

Appendix B – Changes to the North London IAA from Draft at Point of In-Principle Agreement (19th July 2011)

The first part of this appendix details the four key areas of the IAA that have been subject to development since in-principle agreement of the IAA by Cabinet on 19th July 2011, in reference to paragraph 4.6 of the main report. The second part provides a summary of all other, minor changes since in-principle agreement.

1. Key Areas of Development

(a) Confirmation of the Cost Recovery Mechanism (IAA Clause 16 and Schedule 4)

- The constituent councils decide how the costs of the NLWA will be apportioned between each council. Currently the NLWA levy is apportioned in accordance with the default provisions of the Joint Waste Disposal Authorities (Levies) (England) Regulations 2006. The levy calculation currently comprises two elements; the household element of the levy (for household waste tonnages delivered to NLWA) is apportioned between constituent councils on a tonnage basis (audited tonnages for the last full year prior to the budget year) and the other costs element (including overheads and HWRC costs) is apportioned on a council tax basis (for the relevant budget year).
- In the course of the in-principle agreement to the draft IAA in 2011 the Boroughs agreed that the default levy system would be changed to a 'Menu Pricing' system upon 'full service commencement' (the date upon which all facilities are operational), expected to be during 2016/17, under which there will be a separate cost for different waste streams reflecting the actual cost of processing each type of waste (this will serve to incentivise cheaper recycling over more expensive residual waste treatment).
- The full details of the new charging regime have since been developed and finalised, and are set out in Schedule 4 of the IAA (Cost Recovery Mechanism). The objective of Schedule 4 is to ensure an equitable allocation of the financial obligations of NLWA to each of the constituent councils, including those arising as a consequence of NLWA's new contracts. In the context of liabilities and costs under the contracts, the principle of equitable allocation is that each Constituent Borough shall be responsible for the financial consequences of its own behaviour and that of its contractors and agents, such behaviour to be determined by the type and quantity of waste delivered by or on behalf of each Constituent Borough and managed by NLWA (i.e. the Menu Pricing system).
- The outcome of the arrangements, specifically covered by Schedule 4B, are effectively as envisaged in the original Cabinet paper, but there are a number of changes to the way in which the schedule achieves these outcomes.
- The first point to make is that in Schedule 4B non-household waste costs remain unchanged from how they are dealt with now, and how they were proposed to be dealt with in the future. That is to say NLWA estimates both the amount of non-household waste to be delivered by each borough annually and the cost of treating this waste (with different costs per tonne charged for different types of waste). NLWA then invoices the boroughs on a monthly basis during the year, and at the end of the year there is a reconciliation of actual tonnes delivered by each borough and actual costs incurred by NLWA, with appropriate balancing payments to or from NLWA.
- Following legal advice, NLWA will not recover its costs for household wastes through a charging mechanism in the same way as it does for non-household wastes, as was

originally envisaged. Instead, under Schedule 4B it will continue to raise a levy for these costs, but a new form of levy is set out in the IAA to provide the fair funding mechanism that all Parties have agreed. It delivers this fairness firstly by the NLWA levying separately for different waste streams (to reflect their different costs); secondly, by each year's levy being apportioned according to the NLWA's budget forecasts (rather than historic tonnages as at present); and thirdly, by year-end balances (positive or negative) for each waste stream and each Borough being ring-fenced to each Borough to determine its future levy payment obligations. This is being done in accordance with the Joint Waste Disposal Authorities (Levies) (England) Regulations 2006 (regulation 4(1)(a)).

- As noted above, the revised wording of the schedule delivers effectively the same net financial costs and protections to Boroughs as envisaged under the former 'Charging Mechanism' (which dealt with both household and non-household waste costs without distinction) in terms of the provisions for household waste, but through a levying mechanism instead. For clarity and to reflect the changes Schedule 4B has also been renamed 'Menu Pricing Mechanism'.
- In terms of those of NLWA's costs not currently charged or levied on a per tonne basis the charging system for HWRCs will be through a levy (rather than an in-year charge) from 01/04/16 but with the payments by Borough still apportioned by periodic visitor survey as previously envisaged. It has been clarified that for new sites, until such time as a visitor survey can be conducted (i.e. the HWRC is operational and receives visitors), the costs will be borne based on the proportion of households per Borough within a 2 mile radius of the site.
- Furthermore it has been clarified that NLWA's overheads (i.e. staffing and other costs not properly attributable to contract delivery or management) will be levied based on the total tonnage of waste each Borough delivers from 2016/17. These costs are currently levied based upon the proportion of Council Tax 'Band D' properties.
- The costs of NLWA capital programme (i.e. the purchasing of new sites) will be borne based upon the total tonnage delivered by each Borough (as is currently the case). The exception is land for new HWRCs which will be distributed via visitor survey. Any surplus capital receipts that could possibly arise in the future (and where the receipts are not required to repay loans or finance other capital investments) will be distributed amongst the Boroughs in proportion to the actual tonnes of municipal waste delivered to NLWA since 01/04/16 (but in the case of HWRCs apportioned via visitor survey).
- The revenue costs of funding any capital contributions from NLWA to the Waste Disposal Contractors (to replace part of the contractor's borrowing, required to finance the development of new facilities, which would otherwise cost NLWA more through the contracts) shall be apportioned across each of the waste streams in the same proportion as the unitary charge reduction that arises as a result of the capital contribution towards that waste stream. The net effect of a capital contribution will be to provide a reduction in the cost per tonne/menu price for waste streams it is applied to.
- Finally, it has been clarified that menu pricing will begin on 01/04/16, where it was originally intended to be upon Full Service Commencement. The change is to allow a more workable transition.

(b) Clarification of the system for apportioning liabilities as a result of under or over delivering against tonnage forecasts (Clause 10)

- As set out in the original Cabinet report, if the tonnage of waste in a particular waste stream (eg. residual waste or commingled/'mixed' recycling) delivered to facilities operated by the NLWA's contractors falls below a tonnage threshold termed the Guaranteed Minimum Tonnage (GMT) then, subject to some defined means of mitigation, NLWA could be required under its contracts to pay for the tonnage shortfall against the GMT, even though this waste was not actually delivered. The IAA reflects NLWA's confirmation that GMT for each waste stream will be set at a level of 70% of the combined forecast tonnages of all Boroughs in any given year (which forecasts are detailed in Schedule 2B of the IAA).
- As indicated in the Cabinet report, the IAA reflects that where such a shortfall occurs liabilities will be apportioned to Boroughs based upon their individual responsibility for the shortfall. It is crucial to note, however, that there will only be a liability where the total tonnage delivered by all Boroughs falls short of the overall NLWA-level GMT (i.e. an individual Borough or Boroughs may fall below the GMT level against their individual forecasts, but this will not breach the overall GMT where other Boroughs' tonnages offset the shortfall).
- Clause 10.4 of the finalised IAA confirms the specific mechanism for distributing liabilities - where an overall breach of GMT occurs any liabilities will be "recovered from those [Boroughs] that have delivered less than their share of the GMT" with the liabilities "apportioned between these [Boroughs] by reference to their individual variances from the GMT as a percentage of all such variances and shall be recovered by [NLWA]". This confirms that Boroughs cannot be subject to such liabilities as long as they have not fallen below the GMT for a relevant waste stream based on their individual tonnage forecasts. The liability of each Borough is based upon the % of the total tonnage variances below the GMT that its individual shortfall constitutes.
- The treatment of instances in which Boroughs' collectively over-deliver against forecast tonnages has also been clarified in clause 10.6. NLWA's contractors, once appointed, will construct facilities with the capacity to manage all of NLWA's forecast waste plus at least 5% additional capacity. If the Boroughs collectively overproduce waste against the forecasts provided and exceed the capacity of facilities, NLWA can oblige its Contractor to accept any over-production, for processing at other facilities if possible. Alternatively NLWA can seek other facilities itself, outside of the contract, if it feels this is more advantageous. Both options will be subject to prevailing market conditions in terms of the location, cost and availability of facilities. NLWA is committed in the IAA to using reasonable endeavours to minimise the cost of managing such waste. Each borough also has an obligation if it becomes aware that it is likely to breach the maximum tonnage prediction to notify NLWA. The IAA Charging Mechanism reflects Boroughs being charged for waste above the maximum tonnage based on their relative responsibility for the overproduction, in line with the principle for GMT shortfalls.

(c) Approach to delivering Boroughs' preferred waste delivery points (Clause 8)

- As set out in the July 19th 2011 Cabinet report Clause 8 provided for Boroughs to make amendments to their expected waste collection systems (Schedule 1) and tonnage forecasts (Schedule 2) by replacing 'Part A' Schedules with corresponding 'Part B' Schedules within three months of the provision of emerging bid information to Boroughs from NLWA. This approach has been extended in the final draft to include Schedule 3, which details the NLWA 'Reception Points' to which Boroughs will deliver their waste, and which is now able to be revised by Boroughs on the same basis, within the same time period.

- This approach has enabled Boroughs to evaluate bid proposals and provide feedback to NLWA and its bidders, which will inform Final Tenders and effectively deliver Boroughs' preferred waste delivery points.
- The finalised Schedule 3 is contained within the IAA at Appendix A.

(d) HWRC Transfer Decision-Making Process (Clause 11 and Schedule 5)

- Clause 11 has been developed to allow Boroughs to take into account bid information, including indicative costing, before making final decisions on transfer of HWRCs. Schedule 5 of the IAA, which will list the HWRCs to transfer to NLWA, has now been split into Schedules 5A1, 5A2 and 5B to reflect borough positions following provision of information at different stages, with Schedule 5B representing final positions at the point of IAA execution in terms of the HWRCs that will be transferred and subsequently included in NLWA's contract. Previously the clause specified that for HWRCs listed in Schedule 5 as transferring to the NLWA, the transfer must take place before April 2012.
- This represents an improvement for Boroughs in terms of having a clearer indication of the implications of transfer in terms of value for money and recycling performance, on which basis to make decisions. The specific case for transfer is considered at paragraph 4.24 of the main report.

2. Summary of Other Changes to the IAA

Clause 1 – Definitions

There are a number of amendments to definitions in the document. The changes in this area generally fall into four categories:

1. Ensuring definitions are clearer. For example to reflect the potential that NLWA may manage waste in future through arrangements outside of the Waste Services and Fuel Use contracts.
2. Ensuring that definitions are in line with the prevailing legislation.
3. Ensuring definitions reflect other changes made during the drafting of the IAA (as set out below).
4. Adding some definitions where required (i.e. Ad Hoc Waste).

Clause 2 – Partnering Ethos

A requirement upon the Parties to notify one another as soon as possible of any proposed changes or agreements that would affect this Agreement or other Parties' associated contracts as soon as possible has been inserted into sub clause 2.1.2.

In addition wording changes that place a requirement upon NLWA to minimise the costs of waste management consistent with Best Value duties has been inserted into sub-paragraph 2.2.

Clause 5 – Waste Disposal Contracts

Some text previously at sub-clauses 5.2 and 5.3 (now deleted) relating to obligations upon the Boroughs to pay for the costs of waste management has been consolidated into Clause 16 for clarity.

Clause 6 – Principle Obligations of NLWA

An obligation has been inserted at sub-clause 6.2 to prevent NLWA from encouraging or seeking for bidders to artificially change the price differential between waste streams, but allows the differential to change in pursuit of the best overall terms.

Some minor changes have been made to sub-clause 6.4 (now 6.5) and a new sub-clause inserted at 6.6 to clarify that any sums obtained through the performance deductions upon NLWA's contractors or reconciliation payments from those contracts shall be distributed in accordance with the Cost Recovery Mechanism.

6.9.1 has been amended to reflect that the existing obligation for NLWA not to propose changes to NLWA's contracts, nor accept Notice of Changes from the contractor that could materially affect Boroughs, without consulting Boroughs and to withdraw changes if requested, may not apply in the instance of changes required by changes of law.

Clause 7 – Principle Obligations of the WCAs (Boroughs)

The insertion of a requirement (at sub-clause 7.1.1) upon Boroughs to register vehicles delivering waste with NLWA and to notify NLWA of any changes to the content form and timing of waste deliveries. These are in line with existing practices.

Clause 8 – Collection Systems

This clause has been renamed 'Collection Systems and Reception Points'. As detailed in section (c) of the first part of this appendix, the clause has been refined to allow Boroughs to amend their preferred delivery/reception points by completing and submitting Schedule 3A2, and if appropriate (should further changes be required) Schedule 3B, to replace the original Schedule 3A1, within specified time periods.

Revisions to sub-clause 8.6 clarify that minor changes to Borough vehicles and waste collection systems that would not require the NLWA's contractors to materially change the way they deliver services would not be subject to the Change Procedure.

Clause 9 – Recycling Obligations

Sub-clause 9.1.2 which places reasonable endeavours upon NLWA to contribute 10% to the overall 50% recycling target has been made subject to the transfer of all HWRCs to the NLWA (in line with the flexibilities for Boroughs to retain the HWRCs).

Clause 10 – Forecast Tonnages

Further to the key changes to the means of apportioning liabilities for under-delivery against tonnage forecasts outlined in section (b) of the first part of this appendix, there have been a number of alterations to this clause as set out below:

- Confirmation in 10.2 that the Guaranteed Minimum Tonnage (GMT) will be set at 70% of Boroughs' combined tonnage forecasts. The previous position was that the assumed GMT level of 70% would be subject to the ongoing dialogue and only change on the basis of improved VfM.
- Clarification in sub-clause 10.3 that GMT will only apply from the Full Service Commencement Date (i.e. the date at which all facilities are operational) which was expected to be in 2016.
- Confirmation in sub-clause 10.3 that the GMT % will track the forecast tonnage for each stream in each financial year (rather than being fixed at a % of the tonnage delivered in an individual year such as the base year).
- Clarification in sub-clause 10.3 that GMT will apply to mixed (commingled) dry recyclables, mixed food and green waste, and residual waste. For the avoidance of doubt the residual waste GMT applies to residual waste as a whole and does not make the distinction between residual waste that can be processed in the proposed MBT facilities and that which cannot. Further text has been inserted in clause 10.5 (replacing the previous sub-clause) to require NLWA to use reasonable endeavours to ensure that no GMT will apply to separately collected green (garden) waste and to minimise it if it will apply. It is expected that the application and extent of GMT in relation to green waste will be known upon submission of Final Tenders in October 2012. Haringey's Schedule 2B tonnage forecasts contain very low tonnages of separate green waste and consequently the risks related to GMT on this stream are very low.
- A requirement upon each Borough in sub-clause 10.7 (formerly 10.4) to advise NLWA at the earliest opportunity if there is likely to be a greater than 2% variance against tonnage forecasts. This is broadly in line with the current expectation that Boroughs would alert NLWA of any significant variations.

- A new sub-clause at 10.10 that clarifies that each Borough is responsible for paying the costs of any charges borne by NLWA in relation to any Ad-Hoc Waste delivered. Ad Hoc Waste is broadly defined as waste that is required to be segregated and treated differently from other Contract Waste. An example of this is dead animals.
- A new sub clause at 10.11 clarifies that, if boundaries are changed between NLWA Boroughs the tonnage forecasts will be adjusted in proportion to the number of households transferred between the Boroughs affected relative to the number of households within each of those Boroughs. Each Borough would be required to bear any costs in relation to boundary changes with local authorities outside of the NLWA area.

Clause 11 – HWRCs

Further to the key changes to this clause outlined in section (d) of the first part of this appendix, there have been a number of changes to this clause as follows:

- As summarised in paragraph 4.36 of the main report, sub-clause 11.7 (formerly 11.4) reflects a number of amendments to the terms of HWRC transfer. Notably the requirement for a standard lease has been removed; instead the leasing arrangements agreed with NLWA are required to “treat [Boroughs] equally subject to individual site constraints...for a term that will facilitate the delivery of the Waste Services Contract (including any extensions thereto)”. 11.7 also recognises that leasing will be subject to individual site constraints including incorporation of rights that will meet a Borough’s requirements in respect of any interests or adjoining land that will remain in the Boroughs’ ownership.
- Sub-clause 11.8 (formerly 11.3) requires the terms of a lease to be determined by the Disputes Resolution Procedure in Schedule 8 where agreement cannot be reached. The redrafted sub-clause allows either party to trigger this where agreement is not reached 2 months before the transfer date in the prevailing Schedule 5.
- Sub-clause 11.7 continues to reflect that TUPE will apply to the transfer of HWRC staff and in addition now specifies the need for adequate provision for meaningful consultation with staff.
- A new sub-clause 11.9 requires Boroughs transferring sites to confirm in writing to NLWA that they have determined that the transfer to NLWA can be undertaken at peppercorn rent (either by confirming that the peppercorn rent is determined as the best that can be reasonably obtained or because the charging of peppercorn rent either meets the requirements of a general consent or the Borough has obtained permission from the Secretary of State to do so). If such confirmation is not able to be provided a new sub-clause 11.10 allows for a market rent to be charged but neutralised by an equal payment from the relevant Borough.
- Sub-Clause 11.12 (previously 11.6) has been substantially expanded to reflect a process for the consultation of the Borough that is bearing or would bear the most costs of an HWRC (most likely the host Borough) that is proposed to be acquired, developed, subject to capital works, considered for the receipt of paid waste or closed. It commits the NLWA to give appropriate weighting to that Borough’s views. If the Borough is opposed, that Borough may supply notice to NLWA outlining alternative means to bridge

the additional contribution to the 50% recycling target that the NLWA's proposed HWRC changes would deliver.

- A new sub-clause at 11.13 requires the Borough most likely to bear the greatest share of the costs of a new HWRC (most likely the host Borough) has the option to buy the site where it agrees the design with the NLWA, develops the HWRC and then leases the site to NLWA as set out in this agreement, all without delay. Conversely if NLWA has brought and developed an HWRC, but then wishes to sell it, the Borough most likely to receive the greatest share in accordance with the principle in Schedule 4 relating to the treatment of excess capital receipts should have first option to buy the site at the price NLWA could obtain from another third party.
- A minor sub-clause has been added at 11.14 to confirm that NLWA will undertake visitor surveys.
- A new sub-clause at 11.15 confirms that NLWA will apportion the recycling rate performance at HWRCs that it manages in the same proportions as Boroughs will bear the costs under the Visitor Survey system.
- A new sub-clause at 11.16 allows for Boroughs that will not transfer their HWRCs at the point of IAA execution to have a degree of flexibility in negotiating the leasing arrangements with NLWA should they seek to transfer at a later date through the IAA Change Procedure, whilst remaining subject to the key leasing principles provided for in clauses 11.7, 11.8, 11.9 and 11.10 (notably providing for equal treatment as outlined above).

Clause 13 – Communications

Much of the text previously at Sub-Clause 13.3 and 13.8 (now sub-clause 13.7) and the entirety of sub-clause 13.4 which sets the scope of the issues to be considered and administrative/decision making requirements of the Partnership Board has been consolidated within the Terms of Reference of the Partnership Board in a new schedule (Schedule 10) of the IAA.

Sub-clause 13.5 (formally 13.6) has been expanded to oblige NLWA to hold a meeting of the Board after receipt of a notice from at least four Boroughs requesting such a meeting.

Clause 15 – Ownership of Waste and the Duty of Care

Sub-Clause 15.1 has been altered to require Boroughs to deliver waste in accordance with both the Waste Acceptance Criteria and Waste Acceptance Protocol in Schedule 6, as opposed to just the latter.

Clause 16 – Financial Contribution

The details of the changes to this clause are provided in section (a) of the first part of this Appendix B, above, covering key changes to the IAA.

Clause 19 – Changes and Amendments

Sub clause 19.3 has been amended to reflect that NLWA and Boroughs will develop Schedule 6 (the Waste Acceptance Criteria and Protocol) prior to Financial Close to align it with the proposed new waste contracts. This commitment previously referred to the development of

Schedule 3 (Reception/delivery points) but refinement of reception points is now covered in clause 8.

Clause 22 – Exit Arrangements

A minor amendment requires the parties to meet to discuss successor arrangements 5 years before the IAA (and contract) expiry date, rather than the 2 years previously reflected.

Clause 23 – Confidentiality

Text has been added at 23.3.5 which requires that any professional advisors to whom confidential information is provided are themselves contractually bound to confidentiality.

Clause 26 – Public Relations and Publicity

A new sub-clause at 26.2 requires NLWA to undertake reasonable endeavours to ensure that the Boroughs have prior consultation with regards any relevant communications by NLWA or its contractors.

Clause 35 – Governing Law

The clause has been altered to make the jurisdiction subject to the change procedure.

Schedule 1 – WCA (Borough) Collection Systems

A new Schedule 1B has been inserted to allow further refinement of collection system information if required, in line with clause 8. The format of the schedule has also been altered to make it more fit for purpose.

Schedule 2 – Forecast Tonnages

The format of the schedule has also been amended to make it more fit for purpose.

Schedule 3 – Reception Points

A new Schedule 3B has been inserted to allow further refinement of reception point information if required, in line with clause 8. The format of the schedule has also been altered to make it more fit for purpose.

Schedule 4 – Cost Recovery Mechanism

Further to the details of key developments to this schedule as set out in section (a) of the first part of this appendix, there have been a number of changes.

Schedule 4A sets out the prevailing levy arrangements that have applied since 01/04/12 reflecting the agreed revised arrangements to HWRC levying approved by each Constituent Borough in January 2012 (but otherwise in accordance with the default levy).

Schedule 4A2 is intended to contain any revised cost recovery system that may be agreed between 2012 and 2015/16 (i.e. Transitional Menu Pricing) if unanimity can be achieved.

Schedule 4B sets out the proposed levy arrangements from 2016/17 onwards as detailed in section (a) of this appendix.

In addition to the key principles set out in section (a), Schedule 4B also clarifies the principles for apportionment between Boroughs of payments and additions applicable under NLWA's contracts, as follows:

- Where payment deductions or additions are waste stream specific but not Borough specific (for example MRF performance, energy income or adjustments relating to the interface between the Waste Services and Fuel Use contracts) these adjustments will be included in the annual reconciliation to determine the final cost of the relevant waste stream.
- Where deductions and additions are Borough specific but not tonnage specific these will be deducted or added as adjustments in the annual reconciliation of costs to be borne by each Borough. This includes transport distance deductions (where a Borough has to travel an unreasonable additional distance because a reception point is closed and is therefore eligible for compensation) and some payments made under the Performance Management Framework including those relating to vehicle turnaround times. This category also includes, for example, adjustments in relation to costs arising from Borough liabilities arising under the IAA (such as a breach of GMT (to be calculated in accordance with clause 10) or where a change under the Change Procedure leads to additional costs.
- Where of a general nature (neither waste stream- nor Borough-specific) these will be deducted or added based upon the total actual tonnage of municipal waste delivered to NLWA by each Borough for the relevant financial year. Examples include the Total Diversion Performance Adjustment and the Total Excess Profit Share.

Schedule 5 – HWRCs

Schedule 5 has been split into Schedules 5A1, 5A2 and 5B in accordance with the revised Clause 11.

Schedule 6 – Waste Acceptance Criteria and Protocol (formally Waste Acceptance Protocol)

Some explanatory text has been inserted with regards how the protocol will work and a draft Waste Acceptance Protocol has been inserted (which will be subject to further refinement up to Financial Close).

Schedule 7 – Change Procedure

Some minor clarifications and wording changes have been inserted.

Schedule 8 – Disputes Resolution Procedure

Text has been inserted at 2.2 and 2.3 to reflect that disputes shall initially be referred to the Partnership Board. If unresolved they will be referred to the Clerk of NLWA and the relevant Chief Executives and if still unresolved they will be referred to the Chair of NLWA and the relevant Leaders. If still unresolved the matter will be referred to adjudication (previously the first step).

Schedule 10 – Terms of Reference of the Partnership Board

The full terms of reference have been inserted here drawing on text previously within Clause 13.

Schedule 11 – Schedules of the Waste Services Contract and Fuel Use Contract

Inserted for reference to provide the schedules of the NLWA contracts at the time of the execution of the IAA.