

Telephone: 08459 33 55 77
Web: www.defra.gov.uk

5 November 2012

Dear Consultee

Next Steps Consultation: Regime for Specified (Special) Water and Sewerage Infrastructure Projects in England

In February 2011 we consulted on proposals for new secondary legislation to be made under section 36A of the Water Industry Act 1991. This would enable the financing and delivery of large or complex high-risk water and sewerage infrastructure projects to be done by Infrastructure Providers (IPs) that are competitively tendered by English water or sewerage companies (known as “undertakers” for short).

<http://www.defra.gov.uk/consult/2011/02/22/water-sewerage-infrastructure-england-1102/>

The proposals arose because some large or complex high-risk projects such as the Thames Tideway Tunnel could threaten the ability of an undertaker to provide existing water or sewerage services to its customers. New secondary legislation would help deliver necessary infrastructures whilst helping isolate and contain within a distinct IP the associated risks and subsequent costs of financing and delivering large or complex high-risk projects: costs that are directly passed onto customers of undertakers. Hence the proposals should help provide overall better value for money for financing and delivering such projects whilst help keep water or sewerage customers’ bills as low as possible.

The effect of the proposed legislation would be to enable large or complex high-risk water or sewerage infrastructures to be classed as “specified projects”. These would then be financed and delivered by IPs which would help to provide better value for money for customers whilst safeguarding the ability of undertakers to continue delivering their required level of existing water or sewerage services.

Responses to our 2011 consultation were broadly supportive of the proposals. We published a summary in September 2011 in which we said we would further consider the proposals and make a decision on the way forward in due course:

<http://www.defra.gov.uk/consult/files/110222-sewerage-condoc-summary.pdf>.

After due consideration, Ministers intend to lay secondary legislation before Parliament for its affirmative approval in early 2013. A copy of the proposed draft Regulations, its Impact Assessment and a corresponding draft Notice to be made under the proposed Regulations in relation to the Thames Tideway Tunnel is attached to this letter.

Changes since the 2011 Consultation

During the 2011 consultation, we discussed the “special administration” procedures that currently apply for undertakers and their applicability for IPs. The main purpose of a special administration regime for undertakers is to protect the interests of customers by ensuring the continued provision of essential water or sewerage services should an undertaker enter into administration.

We said that we did not intend proposed secondary legislation to apply the Water Industry Act 1991 (WIA91) to allow a special administrator to be appointed if an IP:

- were in serious breach of its principal duties;
- has been or is likely to be in serious contravention of an enforcement order issued under section 18 of WIA91;
- cannot or would not participate in arrangements for an inset appointment under section 7 of WIA 91; or
- were unable or likely to be unable to pay its debts.

We also said that, on balance, the Government believed the impact of a failure of an IP on services to customers of undertakers could be *adequately* managed and that it should be managed through effective commercial, contractual and regulatory mechanisms.

Following the 2011 consultation and after further consideration, we remain of the opinion that proposed Regulations should not apply the Water Industry Act 1991 to allow, for IPs of all specified projects, a special administrator to be appointed if an IP should become insolvent or fail to comply with its statutory duties or an enforcement order.

However, on further reflection, we consider it would be better if special administration for an IP is determined on a project specific basis, prescribed within a separate Notice made under the proposed Regulations which specifies the large or complex high-risk project to be financed and delivered by a competitively tendered IP.

At present, the only project in the next 10-years we anticipate may be specified is the Thames Tideway Tunnel. We believe that having special administration apply to its IP in the same way it currently applies to the incumbent undertaker (in this case Thames Water Utilities Ltd) would best protect the interests of customers. This is because it should enable better project continuity if its proposed IP were to go into administration during its construction phase, so minimising any potential expensive delays for this large project which would subsequently be passed onto customers.

The decision to specify the Thames Tideway Tunnel has not yet been taken. However, it is currently the working proposal that an IP would deliver best value for customers and taxpayers. We have therefore also attached a draft Notice to be made under the proposed Regulations. This Notice would in final form apply to an IP for the Thames Tideway Tunnel. While there is no requirement for a public consultation on such a Notice, we believe it will assist understanding of the proposed Regulations if such a Notice is attached to this consultation. The draft Notice would enable its IP to enter into special administration should that prove necessary.

The draft Notice also envisages giving the IP the power to charge all sewerage retail customers of Thames Water for its functions related to the proposed Thames Tideway Tunnel. This mirrors the position on what happens now for all other infrastructure projects within the region: all customers of Thames Water pay for all of its ongoing individual infrastructure projects irrespective of location within the region.

Another option for customer charging that is being considered for a final Notice would be to give the IP the power to charge Thames Water for the IP's functions related to the Tunnel: Thames Water would then correspondingly charge its customers.

A final decision will be made after this consultation. It is important to note that the effect on Thames Water customers will be the same: they would pay the same charge for the Thames Tideway Tunnel regardless of whether they are charged directly from the IP or indirectly via Thames Water.

Draft Regulations

The draft regulations would implement Part 2A of the WIA91 in relation to water and sewerage undertakers whose appointment areas are wholly or mainly in England.

Draft Regulation 1 would provide for provisions in these Regulations to cease to have effect, in certain circumstances, seven years after they come into force. This is in line with wider Government policy on new regulations that potentially impose burdens on business.

Draft Regulation 2 is an interpretive provision.

Draft Regulation 3 would apply (with modification) the parts of general duty on the Secretary of State and the Water Services Regulation Authority ("Ofwat") in section 2 of the WIA91 for the purposes of their functions exercised under or by virtue of the Regulations.

Draft Regulation 4 would give the Secretary of State and Ofwat powers to specify by notice in writing an infrastructure project in certain circumstances. Ofwat would have to publish guidance to be followed by it in determining whether to specify an infrastructure project. An infrastructure project is a project which an incumbent water or sewerage undertaker must ordinarily undertake to fulfil its statutory duties under section 37 (general duty to maintain water supply system etc.) or section 94 (general duty to provide sewerage system) of the WIA91.

Once specified, the incumbent undertaker would be prohibited under **Draft Regulation 5** from undertaking that infrastructure project, although the Secretary of State or Ofwat may permit or require it to undertake such preparatory work as they may prescribe by notice in writing. The Secretary of State and Ofwat may vary or revoke notices issued by them under **draft regulations 4 or 5**. The power to issue notices would be subject to certain procedural requirements and transitional provisions.

Draft Regulation 6 would require the water or sewerage undertaker to put a specified infrastructure project out to tender. The ordinary procurement rules may apply to such a

tender. Where those rules do not apply or in certain other circumstances, these Regulations would apply (with modifications) certain provisions of the Utilities Contracts Regulations 2006 (S.I. 2006/6) (as amended) for that tender process. Those provisions are set out in **Schedule 1** to these draft Regulations.

Draft Regulation 7 would limit companies associated with the water or sewerage undertaker from bidding in the tender process except where agreed by the Secretary of State or Ofwat by notice in writing. The Secretary of State and Ofwat may vary or revoke any notice issued by them under draft regulation 7. The power to issues notices would be subject to certain procedural requirements and transitional provisions.

Draft Regulation 8 would give the Secretary of State and Ofwat power to designate by notice in writing a person wholly or partly responsible for a specified infrastructure project which has been put out to tender in accordance with the proposed Regulations. The designated “infrastructure provider” (IP) may then be licensed and regulated as set out in **draft Schedule 2** (see further below). Draft Regulation 8 would also give the Secretary of State power to make further regulation by notice in writing in relation to particular specified infrastructure projects. The Secretary of State and Ofwat may vary or revoke any notice issued by them under Draft Regulation 8. The power to issues notices is subject to certain procedural requirements and transitional provisions.

Draft Schedule 2 would set out general licensing and regulatory provisions in relation to IPs. **Paragraph 2** would prevent a water or sewerage undertaker from also being an IP. **Paragraph 3** would give Ofwat the power to licence an IP, and sets out certain procedural requirements. **Paragraph 4** would give Ofwat a wide power to impose appropriate licence conditions on an IP. **Paragraph 5(1) and (2)** would provide for the amendment of those licence conditions by agreement between Ofwat and the IP, or by reference to the Competition and Markets Authority (which will replace the Competition Commission under the Enterprise and Regulatory Reform Bill currently before Parliament) on public interest grounds. The remaining parts of paragraph 5 would apply the procedures for such references in relation to water supply licences to IP licences. **Paragraph 6** would apply the civil enforcement mechanism in the WIA91 to IPs. **Paragraphs 7 and 9** would impose duties on the Secretary of State and Ofwat in relation to protecting consumers and publishing certain information. **Paragraph 8** would impose certain duties on an IP in relation to remuneration and standards of performance. **Paragraphs 10 and 11** would give the Secretary of State and Ofwat powers to gather information and manage civil emergencies.

Draft Regulation 9 would require water and sewerage undertakers and IPs to provide the Secretary of State and Ofwat with such information as they may reasonably require for the purposes of carrying out their functions under these Regulations.

Draft Regulation 10 would provide for civil enforcement of these Regulations under the WIA91.

Draft Regulation 11 would require the Secretary of State to review the operation and effect of the Regulations and publish a report within five years after the Regulations came into force. Following the review it would fall to the Secretary of State to consider whether the Regulations should be allowed to expire as draft regulation [1(2) and (3)] provides, be revoked early, or continue in force with or without amendment. A further instrument would

be needed to continue the Regulations in force with or without amendments or to revoke them early.

Draft Notice for the Thames Tideway Tunnel Project

The draft Notice would be made under the proposed Regulation 8(4) (above), and set out the project-specific regulation for the Thames Tideway Tunnel project. This is on the assumption that the project is specified under the proposed Regulation 4 to be financed and delivered by a competitively tendered IP. If it is specified, the content of the final Notice may differ from this draft to reflect the development of the delivery route for the Tunnel and the ongoing discussions between the Government, Ofwat, and Thames Water Utilities Ltd.

In particular, the following paragraphs of the draft Notice are brought to your attention:

Draft Paragraph 3 would apply the duty in section 2 of the WIA91 on the Secretary of State and Ofwat to ensure that the IP is able to finance the proper carrying out of the statutory functions imposed on it in consequence of its licence.

Draft Paragraph 4 would apply the special administration regime in the WIA91 to the IP.

Draft Paragraph 5 would modify the general duty in section 94 of the WIA91 (general duty to provide a sewerage system) as it applies to Thames Water. It would permit Thames Water to fulfil that duty using the sewer owned by the IP as well as public sewers vested in Thames Water.

Draft Paragraph 6 would disapply two provisions in the WIA91 which ordinarily permit an incumbent sewerage undertaker to declare that sewers in its area are vested in it and to set standards for sewers which are to form part of the sewerage undertaker's system. This is inappropriate in the case of the Thames Tideway Tunnel project because the sewer would be constructed and owned by the IP in accordance with the project documentation.

Draft Paragraph 7 would give the IP powers to charge the sewerage retail customers of Thames Water for the statutory functions that it is carrying out in order to ensure that Thames Water can continue to fulfil its duty under section 94 of the WIA91. It may do so in accordance with agreements with customers or a charges scheme which must be approved by Ofwat under sub-paragraph (2). In general, under sub-paragraphs (3) and (4), it is occupiers of premises which receive sewerage services from Thames Water which would be liable to pay the charges of the IP.

Draft Paragraph 8 would give the IP certain works powers to lay sewers in streets and private land.

Draft Paragraph 9 would make supplementary provision in relation to the IP's works powers. **Sub-paragraph (1)** states that the sewer constructed by the IP will vest in the IP. **Sub-paragraph (2)** makes provision for compensation to be payable for damage caused by the exercise of the IP's works powers. **Sub-paragraph (3)** makes provision for Ofwat to deal with complaints made in respect of the exercise of the IP's works powers on private land. **Sub-paragraph (4)** would require the IP to produce a code of good practice with

respect to the exercise of its powers to undertake works on private land (which must be approved by the Secretary of State). **Sub-paragraph (5)** makes provision for the protection of certain public enterprises and utilities in relation to the IP's works powers. **Sub-paragraph (6)** makes provision for the protection of flood defence works and watercourses in relation to the IP's works powers. **Sub-paragraph (7)** would require any works in tidal lands to be approved by the Secretary of State. **Sub-paragraphs (8) and (9)** make provision in relation to minerals and the mineral rights of third parties which may be relevant during the construction of the sewer in the TTT project. **Sub-paragraph (10)** makes clear that nothing in this regime affects planning law.

Draft Paragraph 10 makes provision in relation to information and other supplemental matters. **Sub-paragraph (1)** would require the IP to maintain records about its sewer and to make them available to the public free of charge. **Sub-paragraph (2)** would require the IP to provide copies of its records to relevant local authorities. It would also require those local authorities to make those records available to the public free of charge. **Sub-paragraph (3)** would require the exchange of metering information between the IP and relevant undertakers which is necessary to give effect to the charging provisions above. **Sub-paragraph (4)** clarifies when a judge or magistrate is not conflicted out of hearing a case under this regime.

Should any other large or complex high-risk water or sewerage projects arise whilst the proposed Regulations are in force, then they could also be subject to a separate and different notice issued under the proposed Regulation 4.

Replies to this Next Steps Consultation

Please send for receipt by **Tuesday 4 December 2012** any comments you may have on this decision or on the draft legislation to the following:

By email:

SpecialInfrastructureConsultations@defra.gsi.gov.uk

By post:

*SIP Regs Next Steps Consultation Responses
Department for Environment, Food, and Rural Affairs
Area 2A, Egon House
Horseferry Road
London SW1P 2AL*

Consultation Criteria

This consultation is in line with the Consultations Principles. This can be found at:

<http://www.cabinetoffice.gov.uk/resource-library/consultation-principles-guidance>

When this consultation ends, we intend to put a copy of the responses in the Defra library at Egon House, London. This is so that the public can see them. Also, members of the public may ask for a copy of responses under freedom of information legislation. To see consultation responses and summaries, please contact the library at:

Defra

Information Resource Centre
Lower Ground Floor
Ergon House
Horseferry Road
London SW1P 2AL

Telephone: 020-7238-6575
Email: defra.library@defra.gsi.gov.uk

Please give the library 24 hours' notice. There is a charge for photocopying and postage.

If you do not want your response - including your name, contact details and any other personal information – to be publicly available, please say so clearly in writing when you send your response to the consultation. Please note, if your computer automatically includes a confidentiality disclaimer, that won't count as a confidentiality request.

Please explain why you need to keep details confidential. We will take your reasons into account if someone asks for this information under freedom of information legislation. But, because of the law, we cannot promise that we will always be able to keep those details confidential.

We will summarise all responses and place this summary on our website at www.defra.gov.uk/consult. This summary will include a list of names of organisations that responded but not people's personal names, addresses or other contact details.

If you have any comments or complaints about the consultation process, please address them to Defra Consultation Co-ordinator, Area 2D Ergon House, Horseferry Road, London SW1P 2AL, or email consultation.coordinator@defra.gsi.gov.uk.

Thank you for your help in this matter. If you have any queries then please contact us as above.

Yours Faithfully

Philip Ryland Jones

Department for Environment, Food and Rural Affairs