

STATES OF JERSEY



DRAFT MEDIUM TERM FINANCIAL PLAN ADDITION FOR 2017 – 2019 (P.68/2016) – ELEVENTH AMENDMENT

Lodged au Greffe on 13th September 2016
by Deputy K.C. Lewis of St. Saviour

STATES GREFFE

DRAFT MEDIUM TERM FINANCIAL PLAN ADDITION FOR 2017 – 2019
(P.68/2016) – ELEVENTH AMENDMENT

1 PAGE 2, PARAGRAPH (a)(i) –

To agree in principle that the payment of recurring water charges (“water rates”) or the cost of supplying drinking water, as appropriate, attributable to all properties previously affected by pollution from the Airport Fire Training Ground (except for those where a legally-binding agreement is entered into with the States of Jersey or the Ports of Jersey in relation to water supply following such pollution) shall continue until such time as water from all the boreholes and wells supplying such properties have been declared (on an individual basis) safe for drinking purposes in respect of such pollution (that declaration to be made by the Minister for Health and Social Services in accordance with the Appendix to the report accompanying this amendment), and in consequence thereof, after the words “as set out in **Summary Table B**,” insert the words –

“except that the net revenue expenditure of the Department for Infrastructure shall be increased each year by an amount to be calculated by the Treasury and Resources Department sufficient to cover the payments in relation to such water supply”.

2 PAGE 2, PARAGRAPH (a)(ii) –

After the words “as set out in **Summary Table C**”, insert the words –

“except that the total proposed central contingency allocation shall be decreased each year by an amount to be calculated by the Treasury and Resources Department to cover the amounts identified in paragraph (1) above”.

3 PAGE 3, NEW PARAGRAPH –

After paragraph (d) insert new paragraph as follows –

“(e) to request the Minister for Treasury and Resources to seek to increase the dividend payments from Ports of Jersey by an amount sufficient to cover the payments in relation to water supply set out in paragraph (a)(i).”.

DEPUTY K.C. LEWIS OF ST. SAVIOUR

REPORT

Purpose/Summary

The purpose of this amendment is to bring some clarity and relief for residents of St. Ouen's Bay (both of St. Brelade and St. Peter), who have for decades been affected by the pollution to their water supplies which was caused by the Airport Fire Service, who for a period of time used foam which contained a carcinogenic chemical during their training at the western end of the Airport.

It has been specifically admitted, on at least 2 occasions, that the Airport, under the direct control of the States of Jersey, caused the pollution.

“When the rig became operational in late 1991, appliances started to discharge foam on a regular basis during all training sessions. It was the discharge of this foam on a regular basis and the passage of that foam in the groundwaters and rainwater falling on the FTG [“Fire Training Ground”] and moving through the shale that gave rise to the water pollution to the west of the Airport.”

[\[Jersey Airport: Fireground Remediation – Deed of Settlement – P.176/2004\]](#)

For the last 2 decades, residents have received assurances and promises which they felt they could rely upon, that the Airport would act in good faith and accept responsibility for the poisoning they caused.

It is now clear that the approach of the newly-incorporated body is far different to the approach previously followed. Residents are concerned that the assurances previously given are no longer being adhered to.

It is therefore important to understand some of the background of this long-running saga, and why it has been felt necessary to bring this matter back to the States.

Background

In 1985, a member of the Public wrote to the Airport stating that “*foam was present some thirty yards from a well*,” and drawing to their attention the possibility of contamination to well water on the neighbouring farms. A swift response was received from Jersey Airport offering various reassurances, and stating that “*the only media used to fight training fires is water. The type of foam we would use at an aircraft accident is both too expensive and too effective to use on training fires.*”

It is assumed that borehole and well users continued to drink their water at this time.

Slightly less than 5 years later, there is correspondence to a different residence from the Official Analysts Laboratory –

“... *The result of the analysis was that the sample contained Butyl Carbitol which is a constituent of 3M's Light Water Foam and also of Angus Petroseal both of which had been used at the airport....*”.

In June 1990, the resident raised the matter directly with the Airport Director and the then President of the then Harbours and Airport Committee –

“... Last February I had occasion to attend to a blockage in a land drain which runs through my field ... I was surprised to find large quantities of foam coming from the drain ... Bearing in mind that the drain in question is some three feet below the ground level, it is surely not unreasonable to assume that at some stage my well water supply could easily become contaminated...”.

The Airport Director was unclear ‘*how the water in a field could possibly contain any Light Water Foam used by the Airport*’, but undertook to engage the then Public Services Department to help trace the contamination.

It is assumed that borehole and well users continued to drink their water at this time.

At the end of 1993 (some 3½ years later), the Airport Director wrote on Jersey Airport letterhead, stating (amongst other things) –

- (1) *“I agree that Jersey Airport has been responsible for the contamination in the well at your farm...”*;
- (2) apologising;
- (3) ... and agreeing that a new borehole needed to be provided (with the attendant works).

It is assumed that borehole and well users continued to drink their water at this time.

A public meeting was held with the Harbours and Airport Committee, and the Jersey New Waterworks Company agreed to alter its capital program such that a new main was installed during 1994/1995. Some 15 of the 23 affected householders took up the offer to link into the new water main.

At this point, I should point out that it was still unclear at this stage as to what the effect of the contamination was. It was also the view of some of the residents that the borehole water was better than the mains water they were being asked to connect to. It should also be noted that in the question answered by Senator A.J.H. Maclean earlier this year¹ he stated that approximately 76 households and businesses had been affected, significantly higher than the original figure of 23.

One of the key matters being raised at this point (if not earlier) was that by being connected to mains water, users were suddenly being forced to give up what had been (in their view) a good, and mainly free, supply of water. Their view was (amongst other matters) that the Airport, as polluter, should be taking responsibility for its actions, not only by providing an alternative supply of water, but also putting them back into the position they had previously been in – namely that the costs of this connection and supply should be the responsibility of the Airport whilst the water was polluted (i.e. not safe to drink). In general, this meant not only paying for the costs of connection, but also paying for the costs of supply – namely, water rates.

On 18th January 2005, the States Assembly debated and approved [P.176/2004 – Jersey Airport: Fireground Remediation – Deed of Settlement](#). The debate was held *in camera*, and basically related to the approval of a settlement from the manufacturer of the fire-fighting foam (3M) to the amount of approximately £2.6 million. This was used to offset

¹ Hansard – 28th June 2016

the expenditure on remediating the Fire Training Ground (“FTG”), which, including related aspects, amounted to approximately £6.5 million.

The then Health and Social Services Committee presented Comments (against the proposition) – [P.176/2004 Com.\(3\)](#). It was apparently based on ‘research and opinion’ ‘by the Director of the Chemical Accident and Poison Unit of the U.K. Health Protection Agency, and included the following remarks –

“The list of commercial and residential properties within the plume of pollution should be updated and where bore-hole water is used for human consumption, properties should be connected to the mains water supply. Where water is used for other purposes, the potential environmental and health significance of this should be investigated. The need for this exercise, which will need to continue for an unknown number of years, and any further remediation required, follows the use of PFOS at the Fire Training Ground. These future financial implications should have been taken into consideration as part of any financial settlement.”

The science of PFOS and related chemicals is in its infancy. It is likely that within, say, 10 years, we will know far more about the health impact of this chemical on human health. Early pointers are that PFOS may have significant effects; it is certainly far too soon to say it is “safe”. This level of uncertainty makes it unwise for the States to assume that PFOS represents no threat to human health or to the environment when the Assembly considers this settlement.”

On 2nd February 2005, a resident received a letter from the Team Leader for Community Health, i.e. from the States of Jersey Health Protection Unit. The letter confirmed the presence of ‘PFOS’ – i.e. Perfluorooctyl sulphate – at a level of 1.7 parts per billion (“ppb”). The letter stated –

“PFOS was the primary compound used in Airport Fire Fighting Foam (“AFFF”) which was used by the Airport Fire Service in the Fire training ground until 1995/1996. A health limit for PFOS has been provisionally agreed by the US Environmental Protection Agency (EPA”) at 1 ppb.” [Note – this is also displayed as 1.0 µg/l].

The letter also stated that –

“PFOS is a persistent, bioaccumulative and toxic to mammalian species. Epidemiologic studies have shown an association of PFOS exposure and the incidence of bladder cancer. Further work is needed to understand this association...”

These remarks (including the level of 1 ppb provisionally agreed by the US EPA, and the reference to bladder cancer, were broadly repeated later in the year in a further letter from Health Protection. The letter also identified various pathways that ‘may account’ for PFOS exposure, including –

- (a) inhalation from aerosol applications of PFOS;
- (b) inhalation, dietary or dermal exposures.

They were again repeated in 2006.

In 2007, the then Deputy A.J.H. Maclean of St. Helier wrote to residents updating them on the installation of the water main in St. Ouen's Bay and indicating that a draft settlement agreement was to be forwarded in the very near future –

“The Settlement Agreement will cover such issues as the payment of water rates, etc.”.

An extract from the draft settlement dated July 2007 states –

“... The Minister shall until Regulatory Approval is given, indemnify the Landowner against ... the sums the Landowner from time to time incurs as water charges...”.

A more detailed letter dated 2nd July 2007 from Deputy Maclean stated –

“... we have decided that all residents who have in the past experienced any level of PFOS contamination in their borehole supply, shall have the cost of their connection to the mains water supply reimbursed as well as having their water rates paid for an, as yet, unspecified period of time ...”.

[It should be noted that this applied to both commercial users and non-commercial users in the bay.]

It is understood that, in 2012, the Airport Director suggested that this should be for a period of 25 years. It is certainly the case that this is the period used by the Head of Property for Ports of Jersey in correspondence in the same year. It should be noted that a number of residents are, by this time (and indeed for a number of years previously), asking why the settlement agreement is taking so long to produce.

In December 2014 the Deputy CEO wrote to residents. The letter included the following –

“... We wish to try to reach a reasonable and satisfactory settlement with all property owners and believe the timing is right with the new Government being formed this year. To this end a briefing paper is being prepared for the new Minister for Economic Development ... We would anticipate being able to respond to you early in the New Year ... We would remind you any water naturally occurring in, on or under the Property should not be used for Prohibited Purposes⁽¹⁾ until Regulatory Approval⁽²⁾ is given ...”.

[⁽¹⁾ Means (i) drinking or eating, (ii) cooking of any food, drink or beverage, (iii) washing, bathing (including recreational bathing) or showering including, but not limited to the washing or brushing of teeth, dentures or any other medical device or appliance, (iv) any food preparations (to include the washing of food) (v) watering or feeding of any animal or livestock, and (vi) the supply of water naturally occurring in, on or under the Property to a third party for any of (i) to (v) above.

(2) Means a written and considered statement by the Minister for Health and Social Services (based on the scientific knowledge on the date of making the statement) the terms of the effect of which is that water naturally occurring in, on or under the Property is no longer unpotable or unwholesome only as a result of the presence of substances which appear to be reasonably attributable to Jersey Airport's use of firefighting foam”].

[It should be noted that, by this time, Ports had been paying water rates/supplying bottled drinking water for a number of properties for a number of years.]

In 2016 the tone appears to considerably change. The attitude of Ports has publicly been described as bullying². In a letter issued by Ports to another property in 2016, reference is made to this matter as follows –

*“Following the incorporation of the Ports of Jersey Ltd. (“Ports”) and the transfer of Jersey Airport to Ports, Ports has undertaken a review of the historic pollution in the St. Ouen’s Bay Aquifer. As you know, a possible source of the contamination was **asserted** to have been the use of fire-fighting foam used for fire training purposes at Jersey’s Airport’s Fire Training Ground, which it has been **asserted** caused (whether directly or indirectly) water naturally rising or occurring in, or under properties in the St. Ouen’s Bay Area, to the west of Jersey Airport (the ‘Plume Area’) to become polluted (the ‘Historic Incident’) ...*

Payment of Water Charges

You incorrectly seek to rely upon draft settlement agreements and correspondence previously circulated by the States of Jersey as constituting some sort of binding commitment that the States of Jersey made (and which you are asserting that Ports is now required to honour) that the [Property’s] water rates will be paid until regulatory approval is given.

There is no binding commitment or contract between the States of Jersey and the [Property’s], which Ports is required to honour. From the correspondence you have provided to us, drafts of settlement agreements were circulated by the States of Jersey. However, terms were never finalised nor agreed upon by the parties. In this regard, we note that consent was not reached between the parties as to the terms of the settlement.

The fact that Jersey Airport (and subsequently Ports of Jersey) has continued to make payment of the water rates does not support the assertion that a binding commitment was provided by the States of Jersey or that a binding agreement was reached between the parties. In this respect, we note that the [Property’s] did not enter into a binding agreement by which it agreed not to bring a claim against Ports in return for Ports making payment of the [Property’s] water rates ...”.

Senator Maclean also confirmed to a separate resident –

² JEP: 7th July 2016

“... I understand that Ports of Jersey have undertaken rigorous water testing over the years and are dealing with property owners on a case by case basis, to reflect whether and, if so, the extent to which property owners have suffered any damage as a consequence of the historic incident. You refer to Ports of Jersey having “renege on the long standing agreement”. However, it is impossible for Ports of Jersey to renege on an agreement, in circumstances where an agreement has not been reached ...”.

On 28th June, I asked the following question of Senator Maclean –

“... Now they have been incorporated, are Ports trying to renege on previous undertakings made to this Assembly, to the public and to affected owners?”

Senator A.J.H. Maclean:

To take the last part of the question first, the Ports of Jersey are certainly not attempting to renege at all...”.

In essence there has been a dramatic change in stance. A public body had clearly been taking responsibility for a serious problem they had caused. Now, the newly-formed company for that body is trying (in the views of residents) to renege on previous, long-standing undertakings, when the problem still exists.

To quote one resident recently – they felt that the change of direction by Ports of Jersey was ‘immoral’, ‘a breach of faith, trust and good intentions by both parties, former and present to reach an amicable settlement’.

To date it is known that one resident has been required to sign an agreement, and was publicly prepared to say that he felt ‘bullied’ into signing that agreement. It has become evident that a number of other properties have basically just been told that they were now required to pay water rates, even though there is a lack of clarity as to whether they have a safe borehole or not.

It is clear that most affected residents remain of the view that unless the water can be declared safe for drinking purposes (in respect of the pollution by the Airport), then it should remain the responsibility of the polluter.

As a Parliament, it is our role to look after the interests of the Public, and I would also suggest, to maintain the Trust the Public have in us. It is this kind of legalistic approach that damages that Trust.

Whilst I can fully understand the costs to Ports of Jersey, they accepted responsibility for them, and it was the Airport that caused the pollution. Once that pollution declines to a level where the water is safe to drink (in respect of that pollution), then it is clearly the case that it would not be appropriate to pay for the cost of supplying water.

However, that pollution still exists in the St. Ouen’s Bay area today. Readings for PFOS contamination taken over a number of years in the affected area show that the level of contamination does not show a pattern of gradual decline; rather, readings taken at the same property can decrease, and then at the very next reading *increase*. This is why PFOS contamination tests must show a safe limit for a number of years before it is reasonable to deem the ground water safe for a user.

The amendment

Broadly speaking, this amendment sets out to achieve 3 things –

- (1) To agree a principle as to how this matter should be treated. It is intended that this is in keeping with the broad principles previously held out to affected residents of St. Ouen's Bay. Simply, that until the water is safe to drink, it is still the responsibility of the polluter to pay the costs of providing them with water. This then ties into the next paragraph. How the water is declared safe is laid out in the amendment, with reference to the **Appendix** to this report.
- (2) It is suggested that the payment of the charges should become the responsibility of the Minister for Infrastructure. I am not actually too worried which Minister should take responsibility, only that the payment of the water charges should be taken on by a body with greater political accountability to this Assembly. The payment is, for the time being, funded from contingency.
- (3) In order to ensure that this is broadly revenue-neutral (on an overall basis), the final aim of the amendment is to direct the Minister for Treasury and Resources to require a greater dividend from Ports, sufficient to cover the costs to be transferred to the Minister for Infrastructure.

Financial and manpower implications

There are no additional manpower implications arising from this amendment.

Provided that the Minister for Treasury and Resources does direct Ports to fund the charges, then there need not be any significant change in the financial impact of this amendment, in comparison to the costs incurred by Ports over the last few years.

At the time of lodging, I have not received confirmation of the exact amount involved; however, residents have previously been informed that it is between £75,000 and £100,000 per year.

APPENDIX

In relation to determining whether or not water from a borehole or well is safe for drinking purposes, for the purposes of paragraph (1) of the amendment, the following principles shall apply –

- The relevant boreholes and wells shall be monitored and tested by the States of Jersey or the Ports of Jersey at least every 6 months for a minimum of 5 years after they have been declared safe for drinking purposes.
- Water shall only be declared safe when the level of each contaminant, or combination of contaminants, in such boreholes and wells does not exceed whichever is the lower of the safe limit for each contaminant, or combination thereof, advised by the British Drinking Water Inspectorate and the United States Environmental Protection Agency for a period of at least 5 years.
- Where it is found that the level of contamination in a water sample in a borehole or well from which water has previously been declared safe for drinking exceeds a safe limit referred to above, the affected property shall fall again to be treated in accordance with paragraph (1) of the amendment until such time as the affected water is declared safe for drinking in accordance with these principles.