TWUL Response to ExA's Second Written Questions

Q2.11.3	The Applicant	**Alternative access for graziers** Appendix A (paragraph 1.1.2) to Applicant's Written Summary of the Applicant's Oral Submissions at CAH2 [REP4-034] advises that the Applicant proposes to make alternative provision for one of the graziers so they will no longer require use of the TWUL access road. i) Please can the Applicant advise what the route of this alternative access would be. ii) Is this shown on any plans or drawings which are in the Examination, and if so please provide references? iii) How have any implications on biodiversity, and any necessary compensation and/or mitigation, be considered? iv) How would its use by vehicles be controlled in practice? v) How is it proposed that the approval of its route, means of access and details would be controlled through certified documents and/or the dDCO? vi) Having Regard to the Applicant's critique of LLMJL's alternative suggestion for the TWUL access route [REP4-048], [REP4-034] how will an alternative route for graziers avoid the any shortcomings identified? vii) How has this been considered in the ES in terms of worst case assumptions?	Although this question is directed to the applicant, TWUL would like to note that any alternative access provided must be sufficient for frequent large vehicle access. The graziers bring horses in and out via horse boxes/trailers. They bring large vehicles carrying hay and water butts, sometimes take the horses out on carts, have vets and farriers in, so it needs to be of sufficient size and material, while minimising further loss of habitat.
Q2.16.4	The Applicant and TWUL	**Deed of Obligation (B) – Members' Area Land** Clause 5 [REP4-031] seeks to require that this area is managed in accordance with the LaBARDS [REP4-012], however there is limited provision in the latest version of the LaBARDS about the	Cory has not provided any detail to TWUL on what is to be included in relation to the Members' Area. As such, TWUL cannot substantively respond to this question at the present time. However, as to the principle, the Members' Area land has never been required for the Proposed Scheme (hence there are no provisions in the current LaBARDS relating to the Members' Area) and so TWUL's view is that the area should not form part of the proposed revised s106 agreement. TWUL also considers that the obligation relating to the Members' Area does not satisfy the CIL Regulation 122 test (see below) – management of the Members' Area is not *necessary to make the development acceptable in planning terms*.

		Members' Area beyond the appended CLNR Management Plan. What provisions are proposed to ensure that the Members' Area will continue to be managed in an appropriate manner?	TWUL wishes to continue to manage the Members' Area in accordance with the 1994 agreement.
Q2.16.5	LBBC, TWUL and Tilfen Land Ltd	**Deed of Obligation (B)** Are the parties satisfied that the Deed of Obligation [REP4-031] has been drafted in a legally satisfactory manner and meets the tests for such obligations?	In accordance with TWUL's deadline 4 response, TWUL's position continues to be that the 1994 agreement should be amended to provide for any purportedly necessary enhancement works to be carried out on the TWUL-owned nature reserve. With regards "the tests for [planning] obligations", we presume this means the tests in Regulation 122(2) of the Community Infrastructure Levy Regulations 2010 ("CIL Regulation 122 test"), namely: "*(2) A planning obligation may only constitute a reason for granting planning permission for the development if the obligation is—* *(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.*" The courts have held that the application of the CIL Regulation 122 test is essentially one of planning judgment (see *R. (Welcome Break Group Limited) v Stroud District Council [2012] EWHC 140,* which adopts the court's approach to old circular 16/91 in *Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All E.R. 636*). In *R. (Tesco Stores Ltd) v Forest of Dean DC [2014] EWHC 3348 (Admin),* the court also held that it was essential that an authority (including a planning inspector) must apply the law in the CIL Regulations, and that this meant in relation to a s.106 obligation offered by a developer that it must approach the CIL tests "*with appropriate rigour*", which will vary from case to case. It is therefore open to the ExA to reach his own view on the planning merits of the deed of obligation proposed by the applicant but the view must be reached after rigorous and careful assessment of CIL Regulation 122. As is set out in TWUL's deadline 4 response (and as is clear from the current version of the LaBARDS itself), TWUL considers that the enhancement works are so limited, particularly on the southern part of the TWUL-owned nature reserve, that it cannot be said that those works are necessary to make the development acceptable in planning terms, per CIL Regulation 122(2)(a). Or, to rephrase the test, the proposed scheme would not be rendered unacceptable in planning terms if the de minimis enhancement works on the southern section of the TWUL-owned LNR were not carried out. The obligation at paragraph 3.1 of Schedule 1 (insofar as it relates to the management of the southern part of the Crossness LNR TWUL Land in accordance with the LaBARDS once it is approved) does not therefore meet the CIL Regulation 122 test of necessity. TWUL considers the position is arguable either way in relation to the works proposed on the land around the periphery of the carbon capture facility ("CCF") (marked 1 and 2 on Figure 15 in the LaBARDS). However, the land overall is already subject to a management regime under the 1994

			agreement and the proposals in the LaBARDS are not of such magnitude to make anything other than a negligible impact to the extant regime. TWUL consider that only the works along the periphery of the CCF are capable of meeting the tests and, as such the LaBARDS should be updated to remove reference to the enhancements on the southern section of the TWUL-owned LNR and the deed of obligation should apply only to the areas along the periphery of the CCF. (N.B. Notwithstanding the foregoing, TWUL does not accept a new s106 agreement is necessary at all; to the extent any obligations are considered necessary, they should be captured by way of deed of variation to the 1994 agreement). TWUL's position in relation to the obligation at paragraph 5 of Schedule 1 (to manage the Members' Area in accordance with the LaBARDS) is set out in response to Q2.16.4. It has never been the applicant's case that improvements or mitigation on the Members' Area is necessary to make the development acceptable in planning terms. The obligation is not necessary and does not satisfy the CIL Regulation 122 test. The 1994 agreement provides for appropriate management of the Members' Area and this should remain unchanged. The principle of the obligation at paragraph 6 of Schedule 1 (payment of TWUL's increased costs) is required by TWUL whether TWUL enters into a new s106 or if the 1994 agreement is amended. For the avoidance of doubt, TWUL will not enter into any agreement which effects a change in the management regime resulting in increased costs, without such costs being met by the applicant. However, whether the obligation at paragraph 6 meets to the CIL tests would depend on whether the proposed management provisions meet the CIL tests. In relation to the endowment payment (paragraphs 7 – 9 of Schedule 1), TWUL's considers that this demonstrates why a deed of modification to the 1994 agreement would be preferable to a new section 106 agreement. Firstly, we respectfully suggest that the drafting at paragraphs 7 – 9 will be difficult for the general public to understand without legal advice. Whilst it is accepted that this is a legal agreement and so there will inevitably be a degree of complexity, the agreement is also a public agreement and should be easy to understand for members of the public who may wish to comment on its contents. It may therefore assist to include worked examples as appendices to demonstrate the potential effects of paragraphs 7 – 9. As to the provisions themselves, the endowment payment mechanism is overly complicated and provides no certainty as to who will receive the payment, nor how much it might be. When applying the provisions and calculations, it may result in there being no payment to the local planning authority. As such, this may not constitute a planning obligation for the purposes of section 106 TCPA 1990 at all (as it would not fall within any of the categories in section 106(1)(a) to (d)). However, this is inherently the problem with any new section 106 agreement: there are too many unknowns – a problem which would be avoided if the 1994 agreement were modified instead. Modification of the 1994 agreement would remove the requirement for an endowment payment as the land is already bound until the end of 2093: this position would be the same no matter which party owned the land. Further, there would be no need to provide for multiple scenarios based on which party owned the land for the time being (which is necessary under the proposed deed of obligation, as it has to attempt to deal with unknowns); nor would there be a requirement to calculate the

			management costs between the date of decommissioning (another unknown at present) and 31 December 2093. Overall TWUL accepts a new deed of obligation is justified in relation to the Norman Road Field, which is where the substantive mitigation is being undertaken to offset the impact of the proposed scheme. However, this is not the case for the majority of the TWUL-owned nature reserve, which should not be subject to the deed of obligation. TWUL's position therefore remains as per its deadline 4 submission: the most appropriate method of dealing with the TWUL-owned LNR is to modify the 1994 agreement and TWUL would happily prepare a deed of variation for consideration.