets Order 2025 was agreed between the relevant parties and therefore is distinguishable from the current case.

Paragraph (1) - Introduction of duty to consult on wake effects plan

67. The Applicant notes at paragraph (1) of the Equinor IPs' and the Ørsted IPs' without prejudice requirement that a duty to consult with each of the owners of the existing and proposed third party offshore wind farms is imposed on the SoS prior to approval of the wake effects plan. Whilst the Applicant considers the adjustment to be unnecessary as the SoS would likely use his or her discretion to consult the relevant asset owners, should the SoS consider it necessary and appropriate to impose a requirement in this case, the Applicant has no objection to this amendment.

Paragraph (1) - Introduction of limb 1(b) relating to "alternative mitigation" and the introduction of limb (c) allowing a combination of limb (a) and (b) to be relied upon to discharge the requirement

68. The Applicant maintains, for the reasons set out in detail at paragraph 82 of the Applicant's Response to RfI 2 – Wake Effects (C3-028) that limb (b) clearly fails all six of the policy tests set out in paragraph 4.1.16 of NPS EN-1 and therefore should not be imposed on the DCO for the Project. This is all the more acute in the Equinor IPs' formulation of limb (b) which makes explicit that "alternative mitigation" can include compensation for economic loss.

69. The Ørsted IPs refer to the commercial agreement reached between the relevant Ørsted entities and the applicant for the Mona DCO in order to discharge limb (b) to argue that the Applicant's position that this limb is unworkable in practice and non-compliant with policy is false.[37] The fact that a commercial agreement has been reached on another project in circumstances where the SoS's grant of the DCO and the discharge of the requirement are unchallenged does not demonstrate that the imposition of such a requirement is policy-compliant, lawful or workable.

70. Paragraph 2.8.233 of the now published 2025 NPS EN-3 states:

"However, there is no expectation that wake effects can be wholly removed between developments, or that inter-project compensation arrangements are a necessary means to mitigate the impact of wake effects, although developers may opt to take such approaches outside of the planning process."

71. The clear effect of paragraph 2.8.233 (i.e. that inter-project compensation arrangements belong outside of the planning process) is that limb (b) ought not to be imposed. The SoS would be entitled to afford this provision of the 2025 NPS EN-3 greater weight now that the 2025 NPS EN-3 is published and is no longer in draft.

72. The Applicant notes that, as justification for the inclusion of limb (b), the Equinor IPs refer to the policies on economic loss in the draft (and now published) NPS EN-3. In doing so, the Equinor IPs conflate "economic loss" generally with the policies on viability. As set out at paragraphs 10 to 28 above and paragraphs 22 to 34 of the Counsel Opinion, there is an important distinction to be drawn between private financial loss and economic loss that engages questions of viability. The potential for private financial loss to be suffered does not, in itself, justify the imposition of limb (b) unless the public interest is engaged.

73. If limb (b) were to be imposed, then the inclusion of limb (c) would be appropriate. However, since the imposition of limb (b) would fail the tests for imposition of a requirement for the reasons set out in detail at paragraph 82 of the Applicant's Response to RfI 2 – Wake Effects (C3-028), limb (c) is not needed.

Paragraph (1) – timing of discharge of requirement

74. The Equinor IPs have proposed that the time limit for discharge of the requirement is brought forward so that construction of the turbines cannot commence until the requirement is discharged. The Applicant is content to accept this amendment and has updated its without prejudice requirement accordingly at Appendix 2.

[37] Page 10, Ørsted IPs' December 2025 Submission

Paragraph (2) – new limb (a)

75. The Ørsted IPs and the Equinor IPs propose a new limb (2)(a) which requires the wake effects plan to provide an assessment of the wake effects on the Equinor IPs' and the Ørsted IPs' assets. The Applicant has already carried out an assessment of the wake effects of the Project (Wood Thilsted Wake Impact Assessment Report (REP6-108)). That assessment was carried out on a "worst case scenario" basis and was agreed by the Ørsted IPs and the Equinor IPs as being a suitable basis to ascertain the potential wake effects of the Project. The requirement for further assessment therefore fails the test of necessity. This aligns with the approach taken for environmental effects where, provided the authorised development is within the consented parameters, further assessment is not required.

Paragraph (2) – deletion of "reasonable"

76. Under the Applicant's proposed without prejudice requirement, the wake effects plan was required to set out "*details of reasonable steps that have been taken by the undertaker to minimise wake effects on the existing and proposed third party offshore wind farms whilst maximising the capacity of the authorised development within the identified technical, environmental and other constraints of the authorised development.*"[38] Both the Equinor IPs and the Ørsted IPs have proposed that the "reasonable" qualifier is deleted. The Equinor IPs propose that reference is made to "all steps".

77. The Applicant strongly resists the deletion of "reasonable". The Applicant should not be obliged to consider any conceivable form of mitigation, regardless of its effect on the overall generation capacity of the Project and the third party projects, its deliverability, its proportionality or its potential effect on technical, engineering or environmental constraints, such as on shipping and navigation. Such an approach would be contrary to policy and the public interest. Indeed, it is symptomatic of the Ørsted IPs and the Equinor IPs failure to engage properly with either matter that they seek to remove the word "reasonable" (which is intended to ensure that the requirement, if imposed, would not give rise to unreasonable and unduly onerous restrictions on the undertaker).

[38] Page 23, the Applicant's Response to RfI 2 – Wake Effects (C3-028)

Paragraph (2)(b) – consideration of operational mitigation

78. The Equinor IPs and the Ørsted IPs have proposed that the wake effects plan should consider the steps taken during the operation of the Project to minimise wake effects, as well as steps taken during the design stage. The Applicant submits that such an amendment is inappropriate. In order to be able to attach weight to mitigation for the purposes of decision-making, the mitigation measure in question must be clearly articulated, sufficiently precise and there must be a reasonable certainty in its delivery. There is no evidence to suggest that any operational mitigations are available or, if they are, that they would be effective in reducing the wake effects of the Project on the Equinor IPs' and Ørsted IPs' assets without significantly curtailing the generation output of the Project.

Paragraph (2)(b) – amendments to balancing exercise

79. The Applicant's proposed without prejudice requirement reflects the terms of Requirement 29 of the Mona Offshore Wind Farm Order 2025 in that, when approving the wake effects plan, the SoS must balance the need to minimise wake effects whilst "*whilst maximising the capacity of the authorised development within the identified technical, environmental and other constraints of the authorised development.*"

80. The Ørsted IPs and the Equinor IPs have suggested amending how this balance is to be struck by requiring instead that the capacity of the Project is not materially reduced and deleting the "*within the identified technical, environmental and other constraints of the authorised development"* qualifier.

81. The Applicant highlights that both the need to maximise the generation from the Project and the need to account for other constraints are squarely in line with policy. Paragraph 2.8.2 of NPS EN-3 states: "*To meet its objectives government considers that all offshore wind developments are likely to need to maximise their capacity within the technological, environmental, and other constraints of the development.*" The formulation proposed by the Applicant therefore most closely aligns with the policy framework which governs the SoS's decision, as well as reflecting the realities of offshore wind farm design which necessarily involves the consideration of multiple constraints. The Applicant submits that it is entirely appropriate that these potentially competing constraints are acknowledged in the need to strike the balance between reducing wake effects on the one hand and the delivery of the significant amount of renewable energy generation from the Project on the other.

82. The Applicant notes that the Ørsted IPs propose deleting the reference to other constraints because it would be challenging for the SoS to evaluate any constraints presented by the undertaker when discharging this requirement as the undertaker could present its subjective view on constraints as absolute. The Applicant submits that, in the event that the SoS was unconvinced as to the nature of any constraint, it would be open to the SoS to request further evidence from the Applicant to justify its position. Such an approach is taken frequently in the determination of consent decisions where an applicant takes the position that it is unable to commit to a particular form of mitigation.

83. The adjustment from "maximise" to "without materially reducing" introduces a considerable amount of uncertainty in how the balance between these two competing interests is to be struck and what constitutes a material reduction. The Applicant notes that the only justification presented for this amendment is that it reflects that agreed between the applicant for the Morecambe Offshore Wind Farm DCO and relevant affected Ørsted asset owners. This formulation of the requirement fails the test of precision.

84. The Applicant also considers it appropriate to clarify precisely what is meant by "capacity" in this context. It is clear that the wording of paragraph 2.8.2 of NPS EN-3 is intended to refer to the amount of renewable electricity that is generated from the authorised development, rather than the nameplate capacity of the development. This will also ensure that the balancing exercise undertaken compares "like with like", i.e. the reduction in electricity generated by the Ørsted IPs' and the Equinor IPs' assets due to wake effects on the one hand with any corresponding reduction in electricity generated by the Project as a result of mitigation on the other. For this reason, the Applicant proposes to include the following definition of capacity in the without prejudice requirement:

    "capacity" means: "the amount of electricity that is generated from the authorised development".

85. The complete wording of the Applicant's revised without prejudice requirement is included at Appendix 2 of this submission.

Paragraph 2 – matters to be included in the wake effects plan – timescales for implementation of wake effects measures and time limits for their implementation[39]

86. Should the SoS consider it necessary and appropriate to impose a requirement in this case, the Applicant has no material issue with the inclusion of these topics in any wake effects plan.

Paragraph 2 – matters to be included in the wake effects plan – monitoring[40]

87. The Applicant submits that the inclusion of monitoring measures in any wake effects plan is not justified. The Applicant notes that the only rationale for including this provision is that it was proposed by the SoS in a Request for Information on the Dogger Bank South project. This does not justify the inclusion of such a provision in a requirement relating to a different project, particularly in circumstances where:

    a. the SoS has not reached a decision that the inclusion of this provision is appropriate for the Dogger Bank South project;

    b. neither the Ørsted IPs nor the Equinor IPs have made any submissions that the wake effects require to be monitored; and

[39] Paragraphs (2)(c) and (d) of the Ørsted IPs' proposed without prejudice requirement; paragraphs (2)(e) and (f) of the Equinor IPs' proposed without prejudice requirement

[40] Paragraph (2)(e) of the Ørsted IPs' proposed without prejudice requirement; paragraph (2)(g) of the Equinor IPs' proposed without prejudice requirement

c. neither the Ørsted IPs nor the Equinor IPs have made any submissions as to how they propose such monitoring could be carried out or what its benefits would be.

Paragraph (2) – matters to be included in the wake effects plan - details of consultation and the extent of any disagreement[41]

88. The Applicant submits that the inclusion of this limb of the requirement is unnecessary. The Applicant has accepted that there will be a duty on the SoS to consult with the Equinor IPs and the Ørsted IPs prior to approval of the wake effects plan. The Equinor IPs and the Ørsted IPs would have ample opportunity to make submissions to the SoS as to their position on the matters to be contained within the wake effects plan and therefore the extent of any disagreement between the undertaker and the Equinor IPs and the Ørsted IPs would be understood by the SoS. There is therefore no need to duplicate that process within the terms of the wake effects plan itself.

89. The Applicant also notes that the wording of limb (2)(f)(i) of the Ørsted IPs' without prejudice requirement and limb (2)(d)(i) of the Equinor IPs' without prejudice requirement do not reflect the balancing exercise that the SoS is required to carry out under either the Applicant's proposed without prejudice requirement or that of the Ørsted IPs' and the Equinor IPs. Reference is only made to whether the Ørsted IPs/Equinor IPs consider there to be any mitigation measures which could further reduce impacts, without considering whether those measures have an effect on the Project's generation.

Paragraph (2) – matters to be included in wake effects plan – express reference to the inclusion of compensation for economic loss and details of the impact of the reduction of the capacity of the authorised development[42]

90. The Applicant submits that the express reference to the inclusion of compensation for economic loss is contrary to policy[43], fails the tests for a requirement (as being not relevant to planning, the payment of a sum from one party to another could not be enforced by the SoS and it is unreasonable) and is inappropriate for the same reasons as the Applicant has set out in paragraph 82(a), (c), (e) and (f) of the Applicant's Response to RfI 2 – Wake Effects (C3-028) in relation to limb (b).

91. The Applicant also highlights paragraph 29 of the Counsel Opinion, which states: "*A requirement imposed only to protect the private commercial interests of another wind farm operator would not be relevant to planning, as the planning system is not concerned with protecting private commercial interests. For the same reasons it would not be necessary or reasonable*." The inclusion of this wording would be wholly inappropriate.

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41 Paragraph (2)(d) of the Equinor IPs' proposed without prejudice requirement; paragraph (2)(f) of the Ørsted IPs' without prejudice requirement

42 Paragraph (2)(c) of the Equinor IPs' proposed without prejudice requirement

43 Paragraph 2.8.233, 2025 NPS EN-3

92. The Equinor IPs have proposed that the wake effects plan is required to include "*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 2(b);*". The Applicant considers the inclusion of such wording to be unnecessary as it duplicates the provisions of paragraph 2(b) which requires the undertaker to set out details of the reasonable steps that have been taken by the undertaker to minimise wake effects whilst maximising the generation capacity of the Project, within the relevant constraints. This necessarily requires the undertaker to set out the scale of any reduction in the Project's generation capacity.

New paragraph – requirement for the wake effects plan to be implemented as approved[44]

93. Should the SoS consider it necessary and appropriate to impose a requirement in this case, the Applicant has no objection to the inclusion of this provision.

[44] Paragraph (3), Equinor IPs' proposed without prejudice requirement; Paragraph (5), Ørsted IPs' proposed without prejudice requirement

Appendix 1 – Counsel Opinion

OUTER DOWSING OFFSHORE WIND FARM

WAKE LOSS

OPINION

Introduction

1. We are asked to advise GT R4 Limited (trading as Outer Dowsing Offshore Wind) ("**the Applicant**") in respect of an application for development consent for the Outer Dowsing Offshore Wind Farm ("**ODOW**").

2. We are asked to advise in respect of issues relating to wake effects from ODOW on existing and proposed wind farms owned and operated by Interested Parties referred to as the Equinor IPs and the Orsted IPs. The Equinor IPs and Orsted IPs have submitted a written opinion by Richard Turney KC ("**RTKC**") dated 17 December 2025 to the Secretary of State. We are asked to provide our opinion on the views expressed in that opinion.

Factual background

3. The examination into the application for development consent closed on 10 April 2025. During the examination, the Applicant submitted a wake impact assessment report by Wood Thilsted (dated 3 April 2025 [REP6-108]) ("**the Wood Thilsted report**"). The Wood Thilsted report identified that effects on reduction in the energy yield of existing and proposed wind farms owned by the Equinor and Orsted IPs ranged between 0.30% and 0.89% (section 6, p.40). The Equinor and Orsted IPs have accepted the output of this assessment (RTKC opinion, paras. 3 - 4).[1]

4. The Equinor and Orsted IPs have requested that the Secretary of State include in the Development Consent Order ("**DCO**") for ODOW protective provisions concerning

[1] The Wood Thilsted report also considered cumulative effects, concluding that ODOW would result in only 0.51% additional wake loss on the operational wind farms considered in the cumulative scenario (see [REP6-108] Tables 4, 5-3 and 5-4, comparison of scenarios 1a and 1b). We note that the Orsted IPs raised an issue over the scope of the cumulative assessment at page 7 of [REP6-135] to which the Applicant responded in [REP6-120] paras 58-62.

wake loss. In the alternative, they have requested that a requirement be imposed dealing with this matter.

5. The proposed protective provisions would oblige the Applicant (or other undertaker of the ODOW project) to do the following: (1) appoint a third party expert to carry out a wake loss assessment having regard to any mitigation in the final design of ODOW to reduce wake loss; and (2) pay compensation to the Equinor and Orsted IPs for any financial loss caused by wake effects. Disputes are to be determined by arbitration. Various forms of drafting of protective provisions have been proposed by the Equinor and Orsted IPs to achieve this.[2]

6. The proposed requirement would prevent commencement of ODOW until a wake effects plan had been submitted to and approved by the Secretary of State, which is to include steps to minimise wake loss. Various forms of drafting have been proposed.[3]

7. The Applicant and the Equinor and Orsted IPs have set out their positions on these matters during the examination and in post-examination submissions to the Secretary of State.

Policy

8. For the purposes of section 104 of the Planning Act 2008, the 2024 versions of National Policy Statement ("**NPS**") EN-1 and EN-3 have effect in respect of the ODOW application. Paragraph 4.1.16 of NPS EN-1 (2024) provides:

> *4.1.16 The Secretary of State should only impose requirements[96] in relation to a development consent that are necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects.*
>
> *[96] As defined in section 120 of the Planning Act 2008*

[2] See for example the protective provisions at Appendix 1 of the Orsted IPs' Response to the Secretary of State's Request for Information dated 12 August 2025 (published on 16 September 2025) [C1-003]; and the protective provisions in the Equinor IPs' Wake Effects Position Statement at Appendix 2 (April 2025) [REP6-143].

[3] See the without prejudice drafting at para. 85 of The Applicant's Response to the Second Request for Information – Wake Effects [C3-028]; the drafting at Appendix 2 of the Orsted IPs' Response to RfI (published 19 December 2025) [C5-005]; and the drafting at Appendix 3 of the Equinor IPs' Response to Request for Information dated 17 November 2025 (published 19 December 2025) [C5-007].

9. The following provisions of NPS EN-3 (2024) are particularly relevant:

> *2.8.2 To meet its objectives government considers that all offshore wind developments are likely to need to maximise their capacity within the technological, environmental, and other constraints of the development.*
>
> *…*
>
> *2.8.197 Where a potential offshore wind farm is proposed close to existing operational offshore infrastructure, or has the potential to affect activities for which a licence has been issued by government, the applicant should undertake an assessment of the potential effects of the proposed development on such existing or permitted infrastructure or activities.*
>
> *2.8.198 The assessment should be undertaken for all stages of the lifespan of the proposed wind farm in accordance with the appropriate policy and guidance for offshore wind farm EIAs.*
>
> *…*
>
> *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.*

10. A revised NPS EN-3 has come into force.[4] While it does not have effect in respect of the ODOW application, it is capable of being an important and relevant consideration

[4] On 6 January 2026.

in the decision-making process: para. 1.6.3 of NPS EN-1 (2025). NPS EN-3 (2025) includes specific policy in respect of wake loss as follows:

> *2.8.176 As we make increasing use of the nation's offshore wind resource, the question of wake effects, where wind turbulence arises between neighbouring developments, has gained attention. As with any new development, applicants should consider the impact of their proposal on other activities and make reasonable endeavours to address these. At the design stage there are therefore clear merits for applicants to make an assessment of inter-array wake effects between their proposed developments, and nearby offshore wind generating stations that are planned, consented or operational.*
>
> *…*
>
> *2.8.232 Applicants should demonstrate that they have made reasonable endeavours to mitigate the impact of wake effects on other offshore wind generating stations.*
>
> *2.8.233 However, there is no expectation that wake effects can be wholly removed between developments, or that inter-project compensation arrangements are a necessary means to mitigate the impact of wake effects, although developers may opt to take such approaches outside of the planning process.*
>
> *…*
>
> *2.8.316 Where an applicant has demonstrated that they have made an assessment of inter-array wake and shown that they have made reasonable efforts to work collaboratively with those who may potentially be impacted to mitigate impacts, then the existence of a residual wake effect impact is unlikely to carry more than limited weight against a project in the planning process.*

Guidance

11. The Government has issued supplementary guidance on wake effects, which comments on NPS EN3 (2025) as follows:

> *1.2 Paragraph 2.8.176*
>
> ***Applicants of proposed offshore wind farms are encouraged to adopt a good neighbour approach**, with constructive dialogue between developers. As part of this, developers of incoming offshore wind farms are strongly encouraged to conduct a wake assessment to understand the impact of their development on nearby offshore windfarms.*
>
> *1.3 Paragraph 2.8.232*
>
> ***This section encourages developers to have made 'reasonable endeavours' to mitigate the impact of wake effects.** In practice, this means developers do not have to take every possible course of action to mitigate the impact of wake effects but should demonstrate reasonable efforts at mitigation, including*

evidencing their rationale for why they have or have not, on balance, decided to implement mitigations.

1.4 Paragraph 2.8.233

This section clarifies the role of the planning system where wake effects are raised. *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.*

1.5 Paragraph 2.8.316

This section is intended to help reduce the chances of delays to new offshore wind farms *by explaining how wake effects will be considered as a planning application progresses. If developers meet the principles set out within the previous paragraphs wake effects will likely carry lower weight against a project being consented in planning decisions.*

12. The Government has issued guidance on viability in the planning regime (*Guidance: Viability*, Ministry of Housing, Communities and Local Government, last updated 16 December 2025). It sets out principles for carrying out a viability assessment, including the following (ref. 10-011):

> *Viability assessment is a process of assessing whether a site is financially viable, by looking at whether the value generated by a development is more than the cost of developing it. This includes looking at the key elements of gross development value, costs, land value, landowner premium, and developer return.*

13. Under the heading of "*Accountability*", the guidance explains (ref. 10-021):

> *Complexity and variance is inherent in viability assessment – in this context, it is imperative that practitioners clearly and reasonably justify their inputs and assumptions, recognising the public interest. Practitioners should act with objectivity and impartiality (without interference), and make explicit all sources of information used. They should ensure and confirm that no conflict of interest, or risk of such conflict, exists.*
>
> *…*
>
> *The inputs and findings of any viability assessment should be set out in a way that aids clear interpretation and interrogation by decision makers. Reports and findings should clearly state what assumptions have been made about costs and values (including gross development value, benchmark land value including the landowner premium, developer's return and costs). At the decision making stage, any deviation from the figures used in the viability assessment of the plan should be explained and supported by evidence.*

Law

14. It is well established that the planning system is concerned with land use in the public interest and does not exist to protect purely private interests. In *Wood-Robinson v Secretary of State for the Environment* [1998] JPL 976 at 979 it was held (per Robin Purchas QC sitting as a Deputy High Court Judge) (emphasis added):

> *Whether a consideration is capable of being a relevant or material consideration for planning purposes, is a question of law for the Court (see Tesco Stores Limited v Secretary of State for the Environment [1995] 1 WLR 759 per Lord Keith at page 764.) It is, however, difficult, if not impossible, definitively to resolve the question of relevancy or materiality, as it were, in a vacuum without reference to the facts of the particular case.* ***As a starting point, I accept that the exercise of planning control should be in the public interest. It is not concerned with the creation or preservation of private rights as an end in itself*** *(see Salmon J in Buxton v Minister of Housing and Local Government [1965] 1 Q.B. 278 at page 283 and Lord Scarman in Westminster City Council v Great Portland Estates plc [1985] 1 AC 661 at page 670).*
>
> *I do not, however, accept the distinction in principle that Miss Ellis sought to draw between the effect on the use of land through overlooking or overshadowing and that through deprivation of outlook or aspect.* ***The guiding principle seems to me to be in each case whether the private interest in question requires to be protected in the public interest.***

15. In *R v Doncaster MDC ex p. British Railways Board* [1987] JPL 444 at 445 Schiemann J held (emphasis added):

> *The received wisdom was that when such a superstore opened it would draw away some trade from existing retail outlets.* ***Whilst it was not a function of land use planning to protect commercial interests****, it was relevant to consider the degree to which the opening of a new store might lead to the decay of existing centres.*

16. The Government's Planning Practice Guidance contains guidance to similar effect (emphasis added):

> *What is a material planning consideration?*
>
> *A material planning consideration is one which is relevant to making the planning decision in question (eg whether to grant or refuse an application for planning permission).*
>
> *The scope of what can constitute a material consideration is very wide and so the courts often do not indicate what cannot be a material consideration.* ***However, in general they have taken the view that planning is concerned with land use in the public interest, so that the protection of purely private***

interests such as the impact of a development on the value of a neighbouring property or loss of private rights to light could not be material considerations.

Paragraph: 008 Reference ID: 21b-008-20140306

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17. RTKC states at paragraph 21 of his opinion that "*Whilst economic viability may often be irrelevant in the planning system, it is clearly capable of being a material consideration*", citing *R (Sainsbury's Supermarkets Ltd) v Wolverhampton City Council* [2011] 1 AC 437 at [59]. That passage from *Sainsbury's Supermarkets* is dealing with the financial viability of a proposed development, or development which will be financially enabled by a proposed development, as a material consideration in deciding whether to grant planning permission for that development. It does not support the proposition that impacts on the private commercial interests of an existing business is a material planning consideration.

18. Under the Town and Country Planning Act 1990, planning conditions must satisfy three criteria in order to be lawful: they must be imposed for a planning purpose; they must fairly and reasonably relate to the development permitted; and they must not be so unreasonable that no reasonable planning authority could have imposed them: *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 at 599.

Discussion

General matters

19. Issues in respect of wake loss need to be approached with proper regard to the legal and policy framework.

20. To the extent that ODOW may lead to reduced financial revenue for the Equinor and Orsted IPs and so affect their private commercial interests, this is not something that the planning system intends to protect: *Wood-Robinson v Secretary of State for the Environment* [1998] JPL 976 at 979, *R v Doncaster MDC ex p. British Railways Board* [1987] JPL 444 at 445, and the Planning Practice Guidance cited above.

21. Policy may provide that the public interest requires protection to be given to a particular activity. In the present case, policy provides that "*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*" (NPS EN-3 (2024) para. 2.8.347, emphasis added). Policy here strikes the balance as to when protection of a private interest is in the public interest.

22. The policy needs to be interpreted correctly, having regard to its context and purpose. The policy refers to the "*viability*" – not profitability – of an activity. Nor is it concerned with a mere risk to viability, or some effect on viability, but it is only engaged when the proposed development is likely to affect future viability. On its plain meaning, the policy is concerned with a situation in which the activity is unlikely to remain viable. The policy evidently presents a high bar, which is only right in circumstances where should the policy apply, substantial weight would be given against the grant of development consent for critical national priority infrastructure for which there is an urgent need, as set out in NPS EN-1 and EN3. The high bar also accords with the general principle that the planning system does not exist to protect private commercial interests; it is only when the activity is unlikely to remain viable that the public interest is engaged.

23. The public interest consideration that is engaged in those circumstances is the ongoing generation of renewable energy by the affected offshore windfarm. If that activity becomes unviable and therefore ceases, the public interest benefits associated with the generation of renewable energy will no longer be realised.

24. Retail planning policy is illustrative. The grant of planning permission for a new shop may lead to trade being drawn away from existing retailers. That financial consequence is not in itself a reason to refuse planning permission. Planning policy, however, is restrictive of certain out of centre developments which have a particular level of impact on, inter alia, "*town centre vitality and viability*" (National Planning Policy Framework (2025) paras. 94 – 95). Only in those circumstances is it justified to

impose protection, either by refusal of planning permission or by imposition of conditions which make any impacts acceptable[5].

25. It is therefore essential to ask whether the protection conferred by the protective provisions proposed by the Equinor and Orsted IPs is warranted by policy. The same applies to a requirement, given it is also a form of planning control and hence needs justification by reference to the public interest, not simply the private commercial interests of other wind farm developers or operators.

26. RTKC suggests that, even where the policy test in NPS EN-3 (2024) para. 2.8.347 is not met, "*It is unclear why wake loss should be treated differently from any other effect in this context in that the Secretary of State should consider how such adverse impacts can be avoided or mitigated, and ultimately compensated for as necessary"* (para. 31). We disagree. That approach is contrary to the policy judgement in NPS EN-3 as to where the line is to be drawn between adverse effects on private commercial interests, which are immaterial, and adverse effects on the public interest, which may be material.

27. We also disagree with RTKC's suggestion that compensation for wake loss in the present case is justified by reference to the mitigation hierarchy (paras. 19, 31 of his opinion). NPS EN-1 (2024) provides as follows in respect of the mitigation hierarchy (emphasis added):

> *4.3.4 To consider the potential effects, including benefits, of a proposal for a project, the applicant must set out information on the likely significant environmental, social and economic effects of the development, and* ***show how any likely significant negative effects would be avoided, reduced, mitigated or compensated for, following the mitigation hierarchy****. …*

28. The mitigation hierarchy and the requirement to mitigate and compensate only apply to likely significant effects. In the present case, the impacts on energy yield are all less than 1%. It does not seem possible to us to reasonably conclude that these could comprise likely significant effects for the purposes of the policy. First, the Orsted and

[5] Such conditions would not and could not lawfully include provision for the payment of financial compensation by the developer of the new retail outlet to existing retailers. To do so would be inconsistent with long-established policy on the appropriate use of conditions as well as being ultra vires (*DB Symmetry Ltd. v. Swindon BC* [2022] UKSC 33 at paras. 52-54).

Equinor IPs refer to the amount of commercial loss in monetary terms, but a purely financial loss to a commercial entity cannot be said to amount to an environmental or social effect or to fall within the remit of the matters set out in reg. 5(2) of, and para 4 of Sch. 4 to, the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 (i.e. population and human health; biodiversity; land, soil, water air and climate; material assets, cultural heritage and landscape). Secondly, a purely financial loss to a commercial entity which neither affects its viability nor has likely significant adverse consequences for the economy cannot in our view be said to be a likely significant economic effect for the purposes of the policy. In our view, the policy about the mitigation hierarchy in para 4.3.4 of NPS EN-1 is intended to address significant effects with public interest consequences rather than effects on purely private commercial interests. That understanding is consistent with what is said in para 2.8.233 of NPS EN-3 about inter-project compensation arrangements for wake loss sitting "outside of the planning process". NPS EN-1 and EN-3 are intended to be read and applied together as a coherent and consistent whole.

29. The law and policy on requirements also need to be applied. By NPS EN-1 (2024) para. 4.1.16, requirements must be necessary, relevant to planning, relevant to the development to be consented, enforceable, precise, and reasonable in all other respects. A requirement imposed only to protect the private commercial interests of another wind farm operator would not be relevant to planning, as the planning system is not concerned with protecting private commercial interests. For the same reasons it would not be necessary or reasonable. Only if the policy test in NPS EN-3 (2024) para. 2.8.347 was met could such a requirement be justified. The legal requirements are to the same effect, i.e. the threefold requirement from *Newbury* set out above in order for a planning condition (or requirement) to be lawful.

30. The legal and policy tests in respect of requirements logically apply to protective provisions also. A set of protective provisions has the same legal and practical effect as a requirement of restricting the development consent, and criminal sanctions for breach would apply equally in respect of both, such that they need to be justified in the same way. The six tests for the imposition of a requirement in paragraph 4.1.16 of NPS EN-1 (necessary, precise, relevant to planning, relevant to the development,

enforceable and reasonable in all other respects) appear to us to be equally apposite when determining whether it would be appropriate to impose a legal obligation on an undertaker in a DCO by means of protective provisions. Indeed, we consider it hard to conceive how it could be lawful for such provisions to be imposed in a DCO unless the Secretary of State concluded that all those tests had been met. The RTKC Opinion does not grapple with this issue.

31. Consideration also needs to be given to policy in the revised 2025 versions of NPS EN-1 and EN-3. Although they do not have effect for the purposes of section 104 in respect of the ODOW application, they are capable of being an important and relevant consideration in the decision-making process (as recognised by para. 1.6.3 of NPS EN-1 (2025)). That they have now come into force means that the Secretary of State can reasonably apply greater weight to them than when they were in draft.

32. The approach proposed by the Equinor and Orsted IPs is directly contrary to that adopted in the revised policy. Most notably, NPS EN-3 (2025) para. 2.8.233 makes clear that "*there is no expectation that wake effects can be wholly removed between developments, or that inter-project compensation arrangements are a necessary means to mitigate the impact of wake effects*". The first limb of that policy is contrary to the Equinor and Orsted IPs' suggestion that wake effects which are below 1% of energy yield require mitigation. The second limb of that policy is contrary to the Equinor and Orsted IPs' suggestion that protective provisions containing inter-project compensation arrangements are necessary to mitigate the wake effects. The suggestion in RTKC's opinion that "*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"* (para. 23) is unsustainable in light of the plain wording of paragraph 2.8.233.

33. RTKC's opinion does not appear to have proper regard to the actual terms of para. 2.8.233 of NPS EN-3 (2025). At para. 15 of his opinion he purports to cite para. 2.8.233 of NPS EN-3 (2025), but in fact sets out para. 1.4 of the supplementary guidance on wake effects. The error also appears to infect para. 24 of the opinion.

34. RTKC suggests 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" (para. 36). That again appears to be a reference to the supplementary guidance on wake effects, which provides that "*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"* (para. 1.4). It is clearly incorrect to suggest that this supplementary guidance, or para. 2.8.233 of NPS EN-3 (2025) to which it relates, supports the use of protective provisions containing inter-project compensation arrangements, when this is precisely what para. 2.8.233 says is <u>not</u> required.

35. RTKC suggests that there can be no confidence that disputes around compensation will be capable of resolution by agreement between the developers (para. 30a). That is effectively a concern that the developer whose wind farm is affected may be left without recourse to compensation for commercial losses. Similarly, RTKC relies on the fact that in the present case there is not "*a clear-cut route to compensation under the statutory compensation code"* (para. 38; see also para. 24). These are suggestions that the planning system should supplement the statutory compensation code in the present case by requiring a developer to pay compensation for the commercial losses of another developer via the mechanism of protective provisions. It is not the role of the planning system to do that.

36. In our view, the references made by RTKC to DCOs including provision for the payment of compensation for the exercise of statutory authority to acquire or interfere with land or rights[6] do not take matters any further. Neither the Equinor nor Orsted IPs have identified any established property right with which there would be any interference. The statutory provisions and common law principles which ensure that compensation is paid for statutorily authorised interference with established property rights therefore have no application here.

37. RTKC relies on two purported comparables (para. 38). The first is where a DCO authorises work which causes disruption to a railway line and provides that compensation is payable to Network Rail, which must then be passed on to a train operating company, in respect of losses incurred by the train operating company due

[6] RTKC Opinion at para. 22

to that disruption.[7] Those facts are far removed from the facts of the present case, and in any case it would certainly seem possible in those circumstances for a decision-maker to conclude that the public interest weighed in favour of compensation being payable for such financial losses, given the direct impact on a public service. The second purported comparable concerns impacts on the fishing industry from construction of offshore wind farms. Again, on those different facts it might well be possible to reach a judgement, having regard to the importance and / or sensitivity of the industry impacted and the scale of any impacts, that it was not simply private commercial interests that were affected and that the public interest required compensatory provision to be made.

38. The premise of the argument by the Equinor and Orsted IPs, that without provision for compensation there will be unfairness and / or there is no other solution to the issues, is also flawed, for the reasons recently articulated by the Examining Authority in its report on the Five Estuaries Offshore Wind Farm project (17 June 2025):

> *4.8.42 Notwithstanding whether the various paragraphs in NPS EN-3 relating to "Other offshore infrastructure and activities" do or do not include wind farms, having regard to the process by which TCE awards leases in various rounds, we are of the view there is an inevitability that some wind farms will be sited at such a proximity to one another for the potential for wake effects to be experienced. That is something that we consider prospective developers for wind farms and TCE ought to be taking account of respectively when leases are being sought and awarded and that the concerns raised by EA2L are of a commercial nature rather than something to be addressed as a land use planning matter. It is evident from the various submissions made by EA2L and the applicant, for example page 56 in [REP3-024], that under the leases granted by TCE should a lessee wish to undertake works encroaching into its lease's buffer then those works cannot be progressed without an adjoining lessee's agreement. That provides a means for protecting the commercial interests of rival wind farm developers/operators. …*

39. It is important to stand back and appreciate what the Equinor and Orsted IPs are proposing. Their position is that development consent should be refused for ODOW (which is critical national priority infrastructure: NPS EN-1 Section 4.2) unless the developer is required, by legally binding protective provisions, to pay significant

[7] See para. 72 of Sch. 14 to The Associated British Ports (Immingham Green Energy Terminal) Order 2025, cited by the Equinor IPs at para. 6 of RTKC's opinion.

financial compensation to its commercial rivals for any commercial losses which they may suffer[8]. It would involve one set of wind farm developers (the Orsted and Equinor IPs) being able to extract, through the planning system, a financial subsidy from another wind farm developer (the Applicant). That is contrary to the law and policy set out above and it has no precedent. It would be a misuse of the planning system. National policy now recognises as much in para. 2.8.233 of NPS EN-3 (2025), which confirms that any such arrangements should sit "*outside the planning process"*.

Viability

40. The policy in NPS EN-3 (2024) para. 2.8.347, which asks whether "*a proposed development is likely to affect the future viability*" of other existing or approved offshore infrastructure, needs to be properly interpreted and applied. That involves, first, understanding that it imposes a high bar, as set out above. Secondly, it requires the decision-maker to scrutinise the evidence to decide whether the test is met.

41. In respect of the Equinor IPs, the evidence on which they rely is principally their Wake Effects Position Statement (April 2025 [REP6-143]) (see paras. 4 and 6 of RTKC's opinion). That contains, at Appendix 1, a Wake Loss Financial Impact Assessment ("**FIA**"), which estimates total potential financial impact from wake loss on two existing wind farms and two proposed wind farm extensions of between £42m and £164m (Table 1, p.7 of 13).

42. Those figures do not enable the decision-maker to conclude that the policy test of "*likely to affect the future viability"* is met. They concern impact on 'net present value' only, and do not comprise a viability assessment. The FIA contains no quantitative

[8] We note that the protective provisions which the Orsted and Equinor IPs are inviting the Secretary of State to impose do not provide for any mechanism which would seek to limit the amount of compensation to that which would be required to safeguard the viability of the offshore generating stations in question. Instead, what is sought is payment of "*Commuted Sums*", defined so as to mean "*the sums representing all losses (including loss of revenue) incurred … as a consequence of the percentage loss in energy yield*" [AS-036] (Appendix 2, para. 5); and "*the sums representing loss of revenue incurred … as a consequence of the percentage loss in energy yield …*" [AS-037] (Appendix 2, para. 2). As the Applicant has noted in its Deadline 6 submissions [REP6-120] at para. 126 that may reflect the absence of any evidence presented to the Examining Authority or Secretary of State as to what would be required to ensure viability.

viability analysis, which would require consideration of matters such as revenue, costs and operating margins to determine whether the wind farms remained viable.

43. The monetary impacts to 'net present value' set out in the FIA must also be seen in the context of the fact that the figures relate to four offshore wind farms (two existing, two proposed extensions) over a period of decades.

44. In respect of the two existing wind farms (Sheringham Shoal and Dudgeon), the Equinor IPs explain that as the life cycle of a typical offshore wind farm progresses, the financial return pattern will change, due to factors such as increased costs as the assets age and the end of the financial support regime for the project which is shorter than the lifetime of the asset (e.g. Contract for Difference and Renewable Obligation Certificate): Wake Effects Position Statement at paras. 79-80. The Equinor IPs then say:

> *81. Hence, a 1% decrease of generation output will have significantly higher impact on the returns during this period. Consequently, the business case for life extension of the DOW and SHS projects are likely to be significantly impacted by the wake losses.*

45. It is on this basis that the Equinor IPs assert that the policy test of "*likely to affect the future viability*" is met. We do not consider that this provides sufficient evidence for the Secretary of State to reasonably conclude that the policy test is met. First, the argument is that as time goes on, the viability of the assets becomes more marginal, and the decision whether to extend their life is sensitive to small changes in the inputs to the viability analysis. On any common-sense approach, that risk to future life extension does not mean that that the viability of the asset has been affected, within the plain meaning of para. 2.8.347 of NPS EN-3 (2024), justifying "*substantial weight*" to be given to the effect. See for example the distinction drawn by the Secretary of State in the decision letter for the Morgan Offshore Wind Farm (29 August 2025) at para. 4.169:

> *The Secretary of State accepts that this [energy yield reduction due to wake effects] will have a financial impact on Ørsted IPs and that this impact may be of some relevance to future decisions in relation to their assets. However, the Secretary of State agrees with the ExA that there is insufficient evidence that wake effects will in itself be likely to affect the future viability or safety of any of Ørsted IPs existing infrastructure. …*

46. Secondly and in any event, no quantitative viability analysis of this risk to future life extension has been provided.

47. In respect of the two future wind farms (Sheringham Shoal and Dudgeon Extension Projects), the Equinor IPs' argument is different. It is said that the difference between success and failure in a Contract for Difference auction can be based on fine margins and that the wake loss impacts "*would present a material threat to the competitive position of these projects representing a material risk to their viability"* (para. 88, emphasis added). Again, we do not consider that this provides sufficient evidence for the Secretary of State to reasonably conclude that the policy test is met. First, it is concerned with the chances of being successful in a Contract for Difference auction, not financial viability. Secondly, a "*material risk*" or "*material threat*" is different to a conclusion that wake effects are "*likely to affect the future viability*" of those wind farms, which is the policy test. Thirdly and in any event, the statements are entirely unsupported by any quantitative viability analysis.

48. The Orsted IPs have also submitted a Wake Loss Financial Impact Assessment (Appendix 1 to Orsted IPs Submission Between Deadlines 5 and 6 [AS-037]). That indicates a total financial impact of between £55m and £199m in respect of three offshore wind farms (Race Bank, Hornsea 1 and Hornsea 2). As with the Equinor IPs, those sums (1) must be seen in the context of the fact that they relate to three offshore wind farms over a period of decades, and (2) do not comprise a viability assessment.

49. The document further states that (para. 2.4):

> *The impacts incurred will influence lifetime extension decisions and are likely to result in the earlier decommissioning of one or more of these assets than would otherwise have been the case.*

50. For the same reasons as set out above in respect of the Equinor IPs, we do not consider that this evidence presented by the Orsted IPs provides sufficient evidence for the Secretary of State to reasonably conclude that the policy test in NPS EN-3 (2024) para. 2.8.347 is met. First, the evidence is only as to lifetime extension decisions and decommissioning dates, once viability has become more marginal in any event. Secondly, no quantitative viability analysis of this risk has been supplied in any event.

51. For both the Equinor and Orsted IPs, the percentage wake loss impacts to energy yield are very small: less than 1%. For the Secretary of State to reasonably find that notwithstanding these very small figures, the wake loss effects were "*likely to affect the future viability*" of the assets (per NPS EN-3 (2024) para. 2.8.347) would require powerful countervailing viability evidence. We do not consider that such evidence has been provided.

    a. The question of viability arises frequently in the context of development control decision-making, and its essential nature and evidential requirements are well-understood. In simple terms, a viability assessment requires a balancing exercise between cost and revenue, with the aim of working out whether the value generated by a development is more than the cost of developing it having regard to a range of factors including developer return.

    b. As the Applicant has noted in its representations[9], neither the Orsted IPs nor the Equinor IPs have provided any such assessment. The evidence presented is limited to an 'indicative view' of lost revenue, with no information on key matters such as costs or the balance between this and ongoing revenue.

    c. The financial analyses presented by the Orsted IPs and the Equinor IPs do not satisfy or purport to satisfy the Government's guidance on viability in the planning regime[10].

    d. In both cases even the limited information that has been provided is significantly caveated with the following words: "*This assessment does not intend to represent the* [IPs'] *internal view of the financial impact which cannot be shared publicly due to its reliance on confidential information*"[11]. Hence the limited information provided on revenue reduction does not even represent the views of the Orsted IPs or the Equinor IPs.

52. We do not agree with the suggestion in the RTKC Opinion that without a provision in the DCO such as that which the Orsted and Equinor IPs are seeking "*it is unclear how*

[9] [REP6-120] at pp. 19-20
[10] Guidance: Viability (MHCLG, 2025), relevant paragraphs of which are set out above.
[11] See [REP6-120] at paras. 97-98, commenting on [AS-036] and [AS-037], and subsequently [REP6-143] which uses the same caveat.

a conclusion can be reached either way on the policy question of whether the development of ODOW will be likely to affect the future viability of the seven wind farms …"[12]. In our view there is also no need for the Secretary of State to "*make assumptions about how wake loss issues will ultimately affect each relevant development*" or to decide "*whether and to what extent the Applicant and the Equinor and Orsted IPs will be able to resolve matters by commercial agreement*"[13]. In short, the Secretary of State will need to determine the question of the likely effect of the assessed wake losses on viability by considering the evidence that has been put before the examination and submitted directly to him by those seeking to persuade him that such an effect is likely, any response to that evidence, and the conclusions of the Examining Authority on this issue. That was the approach in the Mona Decision, where it was accepted that the wake effect would have a financial impact on the Orsted IPs that may be of some relevance to future decisions in relation to their assets but that "*there is insufficient evidence that wake effects will in itself be likely to affect the future viability … of any of Orsted IPs existing infrastructure*"[14]. In short, we do not consider that RTKC is right to conclude, in effect, that the failure of the Orsted and Equinor IPs to adduce adequate evidence on viability is in itself a justification for imposing the protective provisions sought.

53. Finally, even if the Secretary of State was to conclude that the policy test in NPS EN-3 (2024) para 2.8.347 was met, i.e. that the evidence demonstrated that ODOW was "*likely to affect the future viability*" of the assets of the Equinor and Orsted IPs, we still do not consider that policy would support the imposition of protective provisions as proposed by the Equinor and Orsted IPs. Policy provides that if the test is met, the Secretary of State "*should give these adverse effects substantial weight in its decision-making*" (para. 2.8.347). It does not say that protective provisions requiring the applicant to financially compensate the relevant developers should be imposed. Further, there is now policy in NPS EN-3 (2025) para 2.8.233 which provides that such "*inter-project compensation arrangements*" are not necessary. Given that this policy

[12] RTKC Opinion para. 27
[13] RTKC Opinion para. 25
[14] DL para. 4.83

specifically and expressly deals with the issue in question, it will inevitably be an important and relevant consideration for the Secretary of State.

Consistency in decision-making

54. The well-established principle of consistency in planning decision-making, the classic statement of which is contained in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137 at 145, is that like cases should be decided alike and that if a decision-maker proposes to take a different approach, it is necessary to have regard to the importance of consistency and to give reasons for the departure. To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect.

55. The principle does not support the imposition of protective provisions or a requirement in the present case. To the extent that RTKC takes a different view (para. 18 of his opinion), we disagree and we also note that his opinion does not take into account the Secretary of State's decision letter in the Five Estuaries Offshore Wind Farm project (presumably because it was issued on the same day as his opinion, i.e. 17 December 2025). Our reasons are as follows.

56. First, there is no precedent at all in any offshore wind farm decision of the Secretary of State for the protective provisions in favour of another wind farm developer which the Orsted and Equinor IPs are proposing.

57. Secondly, of the four decisions cited by RTKC (para. 11), a requirement concerning wake effects was included in three, but not in the Morgan Offshore Wind Farm decision. To add to that, the Five Estuaries Offshore Wind Farm decision has now been issued, where no requirement was imposed. Plainly, it cannot be said that a requirement has been consistently imposed.

58. Thirdly, each case will be fact specific, having regard to the nature of any impacts in that case.

59. Fourthly, the reasoning in the Secretary of State's latest decision, on the Five Estuaries Offshore Wind Farm, is to the effect that a requirement is not necessary where, inter alia, "*generating losses will be relatively modest*" (para. 4.53). In that case the

generating losses were 1.3% (paras. 4.47, 4.53), i.e. greater than in the present case.

The Secretary of State concluded as follows:

> *4.53 The Secretary of State has therefore concluded that the wake effect assessment produced by EA2 should be relied upon as the worst-case assessment of wake effects, but nevertheless agrees with the ExA that the generating losses experienced will be relatively modest and therefore marginal.*
>
> *4.54. The Secretary of State notes that the parameters of the Proposed Development, which includes an approximately 5.3km buffer distance (as part of the TCE's provision for a 5km buffer distance around wind farms), and refinements to the northern array boundary, which has the effect of increasing the average distance between the Proposed Development and EA2. The Secretary of State agrees with the ExA that further mitigation would be counterproductive as it would result in total generating loss greater than the wake impacts. On 21 August 2025, the Secretary of State had asked the Applicant and EA2L to provide comments on a potential wake effects related requirement which would require for either a suitable WEA, or alternative mitigation for wake effects, to be submitted to the Secretary of State. However, the Secretary of State notes that the Applicant has submitted a WEA on 20 August 2025. The Secretary of State therefore concludes that a requirement is not needed given that any generating losses experienced by EA2 would be relatively modest, and the fact that the proposed mitigation is sufficient. …*

60. That reasoning obviously supports the Applicant's position, rather than that of the Equinor and Orsted IPs, in the present case.

61. Fifthly, whilst RTKC states that "[t]*here has not been any decision of the Secretary of State to date which has rejected the use of protective provisions, and which would therefore have to be distinguished*"[15] the Awel y Mor decision did involve the rejection of a suggestion by an Interested Party[16] that either a requirement or protective provisions should be imposed to secure compensation for wake loss[17].

[15] RTKC Opinion para. 37

[16] Rhyl Flats Wind Farm Ltd.

[17] See the Awel y Mor ExAR at para. 5.14.83, commenting on Appendix A of [REP7-058] and [REP8-109] (see ExAR paras. 5.14.65 and 5.14.74), and DL para. 4.178. In section 12 of [REP8-109] Rhyl Wind Farm Ltd. requested that compensation provisions should be included by way of an additional protective provision.

Conclusion

62. In summary, we agree with the Applicant's position that the protective provisions proposed by the Equinor and Orsted IPs have "*no basis in law, policy or precedent*"[18] and we disagree with the contrary view advanced by RTKC (para. 40 of his opinion). Planning law and policy is concerned with protection of the public interest, not private commercial interests. It would be contrary to the legal and policy position, both under the 2024 and 2025 versions of NPS EN-3, to withhold development consent for ODOW (which is critical national priority infrastructure: NPS EN-1 Section 4.2) unless the developer is required, by legally binding protective provisions, to pay significant financial compensation to another group of developers for any commercial losses which they may suffer. National policy confirms that any such arrangements belong "*outside the planning process"* (para. 2.8.233 of NPS EN-3 (2025)). The approach proposed by the Equinor and Orsted would be wholly unprecedented and there is no lawful basis to adopt it.

Hereward Phillpot KC

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16 January 2026

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[18] The Applicant's Response to the Second Request for Information – Wake Effects (October 2025) [C3-038] at para. 5.

Appendix 2 – The Applicant's Without Prejudice Requirement

Wake effects [33].—

(1) Work No. 1(a) must not be commenced until a wake effects plan has been submitted to and approved by the Secretary of State.

(2) The wake effects plan provided in accordance with paragraph (1) must include details of reasonable steps that have been taken by the undertaker to minimise wake effects on the existing and proposed third party offshore wind farms whilst maximising the capacity of the authorised development within the identified technical, environmental and other constraints of the authorised development.

(3) The design plan submitted to the MMO under condition 13(1)(a), part 2 of schedule 10 of this Order must be in accordance with any approved wake effects plan.

(4) For the purposes of this requirement—

(a) "capacity" means: the amount of electricity that is generated from the authorised development; and

(b) "existing and proposed third party offshore wind farms" means: Race Bank offshore wind farm, Dudgeon Offshore Wind Farm, Hornsea 1 offshore wind farm, Hornsea 2 offshore wind farm, Sheringham Shoal offshore wind farm, Dudgeon Extension offshore wind farm and Sheringham Shoal Extension offshore wind farm.