

RICHARD BUXTON SOLICITORS

ENVIRONMENTAL, PLANNING & PUBLIC LAW

Office A, Dale's Brewery
Gwydir Street
Cambridge CB1 2LJ
Tel: (01223) 328933

www.richardbuxton.co.uk
law@richardbuxton.co.uk

North London Waste Authority
Unit 1B, Berol House
25 Ashley Road
Tottenham Hale
London N17 9LJ

Attn. Cllr Clyde Loakes, Chair

By email only: cldr.clyde.loakes@walthamforest.gov.uk

Our ref: HAC1/1/LPF

Email: lfoster@richardbuxton.co.uk; hnorman@richardbuxton.co.uk

28 January 2022

FOR YOUR URGENT ATTENTION JUDICIAL REVIEW PRE-ACTION PROTOCOL LETTER

Dear Sirs

Edmonton Incinerator, EcoPark, Advent Way, London N18 3AG

1. This is a letter before action sent in accordance with the pre-action protocol for judicial review.

Proposed Claimant

2. The proposed claimant is Dorothea Hackman

Proposed Defendant

3. The proposed Defendants are:

- (1) North London Waste Authority, Unit 1B, Berol House, 25 Ashley Road, Tottenham Hale, London N17 9LJ
- (2) London Borough of Camden¹
- (3) London Borough of Hackney
- (4) London Borough of Enfield
- (5) London Borough of Haringey
- (6) London Borough of Waltham Forest
- (7) London Borough of Islington
- (8) London Borough of Barnet

¹ Addresses and emails for the named local authorities are listed at Appendix 1

4. It is recognised that the named local authorities may prefer not to participate and to leave the matter to the North London Waste Authority (“NLWA”) or to be interested parties, but we have out of caution ensured that each is served with this letter at this stage.

Details of Interested Parties

5. Acciona S.A, Av. de Europa 10, Parque Empresarial, La Moraleja 28108 Alcobendas, Madrid, Spain.

Details of the decision being challenged

6. The execution, on 24 January 2022, by NLWA, on behalf of the other local authorities, of a contract with Acciona S.A (“**Acciona**”) for the construction of the Edmonton Incinerator (the “**Edmonton Incinerator**”), part of the North London Heat and Power Project. The contract for the construction of the Edmonton Incinerator will be known as “the **Contract**”.

Date of Decision

7. 24 January 2022

The issue

Factual Background

8. This is a challenge to the decision by the Defendant parties to execute the Contract for the construction of an incinerator. The project will tie the seven local authorities to a solution for dealing with their waste that is obviously inconsistent with the climate and ecological emergency, national net zero targets for 2035 and 2050, and the fifth and sixth carbon budgets, which call for significant reductions in greenhouse gas emissions during the periods 2028–32 and 2033–37, respectively. While NLWA and its seven constituent councils have regularly declared their climate ambitions and professed to be meeting the urgency of the climate and ecological crisis, the execution of the Contract is a failure to act in line with the climate imperative and the UK’s net-zero targets – in the single most consequential decision north London’s authorities could take on climate change.
9. NLWA is a statutory joint waste disposal authority under Sched 1 Waste Regulation and Disposal (Authorities) order 1985/1884 (the “**1985 Order**”), made under the authority of s. 10 Local Government Act 1985.² The NLWA is a body corporate, consisting of 2 members from the Borough Councils of Barnet, Camden, Enfield, Hackney, Haringey, Islington, and Waltham Forest (Art. 2 and Sched 1 Part III 1985 Order) (the “**Members**”). According to para. A.20 of the Standing Orders Members are bound by the provisions of their local Code of Conduct and the Localism Act 2011 for their constituent council when sitting on the NLWA.
10. Constituent local authorities which are members of the Defendant have all made public declarations regarding the climate crisis. Examples include the following:
 - a. Camden Council declared a Climate Emergency on 08 April 2019 and committed to doing everything possible to make Camden a zero carbon borough by 2030. Following amendments in 2020, Camden Council’s constitution now reflects that, *inter alia*, its Councillors will seek to protect and, if possible, enhance the natural environment, and act to mitigate and ensure resilience to climate change in recognition of the declared climate emergency: see para. 2.03(a) of the Constitution of the London Borough of Camden.

² Standing Orders are available at <https://www.nlwa.gov.uk/ourauthority/governance>

- b. Enfield Council declared a climate emergency on 08 July 2019 and committed to making the authority carbon neutral by 2030 or sooner.
 - c. Hackney Council declared a climate emergency on 28 June 2019, and approved a motion to do everything within the Council's power to deliver net zero emissions across its functions by 2040.
 - d. Haringey Council declared a climate emergency on 18 March 2019, and declared that it would work with stakeholders to work towards making Haringey Carbon neutral by 2030. It has set out a roadmap for how the borough will become net zero-carbon by 2041.
 - e. Islington Council declared a climate emergency on 27 June 2019, and pledged to work toward being a net zero borough by 2030.
 - f. Waltham Forest Council declared a climate emergency on 25 April 2019.
 - g. In December 2021 Barnet Council set a target of reaching Net Zero by 2030.
11. Pursuant to the development consent order (the “DCO”), issued on 24 February 2017 to come into force on 18 March 2017,³ the Defendant took steps to engage a company to build the Edmonton Incinerator. A Prior Information Notice for the contract to construct the Edmonton Incinerator was published on the EU's (OJEU) tender site on 19 December 2019. The contract notice was published on 10 July 2020. A selection questionnaire was provided to interested tenderers, responses to which were received in September 2020. Although four bidders initially submitted responses to the questionnaire in September 2020, only one (Acciona) proceeded to submit documentation in response to the Invitation to Submit Detailed Solutions in April 2021. Acciona submitted a final tender on 25 October 2021.
12. A date for the Defendant's in principle decision on Acciona's bid was set for 16 December 2021.
13. On 16 December 2021, the Defendant's Programme Director provided a report to the Members recommending that authority be delegated to the Managing Director to finalise terms of the Contract and make the award to Acciona (the “Report”). The Report purported to include a 2021 business case review, which states that the Edmonton Incinerator “remains the most beneficial technical and environmental solution” (see para. 1.7 of the Report). The business case review was contained in Appendix D to the Report.
14. Appendix D provided as follows (with emphasis of the most misleading advice added):
- “1.2 [...] the replacement ERF at the Edmonton EcoPark remains the most environmentally, socially, and financially responsible waste management solution for north London residents. It [the Report] confirms that the alternatives will lead to higher net carbon emissions and cost significantly more than building a replacement ERF. [...]
- 4.4 The Authority has agreed and published a strategy for developing a Carbon Capture, Utilisation and Storage (CCUS) solution. The demolition of the existing facility in 2030 will provide adequate space for a carbon capture and conditioning plant and the ERF will be developed to be carbon-capture ready. A feasibility study is currently identifying options for the transportation and storage element of the full CCUS chain. [...]

³ The Secretary of State for BEIS received a request dated 28 March 2017 from NLWA for the correction of errors in the DCO (the North London Heat and Power Generating Station Development Consent Order 2017). Following further clarification of the request, an amended DCO (the North London Heat and Power Generating Station (Amendment) Order 2018) came into force on 20 July 2018, with the effect of increasing the plant's output limit from 70 to 78 megawatts of electricity.

4.6. Once CCUS has been implemented, the ERF will be a priority waste asset able to operate if non-CCUS plants are required to cease operation. CCUS would likely make the ERF carbon negative through the sequestration of biogenic carbon dioxide and could help to rebalance emissions from other sectors to support the UK's overall effort to achieve Net Zero. [...]

Environmental Performance – CO2 Emissions

5.19. The net CO2 emissions from the facility have been calculated to be approximately 28,000t per annum. This is based on the calculation process published by The Department for Environment, Food and Rural Affairs (Defra), based on the emissions from non-biogenic waste and considering the displacement of fossil fuelled power generation (a coal power plant has a carbon intensity of approximately 800g CO2 kWh and a gas power plant has a carbon intensity of approximately 373g CO2 kWh, both above the net emissions of the ERF) plus the carbon content of recyclable material output from the thermal process.

5.20. The GLA have set a Carbon Intensity Floor (CIF) at 400g CO2 / kWh which provides a limit on CO2 emissions from an Energy from Waste Plant. It is intended that the CIF will be reduced to 300g CO2/kWh in the future. The GLA has acknowledged that the ERF will meet these requirements by virtue of the district heating scheme. The ERF has been confirmed to perform at 356g CO2 kWh operating at 35 MWth heat supply (which is already committed) and 284g CO2 kWh when operating at 60 MWth (for which the heat offtake system has been sized).

5.21. The Authority is taking forward its strategy to implement Carbon Capture and Storage (CCS) and engaging with such departments as the Department for Business, Energy and Industrial Strategy (BEIS) to promote its viability. Installing CCS will likely make the facility carbon negative through the sequestration of biogenic carbon dioxide."

15. No papers outlining the Carbon Capture and Storage programme were provided with the Report. The latest the Claimant has found is a report created by the Programme Director for the Programme Committee, dated 02 September 2021 in which it is stated:

"3.5. Following a period of implementation in the early 2030s, it is possible for a post-combustion carbon capture plant (PCC) to be operational at the EcoPark by around 2035. However, the successful implementation and operation of any PCC plant will greatly depend on available funding and financing as well as the establishment of a suitable T&S network connection for the ERF, and the securing of the appropriate planning and permitting consents. The off-site T&S route is being investigated and will be informed by the mapping and options development included in the delivery strategy and initial stakeholder engagement."

16. In a letter to the Claimant's solicitors dated 14 January 2022, the Defendant makes clear that the 28,000-tonne CO2 figure in para. 5.19 of the Report was calculated in a carbon impact screening report commissioned by NLWA from the consultancy Ramboll in 2019 (the "**Carbon Impact Screening Report**"). The Defendant states that the calculations in the Carbon Impact Screening Report are based on *Energy from Waste: a guide to the debate* (2014) (the "**Defra Guidance**"), a Department of Environment, Food and Rural Affairs publication that builds on *Energy recovery from residual waste: A carbon based modelling approach* (2014) (the "**Defra Model**"). The Carbon Impact Screening Report predates and thus does not take into account the most recent publication from the Department of Business, Energy and Industrial Strategy, *Valuation of energy use and greenhouse gas: supplementary guidance to the HM Treasury Green Book on Appraisal and Evaluation in Central Government* (October 2021) (the "**BEIS**

Guidance”). As discussed below, however, NLWA did not follow the Defra Guidance (which is underpinned by the Defra Model) or BEIS Guidance with respect to electricity emissions factors (see para. 19, below).

17. On 16 December 2021, on the basis of the Report at a meeting of the Defendant’s Members, the Members voted to progress with the procurement. We draw the inference that there may have been a decision to delegate authority to the Programme Director to award the Contract to Acciona, though there are no minutes of the meeting online (please provide those by return).

Legal Principles

18. In the realm of public decision making, a public body must take into account all obviously material considerations, and disregard immaterial considerations: R (ClientEarth) v Secretary of State for Business, Energy and Industrial Strategy [2020] PTSR 1709 [99]-[100].
19. A public law decision may be quashed if it is based on a material error of fact or misleading summary of evidence: see *Fordham Judicial Review Handbook* (7th Ed) para 49.3 and the myriad cases set out therein.

Proposed Grounds of Claim

Errors in the Defendant’s decision

20. The premises, as set out above, contain the following misleading statements regarding the environmental credentials of the proposed Edmonton Incinerator:
 - a. Appendix D para. 4.4 communicates to Members that the Edmonton Incinerator “will be developed to be carbon capture ready”. This statement is misleading in that NLWA is not in any position to be able to predict that the plant will be CCS-ready, as the facility will be CCS-ready only once the technical assessments have been made and the financial support has been secured, neither of which currently applies. At this stage, it is not possible to determine whether – and there is no reason to expect that – the Government would provide NLWA with the requisite financing for CCS. Elsewhere, the Defendant provides more plausible information, stating that CCS technology *may* be installed around 2035, 13 years from now. That, of course, would be subject to further permission from BEIS. By stating that the incinerator “will be” CCS-ready, NLWA has misled Members on this crucial issue in a situation where: (i) the DCO does not require the Edmonton Incinerator to be CCS-ready, (ii) the proposed plant will *not* be built CCS-ready, and (iii) there are no legally binding mechanisms ensuring that the plant will be CCS-ready.
 - b. Appendix D para. 4.6 (much like para. 5.21) communicates to Members that “CCUS would likely make the ERF carbon negative through the sequestration of biogenic carbon dioxide”. This assertion is misleading for the following reasons:
 - i. NLWA normally excludes biogenic CO₂ emissions with reference to its total GHG emissions, but here, in the context of carbon capture, it selectively includes biogenic emissions to be able to claim that a greater amount of GHGs would be captured via CCUS than if only fossil-based emissions were captured. NLWA is thus using two different ways of calculating emissions, depending on which yields lower GHGs, without explaining the methodology to Members. A related inconsistency is apparent in NLWA’s approach to comparing landfill and EfW emissions: the Report ignores biogenic CO₂ avoided from landfill sequestration

but counts as “carbon negative” the avoided carbon when captured at an incinerator.

- ii. NLWA appears to be using “CCS” and “CCUS” interchangeably, even though the latter – “Carbon Capture, Utilisation and Storage” – could include utilisation rather than just storage, in which case (utilised) CO₂ is not necessarily avoided, as its release is just temporarily delayed.
- c. Appendix D paras. 5.19–5.21, which are further discussed below, state, among other things, that the proposed Edmonton Incinerator, if built, would emit 28,000 tonnes of CO₂ per year, based on the Defra Guidance. That Guidance, however, is:
- i. eight years old and therefore does not take into account any changes that have taken place in the intervening period. In a context where 2014–2022 includes the signing of the Paris Agreement and the introduction of ‘Net Zero’ into s. 1 of the Climate Change Act 2008, the use of this document materially ignores:
 - 1. any changes to the composition of the National Grid and therefore any energy displaced; and
 - 2. any changes to energy-from-waste and recycling technology.
 - ii. intended to “provide a starting point for discussions about the role energy from waste might have in managing waste” (p. 1). It is a guide for the debate. There is no indication it is intended to set out fixed methods for calculating CO₂ emissions from EfW plants for the next eight years.

By contrast, the BEIS Guidance is up to date, is intended to underpin key central government guidance from HM Treasury (the Green Book), and explains in great detail how to value energy use and greenhouse gas emissions. It is an obviously material basis for calculation of greenhouse gas emissions and, if NLWA had applied it, it would have been clear that the proposed incinerator would emit far more fossil-derived CO₂ per year than 28,000 tonnes.

- d. Appendix D para. 5.19 makes misleading assertions about the CO₂ emissions of the planned Edmonton Incinerator, stating that the plant would emit 28,000 tonnes of CO₂ per year. This calculation is based on Ramboll’s Carbon Impact Screening Report, which contains significant simplifications and fails to adhere to the following Defra Guidance requirements, which are specific to energy-from-waste (“EfW”) plants:
- iii. The Defra Guidance states: “The atmosphere cannot distinguish between CO₂ released from a biogenic source versus a fossil source. However, in terms of considering overall climate impacts it is important they are accounted for and treated differently to avoid double counting. The IPCC have agreed conventions for doing this.” To ensure that Members would be able to make informed decisions regarding the environmental impact of the proposed incinerator, NLWA should have informed the Members of this guidance, which would have clarified that the proposed incinerator, if built, would indeed emit large amounts of (biogenic) CO₂ by burning biogenic material (roughly 55% of all CO₂ emissions, or about 385,000 tonnes per year). Instead, NLWA misled and confused the Members by claiming that the plant would emit only 28,000 tonnes of CO₂ per year, implying that sending biogenic material to incineration results in zero carbon emissions, failing to explain that biogenic CO₂ emissions can be minimised through anaerobic treatment (which is not part of the plans for Edmonton), and failing to provide biogenic CO₂ emissions alongside publicly reported fossil-fuel

emissions, which must be reported as an information item under GHG Reporting guidelines (although they do not need to be accounted for).

- iv. The Defra Model specifies that composition analysis of waste streams, their biogenic and fossil content, and their change over time is required for adequate modelling of EfW incineration and landfill, as the biogenic content has a significant impact on the emissions balance of both technologies. Instead of following this requirement in line with the Defra Guidance and Defra Model, Ramboll's Carbon Impact Screening Report assumes that there will not be any change in the biogenic content over time. NLWA modelling thus excludes an examination of increases (including policy-induced ones) in the relative proportion of biogenic waste over time.
- v. The Defra Model states: "biogenic content of the waste should be maintained as high as possible through the removal of fossil plastics for recycling" and "mixed residual waste may need pre-processing to achieve the biogenic content required". However, the modelling presented in Ramboll's Carbon Impact Screening Report excludes this pre-treatment step. Moreover, NLWA has repeatedly rejected the option of installing a pre-sorting facility to extract plastics from the incineration stream, upgrade them, and redirect them to recycling, which is why pre-sorting is not included in the DCO and why it has not been seriously considered since the DCO was granted, despite relevant technological advances since then.
- vi. The Defra Model states: "Decreasing the carbon intensity of the background electrical energy mix was found to increase the biogenic content of waste required for a plant operating at a given efficiency, or alternatively increase the minimum efficiency of plant required to operate with a waste of a specific biogenic content". It continues: "as time goes on this case [for EfW] will get progressively worse for electricity only generation as the carbon intensity of the marginal energy mix decreases". Nevertheless, Ramboll's Carbon Impact Screening Report excludes an assessment of the impacts of the changing carbon intensity of the marginal energy mix; instead, the modelling assumes that the carbon intensity will remain stable for the lifespan of the planned incinerator.
- vii. In contrast to NLWA's public statements, Ramboll's Carbon Impact Screening Report does imply that the proposed incinerator – if it were to treat around 700,000 tonnes of waste per year – would emit 683,000 tonnes of CO₂ per year, which is nearly one tonne of CO₂ for every tonne processed. It also assumes that 45% of this CO₂ would be fossil carbon, meaning that according to NLWA's own technical documents (if not their public statements), the plant would emit 307,350 tonnes of fossil CO₂ per year based on the assumed feedstock, not 28,000 tonnes. By failing to publicly recognise these calculations, and by putting forward deceptive calculations, NLWA has further misled Members about the actual CO₂ emissions.
- viii. Prior to 2017, NLWA appears to have reported its biogenic emissions to Defra, yet since then it seems to have submitted data that corresponds only to part of the fossil portion of emissions. It is not clear whether the change in data submission corresponds to a change in Defra guidance (such as the UK Pollutant Release and Transfer Register, or PRTR), but a comparison of reported CO₂ emissions by NLWA and Cory to Defra highlights that NLWA seems to be misrepresenting its climate impact (see Appendix 2 at the end of this letter).

- e. Appendix D para. 5.19 also presents misleading information about the displacement of fossil-fuelled power generation, as NLWA did not follow the Defra Guidance with respect to electricity emissions factors.⁴ Regarding comparisons between landfill and EfW incineration, Paragraph 247 of the Defra Guidance states: "Predictions for the marginal electricity mix⁷⁰ show significant decarbonisation within the potential lifetime of existing energy from waste plants", with a clear statement in the footnote defining the marginal energy mix as "the energy mix that Government Green Book guidance says should be used for such comparisons". Paragraph 68 of the Defra Model states: "It is assumed that the source of energy being replaced would have been generated using a plant with the carbon intensity (emissions factor) of the marginal energy mix in line with HMT Green Book guidance on appraisal and evaluation." The footnotes to this paragraph specify that while a combined-cycle gas turbine (CCGT) was considered an appropriate counterfactual for use in 2013, it has not been appropriate for use since 2014 because of the progress made in decarbonising the UK's electricity supply. Indeed, the Defra Model explicitly confirms that "use of the [BEIS] marginal factor is the correct approach for detailed analysis" from 2014 onward. Yet, while the BEIS Guidance provides updated carbon intensity figures of background electrical energy mix, underpins key Government guidance from HM Treasury (the Green Book), and explains in great detail how to value energy use and greenhouse gas emissions, NLWA has failed to take BEIS Guidance into account. Consequently, NLWA has also misled the Members about the carbon intensity of the heat and electricity to be generated by the Edmonton Incinerator, specifically by referring to it as "low-carbon heat and power" although the Climate Change Committee clearly states that it does not qualify as "low-carbon".⁵
- f. Appendix D para. 5.20 states that the planned incinerator "has been confirmed to perform" at specific electricity output levels given certain levels of waste input, but NLWA does not clarify under which circumstances such confirmation was given or by whom. Moreover, incinerators typically need to be operational before such performance levels can be "confirmed", which raises questions about the factual accuracy of this claim.
- g. Appendix D para. 5.21 (much like para. 4.6) specifies that "installing CCS will likely make the facility carbon negative through the sequestration of biogenic carbon dioxide". For details on how this claim is misleading, see 19(b), above.
- h. Appendix D para. 1.2 advises the Members that replacing the current EfW facility "remains the most environmentally...responsible waste management solution". This statement is misleading with respect to four critical aspects: CO2 emissions, CCS readiness, overcapacity, and pre-sorting.
- i. Building an EfW facility that is not CCS-ready is not the most environmentally responsible option, since at the very least building a facility that is CCS-ready would be more responsible (leaving aside our client's preference for increased recycling through pre-sorting and other means, greater investment in a circular economy, and use of nearby surplus EfW incineration capacity for north London's significantly reduced, truly non-recyclable waste). In executing the Contract, the Defendants in fact made a deal for the construction of an *inferior* environmental option, particularly given that a) north London's truly non-recyclable waste could be treated at a nearby energy-from-waste incineration facility that expects to

⁴ One example of the way NLWA failed to follow the Defra Guidance was by modifying its assumptions about how much energy could be generated from waste in order to match the assumptions to client specifications. For example, the NLHPP Combined Heat and Power (CHP) Development Strategy acknowledges that "a net calorific value (NCV) of residual waste of 10 gigajoules per tonne has been specified by the Applicant".

⁵ See page 91 of the Climate Change Committee's *Local Authorities and the Sixth Carbon Budget*, published 9 December 2020.

install CCS technology by 2030 and that is expected to have significant surplus capacity, and b) the DCO for the planned Edmonton facility could easily have been modified to ensure the plant would be built CCS-ready. By claiming that the planned incinerator is the “most environmentally responsible” option, NLWA misled the Members and failed to make clear to them that CCS readiness is achievable today, that CCS-ready plants can be built using current technology, and that NLWA could have ensured (and could still ensure) that the Edmonton Incinerator would be built CCS-ready instead of specifically not CCS-ready. Indeed, the Government’s draft Energy National Policy Statement 3 states that emerging policy is that all EfW facilities must be built CCS-ready (para 2.5.4).⁶

- ii. The Government’s draft Energy National Policy Statement 3 also stipulates that emerging policy is that the construction of a planned EfW facility must not result in EfW overcapacity at the national or local level (para 2.10.5). NLWA has ignored clear warnings that building the incinerator would indeed result in overcapacity in London, has failed to make clear to the Members that building the proposed plant would result in overcapacity, and has not publicly acknowledged the GLA’s surplus capacity forecast, which states that London will have an estimated 950,000 tonnes of EfW incineration overcapacity if both the Edmonton plant and the second Cory incinerator in Bexley are to be built.⁷ Rather than following the Energy National Policy Statement, NLWA is *knowingly* creating EfW incineration overcapacity while disingenuously claiming to the Members that building the proposed plant is the “most environmentally responsible” option.
- iii. Building an EfW facility without a dedicated pre-sorting facility to extract recyclables from the incineration stream is not the “most environmentally responsible option”. The climate impact of such a facility would be to reduce the amount of fossil-derived CO₂ emitted from the proposed plant, in particular by extracting plastic that would otherwise be sent for incineration and whose burning would perpetuate the linear economy. As noted above, NLWA has repeatedly rejected pre-sorting as an option for reducing the amount of waste that is sent for incineration, even though Defra Guidance states that “biogenic content of the waste should be maintained as high as possible through the removal of fossil plastics for recycling” and “mixed residual waste may need pre-processing to achieve the biogenic content required”.
- iv. The Government’s draft Energy National Policy Statements, particularly EN-1 and EN-3, are material considerations to which NLWA and its Members should have given due regard and whose significance NLWA should have made clear to the Members. The draft Statements demonstrate that the Government is aiming to avert EfW incineration overcapacity and to ensure that all EfW plants are built CCS-ready. By relying on historic decisions that predate the draft Government guidance, misleading the Members about what guidance is relevant, and presenting the proposed incinerator as the “most environmentally responsible” option, NLWA caused Members to ignore relevant changing circumstances and considerations to which they should have given due regard.
- v. Should the Members claim not to have been misled by NLWA on CO₂ emissions, CCS readiness, overcapacity, and/or a pre-sorting facility, and should they also characterise the proposed plant as the “most environmentally responsible” option

⁶ The Government’s draft Energy National Policy Statement 3 is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1015236/en-3-draft-for-consultation.pdf

⁷ The GLA forecast is provided in Appendix 4 of our Claimant’s letter to NLWA of 16 December 2021.

although it would not be built CCS-ready, would create overcapacity, and would be built without a pre-sorting facility to mitigate its climate impact, then the Members will have failed to confront: a) the fact that they are procuring a non-CCS-ready EfW facility that will create EfW overcapacity and produce unnecessarily high emissions, and b) the consistency of that procurement with their climate change aspirations and policies.

21. There is no record of the relevant considerations set out above having been brought to the Members' attention. Nor is there any record of the Members grappling with the implications of these points for their London Boroughs' respective climate emergency declarations and net-zero pledges.
22. In light of the above, the decision by the Defendant to enter into the Contract is legally flawed by virtue of the failure to take into account any and each of the following considerations which were, given the matters covered in the Report, obviously material:
 - a. that the Edmonton Incinerator, if built, would release unnecessarily high emissions (both GHGs and air pollution)
 - b. that the Edmonton Incinerator, if built, would not be built CCS-ready
 - c. that the Edmonton Incinerator, if built, would result in EfW overcapacity
 - d. that NLWA's failure to install a pre-sorting facility would cause the Edmonton Incinerator, if built, to release unnecessarily high emissions (both GHGs and air pollution), while also hampering recycling
 - e. that emerging national policy in the consultation Energy National Policy Statements is that all EfW facilities must be built CCS-ready
 - f. that emerging national policy in the consultation Energy National Policy Statements is that new EfW facilities must not result in EfW overcapacity
 - g. that the draft Energy National Policy Statements, particularly EN-1 and EN-3, are material considerations to which due regard should be given
 - h. that the installation of a pre-sorting facility would be in line with Defra Guidance, which states that "biogenic content of the waste should be maintained as high as possible through the removal of fossil plastics for recycling" and "mixed residual waste may need pre-processing to achieve the biogenic content required"
 - i. that, according to an assessment commissioned by NLWA, the Edmonton Incinerator, if built, would not emit 28,000 tonnes of CO₂ per year but around 700,000 tonnes of CO₂, roughly 45% of which would be attributable to the burning of fossil-derived materials (mostly plastics)
 - j. that the Edmonton Incinerator, if built, would emit both fossil-derived CO₂ and biogenic CO₂, that both types of emissions must be reported following the latest government guidance, and that a single, consistent approach for calculating GHG emissions must be applied in all comparisons and projections
 - k. that other options, including applying for an amendment to the DCO to ensure the plant would be CCS-ready and installing a mixed-waste sorting facility to extract recyclables from black bag waste, were available to NLWA
 - l. that any or all of the above would have implications for the respective Council commitments on climate change, climate and ecological emergency declarations, and net-zero pledges.
23. Had the Members turned their minds to the obviously material matters outlined above, it is quite possible they would have reached a different decision and would not have approved delegating authority to enter into the Contract, such that the Contract would not have been entered into.

Details of Legal Advisors Dealing with this Claim

24. Richard Buxton Solicitors
Office A, Dale's Brewery
Gwydir Street
Cambridge CB1 2LJ

Attn. Lisa Foster

Tel: 01223 328933

Email: lfoster@richardbuxton.co.uk

Copy all correspondence to hnorman@richardbuxton.co.uk

Counsel

25. Alex Goodman and Nick Grant, Landmark Chambers.

Details of any information sought

26. The Claimant seeks from the Defendant:

- a. Confirmation as to whether the Defendant agrees with the Claimant's assertion that in view of the National Grid's ongoing decarbonisation, the CO2 emissions estimates on which the environmental impact assessment of the project are based, namely that the Edmonton Incinerator would emit 28,000 tonnes of CO2 per year, are not valid
- b. Confirmation as to whether the Defendant agrees that, based on forecasts in the National Grid's Future Energy Scenarios (2021), the grid could be decarbonised by 2035⁸
- c. Confirmation as to whether the Defendant agrees that the most recent BEIS Guidance – whose emissions factors are in line with National Grid decarbonisation forecasts – must be applied to calculate the amount of CO2 that would be emitted by the proposed Edmonton Incinerator
- d. Confirmation as to whether the Defendant agrees that the planned Edmonton Incinerator will not be built CCS-ready and that NLWA cannot guarantee that the plant will become CCS-ready
- e. Confirmation as to whether the Defendant accepts that a CCS-ready Edmonton Incinerator would be a better environmental option than that which is currently planned
- f. Confirmation as to whether the Defendant accepts the GLA forecast that London will have 950,000 tonnes of surplus capacity if both the Edmonton Incinerator and the 2nd Cory EfW plant in Bexley are to be built and, if the Defendant does not accept the GLA forecast, clarification as to what level of overcapacity NLWA does recognise
- g. Confirmation as to whether the Defendant accepts that, given the GLA's surplus capacity forecast and Cory's stated expectation that both of its Bexley EfW facilities are to operate with CCS by 2030, the better environmental option would be not to build the planned Edmonton incinerator, is not likely to operate with CCS before 2035, if ever

⁸ See, in particular, pp. 209–12, 221, 225, and 226 of the **Future Energy Scenarios**, available at <https://www.nationalgrideso.com/document/202851/download>

- h. Confirmation as to whether the Defendant accepts that the planned Edmonton Incinerator would be a better environmental option if it were built alongside a state-of-the-art pre-sorting facility to extract recyclables, reduce the amount of plastic the plant would burn, and thus reduce its overall climate impact
- i. Confirmation as to whether the Defendant accepts that that the Edmonton Incinerator, if built, would emit both fossil-derived CO2 and biogenic CO2, that both types of emissions must be reported following the latest government guidance, and that a single, consistent approach for calculating GHG emissions must be applied in all comparisons and projections
- j. Any record of the Defendant engaging with the new BEIS Guidance.

Details of any documents considered relevant and necessary

27. The Claimant considers the following documents are, in the event the Defendants propose to contest the claim, necessary:

- a. A full record and minutes of the Members' decision on 16 December 2021, to better understand the Members' consideration
- b. Any calculations of biogenic and fossil-derived CO2 emissions undertaken by the Defendant
- c. Any document showing the consideration the Defendant gave to the BEIS Guidance
- d. Any document exploring the feasibility of applying for the Edmonton Incinerator to be CCS-ready
- e. A full record of considerations of the proposed impact of the Edmonton Incinerator on the UK's ability to meet its net-zero targets and CCC waste sector targets
- f. A full record of considerations of the GLA surplus capacity forecast and the impact of contributing more EfW capacity than is required to treat London's waste
- g. A full record of considerations of the option of installing a pre-sorting facility alongside the planned Edmonton Incinerator.

The details of the action that the Defendant is expected to take

- (i) Consent to the Proposed Claimant's application for Judicial Review; and
- (ii) Pay the Claimant's costs of and relating to this prospective claim

ADR proposals

28. The Claimant has no ADR proposals.

Costs

29. If the claim proceeds the claimant will apply for a protective costs order pursuant to CPR 45.43 on the basis that the claim is an environmental matter. If you disagree this is an Aarhus matter or the making of a PCO on public interest grounds please give your detailed reasons. The claimant is an individual and is funded by Crowdfunding and will be seeking a £5,000 PCO on

the basis she is a retired school teacher and needs costs certainty before she commences legal proceedings. Please confirm your agreement to this costs cap of £5,000 in the aggregate.

Address for Reply and Service of Court Documents

30. Richard Buxton Solicitors
Environmental & Public Law
Office A, Dale's Brewery
Gwydir Street
Cambridge CB1 2LJ

Please respond by email only to:
lfoster@richardbuxton.co.uk with a copy to hnorman@richardbuxton.co.uk.

Proposed reply date

31. Please respond within 7 days, i.e. by 4 pm, 4 February 2022. If you are unable to respond by this date please acknowledge receipt and advise when we can expect your full substantive response.

Yours faithfully

Richard Buxton Solicitors

Richard Buxton Solicitors
Environmental, Planning and Public Law

cc. London Borough of Camden
London Borough of Hackney
London Borough of Enfield
London Borough of Haringey
London Borough of Waltham Forest
London Borough of Islington
London Borough of Barnet
Acciona S.A (presidencia@acciona.es, gabinetedeprensa@acciona.es,
ilblasco@acciona.com)

Appendix 1

London Borough of Camden
9th Floor, 5 Pancras Square
c/o Camden Town Hall
Judd Street
London WC1H 9JE

georgia.gould@camden.gov.uk
adam.harrison@camden.gov.uk
richard.olszewski@camden.gov.uk

London Borough of Hackney
1 Hillman Street
London E8 1DY

mete.coban@hackney.gov.uk
robert.chapman@hackney.gov.uk
mayor@hackney.gov.uk

London Borough of Enfield
Civic Centre
Silver Street
Enfield EN1 3XA

cllr.nesil.caliskan@enfield.gov.uk
Cllr.Kate.Anohue@enfield.gov.uk
Cllr.Hass.Yusuf@enfield.gov.uk

London Borough of Haringey
Civic Centre
High Road
London N22 8LE

isidoros.diakides@haringey.gov.uk
mike.hakata@haringey.gov.uk
peray.ahmet@haringey.gov.uk

London Borough of Waltham Forest
Waltham Forest Town Hall
Forest Road
Walthamstow E17 4JF

cllr.paul.douglas@walthamforest.gov.uk
cllr.grace.williams@walthamforest.gov.uk

London Borough of Islington
222 Upper Street
London N1 1XR

satnam.gill@islington.gov.uk
rowena.champion@islington.gov.uk
kaya.comerschwartz@islington.gov.uk

London Borough of Barnet
North London Business Park
Oakleigh Road South
London N11 1NP

cllr.p.zinkin@barnet.gov.uk
cllr.d.cohen@barnet.gov.uk
Leader@barnet.gov.uk

Appendix 2

Officially reported annual tonnes of CO2 emissions released to the air from two similar size capacity incinerators in London from 2007 to 2020

Source of data: DEFRA - UK Pollutant Release and Transfer Register (PRTR) - <https://prtr.defra.gov.uk/>

