



Defra Bathing Water consultation – OEP response

1. Introduction

The OEP is pleased to respond to Defra's bathing water consultation.¹ Our response is structured using the headings, reforms and questions that Defra presents in the consultation. We have responded to the questions that deal with the reforms proposed (questions 9-18) and the possible wider reforms (questions 27-32). We have not responded to those questions seeking views from particular sectors to inform Defra's impact assessment (questions 19-26).

We have recently published and laid before Parliament a report on the implementation of the Bathing Water Regulations.² That bathing water report was completed before we had seen the current consultation document. Our response therefore refers to that previous report and makes additional comment as appropriate.

2. Core reform 1: Remove the automatic de-designation provision

Q9. To what extent do you agree or disagree with the proposed removal of automatic de-designation from the Bathing Water Regulations 2013 for England and Wales?

We agree in principle with this proposal. However, we have reservations about some aspects of how Defra proposes to give effect to this proposal as outlined below.

Q10. Please give reasons for your answer.

We support this proposal for the reasons set out in our bathing water report (Section 6.3). We note that the most recent bathing water results³ include a fourth successive annual failure of the site at Cromwheel (River Wharfe) to achieve 'sufficient' classification. This highlights a need to act on this matter promptly if the site is not to face automatic de-designation in the event of failing again next year even while improvements are being implemented.

While we support removing the automatic de-designation provision, however, this needs to be done with care to ensure improvements are implemented in a timely manner. This requires a robust and timetabled approach to bringing sites up to at

¹ Defra, 'Consultation on Reform of the Bathing Water Regulations 2013' (2024)

<<https://consult.defra.gov.uk/water/bathing-water-reforms-consultation/>> accessed 9 December 2024.

² Office for Environmental Protection, 'A Review of Implementation of the Bathing Water Regulations in England' (2024) <www.theoep.org.uk/report/Updating-bathing-water-regulations-could-better-protect-public> accessed 9 December 2024.

³ Defra and Environment Agency, '92% of English Bathing Waters Meet Water Quality Standards' (2024) <www.gov.uk/government/news/92-of-english-bathing-waters-meet-water-quality-standards> accessed 9 December 2024.

least 'sufficient' classification, or to higher standards where appropriate. The consultation does not address this issue.

It is not currently apparent how the achievement of bathing water objectives or the duty to increase the number of 'good' and 'excellent' bathing water sites are being pursued under the wider Water Framework Directive (WFD) Regulations.⁴ As we set out in our bathing water report (Section 6.2), there is a need for a more integrated approach to how the Bathing Water Regulations and the WFD Regulations are applied in combination.

We see that the consultation proposes to *'Implement a new provision requiring the EA [...] to review whether it is feasible and proportionate (on cost and deliverability grounds) to improve the water quality to 'sufficient' standard at any designated bathing water that has been classified as 'poor' for five consecutive years.'* We note, however, that there are already several provisions in law which should, if implemented effectively, provide for this. In particular:

- The Secretary of State and the Environment Agency (EA) have a duty to exercise their functions so as to achieve at least 'sufficient' status at all bathing waters (since 2015 – see further discussion on this date under point 5 (Q18, technical amendment 9) below).
- Bathing waters have 'protected area' status under the WFD Regulations.
- This means that the objectives for bathing waters should be included in the relevant River Basin Management Plans produced under the WFD Regulations, with measures identified to achieve those objectives.
- The WFD Regulations also include further requirements that arise in cases where objectives are not being or may not be achieved. Here, the Secretary of State and the EA must take additional action to meet those objectives.

As we have set out in our separate report on implementation of the WFD Regulations,⁵ we have considerable doubts and concerns about how these provisions are being implemented in practice. If implemented effectively, these should already ensure that action is taken promptly where any bathing water falls below 'sufficient' classification. This need not and should not wait for five years of successive failure before the matter is addressed. Before developing any new, stand-alone provision in law for improving failing bathing waters, therefore, Defra should consider whether these requirements can be implemented via more effective application of the WFD Regulations.

The consultation also says that: *'Once sources have been identified [from an investigation into a 'poor' bathing water], the EA [...] will notify the managers of the pollutant sources and instruct them to make the required improvement or modifications or construct new assets to prevent pollution.* However, the EA can only

⁴ The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017, Statutory Instrument 2017 No. 407.

⁵ Office for Environmental Protection, 'A Review of Implementation of the Water Framework Directive Regulations and River Basin Management Planning in England' (2024) <www.theoep.org.uk/report/oep-finds-deeply-concerning-issues-how-laws-place-protect-englands-rivers-lakes-and-coastal> accessed 28 May 2024.

'instruct' the managers of pollutant sources to take the necessary action if it has the functions and powers to do so, the person instructed must comply and is able to do so, and the EA has the means and resources to facilitate and enforce the necessary action. This is not always the case.

As we have noted in our reports on both the Bathing Water Regulations and the WFD Regulations, agriculture and other sectors (not just the water industry) are significant sources of water pollution. Unless effective means are found and applied to address these wider pressures, efforts to protect and improve bathing waters and wider water quality are likely to have only limited success. Government therefore needs to make sure that the necessary policy and legal mechanisms are in place, and applied effectively, to control all pressures on the water environment.

In respect of de-designation specifically:

- De-designation of bathing waters should be a last resort (as the consultation notes), to be taken only in the most extreme cases. There should be a strong presumption against de-designation and in favour of taking action to bring water quality to at least 'sufficient' standards or better.
- Any instances of de-designation should be based on a clear assessment, put forward by the EA and subject to express approval by the Secretary of State, demonstrating that at least 'sufficient' status cannot reasonably be achieved.
- Such an assessment should be based on consideration of the technical feasibility and cost proportionality of achieving 'sufficient' status, together with any natural conditions that may affect water quality.
- Measures to improve bathing waters will often have wider benefits, for example by improving the ecological quality of waters or the state of protected habitats. This should form part of the assessment, rather than dealing with bathing water issues in isolation.
- De-designations could be temporary, time-limited and subject to a timetabled review, rather than necessarily leading to 'permanent' advice against bathing.

We support the production of guidance setting out how the review process will work and what evidence will be considered. Given its significance and implications, we suggest the guidance should be statutory and subject to consultation.

3. Core reform 2: Include the feasibility of improving a site's water quality to at least 'sufficient' as a criterion for final designation

Q11. To what extent do you agree or disagree that water quality, the feasibility to improve water quality to 'sufficient' standard, physical safety and environmental protections be considered before deciding whether to designate a site as a bathing water under the Bathing Water Regulations 2013 for England and Wales?

We agree with this proposal. Again, however, we have reservations about some aspects of how Defra proposes to give effect to this proposal.

Q12. Please give reasons for your answer.

We consider such an approach could form a useful element of a 'pre-identification' process, along the lines of that in Germany as discussed in our bathing water report (Section 4.3).

We recognise that this is not intended to act as a barrier to designating new sites, as the consultation makes clear. The scheme will need to be designed and applied in a way that mitigates this risk. As part of this, Defra will need to consider how long the process will take, and over what period it is reasonable to assess the feasibility of a site achieving 'sufficient' for it to be selected for designation. Defra should also consider what information or advice is to be provided to recreational users of the site in the meantime.

Such pre-identification assessments should include all relevant benefits for the water environment, including compliance with the WFD Regulations, rather than being a balance of the costs and benefits of achieving bathing water standards in isolation. For most water bodies, the environmental objectives under the WFD Regulations are to achieve 'Good Ecological Status' (or potential) by 2027. The consideration of the affordability and proportionality of achieving 'sufficient' bathing water quality should therefore be based on the marginal costs of action beyond that needed to achieve the wider WFD Regulations' objectives.

We do not consider that it should be for proponents of new bathing waters to make the case on the feasibility of achieving 'sufficient' bathing water quality. They may not have the necessary information or expertise to undertake such an assessment. We agree that assessment should be undertaken by the EA. We suggest it should involve input from the proponents and other relevant stakeholders and include some form of public participation. The Secretary of State should make the final decision.

The consultation suggests that details of how this assessment of feasibility will work, and what evidence will be considered, would be set out in non-statutory Defra guidance. Given the significance of this issue we suggest such guidance should be statutory and subject to consultation.

We agree that wider environmental issues (such as the protection of sensitive sites) should be considered as part of the designation process. This should be covered by providing the necessary controls through effective integration with and application of other relevant legislation that would apply in this situation.

Q13. How should the public be notified that a site has been considered as a bathing water but not designated on the grounds that it is not feasible to improve water quality to a 'sufficient' standard?

It is important that proponents of rejected bathing water applications are given a clear justification as to why this decision has been made. This has not always happened in the past, which is unhelpful.

The consultation states that 'decisions cannot be appealed against', suggesting that this will continue. This seems counter to the usual principles of good governance and transparency. We think there should be an appeal mechanism. Otherwise, the only route for challenge will be legal action, for example via judicial review.

Decisions need to be communicated clearly and effectively. This should include information on whether swimming or other activities are prohibited, or advised against, so people can make informed choices. We have also highlighted in our bathing water report the need to make communications more user friendly (see Section 5.3).

4. Core reform 3: Remove the fixed dates of the monitored bathing season from the Regulations

Q14. To what extent do you agree or disagree with the proposed increase in flexibility of Bathing Season dates prescribed in the Bathing Water Regulations 2013 for England and Wales?

We agree with this proposal. As with our previous responses above, we have reservations about some aspects of how Defra proposes to give effect to it.

Q15. Please give reasons for your answer.

We support this proposal for the reasons set out in our bathing water report (see Section 4.2).

We note the suggestion in the consultation that '*season dates would be moved into guidance allowing the EA to adapt the dates to better suit local needs in the future.*' While we support the approach of flexible season dates in principle, it is not yet clear how this would work in practice. The season dates are an important part of the regime, determining when the legal requirements to undertake monitoring, classify bathing waters and provide information apply. For this reason, we suggest that the determination of season dates should be subject to a formal approval mechanism and justification under the regulations.

We therefore think the EA alone should not set or adapt the dates. Rather, we suggest that the EA should propose them for approval by the Secretary of State, with a supporting justification. Season dates, confirmed by the Secretary of State, could then be published alongside the formal list of bathing waters under the regulations.

We also suggest that the determination of season dates should be subject to public consultation and based on the extent to which sites are subject to different levels of recreational water use across the year.

We note that removing the fixed dates from the regulations could allow the possibility of season lengths being reduced at some sites. However, we assume this is not the intention as the drive appears to be for longer rather than shorter season lengths, reflecting how people increasingly use water for recreational purposes. We suggest that Defra clarify this. We also note that the proposed extension beyond bathing will likely lead to increased use over a longer period, possibly year-round.

Extending the bathing season may have an impact on the classification of bathing waters and is an important consideration. Therefore, in considering any change of bathing season, Defra will need to consider the associated impacts on classifications and people's understanding of this information.

We also agree it would be helpful to consider wider environmental issues in setting site-specific bathing seasons.

Any change in bathing seasons will have resource, sampling and analysis cost implications for the EA. These will need to be covered in full to be successful.

5. Technical amendments

Q16. Are you content with the 9 proposed technical amendments listed above?

No.

Q17. [If 'No' to Q16] Which of the 9 proposed technical amendments do you feel raises concerns or may have negative impacts?

We have observations or concerns on the following specific points.

- Technical amendment 3. Remove the seven-day time limit in which a replacement sample under short term pollution (STP) has to be taken
- Technical amendment 4. Remove the requirement for a pre-season sample
- Technical amendment 5. Specify 95th percentile z-value to three decimal places, rather than the current two places
- Technical amendment 9. Amend regulation 5(1)(a) to specify a new target date by which all bathing waters should be classified as at least 'sufficient'.

Q18. [If 'No' to Q16] What negative impacts do you foresee as a result of the technical amendment(s)?

Technical amendment 3. Remove the seven-day time limit in which a replacement sample under STP has to be taken

We question the need for this proposal. If the provision is seldom used because it is rarely needed, this suggests it should not be burdensome. And in those cases where a replacement sample is needed, it is not clear why a requirement to take this within seven days should raise 'considerable logistical challenges'.

We also think it is important to invest effort into developing approaches for more near real-time pollution risk forecasting. We discuss this in Section 5.3 of our bathing water report.

Technical amendment 4. Remove the requirement to take a pre-season sample

We disagree with this proposed change.

The overall classification of a bathing water may not be of great practical use to people who wish to visit a site on a particular day. They may be more interested in the most recent results and any current advice on bathing at that site.

The pre-season sample is therefore the most up-to-date information available when the season starts. For this reason, we do not think pre-season samples should stop.

Technical amendment 5. Specify 95th percentile z-value to three decimal places, rather than the current two places

We are not convinced that the overall accuracy and precision of the sampling and analytical procedures supports the use of three decimal places. It may imply a spurious level of accuracy.

We highlight a related point, which we consider more important in this area. This is the current use of 95-percentile evaluations for some parameters and 90-percentile for others. We suggest consideration of a single, consistent, 95-percentile approach, as also recommended by the World Health Organization. We discuss this further in our bathing water report (see Section 5.1).

Technical amendment 9. Amend regulation 5(1)(a) to specify a new target date by which all bathing waters should be classified as at least ‘sufficient’

We disagree with this proposal and question it being labelled as merely a ‘technical amendment’. Achieving ‘sufficient’ bathing waters that should have been at least at this classification since 2015 is a fundamental provision of the regulations, and a duty that rests on the Secretary of State and the EA on an ongoing basis.

Failures of bathing waters to have achieved ‘sufficient’ status since 2015 therefore represent clear instances of binding obligations not having been met. As highlighted above, this should have triggered action (and should continue to do so) not just under the Bathing Water Regulations but also under the wider WFD Regulations. Specifying a new target date in law would undo this requirement for remedial action.

We therefore think the correct approach in these instances is to determine and apply that necessary remedial action in the face of ongoing failure to meet ‘sufficient’ standards, until those standards are met. In our view, it would not be helpful to address the situation simply by ‘undoing’ the failure through changing the date.

On the other hand, we recognise that such corrective action cannot have an instant effect. We think it would be appropriate, therefore, for the Secretary of State and the EA to set out, as a matter of policy (rather than a change in the law), their assessment of what is needed to bring the bathing waters in question to at least ‘sufficient’ classification, what is going to be done and when, and the expected date(s) through which bathing waters will be brought into compliance as a result.

As previously noted, we suggest that this be done as part of the wider application of the WFD Regulations, notably in respect of Regulation 25 which deals expressly with the situation where objectives are not met (see Section 4.3.2 of our report on implementation of the WFD Regulations).

In the case of new bathing water designations, there will need to be a clear timetable for when these will achieve at least a ‘sufficient’ status. The 2015 date will not apply to these new designations.

6. Wider reforms

Wider reform 1: Clarification and expansion of the definition of ‘bathers’ to include other water users

Q27. To what extent do you agree or disagree that government should pursue wider reform of the Bathing Water Regulations 2013 for England and Wales to include widening the definition of ‘bathers’?

We strongly agree with this proposal.

Q28. Please indicate a reason for your answer

We support this proposal for the reasons set out in our bathing water report (see Section 4.1).

As the regime is intended to protect human health and to facilitate the recreational use of waters, it makes little sense to limit their application based on the consideration only of people whose express intent is to swim. All water users potentially could suffer ill health and therefore need to be protected.

Q29. Which water users should be included within the definition of ‘bather’?

Water users should be defined more broadly than the current very restrictive approach. It is known that certain groups of water users can suffer ill health effects when carrying out their activities.

Some ‘recreational water users’ already can and arguably should be considered as ‘bathers’ under the existing application of the regulations. While the regulations have been taken to refer to those whose express intention is to swim, this is not the only interpretation. A wider approach could view it as covering those who are likely to swim or may need to do so from time to time. This would include, for instance, surfers and paddle boarders. It appears counter to the intent of the regulations that they are not already included. We think this should be applied now rather than viewed as a matter of wider (and presumably later) reform.

As part of the revision of the regulations we suggest considering extending the title beyond ‘bathing’ if the coverage clearly goes beyond this. We have noted in our bathing water report (Section 4.1.3) examples from other countries, such as the USA and Japan, where wider approaches have been adopted based on different water quality standards for different recreational users. The use of public money test should be considered in the context of all recreational water users, not just swimmers.

We also highlight in our report (Section 6.5) a related issue concerning the complicated interaction between the Bathing Water Regulations and bye-laws or other local restrictions. This is already an issue in respect of swimming, and will become more of a challenge as the regime is extended to other recreational activities. We suggest, therefore, that Defra give wider consideration to issues of access to water for recreational purposes alongside this possible revision of the Bathing Water Regulations.

Wider reform 2: Use of multiple monitoring points at each bathing water site where useful to classify water quality.

Q30. To what extent do you agree or disagree that the government should pursue wider reform of the Bathing Water Regulations 2013 for England and Wales to include the use of multiple monitoring points at bathing water sites?

We strongly agree with this proposed reform.

Q31. Please indicate a reason for your answer

We support this proposal for the reasons set out in our bathing water report (Section 5.2). This will require the necessary resources and funding to be provided to the EA to carry out the additional sampling, analysis and reporting.

We note that some sites (such as Cromwheel) in fact already have more than one monitoring point for investigative purposes (though not for classification) so it is not clear why this should need to be viewed as a wider (or later) reform.

7. Potential wider changes to the Regulations

Q32. Please provide links to any relevant evidence that you have used to inform your views for this consultation. If there's anything else you'd like us to know or consider please add it here.

We have based much of this consultation response on our detailed assessment and report on implementation of the Bathing Water Regulations. As set out in that report, in addition to our responses to the questions in the consultation, we think that consideration should be given to the following:

- how to make best use of monitoring data that are currently discounted when advice against bathing is in place (Section 5.1 of our bathing water report)
- the different classification standards for coastal and freshwater bathing sites (Section 5.1)
- the need to find ways to provide information on water quality (both actual and predicted) that is easier to access and understand and of more immediate relevance to people's choices on visiting bathing waters (Section 5.3)
- creating a closer interaction between the implementation of the Bathing Water Regulations and the Urban Waste Water Treatment Regulations by linking the use of event duration monitoring for combined sewer overflows with pollution risk forecasting and the provision of advice to bathers (Section 5.3).

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