

Riverside Energy Park

Applicant's response to Thames Water Utilities Limited Deadline 5 Submission

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1 Applicant's response to Thames Water Utilities Limited Deadline 5 Submission

1.1 Introduction

1.1.1 This document provides a response to the documentation submitted by Thames Water Utilities Limited (TWUL) at Deadline 5, which includes TWUL comments on:

- Applicant's Response to Thames Water's Written Summary of Oral Submissions Made at Hearings, covering matters relating to:
 - Cumulative impact of REP and the Data Centre;
 - Skylarks;
 - Invertebrates;
 - Access to Crossness Local Nature Reserve;
 - Openness and disturbance to visitors;
 - Lapwings;
 - Avian predators;
 - Biodiversity Value;
 - Section 106 Agreement objectives;
 - Cumulative impact of REP and the Data Centre on breeding birds;
 - Suggested amendments to the draft Development Consent Order (dDCO);
- Protective Provisions; and
- Analysis of Metropolitan Open Land (MOL).

1.1.2 The Applicant's response to the above matters is set out below. In order to provide a setting to this response, the planning and policy context for the REP proposals, including the alteration of the extent of the Main Temporary Construction Compounds, is provided at the outset.

1.2 Planning and Policy Context

Variation to land use within the Order Limits

- 1.2.1 The Applicant notes that the matters raised in TWUL's Deadline 5 response (see **REP5-039**) include, but are not limited to, the use of the Data Centre site for the Main Temporary Construction Compounds. This variation to the land use was introduced by the Applicant in its Deadline 2 submissions.
- 1.2.2 As set out in **Paragraph 6.3.1** of the **Statement of Reasons (4.1, REP2-008)**, under Section 122 of the Planning Act 2008 (PA 2008, 'the Act'), a DCO which includes compulsory acquisition powers may be granted only if the conditions in Sections 122(2) and 122(3) of the PA 2008 are met. The conditions to be met are:
- at Section 122(2), that the land is required for the development to which the DCO relates or is required to facilitate or is incidental to the development; and
 - at Section 122(3), there is a compelling case in the public interest for inclusion of powers of compulsory acquisition in the DCO. The Secretary of State (SoS) must be persuaded that the public benefits from the compulsory acquisitions will outweigh the private loss suffered by those whose land is to be acquired.
- 1.2.3 In respect of the Section 122(2) condition, the 'Planning Act 2008: Guidance related to procedures for the compulsory acquisition of land' (September 2013) ('the 2013 Guidance') (at paragraph 11) states that applicants should be able to demonstrate to the satisfaction of the SoS that the land in question is needed for the development for which consent is sought. The 2013 Guidance goes on to say that the SoS will need to be satisfied that the land to be acquired is no more than is reasonably required for the purposes of the development.
- 1.2.4 Paragraphs 8 to 10 of the 2013 Guidance also set out a number of general considerations that the Applicant must demonstrate to the satisfaction of the SoS when justifying an order authorising compulsory acquisition, which are:
- that all reasonable alternatives to compulsory acquisition (including modifications to the Proposed Development) have been explored;
 - that the proposed interference with the rights of those with an interest in the land is for a legitimate purpose and is necessary and proportionate;
 - that the Applicant has a clear idea of how it intends to use the land which it is proposed to acquire;
 - that there is a reasonable prospect of the requisite funds for the acquisition becoming available (see **Funding Statement (4.2, APP-017)**); and

- that the purposes for which compulsory acquisition of land powers are included in the DCO are legitimate and are sufficient to justify interfering with the human rights of those with an interest in the land affected.
- 1.2.5 The amendments to the Order Limits submitted to the Examination at Deadline 2 (see **Works Plans (2.2, REP2-004)** and **Chapter 2** of the **Environmental Statement Supplementary Report (6.6, REP2-044)**) were made in consideration of the 2013 Guidance and sought to rationalise the land take for the Main Temporary Construction Compounds area following a delay to the construction of the consented Data Centre development (Local Planning Authority reference: 15/02926/OUTM) in that location. Whilst the Applicant was seeking temporary possession powers for the original location of the Main Temporary Construction Compounds, the Applicant, as is good practice, applied the 2013 Guidance.
- 1.2.6 Given the aforementioned delay, the Applicant saw no reason for not utilising land within its own ownership, rather than seeking temporary possession over Plots 02/53 and 02/55 (shown on the DCO Application version of the **Land Plans (2.1, APP-007)**, now superseded by **Land Plans (2.1, Rev 2, REP4-003)** submitted at Deadline 4). It should be noted that the submitted ES also considered the Applicant taking temporary possession of Plot 03/07, this plot was removed from the temporary possession powers prior to submission of the application. As a consequence, the existing joinery business and its car parking/yard on Plots 02/53 and 03/07 will now remain in operation during the construction of the Proposed Development. This change also resulted in a net reduction in land affected by the Proposed Development, as the Data Centre site was already included in the Order Land.
- 1.2.7 The Applicant therefore considers the amendments to the Order Limits and the use of the Data Centre site as the Main Temporary Construction Compounds area to respond to, and indeed comply with, the 2013 Guidance.

Consent Position

- 1.2.8 The Data Centre site is owned by Riverside Resource Recovery Limited (a Cory group company) and the principle of construction works and development on the site is accepted as it has the benefit of outline planning consent (Local Planning Authority reference: 15/02926/OUTM) for a Data Centre use (Use Class B8), two four storey buildings, sub-stations, formation of new access, car parking and landscaping (the Data Centre Permission). A Reserved matters application has been submitted to the Local Planning Authority for the detailed design and a decision of these applications is expected in October 2019. Furthermore, the site is identified in LBB's Local Plan as an Employment Area. The Applicant is not seeking permanent consent for this site, rather consent for the temporary use of the site as part of the Main Temporary Construction Compounds, following which the site will revert to the extant Data Centre Permission.
- 1.2.9 It would appear that TWUL is seeking to challenge the principle of development which has already been established through the Data Centre

Permission granted by the London Borough of Bexley (LBB). It is therefore the Applicant's view that the weight afforded to the matters raised by TWUL ought to be viewed in the context of the principle of development of the Data Centre having already been established and accepted by LBB and any consultees involved in that consenting process would have known that consent had been granted.

1.2.10 Whilst the Applicant notes TWUL's concerns and has sought to address these through recent submissions (including in direct response to the remainder of its Deadline 5 response (see **REP5-039**) below), it ought to be highlighted that the potential minor or negligible effects must be considered in the context of the position set out above and the overall scheme for the Proposed Development.

Planning Balance

1.2.11 Section 104(7) of the PA 2008 requires the SoS to weigh the adverse impacts against the benefits of the Proposed Development.

1.2.12 **Section 5.10** of the **Planning Statement (7.1, APP-102)** clearly sets out that an assessment of the likely effects on internationally, nationally and locally designated sites of ecological or geological conservation importance, on protected species, and on habitats and other species of principal importance has been undertaken in accordance with the provisions of NPS EN-1 and relevant development plan policies.

1.2.13 The EIA concludes that the Proposed Development would not result in any residual adverse ecological effects, taking account of relevant policy objectives. In addition, and despite this conclusion, the Applicant has provided further mitigation in the **Outline Biodiversity Landscape Mitigation Strategy (OBMLS) (7.6, Rev 3)** and the **Outline Code of Construction Practice (CoCP) (7.5, REP5-010)** during the course of the Examination to further minimise potential effects on the Data Centre site as far as practicable. Furthermore, the ES concluded that all impacts were found to be Not Significant on all accounts (with the exception of a limited number of residual (moderate) significant adverse effects in relation to Townscape and Visual Impacts, as assessed in the ES (see **Chapter 16 Summary of Findings and In-Combination Effects** of the **ES (6.1, APP-053)**) and that the benefits of the Proposed Development significantly outweigh those adverse impacts identified, which are stated in the **Project and its Benefits Report (7.2, APP-103)** and re-provided below:

- The National Policy Statements EN-1 and EN-3 establish an urgent and substantial need for new energy generation infrastructure, making clear the expectation that the industry will provide this capacity through private led investment such as REP.
- REP meets these policy objectives, delivering new energy capacity through a renewable/low carbon supply, with no public funding support or subsidy.

- Locally, policy of the London Plan is consistent with the National Policy Statements in seeking to: reduce London's carbon emissions; gain decentralised energy supply; and divert waste away from landfill, through new treatment capacity that will enable London to be self-sufficient (by 2026).
- Responding directly to the National Policy Statements and London Plan, REP:
 - is an energy recovery facility that achieves a positive carbon outcome, not least through the recovery of renewable/low carbon electricity from otherwise useless residual waste and has good potential to also contribute to heat demand;
 - is at the right level of the waste hierarchy and constitutes sustainable waste management capacity, taking waste away from landfill, moving it up the waste hierarchy and providing for the reuse of metals and ash as construction aggregates (reducing reliance on the quarrying of primary aggregates); and
 - delivers good design, not least through incorporating a range of energy recovery and storage technologies, being CHP Enabled, and incorporating river freight as part of the multi-modal transport network thereby significantly reducing the number of trucks on London streets.

1.2.14 The National Policy Statements establish the relevant tests against which to demonstrate the need case, for both energy supply and waste management. REP delivers the priority environmental, economic and societal benefits sought by the National Policy Statements - at no cost to the tax payer.

1.2.15 Therefore, pursuant to section 104 of the Planning Act 2008, the Proposed Development should be consented.

Conclusion

1.2.16 The Applicant has made a variation to the proposed land use for the Data Centre site as a consequence of a delay to the construction programme for the Data Centre development and in consideration of the relevant tests and guidance for justifying Compulsory Acquisition as described above. In doing so, the Applicant has removed the need to take temporary possession of other land plots west of Norman Road, which allows the existing joinery business on those plots to continue to operate and fall outside of the Application Boundary.

1.2.17 The Data Centre site is already subject to the Data Centre Permission and so the principle of development of this site has been established and accepted in accordance with relevant planning policies and guidance. Furthermore, the site is identified in LBB's Local Plan as an Employment Area.

- 1.2.18 Furthermore, as a result of the relocation of the Main Temporary Construction Compounds, the Applicant achieved a net reduction in land affected by the Proposed Development as Plots 02/53 and 03/07 (Joinery business) have since been removed from the Order Land. The Applicant is only seeking temporary use of the Data Centre site through the Application. Post construction, the Data Centre site will revert to the extant Data Centre Permission.
- 1.2.19 As stated in the **OBLMS (7.6, Rev 3)**, despite the use of the Main Temporary Construction Compounds giving rise to only a temporary adverse effect, the Applicant commits in this document to treating any habitat loss on this compound site as a permanent loss and providing off-site compensation accordingly. This is despite the fact, that if the Data Centre Permission is implemented then the site would be governed by that permission and its associated biodiversity mitigation. This is an additional commitment over and above the 10% biodiversity net gain that would occur for temporary habitat loss in this area.
- 1.2.20 The Applicant has taken considerable steps to ensure appropriate and proportionate mitigation is secured through the **dDCO (3.1, REP5-003)** and has offered further mitigation in the **OBMLS (7.6, Rev 3)** and the **Outline CoCP (7.5, REP5-010)** to alleviate concerns raised by a range of stakeholders.

1.3 Comments on any Additional Information / Submissions received by previous Deadline - Applicant's Response to Thames Water's Written Summary of Oral Submissions Made at Hearings (8.02.39, REP4-018) ("the Applicant's Response to TWUL's Oral Submissions")

Cumulative impact of REP and the Data Centre

- 1.3.1 As stated in the Applicant's Deadline 6 submission, The **Applicant's response to the ExA's Rule 17 Letter on Changes to the Application (8.02.61, REP6-003)**, the Applicant explains that the change in use of the Data Centre site as part of the Main Temporary Construction Compounds does not change the assessment set out in the ES.
- 1.3.2 The ES assumes that the Data Centre construction works would not be undertaken concurrently with the Proposed Development, as Plots 02/43, 02/44, 02/48 and 02/49 (Data Centre site) were allocated for Works No. 7 in the **Works Plans (2.2, REP2-004)** submitted with the DCO Application. The ES reports the potential effects of the Proposed Development on the basis that the construction of the Data Centre would start after the construction of REP.
- 1.3.3 The **Environmental Statement Supplementary Report (6.6, REP2-044)**, considers two indicative scenarios:
- Scenario 1: the Data Centre site as a whole being used as part of the Main Temporary Construction Compounds; and

- Scenario 2: whereby, once construction works have progressed past the most intensive period and both parcels of the Main Temporary Construction Compounds are not required, the southern parcel of the Data Centre site would be used as part of the Main Temporary Construction Compounds whilst construction of the Data Centre commences on the northern parcel.

1.3.4 Therefore, the **Environmental Statement Supplementary Report (6.6, REP2-044)** considers the construction works in the vicinity of Crossness LNR to include (1) the construction of the Proposed Development followed by the Data Centre and (2) the construction of the Proposed Development partly overlapping with the construction of the Data Centre. The assessment found that the effects in both scenarios did not differ to those set out in the ES. In addition, potential effects in respect of Air Quality and Terrestrial Biodiversity have been agreed with Natural England as Not Significant in a Statement of Common Ground (SoCG) with the Applicant (**Statement of Common Ground between the Applicant and Natural England (8.01.05, REP2-051)**). TWUL provides no information or evidence in either an EIA or methodological context to substantiate its claim as to why the proposed change to the use of the Data Centre site is 'significant' in their view.

Skylarks

1.3.5 TWUL states that *"the construction will displace the breeding Skylark that is present"*. **Chapter 11 Terrestrial Biodiversity** of the **ES (6.1, REP2-023)** and the further information provided in response to written representations shows that potential construction disturbance will not affect the long-term distribution and abundance of the assemblage of breeding birds within the study area or its nature conservation importance. Measures to mitigate potential effects on breeding birds during construction of REP are set out in the **OBLMS (7.6, Rev 3)** which is secured in **Requirement 5** of the **dDCO (3.1, REP5-003)**. These measures will provide mitigation for birds, such as skylark, which breed within the Data Centre site during the period when it is used as part of the Main Temporary Construction Compounds. Once the temporary use has finished, either the land will be restored allowing skylarks to continue to breed or, should the Data Centre be built, Cory (as the applicant for the Data Centre) would need to comply with the conditions relating to the Data Centre permission with regards to provision for biodiversity.

1.3.6 The mitigation that will be provided for the skylarks on the Data Centre site is proportionate to the potential effect, which is Not Significant, as stated at **Section 11.13, Chapter 11 Terrestrial Biodiversity** of the **ES (6.1, REP2-023)**.

1.3.7 As stated in the **OBLMS (7.6, Rev 3)**, whilst the use of the Main Temporary Construction Compounds gives rise to only a temporary adverse effect, the Applicant commits in the **OBLMS (7.6, Rev 3)** to treating any habitat loss on the compound site as a permanent loss and providing off-site compensation accordingly. This is in spite of the fact that the area on which the Main Temporary Construction Compounds is located has the benefit of planning

permission for the development of a data centre, all of which is governed by a separate planning permission and related controls. Therefore, it will have provided compensation loss through the Biodiversity Off-setting metric. In addition, if the Applicant constructs the Data Centre, the controls on the Data Centre permission will apply on top of the compensation provided under the **dDCO (3.1, REP5-003)**. This is an additional commitment over and above the 10% biodiversity net gain for temporary habitat loss.

Invertebrates

- 1.3.8 A report referenced in the submission by Chris Rose (see **REP4-041**) at Deadline 4, by Applied Ecology Ltd (Response to Matters Raised on Biodiversity and Nature Conservation) which was a request for further information on the Data Centre planning application (Local Planning Authority reference: 15/02926/OUTM) and is based on surveys undertaken in 2016, states that invertebrates at the Data Centre site are of 'regional' importance. As identified in **Table 11.6, Chapter 11 Terrestrial Biodiversity** of the **ES (6.1, REP2-023)**, invertebrates at the site are considered as being of Local Conservation Importance and not of National or Regional importance, based on the findings of a more recent survey, undertaken in 2018. The following sets out the rationale for this view.
- 1.3.9 The 2018 survey for the REP proposals did not consider any aquatic invertebrates as the survey did not need to consider the existing drainage ditches around the margins of the Data Centre site, which will be retained as part of the Proposed Development (and protected in accordance with the **Outline CoCP (7.5, REP5-010)** (secured via the DCO). However, the 2016 survey did include aquatic invertebrates and, as such, the aquatic species recorded in 2016 should reasonably be discounted when comparing the two survey findings. The abundance of aquatic invertebrates recorded in the 2016 survey would have contributed to the importance of the overall invertebrate assemblage at the site. However, the 2016 survey was prepared for a different application with different impacts, most notably the fact that the drainage ditches will be protected and therefore will not be affected by the Proposed Development, and particularly by the Main Temporary Construction Compounds.
- 1.3.10 As noted in the 2016 report the Data Centre site is part of a mosaic of sites within the wider area. Many of the uncommon species noted in both surveys (2016 and 2018) are very mobile species that rely on early stage successional habitats. Currently, the Data Centre site is unmanaged and, if left as is, this site would eventually be fully covered, firstly in grassy vegetation and then scrub. In 2018, this site had limited areas of early stage habitat remaining. If left unmanaged, natural succession will eventually alter the character of the site so that the particular habitats needed by many of the uncommon species noted in both of the surveys will disappear, and the overall value of the site for invertebrates will change from that described in these surveys. This will happen, and indeed is happening, in a "no scheme" scenario.

- 1.3.11 The final aspect to consider is the size of the site, which is only approximately 150 x 150 m in size. While it may be a component in a mosaic of various habitat types which collectively support the "Thames Gateway fauna", viewed in isolation it is too small by itself to be graded as a "Nationally Important" site. Its small size mitigates against it being able to hold a long-term, self-supporting population of the various uncommon species recorded. Invertebrate species may be recorded on site purely by chance as they were "in transit" across the site. The site is already moving away from containing a lot of early stage successional habitat, and such habitats can be provided by mitigation through the biodiversity offsetting process secured in the **dDCO (3.1, REP5-003)**. Furthermore, the biodiversity off-set strategy as part of the Proposed Development will ensure that this transient type of habitat vulnerable to succession can be retained and managed over the longer term of at least 25 years
- 1.3.12 The ES takes full account of the ecological features within the Data Centre site, noting the presence of Open Mosaic Habitat, breeding birds and invertebrates. Potential effects on the Data Centre site, arising from the development of REP will be temporary, and measures to mitigate effects to ecological features during construction of REP are set out in the OBLMS and Outline CoCP as secured through **Requirement 5 and 11**, respectively, of the **dDCO (3.1, REP5-003)**. In spite of the potential temporary effects, the Applicant has committed to treating any habitat loss on the area of the Main Temporary Construction Compounds as a permanent loss and to provide off-site compensation accordingly. The site selection process undertaken by the Environment Bank will prioritise sites that can provide a 'like for like' replacement of habitat, with specific regard to opportunities for Open Mosaic Habitat (OMH).

Access to Crossness Local Nature Reserve

- 1.3.13 Access routes to Crossness LNR will not be affected by the Proposed Development, as stated at **Paragraph 1.2.6** in the **Applicant's response to Thames Water Utilities Limited Deadline 4 Submission (8.02.50, REP5-021)**:

"The Applicant does not accept that visitors to the Crossness Local Nature Reserve (LNR) will be materially adversely effected either arriving on foot or for parking. There are also other opportunities that exist to park and walk to access the reserve. Crossness LNR is primarily designated for its biodiversity interest and although community engagement with the biodiversity interest of the site is encouraged through community events and open days arranged by the Friends of Crossness group, there is currently no specific parking provision for visitors to Crossness. On this basis, currently satisfactory, retained access to Crossness LNR from FP2 and FP4 will remain such that the Applicant concludes that the provision of a visitor car park is unnecessary".

- 1.3.14 The Applicant confirmed in its response to Friends of Crossness Nature Reserve (**Applicant's response to Friends of Crossness Deadline 4 Submission (8.02.48, REP5-019)**) and TWUL (**Applicant's response to**

Thames Water Deadline 4 Submission (8.02.50, REP5-021)) at Deadline 5 that the TWUL road, which intersects the Data Centre site (land parcels 02/43, 02/44/, 02/49 and 02/48) does not form part of the DCO Application for REP. Therefore, for clarity, the Applicant confirms that the statement struck through in the following extract from **Table 2.1** of the **Environmental Statement Supplementary Report (6.6, REP2-044)** should be deleted and would not apply:

- 1.3.15 *“With regard to potential for accidents and road safety, the access road that intersects the Data Centre site (access for Crossness Sewage Treatment Works) will be retained. There are likely to be construction-related movements (vehicle and construction workers) between the two retained parcels of land. ~~Therefore, a suitable crossing point along the access road with appropriate traffic controls will be installed during the construction phase.~~”*
- 1.3.16 In light of the above, the Applicant confirms that it does not intend to utilise this route for access from the public highway to the compound areas and that separate access or accesses would be created from Norman Road, as can be seen from the **Access and Rights of Way Plans (Sheet 2) (2.3, REP2-005)**, which were submitted at Deadline 2.

Openness and disturbance to visitors

- 1.3.17 There is likely to be some reduction in openness arising from the development of REP and the Data Centre, however, the Applicant reiterates its position that openness will largely be maintained.
- 1.3.18 As illustrated in **Section 6.1** of the **Design and Access Statement (7.3, APP-104)** and re-provided below (**Figure 1.1**), the main REP building includes a stepped roof design which reduces the overall height and mass of the buildings. This is supplemented by the use of a graded colour scheme for the external cladding, which is designed to further reduce the perceived height of the Main REP Building, with upper elements of buildings lighter and lower levels darker. Furthermore, the orientation of the Main REP Building allows for visual permeability through the REP site lessening the perceived sense of enclosure from within the Crossness LNR. The wireframes presented in **Appendix E.2 – Photo Viewpoints** of the **ES (6.3, APP-073-074)** show a worst-case scenario (maximum stack height of 113 m Above Ordnance Datum (AOD), and a maximum building height of 65 m AOD (see **Chapter 3 Project and Site Description** of the **ES (6.1, REP2-013)**), which has been assessed in the EIA. The design of the REP building has carefully considered factors such as openness as well as shading and visual effects, thus mitigating anticipated potential impacts.
- 1.3.19 At present, views to the east from within Crossness LNR are strongly influenced by existing industrial buildings along Norman Road. These existing buildings act to curtail views of the landscape further to the east. The scale of existing buildings within the immediate urban area, adjacent to the LNR, create a vertical emphasis on the view and result in a skyline that is largely characterised by built form. The Applicant notes that TWUL "accepts" that the

LNR is "located within an existing industrial area." With respect to the potential cumulative impacts on openness with REP and the Data Centre buildings, REP has been carefully designed to reduce potential effects on openness and the Data Centre will be of a similar character to the mixed height existing industrial buildings within the vicinity to Crossness LNR.

RRRF is shown dotted in all images.

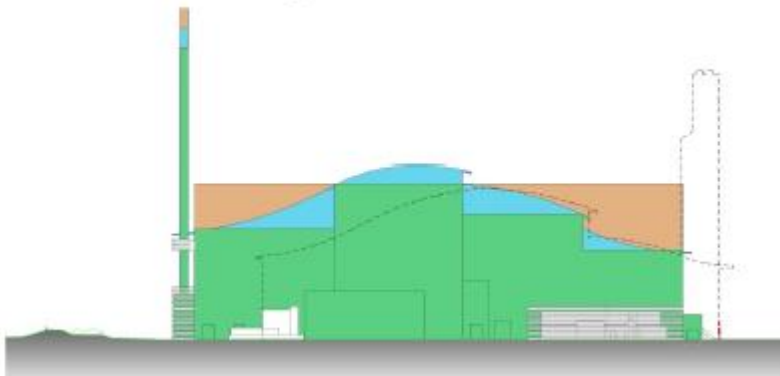


Figure 1.1 Illustrative Scale and Mass Comparison

1.3.20 The Applicant notes TWUL comments that it accepts that “*Crossness Nature Reserve might still offer green relief and provide educational opportunities to local residents, visitors and schools following the construction of the Project and Data Centres*”. It is considered that visitors to Crossness LNR are likely to be focused on undertaking ecological activities within the nature reserve. However, the Applicant has committed further to reduce any potential disturbance and indirect impacts that visitors and wildlife may be attributed to whilst within Crossness LNR. At Deadline 5 the Applicant proposed further mitigation measures as set out below, which are over and above those that are required to mitigate the potential effects of the Proposed Development. These additional measures will further reduce any potential disturbance and impacts on Crossness LNR during the construction period. As such, the following measures were included in the updated **Outline CoCP (7.5, REP5-010)** submitted at Deadline 5:

- The use of printed hoarding depicting vegetation and/or trees to be erected around the perimeter of the Data Centre site. This will provide further visual screening by giving the impression of continued vegetative landscape. The solid hoarding will bring the dual benefit to provide further noise reduction and dust control at the boundary to Crossness LNR; and
- Specified noise attenuating barriers would be erected around the perimeter of the Data Centre site closest to Crossness LNR where any noisy works are to be undertaken as part of the Main Temporary Construction Compound, this will result in further noise reduction at the boundary to Crossness LNR.

Lapwings

- 1.3.21 In response to TWUL's Written Representation (**REP2-092**), the Applicant responded with respect to noise levels and potential disturbance to lapwings at **Paragraphs 5.3.55-5.3.59** of the **Applicant's response to Written Representations (8.02.14, REP3-022)** submitted at Deadline 3.
- 1.3.22 Potential effects to breeding birds, including lapwing, from disturbance during construction will be of low magnitude, temporary and localised to the REP site and its immediate surroundings. Along with inherent resilience of this species to disturbance, effects through disturbance will be Not Significant. As stated above in **Paragraph 1.3.20**, the Applicant has proposed further mitigation, which will further reduce potential noise disturbance.
- 1.3.23 A cumulative assessment, which included the consented Data Centre and potential effects to breeding birds, was undertaken and reported in the ES (**Section 11.10, Chapter 11 – Terrestrial Biodiversity** of the **ES (6.1, REP2-023)**). In light of the mitigation measures included in the Outline CoCP and OBLMS (which the Applicant has developed further during the course of the Examination), which are secured through **Requirement 11** and **5**, respectively, of the **dDCO (3.1, REP5-003)**, the findings of this assessment are that cumulative effects to breeding birds would be Not Significant.

Avian Predators

- 1.3.24 The proximity of REP to Crossness LNR does not have any bearing on increasing avian predators in the area. The existing infrastructure including the Crossness Sewage Treatment Works Sludge Powered Generator and the Applicant's Riverside Resource Recovery Facility, including gantries and outbuildings, provide existing perching structures for avian predators. The addition of REP will not significantly increase the presence of perches for avian predators.
- 1.3.25 TWUL specifically raises a concern over predation of lapwing and other species by peregrine. Peregrine are pursuit predators, catching their prey in active flight, rather than dropping on their prey from a perch. In addition, they have very effective sight and do not require to be perched immediately adjacent to their prey to identify it. Therefore, the addition of REP (and the Data Centre) is unlikely to increase predation by peregrine, as the structures would not alter their existing hunting behaviours.
- 1.3.26 The cumulative assessment for terrestrial biodiversity, as set out in **Section 11.10, Chapter 11 Terrestrial Biodiversity** of the **ES (6.1, REP2-023)**, concludes no significant cumulative effects are anticipated. The Applicant acknowledges that the stacks will provide potential additional avian predator perches, however no significant effect has been identified arising from avian predation of specific species and the addition of perches is set in the context of existing surrounding perches. In the absence of evidence of any significant effect, the Applicant maintains that any effect is Not Significant and is outweighed by the benefits of the proposal in meeting the urgent need for new

energy infrastructure, among other matters set out in the **Project and its Benefits Report (7.2, APP-103)**.

Biodiversity Value

1.3.27 The potential ecological effects on Crossness LNR arising from the construction and operation of REP have been assessed as Not Significant (**Paragraph 11.9.2, Chapter 11 Terrestrial Biodiversity** of the **ES (6.1, REP2-023)**) and therefore the biodiversity value of Crossness LNR will not be adversely affected by REP.

Section 106 Agreement objectives

1.3.28 At Deadline 6, the Applicant submitted the **Applicant's response to the ExA's Rule 17 Letter on Changes to the Application (8.02.61, REP6-003)** which states in relation to TWUL's Section 106 agreement (s106):

1.3.29 *"While TWUL were unable to provide a copy, the Applicant sought to obtain the s106 through alternative means. A full copy of the s106 has now been sourced from the London Borough Bexley's (LBB) Building Control Team. The Applicant has reviewed the 21 obligations set out in Schedule 2 of the TWUL s106 (an extract is provided in Appendix A) and can conclude that the Proposed Development would not contravene any of the obligations set out in Schedule 2, as the Proposed Development would not restrict TWUL from undertaking and maintaining these obligations"*.

1.3.30 As stated in **Paragraph 1.2.9** of the **Applicant's response to Thames Water's Written Summary of Oral Submissions Made at Hearings (8.02.39, REP4-018)**, and **Paragraph 1.3.4** of the **Applicant's response to Thames Water Utilities Limited Deadline 4 Submission (8.02.50, REP5-021)**, section 3 of the Water Industry Act 1991 applies to proposals being promoted by TWUL, not by third parties. In relation to such proposals relating to TWUL's undertaking, TWUL is under a duty to further the conservation and enhancement of natural beauty and the conservation of flora and fauna. Accordingly, the Applicant will not place TWUL in breach of section 3 or section 5 of the Water Industry Act 1991 (which relates to giving practical guidance to relevant undertakers with respect to any of the matters under section 3).

1.3.31 The Applicant would note that whilst TWUL keeps referencing that the Proposed Development "*could prevent TWUL from complying with the s106 and its statutory duties*", it does not identify which obligations or indeed how a development outside the LNR and section 106 agreement could place TWUL in breach. TWUL cannot simply make assertion about a possible breach, it needs to evidence it, which it has continuously not done.

Cumulative impact of REP and the Data Centre on breeding birds

1.3.32 **Chapter 11 Terrestrial Biodiversity** of the **ES (6.1, REP2-023)** and the further information provided in response to written representations shows that potential construction disturbance will not affect the long-term distribution and abundance of the assemblage of breeding birds within the study area or its nature conservation importance. Measures to mitigate potential adverse effects on breeding birds during construction of REP are set out in the **OBLMS (7.6, Rev 3)**, which is secured in **Requirement 5** of the **dDCO (3.1, REP5-003)**. For example, “...where possible, vegetation clearance would be minimised and undertaken outside the core bird nesting season (1st March and 31st August, though it should be noted that variation in dates is possible, for example from geographical variations in climate, or due to a particularly mild winter) to avoid damage or destruction of occupied nests or harm to breeding birds”. These measures will provide mitigation for birds, such as skylark, which breed on the Data Centre site, whilst it is being used as part of the Main Temporary Construction Compounds. Once the temporary use has finished, either the land will be restored or, should the Data Centre be built, Cory (as the applicant for the Data Centre) would need to comply with the conditions relating to the Data Centre permission with regards to provision for biodiversity.

1.3.33 As set out in the **OBLMS (7.6, Rev 3)** the Applicant commits in this document to treating any temporary habitat loss on the area of the Main Temporary Construction Compounds as a permanent loss and providing off-site compensation accordingly. Off-site compensation is likely to be of similar habitat value to breeding birds, including skylark.

Suggested amendments to the draft Development Consent Order (dDCO)

1.3.34 In response to TWUL's suggested amendments to the dDCO, the Applicant considers that LBB or the relevant planning authority is the appropriate sole approving authority for discharging **Requirements 5** and **11** of the **dDCO (3.1, REP5-003)** and express reference to consultation with a limited company, TWUL, is not necessary or justified.

1.4 Protective Provisions

1.4.1 The Applicant is currently waiting for TWUL to respond on the latest iteration of the Protective Provisions for TWUL.

1.5 Analysis of whether the policy on Green Belt in the National Policy Statement applies to the Metropolitan Open Land in respect of the Proposed Development (8.02.41, REP4-020) (the Applicant's "MOL Analysis")

Relevance of the National Planning Policy Framework (NPPF) (paragraphs 2.28 to 2.30 of TWUL's Deadline 5 submission)

- 1.5.1 TWUL asserts that the "*Applicant has sought to rely on the NPPF in its application of the NPS*" and that whilst TWUL considers the London Plan to be relevant it does not consider the NPPF to be relevant.
- 1.5.2 The Applicant's position is clearly set out in **Section 1.3 of its Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)**. Pursuant to section 104(3) of the Planning Act 2008, the National Policy Statements ("NPS"), and the tests within them, take precedence in the decision making process in respect of development consent for a Nationally Significant Infrastructure Project ("NSIPs"). The primary policy contained within NPS EN-1 only affords policy protection to the Green Belt - section 5.10 of NPS EN-1. Accordingly, the primary policy of NPS EN-1, does not provide any policy protection to Metropolitan Open Land ("MOL"). This is not debatable.
- 1.5.3 The Applicant referred to the NPPF in its **Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)** as TWUL is seeking to rely on the London Plan and its policy position of treating MOL as Green Belt. Only if the Secretary of State considers that the policies in the London Plan are both important and relevant is she required to have regard to the policies in the London Plan (section 104(2) of the Planning Act 2008). This is a decision for the Secretary of State. Should the Secretary of State consider that the London Plan is both an important and relevant consideration in deciding the REP Application, then the Applicant's position is that the NPPF, in aiding the interpretation of policy in the London Plan, should also be an important and relevant consideration in deciding the REP Application. This is different to saying that the policy tests in the NPPF apply. The NPPF is helpful as it provides examples of what is "inappropriate development" and examples of what would be "appropriate development" in the Green Belt. These examples are useful in the interpretation of the London Plan policy. These examples were the only reason why the Applicant referred to paragraphs 143, 145 and 146 of the NPPF, which is clear from **Paragraph 1.3.6 of the Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)**. Policy tests and weighting to be applied to impacts/benefits of an NSIP is for the NPS, not the NPPF, which is what the NPPF states at paragraph 5 and which is repeated by TWUL in paragraph 2.30 of its Deadline 5 submission. The Applicant agrees with TWUL in this regard.
- 1.5.4 Unfortunately, TWUL has taken the Applicant's reference to examples in the NPPF of what constitutes "inappropriate development" and "appropriate development" in the Green Belt, as indicating that the Applicant considers the

policy tests and weighting in the NPPF apply. The **Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)** makes no such link and indeed that would be wrong in law and would cause a contradiction with the primary policy of the NPSs.

Relevant “Green Belt” tests to apply (paragraphs 2.31 to 2.31.12 of TWUL’s Deadline 5 submission)

- 1.5.5 Should the Secretary of State follow the London Plan and treat MOL as Green Belt, then the correct tests to assess the REP Application against are not the ones in the London Plan or the NPPF, but in section 5.10 of NPS EN-1. Paragraph 144 of the NPPF is therefore not relevant in the consideration of the REP Application and paragraphs 2.31.4 to 2.31.6 of TWUL's Deadline 5 submission must be disregarded.
- 1.5.6 Paragraph 5.10.10 of NPS EN-1, refers to:
- "a general presumption against inappropriate development **within them** [Green Belt]"
 - “Applicants should therefore determine whether their proposal, or any part of it, **is within** an established Green Belt....”
- 1.5.7 Paragraph 5.10.17 of NPS EN-1, refers to:
- “When **located in** the Green Belt...”
- 1.5.8 These paragraphs are clear in their meaning, they are referring to development that is in the Green Belt, not adjacent to it, or close to it, or nearby. There can be no dispute over their meaning; the language is plain and clear. For TWUL’s interpretation to make sense, you would need to read words into the paragraphs, which is not how you interpret planning policy as well established in case law and practice – policy statements should be interpreted objectively "*in accordance with the language used*", not by inserting words into the policy statement itself (*Tesco Stores Limited v Dundee City Council* [2012] UKSC 13).
- 1.5.9 This does not mean that “indirect” impacts of a development on the Green Belt, or MOL in this case, should not be taken into account; of course they should be (as part of the overall planning balance required by section 104(7) of the Planning Act 2008), but that is very different to classing development that lies outside the Green Belt, or MOL, but adjacent to, or close to the Green Belt/MOL as “inappropriate” development. Indeed, such an interpretation would go against the London Borough of Bexley Local Plan that has been found sound and on this basis allocated the Application Site as the Belvedere Industrial Area and as the Bexley Riverside Opportunity Area.
- 1.5.10 Paragraph 5.10.17 of NPS EN-1, therefore, only applies to those elements of the REP Application that fall within the MOL. TWUL then asserts that reference to "*any other harm*" in paragraph 5.10.17 of NPS EN-1, should be

read as meaning "*any other harm generated as a result of the development*" (paragraph 2.31.10 of TWUL's Deadline 5 submission). Again, this is plainly wrong, reference to "*any other harm*" is reference to the harm caused by the development in the Green Belt. For example, the development in question may not be "inappropriate development", in which case the reference to "*harm by reason of inappropriateness*" would not apply, but that development (being then "appropriate development"), may still have harm to the Green Belt.

1.5.11 Paragraph 5.10.17 of NPS EN-1 applies to the Proposed Development, but only in respect of those elements identified in **Table 1.2** of the Applicant's **Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)**. TWUL's claim that references to Work Numbers 8 and 9 are wrong, is unclear. Reference to Work Number 9 is a reference to the whole of Work Number 9 (being (a) to (e)) whereas not all of Work Number 8 is relevant for the plot numbers in question (hence the identification of the relevant part of Work Number 8). As the **dDCO (3.1, REP5-003)** makes clear at requirement 32, no buildings must be erected on any part of the land hatched orange on the MOL plan, which is why not all of Work Number 8 applies. In any event, the Applicant is unclear where this line of argument takes TWUL and its submissions.

1.5.12 The overarching point is that paragraph 5.10.17 of NPS EN-1 applies to those elements of the Proposed Development identified in **Table 1.2** of the Applicant's **Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)**. As the Applicant's **Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)** sets out, none of these elements are "inappropriate development." Furthermore, none of these works will have an adverse impact on the MOL, and thus there is no "*any other harm*" by virtue of that "appropriate development." Accordingly, paragraph 5.10.17 is not triggered.

Indirect Impacts (paragraphs 2.32 to 2.35 of TWUL's Deadline 5 submission)

1.5.13 As referred to above in **Paragraph 1.5.9**, the indirect effects of the whole of the Proposed Development on the MOL must be considered in the overall planning balance of the Application pursuant to section 104(7) of the Planning Act 2008.

1.5.14 TWUL states in their *opinion* that the curved roof option is the preferred design option to mitigating the appearance of the main REP building on the immediate landscape. As stated above in **Paragraph 1.1.18** of this document, the stepped roof design of the main REP building reduces the overall height and mass of the buildings. The design (orientation, layout, height and material) has carefully considered factors such as openness as well as shading and visual effects, thus mitigating anticipated potential impacts.

1.5.15 The Applicant's stepped building design was determined through taking a number of key considerations into account following design evolution and a

public/stakeholder consultation process, as set out in the **Design and Access Statement (7.3, APP-104)**.

- 1.5.16 Further to the grant of outline planning permission for a Data Centre, a reserved matters application has been submitted to the London Borough of Bexley which provides a number of architectural drawings showing the proposed detailed design for the Data Centre. Some illustrative information was provided to explain the evolution of the design including some 'artist impression' images. These images are indicative in nature and primarily seek to show an overall design approach to the proposed building themselves. The principle of development in that location was established through its allocation for employment use in the LBB Local Plan and the grant of planning permission for the Data Centre.
- 1.5.17 Notwithstanding the above, the design of the Data Centre is not a matter for the REP Examination as the Data Centre does not form part of the DCO Application. The Data Centre already has outline planning permission granted by the London Borough of Bexley, and the Applicant's Reserved Matters application is currently being determined by the London Borough of Bexley. Any comments on the Applicant's design for the Data Centre should be directed to the London Borough of Bexley during the consultation process on the Reserved Matters Application.

1.6 Conclusions

- 1.6.1 Whilst TWUL restates that effects would be 'significant', the Applicant has demonstrated, through its assessments, that the potential indirect effects on Crossness Local Nature Reserve are Not Significant and the Applicant will provide appropriate mitigation through the biodiversity offsetting process, which is secured through **Requirement 5** of the **dDCO (3.1, REP5-003)**. In addition, the Applicant has committed to provide over and above (in planning terms) the 10% biodiversity net gain to mitigate the potential effects for the temporary loss of part of the Main Temporary Construction Compounds.
- 1.6.2 The Applicant welcomes TWUL's acceptance that the LNR is "*located within an existing industrial area*" (para 2.8) and also that the LNR "*might still offer 'green relief' and provide educational opportunities to local residents, visitors and schools following the construction of the [Proposed Development] and Data Centres...*" (para 2.10).
- 1.6.3 The Applicant has set out the reasons for altering the extent of the Main Temporary Construction Compounds and the land acquisition and planning policy context for this. The Applicant has set out the planning balance context, within which the Proposed Development would not result in any residual adverse ecological effects, taking account of relevant policy objectives, and the Applicant has provided further mitigation to minimise potential effects on the Data Centre sites as far as practicable.
- 1.6.4 Regarding the MOL, paragraph 5.10.17 of NPS EN-1 applies to those elements of the Proposed Development identified in **Table 1.2** of the

Applicant's **Analysis of Metropolitan Open Land (MOL) in respect of the Proposed Development (8.02.41, REP4-020)**. As the Applicant's MOL Analysis sets out, none of these elements are "inappropriate development." Furthermore, none of these works will have an adverse impact on the MOL, and thus there is no "*other harm*" by virtue of that "appropriate development." Accordingly, paragraph 5.10.17 is not triggered.