Appeal Decision

Hearing opened on 19 January 2010

by Edward A Simpson JP BA(Hons) MRTPI

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

The Planning Inspectorate
4/11 Eagle Wing
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

☎ 0117 372 6372
email:enquiries@pins.gsi.gov.uk

Decision date:

30 MAR 2010

Appeal Ref: APP/WQ/09/2704

- The appeal is made under sections 91(1)(b) and 91(2) of the Water Resources Act 1991 (as amended) against the giving of a discharge consent that is subject to conditions.
- The appeal is made by United Utilities Water Plc against the decision of the Environment Agency to consent, on 14th April 2009, to the making of discharges of storm sewage and sewage in an emergency from combined sewer overflows, sewage works storm tanks or pumping station overflows at some 663 locations listed in Schedule 2 to the consent and subject to conditions set out in Schedule 1 to the consent.
- The consent is a final determination of the deemed temporary consents that the Secretary of State directed the National Rivers Authority to grant until it had determined the applications.
- The conditions in dispute are Nos.1.1; 2.1; 3.1; 3.2; 3.3; 4.2; 4.3; 4.4 and 4.5.
- The hearing sat for 4 days from 19th to 22nd January 2010.

Summary of Decision:

Decision

1. I allow the appeal and direct the Environment Agency to modify the conditions, set out in Schedule 1 to the consent to the making of discharges of storm sewage and sewage in an emergency from combined sewer overflows, sewage works storm tanks or pumping station overflows at the consent sites listed in Schedule 2 to the consent dated 14th April 2009 by deleting conditions 1 – 4.5 inclusive and replacing them with the conditions that are set out in the attached Schedule A.

Procedural Matters

2. This appeal is one of 6 similar but separate appeals lodged by United Utilities Water Plc (UUWP), Severn Trent Water Ltd (STWL), Anglian Water Services Ltd (AWSL), Yorkshire Water Services Ltd (YWSL), Thames Water Utilities Ltd (TWUL) and Dwr Cymru Welsh Water (DCWW) respectively (referred to jointly in this decision as 'the Companies').

3. Some time prior to the hearing the Companies, with a view to avoiding both duplication and unnecessary complication, agreed that they would present a single joint case. This was agreed notwithstanding the fact that the scope and precise terms of the grounds of appeal varied between the 6 Appellant Companies. It was also the position of the Companies that if I were to allow the appeals, any direction to the Environment Agency (EA) to quash, amend or impose any conditions set out in the various Schedules 1 would apply equally to each of the discharge consents the subject of these appeals save for the matter of the timing of the provision of certain facilities which was a matter

that affected only Dwr Cymru Welsh Water, and was a consequence of the absence of a specific condition on that company's temporary consent to discharge sewage in an emergency which the Secretaries of State, in 1989, had directed the former National Rivers Authority (NRA) to grant prior to the privatisation of the water industry.

4. The Companies Statement of Case (CSoC), at various paragraphs[1], suggested that, on grounds of unlawfulness, an appropriate course of action would be to 'quash' these discharge consents. At the hearing I drew attention to the scope of the Secretary of State's determination, and hence also that of an Inspector in transferred cases such as these, as set out in subsection 91(2D)(c) of the Water Resources Act 1991 as amended (the 1991 Act). That provides for the quashing of all or any of the conditions and, where this power is exercised, the Secretary of State (or Inspector) may give directions as to the conditions to which the consent is to be subject. There is no power in section 91(2D) to appeal against the principle of granting consent, or to quash such consent. I further indicated that, insofar as the Companies continued to wish to question the lawfulness of the various consents (as opposed to any assessment of their subject conditions) those would be matters for the courts and could not be determined as a part of this hearing into these appeals.

5. I include within this the Companies objections in principle based on the fact that the EA were imposing a general set of conditions on a large number of intermittent discharges whose individual characteristics, in terms of size, design, flow-rates etc. showed considerable variety. I have noted, and the EA accept, that it has not previously approached the determination of applications for discharge consents in this way. Equally, I accept that to finally determine these outstanding temporary consents on an asset by asset basis would take a considerable period of time and manpower; resources that would need to be diverted from elsewhere within the Companies' budgets.

6. There was also some concern expressed by the Companies as to potential inaccuracies in or omissions from some of the 'Schedules 2' lists of discharge site locations. Insofar as those are lists of sites of intermittent discharges to which the conditions apply, it is not appropriate at this appeal stage to modify those lists by way of site location inclusions or exclusions. For a site proposed to be excluded this would be equivalent to quashing the consent with respect to that particular site, while any site proposed to be added to a list would not have been subject to the appropriate procedural requirements of Paragraphs 1 and 2 to Schedule 10 of the 1991 Act. While it might be possible to amend a 'Schedule 2' list and delete an inappropriate inclusion by way of the revocation procedures set out in Paragraphs 7 and 8 of Schedule 10 to the Act, any intermittent discharge not on a 'Schedule 2' list that was discovered to still be un-consented, and which required formal consent, would need to be addressed through the normal application process.

7. It is the EA's position that the six 'Schedule 2' lists should only contain asset sites for which applications had been submitted and temporary discharge consent granted in 1989 and/or 1991 following the Secretary of States' 1989 direction to NRA. To the extent that there is uncertainty with regard to the legal position with respect to any temporary consents granted after 1991, for example those granted to YWSL in 1997, that is not a matter before me. With

[1] CSoC paras., inter alia, 16, 35, 79, 90

regard to TWUL's grounds of appeal with regard to it's 'Schedule 2' list, the concern is that given the scale of the task of 'quality assuring' the list, errors are almost inevitable, although no specific cases were raised. To the limited extent that I am able to address this matter I have done so at paragraph 6 above.

Main issue

8. The main issue is whether, in the context of the temporary discharge consent applications made, or deemed to have been made, in 1989, the individual conditions now imposed through these final determinations are unambiguous, necessary, clear, lawful and enforceable.

Reasons

9. For the EA it was emphasised that the temporary consents granted following the Secretary of State's direction under Schedule 26 of the Water Act 1989 were virtually unconditional and were doing little to protect the environment. I note that for storm overflows there was only one condition: *'that where equipment for the separation of solids is provided this equipment shall be maintained in good operating condition.'* For discharges of sewage in an emergency (from sewage pumping stations) the consents required the provision of an alarm *to provide warning of a pumping station failure; where a standby pump or generator was provided, it shall be maintained in working order; and where a pumping station failure took place, it should be rectified as soon as reasonably practicable*.

10. Both in the run up to and during the hearing the parties continued to discuss the detailed wording of the conditions to see if a measure of agreement could be reached. Those discussions took place on a 'without commitment' basis and it remained the EA's position that notwithstanding the revised wording discussed at the final session of the hearing[2] the conditions as originally imposed through the 14th April final determinations met, for the most part, the relevant tests.

11. For the Companies it is acknowledged that these temporary consents can not remain undetermined indefinitely. In the CSoC they confirm that they are not opposed to the principle of standard conditions, although note that this is the first time that the EA has approached the granting of discharge consents by way of general rather than site-specific conditions.

12. For the Companies it was indicated that they were happy to accept conditions which achieved the objective of the EA to see conditions imposed *'in order to achieve the proper regulation* (of the discharges) *in a manner consistent with the state's European law obligations and the proper protection of the environment'*.

13. The 1997 Guidance on the implementation and interpretation of the UWWT(E&W)Regs.1994 is still extant. Annex 8 addresses the framework for consenting intermittent discharges. Para.1.5 notes that it is the intention that a common approach is used by the EA. The requirements are set out with the objective of trying to adopt as simple an approach as possible. It is not intended to be totally prescriptive; there must always be the opportunity for

[2] Hearing Doc.4 – Alternative Wording of Conditions - V.3

flexibility to take account of cost and environmental benefits. Para.1.6 notes that the framework starts from the assumption that the EA will not, in the short to medium term, wish to direct resources to reviewing all intermittent discharge consents just because some consents do not conform with one that would be issued according to this guidance. However, para.5.1, which addresses the consenting of satisfactory CSOs, notes, inter alia, that a discharge may require a consent because it is currently one of the scheduled consents issued by schedule at the time of water privatisation. I am satisfied that this is the situation with regard to the discharges the subject of the 6 Companies' appeals.

14. While I note that the Companies draw attention to the guidance at para.5.1 which states that 'those [CSOs] that are satisfactory will therefore meet the requirements of the [1994] Regulations and consequently there is no need to review their consents to incorporate the requirements of the appropriate Appendix', it is clear that the scheduled consents, which are temporary, are to be treated in the same way as unconsented discharges and are considered to require consent. In the event that these were to be dealt with asset by asset, then the guidance set out in Appendices 8(i) – 8(iv) would form the basis of those determinations.

15. It is accepted that this approach would be both costly and time-consuming, not only for the EA but also the Companies. The EA's approach, when issuing the appealed Notices of Determination, aimed to ensure that, in complying with its duty under para.3 of Schedule 10 to the WRA 1991 (as amended) to determine the applications the subject of the temporary consents, it balanced cost against environmental benefits. The principle of applying general conditions, albeit temporary ones, to a schedule of assets had already been established by the 1989 Ministerial direction to the NRA. In view of the fact that none of the subject discharges had been identified as being 'unsatisfactory' in accordance with the 1994 Regulations and the criteria as set out in the 1997 Guidance, the EA considers that the application of general conditions to a Schedule of assets continues to be appropriate, albeit that this would not be the approach taken when determining applications for individual site-specific consents.

16. Statutory Guidance of the EA's Objectives and Contributions to Sustainable Development was issued by the Secretary of State in 2002[3]. Paragraph 3.10 indicated that the EA should develop approaches which deliver environmental requirements and goals without imposing excessive costs (in relation to the benefits gained) on regulated organisations.

17. That guidance then set out the Government's objectives for the EA. These included to protect and enhance the environment (4.1(a)); adopt an integrated approach to environmental protection and enhancement (4.1(b)); discharge the Agency's functions in an economical, efficient and effective manner (4.1(c)); ensure that regulated individuals and organisations comply with relevant legislation (4.1(f)); develop in conjunction with Government a risk-based, proportionate, consistent, efficient and cost-effective approach to the regulatory process (4.1(g)).

18. In the light of the objectives set out in paragraph 4.1 to the guidance, paragraph 4.2(b) indicates that in, relation to water quality, the Agency should

[3] EA SoC Document Folder item 13.

pursue the following objective: To protect, enhance and restore the environmental quality of inland and coastal surface water and groundwater, and in particular, address both point source and diffuse pollution; implement the EC Water Framework Directive; and, ensure that all relevant quality standards are met.

19. The guidance also addresses the matter of better regulation in relation to objectives 4.1(f) and (g). This indicates that the EA should have regard to the five principles of good regulation: transparency, accountability, proportionality, consistency and targeting. Any enforcement action should be proportionate to the risk, and alternatives to formal enforcement action should be considered.

20. Against this background, and bearing in mind that the determinations were made on the basis that at the date of the notice none of the discharges on the various Schedules '2' had been identified as being unsatisfactory (as defined in the 1997 Government Guidance[4] accompanying the UWWT Regs.1994), it is understandable that the EA should wish to determine these outstanding temporary consents in as cost-effective a manner as possible. It is also recognised by both the EA and the Companies that to undertake individual assessments of each CSO or PSEO to provide the level of information necessary to inform the terms of conditions normally found in site-specific discharge consents would be both costly and time consuming. It is to be noted that some 3,900 discharges are addressed by these 6 company-wide consents.

21. The definitions of unsatisfactory, satisfactory and sub-standard CSOs were re-stated, in guidance to EA staff and water companies, in October 2007[5]. This guidance was principally concerned with classifying storm overflows and identifying any which required improvements as part of periodic review PR09. This guidance is of significance to these appeals in that the matrix differentiates between consented and unconsented storm water overflows and, as set out in para.5.1 to the 1997 guidance, the temporary consents the subject of the Companies appeals are to be treated as if they were unconsented.

22. Satisfactory discharges '*meet AMP guidelines (not unsatisfactory in terms of environmental criteria) and modern standards of engineering for storm overflow structures and aesthetic control, and/or sufficient capacity in system.* Sub-standard discharges '*meet AMP guidelines (not unsatisfactory in terms of environmental criteria) but not to modern standards of engineering for storm overflow structures and aesthetic control, and/or insufficient hydraulic capacity.* In terms of required actions, a satisfactory discharge needs to be consented and should be subject to ongoing inspection and routine maintenance by the water company where required to prevent them becoming unsatisfactory. Similarly, sub-standard discharges need to be consented but also require raising to modern standards of engineering in the medium to longer term through capital maintenance and/or supply demand balance programmes. They also need to be subject to ongoing inspection and routine maintenance where required to prevent them becoming unsatisfactory.

23. There is no definition of 'medium to longer term'. However, some indication can be drawn from the approach to be taken with regard to unsatisfactory

[4] EA SoC Document Folder item 5.
[5] EA SoC Document Folder item 6.

discharges, where the EA will require improvements 'as soon as practicable' and that this is stated to be 'normally 2 – 3 years[6]. 'Medium to longer term' is clearly a longer timescale than this. It is also to be noted that, with regard to any unsatisfactory discharges, any required improvements should be taken through the change protocol process[7]. However, it is not anticipated by the EA, for the reasons set out above, that any of the discharges the subject of these appeals would fall within the 'unsatisfactory' category. More importantly, were any of these discharges to be causing problems they would already have been defined as unsatisfactory, dealt with under normal consenting processes and excluded from the 'Schedule 2' lists.

24. The Companies' concerns that in order to protect their position they would need to undertake improvements to discharges, the scale and therefore cost of which are currently uncertain, is not a sound argument for not imposing conditions that will protect and maintain the environmental (water quality) standards of the receiving waters. The EA is not seeking by these conditions to raise standards. Its aim is to ensure that there is no deterioration in the quality of the discharges and, in an effort to encourage the appropriate management and maintenance of these assets at a level where unacceptable discharge events are avoided, that there are enforceable conditions in place.

25. The guidance on consenting satisfactory and sub-standard unconsented storm overflows indicates that the EA will consent 'as is'. I do not accept that this means that the conditions currently included on the temporary consents will just be transposed onto the new consents but rather that the granting of consents will not require any work to be done to these intermittent discharges other than normal maintenance. The temporary consent conditions place no requirement on the water companies to maintain discharge standards. Taking as an example the 1989 temporary consent for storm sewage discharge granted by NRA to Yorkshire Water Authority, the only condition imposed is that 'where equipment for the separation of solids is provided, this equipment shall be maintained in good operating condition'. Where some form of separation is not provided, and that will be the case with a large number of such discharges, there are no conditions that effect or seek to control their operation. There is no logic in an argument that says that these discharges should not be assessed against a general approach to maintaining environmental (water quality) standards that would be applied to any other discharge. Moreover those standards need to be enforceable.

26. Against the background of unconditioned, and hence unenforceable, temporary consents it is unsurprising that the water companies appear uncertain as to the state and condition of some of these assets as, notwithstanding the fact that they are company assets, there is currently no incentive to ensure their continuing maintenance or the keeping of detailed records of their operation. However, to suggest that there is a potential problem because the Companies have insufficient information about these individual assets is not an argument in favour of not imposing general conditions. Moreover, such an approach is not an appropriate way to manage or regulate assets that have the potential to have detrimental environmental impacts.

[6] EA SoC Document Folder item 6 – para.2.1 + Matrix Case 6.
[7] EA SoC Document Folder item 7a.

27. I have already noted above that the Companies are happy to accept, with modification, Conditions 1, 3 and 4. However, these conditions are limited in their impact. Condition 1 defines the discharge as 'storm sewage effluent resulting from rainfall or snowmelt into the sewerage system'; Condition 3 addresses maintenance issues; while Condition 4 is concerned with pumping station emergency overflows. In the absence of Condition 2 there would be no enforceable conditions aimed at ensuring no deterioration in discharge quality, nor any penalty following an unacceptable discharge event.

28. For the Companies it was argued that they had powerful incentives to remedy any unsatisfactory discharge and that they would wish to cooperate with all bodies who have relevant responsibilities or interests. It was also argued that, in the unlikely event that the Companies changed their responsible approach to these CSOs, there were proportionate statutory mechanisms to enforce compliance with their relevant obligations under the UWWT[8] Directive and Regulations, and that OFWAT, the Secretary of State and the Welsh Assembly had a duty to use their powers to achieve the results required by that and other Directives, as well as duties under the WIA[9] to issue enforcement notices. Those duties include, under Schedule 2 of the UWWT Regulations the design, construction and maintenance of collecting systems in accordance with BTKNEEC[10] regarding, inter alia, the limitation of pollution from storm water overflows.

29. While I accept that powers of enforcement do not reside solely with the EA, there was no suggestion that OFWAT, the Secretary of State or the Welsh Assembly had exercised their powers in the circumstances of individual unacceptable discharge events. Moreover, the fact that there have been very few such events is not a justification for failing to impose an appropriate level of regulation capable of enforcement on a case by case basis by the EA.

30. Evidence of Fish Legal is that there had been very few occasions where it had sought redress through the courts, and this had been by way of suing for damage caused rather than seeking a private prosecution on the grounds of breach of consent. However, Fish Legal also noted that while there had been a small number of intermittent discharge events which had resulted in fish mortality, the absence of enforceable conditions had meant that the EA were unable to bring appropriate penalties to bear on the Companies concerned.

31. The terms of sub-paragraph 3(4) to Schedule 10 to the 1991 Act at (a) – (g) indicate a range of matters that may be the subject of conditions imposed on a discharge consent, and for the Companies it was argued that this somehow prescribed the scope of the conditions to be imposed. However, to take such an approach would place a significant constraint on the freedom of the EA, as expressly set out in sub-paragraph 3(4) to impose 'such conditions as the Agency may think fit'. The approach to the acceptability of imposing conditions on planning permissions is set out as 6 'tests' in the former Department of Environment Circular 11/95. Although not benefiting from separate circular guidance specific to the granting of discharge consents, a parallel approach to these tests has been used in previous discharge consent determinations at appeal. In these instances decision makers have sought to ensure that any

[8] Urban Waste Water Treatment
[9] Water Industries Act
[10] Best Technical Knowledge Not Entailing Excessive Cost

conditions imposed satisfy the 'UNCLE' test; i.e. they are unambiguous, necessary, clear, lawful and enforceable. In support of this approach I note that the Companies' expressed their second issue as 'whether the individual conditions are lawful and/or reasonable, proportionate and otherwise acceptable'[11].

32. As noted above, the extent to which the Companies raised objection to the conditions varied in both scope and degree of concern. Not all of the Companies objected to conditions falling under headings 1, 3 and 4, and those that did accepted that, subject to some detailed and often minor changes in wording, these conditions could be made acceptable. There was, however, strong objection in principle from all of the Companies to the imposition of condition 2 and its elements i) – v) and I address this condition first.

Condition 2 - Restrictions on Discharges from Combined Sewer Overflow or Storm Tank (CSO/ST)

33. Para.2.1 states 'The discharge from a Combined Sewer Overflow ('CSO') or a sewage works storm tank shall not:

    i) cause significant visual or aesthetic impact due to solids or fungus;

    ii) cause or make a significant contribution to a deterioration in river chemical or biological class or cause other adverse environmental impact;

    iii) cause or make a significant contribution to a failure to comply with Bathing Water Quality Standards for identified bathing waters;

    iv) operate in dry weather conditions; or

    v) cause a breach of water quality standards (EQS) and/or other EC Directives' requirements.

34. Following discussion at the hearing, the 'without prejudice' amendments suggested by the EA with the aim of addressing the Companies concerns added the phrase '*so far as reasonably practicable*' after '*tank shall not*' in para.2.1. As set out in paragraph 54 below, it was also agreed that the reference to 'sewage works' before 'storm tank' was unnecessary. I shall amend the wording accordingly.

35. The requirement for discharges not to operate in dry weather conditions, (2.1.iv), was considered by the Companies to be unnecessary as it overlapped with Condition 1 as now proposed to be amended. That condition, addressed at paragraphs 55 - 58 below, defines a consented discharge from a CSO/ST as consisting of '*storm sewage effluent resulting from rainfall or snowmelt into the sewerage system*'. If a CSO/ST were to discharge in dry weather conditions it would not be operating in accordance with Condition 1. Condition 2.1.iv) is, therefore, an unnecessary duplication of what is achieved by that Condition. This is accepted by the EA. I shall quash Condition 2.1.iv).

36. The Companies are of the view that, as offences under S.85 of the WRA 1991 are strict liability offences, they and their staff would be at risk of prosecution on the first occasion of any trouble from any of these CSOs. The Companies 'in principle' objections to Condition 2.1 derive from their concern that enormous expenditure would have to be incurred to investigate the performance of these

[11] CSoC para.22

parts of their networks to avoid risk of such prosecution. As these are not unsatisfactory discharges there would be no additional funding through an AMP or IDoK[12]. The necessary funding would only be available from Companies' existing budgets and the effect of avoiding criminal liability would be likely to distort investment decisions. An example would be the lowering of the priority attached to avoidance measures such as sewage flooding.

37. In the Companies' view the criminalisation of conduct should be used as a last resort, and then where other means of achieving important social objectives have either been shown not to work or there is cogent evidence that they will not work.

38. The reality of the risk of prosecution as assessed by the EA is not accepted by the Companies. It is the EA's position that while there is always the possibility of future prosecution, immediate prosecution is not inevitable. It is EA's case that, in relation to Condition 2.1 as proposed to be amended[13], prosecution would only occur if a) the discharge was the sole or substantial cause of non-compliance with a statutory water quality objective, b) in circumstances where it was reasonably practicable to prevent it happening, and c) the checks and safeguards of the EA Enforcement and Prosecution Policy had been satisfied[14]. The Companies consider the EA's stance to be flawed. While it may currently intend normally to serve enforcement notices for a breach, there is a strong moral obligation for the Companies and their employees to obey the law. In addition, anyone, not just the EA, can prosecute, and the EA's approach in the future may change.

39. Equally important is the fact that a prosecution may arise not because there has been a breach but because someone thinks there has been a breach. Any defence would still need to be evidence based and address the scope of the matters addressed by the various conditions. Moreover, little comfort can be taken from the fact that Fish Legal had not used this mechanism in the past; preferring to sue for the damage caused rather than seeking prosecution for breach of consent. As indicated at the Hearing, Fish Legal gave no undertaking not to follow the private prosecution route in the future if thought appropriate.

40. With regard to conditions 2.1.(i)–(iii), the use of the word 'significant' was considered by the Companies to be subjective and uncertain, although I note that Appendix 8(i) para.5.4.1, in relation to normal requirements for water quality, states that 'the discharge should not cause, or *significantly* contribute to, a deterioration in water quality standards'. This and other similar objections go to the heart of the Companies' concerns with respect to most of the elements to condition 2.1. The Companies current 'modern' consents contain reference to specific flow rates of storm sewage to be maintained within the sewer, and that any intermittent discharge can only occur and be comprised of flows in excess of that specified pass-forward flow[15]. The example consent also addressed composition of solid matter by size, and the continued maintenance of the asset.

41. I accept that that level of detail readily enables the Companies to determine whether a particular discharge is operating in accordance with its consent.

[12] EA SoC Document Folder items.7 and 7a
[13] Hearing Document 4
[14] EA SoC Document Folder item 17
[15] Example - EA SoC Document Folder item 14.c.

However, as already noted, to address each of the current temporary consents in this way would be both time consuming and costly for both the EA and the Companies. It is apparent that there is a lack of information about these discharges[16], particularly flow rate data, and this was confirmed in data supplied by the Companies to Fish Legal following requests under the Environmental Information Regulations 2004[17]. To follow what has previously been the conventional approach would seriously delay the completion of a consenting process which started some 20 years ago. Moreover, until that time the EA would continue to be left with no means of applying modern standards of regulation or enforcement. This is not, however, justification for imposing conditions which fail the normal criteria of the 'UNCLE' test.

42. The EA suggested a possible rewording of Condition 2.1.(i) as follows:

(the discharge shall not) *'cause significant visual or aesthetic impact due to deposit of solids on the bed or banks of the receiving watercourse, beach or shoreline, or growth of sewage fungus on the bed of the receiving water course.'*

43. It is the EA's position that the test of 'significance' is an acceptable basis for criminal liability. While it would be a matter of fact and degree that the prosecutor would have to establish, the use of this approach is one with which the courts are familiar. I do not accept that this test is either subjective or uncertain. While some of the Companies suggested that the EA had no power to regulate visual impacts, the WFD defines pollution as including interference with amenity, while the EA 1995 imposes a duty on the EA to promote amenity. It is also to be noted that in Appendix 8(i) to Annex 8 to the 1997 Guidance to the UWWT Regs, Section 10.1, in addressing Aesthetic control, notes that the major objective in controlling CSO discharges is to minimise the presence of objectionable solids and persistent materials in water courses. Aesthetic controls and aesthetic conditions are also addressed in Appendices 8(ii) and 8(iv) of the guidance.

44. The Companies were also concerned that as the growth of sewage fungus was in part dependant on the quality of the receiving waters, over which they had no control, they could have difficulty in complying with this condition. While I note this concern, were this to be a current problem with an intermittent discharge then it would, by definition, be unsatisfactory[18] and would not, therefore, be included in a Schedule 2 list of assets the subject of these appeals. The fact that a future change in the quality of the receiving water, as opposed to the discharge, resulted in *'significant ... impact due to ... growth of sewage fungus'* would not, of itself, be a 'cause' that could be attributed to the operation of the consented discharge.

45. I am satisfied that the condition as suggested for revision would satisfy the 'UNCLE' criteria. Its wording is unambiguous, it is necessary to maintain appropriate amenity standards and discourage deterioration, and it is clear. To the extent that failure to meet this criterion is accepted as an indication of an unsatisfactory discharge, I am satisfied that its imposition would be both legal and enforceable. I shall direct the amendment of condition 2.1(i) to the revised wording suggested by the EA.

[16] EA SoC Document Folder item 15.
[17] Fish Legal letter to PINS dated 16th December 2009
[18] UWWTR Guidance - Annex 8 para.4.1(i).

46. The EA suggested a revised Condition 2.1(ii) which would replace Schedule 1 Conditions 2.1(ii), 2.1(iii) and 2.1(v). This was worded as follows:

    (the discharge shall not) *'be the sole or a substantial cause, in respect of the receiving water body, of its non-compliance with any statutory water quality objective established under any of the measures listed in Schedule 3 as extant at the date of this consent.'*

47. The Schedule 3 referred to would be a new schedule setting out a list of Regulations, Directions and Notices considered relevant by the EA and which formed the Index to those documents[19] submitted to the hearing on 21st January. In relation to Bathing Waters, it comprised 5 sets of Regulations, 1 Direction and 1 Notice; for Dangerous Substances it comprised 4 sets of Regulations, 2 Directions and 2 Notices; for Shellfish it comprised 1 set of Regulations, 1 Direction and 2 Notices; while for Fishlife it comprised 2 sets of Regulations, 1 Direction and 2 Notices. For the EA it was accepted that there were a very large number of standards derived from these documents that would need to be addressed. Setting aside biological standards, the EA estimated that there were currently some 325 physio-chemical standards that would need to be complied with as appropriate.

48. It is understandable that the EA should wish to have a set of standards against which to assess the quality of the intermittent discharges. However, because these standards relate to impact on the quality of receiving waters at a point which may be some distance from the point of discharge, determining whether a particular discharge was the cause of the alleged breach would be extremely difficult to establish. This might support the EA's stance that, as it would have to prove the breach to normal criminal evidence standards, cases would only be pursued where there was clear evidence of a breach. However, the level of information that the Companies would routinely need to collect, both up stream and, possibly, much further down stream, to ensure that they continued to operate in compliance with the consent would be disproportionate, particularly when compared with that which would be required in relation to consents currently granted, asset by asset, on the basis of information relating to the known physical characteristics and operation of those assets. The EA's position would also suggest that, other than in the most obvious cases of breach, there would be somewhat limited enforceability.

49. Set against the other 'UNCLE' criteria for acceptable conditions, I am not satisfied that the consequent high level of monitoring throughout the receiving waters system that would need to be undertaken by the Companies to ensure that they could respond to questions of compliance with these conditions (both as originally formulated or as proposed to be amended) is reasonably necessary to achieve what is sought by the EA, namely, no deterioration from the current 'not unacceptable' status of these intermittent discharges. In so far as the extent of monitoring required would be disproportionate to the environmental benefit in the context of the general lack of environmental harm currently associated with these discharges, this approach also fails to accord with the EA's published guidance on its approach to regulation, as referred to in para.20 above.

[19] Hearing Document 6

50. While the conditions requirements may appear 'clear' in terms of their scope, for the users of the system, the Companies and other interested parties, it would not be clear as to which particular standards were appropriate to be applied to the assessment of the performance of a particular discharge. In view of this lack of practicality in application I consider that the condition does not satisfy the tests of either clarity or lack of ambiguity.

51. The fact that neither the EA nor the Companies have been able to come forward with any other generic conditions that would achieve the same end is not a reason to impose conditions which so clearly fail the normally applied criteria for acceptability. The only conclusion that can readily be drawn is that, in trying to implement a non-standard approach to the determination of applications – by way of a schedule of assets rather than site by site determinations – as is the case here, the scope of acceptable conditions that could reasonably be imposed appears on the evidence available to be severely limited. I shall direct the quashing of conditions 2.1(ii), 2.1(iii) and 2.1(v). I shall also not impose revised Condition 2.1(ii) as proposed to be re-worded by the EA.

52. This is in no way a criticism of the EA's attempts to impose enforceable conditions that aim to ensure that there is no deterioration in the quality of discharges and that encourage the Companies to continue to undertake appropriate management and maintenance of these assets at a level where unacceptable discharge events are avoided. Moreover, while not entirely an ideal situation, should any of these discharges become 'unsatisfactory', then new individual consents would be required either with the agreement of the Companies, and I note their expressed position with regard to maintaining environmental quality as set out at para.13 above, or by a review of the consent by the deletion of an offending asset from Schedule 2 and the issuing of a site-specific consent, albeit that that review could not take place in less that 4 years without the relevant Company's consent.

Condition 1 – Nature of Discharge from Combined Sewer Overflow or Storm Tank

53. Para.1.1 states 'A discharge from a Combined Sewer Overflow ('CSO') or a sewage works storm tank shall consist solely of storm sewage effluent resulting from rainfall runoff or snowmelt into the sewerage system'.

54. The headings to this and other conditions refer to combined sewer overflow and storm tank, whereas the conditions themselves refer to CSO and sewage works storm tank. For the Companies it was argued that, in the context of storm tanks, the reference to sewage works was inappropriate because it would exclude any storm tanks in the sewerage system not located at sewage works. This was accepted by the EA. I also accept that reference in these conditions to 'sewage works storm tanks', rather than just 'storm tanks' is both unnecessary and incorrectly limiting in its intended application and I shall direct that the words 'sewage works' be deleted.

55. The Companies' main objection to the wording of this condition was not on the basis of principle, but rather a doubt that the precise wording would achieve what the EA intended. It was suggested that the use of the phrase 'consist solely' would allow the rainfall runoff or snowmelt to be discharged but not the sewage element that comprised a part of it, and that it would be impractical to separate this element from the storm discharge.

56. The Companies were also concerned that legitimate flows due to infiltration, which were in any event not wholly under the Companies' control, would become instantly illegal.

57. For the EA it was accepted that at times of high rainfall or snowmelt there was the potential for some infiltration of the system due to elevated groundwater levels caused by that high rainfall or snowmelt. However, the EA is concerned to ensure that the wording of this condition does not allow for or encourage any deterioration in the resistance of the sewerage network to infiltration from groundwater and that normal levels of maintenance are maintained.

58. The Companies' objections would be overcome by the removal of the word 'solely'. For its part the EA also indicated that the condition reworded in that way would be acceptable. I am satisfied that, to the extent that this revised condition would only allow a discharge from a CSO or storm tank to occur at times of storm flows due to rainfall or snowmelt, it would encourage the Companies to ensure that the levels of maintenance undertaken would be such as to resist deterioration in the sewerage system and consequential increases in levels of infiltration at non-storm times.

59. I shall direct that the condition is amended accordingly.

Condition 3 - Maintenance of Combined Sewer Overflow or Storm Tank

60. Para.3.1 states 'The overflow, and any screening system, of a Combined Sewer Overflow ('CSO') or a sewage works storm tank shall be maintained in an effective and efficient operational condition.

61. Subject to the omission of the words 'sewage works', this condition is acceptable to the Companies. In the light of my comments in relation to Condition 1 above, I shall make the appropriate direction.

62. Para.3.2 states 'Where an alarm or telemetry system has been provided it shall be maintained in working order to provide warning of screen failure or operation of the Combined Sewer Overflow (CSO) or a sewage works storm tank.

63. The principal of this condition is not at issue, although both the Companies and the EA suggest minor rewording. For the Companies it was argued that the wording as proposed by the EA would include all telemetry systems, irrespective of whether they were installed to provide warning of screen failure or abnormal operation, and would also apply to temporary as well as permanent installations. I accept that the purpose of the condition is to provide warning of screen failure or abnormal operation, and that it is this equipment that needs to be maintained. This was acknowledged by the EA. In addition, this condition should again omit reference to 'sewage works'. I shall direct that the condition be reworded as follows: '*Where an alarm or telemetry system is installed to provide warning of screen failure or abnormal operation of the Combined Sewer Overflow (CSO) or a storm tank, it shall be maintained in working order*'.

64. Para.3.3 states 'Where equipment for the separation of solids to the standards set out in the Government Guidance Note of July 1997 on Implementation of the Urban Waste Water Treatment (England and Wales) Regulations 1994 is not provided and the Discharge from a Combined Sewer Overflow (CSO) or a

sewage works storm tank results in unsatisfactory solid matter being visible in the receiving waters or on the banks of the receiving waters, beach, or shoreline, in the vicinity of the outfall, the Consent Holder shall take all reasonable steps to collect and remove such matter as soon as reasonably practicable after the discharge has been reported.

65. The objective of this condition is not at issue. However, for the Companies it was argued that the preamble to the condition, with its references to the Guidance Note and the UWWT Regulations, is unnecessary. In addition, while it is unlikely that there would be any 'unsatisfactory solid matter being visible' for any overflow that had 'equipment for the separation of solids' provided, it is unnecessary to make any distinction. I shall direct that the wording of the condition be modified as follows: '*Where the Discharge from a Combined Sewer Overflow (CSO) or a storm tank results in unsatisfactory solid matter being visible in the receiving waters or on the banks of the receiving waters, beach, or shoreline, in the vicinity of the outfall, the Consent Holder shall take all reasonable steps to collect and remove such matter as soon as reasonably practicable after the discharge has been reported.*'

Condition 4 - Discharges from Emergency Overflows

66. Condition 4 addressed five aspects of discharges from Pumping Station Emergency Overflows (Schedule 1 paragraph nos.4.1 – 4.5).

67. Para. 4.1 – 'Nature' states:

(a) The Discharge from a Pumping Station Emergency Overflow (PSEO) shall only occur in an emergency when the sewage pumping station is inoperative as a result of one or more of the following:

i) electrical power failure or electronic control failure not due to the act or default of the Consent Holder, its agents, representatives, officers, employees or servants;

ii) mechanical breakdown of duty and standby pumps;

iii) rising main failure;

iv) blockage of the downstream sewer not due to the act or default of the Consent Holder, its agents, representatives, officers, employees or servants;

and it is not reasonably practicable to dispose of the sewage otherwise.

(b) There shall be no undue delay on the part of the Consent Holder in remedying any such failure or breakdown as set out in 4.1(a) above, and any storage provided for use in an emergency shall be fully utilised before a discharge occurs.

68. Condition 4.1 was not objected to or modified in subsequent discussions on the conditions. It is included in Schedule A to this decision below for completeness.

69. Para.4.2 – 'Telemetry' states: A 24 hour response telemetry alarm system shall be provided and maintained to give notification of failure or breakdown of the pumping station.

70. In granting to the predecessor to DCWW in 1989 the temporary consent for pumping station emergency overflows, the NRA had not included a condition requiring the provision of telemetry equipment. For the EA it is acknowledged

that that temporary consent had differed from those issued to the companies in England. The English companies had not objected to this condition and it is included in Schedule A to this decision for completeness.

71. Para 4.3 – 'Standby' states: Where a standby pump or a standby generator is provided it shall be maintained in working order.

72. While YWSL had objected to this condition generally as one of the group of conditions 4.1 – 4.5, this objection was not subsequently maintained in the Companies' joint case.

73. Para.4.4 – 'Pumping station failure rectification' states: Where a pumping station (emergency overflow)(failure) takes place, the Consent Holder shall notify the Environment Agency forthwith, or if that is not possible as soon as reasonably practicable, and any failure of the pumping station shall be rectified as soon as reasonably practicable.

NB. Only the final determination issued to Thames Water Utilities Ltd (TWUL) referred to pumping station failure. In the other 5 determinations the subject of the joint case the reference is to 'Where a pumping station emergency overflow takes place'. For the EA it was accepted that this was an error in TWUL's determination and that para.4.4 of its consent should also have referred to 'emergency overflow' and not to 'failure'.

74. The Companies point out that the use of the term 'forthwith' in addition to 'as soon as reasonably practicable' is unnecessary; a view with which I concur, and I shall direct amendments to this condition as appropriate.

75. Para.4.5 - Clean Up states: Where equipment for the separation of solids to the standards set out in the Government Guidance Note of July 1997 on Implementation of the Urban Waste Water Treatment (England and Wales) Regulations 1994 is not provided, and the discharge from a Pumping Station Emergency Overflow (PSEO) results in unsatisfactory solid matter being visible in the receiving waters or on the banks of the receiving waters, beach, or shoreline, in the vicinity of the outfall, the Consent Holder shall take all reasonable steps to collect and remove such matter as soon as reasonably practicable after the discharge has been reported.

76. The Companies concerns with regard to this condition reflect those addressed with respect to condition 3.3, and the revised wording for that condition should similarly apply to discharges from PSEOs.

Conclusion

77. In the light of the above I direct the Environment Agency to replace the conditions set out in Schedule 1 to the Consent for Discharges of Storm Sewage and Sewage in an Emergency dated 14th April 2009 by those set out below in Schedule A to this Decision.

Edward A Simpson

Inspector

Schedule A –

Conditions to be imposed as replacement to conditions 1.1 – 4.5 as set out in Schedule 1 to the Notice of Determination of Applications for Consent for Discharges of Storm Sewage and Sewage in an Emergency granted to United Utilities Water Plc as Consent Holder and dated 14th April 2009.

1. Discharge from Combined Sewer Overflow or Storm Tank

1.1 A discharge from a Combined Sewer Overflow ("CSO") or storm tank shall consist of storm sewage effluent resulting from rainfall or snowmelt into the sewerage system.

2. Restrictions on Discharges from Combined Sewer Overflow or Storm Tank

2.1 The discharge or discharges from a CSO or storm tank shall not so far as reasonably practicable cause significant visual or aesthetic impact due to deposit of solids on the bed or banks of the receiving watercourse, estuary or a beach, or growth of sewage fungus on the bed of the receiving watercourse.

3. Maintenance of Combined Sewer Overflow or Storm Tank

3.1 The overflow, and any screening system, of a CSO or storm tank shall be maintained in an effective and efficient operational condition.

3.2 Where an alarm or telemetry system is installed to provide warning of screen failure or abnormal operation of the CSO or storm tank, it shall be maintained in working order.

3.3 Where the Discharge from a CSO or storm tank results in unsatisfactory solid matter being visible in the receiving waters or on the banks of the receiving waters, beach, or shoreline, in the vicinity of the outfall, the Consent Holder shall take all reasonable steps to collect and remove such matter as soon as reasonably practicable after the discharge has been reported.

4. Discharges from Emergency Overflows

4.1 Nature

(a) The Discharge from a Pumping Station Emergency Overflow ('PSEO') shall not occur other than in an emergency and when the sewage pumping station is inoperative as a result of one or more of the following:

(i) electrical power failure or electronic control failure not due to the act or default of the Consent Holder, its agents, representatives, officers, employees or servants;

(ii) mechanical breakdown of duty and standby pumps;

(iii) rising main failure;

(iv) blockage of the downstream sewer not due to the act or default of the Consent Holder, its agents, representatives, officers, employees or servants;

and it is not reasonably practicable to dispose of the sewage otherwise.

(b) There shall be no undue delay on the part of the Consent Holder in remedying any such failure or breakdown as set out in 4.1(a) above, and any storage provided for use in an emergency shall be fully utilised before a discharge occurs.

4.2 Telemetry

A 24 hour response telemetry alarm system shall be provided and maintained to give notification of failure or breakdown of the pumping station.

4.3 Standby

Where a standby pump or a standby generator is provided it shall be maintained in working order.

4.4 Pumping Station Failure Rectification

Where a pumping station emergency overflow takes place, the Consent Holder shall notify the Environment Agency soon as reasonably practicable, and any failure of the pumping station shall be rectified as soon as reasonably practicable.

4.5 Clean up

Where the discharge from a PSEO results in unsatisfactory solid matter being visible in the receiving waters or on the banks of the receiving waters, beach, or shoreline, in the vicinity of the outfall, the Consent Holder shall take all reasonable steps to collect and remove such matter as soon as reasonably practicable after the discharge has been reported.

----------*----------

APPEARANCES
FOR THE ENVIRONMENT AGENCY:

Charles Morgan of counsel	Instructed by Jeremy Graydon, Solicitor, Environment Agency
He called	
Mr C Chubb BSc, ChBiologist, MIBiol MCIWEM	Policy Manager - Water Quality, Environment Agency
Mr J Sweeney MCIWEM	Manager, National Permitting Service, Environment Agency

FOR THE APPELLANT COMPANIES:

Robert McCraken QC and Maurice Sheridan of counsel	Instructed by Anamika Paul, Solicitor, Legal Department, United Utilities Water Plc, First Floor, Grasmere House, Lingley Mere Business Park, Lingley Green Avenue, Great Sankey, Warrington WA5 3LP
They called	
Mr J Martin BSc, MSc, MCIWEM	Waste Regulation Manager Severn Trent Water Ltd.
Mr H Brett BSc	Wastewater Policy and Strategy Manager, Thames Water Utilities Ltd
Mr A R Andrews BSc	Waste Water Regulation Manager, Dwr Cymru Cyfyngedig (Welsh Water)

INTERESTED PERSONS:

Guy Lindley-Adams, Solicitor	Fish Legal, Eastwood House, 6 Rainbow Street, Leominster, Herefordshire HR6 8DQ
Dr Justin Neal, Solicitor	Fish Legal

ADDITIONAL DOCUMENTS SUBMITTED AT THE HEARING

Document	1	Lists of persons present at the hearing.
Document	2	Folder of Responses to EA case on behalf of the Companies.
Document	3	Folder of Documents with Doc.2 above.
Document	4	Alternative Wording of Conditions V.3 submitted by EA
Document	5	Alternative Wording of Conditions submitted on behalf of the Appellant Companies
Document	6	Folder of Regulations, Directions and Notices (draft Schedule 3)
Document	7	River Basin District Surface Water and Groundwater Classification (Water Framework Directive)(England & Wales) Direction 2009 dated 21 Dec.2009
Document	8	Closing Submission on behalf of the Environment Agency
Document	9	Extract from Health and Safety at Work Act 1947 S.15 and S.33, and extract from HSE publication 'Health and safety regulation – a short guide'
Document	10	Closing Submissions on behalf of the Appellant Companies

---------*---------