

March 2024

Criteria for selecting specified infrastructure projects – Ofwat Guidance (May 2015) – a consultation on proposed updates

About this document

This consultation sets out proposed updates to Ofwat's statutory guidance "Criteria for selecting specified infrastructure projects", issued in May 2015¹. We are updating this guidance to take account of changes which have taken place in the regulated water sector since 2015.

Ofwat takes this guidance into account in determining whether to specify an infrastructure project as a 'specified infrastructure project' which is required to be put out to competitive tender under the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013² (the Regulations).

We have structured this consultation into three chapters:

- Chapter 1 outlines the background to the statutory guidance and explains our rationale for updating it.
- Chapter 2 explains the proposed updates / amendments that are included in the draft updated guidance which is set out in the Appendix.
- Chapter 3 sets out the proposed next steps following this consultation.

We seek stakeholder views on the proposed updates / amendments through questions in chapter 2.

¹ [Criteria for selecting specified infrastructure projects – Ofwat guidance, May 2015](#)

² The Regulations were made pursuant to the powers conferred on the Secretary of State by Part 2A of the Water Industry Act 1991. These provisions were inserted into the Act by section 35 of the Flood and Water Management Act 2010. The SI number for the Regulations is 2013 No. 1582 and they can be found along with the Explanatory Memorandum and Impact Assessment on the [legislation.gov.uk](https://www.legislation.gov.uk/all/2013/1582) website at <https://www.legislation.gov.uk/all/2013/1582>. The Regulations were amended on 9 January 2015, in 2016, 2020 and 2024. The Regulations and subsequent amendments can also be found on the website [Legislation.gov.uk](https://www.legislation.gov.uk).

Executive summary

Ofwat is committed to ensuring that customers receive safe, reliable, efficient and affordable water and sewerage services. Investment in our infrastructure is a key priority for the sector, including for government and regulators.

Water resources are coming under increasing pressure from population growth, economic development and climate change. These factors all contribute to a growing sense of urgency that new national water supply options must be developed now, to avoid restrictions on use in the near future. There is also an urgent need for new wastewater infrastructure to address aging sewerage assets, illegal discharges and future development.

Infrastructure is usually delivered by water and sewerage undertakers (referred to in this consultation collectively as water companies). The efficient costs associated with infrastructure projects are paid for by the relevant water company's customers, subject to price review control by Ofwat. Where water companies do not have adequate resources or capacity, they are able to buy in additional capacity or resources or to outsource certain functions, but they are not able to outsource responsibility under the Water Industry Act 1991 (the "Act") or their conditions of appointment ("licence").

The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 ("the Regulations") which came into effect on 28 June 2013³, were made with the purpose of allowing that third party infrastructure providers may finance, design, build, maintain and operate large new infrastructure, in circumstances where the relevant water companies would be unable to do so without a detrimental effect on the rest of their businesses.

The Regulations introduced a new regulatory framework that sits alongside the existing framework for water companies. The Regulations apply to infrastructure projects being developed by water companies who are wholly or mainly in England.

The Thames Tideway Tunnel⁴ was the first large project to be delivered by a third party infrastructure provider under the Regulations.

The Regulations give the Secretary of State for the Environment, Food and Rural Affairs (the Secretary of State) and the Water Services Regulation Authority (Ofwat) the power, in certain

³ The Regulations have been amended since 2013. The 2015 amendment gave Ofwat the power to impose conditions in project licences to provide for certain questions or matters to be determined by the Competition and Markets Authority. In 2016, the Regulations were further amended by the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 to align them with the Utility Contract Regulations 2016. In 2020, the sunset provision in the Regulations was removed to enable them to continue in force. In 2024 the Regulations were amended to align them with the Water Industry (Special Administration) Regulations 2024.

⁴ [Thames Tideway Tunnel – Ofwat information page.](#)

circumstances, to specify an infrastructure project in the water or sewerage sector in England as a project that must be delivered under the Regulations.

Specification means that the infrastructure project must be put out to competitive tender, rather than being delivered by the relevant incumbent water company in the course of carrying out its statutory duties. Such specification is by notice in writing. Projects must meet a threshold test to enable specification.

The Regulations require Ofwat to issue guidance to be followed by it in determining whether to exercise its power to specify an infrastructure project or in determining whether to vary or revoke such a specification notice. Ofwat published such guidance in May 2015.

Ofwat may amend the guidance at any stage but has committed to do so only after consulting on its intention to do so.

Purpose of this consultation

To date, Ofwat has not specified any major infrastructure projects and has not therefore used the published guidance. However, since the guidance was published in 2015, there have been developments in competitive procurement for water and wastewater infrastructure, and in major infrastructure development.

Infrastructure projects have become more complex with many water resource projects being regional schemes and multi-party in nature, i.e. more than one water company is involved in the supply and transfer of water between regions.

Ofwat considers it necessary to update its 2015 guidance to ensure it remains fit for purpose, given the introduction of the DPC model, the increased complexity of infrastructure projects and the learning from the Thames Tideway Tunnel.

The purpose of this consultation is to seek views on our intention to update the guidance and on our proposed amendments.

The proposed updates and amendments to the guidance

We propose making updates and amendments to:

- the 'About this document' section of the guidance
- section 1 – Introduction
- section 2 – Overview of the Regulations
- section 3 – Status of this Guidance
- section 4, 4.1 and 4.2 of the guidance, which deal with specification.

There have been no substantive changes subsections 4.3-4.5 (which deal with the variation or revocation of a specification note), section 5 (which deals with designation of an infrastructure provider) or Annex 1 (which sets out the relevant regulatory provisions).

All updates and amendments are highlighted in the Appendix which sets out the draft updated guidance in full.

Responding to this consultation

We welcome any comments on this document. Please email them to MajorProject@ofwat.gov.uk or post them to:

SIPR Guidance Update Consultation response
Ofwat
Centre City Tower
7 Hill Street
Birmingham B5 4UA

The closing date for this consultation is Tuesday 30 April 2024. If you wish to discuss any aspect of this consultation, please contact us by email at MajorProject@ofwat.gov.uk.

We intend to publish responses to this consultation on our website at www.ofwat.gov.uk. Subject to the following, by providing a response to this consultation you are deemed to consent to its publication.

If you think that any of the information in your response should not be disclosed (for example, because you consider it to be commercially sensitive), an automatic or generalised confidentiality disclaimer will not, of itself, be regarded as sufficient. You should identify specific information and explain in each case why it should not be disclosed and provide a redacted version of your response, which we will consider when deciding what information to publish.

As a minimum, we would expect to publish the name of all organisations that provide a written response, even where there are legitimate reasons why the contents of those written responses remain confidential.

In relation to personal data, you have the right to object to our publication of the personal information that you disclose to us in submitting your response (for example, your name or contact details). If you do not want us to publish specific personal information that would enable you to be identified, our [privacy policy](#) explains the basis on which you can object to its processing and provides further information on how we process personal data.

In addition to our ability to disclose information pursuant to the Water Industry Act 1991, information provided in response to this consultation, including personal data, may be published or disclosed in accordance with legislation on access to information – primarily the Freedom of Information Act 2000 (FoIA), the Environmental Information Regulations 2004 (EIR) and applicable data protection laws.

Please be aware that, under the FoIA and the EIR, there are statutory Codes of Practice which deal, among other things, with obligations of confidence. If we receive a request for disclosure of information which you have asked us not to disclose, we will take full account of your explanation, but we cannot give an assurance that we can maintain confidentiality in all circumstances.

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1. Background and rationale for updating Ofwat's 2015 guidance

Introduction

The Flood and Water Management Act 2010⁵ introduced provisions into the Water Industry Act 1991, allowing the Secretary of State for Environment, Food and Rural Affairs (in England) and Welsh Ministers (in Wales), to make regulations in relation to the provision of infrastructure for use by water and sewerage undertakers (referred to collectively in this consultation as "water companies"). The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 ("the Regulations") were made under these provisions and relate to water companies whose appointment areas are wholly or mainly in England.

The Regulations allow the Secretary of State and Ofwat to specify as 'specified infrastructure projects' projects that must be put out for competitive tender by a water company for delivery by a third-party infrastructure provider (IP). The third party's responsibilities can include the financing, design, build, operation and maintenance of the asset.

The Regulations allow either the Secretary of State or Ofwat to designate an IP that has been specified. Ofwat can issue a project licence to the IP and certain provisions of the Water Industry Act 1991 and the Regulations apply to a licensed IP.

The Regulations are premised on the basis that ring-fencing the risk of large or complex water or sewerage infrastructure projects from the relevant water company, can minimise their associated risks, thereby ensuring better value for money for the water company's customers. Additionally, encouraging competition among market participants in the tendering process can lower costs and encourage innovation in the delivery of solutions.⁶

Only projects that meet the required threshold test can be delivered under the Regulations. The test is that:

1. the infrastructure is of a size or complexity that threatens the water company's ability to provide services for its customers; and
2. specifying the infrastructure project is likely to result in better value for money than would otherwise be the case.

⁵ Part 2A Regulation of Provision of Infrastructure was inserted into the Water Industry Act 1991 by the Flood and Water Management Act 2010.

⁶ The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 – [Explanatory Memorandum, 2013](#)

To date, the only project specified under the Regulations was the Thames Tideway Tunnel (TTT), specified by the Secretary of State in 2014⁷.

Under the Regulations⁸, Ofwat (referred to in the Regulations as ‘the Authority’) must publish guidance that it will follow in determining whether an infrastructure project should be specified as a ‘specified infrastructure project’, thereby requiring the project to be put out to competitive tender by the incumbent water or sewerage company.

Ofwat published such guidance in May 2015 that sets out how it would specify projects in England. While Ofwat has not specified a project under the Regulations, we are reviewing and updating our 2015 guidance to ensure that its scope takes full account of the latest changes within the regulatory framework and that it remains fit for purpose.

Developments since 2015

- Competitive procurement

Since 2015, there have been developments in competitive procurement in the sector and Ofwat has developed a regulatory (non-licensed) competitive procurement model – Direct Procurement for Customers ('DPC').

DPC was developed as part of the Price Review process for 2019 ('PR19') as an alternative procurement model to allow water companies to competitively tender for a third-party (a competitively appointed provider or CAP) that may finance, design, build, operate and maintain infrastructure. The CAP contracts with the water company for the services provided by the asset.

Under PR24, discrete projects above a size threshold of £200m whole life totex⁹ (total expenditure comprised of both capital expenditure and operational expenditure) must be delivered under either DPC or the Regulations.

Given this and the large programme of new major water resource and sewerage infrastructure currently being developed by water companies, and with the expectation that much of this will be delivered through a competitive procurement model, it is important that Ofwat's guidance takes full account of the latest positions within the regulatory framework.

- New major infrastructure

Several water companies are developing infrastructure that will help address water supply deficits in the coming years. These projects are described in each water company's Water

⁷ [Defra specification of Thames Tideway Tunnel, 2014](#)

⁸ Regulation 4(9)

⁹ [PR24 - Appendix 5 - Direct Procurement for Customers, July 2022](#)

Resources Management Plan (WRMP)¹⁰, which detail individual justification for each project. It is through the approval of these plans that the go-ahead will be given for project progression from early development to planning.

Many of the proposed projects are regional and multi-party in nature – meaning that more than one water company is involved in the supply and transfer of water between regions and water companies. Projects range from water reservoirs to water recycling and water transfers, and are explained in summary in the RAPID October 2022 publication 'Building a resilient future – a guide for investors and the supply chain'¹¹.

Developing infrastructure of this size and complexity inevitably leads to new challenges, risks and issues. Ofwat expects to have to consider whether some of these infrastructure projects should be delivered under the Regulations. It is therefore important to review how the 2015 guidance takes account of the size and complexity of the forthcoming generation of new infrastructure.

¹⁰ WRMPs set out how water companies in England intend to achieve a secure supply of wholesome water for customers and a protected and enhanced environment both now and in the long term. The duty to prepare and maintain a WRMP is set out in sections 37A to 37D of the Water Industry Act 1991. Plans are produced at least every 5 years and reviewed annually. Within their WRMPs water companies plan for at least the next 25 years. Water companies should take a leading role in a more holistic and integrated approach to water management exploring all opportunities to deliver cross sector mutual benefits, for society and the environment.

¹¹ [Building a resilient future - a guide for investors and the supply chain, October 2022](#)

2. The 2015 guidance and our proposed updates

This chapter sets out Ofwat's proposed substantive updates and amendments to the 2015 guidance to take account of the current regulatory framework.

Ofwat has reformatted the proposed updated guidance into three 'Parts', retaining the single annex from the 2015 guidance. The reformatting is to make the document more accessible and provide clarity on the purpose of each part.

The Appendix contains the draft updated guidance to which you can cross refer. All updates / amendments are highlighted.

2.1 Summary of content updates / amendments to the 2015 Guidance

In summary, the main updates that have been made to the guidance are as follows:

- Revisions to the introductory 'About this Guidance' section of the 2015 guidance (explained in section 2.2 below)
- Part 1: Overview of the regulatory framework – 1. Introduction: to provide more detail on the wider regulatory context and include a footnote setting out the amendments that have been made to the Regulations since 2015 (explained in section 2.2 below); 2. Overview of the Regulations: updates to Ofwat's general duties since 2015; and 3. Status of this Guidance: clarifying the scope of the guidance.
- Part 2: Guidance on specification of a project – Amendments have been made to section 4, 4.1, and 4.2 – concerning the relevant evidence in assessing against the threshold test for specifying a project (explained in section 2.3 below.)
- No substantive updates have been made to sections 4.3-4.5 of Part 2, which deal with the variation or revocation of a specification note, and only format / information reordering changes have been made to Part 3, which deals with designation.

2.2 Updates to 'About this guidance' and 'Part 1 – Overview of the regulatory framework'

In the 'About this guidance' section of the updated guidance we explain the general purpose of the guidance and have added further information about what both 'specification of an infrastructure project' and 'designation of a company as an infrastructure provider' mean in practice.

In Part 1 (section 1 – Introduction) of the updated guidance, the updates:

- include the details of amendments made to the Regulations since May 2015. In 2016, the Regulations were amended by the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 to align them with the Utility Contract Regulations 2016. In 2020, the sunset provision in the Regulations was removed to enable them to continue in force. In 2024, the Regulations were amended to align them with the Water Industry (Special Administration) Regulations 2024.
- Explain that Thames Tideway Tunnel has been the first large project to be delivered by a third party infrastructure provider under the Regulations and provide links to the specification documents which the Department for Environment, Food and Rural Affairs (Defra) issued.

In Part 1 (section 2 – Overview of the Regulations), we update the list of Ofwat's general duties as these have been added to since 2015.

In part 1 (section 3 – Status of this Guidance), we clarify the process of specification and designation.

Questions for stakeholders

Q1. Do you have any comments on our updates to the 'About this document' section or Part 1 of the guidance? If yes, please explain.

2.3 Changes to 'Part 2 – Guidance on specification of a project as an infrastructure project'

2.3.1 Section 4 – The test for specifying a project as an infrastructure project

At the beginning of section 4 we set out more clearly the two-part threshold test for specification.

2.3.2 New section 4.1 – Threat to services provided by the water company

We have revised section 4.1 of the guidance retitling it 'Threat to services provided by the water company'. It was titled 'Issuing a notice specifying a project as a specified infrastructure project'. We have retitled it because the section provided limited information on the issuing of a notice, with more information on the background to the threshold test.

While we have kept some of the 2015 text in the revised section 4.1, we have moved other parts of it to: (i) a new introductory paragraph for section 4; (ii) section 4.1.1 (evidence on the size of the project); and (iii) section 4.1.2 (evidence on the complexity of the project).

The revised section 4.1 explains what might constitute a threat in the first part of the statutory test (whether the infrastructure project is "of a size or complexity that threatened the undertaker's ability to provide services for its customers"). We set out that we consider that the size and complexity of an infrastructure project may threaten a company's ability to provide services to its customers even if:

1. The threat is not immediate; and
2. The threat is only likely to manifest later in the life of the infrastructure project.

We explain the need to consider the likelihood of the threat, and that:

1. In considering whether there is a threat to a company's ability to provide services, we will consider all the company's legal and regulatory obligations, including, but not limited to, its general duties under sections 37 and 94 of the Water Industry Act 1991 and its obligations under applicable environmental and water quality legislation, now and in the future; and
2. We will take into account the issues facing the relevant water company rather than look at a notional water company (as we would do in setting price controls). This will include the company's other investment needs over the current and future price review periods during which the project will be delivered, and the company's actual financial position including its ability to raise the capital required for the project in addition to its other current and future investment needs. We will consider the impact raising the requisite capital for the project would have on the company's credit rating.

We reference the document that set out the Secretary of State's reasons for specifying the Thames Tideway Tunnel project and explain that we will consider similar risks in deciding whether to specify future projects under the Regulations. The Secretary of State considered scale risk, construction risk, management risk and regulatory risk.

Alternative project delivery models

As explained in the Introduction, there have been developments in competitive procurement in the sector since 2015. We explain in revised section 4.1 how we will take alternative delivery models into account in considering whether to specify a project under the Regulations.

In considering whether delivering a major infrastructure project may threaten a water company's ability to provide services, our primary counterfactual will be in-house delivery. We will consider whether in-house delivery could give rise to any risks that could threaten

the company's ability to provide other services and whether those risks could be mitigated or removed by delivery under the Regulations.

We will consider whether it may be possible for Ofwat to adapt its regulatory framework to facilitate in-house delivery of large and complex projects. The primary two adaptations we will consider are delivery under DPC by way of a competitively appointed provider (CAP) or in-house delivery with a bespoke price review mechanism.

In the price review methodology for PR24, DPC is the default procurement model for water companies and relates to discrete projects above a size threshold of £200m whole life totex¹² (total expenditure which comprises of both capital expenditure and operational expenditure).

DPC involves:

- a water company competitively tendering for and appointing a third-party competitively appointed provider (CAP) that may finance, design, build, operate and maintain large-scale infrastructure projects; and
- the water company having the ability to collect additional revenue from customers for the CAP costs.

In contrast to delivery under the Regulations, there is no statutory framework for DPC. Instead, the regulatory framework for DPC is being implemented through new licence conditions.

Multi-party projects

As explained in the introduction to this consultation, water companies are developing increasing numbers of major infrastructure projects, which are likely to be delivered as multi-party projects in the future. This is where a project is delivered by or for the benefit of more than one water company with collaborative contractual arrangements and sometimes shared assets.

Commercial and regulatory arrangements are expected to be complex in multi-party projects regarding both the construction as well the operation of the assets once they are available for use.

We explain in section 4.1 that we consider that the multi-party nature of projects may impact on the incumbent water company's ability to conduct the rest of its regulated business and that this should be considered as a factor in any assessment of whether a project meets the complexity element of the threshold test.

¹² [PR24 – Appendix 5 – Direct Procurement for Customers, July 2022](#)

Questions for stakeholders

Q2. Please provide any comments on our proposed approach to new section 4 (explaining the test for specifying a project as an infrastructure project), and new section 4.1 'Threat to services provided by the water company', in particular how we propose considering alternative delivery models.

2.3.3 Evidence for assessing projects against the threshold test

We expect that water companies will engage with us on a continuous basis to provide relevant evidence and information to enable us to form an opinion regarding whether the threshold test is met.

In the 2015 guidance, we provided non-exhaustive lists of evidence that were likely to be relevant to Ofwat in assessing a project under the threshold test with regards to size, complexity and value for money.

We retain those lists for the updated guidance, re-ordering them to reflect the order they appear in the test. Value for money was listed first in the 2015 guidance, even though it is the second part of the test, and size and complexity is considered first in the threshold test.

The evidence sections are now numbered – section 4.1.1 ('Relevant evidence on the size of the project'); section 4.1.2 ('Relevant evidence on the complexity of the project'); and section 4.2 ('Value for money').

'Section 4.1.1 – Relevant evidence on the size of the project'

We propose adding the following point to the list that reflects the points made earlier in this consultation concerning the scale of infrastructure projects:

- project delivery risks: delivery risks inherent in undertaking an infrastructure project of this size. Risks associated with the infrastructure project's scale (including construction, management processes and regulatory requirements) as compared with such risks for historic or future projects carried out. This may be particularly relevant where a water company delivers more than one large infrastructure project on similar timeframes or close to each other in terms of timing.

'Section 4.1.2 – Relevant evidence on the complexity of the project'

We propose adding the following points to the list which reflect the points made earlier in this consultation concerning the scale of infrastructure projects and multi-party projects:

- interfaces: the likely interfaces of the infrastructure project (whether physical or financial) with assets or requirements of other water companies relative to other historic or future projects carried out, or to be carried out, by the relevant water company.
- multi-party projects: the complexity of the project (including system-wide operational and financial interactions between water companies in respect of the infrastructure project).

'Section 4.2 – Value for money'

The introduction to this section has been revised to explain how, in assessing value for money, we will take into account alternative delivery approaches, including any that require regulatory adaptations.

We have further explained the factor which relates to delivery through specification, and modified the factor concerning cost and risk, splitting it into two factors:

- Costs of establishing a specified infrastructure project: whether the costs of specification and establishing an infrastructure provider are justified on a value for money basis; and
- Bespoke risk mitigation: whether the infrastructure project is of a nature that it would be delivered at better value for money through a bespoke risk allocation established by a project licence.

We have added an additional factor concerning the value of a project licence:

- Value of a project licence: whether the in-perpetuity duration of the potential project licence issued if the project is specified, offers more efficiencies and better value for money for investors and the specified infrastructure provider, in relation to the life of the infrastructure asset.

Questions for stakeholders

Q3. Please provide any views on the additional evidence factors we propose adding to sections 4.1.1 and 4.1.2?

Q4. Please provide details of any other factors you consider Ofwat might include in sections 4.1.1 and 4.1.2. Please note, the lists in the guidance are not exhaustive.

Q5. Please provide any comments on the clarification made to section 4.2 (value for money) and the modified / additional evidence factors we propose to include. Please note, the lists in the guidance are not exhaustive.

2.4 Designation of a company as an infrastructure provider

Part 3 of the guidance sets out how Ofwat will exercise the power to designate a company as an infrastructure provider. This information was included in the 2015 guidance.

In the updated guidance, we have incorporated an explanation of this section earlier in the guidance, and re-numbered / re-organised the 2015 text.

Section 5.2 (Notice of designations as an infrastructure provider) has become section 5.1 and section 5.3 (Varying or revoking a notice to designate) has become section 5.2.

No substantive changes have been made to these sections.

3. Next Steps

We welcome responses to this consultation document from all interested parties by Tuesday 30 April 2024.

Following our consideration of the consultation responses, we will publish the responses and an outcome document summarising the points raised and our response to them.

We will take responses into account in the final updates we make to the 2015 guidance document and, once finalised, we will publish the updated guidance, which is expected to be later in 2024.

Summary of questions for stakeholders

Chapter 2	Questions for stakeholders
The 2015 Guidance and our proposed updates	<p>Q1. Do you have any comments on our updates to the 'About this document' section or Part 1 of the guidance? If yes, please explain.</p> <p>Q2. Please provide any comments on our proposed approach to new section 4 (explaining the test for specifying a project as an infrastructure project), and new section 4.1 'Threat to services provided by the water company', in particular how we propose considering alternative delivery models.</p> <p>Q3. Please provide any views on the additional evidence factors we propose adding to sections 4.1.1 and 4.1.2?</p> <p>Q4. Please provide details of any other factors you consider Ofwat might include in sections 4.1.1 and 4.1.2. Please note, the lists in the guidance are not exhaustive.</p> <p>Q5. Please provide any comments on the clarification made to section 4.2 (value for money) and the modified / additional evidence factors we propose to include. Please note, the lists in the guidance are not exhaustive.</p>

Appendix: 'Criteria for selecting specified infrastructure projects – Ofwat Guidance' – Proposed updated version

This appendix provides the proposed updated guidance in full with all updates / amendments highlighted.

Please note, page number will be finalised in the final version of the guidance.

About this document

This document sets out the guidance that Ofwat will take into account in determining whether to specify an infrastructure project as a 'specified infrastructure project', which is required to be put out to competitive tender under the Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 (the Regulations)¹. The Regulations are available on the legislation.gov.uk website. A specified project may include the financing and delivery of the infrastructure project. Delivery may include design, construction, maintenance and operation of the project.

If a project is specified:

- the relevant water or sewerage company is prohibited from carrying out the project itself, except for any preparatory work set out in the notice specifying the project;
- the infrastructure project (including its financing) must be competitively tendered; and
- the relevant water company must consult the Secretary of State for Environment, Food and Rural Affairs and Ofwat concerning the terms on which the infrastructure project is to be put out to tender.

This document also sets out the factors to which Ofwat will have regard in deciding whether to designate a company as an infrastructure provider under the Regulations.

Once designated, Ofwat may issue the designated infrastructure provider with a project licence, and the licenced infrastructure provider becomes subject to regulation under the Water Industry Act 1991 (the Act) as applied by the Regulations.

In this guidance, we set out:

- an overview of the current regulatory framework for specified infrastructure projects in England;
- the factors we will take into account before specifying an infrastructure project;
- the factors we will take into account before varying or revoking a notice specifying an infrastructure project;
- the factors we will take into account before designating a company as an infrastructure provider; and
- the factors we will take into account before varying or revoking a notice designating a company as an infrastructure provider.

This guidance has been published following consultation in xxx [Link to Consultation]. It supersedes the guidance issued on 8 May 2015 [once finalised].

¹ <https://www.legislation.gov.uk/ukxi/2013/1582>

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Part 1: Overview of the regulatory framework for specified infrastructure projects

1. Introduction

Ofwat is committed to ensuring that customers receive safe, reliable, efficient and affordable water and sewerage services. Investment in our infrastructure is a key priority for the sector, including for government and regulators.

Water resources are coming under increasing pressure from population growth, economic development and climate change. These factors all contribute to a growing sense of urgency that new national supply options must be developed now, to avoid restrictions on use in the near future. There is also an urgent need for new wastewater infrastructure to address aging sewerage assets, illegal discharges and future development.

Infrastructure is usually delivered by water and sewerage undertakers (referred to in this guidance collectively as **water companies**). The efficient costs associated with infrastructure projects are paid for by the relevant water company's customers, subject to price review control by Ofwat. Where water companies do not have adequate resources or capacity, they are able to buy in additional capacity or resources or to outsource certain functions, but they are not able to outsource responsibility under the Act or their conditions of appointment (**licence**).

The Water Industry (Specified Infrastructure Projects) (English Undertakers) Regulations 2013 (**the Regulations**) which came into effect on 28 June 2013,² were made with the purpose of allowing that third party infrastructure providers may finance, design, build, maintain and operate large new infrastructure, in circumstances where the relevant water companies would be unable to do so without a detrimental effect on the rest of their businesses.

The Regulations introduced a new regulatory framework that sits alongside the existing framework for water companies. The Regulations apply to infrastructure projects being developed by water companies who are wholly or mainly in England.

² The Regulations have been amended since 2013. The 2015 amendment gave Ofwat the power to impose conditions in project licences to provide for certain questions or matters to be determined by the Competition and Markets Authority. In 2016, the Regulations were further amended by the Public Procurement (Amendments, Repeals and Revocations) Regulations 2016 to align them with the Utility Contract Regulations 2016. In 2020, the sunset provision in the Regulations was removed to enable them to continue in force. In 2024, the Regulations were amended to align them with the Water Industry (Special Administration) Regulations 2024.

The [Thames Tideway Tunnel](#), was the first large project to be delivered by a third party infrastructure provider under the Regulations.

The Regulations give the Secretary of State for Environment, Food and Rural Affairs (**the Secretary of State**) and the Water Services Regulation Authority (**Ofwat**) the power, in certain circumstances, to specify an infrastructure project in the water or sewerage sector in England as a project that must be delivered under the Regulations.

Specification means that the infrastructure project must be put out to competitive tender, rather than being delivered by the relevant incumbent water company in the course of carrying out its statutory duties. Such specification is by notice in writing.

The Regulations require Ofwat to issue guidance to be followed by it in determining whether to exercise its power to specify an infrastructure project or in determining whether to vary or revoke such a specification notice.

Part 2 of this document sets out guidance which gives effect to this requirement. Accordingly, we will follow this statutory guidance before specifying any project, or before varying or revoking a specification notice.

Part 3 of this document sets out guidance to which we will have regard before designating an infrastructure provider. Designation allows for the regulation of the infrastructure provider. Once designated, Ofwat may issue a project licence to the infrastructure provider and the infrastructure provider becomes subject to regulation under the Act, as applied by the Regulations. We will have regard to Part 3 of the guidance before issuing a designation notice or varying or revoking a designation notice.

2. Overview of the Regulations

The Regulations introduced a regulatory framework to sit alongside existing provisions for the regulation of water companies. It enables the financing and delivery of large and complex water and sewerage infrastructure projects to be delivered by ‘infrastructure providers’ that are competitively tendered by the incumbent water company.

In particular, the Regulations provide that:

- the Secretary of State or Ofwat may specify certain infrastructure projects, which must be put out to competitive tender by the incumbent water company;
- where an infrastructure project has been specified, the incumbent water company will be prohibited from carrying out the project itself, other than certain preparatory work;
- the Secretary of State or Ofwat may specify an infrastructure project to be put out to tender only if the Secretary of State or Ofwat is of the opinion that:

- the infrastructure project is of a size or complexity that threatens the incumbent company's ability to provide services for its customers; and,
- specifying the infrastructure project is likely to result in better value for money than would otherwise be the case; and
- the successful company that is awarded the tender may be designated by the Secretary of State or Ofwat as an 'infrastructure provider' for the purposes of the Regulations and may be directly regulated by Ofwat under the terms of a newly established 'project licence'.

It is considered that requiring water companies to put certain large and complex projects out to competitive tender will help to deliver necessary infrastructure projects in a way that provides better value for money for customers. Separating the associated risks and costs of financing from the incumbent water company and delivering such projects within a distinct infrastructure provider could provide overall better value for money for the financing and delivery of such infrastructure projects while keeping water and sewerage bills for customers as low as possible. It could also safeguard the ability of water companies to continue delivering the required level of existing water or sewerage services to their customers.

Ofwat's general duties with respect to the water sector (as set out in section 2 of the Act) apply to the exercise of Ofwat's powers to specify a project under the Regulations³. This means that in exercising its power to specify a project Ofwat must act in a manner which it considers best calculated:

- to protect the interests of consumers, wherever appropriate by promoting effective competition;
- to further the resilience objective⁴;
- to secure that the functions of undertakers and licensed infrastructure providers are properly carried out; and
- to secure that undertakers and licensed infrastructure providers are able to finance the proper carrying out of those functions (in particular by securing a reasonable return on their capital).

Ofwat also has secondary duties which include promoting economy and efficiency on the part of companies and contributing to the achievement of sustainable development. In carrying out its functions, Ofwat must also have regard to the "desirability of promoting economic growth".⁵

³ See Regulation 3(3) of the Regulations.

⁴ The resilience objective is i) to secure the long-term resilience of undertakers' supply systems and sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour, and ii) to secure that undertakers take steps for the purpose of enabling them to meet, in the long-term, the need for the supply of water and the provision of sewerage services to customers (section 2(2DA) of the Act).

⁵ The Deregulation Act 2015, read with the Economic Growth (Regulatory Functions) Order 2017.

3. Status of this Guidance

This guidance deals with specification and designation. In summary, specification involves Ofwat or the Secretary of State issuing a notice requiring the relevant water company to put a specified project out to tender. The notice will set out the scope of the project to be put out to tender. Once specified, and following the procurement of an infrastructure provider by the water company, Ofwat or the Secretary of State may designate the company that has been appointed as an infrastructure provider with a project licence. Licensed infrastructure providers are regulated by the Act (as applied by the Regulations) and the Regulations.

The Regulations require Ofwat to issue guidance to be followed by it in determining whether to exercise its power to **specify** an infrastructure project or in determining whether to vary or revoke such a specification notice. Part 2 of the guidance gives effect to this requirement. Accordingly, we will follow this statutory guidance before specifying any project, or before varying or revoking a specification notice.

Either the Secretary of State or Ofwat may specify a project as an infrastructure project that must be put out to tender and either the Secretary of State or Ofwat may vary or revoke a specification notice.

However, only Ofwat is required to issue statutory guidance as to how it will exercise these powers. Although the Regulations do not require the Secretary of State to follow the statutory guidance issued by Ofwat, it is expected that if the Secretary of State specifies a project, or varies or revokes a specification notice, this statutory guidance will be one of the factors that the Secretary of State will have regard to in making that decision.

Similarly, either the Secretary of State or Ofwat may **designate** as an infrastructure provider, a company which appears to the Secretary of State or Ofwat respectively, to be wholly or partly responsible for a specified infrastructure project that was put out to tender in accordance with the Regulations, and either the Secretary of State or Ofwat may vary or revoke a designation notice.

However, Ofwat is only required to issue statutory guidance as to how it will exercise the power to specify, not the power to designate. As such, Part 3 of this guidance is not a requirement of the Regulations but is being issued by Ofwat as a matter of good governance. We will have regard to this non-statutory part of the guidance before issuing a designation notice and before revoking or varying a designation notice issued by us.

It is expected that if the Secretary of State designates an infrastructure provider, or varies or revokes a designation notice, this guidance will be one of the factors that the Secretary of State will have regard to in making that decision.

Ofwat may amend both the statutory and non-statutory parts of this guidance at any stage but will only do so after consulting on its intention to amend the guidance.

Part 2: Guidance on specification of a project as a specified infrastructure project

4. Specifying a project as an infrastructure project

The Act and Regulations make provision for delivery of infrastructure projects by water companies or, in certain circumstances involving large or complex infrastructure, by separate and independent infrastructure providers.

The Act sets a two-part test⁶ for determining whether a separate infrastructure provider should deliver a project. This test makes the interests of customers paramount. Where a water company's ability to provide its other core services may be threatened if it had to carry out a large or complex project itself, it is likely to be in customers' interests to specify the project for delivery by an infrastructure provider. But even in these circumstances, we must still be satisfied that specifying the project is likely to result in better value for money than not specifying the project.

In assessing whether the project is of a size or complexity such that it may threaten the incumbent company's ability to provide services for its customers and whether specifying the project is likely to result in better value for money than would otherwise be the case, we will take into account our general statutory duties, including our duty to promote competition where this is in the interests of consumers.

We set out below the approach we will follow to both parts of the test.

4.1 Threat to services provided by the water company

The first part of the statutory test is whether the infrastructure project is "of a size or complexity that threatens the undertaker's ability to provide services for its customers".

There is an inherent risk that delivery of an infrastructure project which is significantly larger and more complex than other infrastructure projects that have been delivered by that company in the past, could impact the company's ability to deliver its other services.

⁶ The test is: i. the infrastructure project is of a size or complexity that threatens the incumbent undertaker's ability to provide services for its customers; and ii. specifying the infrastructure project is likely to result in better value for money than would otherwise be the case.

However, it is not enough that the project is of a size and complexity different from other projects carried out by the company historically. This is relevant only if delivery of the project threatens the company's ability to provide services for its customers.

In specifying the Thames Tideway Tunnel (TTT) project, the Secretary of State said that "whether the size or complexity condition is satisfied in any particular circumstances is a matter of fact and degree. A variety of risks may affect whether an incumbent undertaker will have the ability to provide services to its customers if it undertakes an infrastructure project."⁷

The Secretary of State considered the following risks as being particularly relevant in deciding whether to specify the TTT project:

- scale risk, arising from the size of the project in the context of the whole of the incumbent undertaker's business;
- construction risk, arising from the nature of the project's construction works in the context of the works usually undertaken by the incumbent undertaker;
- management risk, arising from the type and scale of management resource necessary to manage the project in the context of the management resources necessary to manage the rest of the incumbent undertaker's business; and
- regulatory risk, arising from the duration of the project in the context of the usual duration of capital works in the incumbent undertaker's business.

We consider that the above risks will be relevant for most if not all projects and will consider these risks in deciding whether delivery of a particular project may threaten an undertaker's ability to provide services. Depending on the project, there may also be other risks that will need to be considered.

We consider that the size or complexity of an infrastructure project may threaten a company's ability to provide services to its customers even if:

- the threat is not immediate; and
- the threat is only likely to manifest later in the life of the infrastructure project.

We will, of course, consider the likelihood of any such threat.

In considering whether there is a threat to a company's ability to provide services, we will consider all the company's legal and regulatory obligations, including, but not limited to, its general duties under sections 37 and 94 of the Act and its obligations under applicable environmental and water quality legislation, and its regulatory performance obligations, now and in the future.

⁷ [Specification notice for the TTT project](#)

We will take into account the issues facing the relevant water company rather than look at a notional water company (as we would do in setting price controls). This will include looking at the water company's other investment needs over the current and future price review periods during which the project will be delivered, looking at the company's actual financing structures and financial position including its ability to raise the capital required for the project in addition to its other current and future investment needs. We will also consider the impact raising the requisite capital for the project would have on its financial metrics and credit rating.

Alternative delivery options

In determining whether delivery of the project may threaten the water company's ability to provide services for its customers we will consider any alternative options for funding and delivering the project. The starting point for comparison will be in-house delivery. The question will be:

1. whether in-house delivery will give rise to risks that could threaten the company's ability to provide its other services; and
2. whether those risks could be mitigated or removed by delivery under the Regulations.

It may be possible for Ofwat to adapt its regulatory framework to facilitate in-house delivery of large and complex projects. Whether this is appropriate when there is a statutory alternative will depend on the facts of a particular project. In some circumstances, an alternative delivery mechanism through a regulatory adaptation, may address some of the risks to some extent but may not provide sufficient mitigation to make it a viable alternative.

Two examples of regulatory adaptations that have been introduced by Ofwat to facilitate delivery of large infrastructure are:

- a bespoke price control; and
- delivery by way of a competitively appointed provider (**CAP**) under Ofwat's Direct Procurement for Customers (**DPC**) initiative.

An example of where we have agreed a bespoke price control is the Havant Thicket reservoir being built by Portsmouth Water for the benefit of Southern Water's customers. At PR19 there was a separate price control for Portsmouth Water's costs for building the reservoir. The Havant Thicket price control has an initial duration of 10 years, to align the price control with the expected construction period of the reservoir and reflects the long-term bulk supply arrangements between the parties.⁸

DPC was introduced by Ofwat in the final methodology published ahead of the 2019 price review. It required companies to consider DPC for infrastructure projects where this was

⁸ See [guidance issued by Ofwat on Havant Thicket, March 2021](#)

likely to deliver the greatest value for customers. In the final methodology for the 2024 price review (PR24), we said that DPC should be considered for all discrete projects with a totex over £200 million.

DPC involves:

1. a water company competitively tendering for and appointing a third-party competitively appointed provider (CAP) which may finance, design, build, operate and maintain large-scale infrastructure projects; and
2. the water company having the ability to collect additional revenue from customers for the CAP costs.

In contrast to delivery under the Regulations, there is no statutory framework for DPC. Instead, the regulatory framework for DPC is being implemented through new licence conditions.

For the reasons set out below, we consider that in some respects and for some projects, a regulatory adaptation such as a bespoke price review or delivery under DPC, will not mitigate risks to the same extent as delivery under the Regulations which;

- are the only means for direct regulation of the infrastructure provider. Direct regulation means the infrastructure provider operates under a project licence issued by Ofwat and is subject to specified provisions of the Water Industry Act 1991 (as applied by the Regulations), including the enforcement and special administration provisions; and
- are the only means by which a derogation from the general scheme of the Act (under which undertakers are responsible for the delivery of water and sewerage services and the infrastructure necessary to provide those services) is practicable. As such, even where DPC is a potential alternative, it cannot displace the ultimate accountability of the incumbent undertaker for an infrastructure project.

We will take all the above into account in assessing whether an alternative delivery model sufficiently mitigates risk of delivery for a particular project.

Multi-party projects

The mere fact that an infrastructure project is being delivered for the benefit of more than one undertaker will not automatically result in it being eligible for specification. However, the fact that an infrastructure project is being undertaken for the benefit of more than one undertaker may make issues of size and complexity more acute.

Where a project is being undertaken by or for the benefit of more than one water company the complexity of the project (including system-wide operational and financial interactions

between water companies in respect of the infrastructure project) may impact on the incumbent water company's ability to conduct the rest of its regulated business.

4.1.1 Relevant evidence on the size of the project

We set out below evidence that is likely to be relevant in assessing the size of the project relative to the rest of the company's regulated business:

- the likely cost of the infrastructure project as compared with historic or future costs of other projects carried out, or to be carried out, by the water company;
- the likely finance requirement of the infrastructure project as compared with the finance requirement of historic or future projects carried out, or to be carried out, by the water company;
- the time period over which delivery of the infrastructure project is likely to occur as compared with the periods for delivery of historic or future projects carried out, or to be carried out, by the water company;
- project delivery risks: delivery risks inherent in undertaking an infrastructure project of this size. Risks associated with the infrastructure project's scale (including construction, management processes and regulatory requirements) as compared with such risks for historic or future projects carried out. This may be particularly relevant where a water company delivers more than one large infrastructure project on similar timeframes or close to each other in terms of timing; and
- resources: the likely level of resource required to deliver the project as compared with the level of resource required for delivery of historic or future projects carried out, or to be carried out by the undertaker – in particular, considering the organisational impact of delivery by the water company as opposed to delivery by an infrastructure provider.

4.1.2 Relevant evidence on the complexity of the project

Evidence that is likely to be relevant in assessing the complexity of the infrastructure project and the inherent risks associated with such complexity, may include:

- project delivery risks: the likely complexity and the inherent risks associated with the design, procurement, financing, construction, maintenance or operation of the infrastructure project relative to other historic or future projects carried out, or to be carried out, by the water company;
- interfaces: the likely interfaces of the infrastructure project (whether physical or financial) with assets or requirements of other water companies relative to other historic or future projects carried out, or to be carried out, by the relevant water company;

- competencies: whether the water company's competencies and existing resources are sufficient to enable it to deliver an infrastructure project of this likely level of complexity and inherent risk without threatening its ability to provide services to its customers;
- multi-party projects: the complexity of the project (including system-wide operational and financial interactions between water companies in respect of the infrastructure project);
- risk profile: whether the risks involved in the project constitute a threat in that they are different from the risks normally associated with the water company's capital investment programme and whether the management and mitigation of those risks involve competencies, resources, assets or specialist skills that the water company may not have;
- acquisition of competency: if the water company does not have the necessary competencies, resources, assets or specialist skills, whether it is possible and preferable for the water company to acquire those competencies, resources, assets or specialist skills or whether an infrastructure provider should deliver them;
- concentration risk: whether the inclusion of the infrastructure project in a water company's capital investment programme would concentrate too much risk in a single company or project;
- managerial capacity: the managerial capacity of the water company and, in particular, if the project is not specified, whether carrying out the infrastructure project may divert management time and resources in a way that may put at undue risk the rest of the water company's regulated business; and
- duration: where the infrastructure project is likely to span multiple price review periods, the likely complexity and the inherent risks associated with it doing so.

4.2 Value for money

The second part of the statutory test is whether "specifying the infrastructure project is likely to result in better value for money than would be the case if the infrastructure project were not specified."⁹

If we have concluded that in-house delivery will threaten the company's ability to provide services, it is difficult to envisage situations where we would conclude that in-house delivery provides better value for money than delivery under the Regulations.

An assessment of alternative delivery models (discussed above under section 4.1) will have particular relevance for the value for money part of the statutory test and we will consider whether better value for money could be achieved by delivery using a regulatory adaptation such as DPC or a bespoke price review, rather than delivery under the Regulations.

⁹ Regulation 4(3)(b).

Evidence we may take into account in considering whether specifying the infrastructure project is likely to result in better value for money than would otherwise be the case may include:

- Delivery: whether delivering the infrastructure project through specification is likely to be more efficient than delivery by way of other relevant alternatives within the general scheme of the Act, taking into account the likely relative costs of those alternatives, including procurement costs;
- Costs of establishing a specified infrastructure project: whether the costs of specification and establishing an infrastructure provider are justified on a value for money basis;
- Finance: whether it is desirable to have competitively tendered finance for the infrastructure project under the Regulations;
- Finance: whether the undertaker is likely to be able to raise the finance for the infrastructure project and if so, the likely impact of financing the project on:
 - the undertaker’s ability to finance its other functions;
 - its credit rating, existing finance facilities, the cost of debt and equity; and
 - the level of other financial support required to deliver the infrastructure project.
- Cost overrun risk: if cost overruns occur, the likely consequences (financial or otherwise) of such overruns (including for the undertaker, the infrastructure provider and customers);
- Timely delivery: the likelihood of the infrastructure project being delivered on time if it is specified under the Regulations and if it is not, and the consequences, financial or otherwise, of any such delay;
- Bespoke risk mitigation: whether the infrastructure project is of a nature that it would be delivered at better value for money through a bespoke risk allocation established by a project licence; and
- Value of a project licence: whether the in-perpetuity duration of the potential project licence issued if the project is specified, offers more efficiencies and better value for money for investors and the specified infrastructure provider, in relation to the life of the infrastructure asset.

4.3 Varying a notice specifying a project as an infrastructure project

If the conditions in regulation 4(3) continue to be met¹⁰, the Secretary of State or Ofwat may, in accordance with regulation 4(7)(a)¹¹, vary a notice specifying a project as an infrastructure

¹⁰ Regulation 4(3) sets out the two part test: namely that delivery of the infrastructure project would threaten the company’s ability to provide services and specification is likely to deliver better value for money.

¹¹ See annex 1.

project to be put out to competitive tender. In determining whether the conditions in regulation 4(3) continue to be met, Ofwat will have regard to Part 2 of this guidance.

A need to vary a specification notice is likely to arise if, for example:

- the nature or scope of the project changes – either because it is extended or diminished, or because planning or technical issues cause the scope of the project to change;
- there was an error in describing the nature or scale of the project (possibly because of inadequate information available at the time of specification);
- the project was specified in a way that created overlap with the preparatory work being carried out by the water company, or a case is made for a different allocation between preparatory work and project work (possibly because of practical interface issues); and
- there is a change in circumstances (including a change in law) such that the infrastructure project can no longer be delivered by the infrastructure provider in the manner envisaged, or if it is delivered in the manner envisaged will not be compliant with the law.

4.4 Revoking a notice specifying a project as an infrastructure project

Alternatively, if in the Secretary of State's or Ofwat's opinion, the conditions in regulation 4(3) are no longer satisfied the Secretary of State or Ofwat may revoke the specification of an infrastructure project under regulation 4(7)(b)¹². In determining whether the conditions in regulation 4(3) are no longer satisfied, Ofwat will have regard to Part 2 of this guidance.

We expect that the need to revoke a specification notice will only arise in very limited circumstances in that the primary purpose of a specification notice is to require a company to put a specified project out to tender. Once an infrastructure project has been put out to tender and the tender has been successful, that purpose is spent. If an infrastructure project is subsequently discontinued, that discontinuation will, in most instances be regulated by the terms of the project licence which may be issued to the infrastructure provider.

Therefore, we envisage that the need to revoke a specification notice is likely to only arise:

1. if the competitive tender pursuant to the Act and the Regulations does not result in the appointment of an infrastructure provider either because:
 - (a) no compliant bids are received; or
 - (b) the competitive tender process is abandoned;

¹² See annex 1.

2. where Ofwat issues the infrastructure provider with a project licence and that project licence terminates under its own terms; or
3. where Ofwat does not issue a project licence to the infrastructure provider and the project is discontinued.

4.5 Process for specification and process for varying or revoking a specification notice

The process for specifying a project for delivery under the Regulations is set out in Regulation 4¹³.

Before specifying a project as an infrastructure project, the Secretary of State or Ofwat must prepare draft reasons for exercising the power to specify and must consult:

- the incumbent water company or companies;
- where any part of the infrastructure in question is or is to be in Wales, the Welsh Ministers; and
- any other person the Secretary of State or Ofwat thinks appropriate.

If Ofwat proposes specifying a project it must also consult the Secretary of State and similarly, if the Secretary of State proposes specifying a project, the Secretary of State must consult Ofwat.

If the Secretary of State or Ofwat proposes varying or revoking a specification notice, the above procedural requirements to prepare draft reasons and consult relevant people applies.

Ofwat takes the view that if the Secretary of State specifies a project, it is for the Secretary of State, not Ofwat, to vary or revoke the specification notice. Similarly, we expect that if Ofwat issues a specification notice, the Secretary of State will leave the decision to vary or revoke that notice to Ofwat.

Part 3: Guidance on designation of a company as a specified infrastructure provider

5.1 Notice of designation as an infrastructure provider

Under Regulation 8, either Ofwat or the Secretary of State may by notice designate as an “infrastructure provider”, a company which appears to Ofwat or the Secretary of State to be

¹³ See Annex 1

wholly or partly responsible for a specified infrastructure project that was put out to tender in accordance with the Regulations.

A designation notice may be subject to such conditions as Ofwat or the Secretary of State considers appropriate. Either Ofwat or the Secretary of State may also vary or revoke a designation notice. There is, however, no regulation requiring Ofwat to issue guidance to be followed by it in determining whether to exercise its power to designate or its power to vary or revoke a designation notice.

The power to designate a company as an infrastructure provider is discretionary in nature. However, only Ofwat can issue a project licence to a designated infrastructure provider. It is therefore a necessary step if we consider that the project should be carried out by a regulated entity. The main consideration in deciding to designate will therefore be whether we or the Secretary of State considers that the project would benefit from being carried out by a regulated rather than an unregulated entity.

Regulation (both economic and functional) of a designated infrastructure provider is likely to be something that is decided by Ofwat or the Secretary of State prior to the start of the tender process. Bidders in any tender will need to know whether or not they can expect to be issued with a project licence at the end of the process. We will therefore make the decision in consultation with the incumbent water company and the Secretary of State prior to the launch of the tender process.

There is no obligation on Ofwat or the Secretary of State to consult before designating a company as an infrastructure provider. This is because the hurdle for designation is low. The main factors which need to be satisfied before exercising the power are ones of fact and are as follows:

- the project was specified under the Regulations;
- the project was put out to tender in accordance with the Regulations;
- the company that we may designate as an infrastructure provider appears to the designator to be wholly or partly responsible for the specified infrastructure project;
- the company is not an associated company of the incumbent undertaker save where it has been given consent by Ofwat or the Secretary of State to bid in the tender process; and
- the company being designated is registered in England and Wales or Scotland and is limited by shares of guarantee.

5.2 Varying or revoking a notice to designate an infrastructure provider

The Secretary of State or Ofwat may, having regard to any subsisting project licence, by notice vary or revoke a designation notice.

Before exercising these powers, the Secretary of State or Ofwat is required to prepare draft reasons and consult the company designated as the infrastructure provider, the Secretary of State or Ofwat (depending on who is exercising the power), the incumbent water company and such other persons they consider appropriate.

The main purpose of designation is to enable Ofwat to issue a project licence to the relevant company and a project licence may include conditions for the variation and revocation of the project licence. We therefore consider that the relevant project licence will be the better place to deal with variation and revocation rather than the designation notice. We therefore expect that we will revoke a designation notice only once the relevant project licence has been terminated under its own terms. We also expect that in general we will vary a project licence under its own terms rather than vary a designation notice.

However, there may be a limited set of circumstances where it is appropriate to vary a designation notice – for example, if a designation notice contains an error, if the designated company changes its name, if a designation notice is issued with conditions and those conditions are no longer appropriate, or where the relevant project licence has been transferred to a replacement entity by way of a statutory transfer scheme following a special administration.

Annex 1: Relevant regulatory provisions

The Regulations allowing the Secretary of State or Ofwat (referred to below as ‘the Authority’) to specify certain infrastructure projects as infrastructure projects which are required to be put out to competitive tender, are made under sections 36A to 36G of the Act.

Regulation 4 provides that:

“(1) Subject to the following provisions of this regulation, the Secretary of State or the Authority may by notice specify an infrastructure project.

(2)

(3) The Secretary of State or the Authority may exercise the power under paragraph (1) only if the Secretary of State or the Authority respectively is of the opinion that –

(a) the infrastructure project is of a size or complexity that threatens the incumbent undertaker’s ability to provide services for its customers; and

(b) specifying the infrastructure project is likely to result in better value for money than would be the case if the infrastructure project were not specified, including taking into account –

(i) the charges fixed or likely to be fixed under Chapter 1 of Part 5 of the Act (financial provisions, charges); and

(ii) the powers of the Secretary of State under section 154B of the Act (financial assistance for major works).

(4)

(5)

(6)

(7) Where the Secretary of State or the Authority is of the opinion –

(a) that the conditions in paragraph (3) continue to be satisfied, the Secretary of State or the Authority respectively may by notice vary the notice issued by the Secretary of State or Authority (as the case may be) under paragraph (1); or

(b) that either condition in paragraph (3) is no longer satisfied, the Secretary of State or the Authority respectively may, having regard to any subsisting project licence, by notice revoke the notice issued by the Secretary of State or Authority (as the case may be) under paragraph (1).

(8)

(9) Subject to paragraph (10), the Authority must publish guidance to be followed by it in determining whether to exercise its powers under paragraph (1) or (7).

(10) Paragraph (9) does not apply where the Authority has published such guidance before the Regulations come into force.

**Ofwat (The Water Services Regulation Authority)
is a non-ministerial government department.
We regulate the water sector in England and Wales.**

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