

Planning Act 2008

**The Infrastructure Planning (Examination Procedure) Rules
2010**

**Application by Cory¹ for an Order granting development
consent for the Riverside Energy Park**

Written Representation

on behalf of



**Western Riverside Waste Authority
20 May 2019**

¹ WRWA has contracted with a number of “Cory” associated operating companies over the years, but they are all referred to as “Cory” in this Written Representation other than Riverside Resource Recovery Limited and Riverside Energy Park Limited.

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Introduction

1. This representation is made on behalf of the Western Riverside Waste Authority (“WRWA”), in advance of a Compulsory Acquisition examination hearing scheduled for 6/7 June 2019, further to its initial representation submitted on 1 February 2019.

2. WRWA objects to the making of any order granting development consent for the Riverside Energy Park which includes the compulsory acquisition of plots 02/02, 02/09, 02/12, 02/16, 02/17, 02/30 and 02/56 identified on the land plans and in the book of reference, and in which WRWA holds a leasehold interest, pursuant to the application made by Cory (“the Applicant”). This representation outlines the reasons for its objection, using the following structure:
 - a. Background:
 - i. WRWA waste management responsibilities & arrangements;
 - ii. WRWA’s status as a statutory undertaker under section 8 of the Acquisition of Land Act 1981 (and application of section 127 of the Planning Act 2008);
 - iii. The history of the Belvedere Energy from Waste (“EfW”) facility;
 - iv. The financing of the EfW facility;
 - v. The construction and operation of the EfW facility;
 - vi. The refinancing of the EfW facility;
 - vii. The ongoing commercial relationship between WRWA and the companies within the same group of companies as the Applicant;
 - viii. Attempts to acquire the necessary land and interests by negotiation.
 - b. Impact of the proposed compulsory acquisition:
 - i. Acquisition of WRWA’s leasehold interest (plots 02/02, 02/09, 02/12, 02/16, 02/17, 02/30 and 02/56 - pink land on Land Plan Sheet 2 of 16);
 - ii. Acquisition of rights (plots 02/01, 02/03, 02/10, 02/13, 02/14, 02/15, 02/18, 02/19, 02/25, 02/29, 02/31 and 02/32 - blue land on Land Plan Sheet 2 of 16)
 - iii. Contractual implications;

- iv. Technical implications for the EfW facility;
- v. Serious detriment to the carrying on of the undertaking.
- c. Attempted misuse of Planning Act 2008 powers
 - i. Importance of a failure to attempt to negotiate
 - ii. Availability and sufficiency of compensation following compulsory acquisition
- d. A compelling case in the public interest?

Background

WRWA waste management responsibilities & arrangements

3. WRWA is a “statutory joint waste disposal authority” which was formed in 1986², to take over part of the waste disposal functions previously carried out by the Greater London Council (“GLC”) for the London Boroughs of Hammersmith & Fulham, Lambeth and Wandsworth and the Royal Borough of Kensington and Chelsea. There are 3 other such statutory joint waste disposal authorities in London (which cover 21 of the 32 London boroughs). They were formed to fulfil ongoing waste contracts and to ensure the utilisation of strategic waste assets. They have two key powers:
 - a. a power of direction – which means they can direct their constituent councils where to deliver the waste they collect, and
 - b. a power of levy – which allows them to redeem costs from constituent councils.
4. WRWA and its constituent councils are responsible for the collection, recycling, composting and treatment of some 380,000 tonnes per annum of household and commercial waste generated within their boundaries. The boroughs served by WRWA have a combined population of approximately 980,000, living in 407,000 households. The Belvedere EfW facility is owned and operated by Riverside

² WRWA was established in 1986 as an autonomous statutory local government body to undertake the waste disposal functions prescribed by the Local Government Act 1985 and the Waste Regulation and Disposal (Authorities) Order 1985. Its waste management powers and duties are as set out in the Environmental Protection Act 1990.

Resource Recovery Limited (“RRRL”) (one of a group of companies which includes the Applicant). The Belvedere EfW is WRWA’s sole means of recovery of waste that cannot be reused or recycled. It is therefore an important strategic waste management facility for WRWA and its constituent councils, and indeed for London as a whole.

5. Further details about WRWA and its operations can be in the Annual Report for 2017/18, which is appended to this representation at Annex 1. It is important to appreciate that WRWA’s undertaking (which is authorised by statute), relies upon the transportation of waste by water. Its two waste transfer stations, which are described below, are on the River Thames. Its bulk transportation of waste is carried out by water transport, on barges along the River Thames, see pp.9-10 of Annex 1.

WRWA’s status as a statutory undertaker under section 8 of the Acquisition of Land Act 1981

6. WRWA is a statutory undertaker under section 8 of the Acquisition of Land Act 1981. It is a person “authorised by enactment” to carry on an undertaking which falls within section 8(1)(a), in that not only does it work docks from which its waste barges operate, but its undertaking is concerned with the transportation of waste by water.
7. As such, WRWA benefits from the protection afforded by section 127 of the Planning Act 2008. Compulsory acquisition in relation to its interests can only be authorised provided the Secretary of State is satisfied that “the nature and situation of land [is such] that it can be purchased and not replaced without serious detriment to the carrying on of the undertaking”. The issue of serious detriment is addressed below.

The history of the Belvedere EfW facility

8. In 1986 WRWA inherited from the GLC two riparian waste transfer stations, Smugglers Way and Cringle Dock, both located in the administrative area of the London Borough of Wandsworth. It also inherited a waste disposal contract with

Cory to transfer all of its waste by river to a landfill site at Mucking, Essex until 2000. WRWA carried out a £6 million redevelopment of its Cringle Dock Transfer Station in 1991 to convert it from waste pulverisation to waste compaction and, as part of an agreement with Cory that enabled this, the waste disposal contract with Cory was extended until 2002.

9. In 1998 WRWA settled a waste strategy to inform its procurement process for the management of its waste post 2002. Bidders were allowed to tender for either a short-term 7 year period or a long term 30 year period or both. WRWA received 2 short and 3 long term bids. It was ultimately decided to pursue the long term proposal submitted by Cory. A Waste Management Services Agreement (WMSA) was signed with Cory on 30th May 2002 and commenced on 5th October 2002. Under the WMSA, WRWA has to direct all waste under its 'power of direction' to Cory, but it guarantees no level of tonnage, no minimum payment and no level of calorific value. See below re the important provisions of the WMSA. In short, as will be explained, the contractual arrangements with Cory are of central importance to this representation; and the impact on the WMSA (and in turn WRWA) is a matter of real public interest. It is therefore necessary to reach a clear understanding of the way the WMSA works. To that end, two documents are appended to this representation. The first is a Summary Overview of the WMSA, produced by Shakespeare Martineau (WRWA's solicitors). Its aim is to explain the relevant aspects of the WMSA. That is appended as Annex 2. The second is a Note on Impact (Waste Management Services Agreement), which seeks to explain the effect of the proposed compulsory acquisition on the contractual arrangements between the parties. That note is appended as Annex 3. Relevant extracts of the WMSA appear at Annex 9.
10. The WMSA was let on the basis that the residual waste (that which cannot be recycled) would continue to go to Cory's landfill site at Mucking, for an interim period, before being treated at the RRRL EfW Facility for the remainder of the WMSA.

11. At that time, the proposed RRRL EfW Facility still needed to obtain planning permission and, following that, it would need to be financed and constructed. This had been a common position for the long term bidders, all of whom had tendered landfill followed by different Energy from Waste solutions.
12. Cory uses WRWA's two Transfer Stations to transfer residual waste onto the river and has peppercorn leases from WRWA over the sites, co-terminus with the WMSA. Under the WMSA Cory is also permitted to transfer its own third party commercial waste through the Transfer Stations.
13. As well as WRWA's residual waste, Cory is also required to manage its recyclable waste and the Household Waste and Recycling Centre (HWRC), where the public can bring their waste directly. Cory were required to build WRWA a new 84,000 tonne per annum Materials Recycling Facility (MRF) and rebuild the existing HWRC. Both these facilities are situated at the Smugglers Way Transfer Station. The MRF was opened by HRH the Princess Royal in March 2011 and the HWRC was re-opened following refurbishment in September 2012.
14. As part of its statutory arrangements, WRWA is entrusted with powers in respect of borrowing. It is able to borrow funds at competitive rates. Pursuant to those public powers, 50% of the capital cost of the HWRC (£3million) and 80% of the MRF (£22 million) were directly funded by WRWA via an open book accounting process with Cory.
15. In 1992/93 there was a public inquiry in relation to a planning application by Cory, proposing a 1.2 million tonne EfW Facility at Belvedere. The scheme was rejected by the Inspector mainly because the site was deemed to be too small (Cory's land ownership was less at the time, around 3 hectares) and Norman Road too narrow. Cory submitted another application jointly with Powergen in 1995 but this was subsequently withdrawn in 1997.
16. Cory submitted a planning application for the current EfW facility at Belvedere in 1999 (with a variation in 2002) and a public inquiry was held in 2003. The

inspector's report in 2004 recommended that the Secretary of State grant approval subject to conditions. The Secretary of State's view differed on a number of points with the Inspector and she also wanted to take into account matters that had arisen following the close of the inquiry. Following consultation, the public inquiry was reopened in 2005 and the inspector recommended approval again. In 2006, the Secretary of State granted permission, but the Mayor of London and Bexley Council challenged that decision in the High Court. It was not until February 2007 that the permission cleared all the planning and legal hurdles. A copy of the Secretary of State's decision letter appears at Annex 4.

The financing of the EfW facility

17. The original date by which Cory was to have achieved Financial Close on the EfW Facility (i.e. put in place the finance necessary to construct the EfW Facility) was 31st December 2004, but the WMSA had specifically allowed for the possibility of delay and, by mutual agreement, the longstop date was extended many times until it was finally achieved on 31st July 2008. Arrangements were also negotiated with Cory during this time should alternative interim landfill arrangements have been necessary, but following a number of planning extensions the Mucking landfill site did not close until 2012.
18. The project received £470m funding under a loan facility by the Bank of Ireland, Barclays Capital and Calyon as the joint lead arrangers. In addition, equity finance of approximately £80m was arranged by Cory.
19. Originally, in 2002, the intention was that the plant would have been a "merchant facility" and the WMSA worked on a simple supply and pay basis (WRWA guarantees no tonnage, no minimum payment and no level of calorific value). However, prospective funders became concerned with condition 5 of the planning permission, which restricted the source of the waste to Greater London (a principle Cory had agreed to during the inquiry process):

“the plant shall process only waste arising from Greater London or transported to it from a riparian waste transfer station in Greater London, other than the 85,000 tonnes per year specified in condition 41 below;”

20. In practical terms this effectively meant that, without access to WRWA’s transfer stations, the EfW Facility was a stranded asset. Consequently, to finance the project, the funders required WRWA to become the funder of last resort in a termination scenario and the project evolved into a Public Private Partnership with some quasi Private Finance Initiative (PFI) constituent parts, in relation to the EfW element of the services.
21. In the run up to Financial Close in 2008 (which occurred only 6 weeks before Lehman Brothers filed for bankruptcy), the economic climate was fraught. In this period the LIBOR rate, foreign exchange rates and steel prices all increased. The WRWA gate fee effectively became the balancing figure within the financial model and it increased by £11 per tonne between March and June 2008 (representing around £4 million pounds a year at that time).
22. WRWA was the anchor contract for the EfW Facility (representing 72% of the design throughput at the time) and, in exchange for its increased risk on termination and higher gate fees, it received a number of important benefits in exchange. The contractual arrangements are summarised in the WMSA Summary (appended as Annex 2) and the impact on WRWA is set out in the Impact Note (appended as Annex 3). WRWA entered into a lease and sub-lease arrangements which, together with contractual rights over the RRRL land, provided it with protection in case of changes in law as to how waste needed to be treated in the future. WRWA also received residual rights for 14 years beyond expiry of the WMSA when it can choose either to receive a royalty from RRRL or have its waste processed at effectively cost plus 10% or a combination of the two. The lease over the RRRL land, which runs until 2058, provides the security to WRWA that it will receive those residual rights. The lease and sub-lease appear at Annex 5.

The construction and operation of the EfW facility

23. In February 2007, Cory selected Von Roll Inova as the engineering, procurement and construction partner for the project, who in turn selected Costain as the civil engineering contractor. Construction began in 2008 and the EfW Facility was finally commissioned in October 2011 but not before Von Roll Inova had gone bankrupt and been replaced by Hitachi Zosen Inova.
24. The Riverside Resource Recovery facility incorporates a waste treatment technology known as incineration. Incineration involves combustion of organic materials and substances to generate heat, which is used to produce power. It also converts waste into bottom ash, flue gases and particulates.
25. The waste is initially combusted in the combustion units of the power plant. The process is monitored to ensure that minimum combustion temperatures exceed 850°C. High-efficiency boilers are used to recover the heat energy from the flue gases. The heat energy is further converted into electric power through the use of steam turbines. The turbine at the facility is capable of generating 30MW of steam or heat energy and up to 66MW of electricity.
26. About 6MW of the total power generated by the EfW plant is used on site and the remaining power, around 66MW is supplied to the national grid. The power is initially generated at 11kV but the voltage is stepped up to 132kV for export to the grid.

The refinancing of the EfW facility

27. In 2015 Cory's then owners struggled to refinance the business and new owners acquired the business via a debt for equity swap. The new owners then restructured the business, selling off its waste collection and landfill businesses to focus solely on the RRRL EfW facility and its associated London operations and rebranded as Cory Riverside Energy.

28. In March 2017, Cory completed a £520 million refinancing of the remaining business, including the EfW Facility itself, and as funder of last resort, this required WRWA approval. Following about a year of detailed negotiations a commercial agreement was reached that allowed the WMSA to be amended and restated on 28th March 2017.
29. After the 2017 refinancing, the business was sold in June 2018 (reportedly for £1.5 billion) and the new owners wished to refinance the project again. Following about 4 months of intensive negotiations, Cory completed another £540 million refinancing on 17th October 2018 having reached another commercial agreement with WRWA.

The ongoing commercial relationship between WRWA and the same group of companies as the Applicant

30. The WRWA has an ongoing commercial relationship with Cory, working with it to fulfil its statutory responsibility to dispose of the household, commercial and industrial waste of its constituent councils. As will be appreciated from the above history, there have been various occasions on which negotiation (and renegotiation) of that commercial relationship has been necessary. WRWA contracts in the public interest, its purpose is a statutory one, and so although its approach must be commercial, it is with the public interest in mind. Attempts to negotiate will be addressed further below. At this stage, it is necessary to note only the following. Given WRWA's protected status as a statutory undertaker, and bearing in mind that long established and close commercial relationship, it is unacceptable that no meaningful attempts were made before the DCO application to either acquire the necessary land and interests by agreement, and/or to renegotiate the WMSA. It is flatly contrary to the Government's guidance, set out in "Planning Act 2008 Guidance related to procedures for the compulsory acquisition of land" (September 2013) para. 25. It should be recognised that (unusually), this is not a situation in which the public interest is to be balanced against private loss (cf. paras. 14-16 of that Guidance). There is clear public interest in ensuring that WRWA's contractual position is not undermined in the

manner inevitable if the DCO is approved with the compulsory acquisition powers presently sought. See the Note on Impact appended as Annex 3.

Attempts to acquire the necessary land and interests by negotiation

31. On 13th November 2017, Cory's then Chief Executive Office made a presentation to the WRWA outlining Cory's future plans, including some background on the proposed sale process and a high level summary of its proposals for a Riverside Energy Park (REP). Cory made its plans for REP public on 27th November 2017; and it is understood that Cory notified the Inspectorate of its intention to apply for a DCO in November 2017.

32. WRWA then received a letter from Cory dated 5th February 2018 which provided a limited amount of detail on the proposed REP, including its intention to apply for a DCO. The letter recognised that there was a risk that the WRWA services could be interrupted and talks of land being transferred as being "Surplus Land" although that reference is not to land described in that way (the WMSA specifically identifies "Belvedere Surplus Land" as being land to the south of the EfW Facility. The letter provides the barest detail in relation to the use of the existing jetty and other infrastructure. It mentions that Cory would like to "discuss" the protection of WRWA's interest in "Riverside 1" (the EfW facility) but includes no practical proposals for that. It ends by asking for WRWA's consent to subdivide its lease over the RRRL land and release its interests in it.

33. In June 2018 WRWA received the REP Section 42 notice and responded objecting to the proposed granting of compulsory purchase powers to Cory. In particular, the letter said that the use of compulsory acquisition powers should not be permitted to frustrate the WMSA arrangements on any basis other than terms freely agreed with the WRWA. It was noted that the issues do not revolve solely around monetary compensation but include maintaining the security of the disposal route for the general waste generated by the constituent councils.

34. In December 2018 the Planning Inspectorate announced that it had accepted Cory's application for an Order Granting Development Consent for REP and WRWA registered as an Interested Party by making the Relevant Representation.
35. Following a meeting with Cory on 28th February 2019 WRWA received a letter from Cory on 25th March 2019 setting out the basis upon which an agreement could be reached, but none of which could come into effect before successful financing. It was said that the final agreed documents would require the agreement of lenders . WRWA responded on 5th April 2019 explaining why that was not an acceptable basis upon which to proceed
36. A subsequent offer was received from Cory on 24th April 2019 which is similarly unacceptable to WRWA (and a response will be provided to it).
37. The very limited contact initiated by Cory shows that there was no attempt at all to acquire the necessary land and interests by agreement before the DCO process was commenced; and since then, no meaningful attempt to do so.
38. Copies of all relevant correspondence appear at Annex 6.

Impact of the proposed compulsory acquisition

Acquisition of WRWA's leasehold interest

39. Article 21 of the draft Development Consent Order would authorise the compulsory acquisition of WRWA's leasehold interest in plots 02/02, 02/09, 02/12, 02/16, 02/17, 02/30 and 02/56, as identified in the land plans and book of reference.

Acquisition of rights

40. Article 23 of the draft Development Consent Order would grant new rights as specified in Schedule 7 over plots 02/01, 02/03, 02/13, 02/14, 02/15, 02/18, 02/19, 02/25, 02/29, 02/31 and 02/32, in which WRWA has a leasehold interest. Article 30 would authorise the temporary use of plot 02/10, in which, again, WRWA has a leasehold interest.

Contractual implications

Contractual implications

41. The implication of the compulsory acquisition of the leasehold interest described above is very significant in the context of a contractual arrangement which balances risk and mitigation carefully. The loss of scope to mitigate against changes in circumstances weighs heavily against the public interest invested in the security of waste disposal arrangements. The Note on Impact provides further detail, only the barest summary is included here:

- a. During the currency of the WMSA/Residual Value Agreement³, WRWA's change in law exposure would be significantly increased. If (as is entirely possible), circumstances arise triggering those provisions in the contract, it is highly detrimental to WRWA and, in consequence, to the public interest, if the ability to either adapt by using the currently available land, or to construct a facility to address directly that change, is lost.
- b. Upon an early termination of the contractual arrangements, again, the scope to mitigate WRWA's losses would be removed by its inability to use the land to construct another facility. Such land is extremely scarce; taken together with the existing jetty and other infrastructure, that security is difficult if not impossible to replace. As is summarised below, it is unclear how compensation might address that loss: in circumstances in which that security would be necessary, the land would be enormously valuable, rivalling that of the DCO scheme value.

Technical implications for the EfW

42. A Technical Note produced by Wood Environment & Infrastructure Solutions UK Limited ("Wood") is appended to this representation as Annex 8. The WRWA is very concerned that the operator of the EfW, as a company associated with the Applicant, has not properly brought to the examining authority's attention the potential conflicts between the existing EfW facility and the construction and operation of another. Its concern about the potential for conflict was raised in its

³ Residual Value Agreement – see paragraph 3(c) of the Note on Impact – this agreement relates to WRWA's entitlement to residual value rights for the period 2032 to 2046. A copy appears at Annex 7.

original representation. In light of that concern, WRWA asked Wood for advice about those matters and discloses it now. All data, methodology and assumptions used to support the points made in the Wood report are contained within it.

43. Wood has undertaken a technical risk assessment dealing with:

- a. The REP construction phase, in which there is clear potential for conflict; and risk to the smooth operation of the existing EfW facility;
- b. The REP operational phase, in which, again numerous points of conflict have been identified; and
- c. The fact that although the facility is promoted via the Planning Act 2008 regime as a result of its energy generating capacity (and no point is taken on “need” in that context), there is no demonstrable need for its waste capacity.

44. It can be noted that if there is limited need for the proposed additional waste capacity, the provision of the new facility has the potential to undermine WRWA’s position in respect of the existing EfW still further. The Technical Note requires to be read in full.

Serious detriment to the carrying on of the undertaking

45. The use of compulsory acquisition powers as proposed would cause serious detriment to WRWA’s carrying on of its undertaking. The contractual impacts alone constitute serious detriment; so too the technical implications of the construction and operation of the proposal. Together, they are wholly unacceptable to WRWA. No serious attempt has been made to address, let alone mitigate that detriment.

Attempted misuse of the Planning Act 2008 powers

Importance of a failure to negotiate

46. The examining authority is here dealing with parties who have had close contractual relationships providing for the disposal of London’s waste since the mid 1980s. In the period of more than three decades since WRWA inherited contractual

arrangements with Cory from the GLC, on numerous occasions, the parties have successfully negotiated the construction and provision of new and improved facilities; major financing and refinancing arrangements, amongst other more mundane changes to the relationships between them. In these circumstances, it is egregious that Cory seek to bypass those normal processes, by using Planning Act 2008 powers to compulsorily acquire a key part of the negotiated mitigation for risk within the WMSA and other contractual arrangements and to force a sharing of the jetty and other infrastructure with that existing EfW, with the clear potential for conflict inherent in those arrangements. It is:

- a. Contrary to the spirit and purpose of the 2013 national guidance referred to above;
- b. Contrary to the public interest inherent in maintaining WRWA's position;
- c. A misuse of Planning Act 2008 powers, which should not be supported.

Availability and sufficiency of compensation following compulsory acquisition

47. As will be appreciated from the Summary of the WMSA, the Impact Note and the Technical Note, the compulsory acquisition has profound implications for WRWA. It is wholly unclear how the impacts of the acquisition could be compensated for under the Compensation Code so as to provide equivalence in these circumstances.

Compelling case in the public interest?

48. For the foregoing reasons, it is WRWA's position that even taking into account all the benefits claimed in the DCO application materials, there is no compelling case in the public interest. On the contrary, the public interest is undermined by the harm to WRWA's interests which would arise if the DCO was confirmed with the compulsory acquisition powers sought.