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Our ref: 111209_WW010001_Letter to TW
Your ref: 100-CO-PNC-IPCXX-000003

9 December 2011

Dear Ian,

Proposed Thames Tunnel project and the Planning Act 2008

I am writing with reference to your letter dated 2 November 2011. We have now considered the letter and appendices provided and set out our comments below.

As noted in your letter, the Secretary of State for Environment, Food and Rural Affairs has consulted on a draft order under s.14(3) of the Planning Act 2008 (PA 2008), the effect of which would be to designate the Thames Tunnel project as a Nationally Significant Infrastructure Project (NSIP) to be examined by the Infrastructure Planning Commission (IPC). It is anticipated that the s.14 order could come into effect in spring 2012¹.

The s.14 order as currently drafted includes a supplemental provision with the intent that an IPC Commissioner should be able to exercise discretion in making an acceptance decision on any future application under s.55 of the PA 2008. Our comments do not prejudice any future decisions of the IPC, including that of the Commissioner appointed to consider the acceptance of any future application made under s.55 of the PA 2008.

Your appendices A and B

We note that appended to your letter were notices purporting to be notifications under s.46 of the PA 2008 and regulation 6 of the EIA Regulations 2009. In our meeting of 11th October 2010 and subsequent letter of 29th November 2010, we advised that in spite of Ministerial Statements made before the meeting, the IPC did not have jurisdiction to accept a s.46 notice or a regulation 6 notice on the basis that the IPC cannot have jurisdiction in relation to a "proposed application" when there is no statutory framework in place to enable an application for development consent for that project to be sought and obtained. We consider that this position has not changed.

¹ For the purposes of this advice, reference is made to the IPC however, following the commencement of amendments to the Planning Act 2008, the IPC's functions will be transferred to the Secretary of State.

Notwithstanding this, in the same letter we acknowledged that the IPC may give advice to you under s.51 of the PA 2008 about the development consent application procedure. In light of this, and with a view to being as constructive as possible at this time, we provide the comments at Annex A regarding the content of your letter. We have highlighted areas in which you may wish to consider taking further steps to satisfy the pre-application requirements of the PA 2008 and related secondary legislation.

Draft application documents

Once the s.14 order has come into effect, the IPC will be in a position to advise on the production of application documents such as the draft Development Consent Order (DCO) and explanatory memorandum. We welcome the submission of draft DCOs from developers well in advance of an application being submitted and certainly not less than 6 weeks beforehand. We can offer comments on technical and drafting aspects of the documents without prejudice to any future IPC decision and with a view to addressing any potential problems that might otherwise arise during the examination of an application. The draft order should also be made available to other parties who might have comments on the operation of the order, such as local planning authorities.

The above approach also applies to other draft documents such as Habitats Regulations Assessment reports and consultation reports. We would welcome advance notice of the likely provision of draft documents to assist with our resource planning. Before the s.14 order has come into effect, we can provide s.51 advice to you in relation to any general drafting queries arising on powers which may be included in a DCO.

I trust that the enclosed will prove to be of assistance. Please do not hesitate to contact me should you require any further advice or clarification.

Yours sincerely,

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The IPC gives advice about applying for an order granting development consent or making representations about an application (or a proposed application). The IPC takes care to ensure that the advice we provide is accurate. This communication does not however constitute legal advice upon which you can rely and you should note that IPC lawyers are not covered by the compulsory professional indemnity insurance scheme. You should obtain your own legal advice and professional advice as required.

We are required by law to publish on our website a record of the advice we provide and to record on our website the name of the person or organisation who asked for the advice. We will however protect the privacy of any other personal information which you choose to share with us and we will not hold the information any longer than is necessary.

Before sending information to the IPC, please consider our Openness Policy, which can be viewed on our website or a copy will be provided free of charge on request

Annex A: IPC comments on the content of the letter from Thames Water of 2 November 2011

We provide the following comments regarding the content of your letter to us dated 2 November 2011 and its appendices A and B. Our comments do not prejudice any future decisions of the IPC, including that of the Commissioner appointed to consider the acceptance of any future application made under s.55 of the PA 2008. As appropriate, we have highlighted areas in which you may wish to consider taking further steps to satisfy the pre-application requirements of the PA 2008 and related secondary legislation.

Notifying the IPC of a proposed application ('s.46')

If a developer considers that a project is a NSIP which will require development consent under the PA 2008, it must notify the IPC of the proposed application. This duty is set out in s.46 of the PA 2008. This notification must take place on or before commencing formal pre-application consultation as described under s.42 of the PA 2008 and the IPC must be provided with the same information as proposed to be used for the s.42 consultation.

We note that Appendix A of your letter provides a statement purporting to be a notification under s.46 of the PA 2008. It is our view that the IPC does not have jurisdiction to accept the s.46 notice or the regulation 6 notice on the basis that the IPC cannot have jurisdiction in relation to a "proposed application" when there is no statutory framework in place to enable an application for development consent for that project to be sought and obtained. Whilst we cannot accept this as formal notification, we note the intent of the statement and make the following observations:

- The notice within your Appendix A was received by the IPC on 2 November 2011 and formal pre-application consultation commenced on 4 November 2011.
- Your notice supplies details of where the IPC can access the information that will be used for that consultation.

We consider that the approach you have taken to drafting the notice and its timing reflects the procedural requirements under the PA 2008 for notifying the IPC of a proposed application.

Notifying the IPC that an environmental statement will be provided ('EIA Regulation 6')

Where a proposed project is EIA development, the developer must either request a screening opinion or notify the IPC in writing that it proposes to provide an environmental statement in respect of the development. A notification under the latter approach must be made before carrying out pre-application consultation as prescribed under s.42 of the PA 2008 and must be accompanied by the information set out in Regulation 6(3)(a-c) of the EIA Regulations 2009². This includes a plan together with a description of the development and its effects on the environment.

We note that Appendix B of your letter provides a statement purporting to be a notice under regulation 6(1)(b) of the EIA Regulations 2009. Whilst we cannot accept this as formal notification for the reasons set out above, we note the intent of the statement and make the following observations:

² The Infrastructure Planning (Environmental Impact Assessment) Regulations 2009

- The notice within your Appendix B was received by the IPC on 2 November 2011 and formal consultation commenced on 4 November 2011.
- We acknowledge receipt on 2 November 2011 of the book of plans entitled 'phase 2 consultation notification to IPC' (your document ref: 100_IPCXX-000004).
- Your notice provides a working description of the proposed project and its environmental effects.

We consider that the approach you have taken to drafting the notice and its timing reflects the procedural requirements under the EIA Regulations for notifying the IPC that an environmental statement will be provided.

Your statement that the IPC cannot at this time serve notices under regulation 9 of the EIA Regulations 2009 for the reasons described above is consistent with advice that we have given to you previously.

Duty to consult local authorities, statutory consultees, those with an interest in land and significantly affected persons ('s.42')

After notifying the IPC of a proposed application, a developer must under s.42 of the PA 2008 carry out formal pre-application consultation with statutory consultees, local authorities, those with an interest in land and significantly affected persons. The parties who must be consulted are defined in sections 42 to 44 of the PA 2008 and regulation 3 and Schedule 1 of the APFP Regulations 2009³. The developer must notify the consultee of the deadline for the receipt of responses which is not less than 28 days from the receipt of consultation documents.

We note from your letter that the 'phase two' consultation on the Thames Tunnel project is intended to meet the requirements of s.42 of the PA 2008 and runs from 4 November 2011 until 10 February 2012. We note your intention to consult "local planning authorities, other prescribed persons and land owners specified in sections 42, 43 and 44 of the Planning Act 2008 and regulation 3 and Schedule 1 of the Application Regulations". It will be for your consultation report to explain at submission stage how you have complied with s.42 and how any steps taken before commencement of the s.14 order would have amounted to compliance under s.42.

Duty to consult the local community ('s.47')

Developers must also carry out formal pre-application consultation with the local community. The PA 2008 requires, at s.47, the developer to prepare a statement of community consultation (known as a 'SoCC'), to publish it in the prescribed manner and to carry out consultation in accordance with that statement. There is a duty on the developer to first consult the local authority(/ies) in respect of the content of the SoCC and to allow at least 28 days for comments. The developer must have regard to any response received from a local authority during this time. Additional guidance made under s.50 of the PA 2008 regarding SoCCs is set out in IPC Guidance Note 1.

Your letter explains that you have prepared and consulted on a document which you describe as a revised draft SoCC in preparation for phase two consultation. You state that your revised SoCC would be published in the Evening Standard on 4th November 2011

³ The Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009

and that phase two consultation will run until 10 February 2012 and will be undertaken in accordance with its terms. It will be for your consultation report to explain at submission stage how you have met the requirements under s.47 and how the steps taken to consult with the local authorities on the content of the document published on 4th November 2011 and the community consultation carried out in accordance with it would have amounted to compliance under s.47.

You also state that the SoCC is supported by a Community Consultation Strategy which will be made available at phase two consultation. IPC Guidance Note 1 recognises at paragraph 22 that developers may decide to make available to the public a separate document which provides more detail than the published SoCC can.

SoCC requirements for EIA development ('EIA Regulation 10')

A SoCC should state whether the proposal is EIA development and how the developer will publicise and consult on the preliminary environmental information. This is required under regulation 10 of the EIA Regulations 2009. It is noted that, as stated in your letter, the materials provided for your phase two consultation will include a preliminary environmental information report on the likely significant effects of the proposed project including a non-technical summary. Your consultation report should clarify how the published SoCC meets the requirements under regulation 10.

Duty to publicise a proposed application ('s.48')

At the pre-application stage, a developer must also formally publicise a proposed application and specify a deadline for receipt of responses to that publicity. This requirement is set out at s.48 of the PA 2008 and regulation 4 of the APFP Regulations 2009. The regulations [4(2-3)] prescribe the manner in which the notice should be publicised and the matters which the notice must include.

Your letter states that publicity for your application to meet the requirements set out under s.48 of the PA 2008 is programmed to occur in early Summer 2012. For EIA development, you should also be mindful of the requirements of regulation 11 of the EIA Regulations 2009 which apply at the same time as publicity under s.48.

IPC Guidance Note 1 states that it would be helpful if the published deadlines for receipt of responses to publicity are as close as possible to deadlines to pre-application consultation under s.42. IPC Guidance Note 1 is guidance under s.50 of the PA 2008 and as such developers must have regard to its content. A developer may for good reason choose not to follow the guidance, in which case it should ensure that the application documents (in this case, the consultation report) clearly explain the reasons for this.

Consultation report ('s.37(7)')

Any application to the IPC must be accompanied by a consultation report prepared under s.37(7) of the PA 2008. IPC Guidance Note 1 sets out further guidance about this, including regarding presentation of information to clearly describe the separate strands of consultation under s.42, s.47 and s.48, responses received and account taken of those responses.

Your letter states that a consultation report will be supplied with the proposed application for the Thames Tunnel project and that it will cover both phases one and two of the consultation as well as your publicity under s.48 of the PA 2008. As advised above, in addition to demonstrating compliance with pre application procedure following commencement of the s.14 order, the consultation report should also explain how anything done in connection with the project before commencement of the s.14 order would have amounted to compliance with the PA 2008, the EIA Regulations 2009 and the APFP Regulations 2009 . Please be mindful that the report should also confirm any steps taken to comply with regulation 11 of the EIA Regulations 2009.