

SUBJECT TO CONTRACT

DATED

2011

(1) COVANTA ROOKERY SOUTH LIMITED

- and -

(2) THE MARSTON VALE TRUST

and

(3) COVANTA ENERGY LIMITED

DEED OF UNDERTAKING

relating to

The proposed Resource Recovery Facility
including an Energy from Waste Facility and
post treatment Materials Recovery Facility at
Rookery South Pit near Stewartby

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Date of Original:
Draft No: 1

LDG/LDG/316441/6/UKM/34799725.1

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THIS DEED OF UNDERTAKING is made on

2011

BETWEEN:

- (1) **COVANTA ROOKERY SOUTH LIMITED** (being a company incorporated in England with registered number 07094843) of 8 Darwin House, the Pensnett Estate, Kingswinford, West Midlands DY6 7YB ("**Covanta**");
- (2) **THE MARSTON VALE TRUST** (being a company incorporated in England with registered number 03462405) of the Forest Centre, Station Road, Marston, Moretaine, Bedfordshire MK43 0PR ("**MVT**"); and
- (3) **COVANTA ENERGY LIMITED** (Company Registration Number 05845046 of 8 Darwin House, The Pensnett Estate, Kingswinford, West Midlands DY6 7YB ("**Guarantor**")).

BACKGROUND:

- A Covanta is seeking to develop the Project and has made the Application to the Infrastructure Planning Commission for this purpose.
- B MVT is a registered charity that owns land neighbouring the site of the Project and is committed to the environmental regeneration of the Marston Vale through the creation of the Forest of Marston Vale. MVT's adopted policy on development in the Marston Vale is:
- "Whilst the Trust will support development that directly meets the objectives of the Forest, the Trust is neutral on individual planning applications that do not directly conflict with the aims of the Forest of Marston Vale. Where development is planned the Trust will work with developers and planners to secure a contribution to the Forest that is consistent with the Forest Plan and with the impact of the proposed development on the Vale".*
- C Covanta and MVT have agreed to enter into this Agreement in order to secure certain contributions and commitments in connection with the Project.
- D The Guarantor has agreed to enter into this Deed at the request of Covanta to guarantee the performance of the obligations of Covanta hereunder.

NOW THIS DEED WITNESSETH as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement where the context so admits the following expressions shall have the following meanings:

"Annual Marston Vale Contribution" means the annual sum of £50,000 Index Linked to be paid by Covanta to MVT;

"Application" means the application made by Covanta to the Infrastructure Planning Commission pursuant to section 37 of the Planning Act 2008 on 4 August 2010 for an order granting Development Consent in respect of the Project;

["Bridge" means a bridge planned to be constructed pursuant to clause 7 as shown for indicative purposes only on Plan [] for the purpose of facilitating access between the Millennium Country Park and the area of land known as Rookery North;]

"Bridge Application" means the application to be made to the relevant local planning authority for full planning permission for the construction of the Bridge;

"Bridge Contribution" means the contribution to be paid by Covanta pursuant to Clause 8 towards the construction costs of the Bridge in the maximum sum set out at Clause 8.1 and as may be reduced pursuant to Clauses 8.6 and 8.7;

"Bridge Planning Condition" means the grant of a Satisfactory Planning Permission and either; the expiry of the relevant Judicial Review Period without a legal challenge being made, or, where a legal challenge is made the final disposal of all proceedings relating to such legal challenge leaving in place a Satisfactory Planning Permission;

"Commencement of Development" means the date on which any material operation (as defined in Section 56(4) of the Town & Country Planning Act 1990) forming part of the Project begins to be carried out pursuant to the Development Consent other than (for the purposes of this Agreement and for no other purpose) operations consisting of site clearance, demolition work, archaeological investigations, ecological mitigation work, new translocation, investigations for the purpose of assessing ground conditions, remedial work in respect of any contamination or other adverse ground conditions, diversion and laying of services, erection of any temporary means of enclosure, the temporary display of site notices or advertisements and **"Commence Development"** shall be construed accordingly;

"Commercial Operations" means the operation of the Project for commercial processing of waste and production of electricity for transmission to the national electricity grid following completion of hot commissioning by Covanta and **"Commercially Operate"** and cognate expressions shall be construed accordingly;

"Compensation" means any compensation that may be claimed following the exercise of the compulsory purchase powers pursuant to the Development Consent as derived from case law, legislation, statutory guidance and Lands Tribunal rulings including but not limited to the Land Compensation Act 1961, the Compulsory Purchase Act 1965, the Land Compensation Act 1993, the Planning and Compulsory Purchase Act 2004 and the Planning Act 2008;

"Councils" means Central Bedfordshire Council and Bedford Borough Council (or any successor authority)

"Deed of Easement" means the deed in the form set out at schedule 1 granting certain rights to Covanta to carry out works for the purpose of improving rights of way and for the laying, repairing, maintaining and renewing services as further detailed at schedule 1;

"Development Consent" means an order granting development consent pursuant to the Application authorising the Project;

"Development Consent Obligation" means the development consent obligation to be entered into pursuant to section 106 of the Town & Country Planning Act 1990 (as amended by section 174 of the Planning Act 2008) with Bedford Borough Council and Central Bedfordshire Council relating to the Application;

"Dispute" means any dispute, difference or question of interpretation arising out of this Deed;

"MVT Land Interests" means those interests in land owned by MVT in relation to which Covanta is seeking powers of compulsory acquisition as set out at schedule 3;

- (a) prevents the implementation of the Bridge without the agreement or cooperation of an independent third party; or
- (b) in the reasonable opinion of Covanta would be unduly restrictive of the development or operation of any part of the Project;

"Project" means the proposed resource recovery facility comprising, amongst other things, an energy from waste facility with a generating capacity of 65 MWe and materials recycling facility at Rookery South Pit near Stewart by as more particularly described in the Application;

"Related Dispute" means any dispute under this Agreement in which issues of fact or law arise which are substantially the same as or connected with one or more issues of fact or law which arise in another dispute whether under this Agreement or under another agreement to which Covanta is a party;

"Satisfactory Planning Permission" means the grant of full planning permission for the Bridge pursuant to the Bridge Application which is not subject to any Onerous Conditions;

"Site" means Rookery South Marston Moretaine Bedfordshire shown edged [] on Plan

- 1.2 The headings appearing in this Agreement are for ease of reference only and shall not affect the construction of this Agreement.
- 1.3 Unless the context requires otherwise references in this Agreement to clauses, sub-clauses, paragraphs, recitals, sub-paragraphs, annexures and appendices are references to those in this Agreement.
- 1.4 The word "including" shall mean "including without limitation or prejudice to the generality of any description, defining term or phrase preceding that word" and the word "include" and its derivatives shall be construed accordingly.
- 1.5 In this Agreement (where the context so admits) words importing the singular shall include the plural and vice versa and words importing one gender shall include all other genders.
- 1.6 Any covenant by Covanta or MVT not to do an act or thing shall be deemed to include an obligation to use reasonable endeavours not to permit or suffer such act or thing to be done by another person where knowledge of the actions of the other person is reasonably to be inferred and any covenant by Covanta or MVT to do an act or thing may be deemed to include an obligation to use reasonable endeavours to procure that the act or thing is done.
- 1.7 If any provision in this Agreement shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will not in any way be deemed thereby to be affected, impaired or called into question.
- 1.8 Unless expressed otherwise, in the event of any conflict between this Agreement and any document annexed hereto or referred to herein, the terms, conditions and provisions of this Agreement will prevail.
- 1.9 The Interpretation Act 1978 shall apply to this Agreement.
- 1.10 The words "subsidiary undertaking" and "parent undertaking" have the meanings set out in section 1162 of the Companies Act 2006;

2. **CONDITIONALITY**

This Agreement is conditional upon Development Consent being granted for the Project save for the provisions of Clauses [9 (Non-objection)], 15 (Jurisdiction), 16 (Confidentiality), 17 (Counterparts) and 18 (Termination) which shall come into effect immediately on completion of the Agreement.

3. **TRUST CONTRIBUTION**

3.1 Covanta intends to secure the following commitment in the Development Consent Obligation (or a commitment having substantially the same effect):

3.1.1 "Covanta shall not Occupy the Development unless and until:

3.1.2 the Initial Marston Vale Contribution has been paid to MVT; and

3.1.3 evidence thereof has been provided to the Councils.

Covanta shall not undertake Commercial Operation of the Development in any period of one year where the Annual Marston Vale Contribution has not been paid to the MVT on the anniversary of Occupation."

3.2 Prior to commencement of Commercial Operations Covanta will pay the Initial Marston Vale Contribution to MVT PROVIDED THAT Covanta's cumulative liability pursuant to the Development Consent Obligation and this Agreement in relation to the Initial Marston Vale Contribution shall not be less than or greater than £250,000 Index Linked (whether or not those obligations or monies are provided direct to MVT, the relevant local authority or some other person for substantially the same purposes as those contributions are intended).

3.3 Covanta agrees not to undertake Commercial Operation of the Project in any period of one year when the Annual Marston Vale Contribution has not been paid to MVT on the anniversary of commencement of Commercial Operations PROVIDED THAT Covanta's cumulative liability pursuant to the Development Consent Obligation and this Agreement in relation to the Annual Marston Vale Contribution, shall not be less than or greater than £50,000 per annum Index Linked (whether or not those obligations or monies are provided direct to MVT, the relevant local authority or some other person for substantially the same purposes as those contributions are intended).

3.4 In the event that Covanta intends to cease Commercial Operations for a period of more than one year, Covanta shall give not less than six months prior notice where reasonably practicable to do so.

3.5 If Commercial Operations cease and it is the intention of Covanta that the cessation will be for more than a year, then Covanta shall not be obliged to pay the Annual Marston Vale Contribution on the next anniversary of the Commencement of Operations following such cessation, but payment of the Annual Marston Vale Contribution shall be recommenced on the date upon which Commercial Operations are started again by Covanta (which date shall, for the purposes of Clause 3.3, thereafter be the anniversary of the commencement of Commercial Operations).

3.6 MVT shall pay the Initial Marston Vale Contribution and each Annual Marston Vale Contribution into its restricted account and shall use the contributions for the purposes of the aims and objectives of the Forest Plan (as set out at pages 3 and 4 in the Forest Plan as at the date hereof) [primarily] relating to tree planting and woodland creation and shall keep clear

records of expenditure of such monies and, following any reasonable request by Covanta, shall confirm to Covanta within 14 days of a request being made the amount of expenditure and provide evidence in support of all material expenditure of the Initial Marston Vale Contribution and Annual Marston Vale Contributions.

- 3.7 For the avoidance of doubt, Covanta may at its discretion determine not to include the intended commitments at Clause 3.1 within the Development Consent Obligation and instead decide to deal with payment of such monies solely pursuant to Clauses 3.2 and 3.3.
- 3.8 Following a request from Covanta, where applicable MVT will forthwith provide written confirmation of receipt of any monies pursuant to Clauses 3.2 and 3.3 to both Bedford Borough Council and Central Bedfordshire Council.
- 3.9 Should there be any inconsistency between the terms of this clause 3 and the Development Consent Obligation in respect of any obligations which benefit MVT, then the terms of this Agreement shall take precedence.
- 3.10 In the event that Covanta does not make any payment due under this Agreement within 7 days of the due date for payment it shall pay interest at the Interest Rate on the outstanding sum from the due date for payment until actual payment.

4. CENTRE ELECTRICITY COSTS

- 4.1 Covanta will provide MVT with seven days notice of its intention to commence Commercial Operations ("**Commencement Notice**").
- 4.2 Covanta shall pay £10,000 Index Linked to MVT on the date that Commercial Operations commence and on each anniversary of that date for each year in which Commercial Operations are carried out for a period of more than six months (cumulative) and until such time as [Commercial Operations finally cease] as a contribution towards the electricity costs of MVT in respect of the Forest Centre.

5. MILLENNIUM PARK PLANTING SCHEME

- 5.1 Subject to the costs not exceeding [◆], Covanta being granted sufficient rights or permission to do so by MVT pursuant to the Deed of Easement (or otherwise) and any necessary consents having been obtained (including any protected species licence) Covanta shall, at its own cost and expense, carry out the Millennium Park Planting Scheme in accordance with the agreed details. [*Note: timetable for implementation/ maintenance to be agreed as part of the Scheme to be appended*]
- 5.2 If in Covanta's reasonable opinion the Millennium Park Planting Scheme needs to be varied in order to satisfy the relevant local planning authority, Secretary of State or Infrastructure Planning Commission as may be applicable (whether to obtain Development Consent or to discharge any requirement, condition, obligation or other restriction) then both parties shall each co-operate and act reasonably in order to promptly agree a revised scheme to satisfy the relevant regulatory authority as soon as reasonably practicable and so as to avoid delay to works relating to the Project or Occupation.
- 5.3 [In the event that any of the trees, shrubs or other planting carried out under the Millennium Park Planting Scheme dies [or is dying] within 5 years of the date of planting, Covanta shall at its own cost and expense replace any such trees, shrubs or planting that have died [or are dying].]

- 5.4 In the event that any consents are required in order to implement any part of the Millennium Park Planting Scheme, then MVT agrees to promptly procure these [at the expense of []].

6. MVT'S CONSULTATION RIGHTS

Covanta agrees to consult with MVT on all schemes to be agreed pursuant to the Development Consent or Development Consent Obligation which directly affect the Millennium Country Park and the Forest Plan, including (but not by way of limitation) the internal entrance to the Millennium Country Park at [insert location], footpaths and cycleways that connect with the Millennium Country Park, habitat creation, and an ecological management scheme for the Site.

7. [BRIDGE PROVISION

[Note: Covanta will contribute towards constructing a pedestrian/cycle Bridge to facilitate improved connectivity between Millennium Park and Rookery North. Delivery of the Bridge [or such other forms of linkages and integration as the parties may agree] will require certain conditions to be met, including consent from O&H Properties and further funding to be secured. The detailed terms to be discussed further.]

8. LEVEL CROSSING

Covanta will consult with MVT regarding the proposed detailed design of the Level Crossing prior to this being agreed by Covanta with Network Rail and will keep MVT updated as to material events relating to progress of the proposed Level Crossing.

9. PROPERTY MATTERS

[The deed will make provision in relation to the land and/or rights in land required from MVT, and arrangements with MVT in respect of such land and/or rights in land, in order to allow Covanta to carry out the Project.]

10. DISPUTE RESOLUTION

- 10.1 The Parties shall resolve Disputes arising out of or in connection with this Agreement in accordance with this clause 10.

- 10.2 The Parties shall attempt in good faith to resolve any Dispute promptly by negotiation which shall be conducted as follows:

10.2.1 any Dispute shall in the first instance be referred by a written notice of Dispute (the "**Notice of Dispute**") from the referring Party to the other Party. Within 10 Working Days after the date on which the Notice of Dispute is received, the Party receiving the Notice of Dispute shall deliver to the other Party a written response to the Notice of Dispute (the "**Response**"). Both the Notice of Dispute and the Response shall include a statement of the position of the Party preparing the Notice of Dispute or Response, and shall annex any documents relied upon by that Party;

10.2.2 if the Dispute is not resolved within 5 Working Days of receiving a Response to a Notice of Dispute, or if no Response is delivered, within 10 Working Days of the date upon which the time for delivery of a Response expired, the Dispute shall be referred to the Managing Director of Covanta and the Chair of the Trustees of MVT (or such other persons as they shall appoint) who shall within 5 Working

Days meet at mutually acceptable times and places to discuss and try to reach agreement to resolve the Dispute.

- 10.3 All negotiations and discussions pursuant to clause 10.2 are confidential and shall be treated as compromise and settlement negotiations for the purpose of any applicable rules of evidence.
- 10.4 If the Dispute cannot be resolved pursuant to clause 10.2 the Parties shall attempt to resolve the Dispute by mediation in accordance with the Centre for Dispute Resolution ("CEDR") Model Mediation Procedure (the current version at the time of the Dispute ("**CEDR Model Mediation Procedure**")).
- 10.5 To initiate a mediation pursuant to clause 10.4 the claiming Party must give notice in writing ("**ADR Notice**") to the other Party and the Chief Executive of CEDR requesting a mediation in accordance with clause 10.4 and such notice must be given within 10 Working Days after the date upon which the time for resolution of the Dispute pursuant to clause 10.2.2 expired.
- 10.6 The Parties will sign a mediation agreement in accordance with CEDR's Model Mediation Agreement (or in such other terms as may be agreed by the Parties in writing ("**Mediation Agreement**"). The Mediation Agreement will be signed not less than 7 days prior to the date fixed for the mediation of the Dispute.
- 10.7 The mediation shall take place in England and the language of the mediation will be English. The Mediation Agreement referred to in the CEDR Model Mediation Procedure shall be governed by and construed and take effect in accordance with English law.
- 10.8 If the Parties are unable to reach a settlement at the mediation, neither Party shall call the mediator(s) as witnesses in any arbitration or court proceedings involving or relating to the Dispute.
- 10.9 If the Dispute is not settled by negotiation in accordance with clause 10.2, nor by mediation in accordance with clauses 10.4 to 10.7 within 10 Working Days after the date of the conclusion of the mediation, either Party may initiate court proceedings in respect of the Dispute.
- 10.10 Unless this Agreement has already been terminated, the Parties shall continue to perform their obligations under the Agreement regardless of the nature of the Dispute and notwithstanding this Dispute Resolution Procedure.
- 10.11 In exercising the powers and rights and in observing the obligations and duties set out in this clause 10, the parties shall at all times have regard to the need to resolve any dispute or difference with reasonable expedition and without incurring or causing others to incur unreasonable costs.

11. SERVICE OF NOTICES

All notices, requests, demands or other written communications to or upon the respective parties hereto pursuant to this Agreement shall be deemed to have been properly given or made if despatched by first class letter to the party to which such notice, demand or written communication is to be given or made under this Agreement and addressed as follows:

- 11.1 if to Covanta, to the registered office of Covanta at that time marked for the attention of [Head of Legal]; or
- 11.2 if to MVT, to the address above marked for the attention of the Chief Executive.

12. VARIATION

No variation of this Agreement shall be effective unless made by deed.

13. THIRD PARTY RIGHTS

A person who is not a party to this Agreement has no rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this Agreement but this does not affect any right or remedy of a third party which exists or is available apart from that Act.

14. ENTIRE AGREEMENT

This Agreement contains the whole agreement between the parties.

15. JURISDICTION

15.1 This Agreement shall be governed by and construed in accordance with English law.

15.2 Subject to the provisions of clause 10 the parties to this Agreement irrevocably agree that the courts of England shall have jurisdiction to hear and determine any suit action or proceeding and to settle any dispute which may arise out of or in connection with this Agreement and for such purpose the parties irrevocably submit to the jurisdiction of the courts of England.

16. COUNTERPARTS

16.1 This Agreement may be executed in original and any number of counterparts.

17. TERMINATION

17.1 Without prejudice to any other rights or remedies under this Agreement, Covanta may suspend or terminate this Agreement by notice in writing forthwith if:

17.1.1 the Development Consent is quashed, revoked or otherwise withdrawn or (without the consent of Covanta) it is modified by any statutory procedure or expires prior to the Commencement of Development;

17.1.2 MVT materially breaches any term of this Agreement PROVIDED THAT Covanta has first given notice, with appropriate detail, of such breach to MVT and that MVT has failed to remedy such breach within a reasonable time (being not less than 30 days) of receipt of such notice; or

17.1.3 Commercial Operations have permanently ceased.

17.2 Termination or suspension of this Agreement shall be without prejudice to the accrued rights or remedies of either party.

17.3 The following clauses of this Agreement shall survive expiry or termination of this Agreement: clauses 1, 15 (Jurisdiction), 17 (Termination) and 19 (Guarantee).

18. ASSIGNMENT AND NOVATION

18.1 Covanta may at any time without consent assign, transfer or novate its rights and/ or obligations under this Agreement to any person that is a subsidiary undertaking or parent

undertaking of Covanta and Covanta will promptly notify MVT following any such assignment, transfer or novation.

- 18.2 Subject to the provisions of Clause 20.3 Covanta may at any time assign, transfer or novate its rights and obligations under this Agreement to any person provided that Covanta at the same time grants or transfers the ability to carry out Commercial Operations (in whole or part) pursuant to the Development Consent to such person.
- 18.3 Covanta shall not exercise its rights under Clause 20.2 without the consent of MVT (such consent not to be unreasonably withheld or delayed in the case of an assignment or transfer to a person who is demonstrably capable of meeting Covanta's financial obligations under this Deed) and unless it has first procured that the proposed assignee or transferee of its rights and obligations under this Agreement has entered into a novation agreement with MVT in a form approved by MVT (such approval not to be unreasonably withheld or delayed). Covanta shall reimburse MVT for its reasonable and proper legal costs associated with any novation requiring MVT consent under this Deed.

19. GUARANTEE

- 19.1 MVT having entered into this Deed at the request of the Guarantor (which the Guarantor acknowledges is good consideration passing from MVT to it) the Guarantor hereby confirms that it shall be jointly and severally liable to MVT in the event of any breach by Covanta of its financial obligations under this Agreement.
- 19.2 For the avoidance of doubt, the Guarantor may exercise all defences, set-offs, counterclaims and other rights to which Covanta may be entitled under this Deed [but shall not have the right to terminate this Agreement].
- 19.3 Any assignment, transfer or novation of the obligations of Covanta under Clause 19.1 to a subsidiary undertaking or parent undertaking of Covanta shall not discharge this guarantee. Following the novation of the obligations of Covanta other than to a subsidiary undertaking or parent undertaking of Covanta, the Guarantor shall be released from its obligations under this clause 19.

IN WITNESS whereof this Deed has been executed by the parties hereto and delivered as a Deed on the date first written above.

SCHEDULE 1: DEED OF EASEMENT

SCHEDULE 2: PLANS

SCHEDULE 3: MVT LAND INTERESTS

SCHEDULE 4: MILLENNIUM PARK PLANTING SCHEME

SCHEDULE 5: [BRIDGE]

Executed as a deed by **COVANTA ENERGY LIMITED** by the affixing of its Common Seal in the presence of:

)
)
)

Authorised Signatory

Executed as a deed by **COVANTA ROOKERY SOUTH LIMITED** by the affixing of its Common Seal in the presence of:

)
)
)

Authorised Signatory

[Executed as a deed by **THE MARSTON VALE TRUST** acting by

)
)

Trustee

Trustee

