



# Application for Development Consent

Application Reference Number: WWO10001

Written summaries of the cases  
put orally at the hearings held  
on 28 November 2013

Doc Ref: **APP42.1**



# Compulsory acquisition hearings

## Day 1 – 28.11.13

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## 1 Introduction

- 1.1.1 This document contains a written summary of the oral submissions made by Thames Water Utilities Limited ('Thames Water') at the compulsory acquisition hearing held on 28 November 2013, as part of the examination of the application for development consent for the Thames Tideway Tunnel project. The Examining Authority ('ExA') in respect of the application set out the agenda for the compulsory acquisition hearings ('Agenda') by way of a letter, dated 18 November 2013, addressed to interested parties. This written summary of Thames Water's submissions is broadly structured by reference to the items on that Agenda that were addressed at the hearing on 28 November 2013.

## 2 Agenda items 4.1, 4.2 and 4.3

### 2.1 Legal submissions by Michael Humphries QC

- 2.1.1 Agenda items 4.1, 4.2 and 4.3 were taken together. Agenda item 4.2 invited Thames Water to briefly set out, in summary form, how the conditions referred to in agenda item 4.1 have been met, and where this is evidenced in the application documents and specifically supplemented in the examination submissions.

## 3 Agenda item 4.1, sections 122 and 123 of the PA 2008

### 3.1 Legal submissions by Michael Humphries QC

- 3.1.1 Agenda item 4.1 asked for Thames Water to confirm that sections 122(2)(a) and (b) of the Planning Act 2008 ('PA 2008') are engaged. Thames Water was also asked to confirm that Section 123(2) of the PA 2008 is engaged on the basis that the application for the development consent order ('DCO') included a request for compulsory acquisition of the land sought to be authorised and, in this case, the proposals have been subject to pre-application consultation and other pre-application and application procedures under the PA 2008.
- 3.1.2 Thames Water confirmed that sections 122(2)(a) and (b) of the PA 2008 are both engaged in that land is required for the development to which the DCO relates and land is required to facilitate or is incidental to that development by necessary implication.
- 3.1.3 In relation to Section 122 (2) of the PA 2008, there are a number of documents that set out what the land is required for and the reasons for that.
- 3.1.4 The order land schedule was produced on 23 September 2013, at the request of the ExA, as a way of drawing together information contained in various other documents. The order land schedule sets out, in relation to

each plot included in the *Book of Reference*, the plot description, the site works reference, the nature of the rights sought, the summary of the works of construction proposed, the summary of the works during the operation proposed, and ownership and occupation information. That schedule appears in 14 parts. The document reference numbers are 9.06.01 through to 9.06.14 for each of the 14 local authority areas. The information contained in this schedule sets out what the land is required for, not only in relation to land where there is compulsory acquisition, but also land where there is temporary possession. This information is also contained in the *Book of Reference* and is consistent with the requirements of regulation 7 of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009.

- 3.1.5 The *Statement of Reasons* also sets out the reasons for the acquisition of the land in a number of tables. The *Statement of Reasons* (Document 4.1) sets out the purpose of the application, the justification for the acquisition of the land and the rights required, the justification for the use of the powers of compulsory acquisition, the location and description of the order land, the approach to land acquisition and the national policy position. It also sets out the position in relation to temporary possession powers and makes it clear (a) where particular plots are required for temporary possession and (b) what the purpose is of that temporary possession.
- 3.1.6 There are two further documents that are relevant: the first is the *Engineering Design Statement* (Document 7.18) and the second is the *Engineering Design Statement Addendum* (Document 9.19). Both of these set out the engineering reasons for the particular design and its layout, the reasons why the particular worksites are the size that they are, and the purpose to which the particular sites are to be put.
- 3.1.7 Section 122 (2) (c) of the PA 2008 is not engaged. That provision relates to replacement land, and the compulsory purchase provisions in the *Draft DCO* do not purchase land as replacement land to be given in exchange for order land.
- 3.1.8 Thames Water confirmed that, pursuant to Section 122 (3) of the PA 2008, there is a compelling case in the public interest for the land to be acquired compulsorily. Thames Water also confirmed that Section 123 (2) of the PA 2008 is satisfied in that the order included a request for compulsory acquisition and, in the application form, the relevant box was ticked to make it clear that the draft order included the compulsory acquisition of land.

## **4 Agenda item 4.3 – Public Interest Test**

### **4.1 Legal submissions by Michael Humphries QC**

- 4.1.1 Agenda item 4.3 invited Thames Water to summarise briefly whether there is a need in the public interest for the land to be acquired compulsorily, to include the National Policy Statement ('NPS') position and whether the

land/interests to be compulsorily acquired are required for the scheme to be operated and implemented.

- 4.1.2 As far as the public interest is concerned, the NPS sets out, in a number of places, the national need for this project. Chapter 2 in particular draws attention to the need for the project and makes it very clear that the ExA and the decision maker should start its consideration of any application submitted to it on the basis that the national need for this infrastructure has been demonstrated (para. 2.6.34). The *Needs Report* has also explained the need for, and benefits of, the proposed development. This has been identified in part of our response to first written question 4.30 (paras. 30.1.12 and 30.1.13).
- 4.1.3 In the context of Agenda item 4.3, the ExA also asked Thames Water to address the approach to public interest in relation to the rationale for individual worksites, having regard to the policy guidance contained in paragraph 2.6.34 of the NPS.
- 4.1.4 Paragraph 2.6.34 of the NPS sets out that it would be for Thames Water to justify in its application the specific design and route of the project that is proposed, including any other options it has considered and ruled out. As far as that relates to alternative sites and alternative tunnel alignments, the *Final report on site selection* sets this out in detail. This has been supplemented in the responses to various of the ExA's first round of questions (particularly in the Q14 series of questions) and in Thames Water's responses provided on 2 December 2013.
- 4.1.5 In relation to individual sites, the *Engineering Design Statement* and its addendum deal with the size of the individual sites, and why the amount of land identified in the *Book of Reference* is required. This can be cross-referred back to each plot by looking at the plots in the order land schedule to understand the justification for each plot. The documentation also sets out the effect that the scheme has on the discharges from the individual combined sewer outflows (some of which is dealt with in the *Needs Report*, but also in our response to the first written questions), resulting in a reduction in the overall discharges from the current level of discharge, down to the level where there would be four occurrences per year. It is Thames Water's position that this is compliant with the requirements of the Urban Waste Water Treatment Directive.
- 4.1.6 The information in these documents is supplemented by Derek Arnold's oral explanations and Thames Water's response to first written question 4.31 (g).

## 5 Agenda item 4.4 – Required Documentation

### 5.1 Legal submissions by Michael Humphries QC

- 5.1.1 At Agenda item 4.4, the ExA sought clarification as to whether any updated versions of application documents should be provided and/or referred to. Matters relating to the following documents were addressed:

The *Draft DCO*; the *Book of Reference*; the *Statement of Reasons*; the *Funding Statement*; and the Land Plans

- 5.1.2 By way of overview, Thames Water confirmed that its response to the ExA's first written question 4.31, parts (a), (b), (c) and (d), sought to identify where documents have been updated from those that were included with the application submission. A document tracker has been produced and has been submitted to the ExA under separate cover – see APP36 v1.

## 6 Agenda item 4.4 – the Draft DCO

### 6.1 Legal submissions by Michael Humphries QC

- 6.1.1 In relation to the *Draft DCO*, the ExA sought clarification as to which articles in the *Draft DCO* engage compulsory acquisition powers; whether the DCO excludes the application of a compensation provision or modifies the application of a compensation provision beyond that necessary to enable the compensation provision to be applied; and how protective provisions will be fully incorporated and whether these are in an adequate form.

#### DCO articles engaged

- 6.1.2 The articles which specifically engage compulsory acquisition powers are articles 27 to 33. Articles 36 to 39 relate to compensation. Articles 40 to 47 are supplementary to compulsory acquisition powers. The two powers of temporary possession, articles 34 and 35, are not compulsory purchase powers. These two articles are fairly closely based on the model provisions and clearly distinguish between the power of temporary possession of land and the compulsory acquisition of land.
- 6.1.3 The compulsory acquisition of land involves taking an interest in land or a permanent right over land. The compulsory acquisition of a new right in land is a permanent right. However, it is sometimes said that such a right can, in effect, become spent, eg, if it was a right to construct a work then, at the end of the construction period, one might say that that right is effectively spent. Nevertheless, as the right itself is permanent, it continues to be a right over the land. Utilities are often given powers to take temporary possession of land in order to carry out work or to install apparatus. By contrast, the Town and Country Planning Act 1990 does not contain a power to take temporary possession of land, which is the reason that acquiring authorities under that Act often acquire the freehold interest or acquire, what are in effect, permanent rights in respect of construction works.
- 6.1.4 The power to take temporary possession is itself consistent with a proportionate interference with human rights in relation to property. Where Thames Water does not need the freehold, or it does not need a permanent right, it has sought to take a power of temporary possession as the proportionate exercise of compulsory powers under the Act. It is

recognised that temporary possession does not necessarily mean a short period of time and that will be reflected in any compensation. At the end of that temporary period, however, there is a mechanism in the DCO whereby the land subject to temporary possession, unless otherwise agreed, will be restored to its previous condition.

#### Statutory authority for Article 34

- 6.1.5 The ExA asked for confirmation as to whether Thames Water relies on s120(3) of the 2008 Act as authority for the inclusion of Article 34 of the *Draft DCO*. Thames Water confirmed that it is relying on this section.

#### Article 47 and use of the term ‘appropriation’

- 6.1.6 The term ‘appropriation’ occurs in Article 47 in the *Draft DCO*, which is based on the terminology used in Article 27 in the model provisions. ‘Appropriate’ or ‘appropriation’ also occurs in the context of the Town and Country Planning Act 1990. When it is used in Town and Country Planning legislation, it is used in the context of an authority that already owns land, which it holds for one purpose and then ‘appropriates’ to another purpose (eg, open space that is appropriated for development purposes).
- 6.1.7 Thames Water has used the term ‘appropriation’ in Article 47 of the *Draft DCO* simply because the model used it. Thames Water’s understanding is that it is not correct to use the term ‘appropriation’ as a general expression to include all powers over land that do not amount to compulsory acquisition. The draftsman must have been considering that an applicant could, for example, be appropriating air space and using it for a different purpose (eg, for a crane swinging over land). Thames Water is not seeking to adopt the term ‘appropriation’ as a general term for non-compulsory purchase powers and does not, for example, consider it helpful in the context of its Article 34 and 35 powers.

## 7 Agenda item 4.4 – the Book of Reference

### 7.1 Legal submissions by Michael Humphries QC

- 7.1.1 Thames Water confirmed that all parts of the *Book of Reference* are included with the application, that the provisions are clear and comprehensible, and that it was not aware of any points where people are saying that there are aspects of the *Book of Reference* that are not clear.
- 7.1.2 There are some points where amendments have been made and, in Appendix 4.31.02 to question 4.31(b), there is a schedule of amendments that have been made.

#### Section 102 parties

- 7.1.3 The ExA asked Thames Water to confirm how it is dealing with Section 102 parties that are being notified on a rolling basis. Sarah Beattie for Thames Water noted that all of the information is being logged for the

purposes of the next formal stage for the *Book of Reference*. This will be the Section 134 notice of authorisation of compulsory purchase.

- 7.1.4 For the purposes of the section 134 notification, Thames Water will be proactively checking on the changes that have taken place so that the list of Section 102 parties is as up to date as it can be. Thames Water will take a precautionary approach so that, if there was any doubt about it, the current owners and the past owners would both be served with notices.
- 7.1.5 Thames Water responded to the specific question on Section 102A/102B parties on 29 November 2013 (see relevant summary notes).

## 8 Agenda item 4.4 – the Statement of Reasons

### 8.1 Legal submissions by Michael Humphries QC

- 8.1.1 The Agenda indicated that the ExA will seek views upon whether the *Statement of Reasons* sets out comprehensively the applicant's case for the grant of compulsory acquisition powers with reasons and justification, and whether there are any matters needing clarification. The document that identifies changes to the *Statement of Reasons* is in Appendix 26.02.04.
- 8.1.2 The *Statement of Reasons* also refers to the Replacement Land Report, which is superseded by the document that accompanied the application to the Secretary of State under sections 131 and 132 of the PA 2008 in relation to open space certification. The *Statement of Reasons* also appended the noise insulation and temporary rehousing policy that will now become subject to a unilateral Section 106 undertaking.

#### Open space

- 8.1.3 In the context of considering the *Statement of Reasons* and, having regard to Section 4.8 of the NPS, the ExA sought clarification as to which documents it has before it and, in particular, the extent to which Thames Water's separate application to the Secretary of State for certification under sections 131 and 132 of the PA 2008 should be taken into account in examining the DCO application.
- 8.1.4 In relation to Section 4.8 of the NPS, Thames Water indicated that it is a matter for the ExA to consider the effects of the scheme on land use, including open space, green infrastructure and the green belt. The application for development consent does not include or propose any exchange land for open space that is lost, although it is to be recognised that, after the construction works are completed, there are a number of areas of land, some of which are currently publicly accessible and some of which are not publicly accessible, that would become accessible to the public. That will be part of the ExA's consideration of loss of open space and loss of accessible open space.
- 8.1.5 The application to the Secretary of State under sections 131 and 132 of the PA 2008 is not before the ExA. The ExA is, however, entitled to look

at the effect of the scheme on open space. In relation to the effect on open space, there is an *Open Space Assessment* (Inquiry Document 7.06) that was prepared separately from the Replacement Land Report.

- 8.1.6 The *Open Space Assessment* does not replace the Replacement Land Report but was intended to be the report that addressed the requirements of Section 4.8 of the NPS. The Replacement Land Report itself was produced at a time when the legislation was changing and, in an abundance of caution, Thames Water submitted what, in effect, turned out to be an interim report, which was superseded by the later Section 131 and 132 application material.
- 8.1.7 Technically, however, the Replacement Land Report has not been withdrawn. Insofar as Thames Water is making an application under sections 131 and 132 of the PA 2008, however, that document has been superseded by a later document which more properly addresses the tests under sections 131 and 132, as now amended by the Growth and Infrastructure Act 2013.

## 9 Agenda item 4.4 – Funding Statement

### 9.1 Legal submissions by Michael Humphries QC

- 9.1.1 In considering the issue of financial security for compulsory acquisition compensation, the ExA asked for regard to be had to the provisions of the PA 2008, the Infrastructure Planning (Applications: Prescribed Forms and Procedures) Regulations 2009, together with guidance issued under the PA 2008. In addition, regard will need to be had to the provisions of the Human Rights Act 1998, since compulsory acquisition involves a potential breach of Article 1 of the first protocol, Article 6 and Article 8.

#### Overview

- 9.1.2 Thames Water submitted a *Funding Statement* in January 2013. A revised *Funding Statement* was then submitted in September 2013. By way of brief background, Thames Water:
- introduced the regulatory regime that water companies (including Thames Water) operate within,
  - gave an explanation of why it is considered that the project may be taken forward by an infrastructure provider rather than Thames Water,
  - explained the infrastructure provider process and also the broad framework in which the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 (the SIP regulations) work, and
  - dealt with Article 9 and the transfer of the DCO.
- 9.1.3 In relation to each of these topics, Mr Qureshi and Ms Morgan set out the detail of Thames Water's position and that is set out separately (see below).

- 9.1.4 This part of the summary of the Compulsory Acquisition hearing on 28 November 2013 seeks to pick up a number of other issues that were raised under agenda item 4.4 in relation to compulsory acquisition.

### Preparatory works

- 9.1.5 In the context of the Water Industry (Specified Infrastructure) Regulations 2013, the ExA asked about the preparatory works that may be undertaken by Thames Water after the Thames Tideway Tunnel project has been specified.

- 9.1.6 Thames Water, as the incumbent undertaker, would not be allowed to undertake the specified infrastructure project (ie, one for which the infrastructure provider has been designated) but may nevertheless undertake preparatory works – see Regulation 5 (1) and (3). Preparatory works are defined in Regulation 2 and comprise a list of (a) to (h) as follows:

- a. is conducting the surveys, including in relation to environmental matters, ground conditions, hazardous substances, heritage, the operation of existing infrastructure at ground, surface water quality, and the general condition of the site;
- b. is arranging for the provision of electricity or other power;
- c. is diverting or protecting communications: electricity, gas, water, sewerage assets;
- d. is preparing designs and specifications for a specified infrastructure project;
- e. is preparing and submitting planning applications, including consulting the public in relation to those applications, and enquiring and protecting interests in land;
- f. is procuring goods, services and works;
- g. is preparing a site for works, including remediation for contamination, laying access roads, undertaking demolition and clearing works; and
- h. is an undertaking associated works on the highway.

- 9.1.7 This would allow Thames Water to secure the DCO and carry out any site preparation works of the sort that is included in this definition of preparatory works. It would then be the infrastructure provider that would take the project forward.

### Compulsory purchase powers

- 9.1.8 Insofar as Thames Water is exercising its compulsory purchase powers, Thames Water would retain the obligation to pay compensation. As far as any preparatory works are concerned that Thames Water undertakes before any transfer, Thames Water would be liable for any compensation obligations for works that it undertakes. At the point when the infrastructure provider starts undertaking works in accordance with the DCO, then the infrastructure provider, rather than Thames Water, would

be liable for any compensation in relation to the construction of those works on the exercise of powers transferred to it.

### **Transfer of the benefit of the DCO**

- 9.1.9 Article 9 (1) of the DCO allows the undertaker to transfer to the infrastructure provider the benefit of all the powers in the DCO with the exception of the compulsory acquisition powers in articles 27, 28, 29, 30 and 40. A transfer under Article 9(1) may take place without the consent of the Secretary of State. The reason that a requirement has not been included for the transfer to be made with the consent of the Secretary of State is that both the Secretary of State and/or Ofwat would have been intimately involved in the process of designating, and then licensing, the infrastructure provider. Therefore, the infrastructure provider will be a body that the Secretary of State and/or Ofwat consider to be a fit and proper person. In such circumstances, there is no reason, so far as Thames Water is aware, that the Secretary of State would want or need to consent to a transfer under Article 9 (1).
- 9.1.10 By contrast, Article 9(2) provides that where the transfer is to another person, ie, a transfer that contemplates a person that is not the infrastructure provider, that is done with the consent of the Secretary of State. This could, for example, cover the circumstances where, in the future, the Secretary of State creates some other new type of body, eg, not an infrastructure provider under the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 (SIP Regulations), but some other creature of statute to which the benefit of the DCO could be transferred. As it is not known what that creature of statute could be, it is appropriate to have that transfer undertaken only with consent.

### **TfL/Network Rail/PLA submissions relating to Article 9(2)**

- 9.1.11 TfL indicated that it does not believe that it is possible to make provision in the DCO for future possible changes to the legislation and that Article 9 of the DCO needs to be confined to the infrastructure provider, and that if there are other categories of individuals, they need to be specified.
- 9.1.12 Thames Water argues, however, that the ultimate guarantee for Transport for London in these circumstances is that the power to transfer under Article 9(2) can only be exercised with the consent of the Secretary of State. Ultimately, that must be the right approach. If the Secretary of State did not trust himself to exercise that power properly then, presumably, he would take Article 9(2) out, but we assume that the Secretary of State does trust himself to exercise his powers properly. This is ultimately something that the Secretary of State will have to decide.
- 9.1.13 This sort of provision, where the benefits of an order are transferred to other undertakings, has been made in a number of other development consent orders that have been made by the Secretary of State. There is no good reason for seeking to restrict the ability to transfer with the consent of the Secretary of State in Article 9 (2).

- 9.1.14 If that means transferring the benefit of the order to some other body, for example, the Government itself, then it seems that it is appropriate that those powers can be so transferred. The most appropriate person to decide on whether there should be a transfer is the Secretary of State, by giving his consent. Again, this type of provision is common in other consented orders and the Secretary of State has found it to be a formulation that is acceptable to him.

### Funding compulsory acquisition costs

- 9.1.15 In relation to the position on funding compulsory acquisition costs and other acquisition compensation liabilities, some land has already been acquired by Thames Water and that has been included in the budget for the current asset management plan (AMP) period. The next AMP period, and the business plan that was submitted in the week commencing 2 December 2012, will include some financial provision for additional compulsory purchase and land acquisition, whether by compulsory purchase or otherwise. That will complete all of the anticipated compulsory acquisition in relation to the project.
- 9.1.16 As far as the non-compulsory acquisition compensation is concerned, those costs are accommodated within the business plan submitted for the AMP [? – checking with Amar] period. It is anticipated that some of those costs may ultimately be borne by the infrastructure provider and there will, indeed, need to be an allocation of costs between Thames Water and the Infrastructure Provider.
- 9.1.17 Compensation for statutory blight is regarded as part of compulsory acquisition compensation.

### Designating the IP

- 9.1.18 The Secretary of State for the Environment and Rural Affairs, one of the two Secretaries of State who would make this order, will also be the Secretary of State who will either designate and licence, or be responsible for Ofwat as the body that will designate and licence, the Infrastructure Provider. That should give some confidence that the Infrastructure Provider will be a fit and proper person. The detailed procedures that would have to be gone through in order for a company to become a designated and licensed infrastructure provider are explained by Mr Qureshi and Ms Morgan separately (see below).
- 9.1.19 The advice at paragraphs 33 and 34 of the DCLG guidance on compulsory acquisition clearly contemplates circumstances where the funding of projects may be less than certain, and asks promoters to provide an indication of how potential shortfalls to funding may be met. It also states that promoters should be able to demonstrate that adequate funding is 'likely' to be available. Bearing in mind the way the SIP Regulations have been put in place, the approval process that has been gone through by Government, the various approvals which the Government or Ofwat have to obtain and the financial provisions in the Water Industry Act 1991 itself, the ExA should have a high degree of confidence that appropriate funding

for the compulsory acquisition and other compensation will be in place, and also a high degree of confidence that the funding will be put in place for the delivery of the project itself.

- 9.1.20 The whole purpose of the specified infrastructure provider process is to set up a regulatory framework within which the Infrastructure Provider can deliver the project. Thames Water has no reason to believe that its regulator, Ofwat, will not allow expenditure for the project and, although its recent IDOC was rejected, Ofwat indicated that TWUL would be able to recover land acquisition expenditure during the next AMP period.
- 9.1.21 Section 2 (2A) of the Water Industry Act 1991 provides that:  
*“The Secretary of State, or as the case may be, the authority shall exercise and perform the powers and duties in subsection (1) above in the manner which he considers is best calculated (c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular by securing reasonable returns on their capital) to finance the proper carrying out of those functions.”*
- 9.1.22 There is, therefore, a clear statutory duty on the Secretary of State and Ofwat to make sure that regulated companies, including Thames Water, can finance the proper carrying out of their functions. The circumstances in which the Secretary of State or Ofwat would not allow proper expenditure to deliver the Thames Tideway Tunnel is, therefore, difficult to understand.

## 9.2 Submissions by Amar Qureshi

- 9.2.1 Thames Water is, and the infrastructure provider will be, a regulated utility. Thames Water is a water and sewerage undertaker appointed under the Water Industry Act 1991 and the infrastructure provider will be an infrastructure provider, regulated under the Water Industry (Specified Infrastructure Projects) (English undertakers) Regulation 2013 (SIP Regulations). As regulated utilities, both Thames Water, and the infrastructure provider when licensed, will be under the supervision of Ofwat, the water regulator, and the associated regulatory regime under the Water Industry Act in the SIP Regulations. Both will be economically regulated by Ofwat, meaning that each of them in the same way as any other water utility company in the country, will have a Regulated Capital Value.
- 9.2.2 The Regulated Capital Value of any utility company is essentially the platform through which the utility company can raise financing in the private finance markets (both debt and equity). The Regulated Capital Value (or RCV as its commonly known in the sector) is essentially formed, in Thames Water’s case, through the capital value of the assets. This has been created since privatisation through periodic price review cycles based on the company’s asset management plans (and the capex expended) during a five-year period.
- 9.2.3 Thames Water is about to submit its business plan for AMP6 (ie, the asset management plan for the sixth periodic review since privatisation). Thames Water will publish the business plan for that cycle early next

week. That process is the result of Thames Water's consultation with its customers, and is submitted to the regulator in order to enable Ofwat to scrutinise Thames Water's business plans to ensure that the costs or the service improvements which Thames Water proposes to implement over the next five-year period are costed appropriately, and offer appropriate value for customers. At the end of that scrutiny by Ofwat and the consultation with customers, the regulator determines the prices for the period 2015-2020. Part of that final determination is the Regulated Capital Value. That allows, then, Thames Water to essentially charge its customers a price which is based on the Regulated Capital Value, multiplied by the weighted average cost of capital allowed by Ofwat. The weighted average cost of capital (or WACC) is the cost which sewerage undertakers across the country are permitted to charge for actually raising private financing.

- 9.2.4 Since privatisation, almost 23 years ago, the sector has raised almost £100 billion of private sector investment into the water industry. That gives an indication of the stability of the regulatory environment and its ability to attract private investment. So Thames Water believes that, in terms of the building blocks for any project where revenue certainty is critical, through the engagement with Ofwat, through the tried and trusted regulatory mechanisms, the platform for raising financing – for raising substantial financing – is well established.
- 9.2.5 In order to ensure the ongoing sustainability of water undertakers, there are generic licence conditions. These licence conditions are largely the same for all water companies and water and sewerage undertakers. In terms of the certainty of funding, there are two licence conditions which are directly relevant. There is a condition, and Thames Water currently understands that the same condition will be put in place in relation to the infrastructure provider's licence – which requires the regulated entity to use reasonable endeavours to secure and maintain an investment credit grade rating. That condition gives comfort to both Ofwat and debt providers, that there is a regulatory obligation to maintain an investment credit grade rating. That obligation allows water companies to access the financing markets, which are at their deepest when it comes to accessing investment grade debt, at a price which is cheaper than a price which would be offered by the market to an entity with a sub-investment grade rating.
- 9.2.6 There is also another licence condition which is relevant to liquidity, which requires all licensees to certify each year at least 12 months' liquidity in order to meet the licensee's obligations as they fall due. Currently, Thames Water has almost 18 months of liquidity, and I think that amounts to around £1.7 billion in terms of cash, liquid investments and committed facilities. There will be a similar licence obligation or undertaking in the infrastructure provider's licence.
- 9.2.7 A licence or appointment under the Water Industry Act can be withdrawn under certain conditions, but the withdrawal is a step of last resort, only where other enforcement action has failed. Ofwat will allow a remedial period and only where the regulator feels that there's no alternative then

the licence can be revoked. Further details on licence breach and revocation are provided separately.

### **Why it is appropriate for the Thames Tideway Tunnel to be taken forward by an infrastructure provider**

- 9.2.8 The infrastructure provider is a creature of regulation. It is also a creature of statutes. The Flood and Water Management Act 2010 made certain amendments to the Water Industry Act 1991, and the concept of the infrastructure provider was essentially founded in, and is articulated in, the Flood and Water Management Act. It is a generic piece of legislation; however, one of the primary purposes of the legislation is to provide a funding route for the Thames Tunnel. This is the project which is envisaged to be of a size and complexity which could potentially affect adversely the core functions of the incumbent undertaker.
- 9.2.9 There is a further rationale for the infrastructure provider which is found in the legislation and the SIP Regulations – and that is a value for money test. The reason why the infrastructure provider is the favoured delivery model – from a Defra, and a Treasury, and an Ofwat perspective, as well as Thames Water – is that the financing will be competed. The competition will be run for the right to become the owners of the infrastructure provider and the key part of that competition will be the cost at which those bidders will be able to provide financing. The cost of financing has a significant impact on customer bills, and so the competition which has run will provide value for money benefits for the infrastructure provider route.

### **How the IP process is working in practice**

- 9.2.10 There are various stages for securing an infrastructure provider. It starts with the specification of the infrastructure project, which is the first of the stages.
- 9.2.11 In relation to the timescales, prior to specification of the project, a consultation process needs to have been undertaken, run by the Secretary of State for Environment, Food and Rural Affairs. We expect that consultation to begin very shortly, within the next couple of weeks or so. That consultation process, as Thames Water understands it, will last four to six weeks. Following the consultation, the Secretary of State will need to make a determination about whether the project ought to be specified. The consultation will set out, in the Secretary of State's opinion, why he thinks that the project ought to be specified, but the decision will need to be made in light of the responses which he will receive through the consultation process itself.
- 9.2.12 Assuming that the project is specified, the next stage is the tendering process, which ultimately leads then to a particular bid being accepted, and designation.
- 9.2.13 The cost of the project is stated to be £4.2 billion; £2.8 billion of this capital expenditure is allocated towards the work which the infrastructure provider will be required to carry out. The residual amount at around £1.4

billion is for Thames Water. This cost includes development, land acquisition cost, and other construction activities, which Thames Water itself will undertake.

- 9.2.14 In relation to the bidding process for the infrastructure provider, Thames Water will put to the tenderers, or test through the procurement process, the ability of potential companies to finance the overall project costs. The overall project cost Thames Water estimates in project methodology terms of probability of outcomes. Thames Water will test the tenderer's ability to finance up to P99. P99 means that, in 99 cases, the project will be completed in accordance with that cost envelope. This provides, in Thames Water's view, certainty that the infrastructure provider will be able to fund the project through to completion.
- 9.2.15 An element of the procurement process which is set out in the evaluation criteria tests, at the prequalification stage, the historic ability of bidders (they're likely to be consortia) to raise financing of that scale. Also later on in the process, during the evaluation of the substantive bids, the bidders are tested in terms of their ability to deliver financing of this scale to finance and complete the project. In cases such as these, as big infrastructure projects, part of the deliverability assessment will be the ability of the bidders to put up third-party security, such as letters of credit and other comfort, to ensure that their equity contribution is committed. Traditionally, Thames Water would be looking for letters of credit from banks or other entities with a very strong credit rating but, in practice, it will depend on the nature of the bidder. Those bidders, who are used to investing in regulated utilities, such as sovereign wealth funds or managed funds, may have a credit standing which means that there is comfort as to their ability to meet their obligations in terms of equity commitments over a period of time. But should Thames Water determine that a third-party security is indeed needed then the form would ordinarily be some form of letter of credit.
- 9.2.16 The bidders will be asked to provide a single cost of financing in relation to all project cost, including debt and equity by bidding WACC (or weighted average cost of capital).
- 9.2.17 The capex is incurred during the construction delivery. During the operation phase, there's a different regulated return, which is afforded back to the infrastructure provider. The operational return will be set by the regulator post operational completion.

### **Responsibility for operation and maintenance**

- 9.2.18 The maintenance obligation in respect of the shafts and tunnels remains with the infrastructure provider. In terms of the overall system network, this infrastructure fits into Thames Water's overall system network. Operation of the system more widely is for Thames Water.
- 9.2.19 Indexation will be applied to the project costs on the basis of a basket of indices because of the nature of the capex spend. Indexation, as far as the construction costs are concerned, is mapped on to whatever the indexation of the project costs are. The financing obligations relate to the totality of what the infrastructure provider is required to fund.

- 9.2.20 The infrastructure provider, once it's created, will be the fifth or sixth biggest water utility company in the country, the equivalent in terms of size to Northumbria Water.

**Anticipated compensation liabilities of the IP**

- 9.2.21 In terms of the compensation liabilities and non-compulsory acquisition in terms of land cost, Thames Water has estimated the compensation which the infrastructure provider would need to fund would be in the region of £140 million. Some of these costs, depending on the split of where these compensation liabilities finally sit, may be for Thames Water to fund.
- 9.2.22 If, ultimately, those costs of non-compulsory acquisition are to be met by the infrastructure provider, the infrastructure provider will be expected to demonstrate that it can fund these through the tendering process itself.
- 9.2.23 If funded by the infrastructure provider, such costs will form part of the infrastructure provider's RCV, so that allows the infrastructure provider's investors to take a view on actually financing those costs.
- 9.2.24 To the extent that those liabilities were to reside with Thames Water for whatever reason in that split, such costs would sit on Thames Water's RCV as part of the normal asset management plan price review determination process.
- 9.2.25 The full liability of these costs is included in Thames Water's business plan, because Thames Water is assuming, by referencing them in Thames Water's business, those costs will be funded as part of the project costs. Thames Water is not making a commitment that they will form part of Thames Water's obligation, but they are the likely costs for the tunnel as a whole, so these costs are included regardless of the split of liabilities between the infrastructure provider and Thames Water.
- 9.2.26 Ultimately, the split will be determined once the Secretary of State has finalised the Project Specification Notice and the Regulation 5 Notice. At that point, the Secretary of State will have determined which liabilities fall on which side, then there will be clarity as to the split of where the funding is for which entity.
- 9.2.27 The £140 million of non-compulsory acquisition costs have been reviewed and scrutinised by Ofwat and its advisors, and by the Thames Water team. A crucial part of that scrutiny has been the cross-referencing and benchmarking with other projects of this nature.
- 9.2.28 There are two tests in terms of Thames Water's due diligence over the identity, or capability of the bidders in the context of the infrastructure provider procurement: (i) the Ofwat tests around the fit and proper person; and (ii) the granting of the preferred bidder a licence. Thames Water will be working with Ofwat to ensure that through the procurement process for the IP, the right test is set in the context of the evaluation, so that the likely bidder, or the likely winner could also, Thames Water hopes, satisfy the fit and proper person test, when Ofwat runs that at the end of the tendering process.

## Transfer of the benefit of the DCO

- 9.2.29 In terms of Article 9, as in the case of any large infrastructure project, the developers and other stakeholders (in this case, Ofwat and Defra) need to ensure that the project, in terms of its procurement and development, is resilient. Resilience in this context means that the underlying legal drivers (namely compliance with the Urban Waste Water Treatment Directive) can be satisfied, even where changes to the financing markets, or other changes, mean that your preferred delivery model is not achievable. How that might arise is not something which can be anticipated.
- 9.2.30 That's why Thames Water introduced in Article 9 the ability to transfer powers to another entity. A similar provision is included in the tender for the construction works contracts. This allows for the project to be carried out either by Thames Water, an infrastructure provider or on behalf of a public entity. In an extreme case, in that if this project can't be delivered in the private sector, the public sector would deliver the project. And that's why the OJEU Notice is drafted in that particular way. It's there to ensure resilience in the procurement process, and it's similarly reflected in Article 9 of the DCO, so when Thames Water refers to other entities in Article 9 (2) of the DCO, the most likely entity would be a public sector entity.
- 9.2.31 The maximum number of contracts that are envisaged under that OJEU process are three main works contracts, split geographically throughout the project.
- 9.2.32 Thames Water devised a procurement strategy in order to maximise competition for the project as a whole. A good strong competition is likely to deliver the best outcome for our customers, both in terms of value and also in terms of technical ability to actually deliver the works. Value and deliverability underpinned the reason for splitting the overall project into three lots. However, there is also a technical element to that decision, in relation to the different ground conditions in each of the lots, and an element around optimising the teams which the bidders will put back to us. Thames Water wants the best teams from each of the bidders to be engaging through the procurement process. And so, by splitting the contracts up, from our perspective, it provides us with the optimal procurement strategy.
- 9.2.33 There is also a rule in the main works procurement which underpins the strategic objective of the procurement strategy. That rule is that actually, although bidders are encouraged to bid for all three contracts, they can only win one. Otherwise, we potentially could have just put the whole package out as one. That, for us, underpins the key rationale and the strategic objectives to secure value and technical expertise in our procurement strategy. However, in exceptional circumstances, and those exceptional circumstances are narrowly defined, we do have the ability to award more than one lot to more than one contractor. We also have the ability in cases – post procurement – should cases of financial distress materialise, to fold lots together to ensure that the overall programme, or any disruption to the overall programme, and any escalation to project costs in that circumstance, are minimalised.

- 9.2.34 A separate note is provided in respect of the procurement process and the strategy for merging lots in exceptional circumstances.

#### Funding acquisition costs

- 9.2.35 To summarise the position on funding compulsory acquisition costs and non-compulsory acquisition compensation liabilities, some land has been acquired, and that has been included in the current funding settlement. In the next AMP period, the business plan will include some elements for additional land acquisition, whether by compulsory purchase or otherwise.
- 9.2.36 As far as the non-statutory, or non-compulsory acquisition compensation is concerned (whether temporary possession, or other policies or procedures), those costs are included in the business plan that is going to be put forward for the next AMP period. It was anticipated that some, possibly all, of that might ultimately be borne by the infrastructure provider, and there'll be, in effect, an allocation of that between the two companies, Thames Water and the infrastructure provider.
- 9.2.37 Provision for blight would be included in compulsory acquisition and falls within Thames Water's funding requirement. Non-statutory compensation (such as temporary rights) may be passed through to the infrastructure provider.
- 9.2.38 The whole purpose of the process is to deliver the project. That is why the Government is anticipated to specify the project and designate the IP. Every indication that Thames Water has had so far through the process has been one where expenditure has been allowed, and that includes in relation to project costs that formed part of the recent IDoK. Although the IDoK itself wasn't allowed, the expenditure on land was indicated as being appropriate and something that would come forward in the next AMP round.
- 9.2.39 The regulator has the duty as set out in Section 2 (2A), and then (C), which states:
- “The Secretary of State, or as the case may be, the authority shall exercise and perform the powers and duties in subsection (1) above’ – and that is all the general duties with respect to the water industry – ‘in the manner which he considers is best calculated (c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular by securing reasonable returns on their capital) to finance the proper carrying out of those functions.”*
- 9.2.40 There is a statutory duty on the Secretary of State and Ofwat to make sure, through the process, that regulated companies can fund the proper carrying out of their functions. So, the Secretary of State and Ofwat should not allow part of that expenditure which relates to land and compensation.
- 9.2.41 There is a duty to finance functions, and that's balancing in terms of financing functions and customer's overall benefit. However, in cases where, for example, a level of compensation is agreed with Ofwat and where the actual quantum is greater than that, then Thames Water or the IP as the case may be, will be required to fund those. And at the next

price review, Thames Water will engage with Ofwat in terms of that particular additional expenditure, and obtain a settlement in the next price review. There may therefore be a short cash-flow implication, but ultimately, the costs should be funded under the regulatory regime.

## 9.3 Submissions by Charlotte Morgan

### Sanctions for breach of licence conditions

- 9.3.1 There are two licence provisions which are relevant. The first of those is the reasonable endeavours obligation to maintain an investment grade credit rating which is in condition F of Thames Water's licence, in the standard terms and conditions. This is an obligation to use reasonable endeavours to maintain the investment grade credit rating. There are requirements on the licensee, or the appointee in respect of Thames Water, to inform the regulator if there is any change in the credit rating, including when there is any chance of downgrade, or whether the company goes on to negative watch, or any other aspect relating to the credit rating.
- 9.3.2 In terms of the enforcement which relates to that condition, there is published guidance by Ofwat in respect of the enforcement of any breach of licence condition. That enforcement protocol is publicly available on Ofwat's website. There is a hierarchy of enforcement which starts at the lower end with a requirement to remedy the breach, and goes through various different processes until it finally arrives at special administration as a last resort in terms of enforcement. What is different about the water industry to other regulated sectors, which may be relevant here, is that Ofwat actually has a requirement to enforce a licence, which other regulators don't have. So the water industry is slightly different in that respect.
- 9.3.3 With respect to the other obligation which is also in condition F of Thames Water's licence, and would be in condition F of any water industry licence – and indeed in the infrastructure provider's licence – that's an obligation which is given at the time of publishing the regulatory accounts. It is an obligation to certify that the appointee or licensee has sufficient financial resources and facilities and management resources to enable it to carry out its regulated activities for the next 12 months. That is a certificate which is given by the appointee or licensee direct to the regulator, and would be enforced in the same way.
- 9.3.4 What both of these obligations in the licensee's licence do is they give a high degree of comfort to the private funding markets around the investment quality of the licensees. If you look across the sector at the moment in the water industry, the majority, and in fact all of the appointees, have a good investment grade credit rating.

### Liquidity requirement

- 9.3.5 The requirement in the licence is to certify to the regulator that you have sufficient resources to carry out your regulated activities for the next 12

months. Obviously in addition, companies such as water and sewerage undertakers do also have financial documentation which also has liquidity requirements in it. But it isn't a licence requirement in that respect.

- 9.3.6 What you do have, and what the industry as a whole takes great comfort from, is the credit rating analysis which is carried out by the credit rating agencies themselves which look at a number of factors. The credit rating agencies have well-published methodologies for assessing and determining the credit standing of licensed undertakers. Those credit metrics do look at such issues as the liquidity and other ratios which test the financial stability of those companies. Those are openly reported by the credit rating agencies. Both Moody's and S&P cover the water sector.
- 9.3.7 The licence condition requires a certificate from the appointee that it has the financial resources to meet its regulated activities for the next 12 months. That certificate is given at the point in time when the companies publish their Regulatory Account. It's not linked to the Regulatory Accounts; it is a certificate which is given in respect of its liquidity facilities at that point in time.

### Legal framework

- 9.3.8 The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 are most commonly referred to as the SIP Regulations. These regulations were brought into force earlier this year, and were required to be put in place as a result of Sections 36 (A) to 36 (F) of the Water Industry Act, which were inserted into the Water Industry Act 1991 as a result of the Flood and Water Management Act, which was passed in 2010. The purpose of both the Flood and Water Management Act and the SIP Regulations was to make provision in respect of projects or works that in the Secretary of State's opinion are of a size and complexity which would threaten the undertaker's ability to provide services for its customers.
- 9.3.9 The first step to using the regulations requires the specification of an infrastructure project. This arises under Regulation 4 (1). Regulation 4 (1) allows either the Secretary of State or the authority to specify an infrastructure project. Where the term 'authority' is used in the SIP Regulations, it refers to the Water Services Regulation Authority, or Ofwat, as it is more generally known.
- 9.3.10 The infrastructure project itself is defined in the Water Industry Act, and it relates to the design, construction, ownership and operation of a specified project. So those are the elements of a project that the Secretary of State is able to specify.
- 9.3.11 In order to specify a project, the Secretary of State must be satisfied of two tests. He can only exercise this power if (i) either the Secretary of State or Ofwat is of the opinion that the project is of a size or complexity which would threaten the incumbent undertaker's ability to provide services for its customers; and (ii) that the specified infrastructure project is likely to result in better value for money than would be the case if the infrastructure project wasn't specified.

- 9.3.12 In looking at the question of value for money, the Secretary of State or Ofwat looks at two different aspects. The first of those are the charges which would be fixed under Chapter 1 of Part 5 of the Water Industry Act, which are the charges which the undertaker – the water undertaker or the incumbent undertaker – is entitled to charge to customers. And the second is the powers of the Secretary of State under Section 154(b) of the Water Industry Act, which are the provisions of the Water Industry Act that relate to financial assistance for major works. So effectively, in simple terms, those two sub-limbs relate to the cost to customers and the cost to taxpayers.
- 9.3.13 Before the Secretary of State or Ofwat exercises any powers, it must be of the opinion that both of those limbs are satisfied, and it must – that is the Secretary of State must, or Ofwat must as the case may be, also prepare draft reasons for exercising the power. They are also required to consult both the incumbent undertaker, and Ofwat if it is the power being exercised by the Secretary of State, and any Welsh Ministers for Welsh projects, or any other person that the Secretary of State thinks is appropriate. Once the draft reasons have been published and the consultation carried out under Regulation 4(4) and 4(5) of the SIP Regulations, if the Secretary of State or Ofwat is satisfied at that stage, then it can specify the infrastructure project. Once the project is specified, Thames Water moves into the tendering process for the project.
- 9.3.14 If a project is specified, then the Secretary of State must also consider whether to require the incumbent undertaker to carry out preparatory works under Regulation 5 of the SIP Regulations. He must determine what works must be or may be carried out by the incumbent undertaker – and the incumbent undertaker in the scenario that we’re looking at now is Thames Water. There are provisions under Regulation 5 for the Secretary of State to issue a notice setting out what the incumbent water undertaker can do. But the effect of specification – other than any works specified under Regulation 5 – means that the incumbent undertaker is prohibited from carrying out the specified infrastructure project. So once a project is specified, the incumbent undertaker is prohibited from carrying it out, unless the Secretary of State has given a Regulation 5 notice, and only to the extent set out in that notice, allowing the incumbent undertaker to carry out preparatory works.
- 9.3.15 The effect of specification is to require the incumbent undertaker to put the specified infrastructure project – including the financing of that project – out to tender. The manner in which the incumbent undertaker puts the project out to tender is regulated by Regulation 6. This requires the incumbent undertaker to follow either the utilities regulations or the public contracts regulations, or if neither of those apply because there’s an exception, the incumbent undertaker is required to tender the project in accordance with a hybrid regime, which is set out in Schedule 2.
- 9.3.16 Prior to carrying out the tendering of the project, the incumbent undertaker must consult with the Secretary of State and with Ofwat as to the terms on which it will carry out the tender. Put simply, that means that the incumbent undertaker must sit down and discuss, and agree the terms on

which the tender is put out, including any evaluation criteria. So there's a clear understanding that the questions as to how the project is tendered are discussed with, and consulted on, with Ofwat and the Secretary of State. But ultimately, it is the incumbent undertaker under Regulation 6(6) who must determine which bid to accept.

- 9.3.17 With respect to the designation of the infrastructure provider, this occurs under Regulation 8(1). Once the tender process has been run, and a company has been appointed by the incumbent undertaker to undertake the infrastructure project, then the Secretary of State or Ofwat designates that company as an infrastructure provider through the provisions of Regulation 8(1). They can only designate a company if that party is wholly or partly responsible for the specified infrastructure project which was put out to tender.
- 9.3.18 Once the party, or the infrastructure provider, has been designated as an infrastructure provider, then pursuant to changes which are made to the Water Industry Act by virtue of Schedule 1 of the SIP Regulations, Ofwat is then entitled to grant to the infrastructure provider a project licence, pursuant to the provisions of paragraph 3 of Schedule 1 of the SIP Regulations, which inserts a new provision into the Water Industry Act – Section 17FA, and which deals with the licensing of infrastructure providers, and that sets out the provision for then licensing. It is a pre-licensing requirement, that the company has been designated as an infrastructure provider under Regulation 8(1) of the SIP Regulations.
- 9.3.19 The other provisions of Schedule 1 relate to changes which are made to the Water Industry Act, and which apply to a specified infrastructure project. Those provisions include the right of the infrastructure provider to charge in respect of the services which it is providing. Those charging provisions are set out in paragraph 11 of Schedule 1 and, in effect, they give a power to the infrastructure provider to charge, or to create a charging scheme in respect of the services which they are providing. The charging regime allows the infrastructure provider to charge the relevant undertaker, and also to charge (in certain circumstances), customers who are directly or indirectly connected to the infrastructure, which the infrastructure provider is making available.
- 9.3.20 Paragraph 7 of Schedule 1 of SIP Regulations relate to special administration of the infrastructure provider. For many licensed and regulated utilities, in addition to the right to raise charges, there is also a recognition that there are special provisions which apply should that licence provider get into any financial difficulties. Those are dealt with by way of a special administration order, which gives greater protection to the ongoing services provided by those regulated licensed entities. Enforcement is dealt with under paragraph 6 of Schedule 1 of the SIP Regulations, which allows Ofwat to regulate and enforce against an infrastructure provider.
- 9.3.21 The last part of the – and perhaps, from a funding point of the view, the most significant other aspect of the SIP Regulations – is that application of the Water Industry Act more generically. Under Regulation 3, the Water Industry Act – including Section 2 of the Water Industry Act – applies to an

infrastructure provider in the same way that it applies to a water undertaker. Section 2 of the Water Industry Act requires both the Secretary of State and Ofwat to ensure that undertakers and licensed infrastructure providers are able to finance their functions. The precise wording in respect of that obligation is that:

*“There is a duty to secure that undertakers and licensed infrastructure providers are able, in particular by securing reasonable returns on their capital, to finance their functions.”*

- 9.3.22 And it is that duty which is balanced by the consumer duty – which is the duty to look at the balance between the obligation to enable undertakers and licensed infrastructure providers to finance their functions, which is balanced with the charges which are raised from customers, which is the core plank of why both undertakers and licensed infrastructure providers are able to raise finance in the capital market.
- 9.3.23 For the water undertakers, the regime which Mr Qureshi referred to previously, is where every five years, the water undertakers bring forward their business plans. Those business plans are then scrutinised by the regulator, and then the regulator determines how much funding the water and sewage undertakers – are entitled to charge customers in order that they can finance those functions. That’s where the Section 2 duty is most usually engaged.
- 9.3.24 The exact mechanics for the infrastructure provider are currently being worked through, but it is understood now that the majority of the terms for the revenue would be set out in the project licence, so that there was clarity for the construction period as to the funding stream for the infrastructure provider.

### Preparatory works

- 9.3.25 Preparatory works is defined under the SIP Regulations. These include:
- a. conducting the surveys, including in relation to environmental matters, ground conditions, hazardous substances, heritage, the operation of existing infrastructure at ground, surface water quality, and the general condition of the site
  - b. arranging for the provision of electricity or other power
  - c. diverting or protecting communications: electricity, gas, water, sewerage assets
  - d. preparing designs and specifications for a specified infrastructure project
  - e. preparing and submitting planning applications, including consulting the public in relation to those applications, and enquiring and protecting interests in land
  - f. procuring goods, services and works
  - g. preparing a site for works, including remediation for contamination, laying access roads, undertaking demolition and clearing works

h. an undertaking associated works on the highway.

9.3.26 We believe that those things would allow Thames Water to both get the development consent order and carry out any site preparation works of the sort that were listed there. And it would then be the Infrastructure Provider that would take forward to project itself. We don't believe there is any conflict there. Further detail of the preparatory works notice is provided by way of a separate note.

### **Asset security**

9.3.27 The other point to note around the security on assets of value is that the assets, which are being created for the infrastructure provider, are the shafts and tunnels themselves, and which will form part of the overall assets of the infrastructure provider. Condition K of the Regulated Utilities Licence makes the land and assets protected land, effectively ongoing assets of the company itself. Because those assets are protected land, they aren't assets which can be charged.

### **Designation of the Infrastructure Provider**

9.3.28 In respect of the designation and licensing process, Ofwat currently runs the process in respect of all licence awards, where it has to determine that the entity to whom the licence is to be awarded is a fit and proper person to hold a licence. Our anticipation following discussions with Ofwat would indicate that the same process would be followed in respect of the provision of a project licence to a licensed infrastructure provider. Thames Water is anticipating that that process will go on in parallel with, and subsequent to, the identification of the infrastructure provider. So the order of events, as set out in the legislation, is the identification of the preferred bidder, and then there will be a process for designation and licence award, whereby Ofwat determines that the infrastructure provider is a fit and proper person to hold that licence.

9.3.29 Significant amounts of due diligence will have been already undertaken in respect of the infrastructure provider through the evaluation criteria during the tender process. The evaluation criteria are set at the outset – and would have been agreed and consulted on by Ofwat and the Secretary of State. But then additionally Ofwat will run a subsequent process, so that everybody is satisfied that the infrastructure provider is a fit and proper person to hold the project licence in accordance with their ordinary processes, which is what Ofwat do under legislation already.

9.3.30 There will be a due diligence process undertaken by Thames Water as part of the tendering process. The various steps during that process will have been consulted on by Ofwat once the tender is complete – and the party has been identified. There will then be a consultation process, and final verification process by Ofwat to ensure that that party is a fit and proper person. As part of the overall process, as we mentioned earlier, there is a requirement to obtain, and then maintain an investment grade credit rating, so there also will be a credit rating process, which is in train

with the infrastructure provider, and therefore, there wouldn't be a licence award until the credit rating had also been confirmed.

### Government support package

- 9.3.31 The government support package is not something which is specifically referred to in the SIP Regulations, Section 154b Financial Assistance to Complex Projects, a main provision in the Water Industry Act. However, it has been formally recognised by ministers who are involved in the project, that it is likely that for a project of this size, that there would be a need for government support for exceptional risks associated with the project. So the SIP Regulations have a reference to this balancing act that they have to also make between customers and taxpayer. So there is likely to be, and there has been indicated that there will be some form of government support for exceptional risks.
- 9.3.32 In the funding statement, there is a statement around the government support package, which is at Paragraph 6.8. It says that government has confirmed that it's willing, in principle, to provide contingent financial support for exceptional project risks where it offers best value for money for customers and taxpayers. And the reference in the footnote there is the response of Lord de Mauley, who is the Parliamentary Under Secretary of State for Environment, Food and Rural Affairs, to a question from Lord Berkeley at the House of Lords, which is reported in Hansard at 24 July 2013. And the support that is being talked about would be in the form of a government support package, which would arise during the construction phase of the project, where the project is facing, obviously, the exceptional risks. The Government Support Package, if given, would be given by the Secretary of State under the Water Industry Act, and it would be designed to ensure that the project could raise – the project as done by the infrastructure provider – could raise, private sector finance, however this would need to clear any state aid issues.

## 10 Agenda item 4.4 – Land Plans

### 10.1 Legal submissions by Michael Humphries QC

- 10.1.1 As with the *Book of Reference*, there are no particular outstanding issues. The response to first written question 4.31(d) set out an update on the land plans that had been changed and updated.

## 11 Agenda item 5 – Human Rights and Equalities Duties

### 11.1 Legal submissions by Michael Humphries QC

- 11.1.1 Thames Water was invited to set out, in summary form, where the Human Rights Act 1998 ('HRA') and the Equalities Act 2010 ('Equalities Act') are addressed in the application and the examination documentation to date,

and the position with regard to any interference with Article 1 of the first protocol, articles 6 and 8, and relevant equality duties.

- 11.1.2 In essence, the answer to the two questions about the HRA and Equalities Act duties is covered in the written answers we gave to first written questions 4.31(e), in relation to human rights, and 4.31(f), in relation to equalities.

### Human Rights Act

- 11.1.3 It is clear that the HRA and human rights under the European Convention of Human Rights are potentially engaged, and that will nearly always be the case where there is the compulsory acquisition of land.
- 11.1.4 Article 6 relates to a fair and public hearing. Even before getting to a hearing, the process under the PA 2008 allows people to be consulted and have their views taken into account as part of the pre-application consultation process and then allows them to become interested parties, who are able to make representations throughout the examination process itself. Affected persons also have the right to ask for a hearing in relation to compulsory acquisition and 21 of them have done so.
- 11.1.5 It is Thames Water's position that the PA 2008, together with the regulations and the procedural rules for hearings, are compliant with Article 6 of the convention.
- 11.1.6 Article 8, respect for private and family life, home and correspondence, is a qualified right. It allows interference with that right if that interference is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, the economic wellbeing of the country, prevention of disorder or crime, protection of health or morals, or for the protection of rights and freedoms of others. This particular project, as is pointed out in the NPS, is economically important because of potential reputational risk to the United Kingdom of not reducing pollution in the River Thames. The project's primary objective is to significantly reduce discharges of wastewater into the River Thames in order comply with the requirements of the Urban Waste Water Treatment Directive. European case law (see *Chapman v the United Kingdom* (below)) indicates that interference with the Article 8 right in order to protect the environment is capable of falling within the qualification to Article 8, because the interference is for the protection of rights and freedoms of others (ie, the right not to be subject to pollution).
- 11.1.7 In *Chapman v the United Kingdom*, the European Court of Human Rights states that:
- "The Government submitted that the measures in question pursued the enforcement of planning controls, which were in the interests of economic wellbeing and the preservation of environment and public health. The applicant accepted the measures pursued the legitimate aims of protecting the rights of others, in the sense of environmental protection."*
- 11.1.8 It is clear, therefore, that protecting individuals from environmental pollution is for the protection of the rights and freedoms of others and is,

therefore, capable of justifying an interference with Article 8 rights; and, indeed, does so in this case.

- 11.1.9 Article 1 of the first protocol relates to the entitlement to peaceful enjoyment of possessions and is again a qualified right. It is made clear, however, that the right does not prevent the state enforcing such laws as it deems necessary to control the use of property in accordance with the general interest. Again, the reduction of environmental pollution is in accordance with the general interest in this case, such as to justify any interference with Article 1 of the first protocol rights.
- 11.1.10 The general point that can be made in relation to all three of these articles is that generally the PA 2008 regime, and in particular that part of it directed to the compulsory acquisition of land and rights, has been designed to be convention compliant. That is why the Section 104 test is a balance between the need and benefits of a project as set out in the NPS against, in the case of Section 104(7), the adverse effects of the project. Proportionality is at the heart of the two qualified articles and proportionality is satisfied by the Planning Act 2008 process.
- 11.1.11 The answer to first written question 4.31(e) points to various reports that deal with these issues, eg, the *Final report on site selection*, and the various non-statutory compensation procedures. Those non-statutory procedures are all in addition to statutory compensation that is, in itself, in conformity with convention rights.
- 11.1.12 The *Statement of Reasons* gives consideration to the extent to which the exercise of temporary use powers under articles 34 and 35 of the *Draft DCO* engage convention rights and, quite deliberately, distinguishes between compulsory acquisition, on the one hand, and temporary possession on the other. The *Statement of Reasons* recognises that some of the non-compulsory acquisition powers in the *Draft DCO* have the ability to engage convention rights and a number of those powers were specifically identified for that reason. Thus paragraph 5.3 of the *Statement of Reasons* discusses the temporary use of land power, paragraph 5.4 discusses the protective works, remedial works and survey powers, paragraph 5.5 deals with compensation and paragraph 5.6 deals with supplementary powers.

### Temporary possession

- 11.1.13 Each and every temporary possession site is identified in the Order Land Schedule, along with the reason the land is required for that temporary possession.
- 11.1.14 The fact that some plots of land have been identified as ones where it is only necessary to take a power of temporary possession is itself an indication of the promoter acting in a proportionate manner. In relation to any particular temporary use plots, Mr Arnold explains during the compulsory acquisition hearings why land is required on a temporary basis for construction works.
- 11.1.15 In respect to the point that temporary possession may mean that the owner or occupier of land is not able to use that land as they otherwise

would have, this is a potential infringement of a convention right. Interference with the convention right is, however, proportionate and, importantly, that interference carries with it an obligation on the part of Thames Water or that of the Infrastructure Provider, whoever is exercising the particular power, to pay compensation. That compensation is on the same basis as is indicated by the model provisions drafted by the parliamentary draftsman and is consistent with convention rights.

- 11.1.16 The alternative to taking a temporary possession power would be to compulsorily acquire the land or take what would be a permanent right in the land. As a generality, when using any form of compulsory power, acquiring authorities are encouraged to use the lesser power. It is recognised that, because of the nature of the projects, in some cases, temporary possession may be for longer than a very short period of just a few weeks or months. In that context, however, the length of possession would be reflected in the level of compensation that landowners or occupiers would be able to claim under Article 34(4).

### Article 34

- 11.1.17 There are some instances where temporary possession of land under Article 34 would be taken in respect of land that is not in Schedule 14 of the *Draft DCO*. This is in the circumstances contemplated in Article 34.1(a)(ii), where temporary possession may be taken of land that is subject to compulsory purchase in advance of the use of compulsory purchase powers. Article 34.1(a)(ii) will allow the promoter to enter on and use the land for construction purposes, but ultimately acquire only so much of that land as it actually requires. This is particularly important in circumstances where the DCO provides parameters within which the permanent works may be constructed, but all of the land is required for construction workspace.
- 11.1.18 If temporary possession was taken for a period of time and the landowner wished to sell, those are circumstances in which the landowner would be able to serve a statutory blight notice.

### Equalities Act

- 11.1.19 In relation to equalities duties, an answer was provided in response to first written question 4.31(f), which draws attention to the legal context and various application documents.

## 12 Responses to issues raised at the hearing

### 12.1 Article 34 powers and temporary land-take

#### Issue raised

- 12.1.1 Article 34 powers and temporary land-take where permanent works are left in the land – what status does the land have? Is it intended that

Thames Water will retain an interest? What is the impact of wider DCO focus on this, eg, maintenance?

## Response

12.1.2 In response to concerns expressed regarding the operation of Article 34, notably by the City of London and the Port of London Authority, the opportunity has been taken in the 9 December edition of the *Draft DCO* to clarify the position. The proposed draft of Article 34 now reads as follows:

### **“Temporary use of land for carrying out the authorised project**

**34.—**(1) The undertaker may, in connection with the carrying out of the authorised project—

- (a) enter on and take temporary possession of—
  - (i) the land specified in columns (1) and (2) of Schedule 14 (*land of which temporary possession may be taken*) for the purpose specified in relation to that land in column (3) of that Schedule 14 relating to the part of the authorised project specified in column (4) of that Schedule 14;
  - (ii) any other Order land in respect of which no notice of entry has been served under section 11 of the 1965 Act (powers of entry) (other than in connection with the requisition of rights only) and no declaration has been made under section 4 of the Compulsory Purchase (Vesting Declarations) Act 1981 (execution of declaration);
- (b) remove any buildings and vegetation from that land that reasonably need to be removed in connection with the carrying out of the authorised project;
- (c) construct works (including the provision of means of access) and buildings on that land; and
- (d) construct any works specified in relation to that land in column (3) of Schedule 14, or any other mitigation works.

(2) Not less than 14 days before entering on and taking temporary possession of land under this article the undertaker shall serve notice of the intended entry on the owners and occupiers of the land.

(3) The undertaker may not, without the agreement of the owners of the land, remain in possession of any land under this article—

- (a) in the case of land specified in paragraph (1)(a)(i) after the end of the period of one year beginning with the date of completion of the part of the authorised project specified in relation to that land in column (4) of Schedule 14; or
- (b) in the case of land referred to in paragraph (1)(a)(ii), after the end of the period of one year beginning with the date of completion of the work for which temporary possession of this land was taken unless the undertaker has, before the end of that period, served a notice of entry under section 11 of the 1965 Act or made a

declaration under section 4 of the Compulsory Purchase (Vesting Declaration) Act 1981 or has otherwise acquired the land subject to temporary possession.

(4) Before giving up possession of land of which temporary possession has been taken under paragraph 1(a)(i), unless otherwise agreed by the owners of the land, the undertaker shall remove all works and restore the land to the reasonable satisfaction of the owners of the land; but the undertaker shall not be required to—

- (a) replace a building removed under this article;
- (b) remove any ground-strengthening works (being either works listed in Schedule 11 of this order or other works to provide safe and stable ground conditions) which have been placed in that land to facilitate construction of the authorised development; or
- (c) remove or reposition any apparatus belonging to statutory undertakers.

(5) Before giving up possession of land of which temporary possession has been taken under paragraph (1)(a)(ii), unless otherwise agreed by the owners of the land, the undertaker shall either acquire the land in accordance with the provisions of paragraph (3)(b) or remove all works and restore the land to the reasonable satisfaction of the owners of the land; but the undertaker shall not be required to—

- (a) replace a building removed under this article;
- (b) remove any ground-strengthening works (being either works listed in Schedule 11 of this order or other works to provide safe and stable ground conditions) which have been placed in that land to facilitate construction of the authorised development; or
- (c) remove or reposition any apparatus belonging to statutory undertakers.

(6) The undertaker shall pay compensation to the owners and occupiers of land of which temporary possession is taken under this article for any loss or damage arising from the exercise in relation to the land of the provisions of any power conferred by this article.

(7) Any dispute as to a person's entitlement to compensation under paragraph (5), or as to the amount of the compensation, shall be determined under Part 1 of the 1961 Act.

(8) Nothing in this article shall affect any liability to pay compensation under section 10(2) of the 1965 Act (further provisions as to compensation for injurious affection) or under any other enactment in respect of loss or damage arising from the carrying out of the authorised project, other than loss or damage for which compensation is payable under paragraph (6).

(9) The undertaker may not compulsorily acquire under this Order the land referred to in paragraph (1)(a)(i) except that the undertaker shall not be precluded from—

- (a) acquiring new rights over any part of that land under article 28 (*compulsory acquisition of rights*);

- (b) acquiring any part of the subsoil of (or rights in the subsoil of) of that land under article 29 (*acquisition of subsoil only*);
- (c) carrying out protective works under article 20 (*protective work to buildings and structures*) and remedial works under article 21 (*remedial work to buildings, or apparatus or equipment*); or
- (d) carrying out a survey of that land under article 22 (*authority to survey and investigate the land*).

(10) Where the undertaker takes possession of land under this article, the undertaker shall not be required to acquire the land or any interest in it.

(11) Section 13 of the 1965 Act<sup>1</sup> (refusal to give possession to acquiring authority) shall apply to the temporary use of land pursuant to this article to the same extent as it applies to the compulsory acquisition of land under this Order by virtue of section 125 of the 2008 Act (application of compulsory acquisition provisions). For the avoidance of doubt this provision shall not affect any right of an owner or lessee of that land to make a claim pursuant to Section 150 of the 1990 Act (blight).

(12) [The undertaker may not exercise the powers under this article after the acceptance date.]”

- 12.1.3 This clarifies that the only exceptions to the requirement to restore the land, once temporary use comes to an end, are where:
- (i) a building has been removed;
  - (ii) ground/structure strengthening works have been carried out; or
  - (iii) there is apparatus belonging to statutory undertakers in the land.
- 12.1.4 These exceptions apply whether the land which is subject to that temporary use is either land over which only temporary use powers may be taken (further to Article 34(1)(a)(i)), or which is subject to powers of permanent acquisition. New Article 34(5) then clarifies that if any permanent works are to be left in land which is otherwise subject to permanent acquisition then the undertaker must acquire it.
- 12.1.5 These provisions are subject to any agreement with a landowner which may alter these provisions in respect of that landowner’s land and Thames Water remains committed to seek agreement in all cases.
- 12.1.6 In the case of temporary works in the river, protective provisions for the Port of London Authority (DCO schedule 16 part 2) will secure that works packages for approval will identify not only which temporary works will be removed but how they will be removed. In the future, the PLA has ongoing powers (see schedule 16 part 2 paragraph 14) to require the removal of any works which obstruct navigation and this could apply to abandoned works.
- 12.1.7 Given the nature of the works that might be left in the land when it is returned to its owner, any maintenance works which Thames Water would seek to undertake would clearly be limited to the nature of those works.

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<sup>1</sup> Section 13 is amended by section 139 of the Tribunals, Courts and Enforcement Act 2007 (c.15).

## 12.2 Fixing the drive sites in the tender documentation

### Issue raised

- 12.2.1 Does the tendering process fix the drive sites? What are the exceptional circumstances that would trigger the merging of the contracts?

### Response

- 12.2.2 The Invitation to Tender documents (ITT) invite tenders on the basis of the DCO sites and no variants are permitted so that compliant tenders must be based on the sites set out in the DCO. There is potential to change the information to bidders concerning the drive strategy, although this will need to be considered in view of the nature of the change proposed and whether it would be considered material from a procurement perspective. However, this is the view in relation to the tender documents alone – changes to the drive strategy from a DCO perspective does, of course, have a major impact on the application, particularly in relation to the size of the sites and the land needed for compulsory acquisition and temporary use.

### Merging of the contracts

- 12.2.3 It is not expected that the three contracts are merged but the ITT and contracts legislate for two circumstances where this could happen.
- 12.2.4 The first is in exceptional circumstances during procurement, for example, where no acceptable bids are received for one of the packages. The second is where, post contract, the contract in respect of a package is terminated (for example, for the insolvency of a contractor). The contracts provide a mechanism, where one contractor may step into the package let to another, and the subcontract collateral warranties also facilitate this.
- 12.2.5 Both the circumstances set out above are discretionary but included to provide the mechanisms, if required.

## 12.3 Project cost index/indices

### Issue raised

- 12.3.1 Clarify which index/indices the project cost is subject to (given that the costs are assessed on 2011 figures).

### Response

- 12.3.2 The current construction estimate of £4.2bn is based on June 2011 market rates derived from the Lee Tunnel project tender and information from other sources. The estimate is updated regularly and will over the next 18 months reflect tendered prices from the procurement of the IP and main works contracts.
- 12.3.3 The Thames Tideway Tunnel project (the 'project') is expected to have a construction programme duration of approximately seven years and thus

the impact of inflation can be materially significant to the project. The contracts for the main works will be let as NEC3 Option C contracts (known as target cost contracts). The employer can elect whether the risk of inflation lies with contractors or whether the employer would wish to accept the risk. This high-level approach of allowing for inflation is in line with the HMT's *Infrastructure Cost Review (2010)*, which recommended that infrastructure clients and commissioners should ensure that their commercial strategies recognise the impacts of a potential rapid upswing in infrastructure cost and the dangers of low pricing by contractors, which are likely to be unsustainable.

- 12.3.4 The project has considered a similar approach to Crossrail's station and network contracts, breaking down its construction cost structure and allocating specific weightings to key cost elements. In effect, the contracts have a basket of indices which apply to the main works contracts with 20% non-adjustable element and 80% subject to indexation. The indices, (drawn from Building Cost Information Service of the Royal Institute of Chartered Surveyors) include:
- a. 30% linked to the index for PAFI 1990 Series Civil Engineering Indices 90/1 Labour and Supervision
  - b. 15% linked to the index for PAFI 1990 Series Civil Engineering Indices 90/2 Plant and Road Vehicles
  - c. 5% linked to the index for PAFI 1990 Series Civil Engineering Indices 90/3 Aggregates
  - d. 9% linked to the index for PAFI 1990 Series Civil Engineering Indices 90/13 Steel Reinforcement
  - e. 8% linked to the index for PAFI 1990 Series Civil Engineering Indices 90/15 Sheet Piling
  - f. 8% linked to the index for PAFI Series 3 Building Indices 3/09 Pre cast all in cost
  - g. 5% linked to the index for PAFI Series 3 Specialist Engineering Formulae Indices 3/E1 Electrical Labour
  - h. 20% non-adjustable.

The main works bidders are expected to make assumptions about the non-adjustable element of their bids which will be reflected in the updated construction cost estimate. The element that is subject to indexation will be reflected in the annual revenues the IP requires Thames Water to collect from its wastewater customers. As such, customer funding will reflect an element of inflation enabling the IP to continue to finance its operations.

## 12.4 SIP Regulations

### Issue raised

- 12.4.1 Prepare a briefing on the SIP Regulations and how they apply to preparatory works.

### **Response**

- 12.4.2 See Appendix A, 'Thames Tideway Tunnel Project: SIPR Specification Notice'.

## **12.5 Breach of licence**

### **Issue raised**

- 12.5.1 What action can be taken if the IP is in breach of its licence?

### **Response**

- 12.5.2 See Appendix B, 'Enforcement Action for a Breach of a Licence Condition'.

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## Appendix A: Thames Tideway Tunnel Project: SIPR Specification Notice

### Legislative framework applying to the Specification Notice

#### 1 Regulation 4

- 1.1 Regulation 4 of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulation 2013 (“**SIP Regulations**”) provides for the Secretary of State for Environment, Food and Rural Affairs (the “**Secretary of State**”) or Ofwat to specify an infrastructure project by notice. This power may be exercised where the Secretary of State or Ofwat is of the opinion that:

*“(3)(a) the infrastructure project is of a size or complexity that threatens the incumbent undertaker’s ability to provide services for its customers; and*

*(b) specifying the infrastructure project is likely to result in better value for money than would be the case if the infrastructure project were not specified, including taking into account—*

*(i) the charges fixed or likely to be fixed under Chapter 1 of Part 5 of the Act(1) (financial provisions, charges); and*

*(ii) the powers of the Secretary of State under section 154B of the Act(2) (financial assistance for major works).”*

- 1.2 The draft Specification Notice (the “**Draft Specification Notice**”) published by the Secretary of State on 4 December 2013 includes the design, construction, ownership, specification and financing of the Thames Tideway Tunnel assets.

#### 2 Regulation 5

Regulation 5 of the SIP Regulations provides that the incumbent undertaker, which in the case of the Project is Thames Water, is prohibited from carrying out a specified infrastructure project except where the Secretary of State or Ofwat has issued a notice permitting or requiring Thames Water to undertake *“such preparatory work of such kind and for such purpose in relation to a specified infrastructure project as they may set out in the notice”*<sup>2</sup> (“**Regulation 5 Notice**”).

#### 2.1 Scope of "preparatory works" pursuant to the SIP Regulations

“Preparatory works” is defined in the SIP Regulations as follows:

*““preparatory work” includes—*

*(a) conducting surveys, including in relation to environmental matters, ground conditions, hazardous substances, heritage, the operation of existing infrastructure, ground and surface water quality and the general condition of a site,*

*(b) arranging for the provision of electricity or other power,*

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<sup>2</sup> Regulation 5(3) of SIPR.

- (c) diverting or protecting communications, electricity, gas, water and sewerage assets,*
- (d) preparing designs and specifications for a specified infrastructure project,*
- (e) preparing and submitting planning applications, including consulting the public in relation to those applications, and acquiring and protecting interests in land,*
- (f) procuring goods, services or works,*
- (g) preparing a site for works, including remediation of contamination, laying access roads and undertaking demolition and clearance works, and*
- (h) undertaking associated works on the highway;”*

Accordingly, the Secretary of State set out in a draft Regulation 5 Notice (the “**Draft Regulation 5 Notice**”) published on 4 December 2013 the scope of preparatory works Thames Water is required to undertake in relation to the Project provided the scope of works falls within the definition above. A copy of the Draft Regulation 5 Notice is attached to this note.

## **2.2 Timing of the preparatory works**

The scope of what preparatory works includes is determined by the type of works to be carried out (as identified in the definition), rather than by the timing of the designation of a company as “infrastructure provider” under the SIP Regulations. Further:

- (i) there is no limitation in the SIP Regulations on the time by which Thames Water must provide the preparatory works;
- (ii) the Secretary of State may prescribe in the Regulation 5 Notice the “kind” and “purpose” of the works, neither term is limited in anyway; and
- (iii) some of the works included, by their nature, are of the kind that may be carried out during the construction period at the same time the infrastructure provider carries out its contracted works.

## **2.3 Scope of preparatory works pursuant to the Draft Regulation 5 Notice**

Along with the Draft Regulation 5 Notice, the Secretary of State also issued the Draft Specification Notice as part of the consultation process on both notices with Thames Water and Ofwat as required by the SIP Regulations. Subject to the exercise of the powers under the SIP Regulations and taking into account the Draft Regulation 5 Notice, the preparatory works to be carried out by Thames Water will be as follows:

- (i) Surveys and investigations;
- (ii) Provision of power supply;
- (iii) Diversion of existing utility assets;
- (iv) Certain works at interface sites;
- (v) Obtaining the Development Consent Order;
- (vi) Preparation of the outline design;

- (vii) Procuring certain goods, works and services, including the construction contracts and the IP itself,
- (viii) Land acquisition;
- (ix) Site preparation;
- (x) Marine works; and
- (xi) Testing and commissioning works.

The Draft Regulation 5 Notice provides further detail on each of the above, but of particular note:

### **2.3.1 Land Acquisition (viii)**

Thames Water shall identify and purchase those interests in land that, prior to the designation of the Infrastructure Provider, are in its view, necessary in order to enable design, construction, testing, commissioning and to the extent relevant, operation and maintenance of, the works described in the Thames Tideway Tunnel Project Specification Notice, including relevant interests in land at those sites listed in paragraph 2, Schedule 2 to the Draft Regulation 5 Notice.

Further Thames Water may transfer, lease, licence or otherwise assign interests in land acquired for the purposes described in the above paragraph to the Infrastructure Provider in order to allow the Infrastructure Provider to design, construct, test and commission the works and operate and maintain the IP Owned Structures.

### **2.3.2 Site Preparation (ix)**

The Draft Regulation 5 Notice provides that Thames Water may carry out the following site preparation works as appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project:

- (a) site access, hard standings and access routes through site;
- (b) site hoarding and noise screening;
- (c) temporary services including power, water supply, telecommunications and drainage to the site boundary and within the site for the Incumbent Undertaker's works;
- (d) site welfare for the Incumbent Undertaker's works;
- (e) tree works including pollarding, protection or removal of existing trees and planting of advance trees;
- (f) asbestos mitigation;
- (g) removal of temporary services infrastructure within the site up to the connection points after the Incumbent Undertaker's works;
- (h) demolition of existing buildings and structures;
- (i) renovation of existing buildings and structures on site;
- (j) relocation of existing vehicle access, car parking and bus stops including related traffic management;
- (k) general site clearance;

- (l) relocation of public footways;
- (m) structural and environmental monitoring;
- (n) control of invasive species;
- (o) protection of existing assets; and
- (p) such other site preparation works as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the Authority from time to time.

### **2.3.3 Marine works (x)**

Thames Water may carry out the following marine works and river boat relocations at Victoria Embankment Foreshore:

- (a) relocation of Tattershall Castle and related works; and
- (b) relocation or removal of service moorings, piers and related works.

Further, Thames Water may carry out the following marine works and river boat relocations at Blackfriars Bridge Foreshore:

- (a) permanent relocation of Blackfriars Millennium Pier and related works including new lift and relocation of existing stairs; and
- (b) temporary relocation of President to Chrysanthemum Pier including modifications and strengthening of the existing berthing.

Thames Water may also carry out such other marine works as it considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with Ofwat from time to time.

### **2.3.4 General provisions**

The Draft Regulation 5 Notice also states that Thames Water shall finance the works, services and activities to be undertaken by it as described in the Draft Regulation 5 Notice and provide any ancillary services necessary for the day-to-day activities that are required to carry out such works, services and activities.

Further, prior to the designation of an Infrastructure Provider, Thames Water may, if it considers appropriate, carry out works, services and activities described in the Thames Tideway Tunnel Project Specification Notice that are not otherwise described in the Draft Regulation 5 Notice but are of a preparatory nature and are necessary to facilitate the carrying out of the Thames Tideway Tunnel Project provided that Ofwat has agreed that Thames Water may carry out such works, services and activities and the Thames Water has put the Thames Tideway Tunnel Project out to tender.

Since the precise timings of the Licence Award and designation of the infrastructure provider will not be known at the time of specification the definition of preparatory works in the Draft Regulation 5 Notice is limited to works carried out prior to the designation of the infrastructure provider, however it does provide for further works to be undertaken by Thames Water as agreed by Ofwat.

## **2.4 Variations to a Regulation 5 Notice**

The SIP Regulations provide for variations to a Regulation 5 Notice pursuant to Regulation 5(7). Accordingly, any variation would need to be made in accordance with the process in Regulation 5.

The process requires that the Secretary of State or Ofwat as the case may be must:

- (a) before issuing a Regulation 5 Notice, prepare draft reasons for exercising the power and consult with Thames Water, Ofwat and any other person the Secretary of State thinks appropriate; and
- (b) serve the Regulation 5 Notice on the persons mention in paragraph (a) above<sup>3</sup>.

## **2.5 Funding of “permitted” preparatory works**

Thames Water will be funded by its regulatory settlement for any preparatory works it is required and permitted to carry out pursuant to the finalised Regulation 5 Notice through the mechanisms set out in Thames Water’s licence.

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<sup>3</sup> A similar process applies if the Regulator wishes to issue a Regulation 5 Notice.

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## Appendix B: Enforcement Action for a Breach of a Licence Condition

This note sets out the enforcement actions available to Ofwat for a breach of a licensee's Licence Condition.

### 1 Licence Conditions

The following two Licence Conditions in Condition F (Accounts and Accounting information) were discussed with the Panel as being standard licence conditions which it is expected would form part of any Project Licence for the Infrastructure Provider.

#### 1.1 Investment Grade Credit Rating

*"The Appointee shall use all reasonable endeavours to ensure that it, or any Associated Company as an Issuer of corporate debt on its behalf, maintains at all times an Issuer credit rating which is an Investment grade rating.*

*In this Condition:*

*"Investment grade rating" means a rating recognised as investment grade by Standard and Poor's Rating Group (or any of its subsidiaries), by Moody's Investors Services Incorporated (or any of its subsidiaries) or by Fitch Ratings Limited, or any other reputable credit rating agency which has comparable standing in the United Kingdom and the United States of America.*

*"Issuer credit rating" means a credit rating assigned to an issuer of corporate debt by Standard and Poor's Rating Group (or any of its subsidiaries), by Moody's Investors Services Incorporated (or any of its subsidiaries) or by Fitch Ratings Limited, or any other reputable credit rating agency which has comparable standing in the United Kingdom and the United States of America."*

#### 1.2 Sufficient Financing and Resourcing

*"The Appointee shall, at the same time as it complies with sub-paragraph 9.3 (submission of Accounting Statements) submit to the Water Services Regulation Authority a Certificate in the following terms:-*

*"(1) that in the opinion of the Directors, the Appointee will have available to it sufficient financial resources and facilities to enable it to carry out, for at least the next 12 months, the Regulated Activities (including the investment programme necessary to fulfil the Appointee's obligations under the Appointment(s));*

*(2) that in the opinion of the Directors the Appointee will, for at least the next 12 months, have available to it:*

*(a) management resources; and*

*(b) systems of planning and internal control which are sufficient to enable it to carry out those functions as required by sub-paragraph 6A.1 above; and*

*(3) that in the opinion of the Directors, all contracts entered into with any Associated Company include all necessary provisions and requirements concerning the standard of service to be supplied to the Appointee, to ensure that it is able to meet all its obligations as a water and a sewerage undertaker.”*

## **2 Summary**

**2.1** Breach of a Licence condition will allow Ofwat to enforce in relation to the breach pursuant to its duties and powers under Chapter II of Part II of the WIA, which will apply to the Infrastructure Provider by virtue of paragraphs 6 and 7 of Schedule 1 of the SIP Regulations.

**2.2** The action taken by Ofwat will depend on the nature, seriousness and impact of any contravention. Ofwat's options are (listed in order from least to most serious breach):

**2.2.1** Self-regulation

**2.2.2** Dialogue, letters and warnings

**2.2.3** Quarterly or monthly reporting

**2.2.4** Additional Investment

**2.2.5** Informal Undertaking

**2.2.6** Formal Undertakings (s19 WIA)

**2.2.7** Enforcement Orders (s18 WIA)

**2.2.8** Financial Penalties (s22A WIA)

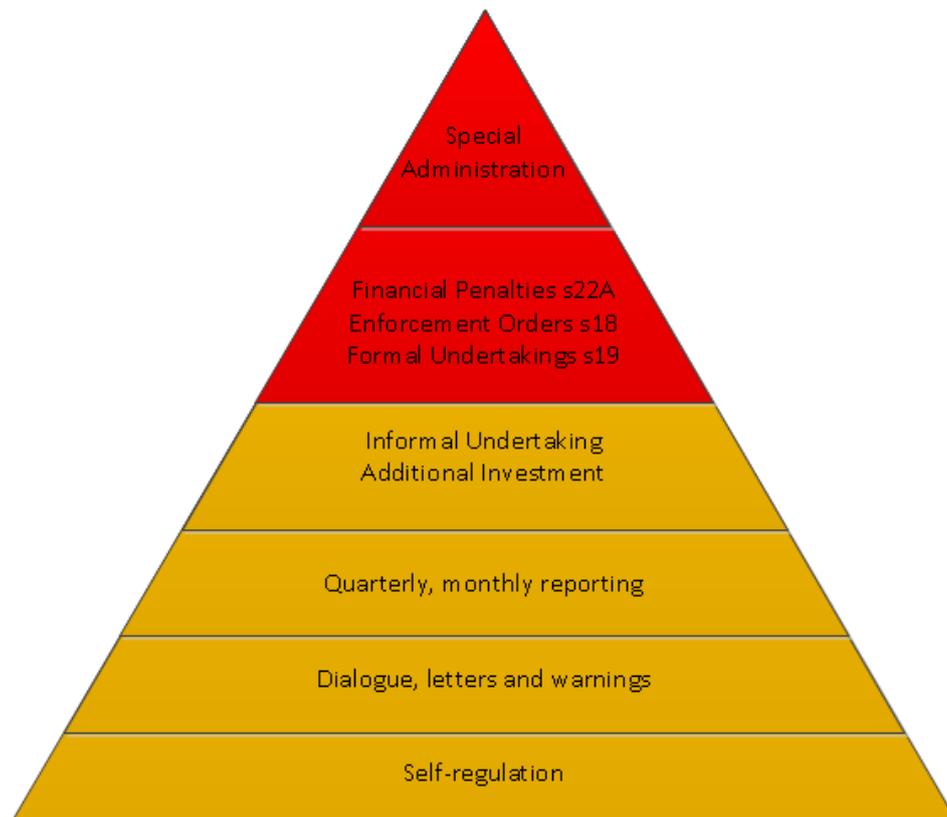
**2.2.9** Special administration

## **3 Enforcement options available to Ofwat for a breach of Licence**

**3.1** The pyramid below which Ofwat has included in its current guidance<sup>4</sup> sets out the enforcement tools currently available to Ofwat in dealing with a breach of a Licencee's obligations (under statute or its licence). The action taken by Ofwat will depend on the nature, seriousness and impact of any contravention.

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<sup>4</sup> Ofwat's approach to enforcement document dated March 2009.



- 3.2** Before taking any enforcement, action Ofwat's first step will be to gather information to determine whether a contravention has occurred, is occurring or is likely to occur, and the nature of the contravention. Ofwat expects companies to provide them with all of the information that they require.
- 3.3** In considering the appropriate enforcement action to take, Ofwat will consider the effect of the contravention or failure on the customers of the company, consumers in general and the regulatory regime.
- 3.4** If companies have wrongly benefited financially from a contravention or failure, through price limits or through incentive mechanisms, Ofwat expects that company to fully redress its customers.
- 3.5** A notice under section 203 WIA91 requires the Infrastructure Provider to produce specific documents or information where it may be contravening or has contravened its licence or a statutory or other requirement. The issue of a section 203 notice is an indication that Ofwat considers a contravention may be or may have been occurring but does not necessarily mean formal enforcement action will be taken. In some circumstances, Ofwat may also seek third party checks or additional information as appropriate in addition to the Infrastructure Provider's response to the section 203 notice.
- 3.6** In some circumstances Ofwat may require an independent investigation so that they have complete information before they decide whether to take enforcement action and the nature of that action.
- 3.7** Ofwat's decisions on appropriate sanctions will be informed by the following principles namely:
- 3.7.1** a sanction should aim to change the behaviour of the offender;

- 3.7.2** a sanction should aim to eliminate any financial gain or benefit from noncompliance;
- 3.7.3** a sanction should be responsive and consider what is appropriate for the particular offender and the regulatory issue;
- 3.7.4** a sanction should be proportionate to the nature of the offence and the harm caused;
- 3.7.5** a sanction should aim to restore the harm caused by regulatory noncompliance where appropriate; and
- 3.7.6** a sanction should aim to deter future non-compliance.

#### **4 Enforcement Orders, Formal Undertakings and Financial Penalties**

- 4.1** The Secretary of State or Ofwat shall make a final enforcement order and may impose a financial penalty where it is satisfied that the Infrastructure Provider is contravening, or likely to contravene, or is causing or contributing (or likely to cause or contribute) to such a contravention of:
  - 4.1.1** any condition of a licence (in relation to which the Secretary of State/Ofwat is the enforcement authority); or
  - 4.1.2** any statutory or other requirement which is imposed in consequence of the licence and for which the Secretary of State/Ofwat is the enforcement authority.<sup>5</sup>
- 4.2** Alternatively, the Secretary of State or Ofwat can make a provisional enforcement order if he or it thinks this is requisite for the purposes of securing compliance with the condition or requirement in question.<sup>6</sup>
- 4.3** An enforcement order need not be made if the Secretary of State or Ofwat is satisfied that:
  - 4.3.1** the contraventions were trivial;
  - 4.3.2** if the contravention was not trivial, the Undertaker's role in causing it was;
  - 4.3.3** the Infrastructure Provider has given and is complying with an undertaking to take all such steps as are appropriate to secure compliance with the condition or requirement in question; or
  - 4.3.4** the duties imposed on the Secretary of State or Ofwat by the WIA preclude the making of, or confirmation of an enforcement order.<sup>7</sup>
- 4.4** An enforcement order:
  - 4.4.1** shall require the Infrastructure Provider to do/not do such things as are specified; and
  - 4.4.2** shall take effect at such time, being the earliest practicable time, as is determined by the order; and

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<sup>5</sup> Sections 18(1) and 22A WIA (and applied to the IP by Schedule 1, paragraph 6 of the SIP Regulations)

<sup>6</sup> Section 18(2) WIA (and applied to the IP by Schedule 1, paragraph 6 of the SIP Regulations)

<sup>7</sup> Section 19 WIA (and applied to the IP by Schedule 1, paragraph 6 of the SIP Regulations)

**4.4.3** may be revoked at any time by the enforcement authority who made it.<sup>8</sup>

**4.5** If the Infrastructure Provider fails to comply with an enforcement order or to pay any financial penalty Ofwat may enforce for breach of Infrastructure Provider's licence.<sup>9</sup>

## **5 Special Administration**

**5.1** In the event that the Infrastructure Provider becomes insolvent for whatever reason or where Ofwat takes enforcement action for breach by the Infrastructure Provider of a principal duty, in each case, the Infrastructure Provider may become subject to a special administration order.

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<sup>8</sup> Section 18(5) WIA (and applied to the IP by Schedule 1, paragraph 6 of the SIP Regulations)

<sup>9</sup> Sections 18 and 22A WIA (and applied to the IP by Schedule 1, paragraph 6 of the SIP Regulations)

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## Appendix C: Draft Thames Tideway Tunnel Project Preparatory Work Notice

*Department for Environment, Food and Rural Affairs*

### **THE WATER INDUSTRY (SPECIFIED INFRASTRUCTURE PROJECTS) (ENGLISH UNDERTAKERS) REGULATIONS 2013**

### **DRAFT Thames Tideway Tunnel Project Preparatory Work Notice**

[date]

The Secretary of State makes this Notice in exercise of the powers conferred by regulation 5(3) of the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 (the “SIP Regulations”) in relation to *infrastructure* which is provided or to be provided for the use of one or more English undertakers.

In accordance with regulation 5(4)(a) of the SIP Regulations the Secretary of State has prepared draft reasons for the exercise of this power and has consulted the Incumbent Undertaker, the *Authority* and such other persons as he considers appropriate.

In accordance with regulation 5(4)(b) of the SIP Regulations, this Notice shall be served on those persons or bodies consulted under regulation 5(4)(a) of the SIP Regulations.

Citation, commencement and application

1.— This Notice—

- (a) may be cited as the Thames Tideway Tunnel Project Preparatory Work Notice;
- (b) takes effect immediately after the Thames Tideway Tunnel Project Specification Notice takes effect.

#### **Interpretation**

2.— In this Notice—

“Incumbent Undertaker” means (in relation to the Thames Tideway Tunnel Project) Thames Water Utilities Limited or such other sewerage undertaker whose ability to provide services for its customers could, in the opinion of the Secretary of State or the *Authority* (as the case may be) be threatened by the Thames Tideway Tunnel Project, but for the exercise of the powers of the Secretary of State or the *Authority* under or by virtue of the SIP Regulations;

“Infrastructure Provider” means the company designated under regulation 8(1) of the SIP Regulations in respect of the Thames Tideway Tunnel Project;

“Thames Tideway Tunnel Project” means the *infrastructure project* which has been specified under regulation 4(1) of the SIP Regulations in the Thames Tideway Tunnel Project Specification Notice;

and

“Thames Tideway Tunnel Project Specification Notice” means the notice issued by the Secretary of State or the *Authority* (as the case may be) pursuant to regulation 4(1) of the SIP Regulations specifying the Thames Tideway Tunnel Project as a *specified infrastructure project*.

Except as otherwise provided in this Notice, words and expressions used in the SIP Regulations and the Water Industry Act 1991 (as modified by the SIP Regulations and as may be amended from time to time) are italicised and have the same meaning in this Notice as they have in those Regulations and that Act.

**Work to be done by the Incumbent Undertaker in relation to a *specified infrastructure project***

- 3.— a) The Secretary of State has issued the Thames Tideway Tunnel Project Specification Notice.
- (1) Save as is specifically set out in this Notice, the Incumbent Undertaker must not undertake the Thames Tideway Tunnel Project.
  - (2) The Secretary of State permits or requires (as the case may be) the Incumbent Undertaker to undertake the *preparatory work* in relation to the Thames Tideway Tunnel Project as is set out in Schedule 1 to this Notice.

Signed

on behalf of the Secretary of State for Environment, Food and Rural Affairs

[date]

## Schedule 1

### **Preparatory work permitted or required to be undertaken by the Incumbent Undertaker in relation to the Thames Tideway Tunnel Project**

#### **Interpretation**

1.— Defined terms are set out in paragraph 15. Any use of the singular includes use of the plural and vice versa.

#### **Surveys and investigations**

- 2.— (1) The Incumbent Undertaker may carry out the following surveys and investigations—
- (a) environmental surveys;
  - (b) ground condition surveys;
  - (c) desk top surveys to provide details of the likely nature and extent of any heritage and archaeological sites of special interest along the proposed Tunnels route and foreshore together with mitigation strategies;
  - (d) surveys in respect of third party assets and utilities which may need to be diverted or protected along the proposed Tunnels route, including condition surveys, heritage and park usage;
  - (e) site investigations; and
  - (f) such other surveys and investigations as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the Authority from time to time.

#### **Provision of power supply**

- 3.— (1) The Incumbent Undertaker may provide or procure the installation of cables and associated infrastructure to enable the supply of temporary power supply and associated substation(s) to serve the following five Tunnel drive sites—
- (a) Dormay Street;
  - (b) Carnwath Road Riverside;
  - (c) Kirtling Street;
  - (d) Chambers Wharf Depot;
  - (e) Greenwich Pumping Station,
- and such other works as the Incumbent Undertaker considers appropriate for installation of cables and associated infrastructure (including sub-stations) to enable the supply of power for the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the *Authority* from time to time.
- (2) The Incumbent Undertaker may transfer or novate any contract for the provision of a temporary power supply and associated substations to the Infrastructure Provider when designated by the Secretary of State or the *Authority* (as the case may be) pursuant to regulation 8(1) of the SIP Regulations.

**Diversion of existing utility assets**

- 4.— (1) The Incumbent Undertaker may undertake diversions, protection, modification, reinstatement or abandonment of utilities and services including, communications, power, gas, drainage, water and sewerage assets as the Incumbent Undertaker considers is appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project, including works at those site specific works listed in paragraph 1 of Schedule 2 of this Notice.

**Works at sites**

- 5.— (1) The Incumbent Undertaker may carry out the following works at Acton Storm Tanks—
- (a) interception chamber;
  - (b) connection culvert;
  - (c) works to existing inlet chamber;
  - (d) overflow chamber rising main and new rising main discharge chamber; and
  - (e) MEICA equipment associated with the above works.
- (2) The Incumbent Undertaker may carry out the following works at Falconbrook Pumping Station—
- (a) modifications to existing screen chamber;
  - (b) combined interception, valve and dry weather flow chamber;
  - (c) recirculation chamber;
  - (d) rising mains; and
  - (e) MEICA equipment associated with the above works.
- (3) The Incumbent Undertaker may carry out the following works at Cremorne Wharf Depot—
- (a) combined interception and valve chamber;
  - (b) connection culvert;
  - (c) Tunnel control panel housed within existing Pumping Station; and
  - (d) MEICA equipment associated with the above works.
- (4) The Incumbent Undertaker may carry out the following works at Earl Pumping Station—
- (a) combined interception and valve chamber;
  - (b) connection culvert;
  - (c) modifications to the existing pumping station and dry weather flow chamber; and
  - (d) MEICA equipment associated with the above works.
- (5) The Incumbent Undertaker may carry out the following works at Hammersmith Pumping Station—
- (a) minor works within existing inlet chamber;

- (b) combined interception and dry weather flow chamber;
  - (c) connection culvert;
  - (d) rising main; and
  - (e) MEICA equipment associated with the above works.
- (6) The Incumbent Undertaker may carry out the following works at Greenwich Pumping Station—
- (a) combined interception and valve chamber;
  - (b) connection culvert; and
  - (c) MEICA equipment associated with the above works.

### **Consents**

- 6.— (1) The Incumbent Undertaker shall carry out any public consultations required prior to submitting the application for the Development Consent Order.
- (2) The Incumbent Undertaker shall submit an application for and undertake the process of obtaining a Development Consent Order for the Thames Tideway Tunnel Project and may submit and undertake the process of obtaining any attendant planning conditions to the relevant competent authorities and may manage any submissions with respect to the application for the Development Consent Order.
- (3) The Incumbent Undertaker may negotiate and agree any agreements with third parties (including in relation to asset protection), to the extent that, in the reasonable opinion of the Incumbent Undertaker, such agreements are required in order to comply with or obtain the Development Consent Order or assist with the design and construction of the Thames Tideway Tunnel Project. Any such agreement entered into for the purposes of the Thames Tideway Tunnel Project shall be novated (or transferred) to the Infrastructure Provider to the extent relevant to the works to be carried out by the Infrastructure Provider, once designated by the Secretary of State or the *Authority* (as the case may be) pursuant to regulation 8(1) of the SIP Regulations.

### **Designs and specifications**

- 7.— (1) The Incumbent Undertaker shall prepare the outline design for the Thames Tideway Tunnel Project and may prepare specifications of the works to be designed and constructed by the Infrastructure Provider. The Incumbent Undertaker may undertake the design for any works to be carried out by the Incumbent Undertaker as specified in this Notice.

### **Procuring goods, services and works**

- 8.— (1) The Incumbent Undertaker may organise and manage the procurement process on behalf of the Infrastructure Provider for the following works and services for the Thames Tideway Tunnel Project—
- (a) the tunnelling contracts for the East Section (from Chambers Wharf to Abbey Mills and the Connection Tunnel from Greenwich Pumping Station to Chambers Wharf); Central Section (from Kirtling Street to Carnwath Road Riverside Main Tunnel and Kirtling Street to Chambers Wharf Main Tunnel)

- and West Section (from Carnwath Road Riverside to Acton Storm Tanks Main Tunnel and the Frogmore Connection Tunnel);
- (b) the MEICA equipment and SCADA contracts;
  - (c) site security contracts;
  - (d) occupational health framework agreements;
  - (e) commissioning management services;
  - (f) insurance brokerage services;
  - (g) insurance contracts for project insurances for construction all risks insurance, third party liability insurance, marine cargo insurance;
  - (h) operation and maintenance contracts; and
  - (i) any other works or services as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of the Infrastructure Provider or as agreed with the *Authority* from time to time in accordance with this Notice.
- (2) In paragraph 8(1) above the Incumbent Undertaker's role may include:
- (a) determining the procurement strategy;
  - (b) developing the procurement documentation including OJEU notices, pre-qualification questionnaires, tender documents, evaluation criteria, contractual provisions, specifications, designs and such other documentation as the Incumbent Undertaker considers are necessary to tender the works and services; and
  - (c) managing the procurement process including market engagement, information events, maximising competition through engagement with domestic and international contractors, accepting and evaluating tenders, clarification processes, negotiation and evaluation of selection of preferred bidders, award recommendations and such other activities as the Incumbent Undertaker considers are necessary.
- (3) The Incumbent Undertaker shall not be obliged (although may consent) to enter into any contract with any preferred bidder in respect of any of the contracts listed in paragraph 8(1).
- (4) The Incumbent Undertaker shall tender the Thames Tideway Tunnel Project for an Infrastructure Provider as specified in the Thames Tideway Tunnel Project Specification Notice and in particular may:
- (a) determine the procurement strategy for the infrastructure provider bidders, having consulted the Secretary of State and the Authority as required pursuant to regulation 6(5) of the SIP Regulations;
  - (b) develop the procurement documentation including OJEU notices, pre-qualification questionnaires, tender documents, evaluation criteria, contractual provisions, specifications, designs and other documentation necessary to tender the works;
  - (c) manage the procurement process including market engagement, information events, maximising competition through engagement with domestic and

- international contractors, accepting and evaluating tenders, clarification processes, negotiation and evaluation of tender and award recommendations;
- (d) determine which bid to accept (if any) in accordance with regulation 6(6) of the SIP Regulations; and
  - (e) enter into such relevant contractual arrangements with the Infrastructure Provider as are necessary in order to deliver the Thames Tideway Tunnel Project.
- (5) If and to the extent necessary, the Incumbent Undertaker may:
- (a) prepare a strategy for the transition of the Thames Tideway Tunnel Project from its development phase carried out by the Incumbent Undertaker to the implementation phase to be carried out by the Infrastructure Provider;
  - (b) build the capabilities of the workforce, including finance, project delivery, operational, engineering, asset management, stakeholder engagement, commercial and legal, business services, health, safety and environment, such that on tender award to the Infrastructure Provider there are such personnel when supplemented by those of the selected Infrastructure Provider to manage a seamless transition from development to implementation of the Thames Tideway Tunnel Project;
  - (c) secure headquarter premises for the Infrastructure Provider for the purpose of the Thames Tideway Tunnel Project;
  - (d) establish data rooms, information archives and other knowledge and technology platforms as the Incumbent Undertaker determines to enable transition of the Thames Tideway Tunnel Project to an Infrastructure Provider; and
  - (e) provide such other people, processes or systems as are determined by the Incumbent Undertaker from time to time as are necessary to maximise the likelihood of a smooth transition to the Infrastructure Provider.

### **Land acquisition**

- 9.—** (1) The Incumbent Undertaker shall identify and purchase those interests in land that, prior to the designation of the Infrastructure Provider, are in its view, necessary in order to enable design, construction, testing, commissioning and to the extent relevant, operation and maintenance of, the works described in the Thames Tideway Tunnel Project Specification Notice, including relevant interests in land at those sites listed in paragraph 2, Schedule 2 to this Notice.
- (2) The Incumbent Undertaker may transfer, lease, licence or otherwise assign interests in land acquired for the purposes described in paragraph 9(1) to the Infrastructure Provider in order to allow the Infrastructure Provider to design, construct, test and commission the works and operate and maintain the IP Owned Structures.

### **Site preparation**

- 10.—**(1) The Incumbent Undertaker may carry out the following site preparation works as appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project:
- (a) site access, hard standings and access routes through site;
  - (b) site hoarding and noise screening;

- (c) temporary services including power, water supply, telecommunications and drainage to the site boundary and within the site for the Incumbent Undertaker's works;
- (d) site welfare for the Incumbent Undertaker's works;
- (e) tree works including pollarding, protection or removal of existing trees and planting of advance trees;
- (f) asbestos mitigation;
- (g) removal of temporary services infrastructure within the site up to the connection points after the Incumbent Undertaker's works;
- (h) demolition of existing buildings and structures;
- (i) renovation of existing buildings and structures on site;
- (j) relocation of existing vehicle access, car parking and bus stops including related traffic management;
- (k) general site clearance;
- (l) relocation of public footways;
- (m) structural and environmental monitoring;
- (n) control of invasive species;
- (o) protection of existing assets; and
- (p) such other site preparation works as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the *Authority* from time to time.

### **Marine works**

- 11.—**(1) The Incumbent Undertaker may carry out the following marine works and river boat relocations at Victoria Embankment Foreshore—
- (a) relocation of Tattershall Castle and related works; and
  - (b) relocation or removal of service moorings, piers and related works.
- (2) The Incumbent Undertaker may carry out the following marine works and river boat relocations at Blackfriars Bridge Foreshore—
- (a) permanent relocation of Blackfriars Millennium Pier and related works including new lift and relocation of existing stairs; and
  - (b) temporary relocation of President to Chrysanthemum Pier including modifications and strengthening of the existing berthing.
- (3) The Incumbent Undertaker may carry out such other marine works as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the *Authority* from time to time.

**Shad Thames Pumping Station, Beckton Sewage Treatment Works, Bekesbourne Street and other works**

- 12.—(1) The Incumbent Undertaker may carry out the following works at Shad Thames Pumping Station—
- (a) demolition of the existing three storey facilities building and adjacent suspended ground floor slab, and boundary wall and construction of new electrical switchgear and facilities building and related works;
  - (b) demolition of existing suspended ground floor slab and excavation within the existing pumping station to create area for new pumps and associated mechanical and electrical equipment and alterations to the external appearance of the pumping station building;
  - (c) modifications to existing sewers and the provision of new pumping main including chambers and ducts within Maguire Street and Gainsford Street;
  - (d) construction of pits, chambers, ducts and pipes for cables, hydraulic pipelines, utility connections, utility diversions and drainage, including facilities for drainage attenuation;
  - (e) construction of new permanent access to Maguire Street and works to create a turning head at the junction of Shad Thames and Maguire Street and subsequent reinstatement of original highway layout; and;
  - (f) such other works as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project, and as are agreed with the *Authority* from time to time.
- (2) The Incumbent Undertaker may carry out the following works at Bekesbourne Street—
- (a) new valve chamber;
  - (b) installation of an electrical and control kiosk and ventilation column including provision of ducts, including construction of pits, chambers, ducts and pipes for cables, hydraulic pipelines, utility connections, utility diversions and drainage, and temporary relocation of existing lamp posts and CCTV camera; and
  - (c) such other works as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the Authority from time to time.
- (3) The Incumbent Undertaker may carry out the following works at Beckton Sewerage Treatment Works—
- (a) two pumps and related works at the Tideway Pumping Station;
  - (b) extension of discharge pipes into, and enlargement of, the flow collection chamber;
  - (c) second flow transfer system pipeline and the addition to or enlargement of the discharge chamber;
  - (d) a bypass pumping system comprising inlet and outlet shafts, a siphon tunnel, and connecting pipes and culverts;
  - (e) duplication of the inlet works grit removal gantries;

- (f) air management structures and plant;
  - (g) MEICA equipment associated with air management system and tunnel controls; and
  - (h) such other works as the Incumbent Undertaker considers necessary to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the Authority from time to time.
- (4) The Incumbent Undertaker shall carry out the following works for other combined sewer overflow modifications and Western Pumping Station—
- (a) Northumberland Street combined sewer overflow, increase weir level;
  - (b) Savoy Street combined sewer overflow, increase weir level and undershot baffle;
  - (c) Holloway combined sewer overflow, Stroud Green Road – Eastern, increase weir level;
  - (d) Holloway combined sewer overflow, Tollington Park – Eastern, increase weir level;
  - (e) Holloway combined sewer overflow, Mildmay Road, increase weir level;
  - (f) West Putney SRS Weir combined sewer overflow, increase weir level;
  - (g) Western pumping station – pump wet well control level optimisation and provision of isolation valves; and
  - (h) such other works as the Incumbent Undertaker considers appropriate to facilitate the carrying out of the Thames Tideway Tunnel Project prior to the designation of an Infrastructure Provider or as are agreed with the *Authority* from time to time.

### **Testing, commissioning, operation and maintenance**

- 13.—**(1) Prior to the Acceptance Date, the Incumbent Undertaker shall, or shall procure the testing, commissioning, operation and maintenance of the works designed and constructed by it that are described in this Notice.
- (2) From the Handover Date to the Acceptance Date, the Incumbent Undertaker may operate the Thames Tideway Tunnel Infrastructure excluding the IP Owned Structures.
- (3) The Incumbent Undertaker may:
- (a) assist the Infrastructure Provider to carry out commissioning tests, provided that such activities do not affect the Incumbent Undertaker’s operation of the Sewer Network; and
  - (b) carry out the System acceptance tests with the support and assistance of the Infrastructure Provider.
- (4) The Incumbent Undertaker may make available staff for training in operation and maintenance of the Thames Tideway Tunnel Infrastructure as necessary until the Acceptance Date.

## General

- 14.—** (1) The Incumbent Undertaker shall finance the works, services and activities to be undertaken by it as described in this Notice and provide any ancillary services necessary for the day-to-day activities that are required to carry out such works, services and activities.
- (2) Prior to the designation of an Infrastructure Provider, the Incumbent Undertaker may, if it considers appropriate, carry out works, services and activities described in the Thames Tideway Tunnel Project Specification Notice that are not otherwise described in this Notice but are of a preparatory nature and are necessary to facilitate the carrying out of the Thames Tideway Tunnel Project provided that the *Authority* has agreed that the Incumbent Undertaker may carry out such works, services and activities and the Incumbent Undertaker has put the Thames Tideway Tunnel Project out to tender.

## Definitions

- 15.—** Defined terms in this Schedule have the following meanings –

“Acceptance Date” means the earlier of the date on which the acceptance tests are satisfactorily completed and the date on which deemed acceptance of the Thames Tideway Tunnel Infrastructure occurs;

“Beckton Sewage Treatment Works” means the Incumbent Undertaker’s sewage treatment facility at Beckton;

“building” includes any building, structure or erection or any part of a building, structure or erection;

“Connection Tunnel” means a Tunnel that connects a Shaft to the Main Tunnel;

“Crossness Sewage Treatment Works” means the Incumbent Undertaker’s sewage treatment facility at Crossness;

“CSOs” means the combined sewer overflows listed in Schedule 2 to the Thames Tideway Tunnel Project Specification Notice;

“Development Consent Order” means the development consent order for the Thames Tideway Tunnel Project to the extent granted to the Incumbent Undertaker, as may be amended from time to time;

“Environment Agency” means the Environment Agency established pursuant to section 1 of the Environment Act 1995 (UK) or any successor thereof;

“Handover Date” means the date on which the design and construction of the Thames Tideway Infrastructure is completed and has been tested (excluding acceptance tests) and commissioned in accordance with any agreements between the Incumbent Undertaker and the Infrastructure Provider;

“highway” has the same meaning as in the Highways Act 1980;

“IP Owned Structures” means the Tunnels, de-aeration chambers, de-aeration vents, vortex tubes, vortex generators, vortex liner, the Shafts, Shaft cover slabs and everything constructed inside the Shafts except for the MEICA equipment, Metalwork and access covers;

“Lee Tunnel” means the tunnels, shafts, the Tideway Pumping Station and associated infrastructure between Abbey Mills and Beckton Sewerage Treatment Works;

“London Tideway Tunnels” means the Thames Tideway Tunnel Project and the Lee Tunnel;

“Main Tunnel” means the tunnel between Acton Storm Tanks and the connection to the Lee Tunnel at Abbey Mills;

“maintain” and “maintenance” includes maintain, inspect, repair, adjust, alter, remove, clear, refurbish, reconstruct, decommission, demolish, replace or improve;

“MEICA equipment” means all mechanical, electrical, instrumentation, control and automation equipment that is part of the Thames Tideway Tunnel Project including:

- (a) penstocks;
- (b) hydraulic and electric actuators;
- (c) flap valves;
- (d) river flap valves;
- (e) dry weather flow pumps;
- (f) ventilation dampers;
- (g) air blowers;
- (h) air filters;
- (i) kiosks;
- (j) level and odour control instrumentation; and
- (k) SCADA;

“Metalwork” means ladders, handrails, platforms, covers and grates, embedded anchor points and other similar appurtenances, excluding any liner provided to the vortex tube;

“Operating Techniques” means the techniques agreed with the Environment Agency for the London Tideway Tunnels;

“SCADA” means supervisory control and data acquisition works and services;

“Shaft” means any shaft connecting to a Tunnel and includes a drop shaft;

“System” means the Thames Tideway Tunnel Project and such parts of the Sewer Network, such that they form an operating system and can be operated in accordance with the Operating Techniques;

“Sewer Network” means the Incumbent Undertaker’s network of sewers, including all necessary component parts and lateral drains, draining the London area of effluent, trade effluent and stormwater, including the Lee Tunnel and any pumping stations and treatment works operated by the Incumbent Undertaker;

“Thames Tideway Tunnel Infrastructure” means all permanent works contemplated in Schedule 1 and Schedule 2 to this Notice;

“Tideway Pumping Station” means the pumping station at the Beckton Sewage Treatment Works at the downstream end of the Lee Tunnel;

“Tunnels” means the Main Tunnel, the Greenwich and Frogmore connection tunnels and all Connection Tunnels but excluding the Lee Tunnel;

“watercourse” includes all rivers, streams, ditches, drains, canals, cuts, culverts, dykes, sluices, sewers and passages through which water flows except a public sewer or drain; and

“works” means all physical works contemplated in Schedule 1 and Schedule 2 to this Notice, whether temporary or permanent.

## Schedule 2

### Site Specific Preparatory Works

#### **Diversion of existing utility assets**

1.— The Incumbent Undertaker may carry out the following site specific works:

- (1) At Acton Storm Tanks—
  - (a) The diversion or abandonment of the Incumbent Undertaker's assets including foul and surface water mains within the site;
- (2) At Hammersmith pumping station—
  - (a) The abandonment of the Incumbent Undertaker's storm water and foul water assets;
  - (b) The diversion or abandonment of overhead communications cables; and
  - (c) The spiking, disconnection and removal of high voltage cables within the site.
- (3) At Dormay Street—
  - (a) The disconnection, abandonment or protection of multiple utility assets within the site;
  - (b) The re-location of a fire hydrant and water main belonging to the Incumbent Undertaker within the site; and
  - (c) The replacement, lining or protection of a gas main at Armoury Way.
- (4) At Falconbrook pumping station—
  - (a) The diversion, protection or abandonment of the Incumbent Undertaker's assets within the site; and
  - (b) Lowering, protection and/or diversion of utilities within York Road and at the site entry/egress locations.
- (5) At Kirtling Street—
  - (a) Protection, diversion or lowering of utilities at the site entry / egress locations; and
  - (b) Protection, diversion or abandonment of minor, privately owned services within the site.
- (6) At Carnwath Road Riverside:
  - (a) Junction improvements and associated utility diversions and protection.
- (7) At Chelsea Embankment Foreshore—
  - (a) Dedicated multiple utility diversion within the footway, carriageway and Ranelagh Gardens.
- (8) At Victoria Embankment Foreshore—
  - (a) Dedicated multiple utility diversion within the footway and carriageway of Victoria Embankment including removal of a length of the existing utility subway; and

- (b) Protection/mitigation measures for the Incumbent Undertaker's water main within the Embankment carriageway.
- (9) At Blackfriars Bridge Foreshore—
  - (a) Diversion of telecommunication assets to an above ground protected utility corridor to the north side of the off-ramp carriageway;
  - (b) Temporary diversion of the combined multi-way telecoms and gas assets inside the subway to an above-ground protected utility corridor; and
  - (c) Mitigation or diversion of extra high voltage power utility asset.
- (10) At Shad Thames Pumping Station—
  - (a) Protection or diversion of multiple utilities within carriageway of Maquire Street; and
  - (b) Replacement of the Incumbent Undertaker's water main within carriageway of Maguire Street.
- (11) At Bekesbourne Street—
  - (a) Diversion or protection of multiple utility assets currently within Bekesbourne Street.
- (12) At Chambers Wharf—
  - (a) Multiple utility diversion in the carriageway around the Chambers Wharf site; and
  - (b) Relocation of existing transformer on site.
- (13) At Earl Pumping Station—
  - (a) [Relocation of the Incumbent Undertakers' fire hydrant and diversion of water main to site].
- (14) At Deptford Church Street—
  - (a) Diversion of telecommunication, high voltage power and water main utility services from the west footway of Deptford Church Street to the eastern footway.
- (15) At Greenwich Pumping Station—
  - (a) Diversion of Incumbent Undertakers foul water asset within the site; and
  - (b) Diversion or abandonment of multiple utility services within the site.

### **Land Acquisition**

- 2.— (1) The Incumbent Undertaker may identify and acquire interests in land at or related to the following worksites as necessary for the Thames Tideway Tunnel Project:
- (a) Hammersmith Pumping Station site;
  - (b) Barn Elms site;
  - (c) Putney Embankment Foreshore site;
  - (d) Carnwath Road riverside site;
  - (e) Dormay Street site;

- (f) King George's Park site;
  - (g) Falconbrook Pumping Station site;
  - (h) Cremorne Wharf Depot site;
  - (i) Chelsea Embankment Foreshore site;
  - (j) Kirtling Street site;
  - (k) Heathwall Pumping Station site;
  - (l) Albert Embankment Foreshore site;
  - (m) Victoria Embankment Foreshore site;
  - (n) Blackfriars Bridge Foreshore site;
  - (o) Shad Thames Pumping Station site;
  - (p) Chambers Wharf site;
  - (q) Earl Pumping Station site;
  - (r) Deptford Church Street site;
  - (s) Greenwich Pumping Station site;
  - (t) King Edward Memorial Park site; and
  - (u) Bekesbourne site.
- (2) The Incumbent Undertaker may identify and purchase all those interests in sub-soil required to design, construct and operate the Thames Tideway Tunnel Infrastructure.

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