Cory Decarbonisation Project

Planning Inspectorate Reference: EN010128

SAVE CROSSNESS NATURE RESERVE

Deadline 4 Submission

Compulsory acquisition, temporary possession and other land rights

Development footprint

1. A theme emerged during CAH2 and ISH2: the Applicant is intentionally avoiding detailed design of the Proposed Scheme at this stage, in order to retain flexibility to cover multiple eventualities. This includes many design aspects that affect the overall development footprint. However, as argued by Landsul and Munster Joinery at CAH2, land may only be compulsorily acquired pursuant a DCO where it is *required* for the development[1]. If it is feasible to deliver the Carbon Capture Facility with a reduced development footprint, the additional acquisition is not required and the Proposed Scheme must not be granted. The Applicant does not have the luxury of flexibility when it requires other parties' land. The detailed design must be advanced as far as possible to ensure acquisition is as minimal as feasible.

2. Expanding on this point, the primacy of the mitigation hierarchy under EN-1 (particularly the *avoidance* of ecological harm), and the particularly strong protections afforded to Crossness Nature Reserve (LNR, MOL, SINC, HPI, high quality open space and green infrastructure), mean that any such feasible reduction in development footprint must be applied to it as far as possible. In any event, the question of *which* land would need to be prioritised is not relevant to the s122 test: it is sufficient to show that the full extent of compulsory acquisition proposed is not required. The evidentiary burden is on the Applicant to show that the full extent of compulsory acquisition is required.

3. As highlighted by Landsul and Munster Joinery, there are substantial opportunities for footprint reduction, including the electrical switchyard, co-location of water storage, tank storage, and general layout efficiencies. In relation to tree planting, we add the following:

    a. Despite, the Applicant's commitment to reduce tree planting, it still proposes extensive planting along the eastern boundary of Crossness Nature Reserve and NRF. This is inappropriate on (or immediately adjacent to) grazing marsh habitat as it risks drying out the habitat, thereby undermining its inherent wetland character (and the Applicant's plans for raised water levels). This would reduce natural carbon storage capacity and threaten the ecosystem;

    b. Similarly, the trees themselves will not thrive in a waterlogged environment, limiting their ecological value;

    c. We do not believe tree planting will achieve the intended visual impact benefits (*"screening to operational equipment"*). The Carbon Capture Facility will stretch far above the trees, which will not be able to grow to any significant height within the 20–25-year timespan of the development (particularly given the unsuitable waterlogged environment);

[1] Section 122 of the Planning Act 2008

d. It is irrational to seek to protect the visual amenity of Crossness Nature Reserve and NRF through the removal of additional land. One of the reasons people use it is the visual amenity of open grazing marsh habitat. Visual amenity is best preserved through retaining as much of this habitat as possible; and

e. Beyond visual amenity, this natural grazing marsh habitat has inherent ecological value; losing it is an ecological harm. The mitigation hierarchy requires the Applicant to avoid/reduce such harm as far as possible – regardless of whether it is purportedly mitigated by new woodland habitat.

Securing LaBARDS through s106

4. As discussed at CAH2, it is entirely possible to secure delivery of the LaBARDS without acquisition via a new s106 agreement, to which TWUL, the Applicant and LBB would be party. TWUL would give commitments to: (1) allow the Applicant to carry out the works, and (2) manage the land in accordance with the LaBARDS. TWUL's commitments to LBB would function as planning obligations and bind the land. TWUL's commitments to the Applicant would function as normal contractual obligations and could include enforcement rights allowing the Applicant to take to the land and ensure compliance. This would give the Applicant just as much certainty of delivery as acquisition. Contrary to the Applicant's suggestion[2], no further restrictive covenants would be required.

5. We maintain that a variation to the 1994 Agreement would also be possible, but the above approach has the added advantages of (1) allaying any concerns around imposition of new obligations onto an old s106 agreement and (2) ensuring all areas are covered under a consolidated management regime.

6. At CAH2, the Examining Authority asked the Applicant to explain why the proposed approach for the Member's Area (i.e. Deed of Obligation) couldn't be used for the rest of Crossness Nature Reserve. The Applicant initially focused on the fact that no works were envisaged in the Member's Area – only management. Firstly, we disagree that this distinction is material: works can be effectively secured under s106 agreement, as demonstrated above. At CAH2, TWUL pointed out that substantive works proposed on Crossness Nature Reserve were limited to specific areas, particularly the eastern border along the Carbon Capture Facility, with the rest being enhancement (see Figures 14 and 15 of Outline LaBARDS). We submit that enhancement should not be considered works at all; it is management. The Applicant responded by stating that a *"consolidated approach is required in relation to the management of the totality"*[3]. This brings us back to the initial question asked by the Examining Authority. There's no distinction between the Member's Area and broader Crossness Nature Reserve in

[2] Row 2.5.29 of Applicant's Response to Interested Parties' Deadline 2 Submissions
[3] Transcript of Recording of Compulsory Acquisition Hearing 2 (CAH2) - Part 2, at 00:16:46:12

terms of *management*. If the former can be included in the management regime without acquisition, then the same must be true of the latter.

7. The availability of delivery and control via s106 agreement shows that the land is not required to be acquired and therefore the section 122 test is not met.

Design

Visual impact - photomontages

8. As raised during the Accompanied Site Visit, we are concerned that the Photomontages do not depict the full visual impact on Crossness Nature Reserve. There is no view showing the full north-south stretch of the Proposed Scheme from Crossness Nature Reserve. 'Sequential View 1' is largely obscured by Riverside 2. 'View 1' shows the Proposed Scheme from FP2 looking north, where the impact is less severe: REP1 and REP2 are already in the sightline, and you do not see the cross-section of the full north-south length of the Proposed Scheme.

9. We request that the Applicant provide an additional view from the entrance to the Member's Area (at the end of the access road and along the north-south path along the western edge of the main Crossness Nature Reserve area), so that the visual impact of the full north-south length of the Proposed Scheme can be assessed. This would also give a close representation of the view from the bird hide, which is particularly sensitive to visual impact.

Biodiversity, ecology and natural environment

10. This submission intends to take a step back and provide an overview of the two separate assessments of (1) ecological impact and (2) BNG. The Applicant's approach blurs the two and the relevant considerations for each. The assessment of ecological harm first depends on understanding the true baseline for the NRF site.

Norman Road Field

11. The Applicant claims that long-term management of NRF under the Veridion Park regime has been implemented for the requisite ten-year period. The Applicant relies on the fact that the initial works were carried out (which is agreed), and an initial 'Ecological Management Plan' was submitted[4]. This document has not been located; the Applicant's explanation is that it was likely submitted in 2010 and *"it is not unusual for documents such as management plans to be lost over such a period of time. There is nothing to suggest they were not submitted and implemented as approved"*[5].

12. However, these two documents do not come close to demonstrating full compliance with the Ecological Master Plan. Extensive evidence is missing, and some evidence actively points to the ongoing management not having been undertaken:

[4] As confirmed by the 07/08166/FULM Committee Report

[5] Row 2.5.23 of Applicant's Response to Interested Parties' Deadline 2 Submissions

a. There is no evidence that *"a series of Management Plans… written to cover a ten-year period"*[6] was provided. It's highly unlikely that every single Management Plan and monitoring report across ten years was lost (the most recent of which being required in 2020 at the earliest). The Applicant would also have to explain why there is no evidence of *receipt* by LBB;

b. There is no evidence that *"annual monitoring so that the condition of the habitat can be recorded and adjustments made to the management regime accordingly"* was ever carried out;

c. Section 5.3 of the Ecological Master Plan provides specific details for the long-term management of grazing marsh grassland (including NRF) – key aspects are set out below, none of which has been evidenced as delivered:

   i. there is a specific requirement to implement a *"management regime suitable for grazing marshes… undertaken in consultation with the warden of the Thames Water nature reserve"* – Ms Sutton has confirmed that consultation has never occurred;

   ii. the grazing regime *"will aim to maintain a diverse grassland sward with a high percentage of finer grasses and herbaceous species"* – there is no evidence that this has occurred;

   iii. the Ecological Master Plan envisages that *"scrapes will be seasonally inundated with water"*, and that a *"hydrological regime appropriate for a grazing marsh is established across the site"* including where necessary *"manipulat*[ion of] *water levels in the ditches via a system of sluices"* – while the scrapes were created, there is no evidence of seasonal inundation or water level manipulation over time;

   iv. there is a specific goal of creating a management regime to *"provide habitat for terrestrial invertebrates associated with grazing marsh… and ground-nesting birds"* – there is no evidence that ongoing management has considered this;

   v. there is even a goal that NRF *"could be incorporated into and managed as part of the nature reserve in conjunction with the payment of an annual sum of money"* – this was never pursued, and further confirms how aligned the existing proposals are to the Applicant's; and

d. The actual conditions on the ground indicate that long-term management has not occurred.

13. The facts – both in terms of documents submitted and the reality on the ground – indicate that the Ecological Master Plan / Management Plans regime has not been complied with. This constitutes a breach of clause 24 of the corresponding s106

[6] Section 5 of the Ecological Master Plan

agreement. This breach remains enforceable by LBB, meaning that it is still possible to secure improvements to NRF under this regime. This *must* alter the baseline for the ecological assessment of NRF. It also undermines the value of the Applicant's mitigation and enhancement proposals (detailed further below).

Ecological assessment

14. The starting point is to look at the harm created by the Proposed Scheme. Ignoring developed land, artificial unvegetated surface and habitat already offset by REP2, 6.21 ha of habitat is lost onsite[7]. A further 0.66 ha of neutral grassland is lost offsite (on TGC). In total, **6.87 ha of habitat is lost**. The Applicant has obscured this figure, and it doesn't appear in any of the main Application documents, which has led us to understating the loss in previous submissions.

15. On top of the 6.87 ha loss of habitat, there are various *further harms* that must be assessed, including:

    a. the qualitative harm from the high value of the land lost – noting the various policy designations;

    b. the loss of HPI – including a qualitative assessment of the fact that these habitats have developed naturally over a long period of time, making them impossible to directly replace;

    c. the various species which will be directly impacted, including various SPI plant species lost and various SPI animal species whose habitats are being reduced;

    d. the impact on adjoining and nearby land, and the habitats and species thereon, caused by fragmentation; and

    e. further harms to species created by the Proposed Scheme, for example from construction noise, light pollution and dust.

    Detailed assessments of these points are covered in our previous submissions and are not repeated here.

16. Once these harms are fully understood, the first question to be asked is whether the Proposed Scheme *avoids* and (failing that) *reduces* these harms as far as possible, as required by the mitigation hierarchy. If it fails to do so, no amount of subsequent mitigation or compensation can justify such a failure. As detailed in our previous submissions, ecological harm could be avoided through delivery in the East Zone and reduced through a reduction in footprint.

17. The next part of the assessment is to consider the adequacy of the proposed mitigation and compensation. The Applicant initially proposed creation of 3.83 ha of

[7] Table 4-1 of the Biodiversity Net Gain Report. We note there is a discrepancy between this figure and paragraph 8.3.2 of the Outline LaBARDS, which gives a total of 6.1 ha, due to a difference in amount of modified grassland lost.

habitat onsite[8] and 1.09 ha offsite (TGC)[9]. However, the offsite figure is now lower: 0.88 ha of the offsite habitat creation was *"open mosaic habitat on previously developed land"*; we understand this referred to the car park area and driving range buildings, which are now excluded from the BNG Opportunity Area[10]. Therefore, it appears that only a total of 4.04 ha is created, meaning the Proposed Scheme results in a **net loss of 2.83 ha of habitat**. In addition, the Applicant proposes enhancement of existing habitat on Crossness Nature Reserve, NRF and TGC.

18. There must then be a qualitative assessment of these proposals. In the tables below we provide a detailed critique of the mitigation proposals at paragraph 8.3.4 of the Outline LaBARDS, and management proposals at Table 1 of the Outline LaBARDS (noting their large overlap). These proposals cover all mitigation and enhancement proposals detailed in the Outline LaBARDS[11].

Table 1 – critique of mitigation proposals at paragraph 8.3.4 of Outline LaBARDS

Proposal	Critique
"improvement in Flood Plain Grazing Marsh habitat from Poor condition to Moderate condition secured through improved ground wetting delivered via proposed drainage proposals associated with improved existing ditches and new ditches"	• Assessment of current ditches was skewed by assessment during a heatwave in June 2023 (see previous submissions) • No detail provided on how water levels will be increased – TWUL already manages water levels in ditches (affecting overall ground wetting) • NRF Ecological Master Plan already requires seasonal inundation of scrapes, establishment of a hydrological regime and active manipulation of water levels in ditches (non-compliance means this is still enforceable) • Risk of harm to SPI species (e.g. nesting bees) without specific management plan
"establishment of new ditch and reedbed habitat"	• Creation of ditches is minimal (0.176ha) and is undermined by loss of some existing ditches (0.091ha) • Creation of reedbed (0.505ha onsite and 0.21ha on TGC) is undermined by loss of existing reedbed (0.373ha) • NRF Ecological Master Plan already requires seasonal inundation of scrapes, establishment of a hydrological regime and active manipulation of water levels in ditches (non-compliance means this is still enforceable) • Risk of harm: soil removed to create ditches might be dumped on site, damaging grazing marsh habitat underneath. This is common, and there is no guarantee this won't occur

[8] Table 4-3 of the Biodiversity Net Gain Report, excluding developed land and artificial unvegetated surface

[9] Table 4-6 of the Biodiversity Net Gain Report, excluding developed land and artificial unvegetated surface

[10] Response to Q1.3.1.14 in Applicant's Responses to Examining Authority's First Written Questions

[11] We note paragraph 10.1.14 of the Outline LaBARDS also includes a list of habitat measures, but all of those measures are covered in our Tables 1 and 2. Paragraph 8.3.4 is only stated to relate to onsite habitat mitigation – however, the two remaining offsite (TGC) proposals at paragraph 11.1.9 (creation of reedbed habitat and enhancement of grassland) are covered in our critique.

"establishment of new neutral grassland habitat"	• Creation of grassland (1.738ha) is *less than* what is lost (1.819ha)
"establishment of ditch, reedbed replacement habitat and enhancement of existing ditch habitat for water voles, secured pursuant to licensing"	• Ongoing concerns from Environment Agency and Natural England • This is at best as mitigation for specific harm to water voles and compliance with legislative requirements; it does not constitute mitigation for any other harmSee above for general points on ditches
"establishment of supporting habitat for protected and notable species including bats: foraging and commuting habitat; breeding birds: nesting habitat; wintering birds: foraging habitat; and habitat for reptiles and invertebrates"	• Net *loss* in potential habitat for these species • Further harm through fragmentation • Applicant's Environmental Statement ascribes the residual effects to these species as 'negligible' (see Table 7-11 of Chapter 7) so cannot be considered a benefit. Our assessment (as per previous submissions) is that the residual effect is *adverse* in each case.
"increasing biodiversity of existing deciduous woodland habitat through management"	• Only management proposed (no works), and no detail on how this would be achieved • Most of existing woodland is on southern edge of NRF – improved management could be achieved through enforcement of Ecological Master Plan
"management of ditches and water courses to improve aquatic planting species diversity"	• No detail provided • Improved management of water courses in NRF could be achieved through enforcement of Ecological Master Plan (non-compliance means this is still enforceable)

Table 2 - critique of management proposals at Table 1 of Outline LaBARDS

Proposal	**Critique**
Species composition and structure following habitat classification system	• Does not justify loss of naturally occurring plant species that create and maintain the habitat in the first place • Basic measure
Sward height management	• Basic measure • Already part of TWUL management regime – to the extent the Applicant proposes going further than the existing regime, this is not detailed
Minimise cover of scrub	• Basic measure • Already part of TWUL management regime – to the extent the Applicant proposes going further than the existing regime, this is not detailed
Minimise bare ground	• Basic measure • Already part of TWUL management regime – to the extent the Applicant proposes going further than the existing regime, this is not detailed
Minimise physical damage	• Basic measure • Already part of TWUL management regime – to the extent the Applicant proposes going further than the existing regime, this is not detailed

Prevention of invasive species	• Basic measure • Already part of TWUL management regime – to the extent the Applicant proposes going further than the existing regime, this is not detailed
Seeding broad mix of wildflowers in grassland areas	• This proposal risks being actively harmful by introducing less-desirable species and creating competition • Cheap and basic measure • Inherently random approach – not specific / considered
Removal of rubbish and waste from ditches	• The Applicant themselves is a contributor of waste • Basic measure • Already part of TWUL management regime – to the extent the Applicant proposes going further than the existing regime, this is not detailed
Water supply of good quality	• This is *"expected to be met by existing supplies of water at the site"* – therefore this is not a change from existing position • There are concerns around the quality of the water supply, in large part due to the Applicant's disposal of waste into the water network
Increase water supply to floodplain grazing marsh	• No evidence as to how this will be achieved • Already part of TWUL management: TWUL uses a wind pump to increase water levels, but lack of wind during dry months has made success limited – to the extent the Applicant proposes going further than the existing regime, this is not detailed • Risk of harm to SPI species (e.g. nesting bees) without management plan
Maintain low cover of scrub	• Basic measure • Already part of TWUL management regime – to the extent the Applicant proposes going further than the existing regime, this is not detailed
Establish new woodland	• This proposal risks being actively harmful: woodland may dry out adjoining grazing marsh habitat • Poor condition of woodland is assumed *"due to the limitations of the woodland block sizes and proximity to the working CCF site"* – woodland not appropriate in the location, and its value limited due to the Proposed Scheme itself
Creation of new NRF ditches	• Risk of harm: soil removed to create ditches might be dumped on site, damaging grazing marsh habitat underneath. This is common, and there is no guarantee this won't occur • Poor condition of ditches is assumed *"due to the limitations of the site's location close to several industrial facilities and the need to maintain open water to support other habitats"* – value limited due to the Proposed Scheme itself (and REP1 and REP2)
NRF woodland enhancement	• Basic measure • Most of existing woodland within NRF – improved management could be achieved through enforcement of Ecological Master Plan (non-compliance means this is still enforceable)

Modify Crossness Nature Reserve water supply to retain ground water	• No evidence as to how this will be achieved • Already part of TWUL management: TWUL uses a wind pump to increase water levels, but lack of wind during dry months has made success limited – to the extent the Applicant proposes going further than the existing regime, this is not detailed

19. This critique reveals that the proposals are of very limited value. In many instances they offer no meaningful benefit and, in some cases, may even entail additional harm.

20. A substantial proportion of the proposals are already carried out by TWUL. The Applicant does not explain how it will achieve a higher standard, and no enforceable outcome is secured. The Applicant lacks experience of nature management, especially compared to TWUL, which is also subject to a higher standard as statutory undertaker. Therefore, there is a strong risk that acquisition and ultimate control by the Applicant would lead to a *lower* standard of management. The ongoing lack of delivery of the offsite ecological mitigation sites for REP2 is testament to this risk.

21. Furthermore, the value of the offsite mitigation on TGC is qualified by:

    a. The uncertainty that it will be delivered. Currently, the Applicant only proposes a Deed of Obligation, meaning the obligations are not secured in planning terms. Peabody's reluctance to enter into a s106 agreement emphasises the precariousness: as the Applicant noted itself at ISH2, *"there is a different commercial position of having a 106 exist on your site to when it doesn't"*. Resorting to financial compensation is not acceptable for the general ecological mitigation (as distinct from BNG); and

    b. The fact that other funding mechanisms to deliver these works are available, which the Applicant accepts[12].

22. It's also important to consider what is *missing* from the proposals. There is no mitigation responding to the extensive loss of plant SPIs. Nor is there mitigation responding to the harm to animal SPIs (except water voles). The Applicant continues to rely on the general enhancement measures, but additional proposals are required to mitigate the specific harms to valuable species. In relation to SPI bee species, the Applicant simply suggests they *"avoid newly wetted areas"*. This overlooks the fact that nests may *already* exist in areas to be wetted and would be destroyed. It cannot be assumed that the bees will re-nest; the Applicant offers no active mitigation.

23. The final question (assuming the Proposed Scheme could demonstrate avoidance and reduction of ecological harms) is whether the enhancement proposals adequately mitigate the extensive range of significant ecological harms *in addition to* the net loss of 2.83 ha of habitat. That is an incredibly tall order; the critique above shows that they fall woefully short.

[12] Row 2.5.8 of the Applicant's Response to Interested Parties' Deadline 2 Submissions

24. It's important that the assessment of ecological harm follows the above approach. Ecological harm is a material planning consideration. As such it needs to be properly assessed through detailed assessments, so it can be properly weighed in the planning balance. Ecological harm must not be conflated with BNG. BNG is a separate regime based on more objectively calculated metrics that often fail to capture the full picture. The assessment of baseline biodiversity units as being of 'poor' condition for BNG purposes does not inform value for the ecological assessment. By conflating the two, there is a real risk that the full extent of the ecological harm is illegitimately understated, and the weighting applied in the planning balance will be skewed.

25. The Applicant's 'created' habitat is on existing habitat and therefore depends on loss of existing habitat. This initial loss constitutes an ecological harm in itself. The Applicant's view is that this further harm *and* the fundamental ecological harm (from the habitat loss under development footprint) are both mitigated by the quality of the habitat that will be created. We disagree. Furthermore, we believe this approach is not legitimate under the mitigation hierarchy: the Applicant must prioritise *avoiding* harm, yet the Applicant is actively *creating* more harm in order to achieve the third-tier objective of mitigation. The Applicant is focused on the calculation of net result, akin to a BNG calculation, ignoring the harms created in the process and making no attempt to avoid them. That approach is not legitimate in the assessment of ecological harm.

<u>BNG</u>

26. We ask that the Applicant provides the biodiversity metric condition sheets used to calculate the biodiversity units for each baseline habitat and confirms what specific proposals were used to determine the biodiversity units for each proposed habitat.

27. The Applicant has not yet prepared detailed design proposals: the Outline LaBARDS is only a loose outline document; TGC enhancements lack detail and are subject to *"iterative changes"*[13]. Therefore, we query how BNG proposals could have been accurately calculated.

28. Furthermore, there have been significant changes since the BNG calculation was made, including removal of habitat provision on the TGC car park and driving range, and removal of trees on Crossness Nature Reserve. The Applicant has not re-run the calculation following these changes, yet it maintains that 10% BNG will be achieved. We query how the Applicant can confirm this without reassessment.

Metropolitan Open Land

29. The Applicant does not rely on the CNP presumption[14] but instead relies on independently demonstrating very special circumstances to justify what is accepted

[13] Response to Q1.3.1.17 in Applicant's Responses to Examining Authority's First Written Questions
[14] Page 37 of Applicant's response to Interested Parties deadline 1 submissions

as inappropriate development on MOL. The Applicant relies chiefly on the contribution to addressing climate change achieved by carbon capture[15].

30. However, this approach does not avoid the requirement to first comply with the mitigation hierarchy that applies to the CNP presumption. The CNP presumption exists because of the need for energy NPS infrastructure, including its contribution to addressing climate change. Despite this need, EN-1 makes clear that the mitigation hierarchy must first be followed, giving primacy to ecological protection. Therefore, the policy intention is that climate changes benefits cannot provide very special circumstances where the mitigation hierarchy has not been followed. This must be true whether those benefits are being claimed under the CNP presumption or as very special circumstances in their own right. We want to avoid any implication that the mitigation hierarchy can be side-stepped by not relying on the CNP presumption.

31. We appreciate that the Applicant claims to have followed the mitigation hierarchy. We of course disagree and have demonstrated that the Proposed Scheme fails to apply the mitigation hierarchy on multiple fronts. The intention of EN-1 is clear: this failure prevents the climate change benefits from being used as very special circumstances to justify inappropriate development on the MOL. Therefore, the Proposed Scheme remains inappropriate development without justification and development consent must be refused.

[15] Paragraph 5.5.5 onwards of Planning Statement