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Thames Water Utilities Ltd.  
7<sup>th</sup> Floor  
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29th November 2010

Our ref: 101129\_WW010001\_TW NPS Letter

Dear Susan,

### **Thames Tunnel and the Planning Act 2008**

Following on from your s46 and Regulation 6 notification letter of 9 September 2010 and subsequent discussions, we now note the Ministerial Statement by Rt Hon Caroline Spelman MP of 16<sup>th</sup> November in which she announced her intention to consult on a draft Section 14 Order in early 2011. We also note that in Part 4 of the draft National Policy Statement (NPS) for Waste Water reference is made to the Thames Tunnel scheme. Notwithstanding reference in the draft NPS to a direction under s35, the Ministerial Statement is nonetheless a clear statement of the Government's intent. We have given careful consideration to the impact of the statement and draft NPS on the scheme's status with regard to the Planning Act 2008 and to the assistance which can be given to you at this time.

The IPC considers that it is possible, as discussed at our meeting on 11th October, to give advice to you under Section 51 of the Planning Act on the development consent application procedure. This may include providing you with a list of consultation bodies (as defined under Regulation 2 of the EIA Regulations) to whom you may write seeking information which may be relevant to the preparation of an environmental statement. The IPC may also offer general advice on the matters which might be included within an environmental statement. Such advice would however have no legal status as a scoping opinion and we would advise against the advice being considered in any way as a substitute for a scoping opinion, which should be sought at the appropriate time.

Subject to time and resource constraints we may also be able to consider the possibility of outreach activity. My colleague Ian Gambles will be in attendance at your next Thames Tunnel Forum on December 3<sup>rd</sup> and we have discussed internally the possibility of using these forums as a future platform for IPC outreach work. We would welcome your views on this.

However, notwithstanding the comfort provided by the Ministerial Statement of 16 November (which may mean that there is less risk of judicial challenge to any decision which the IPC may make) there remains a valid argument that there cannot be a

“proposed application” if the legislative basis for that application to be made to the Commission is not yet in place. You will recall that in our meeting of 11<sup>th</sup> October we advised that in spite of Ministerial Statements made before the meeting, the IPC did not have jurisdiction to accept the s46 notice and the regulation 6 notice on the basis that the IPC cannot have jurisdiction in relation to a “proposed application” when there is no statutory framework in place to enable an application for development consent for that project to be sought and obtained. We consider that this position has not changed.

What is more, in view of the necessity to ensure strict procedural compliance with secondary legislation which transposes the requirements of EC Directive 85/337/EEC it is considered that there is no discretion to apply Regulations 6, 8 and 9 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 to a project for which the Commission does not have jurisdiction to accept an application. There is a real risk to both the applicant and the Commission that a subsequent decision on an application could be rendered unlawful by failing to comply with the strict procedural requirements in the EIA Regulations.

If you have any queries, please do not hesitate to contact me and if you do not agree with the position described above we would welcome Thames Water’s legal opinion (from Leading Counsel if considered appropriate) on this matter. In the meantime, please note that this letter will be placed on the IPC’s Register of Section 51 advice.

Yours Sincerely,

Mark Wilson  
Case Leader

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

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

You should note that we have a Policy Commitment to Openness and Transparency and you should not provide us with confidential or commercial information which you do not wish to be put in the public domain.