

1. Proof of evidence – Thames Water Utilities Limited
9 January 2018 (version 1)

Proof of evidence of Thames Water Utilities Limited in relation to its objections [OBJ/226] about the deemed consent provisions contained in Article 19 of the Network Rail (East West Rail Bicester to Bedford Improvements) Order.

Submitted by Jane Battle of Thames Water Utilities Limited.

1. Introduction

1.1. Thames Water Utilities Limited (TWUL) submitted a statement of case on 18 October 2018 in relation to the Applicant's Order. Good progress is being made in relation to most of our objections, but we are not yet in a position to withdraw those objections. We respectfully request the Inspector refers to our written statement of case for our arguments and evidence on all of our objections, which remain relevant. Although all of our objections remain outstanding, we do not propose to expand upon them here, save for our objection in relation to the deemed consent provision which has been inserted into Article 19 of the Order.

1.2. In light of the potential risks and liabilities that could arise as a result of the deemed consent provisions included within Article 19, TWUL believes that the risks of deemed consent far outweigh any perceived benefits, and that replacing deemed consent with deemed refusal is the only proportionate and sensible solution to resolve both parties' concerns.

2. TWUL's objection to Article 19

2.1. Article 19 gives the Applicant a right to discharge water resulting from the construction, operation and maintenance of the authorised works into TWUL sewers and drains with TWUL consent, which can be subject to conditions. The word 'operation' is not included in the Infrastructure Planning (Model Provisions) Order 2009 (the Model Provisions). The Applicant has agreed to remove the reference to 'operation' of the authorised works from Article 19(1) and has confirmed that it is not their intention to rely on Article 19 to discharge land and track drainage from their stations to TWUL sewers. On that basis, we have no further comments on these specific points.

2.2. However, Article 19(8) says that if the owner of the sewers and drains does not respond to an application for discharge consent within 28 days, it is deemed to have consented to the application. Deemed consent is not included in the Model Provisions (which do not contain any provision as to consent) and TWUL has asked for deemed consent to be removed or to be replaced by deemed refusal. This is because deemed consent could result in unconditioned and therefore uncontrolled discharges to TWUL owned sewers and drains, which may occur through no fault of TWUL e.g. application forms can be lost in the post or be sent to incorrect departments to be processed, and also may not be processed in accordance with the specific requirements of the Order, which do not constitute business as usual process for TWUL.

2.3. The discharges for the authorised works must be conditioned and controlled because:

- 2.3.1. the sewerage system is designed to convey and treat domestic foul and surface water sewage from buildings, and trade effluent. It is not designed to convey and treat potentially contaminated water (sometimes in large volumes) from the construction and maintenance of the railway. It is also not designed to convey and treat operational drainage or contaminated groundwater and track drainage;
- 2.3.2. The Order is silent about payment for the services provided under Article 19, which the Applicant must pay for and actual consent is the most appropriate way for this concern to be dealt with.
- 2.4. As set out in our statement of case, uncontrolled discharges can result in flooding of customer's homes, damage to the sewer network and to sewerage treatment works, damage to the environment and health and safety risks. These issues could also result in potential breaches of statutory duty and significant criminal and civil liabilities. TWUL has always been liable to prosecution if effluent escapes from its sewers on to land or in to rivers (whether or not TWUL caused the offence to occur, as the offence is one of strict liability), or for discharges from its sewerage treatment works that are in breach of environmental permits.
- 2.5. However, since 2014 the potential fines for environmental offences have increased significantly due to the Sentencing Council Definitive Guidelines on Environmental Offences. Since the Guidelines were issued, the potential fines for a company of turnover of £50 million or more can be between £7,000 and £3 million per offence depending on the level of culpability and environmental harm. For companies, such as TWUL, whose turnover is higher than £50 million fines can be adjusted upwards to provide proportionality. Since the guidelines were introduced, TWUL has been fined over £21 million (£1 million in January 2016 for the pollution of a canal and £20 million in 2017 in relation to several pollution incidents occurring in 2013 and 2014). Although the operational risks remain the same and must continue to be managed by TWUL, the potential financial consequences of uncontrolled and unconditioned discharges has increased significantly since 2014.
- 2.6. The Model Provisions have lapsed but Planning Inspectorate Advice Note 13 requests tracked changes showing departures from the provisions. Deemed consent is not included in the Model Provisions, the departure was not highlighted within the Order, and there was no initial explanation as to why deemed consent had been inserted into the Order.
- 2.7. The Applicant has since explained that the reason for including deemed consent is to reflect the need for a streamlined process for detailed approvals to ensure the timely delivery of a project which has already been approved.

- 2.8. TWUL appreciates that the authorised works 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.
- 2.9. The Applicant says that deemed consent has been included in previous orders. We accept that this is the case, but so too 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)). We are treating the Applicant in the same way as we have treated our own projects. In addition, other orders have been silent on consent altogether e.g. they have followed the Model Provisions template and do not contain any provision as to deemed consent or refusal.
- 2.10. The Applicant has also said that deemed consent has been included in some historic orders affecting TWUL. This may be the case, but TWUL has reassessed the risks of deemed consent and for the reasons set out in our statement of case and here, we require the provision to be removed.
3. TWUL's proposed solution
- 3.1. TWUL's solution is to replace deemed consent with deemed refusal. This would (i) in the absence of a decision on the application, enable the Applicant to refer the matter under the dispute mechanism in Article 19(2), which would remove any concern of the Applicant regarding delay or indecision and (ii) provide a vital safeguard against the risk posed by uncontrolled discharges, which deemed consent does not provide.
- 3.2. TWUL would also be happy to discuss a process for considering and approving applications relating to this Order. TWUL has already sent proposals for such a process to the Applicant for consideration.
- 3.3. Furthermore, deemed refusal does not conflict with primary legislation namely the existing provisions under section 111 of the Water Industry Act 1991, which enable TWUL to prosecute any party that puts anything into a sewer which is likely to injure the sewer or interfere with its free flow, such as high volumes of water or contaminated water.
- 3.4. Deemed refusal is also consistent with existing provisions in the Water Industry Act 1991, which provide for deemed consent only in very limited and prescribed situations where TWUL is unable to condition the discharge, it has very limited ability to refuse applications and the potential risks relating to such discharges are low. Unlike these situations, Article 19 discharges can and must be conditioned and may in some cases be refused.

3.5. TWUL has also requested an increase in the timescale in Article 19(8) from 28 days to 2 months.

4. Conclusion

4.1. In the absence of actual consent there is no guarantee that the Applicant's discharges will not cause widespread pollution and damage.

4.2. The risks caused by deemed consent sit entirely with TWUL and the provision has been inserted into the Order without consultation with TWUL and without its agreement.

4.3. The response to the Applicant's concerns needs to be balanced and proportionate and the solution needs to be one which protects the interests of both parties. TWUL's proposal is a proportionate and workable solution, which protects both the Applicant and TWUL.