Dear Mr Woods

PLANNING ACT 2008 –MINISTERIAL CERTIFICATION AND CONSENT REQUIREMENTS FOR THE PROTECTION OF STATUTORY UNDERTAKERS

You may be aware that an application by Thames Water Utilities Ltd for Thames Tideway Tunnel (TTT) has been accepted for examination. The Order land for TTT comprises approximately 1,800 plots of land in, on or over which in the region of 87 statutory undertakers have interests in land, rights or apparatus. In addition, there are currently several further applications accepted for examination likely to have an impact on statutory undertakers’ land and rights. Although amendments to the Planning Act 2008 have been proposed through the Growth and Infrastructure Bill¹ it is our understanding that the current certification and consent procedures will continue to apply to applications received prior to commencement of the Bill (such as TTT). In the interests of ensuring efficient examination of these applications (and with the benefit of experience to date) we would like to review and clarify the delegation from the Secretary of State for Transport (DfT) to discharge functions under s127 of the Planning Act and to confirm the Secretary of State’s consent requirements under s138 of the Planning Act 2008 (PA 2008).

Review of delegation dated 8 May 2012

Identifying relevant statutory undertakers

“Statutory undertaker” is defined in s127 (8)² PA 2008 for the purposes of protection of statutory undertakers’ land under that section. It is the Planning Inspectorate’s understanding as described in Advice Note Three:

¹ As part of the Government’s proposals to reduce unnecessary bureaucracy these amendments will repeal ss 128 and 129 thereby removing special parliamentary procedures for development consent orders which authorise compulsory acquisition of statutory undertaking land. The amendments will also remove requirements under ss 127 and 138 to obtain certificates and consents.

² By reference to the Acquisition of Land Act 1981
that relevant statutory undertakers (whose representation may trigger the need for certification by the Secretary of State for Transport) are:

- Network Rail Infrastructure Ltd, Network Rail (CTRL) Ltd, BRB Residuary Ltd, The Canal and River Trust, Associated British Ports, Transport for London, Port of London Authority, Crossrail Ltd and Trinity House – being “persons authorised by an enactment to construct, work or carry on a railway, light railway, tramway, road transport, water transport, dock, harbour pier or lighthouse undertaking.

- The Civil Aviation Authority.

- NATS (En Route) plc (known as NERL).

The Planning Inspectorate is not aware of any undertakers in the transport field for which DfT has responsibility who are deemed to be statutory undertakers for the purposes of the Acquisition of Land Act 1981 but would be grateful if this could be confirmed.

**Procedures to be followed in respect of s127 functions**

The Secretary of State wishes a s127 examiner to be appointed to make a report about matters relevant to the exercise of the s127 functions. The s127 examiner may need to discuss representations with the parties involved, make inquiries of technical experts, hold a hearing or visit or inspect the land.

It is considered that the statutory scheme under PA 2008 and Infrastructure Planning (Examination Procedure) Rules 2010 provide a fair and transparent framework within which to examine matters relating to statutory undertakers’ land, rights and apparatus through questions, compulsory acquisition (or other) hearings (whether or not held solely for s127 matters) and site visits. It would be appreciated if you would confirm that the Secretary of State is similarly satisfied.

**Draft s127 certificates and notices**

We would be grateful if you would confirm that the Secretary of State still requires draft certificates and notices to be submitted with the s127 examiner’s report. If so, it is intended to ask applicants to provide draft certificates and notices with any s127 application made to the Planning Inspectorate.

**Consent requirements under s138**

**Identifying relevant statutory undertakers**

“Statutory undertaker” is defined in s137 (7)³ for the purposes of protection of statutory undertakers’ rights and apparatus under s138. It is the Planning Inspectorate’s understanding that relevant statutory undertakers (whose representation may trigger the need for consent by the Secretary of State for Transport) are:


³ By reference to the Town and Country Planning Act 1990 (TCPA)
authorised by an enactment to construct, work or carry on a railway, light railway, tramway, road transport, water transport, dock, harbour pier or lighthouse undertaking.

- The Civil Aviation Authority.
- NATS (En Route) plc (known as NERL).
- London City Airport and any other relevant airport operators (within the meaning of Part V of the Airports Act 1986).

The Planning Inspectorate is not aware of any other undertakers in the transport field for which DfT has responsibility who are or are deemed to be statutory undertakers for the purposes of the TCPA but would be grateful if this could be confirmed.

**Procedures to be followed in respect of s138 functions**

The Secretary of State has not delegated reporting functions to Examining authorities to enable her to discharge her function under s138 (4) (b)\(^4\). Arguably such a delegation is not required because for the purposes of examining the request for compulsory acquisition the examination must in any event address the tests in s138 (4) and the report of the Examining authority will provide information to enable the Secretary of State DfT to reach a conclusion as to whether extinguishment or removal is necessary for the purpose of carrying out the development to which the order relates.

We would, however, be grateful if you would clarify the Secretary of State’s requirements and whether the Secretary of State intends to delegate a consent under s138 (4) (if required) to the decision makers\(^5\) under s103.

**Next steps**

Delegation and consent requirements for the protection of statutory undertakers are also being discussed in the same terms with the Department for Communities and Local Government (DCLG) Department for Energy and Climate Change (DECC), Department for Culture Media and Sport (DCMS), Department for Environment, Food and Rural Affairs (DEFRA)\(^6\), Department for Health (DoH) and Department for Business Innovation & Skills (BIS).

This letter will hopefully assist you in clarifying or amending as appropriate the Secretary of State’s delegation dated 8 May 2012 (ref: TWA 2/1/45) and confirming the Secretary of State’s requirements under s138. In view of the operational need to have an agreed position before the Thames Tideway Tunnel examination begins (probably in September this year) I would be grateful if you could let us have a response as a matter of some urgency, liaising with colleagues in DCLG, DECC, DCMS, DEFRA, DoH and BIS as appropriate.

Yours sincerely,

*Simone Wilding*

---

\(^4\) The Secretary of State must consent to the inclusion of a provision for the extinguishment of a relevant right or removal of relevant apparatus if a representation has not been withdrawn.

\(^5\) In the case of TTT, it will be a joint decision of the Secretaries of State for CLG and Defra

\(^6\) And with the Department for Communities and Local Government (DCLG) acting on behalf of DEFRA in this regard
Advice may be given about applying for an order granting development consent or making representations about an application (or a proposed application). This communication does not however constitute legal advice upon which you can rely and you should obtain your own legal advice and professional advice as required.

A record of the advice which is provided will be recorded on the Planning Inspectorate website together with the name of the person or organisation who asked for the advice. The privacy of any other personal information will be protected in accordance with our Information Charter which you should view before sending information to the Planning Inspectorate.
Dear Simone,

PLANNING ACT 2008 – MINISTERIAL CERTIFICATION AND CONSENT REQUIREMENTS FOR THE PROTECTION OF STATUTORY UNDERTAKERS

1. Thank you for your letter of 23 April on the above. I am sorry for the delay in my reply.

2. I have consulted colleagues in DECC on this reply as they set the pattern for the delegation which we followed in my letter of 8 May 2012 to Ian Gambles.

Certification requirements under section 127

Identifying relevant statutory undertakers

3. This Department does not keep lists of those who would qualify as statutory undertakers in the transport sector. Apart from the bodies mentioned in Advice Note Three it is possible that there might be many more bodies who would qualify if their undertaking has at some stage in the past been statutorily authorised, for example, by a private or local Act of Parliament or by an order under the Light Railways Act 1896. Our approach to this matter under the Transport and Works Act (TWA) procedures has been to rely on an applicant to identify relevant statutory undertakers affected by a scheme, since the applicant must do so for the purposes of complying with the TWA procedure rules. Presumably in the context of the Planning Act one could reasonably expect the applicant to identify relevant statutory undertakers for the purposes of requesting a section 127 certificate. If the applicant overlooked a statutory undertaker, it also seems quite likely that the undertaker would draw attention to its status under section 127 in making an objection.

4. I am sorry that we cannot provide any more clarity or certainty on this point. I should, however, mention that BRB Residuary Ltd is (I understand) in the process of
being wound up, and that the Canal and River Trust is sponsored by Defra, not this Department.

Procedures to be followed in respect of section 127 functions

5. I confirm that we are satisfied that the procedures under the Planning Act 2008 and secondary legislation under it provide a fair and transparent framework within which to examine issues arising under section 127 of that Act.

Draft section 127 certificates and notices

6. Yes we would still find it helpful to be provided with draft certificates and notices with the section 127 examiner’s report. I agree that it would be sensible to ask the applicant to provide draft certificates and notices with their application in the same way that they provide a draft of the development consent order which they are applying for.

Consent requirements under section 138

Identifying relevant statutory undertakers

7. Please see my comments above at paragraphs 3 and 4. Although there is not a separate application for consent under section 138, we would have thought that the examination of the application (including the draft development consent order and book of reference), along with the consideration of any representations made by statutory undertakers, should seek to determine the extent to which consents under section 138 are required, and the report should include the Panel’s conclusions on this (as well as a recommendation as to whether such consent should be granted).

Procedures to be followed in respect of section 138 functions

8. The arrangements that were agreed between you, DECC and us last year are covered in the attached exchange between your Mike Harris and Gareth Leigh in DECC. I agree with you that no formal delegation of functions is required in this context and confirm that we would expect the Examining authority’s report to cover section 138 issues (as noted above) where relevant. We do not intend to delegate the decision-making function to the Department considering the associated development consent order, though I understand that the separate decision-making function under section 138 will disappear when changes in the Growth and Infrastructure Act 2013 are fully implemented.

Next steps

9. As I said above, I have consulted DECC on this reply. If, however, as a result of your correspondence with other Departments, you wish us to consider any of the above points further, I am happy to do so.

Yours sincerely,

Martin Woods
Dear Martin

Thank-you for your letter dated 14 May 2013 – confirming satisfaction of the proposed procedures to be followed in respect of the functions under sections 127 and 138 of the Planning Act 2008 (as amended).

We thought it would be helpful to clarify further the approach we intend to take in relation to examination of s127 matters arising in relation to the Thames Tideway Tunnel application and any other applications to which the delegation arrangements of 14 May 2013 apply.

As you will be aware, on the Thames Tideway Tunnel application there are in the region of 87 statutory undertakers having an interest in land, rights or apparatus within the Order land. In the event that the applicant makes an application to the Planning Inspectorate for s127 certificates it is intended to appoint the Panel (comprising five appointed inspectors being suitably qualified persons) as the section 127 examiner. This will allow any one or more of the Panel members to examine matters relevant to the Secretary of State's decision whether or not to issue certificates, ensuring that the resources of the Panel can be deployed flexibly and efficiently throughout the examination.

If the Secretary of State takes a different view we would be grateful to hear from you.

Yours sincerely,

Simone Wilding

Head of Case Management
Advice may be given about applying for an order granting development consent or making representations about an application (or a proposed application). This communication does not however constitute legal advice upon which you can rely and you should obtain your own legal advice and professional advice as required.

A record of the advice which is provided will be recorded on the Planning Inspectorate website together with the name of the person or organisation who asked for the advice. The privacy of any other personal information will be protected in accordance with our Information Charter which you should view before sending information to the Planning Inspectorate.