

1. Introduction

Thames Water Utilities Limited (“TWUL”) attended the issue specific hearing on the draft Development Consent Order (“DCO”) on 19 January 2017 in order to elaborate on its written representations relating to the deemed consent provisions originally included within article 14, but now included within article 68, and to respond to the Applicant’s comments on those representations.

TWUL’s written representations (submitted at deadline 1) explain in detail why TWUL believes deemed consent to discharge to sewers and drains is unacceptable. These submissions should be read in conjunction with those representations.

2. TWUL’s objection to Article 14

Article 14 enables the Applicant to discharge water in connection with the construction and maintenance of the authorised development into watercourses, sewers and drains. The Applicant cannot discharge without the owner’s consent and the owner can impose conditions on the consent. Article 68 says that if the owner does not respond to the application within 28 days, it is deemed to have consented to the application. TWUL’s objection relates to discharges to sewers and drains.

TWUL has asked for deemed consent to be replaced by deemed refusal because deemed consent would result in unconditioned and therefore uncontrolled discharges to TWUL owned sewers and drains.

The discharges for the authorised development must be conditioned and controlled because:

- The sewerage system is designed to convey and treat effluent that TWUL is statutorily obliged to manage, namely foul and surface water sewage from buildings, and trade effluent. It is not designed to convey and treat large volumes of (potentially contaminated) ground water from tunnel de-watering, water by-products from the construction process or tunnel drainage. As such the discharge must be controlled and potentially treated at source before discharge;
- The DCO is silent about payment for the services provided under Article 14. Obviously the Applicant must pay for those services, as TWUL’s customers should not fund the Applicant’s operation. Actual consent is the most appropriate way of notifying the Applicant of the charges payable.

Uncontrolled discharges pose highly significant risks. These risks are set out in our written representations, but in summary they include:

- Flooding of customer’s homes with sewage. If groundwater is discharged into a network which conveys foul and surface water away from homes, the groundwater could take up all the capacity in the network resulting in TWUL being unable to convey sewage away from homes. This could cause homes to flood with sewage due to backflow caused by downstream incapacity;
- Damage to the sewer network because it is overloaded with uncontrolled quantities of water which could cause bursts, or because of unexpected substances in the water which could corrode apparatus;
- Damage to the environment as a result of sewage escapes from manholes / burst apparatus. This is caused by surcharges of large volumes of water which are well beyond the sewer’s design capacity. Typically, it may occur during storm conditions and uncontrolled discharges of groundwater could have an impact far greater than

a typical storm scenario, causing both physical flood damage as well as pollution from untreated sewage;

- Untreated effluent being discharged via surface water sewers directly into watercourses without treatment or the treatment process failing to remove unexpected contaminants before discharging final effluent into watercourses;
- Breach of statutory duties or of environmental permits e.g. failure to effectually drain an area in accordance with s94 WIA, or breach of sewerage treatment works discharge consents because unexpected contaminants are in the effluent which the works are unable to treat;
- Health and safety risks to people working in sewers and works due to uncontrolled levels / quality of discharge, and to the public from flooding.

Uncontrolled discharges could result in potentially significant criminal and civil liabilities.

- Criminal prosecutions: TWUL can be prosecuted if effluent escapes from its sewers on to land or in to rivers (whether or not TWUL caused the escape), or for discharges from its sewerage treatment works that are in breach of environmental permits;
 - According to the 2014 Sentencing Council Definitive Guidelines on Environmental Offences the potential fines for a company of turnover of £50m or more can be up to £3m depending on the level of culpability and environmental harm. For companies whose turnover is higher (such as TWUL), the guidelines suggest that the fines can be adjusted up for proportionality;
 - TWUL was prosecuted in January 2016 for the pollution of a canal. This offence was determined to be a negligent (on a scale of deliberate, reckless, negligent, no culpability) category 3 (minor harm) offence. TWUL was fined £1 million. The potential for very large fines caused by unconditioned discharges from the Applicant is significant.
- Ofwat penalties:
 - TWUL can be fined up to 10% of its turnover by Ofwat for breach of statutory duties, including the statutory duty under s94 WIA to provide a sewerage system, to cleanse and maintain the system and ensure its area continues to be effectually drained.

3. TWUL's proposed solution

The Explanatory Memorandum to the DCO does not explain why the Applicant has included deemed consent within this DCO. TWUL understands that the provision has been included as Article 14 does not contain any deadline which forces decision makers to determine applications, and that indecision could cause delay to the authorised development.

Article 14(2) contains a right to refer disputes for determination as if they were disputes under s106 WIA. Under s106(6) WIA a party can refer a refusal to permit a communication for determination. TWUL's solution to the Applicant's concern (as set out in TWUL's written representations) is to replace deemed consent with deemed refusal. This solution would (i) in the absence of a decision on the application, enable the Applicant to refer the matter under the dispute mechanism already set out under article 14, which would remove their concern regarding indecision and delay, (ii) give decision makers the motivation to determine applications within a specified deadline, rather than allowing the regulator to decide the

application, and (iii) provide a vital safeguard against the risk posed by uncontrolled discharges, which deemed consent does not provide.

As a side issue, in TWUL's written representations, TWUL suggested that as article 14 discharges were more akin to s118 discharges i.e. they can be conditioned and relate to discharges of an unknown quantity and quality, it might be more appropriate for the dispute mechanism to refer to s122 WIA, as opposed to s106 WIA. Under s122 WIA an applicant can refer a dispute about a s118 WIA application to Ofwat if they do not receive a response to their application within 2 months, which is effectively the same as deemed refusal.

TWUL is aware that the s106 WIA dispute mechanism was included in the Infrastructure Planning (Model Provisions) (England and Wales) Order 2009 (SI 2009/2265) (the "Model Provisions"), and assumes that it was included to ensure the article contained a mechanism to refer disputes to the water industry regulator. Section 122 WIA disputes are, like s106 WIA disputes, referred to Ofwat.

4. Applicant's comments on TWUL's representations

In its comments (submitted at deadline 2) to TWUL's written representations the Applicant said that deemed refusal does not follow the usual form of DCO's made to date and is entirely appropriate for inclusion within the DCO due to it authorising a NSIP.

At the hearing on 19 January 2017, the Applicant said that as this is an NSIP it is important that consents are not delayed and that deemed consent had been included in other DCO's and statutory orders.

TWUL's response to these comments is as follows:

Deemed consent is not included within the Model Provisions (article 14). Although these provisions lapsed in 2012, Planning Inspectorate Advice Note 13 says that the purpose of the Model Provisions was to aid consistency and to assist developers to draft a comprehensive set of lawful provisions. The advice note, which is current, requests tracked changes showing departures from the provisions despite the fact that they have lapsed. Deemed consent is not included in the Model Provisions, the departure was not highlighted within the draft DCO, and the explanatory memorandum to the DCO doesn't explain why it has been included.

Deemed consent has been included in previous DCO's, but so has deemed refusal e.g. The Thames Tideway Tunnel Order 2014 ("TTO"), which TWUL applied for, included a provision for deemed refusal (article 19(8)). Like TTO, this DCO involves tunnelling and will likely produce similar water discharges and similar risks i.e. large amounts of potentially contaminated water. Furthermore, although other DCO's have included deemed consent, it is not clear what the potential risks of discharges were on other DCO's, or whether these risks were highlighted or considered during the examination process. The risk of deemed consent in a DCO which involves a tunnelling operation i.e. TTO and Silvertown, would be far greater than an authorised development that was unlikely to produce water. In our view, in light of the significant risks involved with this DCO, deemed refusal is the more appropriate and proportionate deviation from the Model Provisions.

Deemed consent may also be included within other statutory orders (which orders the Applicant did not specify), but it is inconsistent with primary legislation that relates to water discharges to sewers and drains. In our written representations we explain why TWUL believes that deemed consent is unacceptable by reference to equivalent discharge provisions set out in s106 and s118 WIA. We do not wish to repeat the arguments here, but by way of brief reminder, in WIA deemed consent only applies where it is not possible for the sewerage undertaker to impose conditions on the connection or discharge and where TWUL has very limited scope for refusing a consent. For the reasons set out in our written representations, where conditions can be imposed and the risk of discharge could be significant, deemed

consent does not apply. Our proposed solution of deemed refusal would be consistent with the trade effluent provisions of WIA (ss118-122 WIA) under which the sewerage undertaker can impose conditions on discharge, and an applicant can refer a matter for determination if an undertaker fails to give a decision within 2 months (s122 WIA).

Also, under section 111(1)(a) WIA (attached at Appendix 1 for reference if required) it is an offence to put any matter into a sewer which could injure the sewer or interfere with the free flow of the sewer. In the absence of deemed consent, discharging an uncontrolled quantity of water or water of an uncontrolled quality into a sewer which interferes with the flow of the sewer or damages the sewer would be punishable by fine (on summary conviction) or fine / imprisonment (on indictment). The WIA treats such discharges very seriously, but deemed consent creates a conflict with WIA and potentially provides the Applicant with a defence to this offence. It is inappropriate for a DCO to circumvent the purpose of primary legislation in this way.

TWUL appreciates that the authorised development should not suffer undue delay, but of equal importance is the protection of customer homes and the environment from flooding, of apparatus from damage, of TWUL's ability to comply with its statutory duties and environmental permits and of the health and safety of employees and the public. Without actual consent, there is no guarantee that the discharge will not cause widespread damage and pollution, and without deemed refusal there is no safeguard against discharges entering the sewerage network if for some reason the specified deadline is missed e.g. applications / consents not being received.

TWUL's proposal is a proportionate solution which protects both the Applicant and TWUL.

5. Time scale

As stated at the hearing 28 days is not enough time to review an application for discharge and to consider the implications e.g. to assess the condition of the sewer, the capacity of the network and treatment works and to determine appropriate conditions. It is in both the Applicant and TWUL's interests to ensure that sufficient time is allowed to determine an application and to set the correct conditions, which may include a requirement on the discharger to install appropriate pre-treatment before discharge, failing which consent may be refused.

The Model Provisions do not include timescales for dealing with applications, and the 28 day time period is arbitrary. In recent DCO's the timescales for determining applications vary and include 28 days, 56 days, 6 weeks and 2 months. A 2 month timescale was included in the River Humber Gas Pipeline Replacement Order 2016 (schedule 12), the Progress Power (gas fired station) Order 2015 (article 39) and the Hirwaun Generating Station Order 2015 (article 38). TWUL therefore requests 2 months to consider article 14 applications, which is the same as the timescale allowed within the trade effluent provisions of WIA.

6. Summary of arguments

In light of the serious environmental and financial implications of deemed consent, TWUL believes that the risk of deemed consent far outweighs any perceived benefits, and that deemed refusal is the only proportionate and sensible solution to resolve both parties' concerns.

TWUL's solution can be implemented by removing reference to sewer and drain owners in article 68 and including deemed refusal in article 14 with a 2 month time period.

TWUL will liaise with the Applicant further about its concerns. In the event that amendments cannot be agreed with the Applicant, TWUL respectfully requests that if the Examining

Authority makes a recommendation to the Secretary of State to make the DCO, that they do so with a recommendation that TWUL's proposed amendment to articles 14 and 68 be made.

Finally, as set out in our written representations, WIA has not been disapplied by the DCO, so any discharges that fall within the scope of the WIA discharge provisions must be dealt with in accordance with WIA.

7. Update on negotiations with Applicant

As requested in the post-hearing action points, TWUL can confirm that it is continuing to liaise with the Applicant about the remainder of the objections raised by TWUL in its written representations at deadline 1. TWUL hopes to be able to provide a more detailed update on progress in advance of the next issue specific hearing on 28 March 2017.

Appendix 1: Copy s111 of the Water Industry Act 1991

"Provisions protecting sewerage system

111. Restrictions on the use of public sewers

(1) Subject to the provisions of Chapter III of this Part, no person shall throw, empty or turn, or suffer or permit to be thrown or emptied or to pass, into any public sewer, or into any drain or sewer communicating with a public sewer—

- (a) any matter likely to injure the sewer or drain, to interfere with the free flow of its contents or to affect prejudicially the treatment and disposal of its contents; or
- (b) any such chemical refuse or waste steam, or any such liquid of a temperature higher than [forty-three degrees Celsius], as by virtue of subsection (2) below is a prohibited substance; or
- (c) any petroleum spirit or carbide of calcium.

(2) For the purposes of subsection (1) above, chemical refuse, waste steam or a liquid of a temperature higher than that mentioned in that subsection is a prohibited substance if (either alone or in combination with the contents of the sewer or drain in question) it is or, in the case of the liquid, is when so heated—

- (a) dangerous;
- (b) the cause of a nuisance; or
- (c) injurious, or likely to cause injury, to health.

(3) A person who contravenes any of the provisions of this section shall be guilty of an offence and liable—

- (a) on summary conviction, to a fine not exceeding the statutory maximum and to a further fine not exceeding £50 for each day on which the offence continues after conviction;
- (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.

(4) For the purposes of so much of subsection (3) above as makes provision for the imposition of a daily penalty—

- (a) the court by which a person is convicted of the original offence may fix a reasonable date from the date of conviction for compliance by the defendant with any directions given by the court; and
- (b) where a court has fixed such a period, the daily penalty shall not be imposed in respect of any day before the end of that period.

(5) In this section the expression "petroleum spirit" means any such—

- (a) crude petroleum;
 - (b) oil made from petroleum or from coal, shale, peat or other bituminous substances; or
 - (c) product of petroleum or mixture containing petroleum,
- as, when tested in the manner prescribed by or under the [Petroleum \(Consolidation\) Act 1928](#), gives off an inflammable vapour at a temperature of less than [twenty-three degrees Celsius]."