Cory Decarbonisation Project

Planning Inspectorate Reference: EN010128

Written Representation by

SAVE CROSSNESS NATURE RESERVE

Introduction

1. Save Crossness Nature Reserve (SCNR) is a campaign group made up of local residents, bird watchers, local campaigners and environmentalists. SCNR members have extensive first-hand knowledge of the site, including the habitats and species that exist on it. Many of them play an active role in supporting and promoting the nature reserve as volunteers through Friends of Crossness Nature Reserve, a separate group created by Thames Water Limited (who own and manage the site). For example, they use their knowledge to provide free walks and talks, record wildlife data, and provide general support.

2. We have included a summary of the key facts of these written representations.

3. All defined terms used below are those used in the Applicant's submission documents, unless stated otherwise.

Summary (1,046 words)

4. The Applicant has failed to apply the mitigation hierarchy by failing to avoid, reduce and sufficiently mitigate ecological and biodiversity harm. Therefore, the CNP presumptions in EN-1 are not engaged. In any event this is an "exceptional case" that would rebut the CNP presumptions.

5. The loss of 3.5 ha (representing 11.7%) of Crossness Nature Reserve constitutes a severe planning harm on multiple fronts, given the site's range of important designations:

    a. LNR: the loss LNR is a major adverse effect that is insufficiently mitigated.
    b. MOL: the Proposed Scheme is 'inappropriate development', and should only be approved in very special circumstances, with substantial weight given to this harm. The Proposed Scheme fails to counteract these tests.
    c. SINC: development harming SINC is only acceptable where the harm is unavoidable, the benefits clearly outweigh the impacts on biodiversity, and the mitigation hierarchy is applied. None of these requirements are met.
    d. Open space / green infrastructure (as defined in EN-1 and the London Plan): LBB recognises Crossness Nature Reserve as being open space of "higher quality" and "higher value". Open space is recognised as vital infrastructure, and applicants should provide new or additional open space to substitute for any losses. The Applicant has failed to do so.

6. The mitigation proposed to account for these harms is insufficient. No additional land of ecological value is created, merely enhancement to the remaining Crossness Nature Reserve and Norman Road Field. The Applicant has underestimated the ecological value of this land and the harm to it, and as a result the mitigation

proposals are insufficient. Furthermore, the Applicant relies on an incorrect understanding of what constitutes open space for these purposes, and an incorrect belief that accessibility is a key feature of these designations.

7. The Proposed Scheme would significantly impact multiple protected species, Habitats of Principal Importance and a long list of Species of Principal Importance. The Applicant has failed to account for many of these species and has underestimated the impact on the species that are accounted for. There is risk of further harm to the remaining Crossness Nature Reserve through extended public access. Some of the mitigation proposals, particularly tree planting and changes to the water table levels, are either inappropriate for grazing marsh habitat or not properly tested, and risk further harm. The Applicant has failed to appreciate extant planning controls relating to Norman Road Field, which require extensive habitat creation and enhancement, and long-term management and monitoring; this has led to an incorrect assessment of the baseline. Accordingly, the Applicant has failed to adequately mitigate the biodiversity harm.

8. The Applicant places great reliance on the carbon capture achieved from the Proposed Scheme, and its mistaken belief that the CNP presumptions consequently apply. It is wrong to rely on climate and air pollution benefits to justify loss of biodiverse LNR land, which is already helps to tackle climate change and air pollution (as recognised in EN-1) - particularly when other sites for carbon capture are available. The Applicant's claims that the Proposed Scheme will achieve a 95% carbon capture rate on Riverside 1 and Riverside 2 is misleading - as it is not a net figure considering broader emissions - and is also disputed - as most global carbon capture projects are underperforming and achieving nowhere near this amount of capture. The Proposed Scheme will result in the production of other harmful gases. After 20-25 years the facility will be decommissioned, which in itself will have a further carbon impact – the climate benefits, and permanent loss of and harm to irreplaceable ancient grazing marsh, must be seen in this context.

9. The Proposed Scheme will have an enormous visual impact on Crossness Nature Reserve, which is particularly sensitive given a large part of its amenity value comes from the sense of tranquility and openness. This harm has not been adequately assessed or mitigated.

10. The Applicant's consideration of alternatives was insufficient. Delivery in other zones, particularly in/near the 'East Zone' was dismissed without proper investigation and testing. The Applicant's approach illegitimately replaced policy considerations (and their weighting) with the Applicant's own 'Optioneering Principles'. When a policy-led approach is taken, delivery on/near the East Zone performs better (it even performs better under the Optioneering Principles, if applied consistently).

11. Acquisition of the Mitigation and Enhancement Area is not required for the development, meaning the Proposed Scheme does not meet the test under section 122 of the Planning Act 2008. The mitigation and management could be achieved through rights and contractual arrangements, similar to the Applicant's proposals for Thamesmead Golf Course, or the area of Crossness Nature Reserve remaining in Thames Water's ownership. It could also be achieved through amending existing s106 agreements relating to Crossness Nature Reserve and Norman Road Field. The Applicant's desire for a less "messy" approach is not relevant to the statutory test. The Applicant's reliance on avoiding unknown requirements under existing s106 agreements is flawed, as compulsory acquisition will not automatically extinguish any such requirements. Furthermore, there is no compelling case in the public interest to take the Applicant's approach.

12. Section 127 of the Planning Act 2008 prevents compulsory acquisition of Crossness Nature Reserve. TW own and operate Crossness Nature Reserve as statutory undertaker: not only because it is part of the sludge incinerator development (and necessary to render it acceptable in planning terms), but also because of TW's separate statutory duties under s3 of the Water Industry Act 1991 and s40 of the Natural Environment and Rural Communities Act 2006.

13. The parts of Crossness Nature Reserve being lost also constitute 'Special Category Land' pursuant to section 131 of the Planning Act 2008, meaning the grant of a development consent order should be subject to special parliamentary procedure. The land is "open space" for these purposes as it used for the purposes of public recreation, which is not limited to publicly accessible land.

14. In conclusion, the Proposed Scheme produces significant and unacceptable harms that could be avoided on alternative sites, and have not been adequately assessed or mitigated. The Proposed Scheme is therefore unacceptable, and the CNP presumptions do not apply. The tests for compulsory acquisition are not met, and there are further legislative blocks to compulsory acquisition as proposed. Therefore, the DCO Application should be refused.

CNP presumptions and mitigation hierarchy

15. The Applicant places great reliance on the *"CNP presumptions"* in EN-1 to justify the harms created under the Proposed Scheme. In particular, the Applicant relies on paragraph 4.2.16: where the CNP presumptions apply, the Secretary of State will take as the *"starting point"* for decision-making that such infrastructure is to be treated as meeting tests within the NPSs and other planning policy, which require a clear outweighing of harm, exceptionality or very special circumstances.

16. However, as the Applicant accepts, the CNP presumptions only apply where a scheme meets the requirements in EN-1, including the mitigation hierarchy, as well

as any other legal and regulatory requirements (see paragraph 4.2.10 EN-1). At paragraph 4.2.11 of EN-1, it states, "*Applicants must apply the mitigation hierarchy and demonstrate that it has been applied*.". Therefore, the concept of the CNP presumptions being the 'starting point' is not accurate and the true starting point is an assessment of the mitigation hierarchy and other requirements listed above.

17. The mitigation hierarchy is *"the avoid, reduce, mitigate, compensate process that applicants need to go through to protect the environment and biodiversity"*. Paragraph 5.4.42 of EN-1 states that *"as a general principle, and subject to the specific policies below, development should, in line with the mitigation hierarchy, aim to avoid significant harm to biodiversity... including through consideration of reasonable alternatives"*. The Applicant has failed to apply the mitigation hierarchy, on multiple fronts. It has failed to avoid and reduce the significant harm to the environment and biodiversity, by failing to consider reasonable alternatives and smaller scheme designs. Furthermore, it has failed to adequately mitigate the significant harms to biodiversity that the current Proposed Scheme would cause. These points are explored in detailed below.

18. Therefore, the CNP presumptions do not apply, and there remains a need to evidence a clear outweighing of harm, exceptionality and very special circumstances as required under the various policies explored below. The DCO Application fails to do so.

19. Even if the CNP presumptions were to apply, the Proposed Scheme is one of the *"exceptional cases"* where the need does not outweigh the residual harmful effects, which are detailed below.

Planning designations and loss of land

20. The Proposed Scheme will result in the loss or direct compromise to 3.5 hectares of open space in Crossness Nature Reserve, which is high quality ancient coastal and floodplain grazing marsh, with the following planning designations / definitions:

    a. Local Nature Reserve (LNR);
    b. Metropolitan Open Land (MOL);
    c. Site of Importance for Nature Conservation (SINC); and
    d. 'Open space' and 'green infrastructure' as defined in EN-1 and the London Plan 2021.

21. Crossness Nature Reserve also forms part of the Thames Marshes Strategic Green Wildlife Corridor and South East London Green Chain.

Local Nature Reserve

22. LNRs are statutory designated sites, and recognised in EN-1 as sites of regional and local biodiversity and geological interest. Paragraph 5.4.12 of EN-1 notes that LNRs are *"areas of substantive nature conservation value and make an important contribution to ecological networks and nature's recovery* [and] *can also provide wider benefits including public access (where agreed), climate mitigation and helping to tackle air pollution"*.

23. Paragraph 5.4.52 of EN-1 requires the Secretary of State to *"give due consideration"* to this designation. While it should not be used in and of itself to refuse development consent, development *"will still be expected to comply with the biodiversity and geological conservation requirements set out in this NPS"*, including the mitigation hierarchy and other EN-1 requirements, which are set out and analysed below.

24. The Applicant has failed to give due consideration to this designation and the loss of 3.5 ha of LNR, which amounts to 11.7% of Crossness Nature Reserve. In Chapter 7 of the Environmental Statement (Terrestrial Biodiversity) ("ES Chapter 7"), the Applicant gives the site County importance, and considers this loss of LNR to only have a medium magnitude of impact, leading to a conclusion of direct, permanent, long term, moderate adverse (significant) effect. However, this loss represents a total loss of a significant proportion of the LNR, and a large alteration to key elements/features of the baseline conditions, meaning (under the Applicant's own methodology) the magnitude of impact should be high. This results in a finding of major to moderate adverse effect, and we believe a major adverse effect in the circumstances.

25. This failure to adequately assess the extent of adverse effect has led to insufficient mitigation. The Applicant relies on the creation and enhancement of habitats and the 'expansion' of the LNR designation to Norman Road Field. However, neither of these account for or justify the loss of LNR land. Any qualitative gains (the extent of which we dispute below) do not make up for the quantitative loss. The 'expansion' of the designation does not create more open space, but rather it extends the definition to land which is already classified as MOL and which could, if existing planning controls were properly enforced (as detailed below), qualify for LNR designation regardless of the Proposed Scheme. The Proposed Scheme must be understood as a loss of land that is or could already be LNR.

Metropolitan Open Land

26. The London Plan 2021 recognises MOL as *"strategic open land within the urban area* [that] *protects and enhances the open environment and improves Londoner's quality of life"* (paragraph 8.3.1) by providing, amongst other things, leisure use, biodiversity and health benefits. The Bexley Local Plan definition notes MOL is *"intended to protect areas of landscape, recreation, nature conservation and scientific interest*

which are strategically important". The Bexley Local Plan also refers to its function as a *"break within a built-up area"* (paragraph 5.56).

27. MOL is described in the London Plan as fulfilling a *"similar function"* to Green Belt (see definition of MOL on page 512), but there are clear differences. While the fundamental aim of Green Belt is to *"prevent urban sprawl"*, MOL can be distinguished as it does not have a single fundamental aim, but rather multiple aims (as set out above).

28. MOL is afforded the same status and protection as Green Belt land. Therefore, the requirements in the EN-1 and NPPF – that inappropriate development should only be approved in *"very special circumstances"* – applies equally to MOL as Green Belt. It is accepted that the Proposed Scheme is 'inappropriate development' (paragraph 5.3.18 of the Planning Statement).

29. EN-1 paragraph 5.11.37 states that:

> *"the Secretary of State should ensure that substantial weight is given to any harm to the Green Belt* [and therefore MOL] *when considering any application for* [inappropriate] *development, while taking account, in relation to renewable and linear infrastructure, of the extent to which its physical characteristics are such that it has limited or no impact on the fundamental purposes of Green Belt designation. Very special circumstances may include the wider environmental benefits associated with increased production of energy from renewables and other low carbon sources"*.

30. The Proposed Scheme results in a loss of 3.5 ha of MOL, but offers no mitigation against this. The Applicant's reasoning, summarised below, is not sufficient to justify this loss.

31. First, the focus on there being no loss of 'Accessible Open Land' is inappropriate, as accessibility is only one of many factors that gives MOL its value. This ignores the other benefits from biodiversity / nature conservation, health, landscape, and scientific interest.

32. The Applicant also alleges that there is *"limited impact"* as *"the primary aim and relevant function of the MOL will be maintained, there will remain a 'break within the built-up area'. A substantial, and definitive, area of openness between the proposed Carbon Capture Facility and the Crossness Sewage Treatment Works will be maintained"*. We dispute that the impact would be limited. Clearly, the Applicant accepts that there will be a negative impact on the MOL and the extent to which there will be a break within the built-up area will inevitably be reduced if this Proposed Scheme proceeds as currently proposed. The extent to which "some" break within the built-up area will be maintained, is insufficient to achieve the aims and purpose of the MOL designation. As such, the reduction in MOL is unacceptable.

33. The Applicant's analysis ignores the other functions of MOL: to protect and enhance open environment; to improve quality of life; and to protect areas of landscape, recreation, nature conservation and scientific interest. All of these functions will be significantly hindered by the Proposed Scheme, but the DCO Application fails to acknowledge this, and fails to justify or mitigate this significant impact. We also dispute the assertion that the primary aim / function of MOL is to provide a break within a built-up area. There is no clear primary aim / function set out in policy, but the broad wording from the London Plan best summarises its overarching goal: to protect strategically important spaces. These spaces may be strategically important as a result of landscape, recreation, nature conservation and scientific interest. The break within the built-up environment is only part of this strategic role.

34. The Applicant relies on the CNP presumptions, but the failure to apply the mitigation hierarchy means they do not apply. Even they did, this constitutes an exception case due to the significant harm arising from the large loss of MOL and impacts on the landscape, recreation and nature conservation functions of the remaining MOL, as detailed below.

Site of Importance for Nature Conservation

35. Crossness Nature Reserve falls within the Erith Marshes Metropolitan SINC, meaning it is a *"strategically-important conservation site for London"*[1]. In May 2022 LBB produced a SINC paper (Appendix 1) that describes Erith Marshes as *"one of the very few remaining areas of Thames-side grazing marsh in London, supporting scarce birds, plants and insects"*[2].

36. London Plan policy G6 states that SINCs *"should be protected"* (G6 (A)). It goes on to state (at G6 (C)):

> *"where harm to a SINC is unavoidable, and where the benefits of the development proposal clearly outweigh the impacts on biodiversity, the following mitigation hierarchy should be applied to minimise development impacts:*
> *(1) avoid damaging the significant ecological features of the site;*
> *(2) minimise the overall spatial impact and mitigate it by improving the quality or management of the rest of the site;*
> *(3) deliver off-site compensation of better biodiversity value."*.

37. The Proposed Scheme fails to protect the SINC, and results in the loss of 3.5 ha of SINC. The Applicant's justifications are that *"none of this land is Accessible Open Land"*[3] and that mitigation measures limit the impact. However, accessibility is not

[1] London Plan paragraph 8.6.1
[2] See page 13
[3] Planning Statement paragraph 6.4.37

relevant to assessment of SINC, the value of which derives from its nature conservation value. Pursuant to G6, it is not possible to resort to mitigation, as the harm to the SINC is unavoidable through delivery on the East Site (as detailed below), and because the benefits do not clearly outweigh the negative impacts on biodiversity.

38. The Applicant considers Erith Marshes MSINC to be of County importance (paragraph 7.8.8 of ES Chapter 7), but as it is a sustainable area of a priority habit in the UK BAP (and at least a smaller area of such habitat which is essential to maintain the viability of a larger whole), it is in fact of National importance. The loss of 3.5% and resulting fragmentation, the threat to Habitats of Principal Importance (HPIs) and Species of Principal Importance (SPIs), the air quality impacts and broader risk of pollution (all set out below) represent a large alteration to key elements/features of the baseline conditions, meaning the magnitude of impact is high (not medium, as the Applicant concludes at paragraph 7.8.10). Therefore, the effect is major, not moderate. Once again, the Applicant has failed to properly assess and therefore mitigate the harm.

Open space and green infrastructure

39. EN-1 defines open space as "*all open space of public value… which offer important opportunities for sport and recreation and can also act as a visual amenity"*[4]. The London Plan similarly defines Open Space as *"all land in London that is predominantly undeveloped… the definition covers the broad range of types of open space within London, whether in public or private ownership and whether public access is unrestricted, limited or restricted"*.

40. Green infrastructure is defined in EN-1 as *"a network of multi-functional green and blue spaces and other natural features, both rural and urban, which is capable of delivering a wide range of environmental, economic, health and wellbeing benefits for nature, climate, local and wider communities and prosperity"*[5]. Paragraph 5.55 of the Bexley Local Plan contains a similar definition: *"the network of all green and open spaces and includes Bexley's waterways."*

41. Paragraph 5.11.9 of EN-1 requires applicants to *"consider providing new or additional open space including green and blue infrastructure… to substitute for any losses as a result of their proposal"*.

42. London Plan Policy G1(A) states that *"London's network of green and open spaces, and green features in the built environment, should be protected and enhanced"*. Policy G4(B) states that development proposals should *"not result in the loss of protected open space"*, and *"where possible create areas of publicly accessible open space, particularly in areas of deficiency"*.

[4] See footnote 246
[5] Footnote 247

43. The Bexley Green Infrastructure Study 2020 (part 2) (Appendix 2) scored open space in the borough, and considered Crossness Nature Reserve to be of *"higher quality"* and *"higher value",* and to have *"Strong Openness"* [6].

44. The Proposed Scheme fails to provide any new or additional open space to substitute for the loss of 3.5 ha of open space / green infrastructure and fails to protect London's network of green and open spaces.

45. The Applicant places great reliance on the fact that *"there will be no loss of Accessible Open Land resulting from the Proposed Scheme, i.e. land that is actually used as open space"*. However, the Applicant's understanding of what is *"actually"* open space for these purposes is fundamentally wrong. The relevant definition here is that in EN-1, quoted above, which explicitly acknowledges and distinguishes itself from narrower concepts of open space, and clearly includes *"all open space of public value"*, including *"visual amenity"* value. The London Plan definition is also relevant and expressly confirms spaces with limited and restricted public access are included. There is no basis to limit open space to accessible space in this context. Therefore, the Applicant's justification is flawed, meaning they have failed to assess the true extent of the significant harm and failed to adequately mitigate.

Biodiversity

Site context

46. The high biodiversity value of Crossness Nature Reserve is confirmed by its designation as a Local Nature Reserve (which *"provide a significant and long-term contribution to nature conservation"*[7]) and part of Erith Marshes SINC. It consists of high quality ancient coastal and floodplain grazing marsh and reedbed, which are both Habitats of Principle Importance (HPI)[8]. The Applicant disputes whether this grazing marsh land can be considered "ancient" – however, Ordnance Survey Drawings dating back to 1799 show this land has been part of Erith Marshes for at least 225 years. This gives even greater value to Crossness Nature Reserve, and emphasises how irreplaceable it is.

47. Norman Road Field is also part of Erith Marshes SINC, and is also an HPI (coastal and floodplain grazing marsh, and a small amount of reedbed).

Policy test

48. The Proposed Scheme will result in the loss of 3.5 hectares of land designated as LNR, SINC and HPI.

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[6] See Figure 6.39 on page 129 and Figure 8.1 on page 169 of Appendix 2

[7] Bexley Local Plan paragraph 5.106

[8] Pursuant to section 41 of the Natural Environment and Rural Communities Act 2006 (NERC Act)

49. Paragraph 5.4.56 of EN-1 states the following:

> *"The Secretary of State should refuse consent where harm to a protected species and relevant habitat would result, unless there is an overriding public interest and the other relevant legal tests are met. In this context the Secretary of State should give substantial weight to any such harm to the detriment of biodiversity features of national or regional importance or the climate resilience and the capacity of habitats to store carbon, which they consider may result from a proposed development."*

50. The Proposed Scheme results in harm to protected species and their habitat (as detailed out below). Therefore, the Secretary of State should give substantial weighting to the biodiversity harm caused by the Proposed Scheme and should refuse consent. As the CNP presumptions do not apply, they cannot override this substantial weighting; and in any event, the significant extent of harm here, and the ability to avoid it, would render this an exceptional case even if the CNP presumptions did apply.

<u>Biodiversity harm</u>

51. The Proposed Scheme causes extensive harm to various protected species, SPIs and other valuable species, as set out below. For ease, we have followed the order in ES Chapter 7.

52. Assessment of magnitude, importance and consequent effect are based on the Applicant's own methodology in ES Chapter 7 (paragraph 7.4.7 onwards). The Applicant's position is that their approach is based on the CIEEM guidelines. However, the CIEEM guidelines could have been applied differently to how they have been applied by the Applicant in this case, with lower thresholds. This would have led in many cases to the magnitude and significance of the harms identified being greater, leading to conclusions of greater adverse effect. Additionally, further harms may have been identified as a result of crossing the said threshold.

Breeding Birds

53. The Applicant's desk study recorded 20 species that are either legally protected, included on the BoCC red list, SPIs or London Priority Species (LPS).

54. The Applicant's desk study failed to account for three species on the IUCN Red List of Threatened Species: common cuckoo, skylark and northern lapwing. The common cuckoo has been spotted on Crossness Nature Reserve on multiple occasions in spring this year. Breeding skylarks were spotted on Borax Fields up until Riverside 2 construction began. The Applicant notes that lapwing have been present on Crossness Nature Reserve in the past, but have not successfully bred on the site in recent years (the most recent recorded breeding being 2021). The failure of the desk study to account for these species highlights the limitations of this methodological

approach to ecological impact assessments. There is a need for a further full assessment that factors these species in.

55. The Applicant understates the high biodiversity value of the Site in its assessment at paragraph 7.6.35 of ES Chapter 7:

> *"the relatively small size of the Site (especially when compared to other habitats for breeding birds along the Thames), its situation within a heavily developed landscape and sources of anthropogenic disturbance (noise, vehicle movements, pedestrians) tend to preclude more sensitive species (such as breeding lapwing, which have been present in the past but not in recent years)... Thus, the breeding bird community at the Site could be expected to be found at similar wetland sites in the London area. It has therefore been evaluated as being of County importance"*.

56. This is a flawed assessment. The Site is clearly large enough for these birds, as evidenced by their presence (either to this day or in the recent past), therefore it cannot be said that the size precludes more sensitive species. The timing of the absence of skylark aligns with commencement of construction of Riverside 2 and the increased anthropogenic disturbance it creates. While the absence of lapwing breeding pre-dates construction of Riverside 2, we believe the increased anthropogenic disturbance from construction has been a further deterrent that has contributed to the ongoing absence, and the chances of their return would be much higher following construction. The baseline should consider the position excluding/after construction of Riverside 2. This accords with the approach of the CIEEM guidelines which provides for surveys to be conducted over more than one season, during different seasons and tailored to meet the needs of the study.

57. The recent absence of the lapwing and skylark shows how easily an ecosystem can be changed, and the great risk of the Proposed Scheme leading to further absences of other breeding birds, as well as other species. A proper analysis of sensitivity would emphasise that the large loss of SINC / HPI land under the Proposed Scheme presents a significant harm to more sensitive species.

58. The Applicant refers to existing anthropogenic disturbance is flawed. This is inherently already factored into the study of what already exists on site, so shouldn't be an additional consideration. It is wrong to use existing disturbance to justify further disturbance. We dispute whether the breeding bird community could be expected at similar wetland sites; in any event, that is not directly relevant to the assessment of harm to the birds that do happen to be found on site.

59. The loss of 3.5 ha habitat for these birds (being 11.7% of Crossness Nature Reserve) constitutes a large alteration to key elements/features of the baseline conditions,

meaning the magnitude should be high, not low (paragraph 7.8.15 of ES Chapter 7[9]. None of the above serves to lower the importance of the site and, given the regular occurrence of Red List species (common cuckoo) and large presence of SPI species, the importance should be considered National rather than County. Therefore, the effect is major, not moderate adverse.

Plants

60. The Applicant recorded only one SPI / LPS on the Site (via the botany survey conducted by WSP). The Applicant failed to record two further SPIs and many other important species. We commissioned an alternative botany survey by Mr Mark Spencer (see Appendix 3), which found the following species:

    a. Divided Sedge – nationally scarce and listed as a Species of Principal Importance (SPI) under section 41 of the Natural Environment and Rural Communities Act 2006 (NERC Act);
    b. Borrer's Saltmarsh-grass – nationally scarce and SPI;
    c. Round-fruited Rush – vulnerable to extinction in Great Britain and endangered in Greater London;
    d. Strawberry Clover – vulnerable to extinction in Great Britain and vulnerable to extinction in Greater London;
    e. Field Scabious – near threatened in Great Britain and Greater London;
    f. Pink Water-speedwell – near threatened in Greater London;
    g. Hairy Buttercup – near threatened in Greater London;
    h. Wild Celery – near threatened in Greater London;
    i. Slender Thistle - – near threatened in Greater London;
    j. Narrow-leaved pepperwort – vulnerable to extinction in Greater London;
    k. Narrow-leaved Bird's-foot Trefoil - vulnerable to extinction in Greater London;
    l. Few-flowered Spike-rush – critically endangered in Greater London;
    m. Common Spike-rush – endangered in Greater London; and
    n. Frog Rush – endangered in Greater London.

61. Of the two additional SPIs, Borrer's Saltmarsh-Grass was spotted *"across a significant area affected by the proposed development, particularly the East Paddock"*. Divided Sedge was not spotted on the site, but was spotted adjacent to it, and Mr Spencer notes it is likely to occur across the affected area.

62. Mr Spencer holds that the Applicant's failure to spot these important species, in particular the two SPIs, has resulted in a severe under-valuing of the Site and East Paddock in particular. It may be the case that further species are present, too. The Applicant has failed to fully assess the full extent of the significant harm, due to a lack of detailed assessment, failure to enter the East Paddock, and insufficient experience of the surveyors. Additional evidence in the botany report from Mr Joshua Styles (MSc

[9] Note all assessments of specific species and plants is under this paragraph. This citation is not repeated for future references below.

AMRSB MCIEEM FISC Level 6) states that: *"A combination of poor competency, little to no botanical information and evidence, substantial reporting omissions, alongside serious questions around accuracy of reporting would personally raise a number of alarm bells. In my view, the only real way to address these issues would be to have surveys repeated by a FISC 5+ person"*.

63. The Applicant has suggested the East Paddock is *"intensively grazed"* and of poor condition as a result. We strongly dispute this claim. In fact, grazing is a key part of the management of this land to maintain plant diversity and the ecological value of the site. For instance, the 2020 Plant Atlas (Appendix 4) confirms that the decline in Strawberry Clover is *"largely largely due to neglect or undergrazing"*. The Applicant's surveyors did not even enter the East Paddock, and merely surveyed it from the other side of the fence with binoculars. Mr Spencer disputes that the East Paddock could be adequately surveyed in this way. He also notes that important species like Divided Sedge would be easy to overlook, particularly in grazed areas (where the heads/flowers of the plants will be removed).

64. The direct loss of these plants constitutes a large alteration to key elements/features of the baseline conditions, meaning the magnitude should be high, not low. Therefore the effect is major to moderate, not minor.

Terrestrial invertebrates

65. The Applicant recorded 23 notable species including 17 SPIs / LPSs, with 2 species listed under Annex II of the Habitats Regulations.

66. The Applicant acknowledges that *"habitat loss within the East Paddock would remove habitat supporting the wider nationally important terrestrial invertebrate community"*. However, the Applicant seeks to minimise the ham by claiming the East Paddock is *"intensively grazed"* leading to the plants serving as food to these pollinators being *"pushed to marginal areas"*, thus *"limiting [the East Paddock's] role as supporting habitat"*. This is incorrect: as stated above, the East Paddock is carefully grazed under a well-managed regime, which serves to preserve and enhance the biodiversity. The Applicant's surveyors did not enter the East Paddock; however, Mr Spencer did enter East Paddock, and found multiple SPIs listed above present. He disputes the adequacy of the Applicant's assessment of the East Paddock from a distance.

67. The Applicant also points to mitigation as a means of lessening the effect of the Proposed Scheme, but this is inappropriate: mitigation should only be considered after the initial assessment of harm.

68. The extensive presence of SPIs means the Site is of National importance, not County, and the extensive habitat loss for these species is of high magnitude, not low. Therefore, the effect is major, not minor.

Water voles

69. Water voles are protected under s9 of the Wildlife and Countryside Act, which makes it an offence to intentionally damage or obstruct access to water vole burrows. They are also listed as an SPI. The Applicant's desk study returned 278 recordings of water vole on the Site, and the Applicant accepts there is a *"healthy population of water voles using most ditches throughout the Site"*.

70. Accordingly, water voles are of National importance, not County. The loss of 11% of drainage ditch habitat is of high magnitude, not low. Therefore, the effect is major, not minor.

71. The Applicant claims harms will be rendered negligible through mitigation – we refute this in detail in the 'Mitigation' section below.

Freshwater fish

72. The Applicant notes the presence of European eel, and accepts this species is of National importance. The loss of 11% of drainage ditch habitat is of high magnitude, not negligible – notwithstanding the fact that the impact ditches are not permanently wetted, as they still constitute habitat for the species. The Applicant provides no detailed evidence that these ditches could not be used by European eel – it appears to be an assumption. Therefore, the effect is major, not negligible.

Aquatic macroinvertebrates

73. The Applicant's searches found *"high conservation values of macroinvertebrate communities"* in North Dyke and Norman Road River, including a crawling beetle (designated as Near Threatened on the IUCN Red listing), a diving beetle (Nationally Scarce), a lesser water boatman (Nationally Scarce), and an aquatic beetle (Local conservation importance). At paragraph 7.6.70, the Applicant considers the macroinvertebrate community present within the Site as being of National importance. However, at Table 7-10 the Applicant inexplicably reduces this to Regional/County importance.

74. The Applicant relies on the fact that *"no species of conservation importance were recorded in watercourses and ditches that will be impacted by the Proposed Scheme"*. However, there is insufficient evidence to demonstrate that these highly-valuable macroinvertebrate communities are not present in any of the ditches impacted by the Proposed Scheme. Without more detailed evidence, a conservative approach should be taken and National importance should be assumed.

75. The Applicant again relies on the fact that the 11% of drainage ditch habitat lost is not permanently wetted to reduce the magnitude of impact to negligible. Without further evidence this is an illegitimate approach, and such a great loss of habitat should be

considered to be of high magnitude, not negligible. Therefore, the effect is major, not negligible.

Noise and vibration

76. The Applicant accepts a moderate adverse effect on Crossness Nature Reserve (and other designated sites), including moderate adverse effect on specific species. It is unclear whether this includes noise and vibration created by the current construction of Riverside 2. These must be discounted from the assessment – if they are, the ultimate effect will be even greater.

Run-off

77. Emissions from construction of the Proposed Scheme would lead to deposition of nitrogen compounds including nitrogen dioxide and nitrate, and acids including ammonia, which may pollute the water (paragraph 7.8.49 of ES Chapter 7). Furthermore, stored materials, waste and spillages may affect the water quality; run-off is a possible vector for sediment and chemical pollution that would lead to degradation of habitats and altering key conditions for habitats and species (paragraph 7.8.71).

78. Of particular concern is that the degradation of water quality could result in mortality events and reductions in population size for aquatic macroinvertebrates and freshwater fish, both of National importance (paragraph 7.8.35).

79. The Applicant does not assess the harm of the Proposed Scheme before the effect of mitigation measures are applied. Yet, the Applicant concludes that the mitigation measures in the Outline Drainage Strategy reduce the magnitude of change, and therefore the effect, to negligible.

80. Consequently, the Applicant has adopted a flawed approach to this issue. Without establishing the harm caused without mitigation measures being applied, it is not possible to consider the appropriateness and effectiveness of the mitigation that is proposed by the Applicant.

Air quality

81. The Applicant notes that the nitrogen compounds, acids and other chemicals produced by the Proposed Scheme would lead to air pollution (paragraph 7.8.43 of ES Chapter 7). The Applicant relies on the fact that "*background levels of air pollution in the industrialised area of Belvedere are relatively high*" to reduce the magnitude of change to low. We do not accept this as a legitimate approach – the magnitude of change is determined by the increase, not the existing context (that is relevant as a mitigating factor to consider afterwards).

82. The Applicant notes that Crossness Nature Reserve would suffer above-threshold changes in ammonia, nitrogen oxides, sulphur dioxide and nitrogen deposition, leading to a moderate adverse effect.

Additional harm – public access

83. The Proposed Scheme *"extends access through provision of additional PRoW and permissive paths"*, including *"raised walkways"*[10]. The Applicant has failed to appreciate how increased access and use threatens to damage habitats and upset the balance of the ecosystems within Crossness Nature Reserve – not only from the construction works, but also from increased footfall, noise and littering. The Applicant has not provided any evidence of testing to assess potential additional harm.

84. There is a tension between increased public access and environmental protection which the Applicant has failed to grasp. The currently limited level of public access across Crossness Nature Reserve is very much intentional. It appears the Applicant's approach favours public amenity over environmental protection, or at least places them on equal footing. There is no policy support for this position under EN-1. In fact, the opposite is true, as EN-1 places significantly greater weight on the mitigation hierarchy.

Mitigation

85. Firstly, the biodiversity harm resulting in the net loss of 3.5 ha of land recognised as LNR, MOL, SINC and HPI cannot be mitigated by enhancement across the 'Mitigation and Enhancement Area' (MEA). As above, this qualitative improvement (the extent of which is disputed below) does not make up for the quantitative loss.

86. Despite the various significant harms to specific protected species, SPIs and HPIs listed above, the Applicant has failed to provide clear mitigation for these specific harms. The Mitigation Schedule and other relevant Application Documents lack detail; instead, the focus is on general MEA mitigation and enhancement. This approach is insufficient: the direct loss of these species needs considered, focused measures that clearly demonstrate how the specific harm to these species will be mitigated. This is particularly true of the protected species.

87. In the case of water voles, which have incredibly strong protections under section 9 of the WCA, the Applicant alludes to mitigation through the establishment of ditch and reedbed replacement (para 8.3.4 of the LaBARDS) and a translocation programme (paragraph 5.2.3 of the Outline CoCP). However, the proposals lack detail and any firm outcome requirements, and are subject to licensing from Natural England. The Applicant has not properly assessed the risk that these efforts will not be successful. The Applicant has failed to explain how the section 9 requirements are

[10] See section 5.2 (Masterplan Strategies) of Part 2 of the Design Approach Document

met and has failed to provide any clear evidence that the effect will be reduced to negligible or that the significant harm will be sufficiently mitigated.

88. More generally, aspects of the mitigation proposed are inappropriate. For example, the Applicant proposes tree planting on both Norman Road Field and on the current site of the stable block on Crossness Nature Reserve. This is inappropriate for grazing marsh: marshland is by definition an open, wet habitat, dominated by rushes, sedges and other wetland species. Trees contribute to the drying out of marsh habitat and create shading. This reduces the capacity for wetlands to store carbon and reduces the species diversity associated with grazing marsh. Tree planting may also lead to the further loss of the SPI and rare plant species listed above, which were overlooked by the Applicant. This view is affirmed by Mr Spencer's botany report – he notes that tree planting is *"unsuitable"* and *"risk[s] destroying these vulnerable plant species and priority habitats"*. This mitigation risks actively harming, rather than enhancing, the existing natural grazing marsh habitat (which is an HPI).

89. Secondly, the proposals involve raising water table levels on Norman Road Field. While this is a good proposal in principle, there is a risk that raising the water table level too high will have impacts on the existing ecosystem. For example, a raised water table level may drown out small mammals and reptiles, which are prey that attract hunting birds like kestrels, barn owls, buzzards and marsh harriers. A raised water table level may also impact ground nesting bees, including the brown-banded carder bee and shrill carder bee (both SPIs, LPSs, London Species of Conservation Concern; shrill carder bee is also nationally notable). The appropriate level needs to be based on a detailed hydrological study and assessment of these potential impacts, with a comprehensive management regime that takes a cautious and incremental approach, in line with the precautionary principle. The Applicant's proposals do not provide adequate detail and risk inadvertently creating further harms.

90. A large proportion of the MEA is Norman Road Field, which the Applicant believes to be in poor condition. The Applicant's mitigation proposals rely on this belief to set a low baseline for the MEA. However, the Applicant has undervalued the current conditions on Norman Road Field. The Applicant's survey was undertaken in November, when many flowering plants would not be in evidence. In our botany report, Mr Spencer notes that November is *"a time of year when the identification of more challenging plant species, particularly those indicative of grazing marsh, should only be undertaken by someone with considerable expertise; the optimum time to survey a grassland site such as this would be June-September"*. Together with the limited experienced of the Applicant's surveyors (as considered in detail in Mr Spencer's report), this has resulted in the Applicant's survey undervaluing the Site.

91. Furthermore, the Applicant has misunderstood the planning history of Norman Road Field, set out below, which results in a higher baseline. On 25 January 2005, outline

planning permission was granted by LBB for the development of land at Eastern Thamesmead Industrial Estate Extension, known as the 'Veridian Park development' (app 02/03373/OUTEA), with the corresponding s106 agreement was entered into the day before (Appendix 5). In 2013, an application with reference 10/00063/OUTEA was granted to extend the time limit for implementation of the Veridian Park development (Appendix 6).

92. Planning permission 10/00063/OUTEA and the s106 agreement place extensive planning controls regarding ecological/biodiversity enhancement bind Norman Road Field, which are summarised below.

93. Clause 24 of the s106 agreement required adoption and implementation of the Ecological Master Plan (Appendix 7) prior to commencement of Phase 1. The Ecological Master Plan sets out an initial list of enhancement works required in relation to Norman Road Field, including:

    a. creation of two new ditches;
    b. enhance value of existing ditches for water voles, rare and scarce plants typical of Erith Marshes, breeding birds, grass snakes, smooth newts, water shrews and invertebrates;
    c. implementation of a management regime suitable for grazing marshes, with management taken in consultation with the warden of Crossness Nature Reserve;
    d. creation of several small scrapes just above the water table to encourage colonisation of wetland and marsh plants and to provide high tide roosts for wintering waders;
    e. creation of a system of sluices to manipulate water levels, in order to ensure an appropriate hydrological regime;
    f. implementation of a grazing regime aimed at restoring the grazing marsh grassland – either by cattle or horses, the latter to be supplemented by cutting or hand removal of vigorous species to permit the colonisation of finer, less-competitive species;
    g. creation of specific drinking points using fencing to reduce the risk of poaching damage; and
    h. creation of a monitoring system to ensure over- and under-grazing do not occur.

94. A separate planning permission with reference 08/01834/FUL (amending a previous permission with reference 07/08166/FULM) was granted in relation to Norman Road Field on 30 January 2008. The description of development includes *"the creation of a seasonal wetland on 0.47 hectares of the site and the remaining 0.84 hectare converted to a species rich neutral grassland".* A letter on the LBB planning portal for application 07/08166/FULM suggests that these works were intended to relate to the above works required under the Ecological Master Plan. Various conditions under

permission 08/01834/FUL prevent commencement of development until details of certain aspects of the work are submitted to and approved by LBB. It is, however, unclear to what extent these works were carried out, and to what extent they did in fact satisfy the above requirements of the Ecological Master Plan. There is no evidence of an application of discharge of any of the conditions relating to permission 08/01834/FUL.

95. Beyond these initial enhancement works, the Ecological Master Plan requires *"habitat creation and management of the habitat in the long-term"*. The Ecological Master Plan requires that this long-term creation and management would be shaped by a *"series of Management Plans* [that] *will provide detailed prescriptions and specifications"*. The Ecological Master Plan requires each of the Management Plans to be written to cover a ten-year period, and to include requirements for annual monitoring so that the condition of the habitat can be recorded and adjustments made to the management regime accordingly. Unfortunately, it has not been possible to locate the Management Plans, or to confirm if they were ever produced. There is no evidence to suggest that the landowner (Peabody) has complied with these requirements.

96. Condition 18 of planning permission 10/00063/OUTEA sets out a similar requirement:

> *"No development approved by this permission shall be commenced until a detailed scheme, incorporating the recommendations included in the Ecological Master Plan, to protect and enhance the ecological value of the site has been approved by and implemented to the satisfaction of the Local Planning Authority. Any scheme or details prepared and submitted pursuant to this condition shall be consistent with the mitigation measures described in the Environmental Statement and Ecological Master plan and will not be approved if it may have effects significantly different to those considered in the Environmental Statement."*

We presume that this 'detailed scheme' is intended to contain the substance of the Management Plans referred to in the EMP.

97. On 15 December 2015, an application with reference 10/00063/OUTEA13 was granted in relation to discharge of condition 18 for Phase 1. The decision letter issued by LBB (Appendix 8) confirms that the decision to discharge condition 18 was based on an assessment of a submitted document referred to as 'AECOM – Ecological Enhancement and Protection Scheme – September 2015'. We have not seen this document: despite repeat requests, LBB have been unable to provide it.

98. It is unclear from the evidence available when exactly the *"Ecological Enhancement and Protection Scheme"* for Phase 1 approved pursuant to condition 18 was first implemented. However, the earliest it could be is 15 December 2015 (the date it was

approved). Assuming this document constitutes the Management Plans referred to in the EMP (noting clause 24 links implementation of the EMP to commencement of Phase 1), the ten-year period is still running and that these planning controls still apply. The ten-year period expressly applies to the Management Plans; it does not run from the date of the EMP or the works carried out under permission 08/01834/FUL. As these planning controls are extant and enforceable, LBB can and should require the landowners to comply with these planning controls. The environmental baseline for Norman Road Field must take this into account.

99. The Applicant was not aware of the existence of these planning controls when it assessed the environmental mitigation required. This oversight has led to an incorrect assessment of the baseline. Statements made on behalf of the Applicant at ISH1 – that the above regime was *"point interventions"* and *"not looking to change conditions in the long term"*[11] are simply incorrect. It appears they have assumed that the works granted pursuant to application 08/01834/FUL satisfied all relevant requirements under permission 10/00063/OUTEA, but these works at best only reflect the initial works listed under the Ecological Master Plan (and it is not clear if this work was fully or properly carried out). The finer detail of the long-term work, pursuant to the Management Plans / Ecological Enhancement and Protection Scheme had not even been agreed yet.

100. The Applicant's position is that the extant regime is *"essentially replaced by the new proposals"*[12] – we agree but reach a very different conclusion: to the extent the improvements under the Proposed Scheme repeat existing controls, they cannot be considered a benefit or new mitigation. This would not only constitute an impermissible double-counting of the environmental benefit, but would also illegitimately incentivise Peabody to continue not to comply with its extant planning controls as it will allow them to charge the Applicant a higher price for the land.

<u>Conclusion</u>

101. The Applicant has greatly understated the significant biodiversity harm, particularly to protected and other important specific species and habitats. The Applicant has failed to appreciate how increased pedestrian access will create further harm to Crossness Nature Reserve. The Applicant has also failed to correctly assess the baseline for the impacted areas and the MEA. The Applicant's mitigation proposals are insufficient (particularly in relation to the protected and other importance species), and actively harmful in some instances, and thus fail to meet the mitigation hierarchy. This is further reason that the CNP presumptions do not apply (in addition to the ability to avoid this harm through deliver in the East Zone). Even if the CNP presumptions applied, the extent of harm is so significant so as to constitute an exceptional case where the presumption is rebutted.

[11] Mr Joyce on behalf of the Applicant at ISH1
[12] Mr Fox on behalf of the Applicant at ISH1

Biodiversity Net Gain (BNG)

102. The failure to adequately record biodiversity conditions on the Site (as detailed above) in turn affect the legitimacy of the Applicant's BNG calculations.

103. It is imperative for that the underlying assessment of habitats and their condition is accurate. A failure to produce an accurate assessment can be a fatal flaw (for example, see *Bagshaw v Wyre Borough Council* [2014] EWHC 508). In order to achieve an accurate assessment of impact, consideration as to the timing of surveys is a matter of fundamental importance. This is because there are seasonal variations in the distribution and abundance of flora and fauna. The CIEEM guidance says that, "*Variation in populations, habitats or ecosystems over time in the absence of the project should always be considered. This may require more than one year or one season of data to give an accurate reflection of the situation*." (paragraph 3.9, and referenced elsewhere).

104. Unfortunately, the assessment undertaken by the Applicant taken in November, when many plants were not it flower and identification is particularly difficult, and by surveyors with limited experience. As affirmed by Mr Spencer's botany report, the Applicant's assessment is therefore likely to have failed to capture true and reliable data of the full biodiversity value of the Site.

105. Similarly, in respect of the various species and habitats that have been specifically identified above, the assessment failed to adequately consider and account for seasonal variations, thus leading to the likelihood of species and habitats not being captured and, those that were captured, under-reported.

106. Mr Spencer also notes that the Applicant's BNG report *"mischaracterises the area in the SE of Norman Road Fields as not being Grazing Marsh"*. This and the fact that *"such a significant area of HPI (& the species therein) will be lost"*, leads him to conclude that *"it is hard to envisage how a 10% BNG could be achieved"*.

107. Without a more detailed report, taken by more experienced surveyors at a more suitable time of year, there is not sufficient certainty that the BNG inputs are accurate, and therefore there is not sufficient certainty that 10% BNG is achieved under the Proposed Scheme.

Climate change

108. The Applicant places great reliance on carbon capture to justify various harms arising from the Proposed Scheme. These harms are principally to climate change and air quality.

109. In placing great reliance on carbon capture, the Applicant relies on the *"CNP presumptions"* in EN-1 to justify the harms created under the Proposed Scheme. As

stated above, the CNP presumptions only apply where a scheme meets the requirements in EN-1, a key requirement being compliance with the mitigation hierarchy.

110. The mitigation hierarchy is not overridden by the climate benefits that the Applicant asserts will be achieved if the carbon capture system is implemented as part of the Proposed Scheme. Further, it is wrong, as a matter of principle and logic, for the Applicant to rely on a carbon capture scheme that involves destruction of the above-described biodiverse land to achieve a climate benefit. This is principally because the biodiverse land that will be lost to the Proposed Scheme is already a benefit to the climate. As recognised in the EN-1 at paragraph 5.4.2:

> *"The aim* [of government biodiversity policy] *is to halt overall biodiversity loss, support healthy well-functioning ecosystems and establish coherent ecological networks, with more and better places for nature for the benefit of wildlife and people. This aim needs to be viewed in the context of the challenge presented by climate change. Healthy,* ***naturally functioning ecosystems*** *and coherent ecological networks* ***will be more resilient and adaptable to climate change effects****. Failure to address this challenge will result in significant adverse impact on biodiversity and the ecosystem services it provides."* (emphasis added);
>
> and at paragraph 5.4.12:
>
> "*Local Nature Reserves … are areas of substantive nature conservation value and make an important contribution to ecological networks and* ***nature's recovery****. They can also provide wider benefits including public access (where agreed),* ***climate mitigation and helping to tackle air pollution***." (emphasis added).

111. The proposed carbon capture facility also needs to be seen in context. First, there are several other sites nationally and regionally where carbon capture facilities can be installed without loss to biodiverse land with various designations and protections, including delivery of the Proposed Scheme in the East Zone (detailed below).

112. Secondly, the carbon capture facility is being proposed on the basis that it will, during the operation phase, as a minimum, be expected to have a 95% carbon capture rate for emissions from Riverside 1 and Riverside 2 (ES, para 13.9.4). The Applicant of course cannot guarantee this level of capture - this is revealed by the use of the word *"expected"*, which nullifies any claim to this being a *"minimum"*.

113. Looking to carbon capture projects that already exist, the success rate is far lower than the Applicant's optimistic projections. A report from Institute for Energy Economics and Financial Analysis dated 1 September 2022 (Appendix 9), found that "*underperforming carbon capture projects considerably outnumber successful projects globally, and by large margins, with both the technology and regulatory*

frameworks found wanting". Of the 13 projects studied, seven under-performed, two failed and one was mothballed.

114. Thirdly, this 95% carbon capture rate only accounts for savings from Riverside 1 and Riverside 2 and does not represent a net figure. Additionally, the figure fails to account for the embodied carbon in development, and emissions involved in operating the carbon capture facility, including the transport and burying of CO2.

115. Fourthly, GHG emissions are not the only byproduct of the Proposed Scheme. There will be other harmful gases emitted into the atmosphere. Of particular concern are nitrous oxide (N2O) which contributes to climate change due to its positive radiative forcing effect, and the gas has a relatively high impact, with a global warming potential (GWP) of 265 compared with a figure of 1 for carbon dioxide[13]. Consequently, even if the carbon capture system were to achieve the "expected" carbon capture rate, which is disputed, there would still be a significant climatic impact associated with this proposed Scheme.

116. The decommissioning process and the emissions for decommissioning of the carbon capture facility has been scoped out and not considered in the ES (see paragraphs 13.4.7 and 13.8.40). This approach obfuscates the true climatic impact associated with the carbon capture facility and the Proposed Scheme as a whole. This is important, particularly when considering this is likely to be a live issue within 20 years (the relevant "lifetime").

117. It is important that decommissioning is properly considered because it is directly relevant to the assessment of the benefits and harms. For example, if decommissioning is due to take place in 20-25 years' time[14], then this minimises the benefits and makes the harm of loss of valuable natural land (*ancient* grazing marsh) seem less justifiable.

118. In relation to emissions associated with decommissioning, the Applicant asserts that the data is not "consistently" available. This implies that data is obtainable. As such, this data should form part of the assessment (*R v Cornwall County Council (ex parte Hardy)* [2001] Env. L.R. 25). The more pertinent issue is the "consistency" or lack thereof. Where there are issues of consistency or there is a wide range of outcomes, the Applicant should adopt a "worst case" approach *(R (on the application of Milne) v Rochdale Metropolitan Borough Council* [2001] 81 P. & C.R. 27 at [122]). It is not sufficient to simply scope the issue out of consideration.

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[13] See the National Atmospheric Emissions Inventory: https://naei.energysecurity.gov.uk/greenhouse-gases/pollutants/nitrous-oxide

[14] The Application Documents are inconsistent, but some of the Applicant's modelling uses 25 years. The Operational Phase Assessment relies on Environmental Agency guidance which assumes a plant lifetime of only 20 years.

Visual Impact

119. The NPPF states that local planning authorities should design their policies to maximise renewable and low carbon energy development while ensuring that adverse impacts are addressed satisfactorily, including cumulative landscape and visual impacts.

120. The Proposed Scheme will have a huge visual impact. In particular, the 113m Absorber Column(s) and Stack(s) will have a significant detrimental impact on the nature reserve. Further, as EN-1 states, visual impacts are not just limited to physical structures but also any visible stream plumes (paragraph 5.10.2). These visual impacts will have a further negative impact on the amenity available to visitors, visitor experience, visitor numbers and socio-economic impacts (see EN-1, para 5.12.6).

121. The Applicant recognises that the Proposed Scheme will have significant adverse visual impacts, but fails to attribute appropriate weight to these impacts within its assessment. In assessing the impact, one must consider the scale of the impact and the nature of the impact on the particular site.

122. In considering the nature of the impact, it is important to note that Crossness Nature Reserve is protected open space. LBB's assessment confirms it has "strong openness" and is of "high quality" and "high value" (as per LBB assessment in Appendix 2). It is a place where many can go to escape the city and urban areas to enjoy the natural environment. The area is peaceful and tranquil. The Applicant's assessment fails to reflect the sensitivity of the Site to visual amenity impacts or to give sufficient weight to these factors in the analysis.

123. Any further build-up and addition to the built environment will have a cumulative visual impact (see EN-1 5.10.16 and Section 4.3). Insufficient weight has been given to negative the cumulative visual impacts from the Proposed Scheme as a whole.

124. The proposed mitigation of tree planting is not an adequate mitigation measure as the trees will obstruct the currently available long-distance and sweeping views of this grazing marsh.

Alternative sites – East Zone

<u>Policy test</u>

125. The mitigation hierarchy, specifically the requirement to first avoid and then reduce harm, includes a requirement to consider reasonable alternatives – this is expressly confirmed by paragraph 5.4.42 of EN-1.

126. The weighting given to alternatives is guided by the two principles at EN-1 paragraph 4.3.22:

> *"• the consideration of alternatives in order to comply with policy requirements should be carried out in a proportionate manner; and*
>
> *• only alternatives that can meet the objectives of the proposed development need to be considered."*

127. The Applicant's stated Project Objectives of the Proposed Scheme are as follows:

> *"• located in the vicinity of the Riverside Campus and the River Thames, for efficient connection to EfW facilities and the Proposed Jetty;*
>
> *• of sufficient size to accommodate the Carbon Capture Facility, including its Supporting Plant and Associated Infrastructure in order to capture and process the carbon created by both Riverside 1 and Riverside 2; and*
>
> *• deliverable in a timely manner."*

128. These are reasonable objectives and align with government's objectives for the energy system: *"to ensure our supply of energy always remains secure, reliable, affordable, and consistent with meeting our target to cut GHG emissions to net zero by 2050"*. We suggest the notion of "objectives" for these purposes should be guided by the government's energy objectives.

129. In its assessment of alternatives, the Applicant has also relied on its Optioneering Principles (OPs), which are as follows:

1. *Seek to avoid or minimise adverse impact to locally important biodiversity sites.*
2. *Seek to avoid or minimise adverse impact to protected species*
3. *Seek to avoid or minimise the level of adverse impact on existing businesses/third party landowners*
4. *Seek to avoid or minimise land take within the MOL, Accessible Open Land, and impact on PRoW.*
5. *Ease of required connections with the Riverside Campus and the Proposed Jetty.*
6. *Seek to minimise engineering complexity and consequent cost.*

130. However, it is inappropriate for the site selection process to have been driven by the OPs. The OPs are the subjective priorities or preferences of the Applicant, rather than objectives, and go beyond the scope of the government's energy objectives. All of the points covered under the OPs are either already reflected by the Project Objectives or are covered by the policy requirements under EN-1 (or other applicable planning policies). Therefore, the OPs are redundant, and the consideration of these points should instead be dictated by the Project Objectives and application of policy. The policies are not only more detailed, but also provide a broader range of

considerations that are overlooked by the OPs. Furthermore, policies are carefully drafted to give different weighting to different policies, whereas the Applicant has applied the OPs without any particular weighting (paragraph 2.2.26 of the Response to Relevant Representations). It is wrong for the Applicant to suggest this approach *"ensure[s] a balanced conclusion can be drawn"*, as it overlooks the value judgment made by the Applicant in choosing these OPs. A truly well-balanced conclusion is only achieved through a detailed consideration of alternatives pursuant to the policy requirements (and the specific weighting of each set out in policy).

131. The Applicant's approach undermines the policy framework's role in the consideration of alternatives, and leads to a failure to apply EN-1 paragraph 4.3.22.

Applicant's approach to East Zone

132. The Applicant ruled out development in or near to the East Zone[15] far too soon, without gathering sufficient evidence, testing the feasibility of different options, and analysing against policy requirements (for ease, we will refer to the areas similar to / around the East Zone as the East Zone). The Applicant's initial approach to assessing alternative sites seemed to rely on fairly arbitrary rectangles within each area (Options A-I; see Appendix A to the TSAR), which then informed the boundary of the East Zone. It seems that the Applicant never conducted a more detailed assessment of: (1) which locations within that area would be best; (2) whether similar but slightly different locations might be better; and (3) what different designs might make delivery feasible / optimised for those specific areas. The Applicant attempts to justify this approach at paragraph 2.3.12 of the Response to Relevant Representations, by suggesting the *"single block shown in the TSAR… is a reasonable presentation of the East Zone as a whole"*. But this is not the relevant test: the Applicant must determine and assess delivery in the *optimum* site within the East Zone (and surrounding area), not just a general assessment or an average. The Applicant never did so. At the OFH, the Applicant admitted the investigations of economic impacts, the main driver for rejecting the East Zone, were *"very high level"*. Therefore, the Applicant has failed to meet the first requirement of the mitigation hierarchy and avoid the significant environmental harms of the Proposed Scheme by delivering in or near the East Zone.

133. It appears that a slightly different site, incorporating the Iron Mountain facility, and Aviva land next to the Iron Mountain Facility, would be sufficient to accommodate the Carbon Capture Facility and avoid impact on other East Zone businesses. As confirmed at the OFH, the Applicant considered designs for the South Zone 1 that are smaller than 8 ha – we await confirmation from the Applicant as to what the correct minimum figure is. It is unclear whether testing of options within the East Zone were

[15]By 'East Zone' we refer to the area shown on Figure 3-2 in the TSAR. We appreciate that Appendix H to the Applicant's Response to Relevant Representations (Terrestrial Site Alternatives Report – Addendum Annex A) labels a similar area 'North 1'.

repeated after the potential for reduced size was confirmed, but it appears that this did not happen.

134. It was also confirmed that a single process line would be technically feasible and require less space, and that the heat transfer station included in the Proposed Scheme was already required (at least partially) for Riverside 2. Furthermore, it was confirmed that burying the flue pipe would be possible (even if adding technical complexity and cost), which would reduce the space acquired above ground, and also mitigate impacts on FP4. During discussions in OFH, the main reason for dismissing burial of the flue pipe in relation to South Zone 1 was the requirement to cross a major highway. That issue would seemingly not arise with the East Zone.

135. Therefore, it is not legitimate for the Applicant to rule out delivery on/near the East Zone until all potential locations are properly tested, and a reduced size is properly tested – both in terms of the potential size reductions considered for South Zone 1, and through the potential further reductions set out in the preceding paragraph.

136. Nevertheless, even with an 8-ha scheme in the East Zone, this location is revealed as a more suitable location for the Proposed Scheme, if the EN-1 paragraph 4.3.22 approach is taken. We analyse this approach in detail below, considering both the Project Objectives and policy requirements. We also provide an alternative assessment of the East Zone under the Optioneering Principles to show that, even under this skewed approach, the East Zone is preferred to South Zone 1.

137. It should be noted that it is for the Applicant, not the Interested Parties, to provide detailed analysis of alternative sites. To the extent that the East Zone appears to better comply with policy requirements on the evidence available, it is for the Applicant to provide evidence to the contrary. SCNR is making every effort to provide useful evidence for the Examination, but as a voluntary campaign group, it is limited in terms or time, finances, access to information and resources.

<u>Analysis of Project Objectives in East Zone</u>

138. Development on the East Zone, particularly in the north-west corner, would meet all three Project Objectives, as considered in detail below.

139. Regarding the first Project Objective, development would be close to the Riverside Campus and River Thames, and allow efficient connection to the EfW facilities and Proposed Jetty. Confusingly, the Applicant gives the whole of the East Zone a ‘green’ rating for OP 5 (which aligns with this Project Objective), but gives each of the specific East Zones 1-3 a ‘red’ rating. At OFH, the Applicant confirmed that ductwork would be able to reach the Iron Mountain site in the north-western part of the East Zone without technical difficulty and would not require additional booster fans. The Applicant has highlighted concerns around the impact on users of FP4 (at the OFH and in the Application Documents), which is considered below. However, those concerns relate

to impacts on the footpath and public amenity, not the technical feasibility of connection, and so are not appropriate to consider here. No other technical connectivity issues have been raised. Accordingly, the East Zone meets the first Project Objective.

140. Regarding the second Project Objective, there is clearly space across the East Zone to accommodate the full Carbon Capture Facility, and we don't believe this is a controversial point.

141. Regarding the third Project Objective, there is nothing to suggest development on the East Zone would not be deliverable in a timely manner. The Applicant does not suggest this in the TSAR or Response to Relevant Representations; the closest thing is reference to the large scale and complexity to the operations on the site. There are references to *"disturbance"* to and *"wider socio-economic considerations"* on third-party operations, but these do not relate to this Project Objective and are more appropriate to consider as part of the policy requirements. During the OFH, the Applicant referred to a high-level consideration of scale and complexity of delivery on the East Zone, but did not go so far as to state it would prevent timely delivery.

<u>Analysis of policy requirements in East Zone</u>

Planning designations and loss of land

142. As set out above, there are strong policy protections against the loss of LNR, MOL, SINC and open space / green infrastructure, including (but not limited to) the mitigation hierarchy. While South Zone 1 results in the substantial loss of such land, development in the East Zone would either entirely prevent (or at least significantly reduce) this harm.

143. At paragraph 2.3.17 of the Response to Relevant Representations, the Applicant alleges that development in the East Zone *"would still impact upon the MOL as the Flue Gas Ductwork from Riverside 2 would need to be located on the western and southern boundaries of the Riverside Campus"*. The Applicant repeated this assertion during OFH, suggesting there *"simply isn't room within the campus"*. However, this is in direct contradiction with Table 3-2 of the TSAR, which states that, for East Zone development, *"Flue gas ducting would predominantly be within the Applicant's Riverside 1/Riverside 2 site. The route would require crossing a small section of third-party land (Aviva) between the Applicant's Riverside 1 site and Eastern Zone, and FP4"*. The Applicant has not explained or properly evidence this change in position.

144. It is accepted that development in the East Zone would impact FP4, by requiring creation of a vehicular crossing across it and the installation of piping overhead, including temporary stopping up during construction. As open space / green infrastructure, impact on FP4 should be mitigated, and we note the particular reference to public rights of way being *"important recreational facilities"* at paragraph

5.11.30 of EN-1. However, any actual loss of the footpath would be temporary, and the only long-term impact would be to visual amenity. The remark made on behalf of the Applicant at OFH, that it is *"likely that the footpath would have to be lost"*, appears to be completely unfounded, and contradicts the position in the Applicant's own TSAR and Response to Relevant Representations. It would be irrational and contrary to policy requirements to place this relatively minor impact on FP4 above the much greater impact to Crossness Nature Reserve, which has much stronger policy designations (LNR, MOL and SINC). This is particularly true when a great many of the users of the footpath would be using it in order to enjoy Crossness Nature Reserve. Any effort by the Applicant to focus on the accessibility of FP4 (and lack thereof of the parts of Crossness Nature Reserve being lost) does not reflect the policy position, for the reasons detailed in previous sections.

145. A further consideration is that the East Zone is designated as a Strategic Industrial Location (SIL). The Bexley Local Plan confirms that, following a review of Bexley's industrial land, SILs *"will be intensified where possible to optimise the use of this land for appropriate business uses, including waste facilities"*. Policy DP25(2) states SILs *"are appropriate locations for new waste management facilities"*. Therefore, development in the East Zone better conforms to this policy position than South Zone 1. The Applicant claims that its site selection *"sought to maximise use of land within the SIL allocation and minimise loss of land within designations such as MOL, Erith Marshes SINC and Crossness LNR"*, however, the evidence adduced by the Applicant does not support this assertion.

Biodiversity

146. Similarly, development in the East Zone would avoid (or significantly reduce) the 3.5 ha loss of habitat and impact on protected and other important species that result from development on South Zone 1. As listed above, there are strong policy requirements in relation to the protection of biodiversity, including (but not limited to) the mitigation hierarchy.

147. At paragraph 3.3.2 of the TSAR, the Applicant notes a *"potential for impact on the Belvedere Dykes (SINC)"*, but no further evidence is provided on this point, and the Applicant accepts *"it could be possible to mitigate this to an acceptable level"*.

Socio-economic impacts

148. Paragraphs 2.3.15-16 of the Response to Relevant Representations reference the potential additional socio-economic impacts caused by development in the East Zone, compared to South Zone 1, in terms of the potential disruption to Iron Mountain and ASDA (in terms of logistics, end users and potentially jobs).

149. EN-1 acknowledges the potential socio-economic effects (both positive and negative) and encourages the Secretary of State to consider mitigation measures for any adverse impacts (see paragraph 5.13.8). However, the increased impact (when

compared against the similar impacts caused to Landsul and Munster Joinery under South Zone 1) seem to be relatively small, and in any event this policy wording is less strongly worded than those set out above. Accordingly, these socio-economic impacts should be given less weight in the balancing exercise. The Applicant's focus on this impact is overstated, and also lacks evidence.

Cost to Applicant

150. There is no general policy under EN-1 that allows for the costs of delivery to be taken into account when considering alternative proposals / sites. However, paragraph 4.3.27 states that *"alternative proposals which mean the necessary development could not proceed, for example because the alternative proposals are not commercially viable… can be excluded on the grounds that they are not important and relevant to the Secretary of State's decision"*.

151. Therefore, any additional cost of delivery in the East Zone cannot be taken into account unless the Applicant is arguing that those additional costs would render delivery not commercially viable, which they have not argued to date. Any such assessment would also have to factor in the costs of delivery on South Zone 1 which do not arise under delivery in the East Zone (for example, the costs of ecological enhancement and additional biodiversity net gain delivery, and the costs associated with acquisition of Landsul and Muster Joinery's land).

Conclusion

152. When comparing South Zone 1 and the East Zone pursuant to the policy requirements (rather than the OPs), there is a clear preference for the East Zone. The East Zone avoids loss of MOL, LNR and SINC land (this consideration is given strong weight under EN-1). The East Zone avoids biodiversity harm (also given strong weight under EN-1). The East Zone makes greater use of SIL, on which industrial development is strongly supported under policy. There are potentially increased socio-economic adverse impacts from development in the East Zone, but this is not properly evidenced, appears to be a small difference, and this consideration is not given strong weighting under policy. Cost implications would only be relevant under policy if the difference would render deliver not commercially viable, which is not being argued.

<u>Optioneering Principles</u>

153. Even if it were accepted that it were possible for the consideration of alternative sites to be guided by the OPs, a consistent and rigorous application of the OPs would result in the East Zone achieving a better score.

154. In terms of OP 1 (avoid or minimise adverse impact to locally important biodiversity sites), given the extensive harm set out above, South Zone 1 should be considered 'red'. The East Zone should be considered 'green' as it results in very little impact to important biodiversity sites – to the extent there would be impact on the

Belvedere Dykes (SINC), or concerns around noise, air quality, or toxic run-off were considered high, East Zone 1 might be considered 'amber'.

155. Similarly for OP 2 (avoid or minimise adverse impact to protected species), South Zone 1 should be considered 'red' and the East Zone should be considered 'green', or potentially 'amber'.

156. For OP 3 (avoid or minimise the level of adverse impact on existing businesses/third party landowners), both sites should be considered 'amber', as both involve the full disruption and relocation of businesses. While it is accepted that the impact in the East Zone might be worse, the two harms are considered of a similar order. The Applicant has not provided sufficient evidence to explain how or why the impact existing businesses in the East Zone is a 'red' *"fatal flaw"* as they refer to it. Furthermore, they have not sufficiently explored whether a site in the East Zone (and parts of the North Zone) could not be accommodated such that only Iron Mountain's and Aviva's land was affected, avoiding impact on Asda or Lidl. In such a circumstance, the harm would be even closer to that under the South Zone 1 proposals and should firmly fall into the 'amber' category.

157. For OP 4 (avoid or minimise land take within the MOL, Accessible Open Land, and impact on PRoW), we'd first note the skewed language here: it considers the broad notion of 'impact' to PRoW, while limiting considerations of MOL (a stronger policy designation) to 'land take' only. It also ignores the additional designations of LNR, SINC and open space / green infrastructure. We also note the inappropriate reliance on the made-up notion of Accessible Open Land. However, even on the Applicant's formulation, the extensive land take on MOL greatly outweighs the limited impact on FP4 (being temporary stopping up and amenity impact from traffic / pipes overhead). Therefore, South Zone 1 should be considered 'red' and the East Zone should be considered 'green' or potentially just into 'amber'.

158. For OP 5 (ease of connection with the Riverside Campus and Proposed Jetty), both sites should be considered 'green'. As per the analysis of the first Project Objective above, there are no apparent issues or added costs to connectivity to the north-western part of the East Site. Any added technical complexity to run ductwork over FP4 appears to be minor, by the Applicant's own admission. Any impact to amenity of FP4 is not directly related to OP 5.

159. For OP 6 (minimise engineering complexity and consequent cost), while we accept there would be added complexity and cost to deliver on the East Zone (in terms of acquiring the land and then deconstructing current buildings), these are not excessive (the Applicant's considers them 'amber'. Once the complexities and costs of delivering biodiversity enhancement and acquisition of Landsul and Munster Joinery land are factored in, we believe South Zone 1 should also be considered

'amber', but accept it might be considered 'green' – reflecting our belief that the Applicant's main driver for South Zone 1 is cost savings.

160. This would leave the East Zone with a mix of 'green' and 'amber' scores against the OPs, and South Zone 1 with (at best) 2 'green', 1 'amber' and 3 'red' OPs. Therefore, even on an analysis under the OPs (which we do not accept as a legitimate approach), the East Zone clearly performs better.

Compulsory Acquisition

Test under section 122 Planning Act 2008

161. The main test for compulsory acquisition is made of two conditions set out in section 122 of the Planning Act:
    a. the land is:
        i. *"required for the development to which the development consent relates,*
        ii. *required to facilitate or is incidental to that development, or*
        iii. *is replacement land which is to be given in exchange for the order land under section 131 or 132"*; and
    b. *"there is a compelling case in the public interest for the land to be acquired compulsorily"*.

162. Regarding the first aspect of this test, acquisition of the MEA is not required for the development. The meaning of the word "required" was considered by the Court of *Appeal in Sharkey and Another v Secretary of State for the Environment and South Buckinghamshire District Council* (1992) 63 P. & C.R. 332[16]. McGowan LJ giving the leading judgment endorsed the approach taken by Roch J and stated:

> "*I agree with Roch J. that the local authority do not have to go so far as to show that the compulsory purchase is indispensable to the carrying out of the activity or the achieving of the purpose; or, to use another similar expression, that it is essential.* ***On the other hand, I do not find the word "desirable" satisfactory, because it could be mistaken for "convenient," which clearly, in my judgment, is not sufficient. I believe the word "required" here means "necessary in the circumstances of the case.***" (emphasis added).

163. Firstly, Compulsory acquisition of the MEA is not necessary in the circumstances of the case. Mitigation and enhancement can be achieved without compulsory acquisition. Crossness Nature Reserve is Statutory Undertakers' land (discussed

[16] This case considered section 226(1)(a) of the Town and Country Planning Act 1990 prior to its amendment by the Planning and Compulsory Purchase Act 2004, but the principle is equally applicable to current test

more below) and Thames Water (TW) are bound by a s.106 agreement to maintain and enhance the nature reserve (again, discussed more below). Peabody, as owners of Norman Road Field, are bound by the separate s.106 agreement and broader planning controls set out above – in fact, if these controls were enforced they would already achieve a very similar standard to the Proposed Scheme. There is no reason why the Applicant cannot seek to amend these existing s.106 agreements as opposed to compulsorily purchase the land. Alternatively, TW and Peabody could enter into new s.106 agreements. The Applicant's approach already involves TW doing so in relation to the members area, and TW's obligations could simply extend to all the remaining Crossness Nature Reserve land, leaving compulsory acquisition unnecessary. In the same way compulsory acquisition of Thamesmead Golf Course is not necessary to secure the BNG proposals, compulsory acquisition is not necessary for the MEA.

164. Secondly, the reason the Applicant seems to suggest that compulsory acquisition is required is that it would be messy, and it would be desirable to have a clear simple regime. Respectfully, the Applicant is misapplying the test. As per the *Sharkley* case quoted above, the test concerns necessity, not mere desirability.

165. Thirdly, the Applicant seems to suggest that there is need for "certainty" and to avoid any unknown agreements appearing at a later stage in the process. This argument is flawed. Again, this argument seems be based in desirability rather than whether it is required/necessary (contrary to the statutory test). Additionally, this argument doesn't make sense, because compulsory acquisition would not override any existing s106 rights without expressly abrogating them. The s.106 rights cannot be abrogated without first having knowledge of them. Thus, the risk of any unknown planning obligations is the same in either scenario.

166. Fourthly, the Applicant seeks to bolster its position saying that compulsory acquisition is needed in order to ensure certainty of delivery. This argument does not assist the Applicant because the s.106 agreement route to delivery would provide sufficient certainty of delivery. This is because s.106 agreement are enforceable agreements. Further, even on the Applicant's proposed route (acquisition but continued management by TW), TW cooperation is still necessary. It's not clear what Applicant would do if TW no longer complied. Consequently, there is no certainty that the land would be managed appropriately through compulsory acquisition, which in turn raises significant concerns over the long-term maintenance of the nature reserve. There is no suggestion from the Applicant that it would be able to manage the land itself.

167. Regarding the second condition which must be satisfied, there is no compelling case in the public interest pursuant to Section 122 (3) of the Planning Act 2008. When considering a compelling case in the public interest, the Planning Act requires compliance with the Human Rights Act 1998. This especially refers to Articles 1 and 8 of the European Convention on Human Rights, which safeguard the peaceful

enjoyment of possessions and respect for private and family life. The Examiner will also be aware of the Grazier's who have protected characteristics under the Equality Act 2010 (namely race).

168. The Guidance provides further clarification on these statutory requirements, emphasising the need for detailed justification for each parcel of land and the importance of negotiating with landowners to avoid compulsory acquisition where possible.

169. The Examining Authority will be conversant with *R. (FCC Environment) v SSECC* [2015] Env L.R. 22, in which the Court of Appeal considered the effect of the compulsory acquisition provisions. Examples of where compulsory acquisition may not be justified despite the project being supported by a national policy statement include (see FCC at [11]):

a. Where the land sought to be acquired exceeds what is necessary to construct the proposal;
b. The acquisition of a more limited right, rather than the entire land, would suffice;
c. The owner is willing to agree to a sale and accordingly it is unnecessary to compel him to do so;
d. Where, despite the relevant NPS not requiring the consideration of alternative sites for the purposes of deciding whether to grant development consent, the existence of an alternative would be relevant for the purpose of deciding whether there was a compelling case in the public interest for compulsory acquisition.

170. In respect of these points:
a. The land sought to be acquired exceeds what is necessary to construct the proposal;
b. As stated above, a s.106 agreement would give the Applicant sufficient rights over the land and therefore it is unnecessary to compulsory purchase the land;
c. The Applicant is required to consider alternative sites and there are better alternative sites for this development.

171. Further, the Grazier's and local residents' particular circumstances mean that the use of powers of compulsory purchase are unjustified because:
a. The detrimental consequences on the functionality as a grazier;
b. The adverse impact on the ability of the Grazier's to enjoy the land;
c. The adverse impact on the residents ability to enjoy the land;
d. The adverse impact on health (including mental) and welfare of those impacted.

Section 127 Planning Act 2008 – Statutory Undertakers' Land

172. S.127 Planning Act 2008, prevents compulsory purchase of statutory undertakers' land unless that land can be purchased and replaced without serious detriment to the carrying out of the undertaking or can be purchased and replaced by other land (owned by or available to be acquired by the undertaker) without serious detriment to the carrying out of the undertaking.

173. TW own the land as statutory undertakers and operate the land as statutory undertakers. This land is necessary to TW to render the sludge incinerator acceptable in planning terms. This means that the nature reserve is inherently linked to and part of TW's operations. Further, TW are under obligations under a s106 agreement to maintain and enhance the nature reserve. They are under statutory duties to further conservation and enhancement of natural beauty and conservation of flora and fauna (s.3 Water Industry Act 1991), and to have regard to conserving biodiversity (s.40 Natural Environment and Rural Communities Act 2006).

174. SCNR's understanding is that TW hold the land for the purposes elucidated in the above paragraph. However, even if it were the case that TW hold this land solely for the purposes of the s.106, this is irrelevant and would not overcome the s.127 issue. Neither of the s.127 conditions apply because (s.127(3)):

a. The land cannot be replaced without serious detriment to the carrying on of TW's undertaking; and
b. there is no other land that can be acquired by Thames Water to carry out this specific function, especially when the unique status of the nature reserve land is taken into account.

175. For the avoidance of doubt, if either subsections (a) and (b) in the above paragraph (which mirror those in s.127(3) Planning Act 2008) apply, the acquisition of land is prevented.

176. The suggestion that acquisition would nullify TW's s.106 agreement obligation is based on flawed logic. First, the s.106 agreement which places obligations on TW and still serves a purpose and TW act in order to maintain and enhance the nature reserve to this date. This is not an obligation that can simply be bought out. Secondly, If the Applicant's position were correct, this would defeat the very purpose of s.127 of the Planning Act 2008.

177. In conclusion, s.127 applies in relation to the Proposed Scheme. S.127 prevents the compulsory purchase of the land. The impact of s.127 cannot simply be overcome by purchasing the land, which would be contrary to the s.106 agreement currently in place and the purpose of s.127.

S.131 Planning Act 2008 – Special Category Land

178. s.131 applies to any land forming part of a common, open space, or fuel or field garden allotment. The relevant definition of "open space" for these purposes is that set out in section 19 of the Acquisition of Land Act 1981: *"any land laid out as a public garden, or used for the purposes of public recreation, or land which is a disused burial ground"*. 'Recreation' does not have a statutory definition that necessitates that the land be publicly accessible in a physical sense. Land may have restricted physical access but still considered to have recreational value. Pursuant to an ordinary dictionary definition, recreation can cover any activity done for enjoyment. This would include twitching, for example. The bird hide and wildlife viewing screens show how the inaccessible areas are used for recreation – they have been carefully designed to allow for viewing and enjoyment of wildlife without disturbing it (and for visitor safety). Consequently, the Applicant's case that "recreation" means that the land must be "publicly accessible" (seemingly in a physical sense) is wrong.

179. As such, SCNR's case is that s.131 Planning Act 2008 applies as the Proposed Scheme impacts on special category land and the applicant needs to satisfy the requirements of this section.

180. Special parliamentary procedure will apply in such cases unless the Secretary of State is satisfied that one of the following circumstances applies:

a. replacement land has been, or will be, given in exchange for land being compulsorily acquired (sections 131(4) or 132(4));
b. the land being compulsorily acquired does not exceed 200 square metres in extent or is required for specified highway works, and the provision of land in exchange is unnecessary in the interests of people entitled to certain rights or the public (sections 131(5) or 132(5));
c. for open space only, that replacement land in exchange for open space land being compulsorily acquired is not available, or is available only at a prohibitive cost, and it is strongly in the public interest for the development to proceed sooner than would be likely if special parliamentary procedure were to apply (sections 131(4A) or 132(4A));
d. for open space only, if the land, or right over land, is being compulsorily acquired for a temporary purpose (sections 131(4B) or 132(4B)).

181. None of the circumstances outlined immediately above apply in this case.

Conclusion

182. Pursuant to *R. v Secretary of State for the Environment* (1986) 52 P. & C.R. 318, the burden is on the Applicant to establish the test for compulsory purchase has been met and the compulsory purchase order can be properly made. Additionally, it is the duty of the Applicant to lay the information and evidence that is required to demonstrate the test is met.

183. It is submitted that the case against compulsory acquisition heavily outweighs the case in favour of compulsory acquisition.

184. Even if the Examiner were to consider the issue to be evenly balanced, the Examiner should come down against compulsory acquisition, in accordance with *Prest v Secretary of State for Wales* [1983] 1 WLUK 416, which is authority for the following propositions:

a. where the scales are evenly balanced then the decision should come down against compulsory acquisition;
b. the deprivation of an interest in land against the citizens' will is only lawful if the public interest decisively so demands; and
c. if there is any reasonable doubt on the matter, the balance must be resolved in favour of the citizen.

185. For all the reasons set out above, the case for compulsory acquisition should be dismissed.

Conclusion

186. The Proposed Scheme involves significant harms that could be avoided through delivery on/near the East Zone. These significant harms have not been properly assessed, and subsequently they have not been adequately reduced and mitigated. For these reasons, the Proposed Scheme is unacceptable. These reasons also mean the CNP presumptions do not apply.

187. The section 122 test for compulsory acquisition has not been met. Section 127 also prevents compulsory acquisition of Crossness Nature Reserve as it constitutes statutory undertakers'. The Site is also Special Category Land, meaning special parliamentary procedure would apply. For these reasons, the case for compulsory acquisition, and in turn the Proposed Scheme, should be dismissed.

188. All of the above means that the DCO Application should be refused.