



Department
for Environment
Food & Rural Affairs

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Consultations on (A) Draft Reasons for Specifying the Thames Tideway Tunnel as a Specified Infrastructure Project and (B) Draft Reasons for Issuing a Preparatory Work Notice

Summary of responses and next steps

April 2014



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www.gov.uk/government/consultations/thames-tideway-tunnel-draft-reasons-for-specifying-the-project-as-a-specified-infrastructure-project-and-issuing-a-preparatory-work-notice

Any enquiries regarding this document/publication should be sent to us at:

Defra

Specification of the Thames Tideway Tunnel

Water Supply and Resources

Area 3D, Nobel House

17 Smith Square

London SW1P 3JR

Tel: 020 7238 1591/2019

Email: thamestunnelteam@defra.gsi.gov.uk

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Background

1. The purpose of these two consultations was to seek views on both the draft reasons for specifying the proposed Thames Tideway Tunnel as a Specified Infrastructure Project under the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013, referred to as the “SIP Regulations”, and the draft reasons for issuing a preparatory work notice for Thames Water Utilities Ltd, referred to as “Thames Water”. Both consultations were run in parallel.

2. By specifying the Thames Tideway Tunnel as an infrastructure project under the SIP Regulations, Thames Water would be required to tender competitively for a new independent company to finance and deliver the Project rather than undertaking the Project itself. The Regulator, Ofwat, would then consider designating the successful bidder as the ‘Infrastructure Provider’ for the project and granting it a Project Licence. This competitive tendering process should ultimately help to ensure that best value for money for customers is achieved and costs minimised. Although Thames Water would be prohibited from carrying out the specified infrastructure project, the Secretary of State may permit or require Thames Water to undertake certain preparatory work in relation to the project by issuing a preparatory work notice. The draft reasons for issuing such a notice were the subject of the second consultation.

3. The consultation ran for four weeks between 4 December 2013 and 6 January 2014, and was issued to 324 contacts by email, including:

- Ofwat;
- Mayor of London;
- Greater London Assembly members
- London local authorities;
- London MPs with an interest;
- MPs in the Thames Water region;
- EFRA Committee MPs;
- English Water and Sewerage companies; and
- The Consumer Council for Water.

4. The consultation documents were placed on the Defra consultation website and it was open to members of the public to submit their views and comments.

Summary of replies

5. Defra received 20 replies to the public consultations; the types of respondents break down as follows:

Replies to Public Consultation		
Organisation Type	Number of Respondents	% (rounded)
Individuals	5	25
MPs/Lords	4	20
Water & Sewerage Companies	1	5
Non-Governmental Organisations	1	5
Public Bodies	5	25
Local Authorities	3	15
Local Community Groups	1	5
<i>Total</i>	<i>20</i>	<i>100</i>

6. The public consultations invited comments on the draft reasons for specifying the proposed Thames Tideway Tunnel as a Specified Infrastructure Project, and the draft reasons for issuing a Preparatory Work Notice for Thames Water Utilities Ltd to carry out certain preparatory works related to the Tunnel project. A summary of the main points raised by respondents, and the Government's response, is detailed below.

7. A full list of respondents to the consultation is attached at Annex 1.

Main points

8. The 20 respondents provided views and comments on the draft reasons notices as well as a range of other issues related to the proposed Thames Tideway Tunnel project. Although some of the points raised were not strictly relevant to this consultation exercise, for the sake of completeness they have been included in the summary below:-

- **Supportive of the Thames Tideway Tunnel project**
 - Regard must be had to securing the best value for the taxpayer.
 - Strategic support for the Thames Tideway Tunnel by Mayor of London/GLA in Policy 5.14 of London Plan.
 - The Tunnel should be delivered in the most cost-effective way, with as little disruption as possible and taking as little land as possible.

- **Supportive of draft reasons for specification and/or preparatory works notices**
 - Specification could ultimately minimise the risks of the project and help ensure better value for money for customers through a competitive bidding process for delivery of the project, than if delivered by Thames Water.
 - Taken together, the draft specification reasons and the draft preparatory work reasons strongly underpin the case for specification of the TTT project and for the issue of the related preparatory work notice.
 - Thames Water expressed support for the use of the SIP Regulations regime to implement the TTT project. They are fully supportive of both the specification of the TTT Project and the use of a preparatory works notice. Thames Water also broadly endorses the draft reasons for both notices, although clarification was sought on particular points summarised below:-
 - Clarification was sought on whether the Secretary of State would be required to have regard to Ofwat's guidance in respect of raising or revoking a specified infrastructure notice;
 - Clarification needed at paragraph 12 of the draft specification reasons and paragraph 13 of the draft preparatory work reasons that Thames Water only has responsibility for compliance with the Urban Waste Water Treatment Regulations 1994 to the extent that Ofwat has ensured it can finance its functions;
 - Clarification needed at paragraph 14 of the draft specification reasons and paragraph 18 of the draft preparatory work reasons that the Thames Water expenditure stated could change if the draft preparatory work notice changes in regard to the extent of works needed, and at paragraph 15 of the draft specification reasons and paragraph 16 of the draft preparatory work reasons that Infrastructure Provider construction works will on some occasions have to be inside Thames Water's existing infrastructure;
 - Consideration should be given to extending the second bullet point in paragraph 38 of the draft specification reasons to refer to the impact on the cost of financing not only for other Thames Water investments, but for Thames Water's provision of services to its customers.
 - Putting the main part of the investment and construction of the Tunnel out to competitive tender is a good discipline for helping to achieve value for money, as it will reflect current market rates.
 - The Infrastructure Provider should retain the risk associated with the main Tunnel delivery; should circumstances lead to the need for a government/taxpayer intervention, this separation of interests would ensure

that the project, rather than Thames Water, was the recipient of any financial support.

- Appropriate measures should be put in place to ensure preparatory works costs are properly attributed and are no more than necessary. These costs should be separate from Thames Water's other sewerage investment plans to ensure transparency and accountability.
- **Neutral on the Thames Tideway Tunnel project and draft reasons for notices, but with concerns about practical effects of the notices**
 - The more complex the relationship between Thames Water, the IP, contractors and sub-contractors the more difficult it will be to hold contractors to account for undue impact or to get problems resolved effectively. There should be a clear construction site management regime and public communications system in place for each site, with ultimate responsibility resting with Thames Water's Chief Executive.
 - More clarity needed about how site-specific details of preparatory works will be consulted upon (by Thames water and the contractors), notified and otherwise managed.
 - Needs to be clarity about the relationship between an Infrastructure Provider and other public bodies regarding protection of their assets (such as rail infrastructure), services and ability to discharge their duties during construction works activities and operation.
 - The Secretary of State should have regard to ensuring that construction risk is fully funded by the Infrastructure Provider with appropriate safeguards to ensure that the Infrastructure Provider can meet all liabilities associated with potential impact on other bodies' undertakings and that they will be effectively indemnified against any impacts consequent on carrying out works for the project.
 - Strategy for the transition of the project from Thames Water to an Infrastructure Provider should involve consultation with relevant local authorities, so they can build a good relationship with the Infrastructure Provider from the start and have clear points of contact about who is responsible for different aspects of the project.
 - The issue of a preparatory work notice should not supersede the planning process, as some of the proposed preparatory works may require separate planning permission in their own right.
- **Opposed to the Thames Tideway Tunnel project**
 - Thames Water's debt level nearly 80%, little or no corporation tax paid, and dividend payments of £2 billion in last 6 years have restricted its ability to

invest in large infrastructure projects because of the adverse impact on its credit rating potentially leading to insolvency; Government support would not be value for money.

- Thames Water is failing to fulfil its main statutory obligations under s.37 and s.94 of Water Industry Act 1991 by not developing and maintaining an economic and efficient water supply and public sewerage system, and by not putting aside money to do so. This has contributed to the UK breaching Urban Waste Water Treatment, Water Framework, and Floods Directives, as well as other air quality, biodiversity and national carbon target requirements. Specifying the Thames Tideway Tunnel project as a Specified Infrastructure Project would perpetuate this.
 - Makes no sense to drain rainwater into a new expensive tunnel when a better, cheaper Blue-Green Infrastructure solution exists to stop rainwater entering the sewers in the first place (and also help solve flooding and drought problems).
 - If the risk associated with building the Thames Tideway Tunnel to Thames Water as a company is so great that a separate special-purpose company is needed, then it should not be built at all.
- **Opposed to specification of the Thames Tideway Tunnel project, and draft reasons**
 - Proposed procedure for assessing whether to specify a project is weak and lacks objectivity and transparency – will result in endless argument and conflict; failures in other public service sectors, e.g. Private Finance Initiative (PFI) projects, should not be repeated:
 - Cost & size – specification should not be for relatively small deals, to avoid undue Government and Regulator administration burdens; minimum £100 million recommended.
 - Complexity & risks – should not be used as criteria for specification as these will be the same whether the project is specified or not. Utilities' licences are assumed to have approved them as competent to undertake all activities.
 - Value for money – a flawed concept as it is a subjective rather than objective judgement; depends on assumptions of current value of estimated future economic and financial costs and benefits brought back to today's value using an assumed discount rate ('cost of money'). Different parties have different views about what these assumptions should be.

- Previous infrastructure and PFI projects have failed financially because flawed Green Book methodology has been used to assess future costs and benefits. English water and sewerage companies as private companies and Ofwat are not constrained by the Green Book in considering cost of capital, etc., but its use has led to ‘cost of money’ errors in five-year plans.
 - Specified project won’t necessarily secure more competitive financing; whether undertaken by special-purpose company or regular undertaker, developers and managers should seek most competitive financing package anyway.
 - Quite possible that specified special-purpose company with no proven track record would command more costly financing than an established utility company.
 - Suggested alternative Gateway process for assessing whether to specify an infrastructure project as a Specified Infrastructure Project.
 - Variations of the specification notice should not be allowed (except in cases of force majeure) and revocation should be automatic and irreversible if the project is not implemented in 2 years.
- Specification leading to an Infrastructure Provider option would place financial interests of Thames Water shareholders above those of its customers and the taxpayer, and almost certainly contravene Regulation 4(3)(b) of the SIP Regulations. Too little consideration has been given to the split of debt to equity in Thames Water’s investment programme.
- The Thames Tideway Tunnel as proposed by Thames Water is neither necessary nor desirable and therefore the Secretary of State should not specify it as a Specified Infrastructure Project.
- **Opposed to preparatory works by Thames Water, and draft reasons**
 - Land comprising the foreshore of the King Edward Memorial Park would be acquired. Parks are in very short supply in central London, and the Wapping area in particular. The loss of another green space, even for just three or four years, would have a detrimental effect on the area.
- **Other Thames Tideway Tunnel-related issues**
 - Carnwath Road should not be used as a main tunnel construction site because of likely adverse impact on the local community around it, and that another more suitable alternative site should be found.
 - The land for the TTT construction site at Carnwath Road should not be subject to compulsory purchase.

- Not satisfied that adequate assessment of the socio-economic impact of the use of the Carnwath Road site has been carried out by Thames Water, and there appears to be no clear justification for the site selection of Carnwath Road over Barn Elms.
- Speculative action by Thames Water seeking to charge customers for the project is unfair when there is no guarantee that Thames Water will be delivering it.
- Shareholders should inject fresh capital into Thames Water to rebalance the debt: equity ratio and enable it to build the Tunnel itself and avoid a credit rating downgrade with the higher associated costs that would involve.
- The Thames Tideway Tunnel project as proposed by Thames Water is not environmentally sound. Much better results could be achieved by a combination of measures, in particular retrospective separation of foul and surface water, SuDS, use of storm tanks and better sewer management – no official study has been done comparing such combination with the tunnel.
- A combination of alternative projects could be financed in conventional ways and produce environmental benefits earlier than a large tunnel; nor would it involve ‘difficult to insure’ risks that could be involved in tunnelling under the Thames.
- Inclusion of the Thames Tideway Tunnel project in the Waste Water National Policy Statement is anomalous and indicates Ministerial decision to adopt it as the solution to non-compliance with the Urban Waste Water Treatment Directive was taken a long time ago and without proper consideration of alternative solutions.
- Thames Tideway Tunnel project does not meet the Urban Waste Water Treatment Directive qualification that any solution to ensure compliance should be in accordance with the best technical knowledge not entailing excessive cost (BTKNEEC).
- Concerns about the scale of the proposed increase in customer bills, and the effect it will have on Thames Water’s lower-income customers at a time when there is already enormous pressure on household budgets and incomes.

Government response

9. We have noted the range of views and comments received from respondents on the draft reasons for specification of the Thames Tideway Tunnel project and for certain preparatory works related to the project to be carried out by Thames Water. Other comments relating to the merits of the Thames Tideway Tunnel project itself were also

received and noted, although these are considered to be outside the scope of the consultations. The purpose of these consultations was not to review the merits of a tunnel or of Thames Water's application for a Development Consent Order, but to consider the question of whether the Thames Tideway Tunnel project should be delivered by an Infrastructure Provider. In the case of the draft specification notice, this involved looking at whether the size or complexity of the project would threaten Thames Water's ability to provide services to its customers and whether the proposed Infrastructure Provider delivery model would offer better value for money than if the project was carried out by Thames Water. In the case of the draft preparatory works notice, the consultation was directed at whether Thames Water should be required or permitted to carry out the preparatory works specified in that notice in relation to the Thames Tideway Tunnel project.

10. The case for a tunnel has already been addressed in the Government's Waste Water National Policy Statement, which was debated and approved by Parliament in March 2012. The Government supports a tunnel-based solution as the most cost-effective, timely and comprehensive response to the problem of significant sewage pollution in the River Thames, and to comply with the judgment of the Court of Justice of the European Union in October 2012 that the UK was in breach of the Urban Waste Water Treatment Directive in respect of London. A range of alternative solutions over the last decade or so, including the use of green infrastructure and sustainable drainage systems (SuDS) either on their own or in combination with various smaller tunnel options, were assessed as being unable to meet the environmental standards for the Thames Tideway or to reduce the number of Combined Sewer Overflow spills to a level that would achieve compliance with the Urban Waste Water Treatment Directive.

11. The concept of 'Best Technical Knowledge Not Entailing Excessive Cost' (BTKNEEC) allows compliance with the Urban Waste Water Treatment Directive without imposing unachievable obligations that Member States might only be able to fulfil at disproportionate cost, or not at all. The Directive does not specifically define what might constitute excessive cost, and this will vary on a case by case basis. However, the principle that all waste water must be collected and treated in normal circumstances must not be undermined by Member States' invoking disproportionate costs as a reason for not complying other than exceptionally. The judgment of the Court of Justice of the European Union of October 2012 against the UK confirmed this point.

12. With respect to Thames Water's application for a Development Consent Order ("DCO") to build and operate the Thames Tideway Tunnel, this was submitted to the Planning Inspectorate in February 2013 and is currently being examined by the Planning Inspectorate. A final decision is expected to be taken by Ministers in autumn 2014. It should be noted that this is a Thames Water project, and because of the quasi-judicial role of the Secretaries of State for Environment, Food and Rural Affairs, and Communities and Local Government in deciding the DCO application, the Government has played no part in formulating the detail of the DCO application and cannot comment on site-specific matters or the route of the Tunnel.

13. It should also be noted that prior to submitting the DCO application, Thames Water conducted two three-month public consultations on the proposed route of the Tunnel in 2011 and 2012, which provided opportunities for local communities' concerns to be raised and detailed consideration of the proposed construction sites. There were also some further site-specific consultations after the two main consultations. As part of its DCO application, Thames Water also submitted an Environmental Statement describing the aspects of the environment (including impacts on people) that are likely to be significantly affected by the project, and including measures envisaged for avoiding or mitigating significant adverse effects.

14. Several respondents commented on Thames Water's tax and shareholder dividend arrangements. The Government does not comment on the tax affairs of individual companies. However, HM Revenue and Customs' approach is to treat everyone even-handedly in line with tax law and their Litigation and Settlement Strategy, and to ensure consistent outcomes so that companies pay the tax they owe and receive the reliefs to which they are entitled; including any claims to capital allowances which may be due on infrastructure projects. Ofwat as the Regulator also seeks to ensure that any reliefs claimed by companies are taken into account as part of its Price Review process

15. Some respondents proposed that shareholders, not customers, should pay for the Tunnel. Investment in the water sector is funded through a mixture of equity (i.e. shareholders) and debt raised on the capital markets. The income from customer bills is used to repay debt and provide a return to shareholders. If there was no income from customer bills, it would not be possible to attract investment or repay debt. Therefore this is not a viable option for financing the Thames Tideway Tunnel.

16. It is the level of risk in the Tunnel, including that arising from its scale, which is likely to make the Tunnel difficult to finance and deliver at an acceptable price without some contingent financial support from government, as described in a Written Ministerial Statement in November 2011 and which is currently under discussion. This challenge is not related to Thames Water's capital structure (e.g. its level of debt or "gearing") but to the risk profile of the Thames Tideway Tunnel project.

17. An alternative approach to specification proposed in response to this consultation was a "gateway" model that among other things would remove "complexity" as a criterion for specification, and "value for money" in Regulation 4(3)(b) as a measure for specification, along with recommending that specified infrastructure projects should be regulated by Ofwat. However, both the concepts of complexity and value for money form part of the conditions for specifying a large or complex project in the SIP Regulations, which also provide for Ofwat to regulate such projects through a Project Licence granted to an independent Infrastructure Provider. The SIP Regulations also include specific provision for the variation and revocation of a specification and/or a preparatory works notice. In addition, value for money in the context of specifying a project is considered to be about cost-effectiveness, i.e. procuring its financing at lowest cost through competition and the separation from a water company's day-to-day business of the provision of

infrastructure of a different risk profile. The Government therefore has no plans to change the criteria for specifying a large or complex project, as detailed in the SIP Regulations.

18. Section 94 of the Water Industry Act 1991 sets out the duty of every sewerage undertaker: to ensure its area is effectually drained. To this end the undertaker must provide an appropriate system of sewers and must also ensure that it complies with its duties under the Urban Waste Water Treatment Regulations 1994. However, these duties must be read alongside the wide-ranging duties imposed on the Secretary of State and Ofwat under section 2 of that Act, which requires them to exercise and perform their statutory powers in the manner they consider best calculated to secure that the functions of a sewerage undertaker are properly carried out. This duty includes ensuring that such undertakers are able, by securing reasonable returns on their capital, to finance the proper carrying out of their functions.

19. A specification notice would require Thames Water to put the infrastructure project as specified out to tender, and place a prohibition on Thames Water from undertaking the project. The sole purpose of the preparatory works notice would be to release Thames Water from this prohibition so that it can carry out certain preparatory works in relation to the project. The preparatory works notice would not override highway powers or confer consent under other statutory regimes such as planning permission.

20. The issuing of specification and preparatory works notices would not materially affect the relationship between the body delivering the Tunnel and other bodies. Whether the body delivering the Tunnel is Thames Water or an IP or any other vehicle, it will need to agree a series of Asset Protection Agreements between them, covering their services and ability to discharge their duties during construction works activities, and ensuring proper allocation of liabilities and indemnities.

21. Similarly, the requirement or otherwise for any further planning clearances will not be dependent on the existence or otherwise of an Infrastructure Provider. Matters such as construction site management regimes and public communications systems will be determined by Thames Water and any Infrastructure Provider as appropriate as part of preparations for construction in due course.

Next steps

22. In the light of the responses to the two consultations, the Secretary of State is considering whether to issue a Notice under the 2013 SIP Regulations to specify the Thames Tideway Tunnel project as a Specified Infrastructure project, and a Notice under the SIP Regulations requiring or permitting (as the case may be) Thames Water to carry out certain preparatory works in relation to the Thames Tideway Tunnel project. A decision is expected in the summer.

23. Should the Secretary of State decide to issue the above two Notices, the reasons for exercising those powers will also be published as soon as reasonably practicable afterwards.

Annex 1: list of respondents

London (Royal) Borough of Kensington & Chelsea

London Borough of Hammersmith & Fulham

City of London Corporation

Mayor of London/Greater London Authority

Angela Watkinson MP

Greg Hands MP

Simon Hughes MP

Lord Berkeley

Thames Water Utilities Ltd

Marine Management Organisation

Transport for London

Network Rail

Consumer Council for Water

Thamesbank

Carnwath Road Coalition

5 individual citizens