

CONTINGENT LIABILITY – DEPARTMENT FOR TRANSPORT, AFFINITY WATER

It is normal practice, when a government department proposes to undertake a contingent liability in excess of £300,000 for which there is no specific statutory authority, for the minister concerned to present a departmental minute to Parliament, giving particulars of the liability created and explaining the circumstances; and to refrain from incurring the liability until 14 parliamentary sitting days after the issue of the Minute, except in cases of special urgency.

Affinity Water Ltd (“Affinity”) is a water-only supplier covering parts of Bedfordshire, Berkshire, Buckinghamshire, Essex, Hertfordshire, Surrey, and north-west London. Affinity draws a significant proportion of its water supply from a Chalk aquifer south of Harefield, using licensed abstractions. The route of HS2 will pass close to these sources and within 1km of 6 of Affinity’s abstraction points (combined abstraction more than 70 million litres per day). It is considered that the 3 boreholes closest to the proposed HS2 Colne Valley Viaduct in this area will be at risk from the impact of the HS2 construction works. The closest abstraction point, Blackford, is located approximately 40 metres from the centreline of the route.

The risk of impact to the groundwater at the borehole locations arises from activities including the piling required for the Colne Valley Viaduct, tunnel boring along the proposed Chiltern Tunnel, excavation of cuttings and general construction operations at the surface such as topsoil stripping and stockpiling. Potential risks associated with these activities include the release of contaminative fluids (via spills etc.), changing the hydraulic flow regime around boreholes and the creation of chalk particles as ‘turbidity’ within groundwater. This turbidity interferes with the water treatment process for bacteria. Water abstraction automatically terminates when the turbidity level increases above the safe limit. The impact of even low levels of turbidity could cause the closure of a source due to the high quality required to be met for potable use.

Mitigation measures will be adopted to avoid the construction impact risks set out above. However, fully mitigating against the risk is not possible due to the unpredictable nature of impacts on the aquifer. The realisation of this risk would affect Affinity’s supply and thereby cause them financial detriment. The High Speed Rail (London to West Midlands) Bill provides water companies with specific means of recourse against the Promoter of the Bill (the Secretary of State for Transport) for any damage to their apparatus (i.e. pipes or distribution network), including if the Promoter causes a loss of supply through damaging their assets. However, the Bill does not protect water companies if the project causes damage to the resources on which they are dependent. As a result, if Affinity Water should suffer any loss as a result of impact on water resources, their only legal recourse against the Promoter will be through common law (i.e. negligence). However, if the Promoter has undertaken all reasonable measures to protect the water resources and Affinity’s abstraction, they will not have been negligent or have failed in their legal duty of care, meaning Affinity will have no claim against them either under common law or the Bill. A specific, contractual indemnity would ensure that Affinity can formally reclaim any losses incurred as a result of impact from HS2 upon natural water resources. This indemnity will

effectively transfer the financial risk caused by the project back to the Promoter, instead of it lying with Affinity or their customers. This indemnity would provide Affinity with a cause of action against the Promoter, even where it was clear the Promoter had acted with due care and was not negligent.

This indemnity will be time limited to effects arising as a result of the construction activities. This indemnity would not cover detriment due to Affinity's own negligence. It is further noted that the Promoter would be liable for any detriment on account of its own negligence or that of its contractors irrespective of this indemnity.

The worst case credible impact is considered to be a case where 3 boreholes are affected (more than temporarily) and must be replaced in conjunction with a requirement to import temporary replacement supplies for a combined period totalling one year. The costs resulting from this combination of events would be in the order of £77 million. This figure accounts for the risk from contractor negligence (i.e. contaminant spill) as well as the inherent risks from construction close to the aquifer (as outlined above) and is included within budgets. The liability will not be limited and if the liability is called, provision for any payment will be sought through the normal Supply procedure.

For the HS2 Phase One route (London to the West Midlands), there are no other water companies' abstraction points as near to the proposed line of route as Affinity Water's. With respect to this indemnity creating a precedent for future infrastructure projects, the principle behind this indemnity mirrors that of indemnities given to other statutory undertakers and, therefore, does not represent a shift from the approach taken on other schemes.

HM Treasury has approved this proposal in principle. Final approval to proceed with incurring the liability will not be withheld unless a notice of an objection is received during the 14 parliamentary sitting days. In case of any such objection, final approval to proceed with incurring the liability will be withheld pending the examination of the objection.