



**Cory Decarbonisation Project**

**Planning Inspectorate Reference: EN010128**

**SAVE CROSSNESS NATURE RESERVE**

**Deadline 6 Submission**

## Biodiversity, Ecology and Natural Environment

### New access route

1. In the revised Outline LaBARDS, the Applicant proposes a new alternative access route for TWUL, EA, graziers and volunteers (including SCNR). The location of this route raises very serious concerns:
  - a. This will result in a large further loss of habitat across Lagoon Field and Norman Road Field – noting the route requires a particularly long detour around the southern stretch of the Proposed Scheme;
  - b. The area affected includes the area where SPI plants were identified by Dr Mark Spencer. Therefore, it is highly likely that this will result in a further direct loss of SPI;
  - c. The route will need to be a wide road to accommodate two-way traffic, large vehicles for maintenance / emergency access, and a large turning circle. The amount of habitat loss will be significant – greater than Outline LaBARDS Figure 9 suggests;
  - d. Beyond direct loss of habitat, the route will cause further fragmentation which will have a significant impact on animal species and SPIs;
  - e. The raised ground levels and built structures required will increase the likelihood of flooding on Norman Road Field, which is already prone to significant flooding (particularly in winter); and
  - f. The route will require significant maintenance, requiring significant cost and site manager time.
2. None of these significant impacts has been assessed. No additional mitigation is proposed for this loss of habitat and broader ecological harm; therefore, this is a further failure to follow the mitigation hierarchy.
3. This serves as an example of how the full extent of harm cannot be known without the detail being confirmed. This demonstrates how the lack of detail throughout the Outline LaBARDS does not allow the ExA to adequately assess the Proposed Scheme.

### Extent of loss

4. The distinction between our figure for lost habitat (6.87 ha) and the Applicant's (6.79 ha) is due to our inclusion of the 0.09 ha of ditches that will be lost. We see no reason why the ditches should not be included.
5. The Applicant accepts that the TGC car park can no longer be used for the proposed creation of 0.88 ha of OMH, and it now seems this will be delivered elsewhere on TGC. Given the rest of TGC is existing habitat, this constitutes a further loss of habitat, taking the total loss to **7.75 ha** (and the further loss from the proposed access route will take this total even higher). Of course, the same amount would need to be added

to total habitat creation, leaving the net loss at **2.83 ha**. However, this increase in gross habitat loss constitutes a further failure to meet the mitigation hierarchy requirement to first and foremost avoid ecological harm (and in any event the proposed access route will result in an increase in net loss of habitat).

6. The Applicant's tables do not appear to have been updated to reflect this changed position, and we state again that it is inappropriate for the Applicant to maintain that this does not change its conclusions on both ecological harm and BNG, especially without carrying out any further assessment or analysis.

#### Tree Planting

7. We maintain that tree planting would be harmful. While the Applicant intends to pick species that can tolerate wet conditions, their introduction will still have negative impacts on the grazing marsh habitat, for example through competition (from roots and foliage) and shading. From a visual perspective, notwithstanding trees being present in some other coastal grazing marsh habitat, this habitat is defined by its open character and active management; the goal should be reduction in tree cover, rather than addition. None of this has been adequately assessed.
8. The Applicant asserts various reasons for tree planting: *"biodiversity enhancement, habitat creation, townscape integration, visual amenity, and visual screening"*<sup>1</sup>. These first two aims are nonsensical and fundamentally against the mitigation hierarchy, as the proposals involve the destruction of the more appropriate existing habitat (grazing marsh HPI) and a resulting impact on the species that live on it. The other reasons relate to visual impact and are in no way sufficiently important in planning terms to warrant ecological damage and loss of HPI. Again, this approach of prioritising low-level policy aims over direct ecological harm completely contradicts the mitigation hierarchy. Whether or not the Applicant considers the tree planting to be part of the compensation for loss of grazing marsh habitat is beside the point. The tree planting proposals constitute clear ecological harm that is in no way necessary and must be avoided.
9. The Applicant still intends to compulsorily acquire land for this purpose. We have demonstrated (above and in previous submissions) that the tree planting is not necessary. Therefore, this proposed acquisition fails to meet the s122 test and must be refused.

#### Mitigation of losses and conflation with BNG

10. The Applicant continues to conflate ecological harm (and its mitigation) with the BNG regime. In demonstrating adequate mitigation of ecological harm, the Applicant relies on the following:

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<sup>1</sup> Page 15 of Applicant's Response to Interested Parties' Deadline 4 Submissions

- a. *“losses are fully compensated for following the Statutory Metric Trading Rules”*<sup>2</sup> – these rules are specific to the BNG regime and are not appropriate for assessing mitigation of ecological harm;
- b. the *“qualitative assessment of net gain”*<sup>3</sup> in Section 5 of the Biodiversity Net Gain report – but this is an assessment against the BNG Good Practice Principles, which are of course limited to the BNG regime and do not form a basis for assessing mitigation of ecological harm;
- c. reference to *“condition, a key element of value”* and *“Strategic Significance evaluation of each habitat”*<sup>4</sup> – these are both notions specific to the BNG regime, and as stated in previous submissions, assessment of condition under the BNG regime is not determinative of broader ecological value.

11. The Applicant itself seems to make this final point when it says (regarding ditches) *“poor condition as defined by the Statutory Metric... does not indicate a lack of ecological value”*<sup>5</sup>. Crucially, this reaffirms the illegitimacy of the Applicant’s whole approach to assessing existing habitats: it has continually sought to undermine these habitats’ ecological value by reference to their Statutory Metric condition as ‘poor’. By the Applicant’s admission, this does not indicate a lack of ecological value.

12. In any event we dispute compliance with the BNG Good Practice Principles:

- a. Principle 1 – *“Apply the mitigation hierarchy... Do everything possible to first avoid and then minimise impacts on biodiversity. Only as a last resort and in agreement with external decision-makers where possible, compensate for losses that cannot be avoided”*. We have provided extensive evidence to demonstrate how the Applicant’s approach involves many examples of avoidable ecological harm and a failure to apply the mitigation hierarchy.
- b. Principle 3 – *“Be inclusive and equitable... Engage stakeholders early, and involve them in designing, implementing, monitoring and evaluation the approach to Net Gain”*. There has been no meaningful engagement with SCNR, and we feel our views have been largely ignored.
- c. Principle 6 – *“Achieve the best outcomes for biodiversity... by using robust, credible evidence and local knowledge to make clearly-justified choices”*. The destruction of established HPI and SPI and net loss of habitat are not the best outcomes for biodiversity. The inadequate assessment of harms, lack of detail in the Outline LaBARDS, and lack of SPI-specific measures mean that the evidence is not robust or credible. The local knowledge of SCNR has been largely ignored. Accordingly, the choices are not justified.

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<sup>2</sup> Page 21 of Applicant's Response to Interested Parties' Deadline 4 Submissions

<sup>3</sup> Page 22 of Applicant's Response to Interested Parties' Deadline 4 Submissions

<sup>4</sup> *ibid*

<sup>5</sup> Page 16 of Applicant's Response to Interested Parties' Deadline 4 Submissions

- d. Principle 7 – *“Be additional... do not deliver something that would occur anyway”*. As demonstrated in our Deadline 2 submission, Peabody made the plans to improve TGC before the Applicant’s involvement; the Applicant is only delivering funding, and the Applicant accepts that other sources of funding are available.
  - e. Principle 8 – *“Create a Net Gain legacy... Engaging stakeholders and jointly agreeing practical solutions that secure Net Gain in perpetuity... Designing Net Gain for biodiversity to be resilient to external factors, especially climate change”*. SCNR is a crucial stakeholder but has not been adequately engaged. The proposals do not secure net gain in perpetuity. The proposals result in less resilient biodiversity due to fragmentation, and the replacement of well-established habitats and ecosystems with new and untested ones, which lack detail around their delivery. There is still insufficient detail and enforcement measures around long-term monitoring and management.
  - f. Principle 10 – *“Be transparent... Communicate all Net Gain activities in a transparent and timely manner”*. A lot of detail around the mitigation is still missing from the Outline LaBARDS, despite there being no reason that this information could not be provided now.
13. Ignoring these references to the BNG regime, the Applicant has still not set out a detailed explanation as to how the proposals mitigate the ecological impact. The Applicant refers to ES Chapter 7, but while this attempts to assess ecological harm distinct from BNG, for the reasons set out in previous submissions, it repeatedly understates the harm. Furthermore, it relies on generic references to mitigation and compensation proposals – when pressed to explain why those proposals are sufficient, the Applicant falls back on the above explanations that relate to BNG, making the Applicant’s argument circular.
14. The Applicant claims that the Outline LaBARDS demonstrates *“quantitatively and qualitatively that they will achieve a net gain in biodiversity”*. This is yet another example of conflating the two regimes. Beyond that, it is a misleading statement: the assessment of biodiversity net gain is a single metric, combining quantity and quality. It does not make sense to refer to a purely quantitative or purely qualitative assessment of net gain in biodiversity. In terms of ecological impact, it is clearly not true that the proposals result in a quantitative improvement/gain, as it results in a significant net loss of valuable habitat.
15. The Applicant is also highly misleading in its response to the ExA’s request for the total area of habitat creation on-site (Q2.3.5): the Applicant provided figures for *“habitat compensation”* i.e. creation and enhancement, the vast majority of which is the latter. There is in fact only 1.37 ha of habitat creation on-site. Enhancement of existing habitat is inherently of lower value than creation of new habitat, and for the reasons set out in previous submissions, the Applicant has underestimated existing value and overstated the value of its enhancement proposals.

16. We maintain the point from our Deadline 4 submission that there is no certainty that the TGC mitigation will be delivered. The Applicant's response relies on Requirement 12, but this doesn't ensure the mitigation is delivered on TGC – this is clear from the Outline LaBARDS paragraph 11.1.11: *“this Outline LaBARDS does not require that off-site habitat delivery for BNG has to be delivered at the BNG Opportunity Area”*. We repeat: financial compensation in lieu is insufficient for the ecological mitigation and is the absolute last resort on the mitigation hierarchy. Without any such certainty, the Proposed Scheme must be assessed on the basis of a worst-case scenario, i.e. financial compensation in lieu. The failure to secure delivery of the TGC mitigation measures demonstrates a further failure to comply with the mitigation hierarchy.
17. The Applicant's response<sup>6</sup> to our critique of the proposed mitigation and enhancement fails to adequately respond to our concerns. We note the following in particular:
- a. We disagree that the level of detail in the Outline LaBARDS is appropriate for this stage in design. It fails to give enough detail to fully understand and assess the proposals (in terms of both harm and mitigation). It fails to set a clear standard that can be measured and enforced. It fails to set out a workable mechanism through which monitoring and review can be carried out. Assurances that detail will come in the final full LaBARDS are insufficient; by then it will be too late for ExA scrutiny. On multiple specific points (sward height management, scrub cover, minimising damage, prevention of invasive species etc) the Applicant defers the detail to the full LaBARDS. There is no reason that this detail cannot be provided now. This approach prevents due scrutiny and fails to guarantee a sufficient minimum level of quality.
  - b. The Applicant accepts that the measures proposed are *“basic”*, justifying this on the grounds that *“they are standard, widespread and fundamental principles”*. This only supports the view that these measures are not of sufficiently exceptional quality to justify a net loss in habitat. It also demonstrates that these measures are already being delivered on Crossness Nature Reserve and should have been (and should still be) delivered on Norman Road Field pursuant to the Veridion Park regime. Therefore, there is no additional benefit to existing regimes.
  - c. The Applicant expressly accepts that many measures are already carried out on Crossness Nature Reserve, stating the mitigation is for Norman Road Field only. Firstly, this greatly reduces the potential benefit of these proposals. Secondly, as above, these are the sorts of measures that would have been expected under the Management Plans, which we maintain are still extant and enforceable. There is still no evidence that ongoing management in compliance with planning obligations was ever carried out on Norman Road

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<sup>6</sup> Appendix A of Applicant's Response to Interested Parties' Deadline 4 Submissions

Field – indeed there is no evidence of any ongoing management at all (apart from low density grazing).

- d. Yet again, the Applicant repeatedly relies on the BNG regime, with references to achieving net gain, the Statutory Metric and the corresponding notion of ‘condition’. None of them assesses quality of ecological mitigation. The Applicant only separates the two regimes when it suits, by noting that ‘poor’ condition under BNG “*does not indicate a lack of ecological value*”.
- e. As set out in detail across our previous submissions, the claims that “*there will be no significant effects on these species*” and “*no significant adverse residual effects of fragmentation*” are false – the Applicant has routinely understated the effects on species (in part by illegitimately undervaluing their Importance) and has illegitimately denied the extent fragmentation is occurring (let alone its effect). No species-specific mitigation is proposed.
- f. As set out above, we maintain that creation of woodland / tree planting would be harmful.
- g. Regarding the proposals to use surface water runoff from the Carbon Capture Facility, the evidence submitted by Ridgeway Users demonstrates a high risk of contamination, making the water unsuitable.
- h. No adequate response is given regarding potential impact to bees and their nesting sites – the Applicant simply points to other threats and hopes the species are “*resilient*”. While the Applicant does not “*intend*” to raise water levels to such an extent that it will harm these species, this potential harm has not been tested.

### Monitoring Regime

18. The new Outline LaBARDS references an Ecological Monitoring Strategy and Ecological Monitoring Reports, but the provisions are still insufficient. Again, there is no detail as to what’s required and no measurable standard that could be meaningfully enforced, noting that the word “*effective*” at paragraph 12.1.6 is entirely undefined (seemingly left for the Applicant to determine). There is vague reference to LBB approval but there is no detail on what would happen should LBB reject the documents, or on what basis they could do so. In any event there needs to be greater detail supplied in the Outline LaBARDS now, so that it can be scrutinised by the ExA.

### Impact on SPIs

19. The Applicant accepts that the Outline LaBARDS does not refer to SPIs, but claims their “*protection and conservation... is implicit in the proposals*”<sup>7</sup>. This is insufficient – given the importance of SPIs, and given the extensive loss and fragmentation of their habitats, there must be detailed and species-specific mitigation. The Applicant

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<sup>7</sup> Page 12 of Applicant’s Response to ExA’s Second Written Question

points to Sections 7.7 and 7.9 of ES Chapter 7. However, this mitigation relates exclusively to minimising construction impacts, rather than mitigation for loss of habitat. There are no positive measures proposed to improve conditions specifically for these species.

20. The Applicant makes the sweeping claims that “*habitat enhancement and creation will lead to benefits to animal Priority Species*”<sup>8</sup> and “*will lead to an overall benefit to the botanical community*”<sup>9</sup>. There is simply no evidence to suggest general habitat improvements will counteract the various adverse impacts (both direct and indirect) to these highly important and sensitive species, let alone actively benefit them.

21. The minor amendments to Requirement 12(3)(g) make no material difference: our concerns remain that the regime is not detailed, measurable or enforceable.

### **Compulsory Acquisition**

22. While the Applicant now accepts that it would be possible to avoid acquisition of the remaining Crossness Nature Reserve area through a s106 agreement, it continues to claim that a separate agreement dealing with “*practical arrangements of delivery and management*” and a restrictive covenant would still be required<sup>10</sup>. As we have shown repeatedly and extensively in previous submissions, this is not true – all obligations could be covered by the s106 agreement, and this would automatically run with the land and bind successors in title. The Applicant has failed to give a single example of a required contractual provision that cannot be dealt with under the s106 agreement (if it was deemed not to meet the test of a s106 obligation, it could still be secured in the s106 agreement as a simple contractual obligation). The claim that a buyer could “*unpick LaBARDS arrangements*” is simply untrue.

23. The Applicant continues to make the “*akin to compulsory acquisition*” claim but offers no new argument in response to the points raised by TWUL and SCNR that reveal this point to be without merit. In any event this argument seems irrelevant now that the Applicant accepts the principle of a s106 agreement.

### **Photomontages**

24. We maintain the need for photomontages that depict the greatest visual impact on Crossness Nature Reserve (i.e. the full north-south length of the Proposed Scheme). We disagree that the views will be “*largely similar*”, for the reasons explain in our Deadline 4 submission.

25. Importantly, we note that we’re not asking for views from within the Member’s Area, but from the outside the entrance gate, which is part of the fully publicly accessible area.

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<sup>8</sup> *ibid*

<sup>9</sup> Page 24 of Applicant's Response to Interested Parties' Deadline 4 Submissions

<sup>10</sup> Pages 28 and 29 of Applicant's Response to Interested Parties' Deadline 4 Submissions



26. We don't dispute that the additional photomontages would not change the Applicant's assessment of effect / harm: the Applicant has shown a complete refusal to re-assess effects even in light of material changes to the proposals. However, and much more importantly, we believe the additional photomontages would reveal a much greater visual impact for the purpose of the ExA's (and other parties') assessment.

## **MOL**

27. We fear the Applicant has (perhaps wilfully) misunderstood the point in our Deadline 4 submission. The Applicant claims not to rely on the CNP presumption, but maintains very special circumstances exist – the main one being the delivery of carbon capture infrastructure. We maintain our stance: the CNP presumption exists because of that infrastructure's potential to address climate change. In making the CNP presumption subject to the mitigation hierarchy, the government has given a clear message that this climate benefit does not trump ecological harm. Logically, this must hold where the same climate benefits are alleged as very special circumstances (outside of the CNP presumption) to justify inappropriate development on MOL.

28. The Applicant has failed to comply with the mitigation hierarchy and therefore cannot rely on the purported climate benefits as a very special circumstance.

29. The Applicant alleges other very special circumstances, which we respond to as follows:

- a. Future proofing of waste management – this is another way of saying that the proposals would capture some of the carbon from the waste burning facility, which is the same thing as the climate benefits already cited.
- b. Delivery of sustainable infrastructure – given the goal of the infrastructure is carbon capture, this again is tantamount to the purported climate benefits.
- c. Extensive proposals for biodiversity – the scheme results in a net loss of HPI and SPI, and further ecological harms that we have extensively set out in previous submissions. The mitigation hierarchy has not been complied with. It is completely unacceptable to consider this as a very special circumstance.
- d. Amenity – we have demonstrated that the amenity benefits are overstated and revealed extensive harm that the Applicant has failed to adequately consider. The amenity benefits come at the expense of further ecological harm, through loss of habitat and fragmentation. Amenity is given a much weaker weighting under planning policy than loss of MOL or ecological harm and therefore cannot be considered to be a very special circumstance.