NOTE RE SECTION 106 CORY CCF

I. TWUL's primary position in relation to the enhancement land is that the Applicant has not made a case for any rights in respect of the same, save along the periphery of the carbon capture facility ("CCF"), as the substantive mitigation takes place on the Norman Road Field which falls outside TWUL's ownership.

II. If, however, the Examining Authority and/or the S/S take the view that the enhancement works are necessary TWUL avers that the Applicant has not and cannot demonstrate that the outright acquisition of the land is justified. Guidance on procedure for the compulsory acquisition of land (available here) ("the 2013 Guidance") is clear that taking outright ownership by compulsion is only justified if it is necessary and that all reasonable alternatives have been explored. Acquisition is neither necessary nor proportionate. If the enhancement works are required in order to make the project acceptable then temporary rights granted to the Applicant would enable it to carry out the works. The said works could then be maintained by TWUL by modifying the extant section 106 agreement so as to include the maintenance of the enhancement works.

III. The Applicant ought to be responsible for any additional costs incurred by TWUL as a consequence of the enhancement works and the Applicant should be added as a party to the section 106 agreement to make provision for determining the amount of money which should be paid by the Applicant and ensuring that it is obliged to make the payment or payments. A model for the provisions which should be included in respect of the Applicant's financial responsibilities is already provided in document REP1-030 Draft Deed of Obligation. That mechanism could be adopted for the entirety of the TWUL enhancement land, including that which lies beyond the order limits, save that TWUL would aver that the financial obligation should persist for the entire period of the development and not the first 5 years, perhaps with a mechanism for determining the additional costs on a 5 or 10 yearly basis with a default that the payment is to increase every 5 years in line with CPI unless either party applies for a different sum.

IV. Such an arrangement would be a less significant interference with TWUL's property rights and is precisely the type of alternative which the Guidance states that developers should explore and pursue. The Applicant, however, states that such an arrangement is

either not practicable or lawful. It has provided its reasons in the document REP1-028, pages 7 to 12. At the hearings of 11 and 12 February 2025 the Applicant provided a further reason as to why modification of the extant section 106 agreement is not a tenable alternative to outright acquisition.

V. In this document TWUL addresses systematically all of the arguments made by the Applicant as to why modification of the section 106 agreement together with the grant of temporary powers for the Applicant to carry out the enhancement works is not a tenable alternative. The upshot is that none of the Applicant's arguments are convincing. The S/S has the power under section 120(3) and paragraph 3 of Schedule 5 of the PA 2008 to modify agreements provided that those modifications are related to the development. Modifying the agreement would mean that the enhancement works would be maintained and conserved by TWUL for the lifetime of the development, with any additional costs being financed by the Applicant who would also be added as a party to the modified section 106 agreement. To carry out the works the Applicant only needs temporary powers/rights and does not require ownership. In the circumstances, it is clear that outright ownership is not necessary. Instead, if rights over TWUL's enhancement land to carry out enhancement works are necessary then the DCO should only make provision in respect of those temporary rights and modify the section 106 agreement to ensure that they are maintained. As explained orally at the hearings of 11 and 12 February 2025 it is clear that the S/S has the power under s 120(3) of PA 2008 to modify the section 106 agreement regardless of the consent of TWUL or the Applicant.

VI. In the remainder of the document the arguments of the Applicant are summarised or cited followed by TWUL's response. (1) to (14) address the representations made by the Applicant in REP1-028, pages 7 to 12; (15) addresses the representations made by the Applicant at the hearings of 11 and 12 February 2025.

(1) Applicant seeking to reach a negotiated position with TW but in the absence of agreement CA powers are required (page 7)

1.1 Response: The negotiated position relates to something other than outright acquisition. If a negotiated settlement falling short of outright ownership by the Applicant is acceptable and sufficient to provide the required mitigation and enhancement then a solution imposed upon the Applicant and TWUL under section 120(3) is also sufficient.

(2) Applicant believes rights not sufficient because that would not stop TWUL doing something inconsistent with the land, necessitating the imposition of restrictive covenants (page 7).

2.1 Response: The proposition that granting rights to the Applicant would require there to be corresponding restrictive covenants on TWUL is, with respect to the Applicant, a nonsense. All that is required is a modification to the s 106 to require the maintenance of the enhancement works undertaken by the Applicant. Any actions by TWUL which then somehow undid the enhancement works, or were inconsistent with the enhancement works, would be a breach of the section 106 agreement as modified under the DCO. That is sufficient to secure that TWUL maintains rather than destroys the enhancement works.

(3) Thirdly, it is not legally possible for the Applicant to CA positive covenants requiring TWUL to look after the land the way it wishes it to be looked after in accordance with the Outline LABARDS.

3.1 Response: This is closely related to (2). Standalone positive covenants are not required. As above, all that is required is a modification of the section 106 to obligate TWUL to maintain and conserve the enhancements undertaken by the Applicant and for there to be a mechanism for the Applicant to pay the additional costs associated with maintaining the enhanced land and for those costs to be agreed or determined.

(4) TP powers could deliver the works, but if you can't then manage them in accordance with the LaBARDS, then the Applicant would only have complied with part of what will be required by the DCO. The on-going management of the LaBARDS proposals will be requirement of them and a key to their success. (page 8)

(5) This is important in the context that ultimately, the Applicant cannot force Thames Water to enter into an agreement (page 8).

5.1 Response to (4) and (5): the S/S under section 120(3) can modify an agreement and that modification does not require all the parties to the section 106 to agree to the same, albeit as a matter of natural justice any affected party should be given an opportunity to make representations in relation to any such modification (for the avoidance of doubt TWUL has been afforded such an opportunity and suggested at the hearings on 11 and 12 February 2025 that a modification of the section 106 agreement was (i) possible and (ii) a much less intrusive interference with TWUL's rights than the alternative promoted by the Applicant of outright compulsory acquisition).

(6) If TW retained ownership but didn't manage the land in accordance with those management requirements, the Applicant would be left in the position where it is legally responsible for that failure, and therefore subject to enforcement proceedings and consequential criminal liability. As such, the Applicant cannot be in position where it is not able to control the behaviour of a third party and would be exposed to those sorts of enforcement proceedings. (bottom page 8, top page 9)

6.1 Response: Modifying the section 106 to oblige TW to maintain the nature reserve as enhanced addresses these concerns. When considering any enforcement action, the LPA would be obliged to conduct itself reasonably and rationally in considering any enforcement action and the only reasonable and rational enforcement response would be to enforce the terms of the section 106 against TWUL.

(7) The Applicant is willing to enter into an Agreement in respect of this land, that may involve TW accepting an easement + restrictive covenant position, but unless and until that position is accepted, it needs to ensure it has the appropriate powers to deliver and manage its LaBARDS commitments. (page 9)

7.2 Response: The modified section 106 would oblige TW to maintain the enhanced NR and could be enforced by both the Council, as local planning authority and the Applicant, contractually. The section 106 can be modified without the agreement of TWUL or, indeed, The Applicant provided that the principles of procedural fairness have been observed. As the matter has been canvassed in the Examination there is no problem re procedural justice.

Answers to the points/questions raised by Richard Turney KC re modification of section 106 (questions page 9)

(8) It is right that the existing agreement can be modified…but crucially the Applicant is not just modifying what is under those Agreements but also seeking to ensure that additional mitigation over and above the requirements of those agreements is secured. As such the cleanest and most appropriate way is to take the 'clean-slate' approach to deliver on the Proposed Scheme commitments through a single composite approach to the delivery of ecological outcomes based on the Outline LaBARDS. (page 10)

8.1 Response: It is acknowledged by the Applicant that the existing agreement could be modified. The reference to additional mitigation is noted but is irrelevant: if the agreement can be modified the degree of maintenance and conservation can be increased as well as being decreased. The proposition that CA of the freehold is the cleanest solution is mere assertion. Acquisition of the freehold may be a 'clean' approach from the Applicant's perspective but that is not the test under section 122 of the PA 2008 as is made clear by paragraph 8 to 11 of the Guidance.

8.2 In short, the Applicant is obliged to demonstrate that all reasonable alternatives to CA have been explored (para 8 of the Guidance), that the proposed interference with TWUL's property rights is necessary and proportionate (para 8 of the Guidance), and that the rights/interest sought is no more than reasonably required for the development (para 11 of the Guidance). An appeal to convenience on the part of the Applicant shows that the Applicant has wilfully disregarded the well-known principles and guidance relating to CA and any decision based on the criterion of 'convenience' would be unlawful.

8.3 Though it is not neither acceptable as currently drafted to TWUL nor a section 106 agreement the Deed of Obligation B, Rep 1-030, illustrates that drafting a modification of the section 106 to provide (i) that TWUL would maintain the enhancement works carried out by the Applicant and (ii) providing a mechanism for the Applicant to reimburse TWUL for the additional costs of doing so is straightforward. Furthermore, a modified section 106 agreement would have the advantage over the said Deed of Obligation because it would remain enforceable as a section 106 agreement rather than an agreement made under section 111 of the LGA 1972.

(9) Crucially the Applicant is not taking the CA approach because it is easier but because it believes it is necessary to ensure delivery and enforcement of the mitigation and enhancement proposed. As noted above, it is important in this context that you cannot enforce a positive covenant over Thames Water using compulsory powers.

9.1 Response: The requirement for positive covenants is a red herring as set out in TWUL's responses above: under a modified section 106 agreement TWUL would be obliged to maintain the nature reserve as enhanced by the Applicant's enhancement works under Works No 7.

(10) Furthermore, the Applicant does consider that there is a principle ('the Principle') that where you are changing the nature of what the party can do with their land to such a degree that it effectively deprives them of the ordinary incidence of that land then it is appropriate to compulsory acquire in those circumstances. (page 10)

10.1 Response: There is no dispute as to the existence of the Principle but the Applicant wholly misapplies it in the context of the mitigation and enhancement land. The rationale for the Principle is that public authorities and developers exercising compulsory purchase powers should be transparent and that form and substance should be aligned. For example, where a highway authority takes land for a new motorway it would offend the Principle if the acquisition was of rights to build the motorway and to the top two spits rather than outright acquisition. That is because the landowner of land taken for a motorway is left with nothing of practical utility: accordingly, the developer must either make out a case for outright acquisition or not proceed at all. Taking temporary powers and rights to the top two spits would lead to a conflict between form and substance.

10.2 In this case, modifying the section 106 agreement would only have a modest impact on TWUL. The land is already a nature reserve which is maintained by TWUL which employs a manager for the nature reserve. The vast majority of the substantive mitigation proposed by the Applicant is to take place outside TWUL's ownership on the Norman Road Field. As explained by TWUL at the hearings on 11 and 12 February 2025, the proposals in terms of enhancement on its land, with the possible exception of the boundary with the CCF, is light touch. The principal work with financial implications for TWUL's management regime involves the proposed boardwalk.

10.3 Accordingly, the Principle does not apply in this case. A modification of the section 106 agreement, together with temporary rights for the Applicant to carry out the works of enhancement is all that is required. Moreover, modification of the section 106 would result in form and substance being aligned. By contrast, the Applicant's proposal that it should acquire the freehold simply to undertake some light touch environmental enhancements is a wholly disproportionate means of pursuing those environmental ends.

(11) The Applicant's case for CA powers does not rely solely on this latter point. As previously explained, the CA powers are necessary in order to deliver a single comprehensive approach to land management, rather than having parts of amended agreements. It is not just that it is de facto, that is an additional practical aspect, but the ExA can be satisfied that CA is necessary because the Applicant needs to ensure a clean slate to deliver not only what has gone before, but what [we] are proposing now and into the future.

11.1 Response: The owner of the Norman Road Field is not actively objecting to the CA of its freehold. Furthermore, the mitigation works proposed for the Norman Road Field are much more substantive and the land is not at the moment a nature reserve. In short, CA of the freehold may well be justified in respect of Norman Road Field in which case there will only be one agreement.

11.2 In any event, the existence of two agreements can hardly justify taking outright ownership when that is neither necessary nor proportionate. This is another example of the Applicant prioritising its own convenience rather than applying the Guidance. The clean slate metaphor is being asked to carry a burden that it cannot bear and which does not stand up to scrutiny.

(12) There is nothing in property terms preventing TWUL from wishing to develop that land for development in the future…..As such, any consideration of the impact of CA powers needs to be seen in the context of whether or not any other powers would prejudice the ability of Thames Water to enjoy and exploit its land. (page 11)

12.1 Response: The additional obligations under any modified section 106 would be modest and are likely to expire prior to the expiry of the current obligations on TWUL under the extant section 106. The proposition that the additional burden of maintaining the limited enhancement

works proposed by the Applicant which is a burden which is limited would somehow be unacceptable, but that acquiring the entire freehold interest in the nature reserve (excluding the members area) is justifiable is manifestly wrong, since outright acquisition would necessarily preclude any future development by TWUL

(13) Reference to DfT Circular 02/97 and the MCHLG Guidance.

13.1 Response. This a reiteration of the Principle. It does not apply to the facts of this matter for the reasons set out at 10.1 to 10.3 hereof.

(14) The Applicant considered and dismissed the option of simply seeking to vary Agreements plus imposing restrictive covenants for the following reasons:

- simply abrogating existing management measures would only have the effect of removing existing obligations

- to enable this outcome to be achieved the Applicant would in the alternative have to seek to use the DCO to vary the existing section 106 obligations to replace them with an obligation to comply with the the LaBARDS. This would have the effect of imposing new planning obligations on a third party, which the Applicant consider is not appropriate as:

    - The third parties affected would be having new obligations imposed on them which they have not otherwise asked for, so would essentially be akin to a positive covenant in property terms; and
    - The Applicant would still not be in control of compliance with the LaBARDS if the third parties decided not to comply with these replacement obligations – there is no guarantee that the LPA would seek to enforce for breach of a revised section 106 obligation, rather than against the Applicant for breach of the LaBARDS; and

- This could not be solved by imposing restrictive covenants in addition to varying section 106 obligations, as that would have the effect of only preventing the third

parties from undertaking activities which breach the LaBARDS requirements but could not require them to proactively undertake measures to comply with them.

14.1 Response. As for the first white bullet point TWUL is not suggesting that the existing agreement for the nature reserve is to be abrogated. Its primary case is that the current regime is satisfactory.

14.2 The second white bullet point addresses the solution advanced by TWUL at the hearings of 11 and 12 February 2025 as a more proportionate and reasonable alternative to outright acquisition of TWUL's enhancement land should the Examining Authority and/or the Secretary of State conclude that the limited enhancements proposed on TWUL's enhancement land are necessary to make the project acceptable. The Applicant avers that this solution is not appropriate because it involves imposing a planning obligation on a third party i.e. TWUL and then particularises this proposition in the following two bullets.

14.3 The general proposition that the imposition of a planning obligation on a third party is unacceptable but the imposition of an order which takes the third party's entire freehold interest is acceptable does not bear scrutiny: typically, taking ownership of land will be a more significant interference with property rights than imposing obligations on the landowner. On the facts of this case, the impact on TWUL of modifying the section 106 agreement to require it to maintain and conserve the works of enhancement to be carried out by the Applicant is slight. Indeed, providing the Applicant finances the additional cost of maintaining the proposed boardwalk and the other enhancements during the period of the development, the impact of modifying the section 106 agreement on TWUL is negligible. By contrast, the Applicant is proposing to deprive TWUL of ownership of the enhancement land which is a very significant interference with its property rights.

14.4 In the first black bullet point the Applicant notes that modifying the section 106 agreement would be akin to the imposition of a positive covenant on TWUL and suggests implicitly that this is somehow unacceptable. Section 106 agreements typically do impose positive obligations on landowners. TWUL is already under an obligation to conserve and maintain the nature reserve and it would be under similar obligations under a modified section 106 agreement with the additional financial burden being financed by the Applicant. On any view of matters, this is less onerous than being compulsorily deprived of its ownership of the land. It is, moreover,

a less intrusive alternative to outright acquisition which is precisely what is required by paragraphs 8 to 11 of the Guidance.

14.5. In the second black bullet point the Applicant says that modification of the section 106 agreement is not appropriate because it would leave it vulnerable to enforcement action for breach of the LaBARDS without the power to take remedial action. This concern is misconceived for the following reasons. First, section 106 agreements provide the LPA with a familiar and established means of enforcing obligations widely used in conjunction with the development of land; there is no basis for supposing that the modified section 106 agreement would not be enforced against TWUL. Secondly, the Examining Authority knows that the without prejudice discussions between the Applicant and TWUL involve a modified or new section 106 agreement i.e. something other than outright acquisition of TWUL's land: if this model were unacceptable from an enforcement point of view the Applicant would not be entertaining a voluntary arrangement which uses the model. Thirdly, TWUL has been subject to a section 106 agreement over the nature reserve since 1994 and there is no evidence of any difficulties re enforcement; rather, it is clear that the nature reserve is being conserved and maintained by TWUL. Fourthly, the concern implicitly relies on the LPA taking an irrational and thus unlawful approach to enforcement; if the default were on the part of TWUL the LPA would take enforcement action against TWUL and not the Applicant. Enforcement action would only be taken against the Applicant if it had contributed to the lack of management by, for example, refusing to abide by its financial obligations under the modified section 106 agreement but in that case there would be nothing objectionable about the LPA taking enforcement action against the Applicant.

14.6 The third white bullet point discusses a solution to a problem which does not exist. For the reasons set out above, a positive obligation to maintain the enhancement works carried out by the Applicant can be imposed upon TWUL by modifying the section 106 agreement. Furthermore, there is nothing objectionable about this, especially when the only alternative proposed by the Applicant is the draconian step of acquiring TWUL's freehold title in the land by compulsion.

(15) At the hearings on 11 and 12 February 2025 the Applicant put forward a further reason as to why modification of the section 106 was not an acceptable alternative. That further reason

is that modifying the section 106 would breach the tests under regulation 122 of the CIL Regulations that such obligations should be:
(a) necessary to make the development acceptable in planning terms;
(b) directly related to the development; and
(c) fairly and reasonably related in scale and kind to the development.

15.1 The Applicant's argument is based on taking 'the development' for the purposes of the tests as being the planning permission obtained by TWUL in 1994 which gave rise to the original section 106 agreement. The Applicant misidentifies the development: any modification to the section 106 agreement should be tested by reference to the Applicant's carbon capture and storage project not the historic project. The Applicant's argument is thus misconceived.

15.2 That the Applicant's argument is wrong because it identifies the wrong development is also apparent if one considers the power by which a DCO is able to modify agreements, namely section 120(3) which reads as follows:

"An order granting development consent may make provisions relating to, or to matters ancillary to, the development for which consent is granted"

15.3 The development which is contemplated in s 120(3) is the DCO not the development which was subject to the 1994 permission. Accordingly, it is perfectly obvious that as the power to abrogate or modify a land agreement under paragraph 3 of Schedule 5 only arises in respect of the development which is subject to the DCO that 'the development' for assessing whether the CIL tests are met is the Applicant's carbon capture and storage project.

15.4 Finally, it cannot be the case that the CIL Regulations apply only to modifications of agreements relating to land and not to abrogation. The Applicant is apparently of the view that the CIL Regulations are irrelevant when it comes to abrogating the 1994 agreement but asserts that they are relevant when it comes to its modification – so much so that they somehow override the powers provided by the PA 2008. Both of these positions – that the CIL Regulations apply to modification but not abrogation – cannot be correct, and indeed are not correct: section 120 and paragraph 3 of Schedule 5 to the PA 2008 make no such distinction and so where an agreement may be abrogated, it may also be modified.