

## Written evidence submitted by the Western Riverside Waste Authority (EB67)

### Submission of Evidence to Environment Public Bill Committee in respect of the Environment Bill

#### Western Riverside Waste Authority

- 1 Western Riverside Waste Authority (**WRWA**) is one of the remaining five autonomous statutory local government bodies established in 1986 to undertake waste disposal functions prescribed by the Local Government Act 1985 and the Waste Disposal (Authorities) Order 1985. WRWA assumed responsibility for waste disposal on behalf of its four constituent London Boroughs, namely Hammersmith & Fulham, Lambeth, Wandsworth and the Royal Borough of Kensington and Chelsea, following abolition of the Greater London Council. WRWA is funded by way of a levy raised on the Constituent Boroughs.
- 2 The law relating to the collection and disposal waste is principally contained in the Environmental Protection Act 1990 (**EPA**). A Waste Collection Authority (**WCA**) is under a duty to arrange for the collection of household waste (section 45 EPA) and to deliver for disposal all such waste to such places as the Waste Disposal Authority (**WDA**) directs (section 48(1) EPA).
- 3 Under section 51(1) of the EPA, a WDA is under a duty to arrange for the disposal of the controlled waste collected in its area by the relevant WCAs. In the area of WRWA, the Constituent Boroughs (CBs) also happen to be the WCAs.
- 4 WRWA has a substantial PPP type contract known as the Waste Management Services Agreement (WMSA) with Cory Environmental Limited (**Cory**) under which Cory provides waste management services for WRWA. Currently under that contract Cory manages WRWA's waste, principally at its Belvedere Energy from Waste (EFW) facility. WRWA directs the CBs to deliver their collected waste to two transfer stations, from which it is transported by Cory to the Belvedere EFW facility, in the main by barge.
- 5 WRWA has identified a particular issue in existing legislation which is confusing and a cause of potential disagreement between WDAs, WCAs and waste contractors in relation to food waste and the treatment of such by Anaerobic Digestion (**AD**). It is of the view that the Environment Bill (**the Bill**) should be amended to correct this anomaly. Furthermore, it is of the view that the Bill presents the opportunity to bring further clarity as to what constitutes, in law, recycling and associated terminology.

#### Food Waste

- 6 Clause 55(4) of the Bill makes provision for measures dealing with the Separation of Waste. It proposes inserting a new section 45A to the EPA in relation to the collection of recyclable household waste. It makes a number of provisions, including:
  - Recyclable household waste to be collected separately from other household waste
  - Recyclable household waste must be collected for recycling or composting
  - Recyclable household waste in each recyclable waste stream must be collected separately except where not technically or economically practicable or has no significant environmental benefit

- Specific identification of “recyclable waste streams”
  - Specific prohibition on co-mingled collection of dry recyclables (i.e. glass, metal, plastic and card and paper) with other recyclables i.e. food waste and garden waste.
- 7 WCAs may make arrangements for recycling waste which they remove from the waste stream (albeit that the WDA can object if it has itself made arrangements to recycle that particular waste stream). Many WCAs already carry out a separate food waste collection (which will be a requirement under the Bill, although it permits co-mingling of the collection with garden waste).
- 8 WRWA’s experience operating within the current legislative framework has identified an issue with the existing legislation (explained below) regarding the treatment of food waste by a WCA through AD (it is recognised this is not an issue in respect of the process of In Vessel Composting). WRWA believes that the opportunity should be taken in the Bill to correct this anomaly, especially given that it will become obligatory for a separate collection of food waste to be made. Once that separate collection is made mandatory, WRWA believes that it is likely that there will be an increase in WCAs seeking to recycle food waste and this may be through AD. The power of direction and the particular legal anomaly set out below is relevant only to the situation where there is two-tier local government and to the five statutory joint waste authority areas.

### Existing Legislation

- 9 Section 48 of the EPA sets out the duties of WCAs with regard to waste collected by them. In effect, section 48 sets out a sequence of compliance depending upon whether the WCA wishes to undertake any recycling of the waste it collects. The sequence of compliance runs as follows:
- WCA shall deliver waste collected to such places as the WDA directs under section 51(4)(a);
  - WCA may make arrangements for recycling waste which removes it from the scope of the direction;
  - WDA may object to the WCA having the waste recycled, if it has itself made arrangements to recycle that particular waste stream.
- 10 The EPA is not at all clear on what constitutes recycling for the purposes of the second and third bullet points above. It is not a defined term. Section 29 sets out a number of terms, referring to treatment in subsection 6 and including recycling as falling within the ambit of that term: “waste is “treated” when it is subjected to any process, including making it re-usable or reclaiming substances from it and “recycle” (and cognate expressions) shall be construed accordingly”. However, the EPA does not provide any further clarity or statutory guidance on whether any particular process or treatment would constitute recycling.
- 11 Section 55 of the EPA sets out specific powers of recycling for both WDAs and WCAs. The section states as follows:
- (1) This section has effect for conferring on waste disposal authorities and waste collection authorities powers for the purposes of recycling waste.

(2) A waste disposal authority may—

- (i) make arrangements . . . to recycle waste as respects which the authority has duties under section 51(1) above or agrees with another person for its disposal or treatment;
- (ii) make arrangements . . . to use waste for the purpose of producing from it heat or electricity or both;
- (iii) buy or otherwise acquire waste with a view to its being recycled;
- (iv) use, sell or otherwise dispose of waste as respects which the authority has duties under section 51(1) above or anything produced from such waste.

(3) A waste collection authority may—

- (i) buy or otherwise acquire waste with a view to recycling it;
- (ii) use, or dispose of by way of sale or otherwise to another person, waste belonging to the authority or anything produced from such waste.

- 12 Whilst it remains clear that a WCA has the power to recycle waste (see Section 48), what section 55 of the EPA does is to set out the further powers of WDAs and WCAs with regard to recycling. It does not directly seek to define recycling, but by addressing certain activities allowed in respect of recycling, with specific and different provision made for WDAs and WCAs, it has limited the ability of WCAs to undertake certain activities. The issue which WRWA has identified as causing difficulty is in relation to food waste and the treatment of such by AD.
- 13 Section 55 does not contain anything by way of definition of recycling. However, it is important to understand the parameters of these powers, which have been the source of some confusion, particularly in the way it might interact with section 48. The key provision in the context of the issue here is the ability to use waste for the purpose of producing from it heat or electricity and whether the purpose of AD would be classified as having the purpose of generating heat or electricity or alternatively the purpose of treating food waste to produce a digestate product (in a similar way that the composting of food waste produces a compost product).
- 14 The power of using waste for the purpose of producing from it heat or electricity is specifically available only to a WDA (section 55(2)(ii) EPA). It is noted that under this provision at least, the production of heat and electricity is classified separately from recycling of waste in the powers granted to a WDA in section 55(2)(i), but nevertheless logically on the reading of section 55 as a whole, would appear to fit within an extended definition of recycling, albeit that that is inconsistent with the waste hierarchy and is not permitted to a WCA.
- 15 Despite the generality of section 55(1), it does lay down boundaries to the respective powers of WDAs and WCAs with regards to recycling and associated processes. For these purposes, therefore, one might reasonably conclude that the more general power given to WCAs to recycle waste in section 55(1) would not include a power to produce heat and electricity from waste, even if one took the view that such activity by a WDA is deemed to be recycling. It would simply mean that this form of recycling

is not permitted to a WCA because of the explicit division of powers granted under section 55.

- 16 On the basis of section 29(6) alone, waste, which is subjected to AD would be “treated”, and as such would be counted as a “process”. It seems reasonably clear that it does involve a process which makes waste re-usable or allows for the reclamation of substances from it. It follows that it would be difficult to argue reasonably that AD is anything other than a process of recycling. However, in this instance, section 55 arguably impacts such an interpretation given it qualifies which type of authority is permitted to carry it out.
- 17 The Waste Framework Directive 2008 (WFD) contains a definition for recycling. Recycling means “any recovery operation by which waste materials are reprocessed into products, materials or substances, whether for the original or other purposes” (*Article 3(17)*). It includes the reprocessing of organic material but does not include energy recovery or reprocessing into materials to be used as fuels or for backfilling operations. This Directive was implemented in the Waste (England and Wales) Regulations 2011/988 (as amended), but the definition was not included. The EU has amended the WFD in the Amending WFD 2018. DEFRA issued a policy statement with regard to transposition of this in July 2020. The policy statement indicates that the 2018 amending waste directives [and 2020 CEP measures] due to be transposed by 2020 will be transposed by a combination of legislative and non-legislative changes with a minor impact.
- 18 As a general proposition and without prejudice to its specific suggestions in relation to AD and section 55 of the EPA made to address, WRWA believes that the Government should take the opportunity presented in the Bill to capture the WFD definitions to provide overall clarity as to the meaning of key terms such as recycling and recovery.
- 19 On the basis that these assumptions are correct regarding the lack of a specific power for a WCA to produce heat and electricity from waste, the question is raised whether the process of AD falls within this classification or whether instead it is to be classified as recycling, independently of the construction of the power in section 55(2). This appears to turn upon what the process of AD actually is. There is no statutory definition of AD. There are undoubtedly a number of different bespoke or branded technologies which might be classified as AD, but the common factor is that the process produces both biogas and a digestate. The gas may be refined further into biomethane for use as a fuel for vehicles or for offtake to the gas grid, burned to produce electricity and heat or burned in a gas boiler to produce heat for local use such as district heating or heat for an industrial user. The digestate produced may be stored until required and can be separated into liquid and solid fractions. The solid fraction can be processed further by being put into a composting operation for further processing or used directly on land. The liquid may also be used on the land as a biofertiliser.
- 20 Applying this to section 55, one might conclude that if the purpose of AD was to produce heat and power, with the digestate being only a by-product of the process, this would logically fall within the categorisation of the production of heat and electricity and not be available to a WCA. If the reverse was the case, one might argue that the production of digestate to spread on land is the recycling process and that the production of heat and power is merely ancillary to that and as such would not be an inhibitor to the WCA to undertake AD. The WCA would be relying upon its general recycling powers in section 55 and that the ancillary outcome of the AD

process need not, in the absence of a specific prohibition, prevent the WCA from undertaking it as primarily a recycling function.

- 21 WRWA is of the view that evidence suggests that making use of or distribution of digestate produced from municipal waste can be difficult to achieve. Further, most AD technologies used focus primarily on extraction of energy and heat rather than production of digestate. That would point to AD being in essence a process under which heat and power is produced.
- 22 WRWA has sought the views of leading environmental and waste lawyer, Stephen Tromans QC on this issue. In his view, there is no easy answer to whether the treatment of food waste by a WCA by AD is recycling within the WCA's powers under section 55 and would allow the WCA to give notice under section 48(3). It can be argued both ways and it would be difficult to predict with certainty which way it would be decided by a court. What can be said with confidence is that there is a significant risk that it might be held to be energy recovery rather than recycling and that the legislative position is far from clear.
- 23 In his advice to WRWA, he addressed the provision in the Bill. He queried whether anyone has given thought to what "recycling" and "recyclable" mean in this specific context. Excluding AD from recycling would mean that this option was not open to WCAs to deal with separately collected food waste, meaning that all food waste collections by WCAs which are not WDAs could only be dealt with as directed by the WDA. He was not sure whether that was the government's intention. It is for these reasons that WRWA feel it necessary to bring this issue to the attention of the Committee for its consideration.

#### **Practical Difficulties**

- 24 WRWA does not believe this is just a matter of legal construction. By itself, it does not have any philosophical objection to a Constituent Borough undertaking any recycling including AD. However, to enable a Constituent Borough to do so, when it does not have the requisite powers to do so, has the potential to create problems under the WMSA.
- 25 WRWA entered into its contract with Cory on 31 July 2008 (amended and restated subsequently and most recently on 17 October 2018). In substance, Cory is contracted to manage WRWA's waste, with the principal place and means of disposal being the Belvedere Energy from Waste (EFW) facility. WRWA directs the WCAs to deliver their waste to two transfer stations for onward transportation (mostly by barge) by Cory to Belvedere.
- 26 The WMSA obliges WRWA to send all of the waste over which it has a power of direction under section 48 to Cory. The contract appears not to place WRWA in breach of contract should a Constituent Borough not comply with the direction. Instead, by way of a collateral obligation, the CCs have undertaken to Cory to comply with such direction.
- 27 With regard to food waste, WRWA has a power of direction and this cannot be avoided by application of the sequence under section 48. Because it appears that a WCA does not have the power to carry out AD, then the question never arises as to whether or not the WCA is undertaking recycling and if so whether or not the WDA has already made such provision.

- 28 The Bill does not change the provisions in the EPA which have been identified as the source of the above issue. With regard to food waste, the Bill's provisions amend the current position for WCAs from one where they have the discretion as to whether to collect food waste separately into an obligation to do so. It does not go on to say that the WCA does then have the power to submit that waste stream to an AD process which produces heat and power. However, WRWA apprehends that the existence of the new duty will increase the pressure from Constituent Boroughs to be able to undertake AD for the treatment of food waste. In turn this raises the risk of breach of the WMSA.
- 29 Although there is an alternative form of treatment of such waste through In Vessel Composting (over which there is consensus that it is a form of recycling which is not otherwise outside the powers of WCAs), many authorities would take the view that AD is a preferable process for the treatment of food waste.
- 30 The introduction of a duty upon WCAs to separately collect food waste would give rise to a "qualifying change in law", a mechanism under the WMSA which would require WRWA to compensate Cory in the event of certain changes in legislation (and commonly found in most PFI and PPP contracts). Where there is to be a change in law, then WRWA (technically via the funding mechanism of raising levies on the Constituent Boroughs) and any other bodies so affected ought to be compensated by the Government for this change in law cost though the 'New Burdens Doctrine', to enable it to meet the additional costs under the WMSA. The issue of contractual change in law provisions has been highlighted to Government in consultation responses and the Government Response does say:
- "We will work closely with local authorities to decide how best to introduce these proposals from 2023 taking into consideration commitments from pre-existing contracts, infrastructure and fleet capabilities. Where contracts may be affected by changes in law we would want to work with parties to resolve concerns and to ensure new duties can be incorporated effectively. We note that during the Committee's evidence sessions waste operators were concerned to take a pragmatic approach to support implementation of changes. We recognise that the proposals will mean new duties for local government. The additional burden presented by these will be appraised in line with New Burdens Doctrine and costs of new duties will be funded, including support needed for financial, communications, contractual and technical consequences of new measures."*
- 31 WRWA would welcome a change in law on the basis of the application of the New Burdens Doctrine. This would allow the Constituent Boroughs to make arrangements through AD for the food waste collected, which it believes would be widely supported. In principle too it should mean that neither WRWA nor Cory would be put at a financial disadvantage under the WMSA. WRWA would welcome confirmation from the Government that it would recognize that the new duties affect not just WCAs, who have the direct obligation of separate collection, but also WDAs who have made arrangements for the treatment and disposal of waste under long term waste management contracts, where financial protection is provided to the contractor for a change in law which would impact the volume and type of waste being treated at waste treatment facilities. It is believed that this position is not unique to WRWA and would be repeated in other contracts for waste disposal and management let by WDAs.

## Proposed Changes

- 32 WRWA believes that there has long been ambiguity around what constitutes recycling and the extent of the powers respective WDAs and WCAs have. It is of the view that the Bill is an opportunity to remove any such ambiguity. Moreover, it takes the view that the Bill would increase the existing ambiguity by placing WCAs in a position where they are required to collect food waste as a “recyclable household waste stream”, but would be denied the ability to make their own arrangements for treatment by AD because of the continued limitation in section 55 of the EPA.
- 33 WRWA believes that there are a number of ways to address this issue. The simplest would be to use the Bill as a vehicle to define AD as a form of recycling and to make it explicitly the case that although the WCA would have the power to make arrangements for the treatment of waste by AD, this would not extend to the more general power afforded to WDAs to make arrangements to use waste for the purpose of producing from it heat or electricity or both. Alternatively, WCAs could be given a specific power within the Bill to undertake AD, but again without prejudice to the existing delineations of the powers in section 55.
- 34 In either case WRWA believes that waste authorities and the waste industry would benefit from comprehensive and clear statutory definitions of recycling and recovery and the opportunity ought to be taken to include such provisions in the Environment Bill.
- 35 Should the Committee require any further information in respect of the above submissions, please contact:

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