Cory Decarbonisation Project

Thames Water Utilities Limited

Closing Representations

1. Introduction

1.1 These closing representations are made on behalf of Thames Water Utilities Limited (**TWUL**), as landowner of the current Crossness Local Nature Reserve (**CLNR**), in relation to the application for development consent for the Cory Decarbonisation Project (**Project**) made by Cory Environmental Holdings Limited (**Cory**).

1.2 These representations are supplemental to those also ready made by TWUL as part of the examination, which remain TWUL's substantive case. For ease of reference, these are:

1.2.1 TWUL's Relevant Representation (Examination Library Reference RR-195);

1.2.2 TWUL's Written Representation (Examination Library Reference REP1-058);

1.2.3 TWUL's response to Examiners First Written Questions (Examination Library Reference REP3-043);

1.2.4 TWUL's Deadline 3 Submission (Examination Library Reference REP3-048);

1.2.5 TWUL's oral representations at CAH2, as set out in TWUL's Deadline 4 Submission (Examination Library Reference REP4-045);

1.2.6 TWUL's response to Examiner's Second Written Questions (Examination Library Reference REP5-055); and

1.2.7 TWUL's Deadline 6 Submission (Examination Library Reference REP6-051).

1.3 In the context of the above, these final representations have been prepared to highlight the primary areas of TWUL's case, which is that development consent for the Project should be refused. Alternatively, if development consent is granted, the compulsory acquisition powers sought by Cory in relation to the part of the CLNR not required for the construction, operation and decommissioning of the Carbon Capture Facility should be refused.

2. Objection to the Project

2.1 TWUL's primary reasons for objecting to the grant of development consent for the Project is due to the total loss of approximately 3.5 hectares of the CLNR and the adverse ecological impact on the remainder, which TWUL submits is significant.

2.2 The CLNR benefits from a number of national and local policy designations, including being Metropolitan Open Land (**MOL**), a statutory local nature reserve, metropolitan grade SINC and designated open space.

2.3 MOL has the same status, in policy terms, as Green Belt land and therefore benefits from the same protections contained in the NPPF (December 2024), including that development in the Green Belt should not be approved unless very special circumstances apply[1].

2.4 In determining an application for development consent, the Secretary of State must have regard to (inter alia)[2]:

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1 NPPF Paragraph 153

2 Section 104(2) Planning Act 2008

2.4.1 any national policy statement which has effect (in this case, **NPS EN-1**);

2.4.2 any local impact report submitted to the Secretary of State; and

2.4.3 any other matters which the Secretary of State thinks are both important and relevant to the decision.

National Policy Statement – PA 2008, section 104(2)(a)

2.5 NPS EN-1 specifies that projects which are of critical national priority (which includes low carbon infrastructure), will be taken to have met the very special circumstances test (**CNP Presumption**), but this is only the starting point[3]: it is open to the Secretary of State to find that the CNP Presumption shall not be taken to apply in any given case.

2.6 Additionally, before the CNP Presumption does apply in any event, the Secretary of State must be satisfied that the applicant has demonstrably applied the mitigation hierarchy which, in TWUL's submission, is not the case insofar as the Project is concerned: the proposed loss of part of the CLNR is avoidable and only arises as a result of Cory's defective site selection process and excessive land-take.

2.7 It has been demonstrated by representatives for Landsul Limited and Munster Joinery (UK) Limited that the land take for the Project is more than required; a view shared by TWUL and other interested parties. In the expert report of [redacted] it was confirmed that the Project could have been accommodated within the preferred South Zone with "*minimal impact on the area designated as nature reserve*"[4].

2.8 In relation to site selection, as is set out in TWUL's Written Representation[5], TWUL remains of the view that Cory prematurely dismissed the 'East Zone' as a viable alternative to the chosen location. Veridion Park was also not assessed at all in the first instance and the subsequent brief assessment set out by Cory in its response to TWUL's Written Representation, including the reasons for its unsuitability are both inadequate and unsubstantiated.

2.9 Cory's site selection is also criticised by a number of other interested parties, who all effectively say that the East Zone would be a more suitable location for the Project or should have been given greater consideration, including the local planning authority and, again, [redacted] in his expert report:

"*4.16 The East Zone (North 1 Zone) would have the benefit of avoiding any impact on the Crossness Local Nature Reserve. It would also be technically superior to the south zone given its closer proximity to both the EfW facilities and the jetty. This would mean lower capital costs and operating costs for the Applicant were this zone selected. However, it was discounted by the Applicant due to impact on local businesses as well as concerns that* "it would not form a single homogenous area with the Riverside Campus*".*

4.17 This second reason seems very strange given that the Applicant's plans for the development using the Southern Zone also do not form a single homogenous area with the Riverside Campus".

2.10 The site selection issues also result in significant adverse impacts on the CLNR's ecology, as set out in TWUL's Written Representation at paragraphs 2.33 to 2.39. This includes loss of habitats and species included on the national list of principal importance (Borrer's Saltmarsh grass) and those classified as vulnerable to extinction (bird's foot trefoil). Cory's assessment of the part of the CLNR containing these species and habitats was undertaken by the use of binoculars from the roadside, which is an entirely inadequate approach to have taken. As a result, TWUL submits that the Secretary of State cannot properly discharge the duty to further the conservation of the living organisms and types of habitat included

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3 NPS EN-1 – paragraph 4.2.17

4 See Annex A to REP1-059, paragraph 4.21 and Annex C to the Report

5 See paragraphs 2.14 to 2.23

in the above mentioned list, pursuant to section 41(3) of the Natural Environment and Rural Communities Act 2006.

2.11 The Secretary of State must give due weight to the site selection and land-take issues/criticisms made throughout the examination and, in TWUL's submission, the correct conclusion to reach on this point is that the mitigation hierarchy was not adequately applied. As such, the CNP Presumption does not apply to the Project and, as per NPPF paragraph 153, very special circumstances will not exist unless the potential harm to the MOL and any other harm resulting from the Project, is clearly outweighed by other considerations. In TWUL's submission, the harm is not clearly outweighed by other considerations[6] and the Secretary of State should therefore ensure that substantial weight is given to any harm to the MOL when determining Cory's application, in accordance with section 5.11.36 of NPS EN-1.

Local Impact Report – PA 2008, section 104(2)(b)

2.12 Section 104 of the Planning Act 2008 imposes a statutory requirement that the Secretary of State must have regard to the local impact report submitted by the London Borough of Bexley Council dated 26 November 2024 (REP1-034) when determining the application for the Project. The LIR concludes, on page 66:

"*The development proposals are considered not compliant with the Bexley Local Plan (2023) from a Land Use and Consideration of Alternatives perspective.*

Positive Impacts

No positive impacts have been identified.

Negative Impacts

The following negative impacts have been identified:

- *Inappropriate development on Metropolitan Open Land (MOL).*
- *Loss of part of Erith Marshes Metropolitan SINC, which includes part of the*
- *Crossness Nature Reserve.*
- *Lack of scrutiny of alternative sites.*
- *Application of mitigation hierarchy has not been applied.*"

2.13 The LIR clearly supports TWUL's (an others') position on site selection and is a further consideration which adds further weight to the case against the grant of development consent for the Project.

Other important and relevant matters – PA 2008, section 104(2)(d)

2.14 The following matters are also considered by TWUL to be important and relevant to the Secretary of State's determination:

2.14.1 the Project is contrary to both the Bexley Local Plan 2023 and the London Plan 2021 in a number of respects, as set out at paragraphs 2.1 to 2.9 of TWUL's Written Representation; and

2.14.2 the Project would result in a loss of open space which, per section 5.11.32 of the NPS, should be avoided, as set out at paragraphs 2.40 to 2.46 of TWUL's Written Representation.

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6 See paragraph 2.24 of TWUL's Written Representation

2.15 For the above reasons and for the reasons set out in the TWUL representations specified at paragraph 1.2 above, TWUL submits that development consent for the Project should be refused.

3. Compulsory Acquisition

3.1 In the alternative to refusal of development consent for the Project, TWUL case is that the Project is capable of proceeding without requiring the compulsory acquisition powers sought by Cory in respect of the part of the CLNR identified for the Project's purported ecological mitigation and enhancement (**Mitigation and Enhancement Area**/**MEA**). As such, in granting development consent for the Project, freehold acquisition powers over the MEA should be refused.

3.2 It should be noted that as at the date hereof, Cory is proposing to 'downgrade' the powers sought over the MEA from freehold acquisition to rights only, for the reasons and to the extent specified in Cory's response to Examiner's Second Written Questions (ExQ2.5.3). Cory states that the proposed change is contingent on the completion of Deed of Obligation B (**Deed B**).

3.3 Negotiations in relation to Deed B are ongoing and, at the date hereof, TWUL is optimistic that agreement will be reached (a view understood to be shared by Cory). However, TWUL must protect its position by continuing to make the case that freehold acquisition powers over the MEA are not justified whether or not Deed B is completed, in the event that it is not, for any reason, and Cory does not formally downgrade the powers sought over the MEA.

3.4 Section 122 of the Planning Act 2008 provides that:

"*(1) An order granting development consent may include provision authorising the compulsory acquisition of land only if the Secretary of State is satisfied that the conditions in subsections (2) and (3) are met.*

(2)The condition is that the land—

(a)is required for the development to which the development consent relates,

(b)is required to facilitate or is incidental to that development, or

(c)is replacement land which is to be given in exchange for the order land under section 131 or 132.

(3)The condition is that there is a compelling case in the public interest for the land to be acquired compulsorily"

3.5 In the Court of Appeal case of *R (FCC Environment (UK) Ltd) v Secretary of State for Energy & Climate Change*[7], it was agreed that notwithstanding there may be an urgent need for a particular development, it does not automatically follow that there is a compelling case for the compulsory acquisition powers sought. If, on a proper analysis, the land proposed to be acquired is found to be excessive because:

3.5.1 the development proposed can be constructed without needing that land (in which case, the section 122(2) test would also not be met); or

3.5.2 the acquisition of rights over the land, rather than its acquisition, might suffice,

then there is no compelling case for compulsory acquisition, despite the NPS having established the urgent need for the development. In such instances, the development may

[7] [2015] EWCA Civ 55

be consented without the acquisition powers being awarded or (if appropriate), the powers awarded should comprise rights only.

3.6 TWUL submits that this is precisely the case in relation to the Project and the MEA: the MEA is not required to construct the Project and so there is no compelling case for compulsory acquisition of the freehold interest: rights are sufficient and TWUL refers to its Deadline 4 and Deadline 6 Submissions in this respect.

4. 1994 Section 106 Agreement

4.1 In Cory's responses to Deadline 4 submissions (REP5-032), TWUL notes that, on the whole, Cory considers TWUL to be conflating property and planning positions in respect of the case for modification of the 1994 section 106 agreement, for example:

"*The Applicant's position is that it does not consider that it would be appropriate in policy terms for an existing section 106 Agreement, relating to a previous development, to be amended to add in additional obligations which arise as a result of a completely different development.*

This would be the imposition of new positive covenants on TWUL's land 'through the back door', using the planning system to circumvent restrictions on compulsory acquisition powers (which cannot be used to acquire positive covenants). It is considered that this is not acceptable or appropriate in legal terms, notwithstanding the powers in section 120 and Schedule 5."

4.2 TWUL does not follow or agree with Cory's response in this regard. Firstly, TWUL reiterates that if it is acceptable to abrogate an agreement relating to land (which relates to a completely different development), it must also be acceptable to modify that agreement, given the terms of Schedule 5, paragraph 3. Secondly, if the phrase "modification of an agreement relating to land" includes section 106 agreement (which it must do, if a section 106 agreement can also be abrogated), this will almost always involve a section 106 agreement relating to a completely different development – it is difficult to imagine why one would be required to include powers of abrogation or modification in DCO relating to a section 106 agreement for the development authorised by the same DCO.

4.3 In relation to restrictions on CPO powers, firstly, modification of the 1994 agreement would not engage compulsory acquisition; Cory would not be 'acquiring a positive covenant' and so it is unclear what is meant by Cory's response in this respect. The modification would simply (inter alia) swap out the current management regime with the LaBARDS and introduce a mechanism whereby Cory pays TWUL's increased costs (if any), in both cases, importantly, by agreement. Such agreement would also ensure Cory had sufficient powers in terms of requiring compliance with the LaBARDS.

4.4 TWUL is further unclear how a new section 106 agreement which imposes new obligations and restrictive covenants is any different to modifying an existing agreement to achieve the same and, again, is unclear as to the reference to overriding restrictions on CPO powers in Cory's response. In TWUL's view, the 1994 agreement can be modified to impose new covenants and restrictions, which, again, would be by agreement.

4.5 In summary, TWUL submits that modification of the 1994 agreement is the simplest and fairest mechanism to secure compliance with the LaBARDS: it is legally viable and would require no interference with TWUL's property rights.

5. Access Road and Protective Provisions

5.1 Paragraph 5.1 of TWUL's Deadline 6 Submission states that:

"*Cory has amended TWUL's protective provisions as set out in the response to ExQ 2.5.3. In effect, this means that TWUL may now exercise its freehold acquisition powers in respect of the TWUL emergency access road without reaching agreement with TWUL. This is a significant change of position so far as TWUL is concerned, which has been effected without*

any engagement or consultation whatsoever and, for the avoidance of doubt, is not agreed by TWUL".

5.2 Following further discussions with Cory, it has been clarified that the amendment set out in EXQ 2.5.3 should have included reference to the access road land plot. In short, Cory is not seeking to change its position in the protective provisions insofar as they relate to the access road and Cory have advised they will be confirming this at Deadline 7. TWUL accepts this position, subject to being content with Cory's Deadline 7 response in this respect.