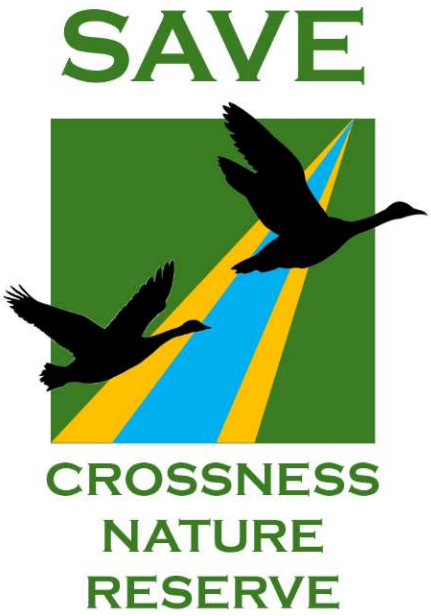

Cory Decarbonisation Project

Planning Inspectorate Reference: EN010128

SAVE CROSSNESS NATURE RESERVE

Deadline 5 Submission

Compulsory Acquisition, Temporary Possession and Other Land Rights

Minimisation of Land to be Compulsory Acquired

1. We maintain that the Applicant has failed to show that it has limited acquisition of land to what is strictly necessary (under the s122 test) and have reduced the development footprint as far as possible to comply with the mitigation hierarchy.

2. In section 3 of the Written Summary of the Applicant's Oral Submissions at CAH2, the Applicant tries to shift the question to whether there is a form of proposal which can avoid taking *any* land from LMJ. This is an illegitimate flipping of the legislative test: the Applicant must demonstrate that the full extent of land acquired is necessary; even if only a small part is deemed not necessary, then the test is not met.

3. On page 15 of the Written Summary of the Applicant's Oral Submissions at CAH2, the Applicant introduces a new possibility of delivering water storage as open surface water attenuation ponds instead of underground tanks and suggests the final strategy will be developed as part of the detailed design of the plant. The Applicant does not set out any benefits of using ponds, nor does it explain why this design detail cannot be confirmed at this stage. Therefore, there is no justification for the Appellant increasing land acquisition in order to keep its options open. The design details – for the tanks and the other design aspects discussed – need to be confirmed now, and the most space-efficient option must be chosen.

4. The Applicant goes on to explain why it is "*undesirable*" to provide the outage laydown area above the water tank – namely access, the need to use reinforced tanks to withstand loading, and the potential for differential settlement leading to increased maintenance. Firstly, none of these appear to create insurmountable problems; minor constraints on use and increased maintenance are not sufficient to demonstrate necessity in satisfaction of the s122 test. In any event, there are other potential uses above the water tanks that could minimise these issues – the Applicant must demonstrate that they have tested all reasonable potential layouts to maximise the space.[1] It seems highly unlikely that there is *no* feasible use of the land above the underground tanks.

5. If it is true that the space above the underground tanks was unusable, then we maintain that above-ground tanks, which require 900m2 less space, should be used instead. The Applicant notes we have selected *"just one element of the Proposed Scheme",* suggests 900m2 is only a small saving, and claims to have taken a *"balanced approach across all relevant criteria"* including minimisation of land acquisition and visual impact[2]. It is not appropriate to take a *"balanced approach"* to

[1] See, Department of Communities and Local Government Guidance: "Planning Act 2008, Guidance related to procedures for compulsory acquisition of land" at paragraph 8; *R (oao FCC Environment (UK) Ltd) v Secretary of State for Energy & Climate Change* [2015] EWCA Civ 55 at [12] - [30]; and *R (Mars Jones) v Secretary of State for Business Energy and Industrial Strategy* [2017] EWHC 1111 (Admin) at [54]-[62].

[2] Page 69 of Applicant's Response to Interested Parties' Deadline 3 Submissions

the extent this places the s122 test and mitigation hierarchy on a level with, or below, weaker policy objectives . It is perfectly legitimate for SCNR to focus on one element of the scheme if it demonstrates that more land is being taken than required. Furthermore, we reject the implication that 900m2 is insignificant in this context – if a part of Crossness Nature Reserve the size of three and a half tennis courts can feasibly be retained, it must be retained. In any even this is just one example to demonstrate the point – the potential total savings are much larger.

S106 as Alternative to Compulsory Acquisition

6. The Applicant's assertion that *"acquiring a lesser interest… would not be sufficient [and] would need to be accompanied by a restrictive covenant"*[3] is simply untrue. We have made extensive submissions to show that a s106 agreement entered into by TWUL / Tilfen would provide sufficient protection without the need for acquisition or further restrictive covenants and would bypass the limitations on positive covenants. The Applicant is yet to provide any example of a restrictive covenant that is required that could not be achieved via s106 agreement.

7. Regarding the claim that *"to disaggregate parts [of Crossness Nature Reserve] would limit the requisite control and undermine the management vision"*[4], the Applicant has not given an example of any specific control or management measures which could not be achieved via s106 agreement. In any event, the vague notion of the Applicant's 'management vision' does not demonstrate necessity of acquisition under the s122 tests.

8. Draft Deed of Obligation B is now a s106 agreement and includes parts of Crossness Nature Reserve within the Order Limits (i.e. not just the Member's Area) as well as Norman Road Field (with Tilfen Land added as a party). This affirms what SCNR has argued all along: that a s106 agreement can be used to avoid compulsory acquisition. The Applicant states it is *"seeking negotiated agreements with TWUL and Tilfen Land Limited (regarding Norman Road Field) but until these are in place, it cannot rely on those agreements being in place"*[5]. Before the Applicant can turn to compulsory acquisition, it must provide detailed evidence of efforts to secure agreement with TWUL and Tilfen, and a clear explanation if agreement cannot be reached. Cursory or unevidenced negotiations are insufficient.

9. We note that the side comment at paragraph 3 of Schedule 1 refers to a *"voluntary agreement… that will include protections for the Applicant to ensure it can take step-in powers"* – it is unclear to us why these provisions could not be included in the s106 agreement. We ask the Applicant to explain what further agreements are anticipated and why they are considered necessary.

[3] Page 9 of Written Summary of the Applicant's Oral Submissions at CAH2
[4] *ibid*
[5] Page 8 of Written Summary of the Applicant's Oral Submissions at CAH2

Alternative Sites and Bifurcation

10. We maintain that the Thames Water Access Road bifurcates the Site, meaning that the Proposed Site performs worse than the East Zone on this metric. The Applicant continues to misunderstand and understate the usage of the Access Road by third parties. The Applicant claims that the road is used *"very infrequently"* by the EA, but then undermines this by admitting that the EA has its key and *"it's possible that the EA may use the Access Road more frequently than Cory is aware of"*[6]. For example, during the recent upgrades to the Great Breach Pumping Station, EA access occurred multiple times a day across many months.

11. In terms of TWUL and volunteer use, until recently volunteers would commonly visit the site twice a week, gaining access via the Norman Road gate and TWUL's access road. We note this has reduced recently since the main volunteer passed away, but the intention is to find replacement volunteers.

12. We maintain that community events have been reduced due to Riverside 2 construction. The Applicant's comments about communication between the site manager and Applicant site team[7] (which are accepted), do not change the reality that active construction and associated road usage have made it more difficult and less attractive for visitors to come to the site. The site manager has confirmed that event activity has been reduced, and that it would continue to be reduced during construction of the CCF.

13. Beyond construction, there is a strong risk that the completed Proposed Scheme would also result in limitations on community events. When such events do occur, naturally there is extensive use of the Access Road with guests coming and going at different times, all co-ordinated by the TWUL site manager. These events depend on the ability of the site manager to allow access and exit on a rolling, casual basis.

14. There are two important points to conclude from the above. Firstly, the baseline (i.e. post-construction) use of the Access Road is greater than the Applicant suggests, and this usage means that the Proposed Site would be bifurcated. Secondly, giving control of the Access Road to the Appellant and limiting its use would severely impact the ability to run community events. This harm has not been considered or mitigated.

15. In relation to the East Zone, we maintain that a relocation of FP4 could be achieved to avoid a bifurcated site. The Appellant's claim that we have not suggested a replacement route is false[8]. We also reject their further claim that *"it is not readily possible"* to find a replacement route[9]. The fundamental point remains that the Applicant has not tested a scenario of delivery on the Iron Mountain site and Aviva land, with FP4 relocated around the southern and western edges. See Figure 1 below: while acknowledging this is a somewhat crude calculation, it shows that potentially

[6] Page 36 of Applicant's Response to Interested Parties' Deadline 3 Submissions
[7] *Ibid*
[8] *Ibid* – Note SCNR proposed an alternative route at Figure 1 of its Deadline 2 submission
[9] *Ibid*

over 7.2 ha would be available under this approach, suggesting Lidl and Asda plots could be avoided. Given the roundabout in the south-western corner is only used by Iron Mountain, it would be available for development. It may even be possible to extend use further south along the road.

Figure 1 – potential East Zone location and relocated FP4 (in red)

16. We repeat our assertion that, if it is not accepted that delivery at the above location is possible, a split delivery across the East Zone and Borax North/Borax South must be considered[10]. It does not appear that this would require two Carbon Capture Plants as previously suggested – it may require a bifurcated site, but for the reasons above this is true of the South Zone.

Public Recreation

17. We maintain that the parts of Crossness Nature Reserve that are not publicly accessible are used for the purposes of public recreation. Before considering the *public* aspect, the concept of recreation should be defined. In the *Muir* case[11], the

[10] See paragraph 7 of SCNR Deadline 2 submission

[11] *R (ex p. Muir) v Wandsworth BC & Smart Pre-Schools Ltd* [2017] EWHC 1947 (Admin)

High Court endorsed a broad legal definition of recreation, consistent with the dictionary definition: *"a means of refreshing or enlivening the mind or spirits by some pleasant occupation, pastime or amusement"*[12]. Wildlife observation / nature watching within a nature reserve would clearly fall within such use. On a natural reading, this would include inaccessible but viewable areas of a nature reserve which provide a key part of the pastime. Therefore, the East Paddock and Stable Paddock, which can be viewed from accessible parts of Crossness Nature Reserve (and even have allocated public viewing points), should be considered part of its recreational use. The analogies previously provided were intended to demonstrate this point: the non-accessible parts of a sculpture park are naturally considered part of the recreation.

18. Whether a recreational use is *public* recreation depends on whether it is freely available to members of the public. Given Crossness Nature Reserve is freely accessible to the public, the recreational use related to it is public recreation. This extends to areas that are not publicly accessible, but inherently part of, that recreational use. Therefore, East Paddock and Stable Paddock should be considered part of the public recreation. To refer back to the sculpture park example: if a sculpture park were free to access, you would not say that the publicly accessible areas were part of the public recreational use, but the cordoned-off areas were private recreational use. The Applicant's point that sculpture parks are *"not normally publicly access except by ticket"* is of course irrelevant to the analogy.

19. The Applicant suggests that taking our definition *"to an extreme would suggest that any land adjacent to a park, for example, should be considered as special category land"*[13]. We completely disagree: land adjacent to a park is not an inherent part of its recreational use. Our definition accords with a natural reading, is supported by the above caselaw, and is not prone to being extended in this way. Therefore, we submit that the East Paddock and Stable Paddock qualify as Special Category Land.

Biodiversity, Ecology and Natural Environment

Ecological Harm

Determining National Importance

20. The Applicant insists that SPIs are not inherently of National importance, vaguely citing CIEEM Guidelines[14]. However, under the 'Determining Importance' section of those Guidelines, paragraph 4.18 states: *"Species that are considered to be priorities for conservation in England are listed as species of principal importance under sections 41 of the Natural Environment and Rural Communities Act, 2006"*. Clearly the intention is for SPIs to be considered as having National importance. Furthermore,

[12] Paragraph 99 – also see broader discussion at paragraphs 98 and 100
[13] Page 36 of Applicant's Response to Interested Parties' Deadline 3 Submissions
[14] Page 50 of Applicant's Response to Interested Parties' Deadline 3 Submissions – and see footnote 2

paragraph 4.20 adds *"a species could be considered particularly important if it is rare and its population is in decline"* - this is true of Borrer's Saltmarsh-grass and Divided Sedge, which are both in *"strong decline"*[15].

21. The Applicant has not provided any explanation as to *how* its methodology is *"adapted from CIEEM's Guidelines"*. We see nothing in the Guidelines that supports the view that a *"large population"* of an SPI is required for it to qualify as Nationally important[16], or that "*a regularly occurring, locally significant population of a SPI*" should be only of Regional/County importance. The other literature cited by the Applicant does not relate directly to the determination of 'importance', nor does it negate the above reading of the CIEEM Guidelines. We accept that size is relevant to assessing the *general extent and quality* of habitats, and may even help determine importance in the absence of clear criteria such as the SPI list – but in the present case SPI status is determinative of National importance.

22. The Applicant has failed to respond to our additional point: even if a large SPI population were required to achieve National importance, Mr Spencer has confirmed that there is in fact a large population of Borrer's Saltmarsh-Grass on the Site and, while it was harder to confirm the extent of Divided Sedge at the time of year of his site visit, he believes it is highly likely there is an extensive presence of this SPI too[17]. The Applicant has no evidence of population size and so has no authority to dispute this view.

23. In relation to water voles, the Applicant states our finding of National importance is *"not credible"*[18], because we rely again on SPI status, in additional to legal protection. For the reasons given above, this is the natural reading of the CIEEM Guidelines. In any event, the Applicant itself accepts the population is large[19], meaning the Applicant's own criteria for National importance is met: *"A large population of a species identified as a Species of Principal Importance (SPI)"*[20]. We are therefore confused as to how this can lead to a conclusion of anything but National importance.

24. In relation to BoCC Red List breeding birds, we accept that the CIEEM Guidelines do not expressly state that this designation equates to National importance in England. However, we note paragraph 4.18 (also in the 'Determining Importance' section) says: *"There is no equivalent list of national priority species in Ireland* [referring to SPI lists]*, apart from species protected under the Wildlife Acts 1976 to 2012, Red Lists and Birds of Conservation Concern in Ireland species"*. Given the BoCC for Ireland and UK are of equal standing (affirmed by Box 14), the inference is that the BoCC list also indicates National importance in England.

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[15] See BSBI Plant Atlas - https://plantatlas2020.org/atlas/ - hover over downward arrow for Britain.
[16] ES Chapter 7 paragraph 7.4.14 and Table 7-6
[17] See paragraph 37 of SCNR Deadline 3 submission
[18] Page 52 of Applicant's Response to Interested Parties' Deadline 3 Submissions
[19] *Ibid*
[20] ES Chapter 7 Table 7-6

Assessment of Harm and Mitigation for Harm to SPIs

25. According to the Applicant, the addition of two SPI plant species *"does not change the assessment of the botanical community as County importance and it would not change the considered impact on Crossness LNR"*[21]. Notwithstanding the points made above that each of the SPIs by themselves are of National importance, the Applicant simply cannot make this statement without carrying out a further site assessment and a further environmental impact assessment to reflect this new information. It is unacceptable and unlawful to rely on an informal assessment and reach new conclusions without any evidence or formal process.

26. We repeat that the SCNR Botanical Report does not definitively confirm *all* important plant species (including SPIs) potentially on site and the Applicant cannot rely on it as such. Furthermore, there may be important fauna species (including SPIs) present that were not identified during the Applicant's poor-quality inspection. Therefore, the Applicant is unable to give an accurate assessment of the conditions onsite and the potential harm of the Proposed Scheme.

27. The Applicant equivocates at page 49 of the Applicant's Response to Interested Parties' Deadline 3 Submissions when it states: *"The objective of the botanical survey was to … identify any populations of rare or notable plants… Notable plant species were identified by the botanical survey, and these findings are detailed in the species lists presented in* [the Applicant's Botanical Survey]*"*. Yes, *some* notable plant species were identified, but crucially not *all* of the notable plant species were identified – clearly the latter is required in order for the Botanical Survey, and the environmental assessment which relies on it, to be valid.

28. On page 51 of the Applicant's Response to Interested Parties' Deadline 3 Submissions, it offers a new argument: the *"enhancement and creation of Coastal Floodplain Grazing Marsh will not only increase the population of Borrer's Saltmarsh-grass on Site but all other SPIs that are found within this habitat"*, simply by virtue of the fact that Borrer's Saltmarsh-Grass *"resides"* on this type of habitat. There is nothing to suggest that the Applicant's proposals, which are generic and offer no measures targeted at promoting Borrer's Saltmarsh-Grass, will lead to an increase in this species or any other SPI. If these SPIs could be expected to flourish and spread naturally in Coastal Floodplain Grazing Marsh, then surely they would already have spread over Crossness Nature Reserve? There is also no attempt to show how the general enhancements will lead to their population growth. Clearly, the *extensive direct loss of* Borrer's Saltmarsh-Grass outweighs any unsubstantiated indirect benefit that might result from the generic (and limited) enhancements proposed. The Applicant's response does not even mention the other SPI identified (Divided Sedge).

[21] Page 48 of Applicant's Response to Interested Parties' Deadline 3 Submissions

Reduction in Tree Planting

29. The Applicant suggests that the proposed tree planting *"does not affect the outcomes"* of the assessment under ES Chapter 7, because tree planting is not directly cited as mitigation[22]. This is clearly not true.

30. Firstly, ES Chapter 7 repeatedly relies on *"buffer planting"* (understood to mean tree planting) as a key piece of noise mitigation, particularly in relation to breeding birds, water voles and wintering birds[23]. Naturally, a reduction in tree planting will undermine this mitigation.

31. Furthermore, ES Chapter 7 repeatedly relies on the habitat creation and enhancement measures set out in the Outline LaBARDS[24], which include tree planting[25]. There is nothing to suggest references to the Outline LaBARDS in ES Chapter 7 should exclude tree planting proposals. Therefore, tree planting was in fact relied on throughout the assessment, and so the reduction must affect the outcomes.

32. This is yet another example of how the ES assessment no longer reflects the reality of the proposals, meaning it does not accurately assess the proposed mitigation and residual harm, and it would be unlawful to continue to rely on it. It also once again demonstrates the Applicant's unacceptable approach of relying on vague and outline mitigation proposals in a generalised and unmeasurable way. Under such an approach, it is not possible to accurately demonstrate that the ecological harms have been adequately mitigated.

Impact of Additional PRoW

33. The Applicant has confirmed that *"the routes of any new or altered PRoW will not be available during the examination"* and *"disagrees that there would be residual risk of harm to ecological features"*. It relies on the fact that the Outline LaBARDS *"gives consideration to ecological features… and demonstrates how additional PRoW will avoid effecting these features"*[26]. However, the only wording in the Outline LaBARDS to this effect is at paragraph 6.4.14: *"Proposals for new footpath and permissive paths or links will be developed with terrestrial biodiversity in mind and through engagement with LBB and relevant user groups to ensure that potential negative impacts are understood, mitigated and managed through construction and operation phases"*. Merely having terrestrial biodiversity in mind in no way translates into a guarantee of no residual risk of harm to ecological features. It is also unmeasurable and unenforceable. Avoiding key ecological features is not enough. It is obvious that new PRoW will result in *some* ecological harm – at the very least, harm will occur through the direct loss of grazing marsh HPI.

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[22] Page 54 of Applicant's Response to Interested Parties' Deadline 3 Submissions
[23] See paragraphs 7.8.68 and 7.8.69
[24] See for example paragraphs 7.7.1, 7.7.3, 7.7.5, 7.9.2 and 7.9.4
[25] See Table 1
[26] Page 38 of Applicant's Response to Interested Parties' Deadline 3 Submissions

34. Flowing from this, we reject the Applicant's claim that *"Proposed PRoW would not contribute to habitat fragmentation"*[27]. The Woodland Trust says *"fragmentation happens when parts of a habitat are destroyed, leaving behind smaller unconnected areas"*[28] – that is exactly what is happening here. They add that "*a simple example is the construction of a road through a woodland… a barrier has been created that effectively divides the wood. What was once one habitat has become two smaller habitats"*. The creation of PRoW through grazing marsh is directly comparable to this example. The Applicant suggests certain animals would not be affected: *"it would not be a barrier to movement of birds (which can fly over it), reptiles (which may use it as a basking spot) or other animals that may be found in this area"*. Firstly, this overlooks the various other animals that would be directly affected, particularly invertebrates and amphibians. Secondly, it overlooks indirect effects, also affecting birds and reptiles, resulting from the impact on the prey and plants they depend on. These plants will be impacted not only through direct loss, but also through the limitation on their ability to disperse. The Applicant has no authority to make such a bold, categorical statement before the detail of the PRoW has even been confirmed, let alone before it's been tested.

35. We stress again that the additional PRoW proposed in the north-east corner of Sea Wall Field is completely unnecessary given the existing PRoW adjacent to it.

Level of Harm and Conflation of BNG and Ecological Mitigation

36. On page 46 of the Applicant's Response to Interested Parties' Deadline 3 Submissions, the Applicant maintains the level of ecological impact *"is not unusual for a project of this scale, with direct loss of habitat limited to some 2.5ha; importantly, it is readily mitigated and compensated with the proposals set out in the Outline LaBARDS [and] Biodiversity Net Gain Report… providing for biodiversity net gain"*. It adds: *"habitat creation and enhancement included in the Proposed Scheme is such that it achieves additionality (i.e. biodiversity net gain) and is not also used for the mitigation and compensation of the ecological impacts of the Proposed Scheme"*.

37. Firstly, the overall habitat loss is in fact 6.87 ha, and net loss is 2.83 ha[29]. Secondly, the Applicant has not responded to our point that this habitat is of especially high quality given its extensive designations[30]. Thirdly, it is unclear whether the Applicant's position is that the direct harm itself (i.e. pre-mitigation/compensation) is not unusual, or whether it is not unusual once mitigation/compensation is factored in. This again reveals a misunderstanding of the ecological mitigation hierarchy. Fourthly, we refute the quality of the mitigation and compensation measures[31]. Fifthly, the Applicant is again conflating BNG and ecological mitigation and relies on a blurred

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[27] *ibid*

[28] https://www.woodlandtrust.org.uk/blog/2018/08/what-is-habitat-fragmentation-and-what-does-it-mean-for-our-wildlife/

[29] See SCNR Deadline 4 submission, which relies on Applicant's Biodiversity Net Gain Report

[30] See paragraph 26 of SCNR Deadline 4 submission

[31] See Deadline 4 submission, particularly Tables 1 and 2

boundary between the two. It remains unclear where one ends and the other begins – we believe this is because the requisite detail is simply not there, and if a comprehensive review were undertaken, it would reveal that the Proposed Scheme falls short.

Review of LaBARDS – Management, Maintenance and Monitoring

38. The management, maintenance and monitoring proposed under the Outline LaBARDS (section 14) fails to secure a meaningful mechanism for review, update and approval. To highlight some key examples:

    a. It refers to the establishment of an *"overarching Riverside Campus management body with clear roles and responsibilities"* – but does not define what those 'clear roles and responsibilities' are, making this an effectively empty commitment;

    b. It assumes *"management activities will be undertaken in conjunction with the Friends of CLNR supported by specialists for defined works based on an agreed management programme"* – but does not define the works or suggest what this management programme will be. This is a very big assumption: the continued free labour and input of Friends of Crossness Nature Reserve should not be assumed, especially considering many members will not want to contribute to a project they view as being incredibly harmful to Crossness Nature Reserve;

    c. *"the quality and maintenance standards of the landscape, habitats, PRoW and recreation facilities will be defined in the full LaBARDS"* – currently there is no indication of what these standards would include. There is no detail nor any measurable standards for the ExA to consider in order to ensure 'quality' will be achieved and maintained;

    d. *"Management of the Site and expanded LNR will ensure that the key aim of providing an appropriate visual setting for the Riverside Campus, a healthy natural environment for the community and an attractive landscape and recreational setting which will support a range of recreational activities as well as a range of thriving and diverse habitats are achieved"* – again there is nothing measurable here, and nothing that can be meaningfully enforced;

    e. *"Management would be considered effective if it maintains both the character of habitats in reference to their definition (primarily with reference to the UK Habitats Classification system, which incorporates definitions of Habitats of Principal Importance) and their target condition. Monitoring would assess: • ditches against the criteria within the Statutory Biodiversity Metric to ensure they are meeting targets detailed, as well as against habitat definitions within the UK Habitats Classification system to check they are not deviating from their desired habitat type; • plant species diversity in line with expectation of their*

UK Habitats Classification type; and • that ground water levels are being maintained at the desired raised level".

As a general comment, it is unclear who would carry out this monitoring, how it would be externally reviewed, and how any necessary changes would be implemented and verified, and how it could ultimately be enforced. More specifically:

i. Ditches – given the target condition of the ditches is 'poor' (i.e. passes 5 *or fewer* of the condition criteria), there is no minimum condition threshold, rendering the monitoring meaningless and any enforcement action impossible;

ii. UK Habitats Classification type – this is far too vague to present anything measurable or enforceable. For example, for coastal floodplain grazing marsh, the Classification refers you to steps 18k and 27b, with Secondary Code 25[32]. Each of these steps merely describes the sort of landscape and topology you might expect to see, but does not provide any measurable or enforceable benchmark;

iii. Ground water levels – *"desired raised level"* is not a measurable or enforceable concept;

f. *"Details of monitoring, management and maintenance procedures should be defined in the submission of the full LaBARDS(s), following engagement with Thames Water, Buglife, graziers, and the Friends of Crossness LNR"* – there is no detail on what these procedures must include. There is no means to ensure engagement translates into meaningful changes to the procedures;

g. *"The management of the Site and expanded LNR will work to a detailed and agreed annual programme of maintenance works"* – there is no detail as to what this programme must include, or how (and when) it must be agreed;

h. *"The programme of works can be adjusted through the course of any year, if necessary, if conditions require this but should be reviewed not less than every 2 years seeking input from stakeholders including graziers, to ensure the annual maintenance requirements are still appropriate as the planting matures and habitats establish"* – there is no detail as to what extent of adjustments are allowed, and how they can be secured. It appears this would give the Applicant free reign to adjust as it saw fit without any external review or approval. There is no detail as to how the biennial review must be conducted, including how it is verified. Again, there is nothing to ensure 'input'

[32] See point 3 on page 4 and then steps noted above on pages 17, 22 and 24: https://ecountability.co.uk/wp-content/uploads/2018/05/UK-Habitat-Classification-Field-Key_May2018.pdf

from stakeholders translates to meaningful outcomes. The benchmark for what is considered 'appropriate' is entirely undefined;

i. *"Any maintenance measures would take into consideration the recommendations set out in the Operational Environmental Management Plan secured through DCO Requirement, including seasonal constraints to address timings of works as a result of wildlife nesting, breeding or emergence must be strictly adhered to"* – DCO Requirement 14 does not set out any benchmark for what is required under the Operational Environmental Management Plan, and the requirement to only take it 'into consideration' is not enforceable in practice;

j. *"Once in place a review of the full LaBARDS(s), and any detailed habitat management and monitoring plans derived from it, should be carried out not less than every 3 years (or less frequent if agreed by LBB) … This review will be undertaken alongside engagement with Thames Water, Buglife, graziers, LBB and the Friends of Crossness LNR"* – there is no detail as to what is required under such a review or how it will translate to any specific outcome. Again, there is nothing to ensure the undertaking of the review 'alongside engagement with' third parties is meaningful; and

k. *"Any updates to the full LaBARDS(s) as a result of that review will be issued to LBB for record purposes and form the basis for ongoing management from that point"* – there is no mechanism for scrutiny and approval of the review by LBB.

39. All of the above reveals the proposed management, maintenance and monitoring to be a hollow exercise, with no clarity of process, no measurable or enforceable standards (and often no right of enforcement at all) and no guarantee that engagement results in meaningful outcomes. Therefore, there is nothing to ensure the commitments elsewhere in the LaBARDS – which in any event are of limited value – will be effectively delivered over time.

Alternative Offsite Delivery

40. At ISH2, the Applicant committed to providing more certainty about the proposals for offsite delivery of ecological proposals in the event that delivery on TGC does not occur; in its Post Hearing Note, it now states that this further certainty *"is in fact not necessary"*[33]. It suggests this is explained by side comments in the latest Draft Deed of Obligation, but we see no such comment.

41. We disagree with this view and assert that it is still necessary to provide more certainty about any alternative offsite delivery of ecological proposals. The proposals on the 'BNG Opportunity Area Land' are in fact more than BNG proposals – they are an essential part of the Applicant's ecological mitigation including, in particular, replacement OMH for that lost on the Gannon land. Insofar as these proposals are

[33] See page 11 of Written Summary of the Applicant's Oral Submissions at ISH2

ecological mitigation, it is irrelevant that DCO Requirement 12 secures 10% BNG, or that the BNG regime allows for conservation covenants. This is yet another flawed conflation of the two regimes.

42. In order to demonstrate that mitigation is sufficient, and that the mitigation hierarchy has been complied with, the ExA needs greater detail as to what these proposals would involve, and some certainty that they will be delivered. Currently, there is not even the vaguest indication of what these alternative proposals might be, or on what land they would be carried out. Delaying these details until a revised LaBARDS (i.e. after the grant of DCO) is too late.

43. Furthermore, the definition of 'Alternative Off-Site Delivery Mechanism' in the Draft Deed of Obligation is vague: *"an alternative strategy… to ensure that… off-site ecological compensation to be set out in the Landscape, Biodiversity, Access and Recreation Delivery Strategy is delivered"*. The Applicant has failed to provide a clear and measurable breakdown of (1) the extent to which the TGC proposals are ecological mitigation or part of BNG, and (2) what proportion of the total ecological mitigation can be considered to be delivered under the TGC proposals. Therefore, the *"off-site ecological mitigation"* is not a clear or measurable notion that could be compared against the alternative delivery. Even if it could, which is denied, it is necessary for the ExA to make that assessment, not LBB.

44. These failings reveal the inadequacy of Deed of Obligation A proceeding as a s111 agreement: a s106 agreement is necessary to bind the TGC and ensure the obligation binds successors in title . A s106 agreement would also facilitate enforcement via an injunction, which could include specific performance to require delivery of the ecological mitigation (or LB could be empowered to take to the land and delivery the mitigation themselves). At ISH2 the Applicant said it would consider an additional covenant to ensure that any transferee enters into[34], but no such covenant appears in the latest draft.

<u>Applicant's Track Record</u>

45. In response to concerns around the Applicant's lack of experience owning and managing nature reserves, the Applicant cited Mucking Landfill and five local off-site Conservation Sites associated with Riverside 2[35]. However, the Applicant does not actively manage any of these sites. Mucking Landfill is managed by the local Wildlife Trust. Four of the five Conservation Sites haven't even been delivered to date. The Applicant advises that the four Conservation Sites owned by LBB are going through the final stages of procurement; this has been the case for a number of years now. In any event, it is not clear who will implement, manage and monitor these Conservation Sites - but our understanding is it will not be the Applicant.

[34] *ibid*

[35] See page 10 of Written Summary of the Applicant's Oral Submissions at ISH2

46. Therefore, these examples only serve to confirm the Applicant's complete lack of experience of actively managing ecological sites, let alone a nature reserve.

Norman Road Field

47. We rely on our Deadline 4 submission for detailed points on this topic. However, in response to the Applicant's acknowledgement that only a small part of Norman Road Field was intended to be enhanced under the Veridion Park proposals[36], we believe this actually supports our argument. It shows that the initial enhancement works, the part everyone agrees did occur, was only the capital works, and that the greater value would have come from the ongoing maintenance, management and monitoring (and further improvements flowing from them), which were to be secured through the Management Plans. We repeat the fact that, to date, no evidence has been produced that the required management and monitoring were ever carried out[37]. Our Deadline 4 submissions explain why these Management Plans remain enforceable and therefore still relevant to the determination of the baseline for Norman Road Field.

[36] Page 55 of Applicant's Response to Interested Parties' Deadline 3 Submissions
[37] See paragraphs 11-13 of SCNR Deadline 4 submission