Cory Decarbonisation Project

Planning Inspectorate Reference: EN010128

SAVE CROSSNESS NATURE RESERVE

Closing Submissions

Introduction

1. These final submissions are made on behalf of the Save Crossness Nature Reserve campaign group ("SCNR"). SCNR is made up of local residents, bird watchers, local campaigners and environmentalists. All of the members of SCNR have a deep interest in and concern for the nature reserve that the Applicant seeks to compulsory purchase and build on.

2. Crossness Nature Reserve is part of Erith Marshes Site of Importance for Nature Conservation ("SINC"). It consists of high quality ancient coastal and floodplain grazing marsh and reedbed, which are both Habitats of Principle Importance ("HPI").[1]

3. SCNR members have extensive first-hand knowledge of the site, including the habitats and species that exist on it. Many of them play an active role in supporting and promoting the nature reserve as volunteers through Friends of Crossness Nature Reserve, a separate group created by Thames Water Utilities Limited ("TWUL") (who own and manage the site). For example, they use their knowledge to provide free walks and talks, record wildlife data, and provide general support.

4. SCNR rely on all their previously submitted submissions. In these closing submissions, SCNR highlight the key submissions and points that it relies upon in support of its case, which is that the Examiner should recommend refusal of the application for a Development Consent Order ("DCO").

5. SCNR's key submissions are encapsulated in the following propositions:

    a. The need case is not met.
    b. The statutory test for compulsory acquisition has not been met;
    c. The land being lost is special category land;
    d. Section 127 of the Planning Act 2008 prevents compulsory acquisition of Crossness Nature Reserve;
    e. The Applicant has failed to properly apply the mitigation hierarchy;
    f. The proposed development will result in severe planning harm;
    g. The mitigation proposed to account for the planning harms associated with the development is insufficient;
    h. The Applicant places great reliance on the carbon capture achieved from the Proposed Scheme, and its mistaken belief that the CNP presumptions consequently apply.

[1] There are further designations, which are referenced below.

The Need Case

6. The need case is primarily placed on the need for carbon capture as a means to contribute to the challenge of meeting net zero by 2050, as set out in the Climate Change Act 2008 (section 1, Climate Change Act 2008).

7. SCNR take no issue with the importance of climate change and the need to achieve net zero by 2050, nor the need to not exceed the emissions targets set by the carbon budgets. However, the need to progress towards net zero does not in and of itself demonstrate need for this project.

8. The first point to make is that the application is footed on the claim that it will achieve 95% carbon capture, and this will be secured through environmental permitting. SCNR do not agree that 95% carbon capture will be achieved, nor do they agree that the permitting will secure at least a 95% carbon capture.[2] Put simply, the Best Available Techniques ("BAT") is not a system which equates to a guarantee of an emissions outcome. Furthermore, focusing purely on carbon capture overlooks the emissions resulting from the project, including construction, operation, transport and storage of captured carbon, and ultimate decommission.

9. The second point to make is that nature capital, such as that provided by Crossness Nature Reserve, has its own inherent value. Crossness Nature Reserve, which is high quality ancient coastal and floodplain grazing marsh, has the following planning designations / definitions:

    a. Local Nature Reserve ("LNR");[3]
    b. Metropolitan Open Land ("MOL");[4]
    c. Site of Importance for Nature Conservation ("SINC");[5]
    d. 'Open space' and 'green infrastructure' as defined in EN-1 and the London Plan 2021;[6]
    e. part of the Thames Marshes Strategic Green Wildlife Corridor; and
    f. part of South East London Green Chain.

    These designations emphasise how important the nature reserve land is, in and of itself.

[2] See paragraphs 33 – 38 of SCNR's deadline 2 submission for the submissions on this point.
[3] See paragraphs 22 – 25 of SCNR's deadline 1 submission for the background on this designation.
[4] See paragraphs 26 – 34 of SCNR's deadline 1 submissions for the background on this designation.
[5] See paragraphs 25 – 38 of SCNR's deadline 1 submission for the background on this designation
[6] See paragraphs 39 – 45 of SCNR's deadline 1 submission for the background on this designation.

10. As the latest State of Natural Capital Report for England 2024 sets out:[7]

> "*Fixing our relationship with nature is one of the most urgent challenges of our age. Climate change may grab more headlines, but the depletion of the natural world is an equally severe emergency and one very much fuels the other*."[8]

11. Additionally, as the State of Natural Capital Report goes on to explain, there are also many linkages between natural capital and the economy,[9] ecosystems,[10] society and human beings more widely,[11] efforts to achieving net zero,[12] climate adaptation,[13] food security,[14] and water security.[15] The priority actions that are required are: (a) large-scale targeted restoration of ecosystems; (b) reduction of the drivers of change that are causing nature loss; and (c) making natural capital central to decision-making.[16]

12. In the context of the present application, it is perverse to sacrifice nature reserve land and over 7.75 hectares of habitat loss[17][18] to serve some climate objectives, which the nature reserve is already, to some extent, serving, along with many more benefits. This is particularly so when:

    a. the amount of carbon capture that is claimed to be achieved by the project is far from being certain and enforceable; and
    b. the project could be developed without requiring any land from the nature reserve (explored in more detail below).

Development Consent and Compulsory Purchase[19]

13. The Planning Act 2008 ("PA 2008") introduced a new regime for granting consent for nationally significant infrastructure projects ("NSIPs"). Orders granting development consent ("DCO") may include provision for compulsory purchase of land.[20]

---

[7] The Report is drafted by Natural England and can be found here: file:///C:/Users/aclan/Downloads/NERR137%20Edition%201%20State%20of%20Natural%20Capital%20Report%20for%20England%202024%20-%20Risks%20to%20nature%20and%20why%20it%20matters.pdf
[8] Ibid, page 5
[9] Ibid, page 15 and 28
[10] Ibid, page 17
[11] Ibid, page 23 and 38
[12] Ibid, page 31
[13] Ibid 33
[14] Ibid, 35
[15] Ibid, page 40
[16] Ibid, page 70
[17] When further loss from the alternative access route is included
[18] See paragraph 2 of SCNR's sixth deadline submission.
[19] See paragraphs 161 – 171 of SCNR's first submission for full overview of caselaw and application to this proposed project.
[20] Section 122, PA 2008

14. The main test for compulsory acquisition is made of two conditions set out in section 122 of the Planning Act:

    a. the land is:
        i. "*required for the development to which the development consent relates,*
        ii. *required to facilitate or is incidental to that development, or*
        iii. *is replacement land which is to be given in exchange for the order land*
        iv. *under section 131 or 132*"; and
    b. "*there is a compelling case in the public interest for the land to be acquired compulsorily*".

15. The effect of section 122(2) PA 2008 is to set two main pre-conditions to the inclusion of compulsory purchase powers in a DCO. First the decision-maker must be satisfied that the land is "required" for the stated purpose. The word "required" was included in section 226(1)(a) of the Town and Country Planning Act 1990 ("TCPA 1990") prior to its amendment by the Planning and Compulsory Purchase Act 2004. The meaning of the word "required" in that statute was considered by the Court of Appeal in *Sharkey and Another v Secretary of State for the Environment and South Buckinghamshire District Council* (1992) 63 P. & C.R. 332.[21]

16. The second condition which has to be satisfied is that there is a compelling case in the public interest for the land to be acquired compulsorily (section 122(3) PA 2008). It is necessary, when considering confirmation of any Compulsory Purchase Order ("CPO"), to address the question of whether there is a compelling case in the public interest, in order to address the policy in the Circular and in order to address considerations arising when Article 1 Protocol 1 and Article 8 (European Convention on Human Rights ("ECHR")) rights are engaged.

17. In summary, the test for compulsory acquisition has not been met for the following reasons:

    a. Compulsory acquisition of the Mitigation Enhancement Area ("MEA") is not necessary as the MEA can be delivered without compulsory acquisition;[22]
    b. Desirability of acquisition, as opposed to entering into s.106 agreements or amending existing s.106 agreements, does not meet the necessity test (see *Sharkey* case);
    c. Contrary to the Applicant's assertion, a s.106 agreement would not need to be accompanied by a restrictive covenant to ensure delivery of the scheme;[23]
    d. The land sought to be acquired exceeds what is necessary to construct the proposal. For example:

[22] See also paragraphs 4 – 7 of SCNR's third deadline submission
[23] See paragraphs 6 – 9 of SCNR's fifth deadline submission.

i. The alternative designs prepared by [redacted] on behalf of Landsul and Munster Joinery (and supported by our submissions) revealed there are substantial opportunities for footprint reduction, including the electrical switchyard, co-location of water storage, tank storage, and general layout efficiencies;[24] and

ii. tree planting is not necessary and so acquisition for this purpose is not necessary.

e. There is no compelling case in the public interest pursuant to Section 122 (3) of the Planning Act 2008 because:

i. The Applicant is required to consider alternative sites and there are better alternative sites for this development. The Applicant's reliance on Project Objectives and Optioneering Principles to select sites, rather than policy priorities is flawed;

ii. More specifically, delivery in the East Zone is possible which would avoid (or minimise) loss of Crossness Nature Reserve as follows:

- [redacted] alternative designs (as supported by our submissions) show that delivery in the East Zone (specifically North Zone 1) is possible;[25]
- A relocation of FP4 along the southern and eastern edges of North Zone 1 would allow for a more efficiently designed site in East Zone (North Zone 1). While we do not consider this change necessary, it would make it even more feasible to avoid impact to third parties, allow for a contiguous site, and also facilitate access to and from Norman Road. It would also minimise impact on users of FP4, as detailed below;[26]
- It may also be possible to split delivery of the Carbon Capture Facility across the East Zone (North Zone 1), Borax North and Borax South. This approach should only be considered as a fallback to delivery in East Zone (North Zone 1), as it would entail some harm to Crossness Nature Reserve (albeit significantly less than the Proposed Scheme);[27]

iii. A s.106 agreement would give the Applicant sufficient rights over the MEA land and therefore it is unnecessary to compulsory purchase the land. It is in the public interest for TWUL to retain ownership given its experience of ecology management, as opposed to the Applicant, who has no such experience;

[24] Paragraph 3 or SCNR's third submission deadline; and see also paragraphs 1 – 5 of SCNR's fifth deadline submission.

[25] See paragraph 5 of SCNR's second submission and Landsul and Munster Joinery's deadline 1 submission

[26] See paragraph 6 of SCNR's second deadline submission; and see also paragraphs 10 – 16 of SCNR's fifth deadline submission

[27] See paragraph 7 of SCNR's second deadline submission.

f. the Grazier's and local residents' particular circumstances mean that the use of powers of compulsory purchase are unjustified because:
    i. The detrimental consequences on the functionality as a grazier;
    ii. The adverse impact on the ability of the Grazier's to enjoy the land;
    iii. The adverse impact on the residents ability to enjoy the land;
    iv. The adverse impact on health (including mental) and welfare of those impacted.

18. The lack of detailed design from the Applicant in order to retain flexibility is not something which can be used to justify the test for compulsory acquisition. Land may only be compulsorily acquired pursuant a DCO where it is required for the development. If it is feasible to deliver the Carbon Capture Facility with a reduced development footprint, the additional acquisition is not required, and the Proposed Scheme must not be granted. The Applicant does not have the luxury of flexibility when it requires other parties' land.[28]

Special Category Land

19. The Applicant continues to hold the position that land must be accessible to be considered for the purposes of public recreation. They claim this is true "in statutory terms" but fails to demonstrate how the statutory wording sets this out – SCNR sees no reason why "used for the purposes of public recreation" should be interpreted in such a narrow way. There are countless hypothetical examples where inaccessible land is an inherent part of public recreation use. For example, a sculpture park might have off-limits areas around the sculptures, but those areas would still be regarded as land used for public recreation. As with the non-accessible parts of Crossness Nature Reserve, public recreation is derived from looking at these areas from the designated viewing area.

20. Therefore, these areas also qualify as Special Category Land, making the extent of Special Category Land to be lost far greater than the Applicant has previously suggested. In relation to the land which the Applicant accepts as being Special Category Land, the Applicant believes that special parliamentary procedure can be avoided on the basis of section 131(4A) Planning Act 2008, on the grounds that there is no suitable land available in exchange, and it is strongly in the public interest for the development to begin sooner than is likely to be possible following special parliamentary procedure. SCNR disagrees with this proposition. It is precisely because of the unique nature of this land, and the fact there is no land available in exchange, that the special parliamentary procedure should be followed. There is public interest in retaining the land and at the very least ensuring that its potential loss is subject to the enhanced democratic scrutiny of special parliamentary procedure.

[28] See paragraphs 1 – 3 of SCNR's third deadline submission.

21. The fact that the Special Category Land is larger than accounted for by the Applicant further emphasises this point. The Applicant's suggested approach is again completely contrary to the statutory scheme and would, in effect, devoid the special parliamentary procedure of its meaning and applicability.

22. The Applicant therefore needs to follow special parliamentary procedure.

Section 127 PA 2008, Statutory Undertakers' Land[29]

23. S.127 Planning Act 2008 prevents compulsory purchase of statutory undertakers' land unless that land can be purchased and replaced without serious detriment to the carrying out of the undertaking or can be purchased and replaced by other land (owned by or available to be acquired by the undertaker) without serious detriment to the carrying out of the undertaking.

24. In relation to the present application:
    a. TWUL own the land as statutory undertakers and operate the land as Statutory Undertaker;
    b. TWUL's ongoing maintenance of Crossness Nature Reserve was deemed necessary to render the sludge-powered generator acceptable in planning terms;
    c. TWUL are under obligations under a s106 agreement to maintain and enhance the nature reserve;
    d. TWUL are under statutory duties to further conservation and enhancement of natural beauty and conservation of flora and fauna (s.3 Water Industry Act 1991), and to have regard to conserving biodiversity (s.40 Natural Environment and Rural Communities Act 2006);
    e. Even if it were the case that TWUL hold this land solely for the purposes of the s.106, this is irrelevant and would not overcome the s.127 issue because neither of the s.127 conditions apply because (s.127(3)):
        i. The land cannot be replaced without serious detriment to the carrying on of TWUL's undertaking; and
        ii. there is no other land that can be acquired by TWUL to carry out this specific function, especially when the unique status of the nature reserve land is taken into account;
    f. The Applicant's suggestion that acquisition would nullify TWUL's s.106 agreement obligation is based on flawed logic because:
        i. the existing s.106 obligations binding TWUL still serves a purpose and TWUL act in order to maintain and enhance the nature reserve to this date. This is not an obligation that can simply be bought out; and
        ii. If the Applicant's position were correct, this would defeat the very purpose of s.127 of the PA 2008.

[29] See paragraphs 172 – 177 of SCNR's first submission for a fuller exploration of this issue.

The Mitigation Hierarchy[30]

25. The mitigation hierarchy is "*the avoid, reduce, mitigate, compensate process that applicants need to go through to protect the environment and biodiversity*". Paragraph 5.4.42 of EN-1 states that "*as a general principle, and subject to the specific policies below, development should, in line with the mitigation hierarchy, aim to avoid significant harm to biodiversity… including through consideration of reasonable alternatives*".

26. The Applicant has failed to apply the mitigation hierarchy, on multiple fronts. The Applicant has failed to avoid and reduce the significant harm to the environment and biodiversity, by failing to consider reasonable alternatives and smaller scheme designs and through design efficiencies (as detailed above at paragraph 17). Its approach to mitigation and pursuit of lower-value policy aims (including amenity) involve the avoidable loss of existing habitat, resulting in a large gross loss of habitat (approximately 7.75 ha). Furthermore, it has failed to adequately mitigate the significant harms to biodiversity that the current Proposed Scheme would cause.

27. Therefore, the Proposed Scheme breaches this crucial policy. It also means the CNP presumptions do not apply, and there remains a need to evidence a clear outweighing of harm, exceptionality and very special circumstances as required under the relevant policies (including for inappropriate development on MOL). The DCO Application fails to do so. Even if the CNP presumptions were to apply, the Proposed Scheme is one of the "*exceptional cases*" where the need does not outweigh the residual harmful effects, which are detailed below.

Planning Harm

28. The Proposed Development would result in widespread and significant harm to the Crossness Nature Reserve.

29. There are multiple sources of harm that will result from the proposed scheme, should it go ahead, including:
    a. Loss and fragmentation of highly valuable and highly designated wildlife habitat (including direct loss of HPI and SPI plant species);
    b. Loss of highly valuable and highly designated amenity space;
    c. Noise and vibration;[31]
    d. Run-off;[32]
    e. Air pollution from emissions;[33]

[30] See paragraphs 15 – 19 of SCNR's first deadline submission
[31] See paragraph 76 of SCNR's first deadline submission
[32] See paragraphs 77 – 80 of SCNR's first deadline submission
[33] See paragraphs 81 and 82 of SCNR's first deadline submission

f. Visual impacts;[34]
g. Light pollution; and
h. Reduction of and interference with public recreation.[35]

30. These significant harms will be felt by:
    a. Breeding birds;[36]
    b. Plants;[37]
    c. Terrestrial invertebrates;[38]
    d. Water voles;[39]
    e. Freshwater fish;[40]
    f. Aquatic macroinvertebrates;[41]
    g. Small mammals;
    h. Reptiles; and
    i. Humans and users of the nature reserve[42].

31. The Applicant has understated the harm to these different species, some of which are Species of Principal Importance ("SPI") in particular by ascribing illegitimately low Importance that fails to accord to CIEEM guidance. The Applicant has also understated the impact on users of Crossness Nature Reserve.

Mitigation[43]

32. The mitigation proposed by the Applicant fails to address the widespread and significant harm outlined in the above section.

33. First, the proposed ecological mitigation is wholly insufficient as follows:

    a. It does not address quantitative loss, including the loss of 3.5 hectares of high quality and highly designated nature reserve land – the Proposed Scheme results in a net loss of over 2.83 ha of habitat;
    b. Crossness Nature Reserve is already subject to a detailed management regime run by TWUL that is secured by planning controls. Norman Road Field is also subject to planning controls that remain extant and that, if enforced, would improve the ecological condition. It is this improved condition that should be taken as the baseline for any assessment of mitigation. To the extent

[34] See paragraphs 8 and 9 of SCNR's third deadline submission
[35] See paragraphs 17 – 19 of SCNR's fifth deadline submission
[36] See paragraphs 53 – 59 of SCNR's first deadline submission
[37] See paragraphs 60 – 64 of SCNR's first deadline submission
[38] See paragraphs 65 – 68 of SCNR's first deadline submission
[39] See paragraphs 69 – 71 of SCNR's first deadline submission
[40] See paragraph 72 of SCNR's first deadline submissions
[41] See paragraphs 73 – 75 of SCNR's first deadline submission.
[42] See paragraphs 83 – 84 of SCNR's first deadline submission.
[43] See paragraphs 85 – 100 of SCNR's first deadline submission; and paragraphs 20 – 39 of SCNR's fifth deadline submission

the purported improvements under the Proposed Scheme repeat existing controls, they cannot be considered a benefit or new mitigation as this would constitute an impermissible double-counting of the environmental benefit;

c. The purported improvements to the MEA are, taken at their highest, of insufficient quality to address all the relevant harms already identified;
d. There is no mitigation responding to the extensive loss of plant SPIs. Nor is there mitigation responding to the harm to animal SPIs (except water voles); and
e. Additional ecological harms have been added since the impact was first assessed – including an additional access route that will cause further habitat loss and fragmentation – without any additional mitigation proposed.

34. Secondly, much of the mitigation outlined is "general" and lacks the specificity required to satisfy the Examiner that the harms have been appropriately and effectively mitigated. The Outline LaBARDS remains too vague.

35. Thirdly, some of the mitigation proposed is inappropriate, for example:

a. the proposed tree planting both on Norman Road Field and along the eastern boundary of Crossness Nature Reserve;
b. the proposed PRoW in the north-west corner of the Site, creating a second route between FP2 and FP3 is redundant given the existing route to the west that serves the same purpose, but will result in inherent ecological harm;
c. the relocation of grazing land for the grazier will create potential health and safety risks affecting public access

36. Fourthly, there are several ways in which improvements to Thamesmead Golf Course can be funded in the near future without needing to approve the Applicant's Proposed Scheme.[44]

37. Fifthly, there is uncertainty that the proposed offsite mitigation can be delivered on the Thamesmead Golf Course because the obligations are not secured in planning terms (only under a Deed of Obligation).[45]

38. Sixthly, the monitoring and management regime in the Outline LaBARDS does not provide a measurable or enforceable system over time. The Applicant's lack of any track record managing ecological sites, its failure to deliver ecological mitigation promised under Riverside 2, and its failure to deliver the promised District Heat Network, cast further doubt on its ability to deliver.

[44] See paragraphs 9 – 13 of SCNR's second deadline submission
[45] See paragraph 21 of SCNR's third deadline submission; and paragraphs 40 – 44 of SCNR's fifth deadline submission

39. Seventhly, the Applicant has inappropriately conflated ecological mitigation with Biodiversity Net Gain ("BNG"). This is evident both in terms of how the Applicant defined the current state of land as being in poor "condition" (relying on Statutory Metric notion of condition) and also in the Applicant pointing to 10+% net gain to demonstrate the quality of mitigation. The Applicant has failed to demonstrate how the ecological mitigation is sufficient without inappropriately relying on these concepts specific to the BNG regime.

40. For a fuller critique of the mitigation proposals, see table 1 of SCNR's third deadline submission.

Conclusion

41. For all of the reasons outlined above and contained in SCNR's previous submissions, the Examiner should refuse the application for DCO and compulsory purchase. As a secondary position, should the Examiner approve the application for DCO and compulsory purchase, SCNR's submission is that the project can proceed without any need to acquire the Crossness Nature Reserve, and so there should be no compulsory purchase of any nature reserve land.