

# Thames Tideway Tunnel – explanatory note as to Ofwat’s and the Environment Agency’s likely approach to enforcement

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## **A. Status of this explanatory note**

1. This explanatory note is a statement of how Ofwat and the Environment Agency (EA) are likely to apply their existing guidance and statements of policy in the context of the Thames Tideway Tunnel Project. It is not statutory guidance and it is not intended to replace any other guidance issued by Ofwat or the EA.
2. In particular, this explanatory note does not override the published enforcement policies, statement or guidance issued by Ofwat or the EA and referred to in the body of this document. It also does not override any guidance published for regulators and prosecutors in exercising their roles in enforcement and prosecution including but not limited to the Regulators' Code and the Code for Crown Prosecutors and it does not override the statement of policy with respect to penalties that Ofwat is required to issue under section 22B of the Water Industry Act 1991 (WIA). It also does not override any amendments or updates to any of the documents referred to in this paragraph. This document is not intended to and does not prejudice Third Party rights.

## **B. Overview of the Thames Tideway Tunnel Project**

3. The Thames Tideway Tunnel will be a 25 km sewer under London. It will intercept discharges from combined sewer overflows (CSOs) which would otherwise spill into the River Thames, thereby reducing the frequency and extent of polluting discharges of untreated sewage into the tidal Thames. The Thames Tideway Tunnel will be constructed between Acton Storm Tanks and Abbey Mills Pumping Station, where it will connect to the Lee Tunnel, allowing the sewage to be passed via the Lee Tunnel to Beckton Sewage Works for treatment. A new infrastructure provider company will be created to deliver the Thames Tideway Tunnel Project and it will have responsibility for designing, constructing, owning, financing, operating and maintaining the Thames Tideway Tunnel. This regime is provided for in the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 ('the Regulations') which were made by the Secretary of State pursuant to the powers conferred by Part 2A of the WIA (as inserted by the Flood and Water Management Act 2010).
4. Under the Regulations, the Secretary of State or Ofwat may specify an infrastructure project in certain circumstances. 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 WIA. Once specified, the incumbent undertaker is prohibited from undertaking the infrastructure project and must instead put the project out to tender. The Regulations give the Secretary of State or Ofwat the power to

designate the successful bidder as an 'infrastructure provider' (IP). The Regulations also apply parts of the WIA (modified or otherwise) and introduce new provisions into the WIA for the purposes of regulating infrastructure providers (the modified WIA). Under a new section 17FA of the modified WIA, Ofwat may grant the IP a project licence. In terms of its project licence and the modified WIA, the IP will become subject to a modified version of the regulatory regime that applies to water and sewerage undertakers.

5. Since the enactment of the Flood and Water Management Act 2010, Ofwat, Defra, Infrastructure UK, Treasury and Thames Water Utilities Ltd (Thames Water) have worked together to develop an IP model to finance and deliver the Thames Tideway Tunnel Project. On 4 June 2014, the Secretary of State specified by notice (the Specification Notice) the Thames Tideway Tunnel Project as an infrastructure project that must be put out to tender under the Regulations.
6. The Specification Notice provides that:
  - a) from the date of handover (ie, at the conclusion of construction), the Thames Tideway Tunnel infrastructure is required be fit for purpose in every respect so that when operated with the sewer network it complies with the Operating Techniques and with any environmental permit;
  - b) from the date of system acceptance (ie, after the Thames Tideway Tunnel has undergone testing and has been accepted by Thames Water), the IP owned structures must allow the transfer of combined sewage;
  - c) the IP owned structures will not include MEICA equipment<sup>1</sup>, metalwork and access covers;
  - d) from the date of system acceptance, ownership of the IP owned structures may be subject to an agreement between the IP and Thames Water.
7. The conception of a new licensed IP creates an unusual regulatory situation in the water sector where two regulated entities operate inter-connected assets in the same geographic area. The IP will own and operate the Thames Tideway Tunnel which will form part of Thames Water's wider sewerage network.

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<sup>1</sup> Mechanical, Electrical, Instrumentation, Controls, Automation.

## C. Thames Water's duties and obligations

8. Thames Water is a licensed water and sewerage undertaker appointed by the Secretary of State under the WIA. The WIA places principal duties on water and sewerage undertakers to provide water and sewerage services. In relation to the provision of sewerage services, Thames Water has principal duties under section 94 (as supplemented by the Urban Waste Water Treatment Regulations 1993) to provide a sewerage system and to provide and maintain collecting systems and treatment plants.
9. As a result of the Thames Tideway Tunnel being specified as an infrastructure project under the Regulations, Thames Water, as the incumbent undertaker, is now subject to a modified section 94 duty. Thames Water's duty to provide, improve and extend a sewerage system is now, for the purposes of the regulation of the specified infrastructure project, a duty "to ensure that all necessary arrangements are made to provide, improve and extend a system of sewers" and in the context of this duty a sewer includes a sewer which is owned by a licensed IP. The specification of the Project under the Regulations also prohibits Thames Water from carrying out the specified infrastructure project, although Thames Water is permitted or required (as the case may be) to undertake certain preparatory works in relation to the Project as are specified in the Thames Tideway Tunnel Project Preparatory Work Notice<sup>2</sup>.
10. Thames Water's duties, as set out in its licence and in the WIA, are enforceable by Ofwat and the Secretary of State under section 18 WIA.
11. For the purposes of the Thames Tideway Tunnel, Thames Water is responsible for the operation of the overall integrated sewerage network comprising the Thames Tideway Tunnel and its surrounding sewerage system. In its role as water and sewerage undertaker, Thames Water has agreed with the EA:
  - a) which of the CSOs along the length of the Thames river will form part of the Thames Tideway Tunnel and which will not;
  - b) the fixed requirements for the Thames Tideway Tunnel, including, the design flows at each CSO; the overall volume of the Thames Tideway Tunnel; the diameter, gradient and alignment of the tunnels forming the Thames Tideway Tunnel; and
  - c) Operating Techniques for the Thames Tideway Tunnel.

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<sup>2</sup> Issued by the Secretary of State on 4th June 2014, under the Regulations.

12. Thames Water has developed the outline design, and Thames Water has agreed the Operating Techniques for the Thames Tideway Tunnel based upon the fixed requirements which are defined by the environmental design criteria agreed with the EA.

## **D. The IP's duties and obligations**

13. In accordance with the Project Licence and the Specification Notice the IP must:

- a) design, construct, finance, test and commission, operate<sup>3</sup> and maintain, and achieve system acceptance of the Thames Tideway Tunnel infrastructure by a specified date (the construction period); and
- b) from the date of system acceptance of the Thames Tideway Tunnel infrastructure: own; finance; and operate and maintain the IP owned structures of the Thames Tideway Tunnel so that they are available for use by Thames Water and the Thames Tideway Tunnel as a whole is capable of being operated by Thames Water, in each case in accordance with Thames Water's environmental permits and with the Operating Techniques (the operating period).

14. The IP's duties under the Regulations and WIA are enforceable by Ofwat and the Secretary of State under section 18 WIA (as applied by the Regulations).

15. For the purposes of the Thames Tideway Tunnel Project, the IP is responsible for adopting and further developing the outline design (prepared by Thames Water) to ensure that the Thames Tideway Tunnel, as constructed, is capable of meeting the fixed requirements and being operated in accordance with the Thames Water's environmental permits and the Operating Techniques.

## **E. Ofwat and the EA's roles and enforcement powers**

### **Ofwat's role and enforcement powers**

16. Ofwat is the economic regulator of the water and sewerage industry in England and Wales and was set up by statute. Its statutory duties and roles are set out in the WIA. Under the WIA, amongst other things, Ofwat must licence and regulate undertakers in a manner which it considers "best calculated" to secure the

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<sup>3</sup> The word 'operate' is used in a limited way in that the IP will only operate the tunnel in the sense that it must ensure the tunnel is capable of being operated in accordance with Thames Water's environmental permits and the operating techniques. Thames Water is the system operator and will hold the environmental permits and Thames Water will retain responsibility for the operation of the overall integrated sewerage network.

proper carrying out of the undertakers' functions. Sections 18–22E WIA provide that Ofwat may take enforcement action against the companies it regulates where these companies either fail to comply with their statutory duties and licence obligations or are likely to do so. Thames Water is regulated by Ofwat under the WIA and Ofwat may take enforcement against it for breach of its statutory or licence obligations.

17. Under the modified WIA Ofwat is under a duty to regulate a licensed IP in a manner which it considers “best calculated” to secure the proper carrying out of the functions of a licensed IP and Ofwat is able to take enforcement action against a licensed IP should it fail to comply with its statutory or licence obligations or is likely to do so.
18. Ofwat can also take enforcement action if either an IP or undertaker causes or contributes to a breach by another IP or undertaker of its statutory or licence obligations or is likely to do so.
19. Ofwat also has concurrent powers with the Competition and Markets Authority (CMA) under the Competition Act 1998 in respect of cases of possible competition law infringements by water or sewerage companies. Specifically, the WIA empowers Ofwat (as a designated competition authority) to apply and enforce infringements of chapters I and II of the Competition Act 1998 and the equivalent EU-level prohibitions in Articles 101 and 102 of the Treaty on the Functioning of the European Union. Chapter I prohibits agreements which may prevent, restrict or distort competition, or are intended to do so, and which may affect trade within the UK. Article 101 is similar save that it requires an effect on trade between EU Member States. Chapter II prohibits conduct by one or more businesses amounting to the abuse of a dominant position in a market which may affect trade within the UK (again, Article 102 is similar save that an effect on trade between EU Member States is required).
20. The Enterprise and Regulatory Reform Act 2013 amended the WIA to provide that “before making an enforcement order or confirming a provisional enforcement order, the Authority (Ofwat) shall consider whether it would be more appropriate to proceed under the Competition Act 1998”. Similarly Ofwat may not impose a financial penalty if it considers that it would be more appropriate to proceed under the Competition Act 1998<sup>4</sup>.

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<sup>4</sup> Schedule 14 paragraphs 8–10 of the Enterprise and Regulatory Reform Act 2013.

## The EA's role and enforcement powers

21. The EA is the environmental regulator in England and is responsible for regulating the water industry's environmental performance in the delivery of environmental requirements. The EA has enforcement powers under, among other things, the Environmental Permitting (England and Wales) Regulations 2010, ('EPR') and the Regulatory Enforcement and Sanctions Act 2008 and it may decide to enforce if there is a breach of the conditions of a permitted activity or if there is non-compliance with legislation<sup>5</sup>.
22. The EPR prohibits any person from operating a regulated facility or causing or knowingly permitting a water discharge activity except under and to the extent authorised by an environmental permit. A breach of this obligation relating to poisonous, noxious or polluting matter, has for many decades, been a strict liability offence and is currently set out in Regulation 38 of EPR. Pursuant to Regulation 38(6), if an offence is committed by a person under regulation 38 and such offence is due to the act or default of some other person, that other person is also guilty of an offence and is liable to be proceeded against and punished accordingly, whether or not proceedings for the offence are taken against the first mentioned person, for example a permit holder. The EA is the regulator of matters, inter alia, relating to pollution and to the relevant environmental permits.
23. The EA also has relevant regulatory responsibilities under the Environmental Damage (Prevention and Remediation) Regulations 2009 and under the Salmon and Freshwater Fisheries Act 1975.
24. The EA is the overarching regulator for waste matters in England<sup>6</sup>. It issues environmental permits relating to the carrying, treatment and disposal of wastes.
25. The EA has responsibility for flood defences and land drainage in London and along the tidal Thames and its tributaries. These responsibilities include control of many types of works on the river bank and the control of structures and other works relevant to the flood protection of London<sup>7</sup>.

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<sup>5</sup> It also has enforcement powers under the Environmental Protection Act 1990 (EPA): Discharges to land may be an offence under s33 of the EPA.

<sup>6</sup> Pursuant to the Environmental Protection Act 1995, the Environment Act 1995 and the Environmental Permitting (England and Wales) Regulations 2010 and associated legislation.

<sup>7</sup> For example the definitions of "flood works" in section 2 of the 'Metropolis Management (Thames River Prevention of Floods) Amendment Act 1879' and of "flood protection works" and "river control work" in Byelaw 3 of the 'Thames Water Authority Land Drainage Byelaws 1981'.

## **Approach to enforcement**

26. Both Ofwat's and the EA's approach to enforcement is based on the principles of better regulation – transparency, accountability, proportionality, consistency and targeting; and also follows the penalty principles set out in the Macrory review, which state sanctions should:
- a) aim to change the behaviour of the offender;
  - b) aim to eliminate any financial gain or benefit from non-compliance;
  - c) be responsive and consider what is appropriate for the particular offender and the regulatory issue;
  - d) be proportionate to the nature of the offence and the harm caused;
  - e) aim to restore the harm caused by regulatory non-compliance where appropriate; and
  - f) aim to deter future non-compliance.
27. In taking enforcement action, the EA and Ofwat have a range of tools available to them to enable a proportionate and targeted approach to address non-compliance.

## **Ofwat's approach to enforcement**

28. Ofwat is required to enforce unless the contraventions or likely contraventions are of a trivial nature; the extent to which the company caused or contributed to a contravention was trivial; the offender has given and is complying with an undertaking to secure compliance; or if Ofwat is satisfied that the duties imposed on Ofwat elsewhere in the WIA preclude the making of an enforcement order<sup>8</sup>. Duties which may preclude the making of an enforcement order include Ofwat's primary duty to exercise and perform its powers and duties in a manner which it considers is best calculated to further the consumer objective; secure that the functions of water and sewerage undertakers and licensed IPs are properly carried out; secure that undertakers and licensed IPs are able to finance the proper carrying out of those functions; and further resilience of undertakers' water supply and sewerage systems. Ofwat also has secondary duties which include promoting economy and efficiency on the part of companies and contributing to the achievement of sustainable development.

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<sup>8</sup> Section 19 of the WIA sets out the exceptions to duty to enforce.



29. Ofwat's approach to enforcement aims to secure companies' compliance and change their behaviour in order to protect customers. Ofwat will seek to balance its duties, and will consider how best to exercise and perform its powers in order to secure compliance by an undertaker or IP with the undertaker's or IP's duties. Ofwat takes a stepped approach to enforcement, ranging from regulatory action such as quarterly reporting and informal undertakings; to formal enforcement action including formal undertakings and financial penalties, depending on the nature, seriousness and impact of any contravention. This allows Ofwat to take action proportionate to the breach and to escalate actions as necessary. Ofwat is only likely to take formal enforcement action in relation to more serious or persistent breaches.
30. Ofwat's stepped approach to enforcement is consistent with Ofwat's obligation in the WIA to have regard to the principles of best regulatory practice when exercising its powers and performing its duties.
31. The ultimate enforcement tool is an application for special administration. With the consent of the Secretary of State Ofwat can apply to the High Court for a special administration order. The High Court can only make a special administration order in certain circumstances, including where it is satisfied that:
- a) there has been or is likely to be a contravention of a principal duty or an enforcement order where in either case it is serious enough to make it inappropriate for the company to continue to hold its appointment or licence; or
  - b) the company is or is likely to be unable to pay its debts.

For Thames Water its principal duties are the requirements imposed on it by the WIA to provide a main water supply system etc. (section 37 of the WIA) and to provide, improve, extend and maintain a general system of public sewers, collecting systems and treatment plants (section 94 of the WIA). In respect of the Thames Tideway Tunnel Project, the section 94 duty is amended so that Thames Water's principal duty is "to ensure that all necessary arrangements are made" to provide, improve, extend and maintain a system of sewers and for the purpose of this duty sewers is defined to include a sewer owned by a licenced IP.

For the licensed IP, its principal duties are defined as any condition of its licence or any statutory requirement imposed on it in consequence of its licence<sup>9</sup>.

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<sup>9</sup> Section 24(7)(b) WIA, as applied by Regulation 3(1) of SIPR.

To date, neither the Secretary of State nor Ofwat (with consent) have needed to apply to the High Court for a special administration order in relation to a water and sewerage undertaker.

## **Ofwat's enforcement process**

32. Before taking enforcement action, Ofwat will gather information to determine whether a contravention has occurred, is occurring or is likely to occur, and the nature of that contravention. It will require the relevant party (ie, the IP or Thames Water) to provide it with all the information it needs, if necessary using its powers under section 203 of the WIA<sup>10</sup> (power to acquire information for enforcement purposes), or regulation 9 of the Regulations, or under the licence conditions of the IP or Thames Water. Ofwat may also carry out independent investigations to ascertain more information about a contravention, which may include using auditors or other experts. Ofwat encourages companies to come forward if they consider a breach is occurring or is likely to occur and to take action to remedy or pre-empt the damage that the breach has or is likely to be caused. Where companies proactively report a breach; cooperate with an investigation; take appropriate action to rectify the contravention; and provide restitution and compensation to customers, Ofwat will consider these mitigating factors when determining what level of enforcement action to take.
33. Ofwat makes its decisions public to ensure its approach is transparent and that it is accountable for its decisions. It will therefore publish information on any investigations and action it takes against the IP or Thames Water. Under section 195A of the WIA, Ofwat is required to provide reasons for any formal enforcement action it takes.

## **Ofwat – financial penalties**

34. Under section 22A of the WIA, Ofwat is able to impose financial penalties on licensed companies if they are in breach of their statutory duties or licence conditions (the Secretary of State is able to impose financial penalties for a breach of statutory duties). Under the WIA Ofwat is required to prepare and publish a statement of policy that it will have regard to in deciding whether to impose a penalty and in determining its amount.

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<sup>10</sup> Regulation 3 of SIPP applies section 203 WIA 1991 to the IP (power to acquire information for enforcement purposes).

35. In considering financial penalties, Ofwat will have regard to any potential prosecutions and will liaise with outside bodies to determine who should take enforcement action. To avoid double jeopardy, a financial penalty will not be imposed when the undertaker or licensee is being (or has been) prosecuted in respect of that failure or contravention, although a penalty might be appropriate in respect of different consequences of such a contravention or failure.
36. Under the WIA, the maximum penalty that can be levied is ten per cent of a company's turnover (in a relevant year). The ten per cent figure is in respect of each breach and is not cumulative over a year – ie, Ofwat could fine up to ten per cent turnover for each respective breach. All financial penalties are borne by shareholders rather than customers.
37. Since 2005, Ofwat has imposed eight financial penalties on five different companies. In setting penalties, Ofwat considers aggravating and mitigating circumstances – eg, whether there have been repeated contraventions or failures; or whether the company has taken appropriate action to rectify the situation. Although Ofwat has the power to set penalties of up to ten per cent, in practice, penalties so far have been between 0.3% and 3.5% of turnover.

[Ofwat's approach to enforcement](#), its [statement of policy on financial penalties](#), and a history of the formal enforcement action Ofwat has [taken](#) (including the level of fines levied) are available on its website.

## **The EA's approach to enforcement**

38. The EA encourages individuals and businesses to put the environment first and to combine good environmental practices with normal working methods. It may take enforcement action when it suspects an offence has occurred or in some cases is about to occur. When it takes enforcement action its aim is to make sure business and industry take appropriate action to protect the environment, make sure the law is complied with and secure better outcomes for the environment, people and business. This may range from providing advice and guidance, serving notices or applying civil or criminal sanctions. A combination of actions may be used to achieve the best outcome for the environment and for people.
39. In the context of water discharge activities, the immediate purpose of an investigation by the EA of a pollution incident is to:
  - a) stop the pollution event;

- b) to understand it sufficiently to ensure that steps are taken to prevent its recurrence; and
- c) to commence immediate remediation of the any environmental damage. Investigations address any failure of equipment, of systems, of individual responsibility or of management responsibility that may have caused or contributed to the pollution incident.

For example, in cases where subcontractors are involved, the EA regularly examines the actions of subcontractors as well as of the principal, including the terms of a subcontractor's engagement and of their supervision by the principal. If failures are discovered during an investigation that indicate any breach of the law (including breach of a permit) by any person or company, then formal evidence may be gathered for future assessment of an appropriate enforcement sanction or response. An assessment of the appropriate enforcement response by the EA always entails a consideration of the evidence of the culpability of the person or company against whom enforcement action is considered, including considerations of those actions which appear to have contributed to the pollution event.

## **EA – permitting regime**

- 40. The EA issues and administers environmental permits for activities that could cause environmental harm, and is responsible for taking enforcement action against organisations or individuals that fail to comply with those environmental permits or which conduct activity which is not covered by a relevant permit.
- 41. Compliance with environmental permits is monitored continually throughout the life of a permitted activity. Monitoring includes site inspections and reviews of operator self-monitoring data as well as desk based audits and reviews of procedures.
- 42. Where monitoring suggests a significant risk of non-compliance the EA typically offers advice on corrective or remedial actions to avoid or mitigate the risk of a breach of permit conditions occurring. Where there is evidence of a breach of permit conditions the environmental impact is assessed and the cause of the breach investigated.
- 43. Where an operator has failed to adhere to a specific management system (such as agreed Operating Techniques) this can also constitute a breach of permit requirements.

44. A number of actions are available to the EA in response to a breach of permit conditions, and the course of action will be determined on the basis of the penalty principles of the Macrory review outlined previously.
45. Enforcement options available include:
- a) offering advice and guidance;
  - b) amending Operator Management Systems;
  - c) agreeing an improvement plan proposed by the operator;
  - d) issuing a warning letter, formal notice, or caution;
  - e) prosecution;
  - f) regime specific reporting actions
  - g) permit review, or ultimately permit revocation; and
  - h) any available civil sanction. (Note that currently civil sanctions are not available for “water discharge activities” or most waste operations under EPR although the Government could make them available in the future.)
46. The choice of the enforcement response, or mix of options, is in accordance with ‘public interest’ principles addressed in detail in the documents linked below, but includes such factors as the seriousness of the harm or potential harm, the response to the harm, the culpability of the offender (eg, deliberate, reckless, negligent, and includes, for corporate offenders, the systems of a company and the oversight of employees, contractors and systems), the contrition and attitude of an offender and any history of previous offending.
47. The EA seeks to enable businesses to operate effectively. The issue of proactive advice on permit compliance is designed to facilitate this. Self reporting of pollution incidents is expected in the water industry. The action of self-reporting is taken into account in determining the appropriate enforcement response

**The EA’s existing [enforcement statement and guidance](#) and detailed [guidance relating to the enforcement powers of the EA in relation to EPR](#) are available on the [gov.uk](#) website.**

**These documents, or any amendment or replacement to them are the primary and controlling source of information and guidance as to the EA's approach to enforcement for incidents involving pollution or breaches of environmental permits.**

## **F. How Ofwat's and the EA's enforcement approaches might apply to the Thames Tideway Tunnel**

48. The creation of a third party IP to construct and maintain the Thames Tideway Tunnel creates a situation where there is a physical interface between two regulated entities' assets and therefore the acts or omissions of one entity may put the other in breach of its statutory, licence or environmental permit obligations.
49. In general: Ofwat and the EA will enforce against the IP and Thames Water for a breach of their statutory obligations or of any obligations in a permit (or licence or consent or their equivalent)
50. While there is no requirement for the EA and Ofwat to consult each other in taking enforcement action, it is likely that the two regulators will discuss their intention to pursue enforcement action to the extent that it impacts the other's statutory duties.

### **How Ofwat's enforcement approach might apply to the Project**

51. Ofwat will look at whether a breach was caused by Thames Water or the IP and will take enforcement action against the party that caused the breach to occur.
  - a) Where both Thames Water and the IP are at fault in relation to a breach, a decision around enforcement action will take all relevant factors into account, including the view that Ofwat take of the degree of fault of the IP and Thames Water respectively.
  - b) Ofwat will also consider taking enforcement action for any acts or omissions by one party that causes or contributes to or is likely to cause or contribute to a breach by the other party of its statutory or licence obligations.
  - c) During construction, Ofwat may take enforcement action against the IP if the Thames Tideway Tunnel Project is not or is unlikely to be completed within the time limits set out in the IP's licence. It may also take enforcement action for a failure to build in accordance with the agreed specification (see paragraph 13).

- d) During operations, Ofwat may take enforcement action against the IP for a failure to make the Thames Tideway Tunnel available to Thames Water for use; and if it is unable to be operated in accordance with Thames Water's environmental permits and with the Operating Techniques.
52. As explained previously, before taking enforcement action, Ofwat will gather information to determine whether a contravention has occurred, is occurring or is likely to occur, and the nature of that contravention. In practice this information gathering will be assisted during construction by regular reporting by both Thames Water and the IP to a liaison committee during construction, which Ofwat will attend.
53. In investigating the responsibility for a breach of statute or licence obligations, Ofwat will take into consideration the practical circumstances surrounding the breach, including any contractual allocation of responsibility. This includes any acts or omissions which constitute a contravention, or cause or contribute to a contravention, of any licence condition or statutory requirement by the contravening party.
54. The relationship between the IP and Thames Water is partly governed contractually. Within the contracts governing the relationship there is a tiered escalation mechanism for raising issues. We would therefore expect the IP and Thames Water to work together to address problems, with enforcement only being needed as a last resort. Where there is a contractual breach, Ofwat will only resort to enforcement action if that contractual breach is also a breach of either party's statutory or licence obligations.
55. If the IP fails to comply with its contractual obligation to build the Thames Tideway Tunnel to the agreed specification, Ofwat in the first instance will expect the IP and Thames Water to take remedial action under their contracts, where possible. Contractually, Thames Water has the right to require the IP to take such remedial action and if it does not do so, Thames Water may step in and take the remedial action itself, where feasible. If necessary and appropriate, Ofwat will take regulatory or enforcement action against the IP for its failure. The contractual arrangements between Thames and the IP and any resulting remedial action undertaken do not prevent Ofwat taking regulatory or enforcement action.

56. If Thames Water fails to deliver the works (for which it is responsible) to specification, Ofwat in the first instance will expect the IP and Thames Water to take remedial action under their contracts, where possible. Contractually, the IP has the right to require Thames Water to take such remedial action and if it does not do so, the IP may step in and take the remedial action itself, where feasible. If necessary and appropriate, Ofwat will take regulatory or enforcement action against Thames Water for its failure to deliver the works for which it is responsible. The contractual arrangements between Thames and the IP and any resulting remedial action undertaken do not prevent Ofwat taking regulatory or enforcement action.
57. Circumstances in which the IP builds the Thames Tideway Tunnel to specification, but the Thames Tideway Tunnel does not meet the requirements of the Urban Waste Water Treatment Regulations 1991 or other required environmental standards are unlikely to justify Ofwat taking enforcement action against the IP or Thames Water.
58. Ofwat is unable to oblige either Thames Water or the IP to deliver additional works to meet environmental standards unless Thames Water or the IP is funded to deliver those additional works. It cannot enforce against either party for not delivering works for which they have not been funded. For example, if the Specification Notice is revoked, Ofwat cannot enforce against Thames Water for failing to deliver the Project. Where the Specification Notice is revoked Thames Water is required to present a proposal in accordance with the terms of its licence, and Ofwat can only enforce against the proposal once it has funded Thames Water to carry it out.
59. During the construction and operation of the Thames Tideway Tunnel, an unexpected event may occur outside both the IP's and Thames Water's control, which prevents either company or both companies from complying with their respective statutory duties and licence terms. In such a situation, Ofwat would not expect to pursue formal enforcement action. However, it would review the controls that the companies have in place to secure services to customers in such circumstances and would review how the companies responded to the event to ensure customers' interests are properly protected.
60. Once an IP is in existence, should Ofwat decide to impose financial penalties on Thames Water for any contravention, Ofwat will take into account the fact that Thames Water's regulated activities exclude the IP's regulated activities when calculating the maximum penalty that can be levied on Thames Water (see paragraph 8 and 36).



## **How the EA's enforcement approach might apply to the Project**

### **EA – the permitting regime**

61. The EA, generally, is the regulator responsible for water pollution matters in England. It specifically regulates potentially polluting “water discharge” activities by way of environmental permits (formerly known as discharge consents).
62. The permitted activity associated with the Thames Tideway Tunnel is the discharge of storm sewage from a number of permitted CSOs along the Thames Tideway.
63. Consequently the EA regulates Thames Water which holds permits for the existing CSOs along the tidal Thames. At the end of construction it is intended that Thames Water will hold new environmental permits for the CSOs listed in Schedule 2 to the Specification Notice. The EA will monitor compliance with environmental permits and the Operating Techniques for discharges from CSOs actively controlled or influenced by the Thames Tideway Tunnel, and may take enforcement action where there is a failure to comply with the environmental permits or where there is activity not authorised by the environmental permits.
64. Under the Specification Notice, it is planned that the IP will own and operate the shafts and tunnels but not the CSOs or any other discharge point into the tidal Thames. Therefore the IP will not hold the environmental permits issued by the EA. Obviously, as part of its overall pollution responsibilities, the EA may investigate any unlawful discharge activity, whether a permit is involved or not. As noted in paragraph 22 above, the EA may consider taking enforcement action against the IP if an offence under Regulation 38 EPR committed by Thames Water is due to the IP's acts or defaults.
65. Environmental permits can, where appropriate, contain reference to management systems. These define aspects of the operation of permitted activities which affect their environmental impact. To ensure spills happen as infrequently as practically possible the environmental permits for the CSOs therefore can contain reference to a relatively detailed management system, in this case the Operating Techniques.

66. Individual environmental permits will be issued for each of the CSOs affected (captured or influenced) by the Thames Tideway Tunnel. Because the operation of any or all of these CSOs will be the result of the way the Thames Tideway Tunnel is operated and maintained, it is envisaged that these environmental permits will all make reference to a single Operating Techniques document which sets out how the Thames Tideway Tunnel and its CSOs are managed. Certain factors set out in the Operating Techniques, such as flow rates or water levels, will be specified in both environmental permits and the Operating Techniques. This is because they fundamentally define the discharges from individual CSOs.
67. One benefit of this approach is that all the environmental permits for CSOs affected by the Thames Tideway Tunnel will be similar and the operation of the entire scheme will be directed by a single document (ie the Operating Techniques).
68. The EA has agreed the Operating Techniques for the Thames Tideway Tunnel (and the captured CSOs) with Thames Water and the primary responsibility of complying with the environmental permits will remain with Thames Water. For this reason, the EA will consider enforcement action against Thames Water for any event of non-compliance. If Thames Water is able to provide the EA with evidence, or the EA otherwise forms the view, that it was the IP's acts or omissions that caused or contributed to Thames Water failing to comply with the environmental permits, the EA may consider taking enforcement action against the IP and/or TWUL.
69. Each CSO either captured or actively influenced by the Thames Tideway Tunnel will at times (such as when the Tunnel is full) still discharge storm sewage to the Thames. They will therefore all require an environmental permit under EPR for a water discharge activity.
70. Typically, the occasions when a CSO is permitted to discharge under the terms of its environmental permit can be defined in terms of "pass forward flow", the minimum rate of flow that the foul sewer at a CSO must convey before any sewage may be discharged from the CSO. This sets a straightforward numeric threshold defining when the system is effectively full and would risk, for instance, causing flooding unless a CSO discharge were to take place. In the Thames Tideway Tunnel scenario many factors under the operator's control influence when the system can be considered to be at capacity. How frequently this happens is directly influenced by the way the wider system is operated - how much sewage is passed to Beckton & Crossness Sewage works for treatment, for example.

71. Discharges from CSOs require environmental permits at all times. In the context of the Thames Tideway Tunnel Project this includes the construction, commissioning, system acceptance and operational phases. It is recognised that the environmental permits and the agreed Operating Techniques do not currently apply to the commissioning period in particular, and a review of the Operating Techniques to enable this is necessary before construction starts. This review process is likely to involve representatives from the EA, Thames Water, and the IP, but could include others if it is considered beneficial.
72. If, following the date of handover, the system acceptance tests find that it is possible to optimise the operation of the scheme there may be scope to agree some changes to the Operating Techniques without the need to formally vary the permit. As with all environmental permits the holder has the right to request a variation of any aspect of the permit by applying for a variation from the EA.

### **EA – waste and construction related pollution**

73. As indicated above, the EA issues environmental permits relating to the carrying, treatment and disposal of wastes. Amongst other wastes, the Thames Tideway Tunnel Project will generate enormous quantities of waste soils (including sands, gravels, clays, etc. and contraries in them). The EA expects that Thames Water, the IP, or any other company or person employed in the fulfilment of the Project, will:
- a) obtain and comply with all necessary permits for the lawful handling of the waste produced by the Project; and
  - b) in the letting and supervision of contracts to further the Project will ensure waste responsibilities and obligations to comply with environmental permits are secured.
74. The risks associated with pollution potentially arising from major construction projects are not unique to the Thames Tideway Tunnel and are therefore not dealt with in detail in this document. During the construction phase, the EA is likely to take enforcement action in the event that activities cause pollution, or there is a failure to comply with relevant permits. The Code of Construction Practice is a key document for preventing pollution during this phase, and the [EA Pollution Prevention Guidelines \(PPG6, 'Working at construction and demolition sites'\)](#) sets out good practice.

## **EA – flood defences and flooding in London**

75. In the interests of maintaining the integrity of the flood defences of London, Thames Water and the IP must consult with the EA with regard to any proposed works to or on any relevant river bank or affecting any flood protection works or river control works and must obtain any necessary consent.

NOTE THAT THE ABOVE EXPLANATORY NOTE (AND THE INCORPORATED DOCUMENTS RELATING TO ENFORCEMENT) IS IN ACCORDANCE WITH THE LAW AND WITH THE STATE OF OFFICIAL GUIDANCE WHICH OFWAT AND THE ENVIRONMENT AGENCY IS OBLIGED TO FOLLOW AS AT SEPTEMBER 2014. BOTH THE LAW AND GUIDANCE CAN CHANGE AND THOSE TWO BODIES WILL BE OBLIGED TO APPLY THE LAW AND GUIDANCE THAT APPLIES AT THE TIME OF ANY INCIDENT.