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Dear Mark

The Thames Tunnel

Thank you for your letter dated 18 May 2012. This letter responds in respect of the question of whether the Thames Tunnel project involves 'offshore development'.

1 Introduction

- 1.1 We have set out below our reasoning as to why we do not believe that the proposed application for the Thames Tunnel project ('the project') should be or needs to be treated as an application that relates to 'offshore development' requiring notification in Lloyd's List and an 'appropriate fishing trade journal' further to regulation 4(2)(d) of the Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009 ('the APFP Regulations').
- 1.2 In reaching our conclusion we have taken into account the view expressed in your letter that a reasonable approach might be to define 'offshore development' as meaning any *'development located in waters below the mean low water mark or [within the] boundary of inland waters up to the territorial limit'*. However that view seems to us to be driven by a precautionary approach to pre-application consultation as opposed to being a statement of the Inspectorate's interpretation of the legal position.
- 1.3 We understand the rationale behind such an approach but it does have implications for the project most significantly in terms of potentially increased cost and programme but also for promotion generally. Our preference is to only proceed with publication of a notice further to regulation 4(2)(d) if it is necessary to ensure that the application is lawfully made. Despite the recent amendments made to section 55 of the Planning Act 2008 it is still necessary for the Inspectorate to be satisfied that the applicant has complied with the pre-application procedures that apply in respect of NSIPs (as set out in Chapter 2 of Part 5 of the Planning Act 2008) and it will, as part of that exercise, be required to reach a definitive view on that issue when determining whether it can accept an application for development consent for the project.
- 1.4 The risk that the project may not be accepted is a very real concern to Thames Water (and other parties interested in the efficient and effective delivery of the project including

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Infrastructure UK) given the cost and programme implications that it would have for the project. In the circumstances it is clearly important that the Planning Inspectorate's determination of this issue is not left until the 28 day period in which the Inspectorate has to determine whether to accept the application for development consent for the Thames Tunnel, when it is in a position to make its determination of this question now. Of course clarification of this issue may well assist applicants for other proposed NSIPs as well.

- 1.5 We would therefore ask for the Planning Inspectorate's advice on whether the Thames Tunnel project includes 'offshore development' and hence requires publication further to regulation 4(2)(d) of the APFP at section 48 publicity stage. We would emphasise that this request for advice purely relates to the procedural question as to whether the Thames Tunnel project includes 'offshore development'. We would be grateful to receive your advice by 25 June 2012 if at all possible.

2 **Characteristics of the Thames Tunnel project**

- 2.1 Before dealing with the legal position I should highlight a number of characteristics and features of the project and the pre-application consultation that has been completed in respect of it that underpin our conclusion that the proposed application for the project does not relate to 'offshore development'.

2.2 *The nature and location of the development*

- 2.2.1 The two main elements of the project are tunnels at considerable depth below ground (including the bed of the Thames Tideway) and surface level construction sites. Some construction sites are land locked but others involve the provision of development beyond the mean low water mark. This includes provision of temporary facilities such as jetties and campsheds, coffer dams and other works necessary for the construction of the project that will be removed at the end of the construction phase. The permanent development that would be constructed beyond the mean low water mark are the structures to accommodate CSO drop shafts, as is the case at a number of embankment sites in central London. The construction of these sites involves construction, within the protection of the temporary coffer dams, of new lengths of river wall the areas behind which would be backfilled to create new land that is above the mean high water mark. As such that development ceases to be 'offshore' although it is accepted that its creation may have implications for the 'offshore' environment and 'offshore' interests.

2.3 *Pre-application consultation*

- 2.3.1 As you know the pre-application consultation strategy in respect of the project has shadowed the requirements of Chapter 2 of Part 5 of the Planning Act 2008. This has entailed consultation with local planning authorities, the Marine Management Organisation, the Greater London Authority, land owners and the stakeholders specified in Schedule 1 to the APFP Regulations further to sections 42 to 44 of the Planning Act 2008. This includes extensive consultation and discussion with the Port of London Authority, the harbour authority for the tidal sections of the River Thames affected by the development referred to above.
- 2.3.2 We have completed consultation on and publication of an original and subsequently amended statement of community consultation (SOCC) further to section 47 of the Act.

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The original and the revised SOCC were published in the Evening Standard. Numerous public exhibitions and meetings have been held - the project has never refused a meeting with any interested party. The project has received and will continue to receive extensive publicity in local, regional and national media outlets. The project received over 6,000 responses to its phase two consultation that closed in early February 2012.

2.4 There can be no serious questioning of whether communities and stakeholders potentially affected by the project are aware of it or that they are failing to respond to consultation. Given the commitment the project has given to public and stakeholder consultation we consider the approach to pre-application consultation is entirely consistent with the legal and policy requirements of the pre-application phase in respect of this project.

2.4.1 As indicated we will shortly proceed with publication of our proposed application further to section 48 of the Planning Act.

3 **The relevant statutory provisions**

3.1 These are set out at regulation 4 of the APFP Regulations, they will be very familiar to you and I have not repeated them here.

3.2 Regulation 4(2)(d) requires publication of notice of projects relating to 'offshore development' in the prescribed manner in Lloyd's List and an 'appropriate fishing trade journal' (this is generally taken to be the 'Fishing News'). This requirement operates in addition to the general publication requirements of regulation 4(2)(a) - (c), which are applicable in all cases. The requirement to publish in Lloyd's List and an appropriate fishing trade journal is repeated in respect of an application for development consent in respect of a project relating to offshore development that is accepted by the Planning Inspectorate (see regulation 9 of the APFP Regulations).

4 **The meaning of 'offshore development'**

4.1 As in your 18 May letter, we start from the position that the phrase 'offshore development' is not defined by the APFP Regulations or the Planning Act. In the absence of a definition of 'offshore development' one is compelled to apply the normal principles of legislative interpretation and, in particular, to attempt to identify a purposive construction in accordance with the courts' modern practice. That means that the term needs in our view to be considered and construed in the context in which it was enacted, having regard to the broad purpose of the legislation and the plain meaning of the words used. We also start from the fact that 'marine area' is defined elsewhere in the regulations, and we conclude that since regulation 4 has chosen not to adopt or replicate the earlier definition, its policy objective is different (see further below).

4.2 The first point we would note is that 'development' is defined in the Planning Act (see section 32). There is no reason or basis to read the word 'development' as having a different meaning in the context of the expression 'offshore development' in regulation 4(2)(d), and plenty of reason why it should not be taken to have another meaning given the overall regulatory framework established by APFP Regulations and the Planning Act 2008. It seems reasonable to assume that the phrase is therefore aimed at 'development' (as opposed to other activities) that is to be undertaken offshore - the formulation of regulation 4(2)(d) seems perfectly clear on that point also.

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- 4.3 We also agree with you that the legislative purpose of regulation 4(2)(d) is as set out in your letter ('The effect of undertaking publicity ...'): application of that purpose leads us to believe that the regulation is aimed at 'real' offshore developments such as offshore wind farms and major port expansions or extensions with potentially significant effects on commercial shipping and fisheries, and not at the unlikely possibility of incidental effects of essentially inland projects like the Thames Tunnel that will have no effects on the 'offshore' environment (see further below).
- 4.4 In support of that it is our understanding, based on our familiarity with the principles that underpin the development consent system generally and from various sources including discussion with relevant stakeholders, that the requirements concerning 'offshore development' were always aimed at genuinely offshore development such as offshore wind farms or major port expansions or extensions, categories of NSIP completely different in their manifestation and effects from the development proposed as part of the Thames Tunnel. That also seems clear from the fact that there is a definition of 'offshore' in section 15 of the Planning Act that is concerned with generating stations, a category that includes offshore wind farms, but which is not extended more widely through the Planning Act 2008. That understanding of the purpose of regulation 4(2) is also consistent with the requirement to publicise such 'offshore development' in publications associated with the commercial shipping and fishing industries. It is also consistent with paragraphs 44 to 47 of emerging Department for Communities and Local Government Guidance on pre-application consultation published for the purposes of the 'light touch' review of existing DCLG guidance on the Planning Act 2008 procedures.
- 4.5 Further whilst not definitive it is interesting to note that the Oxford English Dictionary defines the word 'offshore' (when used as an adjective, as it is in the phrase "offshore development") to mean 'Situated at sea some distance from the shore'. This definition clearly refers to something which is at a distance from the shore. It is entirely consistent with the points already made above concerning a purposive approach to the legislation.
- 4.6 In applying that purposive approach it is not disputed that the project involves development beyond the mean low water mark in the tidal section of the River Thames (as well as development above the mean high water mark). However that cannot be determinative of the question as to whether the project involves 'offshore development' having regard to the purposive approach set out above given the characteristics of the project. Firstly it cannot be disputed that the development would be carried out in an urban environment a considerable distance from the sea¹. Secondly the location of the project does not sit within the category or group of projects that were clearly intended to be within the remit of regulation 4(2)(d). Thirdly when one has regard to the publications within which the projects involving offshore development are required to be published it is clear that regulation 4(2)(d) was intended to apply to developments that might have an effect on or implication for commercial shipping and fishing sectors, which the Thames Water does not (see further below). Consequently we conclude that the project cannot properly be said to comprise 'offshore development'.

¹ In this respect it is instructive to note that the River Thames is considered to be an inland water by the Port of London Authority. In that respect the categorisation of the River Thames by the Marine and Coastguard Agency under its 'Categorisation of waters' further to Regulation 2 of the Merchant Shipping (Categorisation of Waters) Regulations 1992 is also of note. No part of the River Thames affected by the project categorises above category 'C' which deals with tidal estuaries but also deep lakes and lochs. Category 'D' is highest level on the MCA categorisation, that does not include the sea. The latter being outside the categorisation.

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4.7 In your 18 May letter, you suggested that a reasonable approach might be to construe 'offshore development' as meaning any development located in waters below the mean low water mark or boundary of inland waters up to the territorial limit. This approach appears to be based on the proposition that 'offshore development' is development that falls within the 'marine area' as defined by the APFP Regulations. However, it is notable that the APFP requirement for publicity is in respect of a *'proposed application [that] relates to offshore development'*, not development within the 'marine area', and that in the case of 'offshore generating stations' a definition of 'offshore' is offered but limited to the definition of that class of NSIP. Surely if the intention was that regulation 4(2)(d) was to relate to any 'development' within the 'marine area' it would have said so. The only context in which 'marine area' is used is in defining the appropriate range of consultees further to section 42(1)(a) of the Planning Act. That is entirely consistent with the publicity requirements in relation to 'offshore development'. One can easily conceive of a circumstance that might justify the requirement to consult the Maritime and Coastguard Agency but which would not require wider publicity in respect of 'offshore development' given the points set out above and that specific organisation's responsibilities for maritime and coast safety.

4.8 Equally the fact the project is consulting the MMO cannot automatically mean that the project includes 'offshore development'. The licensing regime established under the Marine and Coastal Access Act 2009 that is overseen by the MMO cannot be disapplied in a development consent order, but a deemed licence may be given. Consequently as the project includes development that extends beyond the mean high water mark it is required to obtain either a deemed or actual licence for those structures from the MMO.

4.9 However the MMO licensing regime covers a range of activities in the 'UK marine area' a number of which do not amount to 'development'. The definition of 'UK marine area' in the Marine and Coastal Access Act (section 42) must be read in that context. The fact the Thames Tunnel project includes development that is within the regime established by the 2009 Act and over which the MMO has jurisdiction, and that that regime cannot be disapplied from applying to DCO projects, does not automatically mean the project entails 'offshore development' given the absence of a definition as to what that expression means and the characteristics of this project as described already above. It does however mean that the project needs a licence from the MMO and that the project must therefore be in contact with them. The 2009 Act does not define what is or is not 'offshore development' for the purposes of the Planning Act and the APFP regulations. If that had been intended presumably the requirements to publicise would have been framed in the context of 'development within the UK marine area'. The Marine and Coastal Access Act could have amended the Planning Act to that effect, it did not. Likewise the Localism Act 2011 did not address this point despite making extensive changes to the planning process for NSIPs as established in the Planning Act 2008.

4.10 For all the reasoning set out above we do not consider that the Thames Tunnel project includes 'offshore development' that should be publicised under regulation 4(2)(d) of the APFP Regulations. Further for the reasons set out below we do not consider that has any bearing on the effectiveness of the project pre-application consultation.

5 Consultation on the Thames Tunnel project

5.1 As noted above your letter confirms that the purpose of publicity in accordance with regulation 4(2)(d) is to alert those who might otherwise not have been consulted about the

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project, you go on to specifically mention shipping and fishing interests. The implication presumably that those people or organisations may be concerned about the project. More generally it is accepted that the purpose of the pre application consultation and publicity procedure set out in Chapter 2 of Part 5 of the Planning Act and the supporting Regulations is, as has been confirmed by the Planning Inspectorate in Planning Inspectorate Advice Note sixteen and on numerous other occasions (including by its predecessor), to ensure that persons potentially affected by or interested in a proposed application for an NSIP are made aware of and have an opportunity to comment on the proposals before an application is formally submitted. It is expected that any comments made by such persons are taken into account by the promoter of the relevant project. We have not repeated the relevant statutory provisions as you will be totally familiar with them.

- 5.2 Having regard to the normal coverage of Lloyd's List it is clear that the requirement to publish a notice in it is clearly directed towards ensuring that the commercial shipping industry is notified of proposed applications for "offshore development" which may have an impact on its activities and operations. The requirement to publish a notice in an appropriate fishing trade journal has been consistently met (without objection from the Inspectorate) by publication in 'Fishing News'. The MMO confirmed recently (during discussion on the project) that this is the publication they would use for such purposes. That publication is aimed at the commercial fishing industry and we feel confident therefore in assuming that the purpose of the second requirement in regulation 4(2)(d) is aimed at notifying commercial fishing trade of NSIPs that may be of concern or interest to them.
- 5.3 For the reasons set out below we are confident the Project will not have any impact on commercial shipping or sea fishing trade within or outside of territorial waters.
- 5.4 The MMO has confirmed in its response to phase two consultation that there are no commercial fisheries operating in areas of the River Thames that could be affected by the project and that there are no utilised shell fish beds in the River Thames. There has been no suggestion in any response to the scoping report in respect of the EIA of the project that it might have a significant effect on any commercial fishery.
- 5.5 The Marine and Coastguard Agency has chosen not to respond to either phase one or phase two consultation on the project despite being consulted on both occasions.
- 5.6 The response to phase two consultation from Trinity House confirmed that the Port of London Authority is the primary navigation authority for the Thames Tideway. Trinity House raised no concerns about the project.
- 5.7 None of the organisations that should have been and have been consulted about the effects of the project below the mean high water mark and on the marine and tidal environment as specified in Schedule 1 to the APFP Regulations has raised any concern about the project (accepting that we are still working with the MMO on the deemed marine licence to be included in the development consent order for the project).
- 5.8 We are in direct and regular contact with the Port of London Authority, the harbour authority for the River Thames. As harbour authority they can be expected to raise any concerns over the effect of the project on commercial shipping and fisheries. They are engaged in the process and have raised a number of concerns about the project that we are in the process of addressing. However their representations on the project so far, whilst

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raising a number of issues we need to address, do not refer to any impact on commercial shipping or fisheries. When this is considered against the emerging advice in the draft DCLG guidance on pre-application consultation (paragraphs 44 to 47) it leads to the conclusion that advertising the project as 'offshore development' is not necessary in order to achieve the objectives of the pre-application consultation process as confirmed by the Planning Inspectorate.

5.9 There is no significant recreational angling on the Thames Tideway and we do not believe that is within the requirement of regulation 4(2)(d); see our earlier comments above.

5.10 The project has been the subject of extensive consultation and publicity as has been described above. It is clear that if the commercial shipping operations had concerns about the project they would have been raised by now. Equally no commercial fisheries are likely to experience any effects from the project. For the reasons given above we do not believe any relevant party would be prejudiced by not advertising the project in Lloyd's List and / or an appropriate fishing trade journal.

6 Transboundary effects

6.1 Your letter refers to transboundary effects and it seems to suggest that the issue of transboundary effects goes to whether the project should be treated as involving 'offshore development'. We do not agree with that proposition as a matter of principle. We note however that the Planning Inspectorate will be screening the application to determine whether there are any transboundary effects. For the reasons set out below we do not consider that the presence or otherwise of transboundary effects means the project should be considered 'offshore development'.

6.2 The project will improve water quality in the Thames Tideway. The environmental studies of the project we have completed do not reveal any likelihood of transboundary effects in terms of water quality (or in terms of any on shore effects in another EU nation). In particular, the Habitats Regulations Screening Report being prepared for the project indicates that the project will not give rise to any adverse effects on European sites. That conclusion has been broadly accepted by Natural England. Certainly no response to either phase one or phase two consultation raises transboundary effects as an issue. The Planning Inspectorate's response raised this as an issue in response to the report on the scope of the EIA for the project. Since the habitats screening process has not identified any effects on the Thames Estuary, transboundary effects are not considered to be possible.

6.3 In short no transboundary effects have thus far been identified. We do not accept that the identification of transboundary effects would, in any event, mean the project must be identified as 'offshore development'. It follows that in the absence of transboundary effects this issue does not indicate one way or other that the project needs to be notified as involving 'offshore development'. For the reasons given previously we do not think it does require publicity in that manner.

7 Formal request for confirmation of the Planning Inspectorate's advice

7.1 In light of the position set out in this letter, we request the Planning Inspectorate's advice as to whether it considers that the proposed application for the project relates to 'offshore

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development' for the purposes of compliance with regulation 4(2)(d) of the APFP Regulations (and regulation 9(1) of the APFP Regulations).

- 7.2 It will be apparent we do not consider that the project falls within the remit of those specific requirements and further that we do not consider there will be any prejudice to the integrity of the pre-application consultation exercise further to Chapter 2 of Part 5 of the Planning Act if the project is not advertised further to regulation 4(2)(d) of the APFP Regulations.
- 7.3 As indicated in our introductory comments it would benefit all parties if you could reach a definitive view on this point as soon as possible so that we can ensure that we proceed in a way that meets the Planning Inspectorate's interpretation of the procedural requirements. Whilst we are confident in the views expressed in this letter, for the reasons referred to in the introductory comments we wish to be certain that the Planning Inspectorate concurs with our analysis. If the Planning Inspectorate were to take a different view of the statutory provisions to that set out above, then the consequence may be non-acceptance of the application for a development consent order. That would involve significant cost and delay to Thames Water as promoters of a project that is identified in the adopted National Policy Statement for Waste Water and which is in the public interest for a whole range of reasons not least the fact that it will achieve compliance with the EU Urban Wastewater Treatment Directive. We therefore believe it to be a sensible and reasonable expectation that the Planning Inspectorate confirms whether in its view the Thames Tunnel project comprises 'offshore development' at this time before the project commences its section 48 publicity. We would emphasise it is entirely procedural advice we require not advice on the merits of the project or any part of it or indeed the adequacy of the consultation process so far.
- 7.4 Please take this letter as a request for explicit advice pursuant to section 51 of the Planning Act given the matters referred to above. We would be grateful to receive your response by 25 June 2012.

If there are any points that we can clarify in order to assist the Planning Inspectorate in this matter please do not hesitate to contact me.

Best wishes,

Yours sincerely



 **James Good**

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