**COVANTA ROOKERY SOUTH LIMITED**

**PROPOSED MILLBROOK POWER PROJECT**

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**A D V I C E**

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Introduction

1. Covanta Rookery South Limited ("CRSL") is the undertaker in relation to the Rookery South (Resource Recovery Facility) Order 2011 ("the RRF Order") which authorises the construction, operation and maintenance of an electricity generating station at Rookery South Pit, near Stewartby, just south of Bedford. The RRF Order came into force on 28 February 2013 and CRSL commenced the authorised development in January 2018.

2. Millbrook Power Limited ("MPL") have applied for development consent for the construction and operation of a gas fired power station on land south of CRSL's proposed facility ("the MPL Order"). The proposed Order limits sit within part of the Order limits of CRSL's RRF Order such that there would be an overlap between the two DCOs if the MPL Order were made. There are four key areas of potential interaction between the two projects namely in

relation to the works packages, rights of way, temporary use and other statutory powers and proposed mitigation and enhancement measures.

3. CRSL has sought to engage with MPL in order to ensure that the areas of interface between the proposed schemes are satisfactorily managed to the benefit of both. CRSL's view is that the most appropriate means to address the interactions is an agreement between the parties and at a meeting with MPL in September 2017, MPL agreed to circulate an appropriate draft agreement. However, that has not to date materialised. Instead, MPL's current proposals as contained in the draft DCO are that the RRF Order should be amended by the MPL Order in reliance on section 120 of the Planning Act 2008 to manage the relationship between the two schemes.

4. In summary, what is proposed is that the RRF Order should be amended to include protective provisions in favour of both CRSL (Schedule 10 Part 6) and MPL (Schedule 11 of the draft DCO).

5. My advice is sought on the scope of the powers contained in section 120 of the Planning Act 2008, the criteria for their exercise and whether the justification advanced by MPL for the inclusion of its proposals for amendment to the RRF Order are satisfy the relevant criteria.

<u>Section 120(5) of the Planning Act 2008</u>

6. Section 120(5) provides:

> *"(5) An order granting development consent may—*
>
> *(a) apply, modify or exclude a statutory provision*

*which relates to any matter for which provision may be made in the order;*

*(b) make such amendments, repeals or revocations of statutory provisions of local application as appear to the Secretary of State to be necessary or expedient in consequence of a provision of the order or in connection with the order;*

*(c) include any provision that appears to the Secretary of State to be necessary or expedient for giving full effect to any other provision of the order;*

*(d) include incidental, consequential, supplementary, transitional or transitory provisions and savings".*

7. The definition of "statutory provisions" is contained in section 120(6):

> *" 'statutory provision' means a provision of an Act or of an instrument made under an Act"*

8. The RRF Order is an instrument made under the Planning Act 2008 and it is therefore a statutory provision for the purposes of section 120(5).

<u>The Section 120(5)(a) and (b) distinction</u>

9. The two sub-paragraphs of section 120 use quite different terminology. Section 120(5)(a) allows a DCO to *"apply, modify or exclude"* whilst section 120(5)(b) allows "*amendments, repeals or revocations".* Section 120(5)(b) applies only to statutory provisions of *"local application". Public* General Acts cannot be amended, repealed or revoked. In this context, Parliament's decision to use the term *"modify"* in section 120(5)(a) can be seen as deliberate and to indicate that it means something other than *amend (the term used in section 120(5)(b)).* If the two terms were synonymous, there would be no need for section 120(5)(b) to refer to anything other than repeals or

revocations, because amendments to all statutory provisions would fall within the compass of section 120(5)(a).

10. As to the meaning of "modify", read in the context of the words *"apply"* and *"exclude",* it is clear that it is intended to mean to take the relevant statutory provision and to apply it in appropriately modified form to the development to be authorised by the DCO, leaving the original statutory provision unchanged. Examples of applying this approach can be seen in Articles 22(4) and 26 of the draft MPL Order and Article 21 of the RRF Order.

11. The term "*modify*" does not therefore extend to amending provisions within a different Act or statutory instrument. I would add that it would be unusual for Parliament to use the term *"modify"* as a means to describe amendments to primary and secondary legislation and the context shows that this was clearly not its intention. It follows in my view that MPL cannot rely on the power contained in section 120(5)(a) in order to support any amendments to the RRF Order.

12. I also note that Article 39 and Schedule 11 to the MPL Order are headed *"Modifications to* ***and amendments*** *of the Rookery South (Resource Recovery Facility) Order 2011* indicating that MPL itself recognises that what it proposes extends beyond the scope of the power contained in section 120(5)(a).

Section 120(5)(b)

13. Section 120(5)(b) would in principle allow a subsequent DCO to effect amendments to an earlier potentially inconsistent DCO. The RRF DCO is a statutory provision of local application and I can see no reason in principle why the power of amendment should not be available in relation to it. The only potential objection is that recourse to this power might circumvent the safeguards which are embodied within the procedures for making changes to DCOs contained in section 153 and Schedule 6 to the 2008 Act. However, given that the requirements of the changes procedures in terms of consultation and examination are little different to those for new DCOs, this is not a serious argument against the use of the section 120(5)(b) power in such circumstances.

14. As to the criteria to be satisfied before the Secretary of State sanctions the inclusion of provisions amending an earlier DCO within a subsequent DCO, section 120(5)(b) uses the familiar *"necessary or expedient"* wording. Necessary means required in the particular circumstances of the case, whilst expedient is best defined as meaning reasonable in all the circumstances.

15. Whether MPL has can demonstrate that either of these criteria is met in the context of their particular proposals for managing the interface between the two schemes will be a key consideration for the examination. I would note that the statutory test applies as much to the detail of the amending provisions as it does to whether they should be included at all.

MPL's Justification

16. MPL appear to accept that the interaction between the CRSL scheme and its proposals can satisfactorily be addressed by an agreement. That much is clear from the discussions between the parties and the content of MPL's *"MPL Covanta Position Statement"*.[1] This is plainly material to whether or not the amending provisions of its DCO are necessary or expedient. In the context of CRSL's already authorised nationally significant infrastructure project, MPL are more likely to be able to persuade the Examining Authority and the Secretary of State that such provisions should be included where they have made concerted efforts to reach agreement with CRSL but failed, rather than where no meaningful attempt has been made at all.

17. Because MPL appears to have proceeded on the assumption that it can rely principally on section 120(5)(a) neither the Position Statement nor the Explanatory Memorandum grapple with the implications of the 'necessary or expedient test'. Such justification as is advanced is directed at the need to manage the interface between the schemes (which is not disputed but can be dealt with by agreement) and general assertions that the proposed clauses provide "certainty" (although the proposed drafting appears to provide certainty only for MPL) and that clauses requiring the consent of another party or undertaker prior to the exercise of powers are commonplace. Neither document attempts to justify why MPL should be placed in the position of being able to dictate[2] whether CRSL's already approved nationally significant project should be allowed to be carried out which is the effect of paragraphs

[1] See e.g. paras.2.3 and 2.5 p.2

[2] Subject only to the arbitration clause within the RRF Order at Article 34.

24 and 25 in Schedule 11 Part 2 to the draft DCO. There are better ways of ensuring the necessary certainly for both parties than this. It does not appear to me to be an approach which is either necessary or remotely reasonable and therefore it fails the statutory test.

18. I am also concerned about the proposals in relation to the requirements of the RRF Order contained in paragraphs 27 and 28 of Schedule 11 Part 2 of the draft DCO. Effectively the Secretary of State is being invited to sanction unspecified and unlimited breaches of requirements with no particularisation of the likely effects of such breaches. That is not reasonable. This is coupled with the introduction by way of amendment, of a purported defence to any resulting offence committed under section 161 of the 2008 Act. Whilst the Explanatory Memorandum refers to examples of Acts or statutory instruments deeming a person to have authority to create a public nuisance or providing defences to offences,[3] none appear to me to be comparable to the circumstances here.

19. The only suggestion as to a relevant enabling statutory power for these paragraphs is to section 125(4) and schedule 5 paragraph 10 to the 2008 Act (the protection of the property or interests of any person). That power does not in my view extend to the creation of defences to offences contained within the 2008 Act. Indeed, it would be a surprising result of the scheme of the 2008 Act, which is the enabling Act, if it allowed in any circumstances, undertakers to claim exemption from the principal means of enforcement available under the Act. It would also be inconsistent with the apparent policy

[3] See paras.77 to 79

of the Act which, as is clear from section 120(8) reserves the creation of criminal offences (save a very limited category) to Parliament.

20. The proper route to address any inconsistency between the requirements within the CRSL Order and the MPL scheme is to amend the requirements to provide for appropriate flexibility if such amendment can be demonstrated to be necessary to avoid potential inconsistency.

Conclusion

21. MPL has not in my view adequately justified the amending provisions it is seeking. As presently advanced they lack proper statutory authority and/or fail to meet the statutory test that they be necessary or expedient. An agreement between CRSL and MPL is the appropriate means to address interface issues because it allows the flexibility both parties require but in a way which properly respects the statutory scheme and the policy of the 2008 Act.

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7 March 2018

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