

**Investigation and Information Notice**



**Office for  
Environmental  
Protection**

The Rt Hon Steve Reed MP  
Secretary of State for Environment, Food and Rural Affairs  
Seacole Building  
2 Marsham Street  
London  
SW1P 4DF

**By email only to:** [Secretary.State@defra.gov.uk](mailto:Secretary.State@defra.gov.uk)

**CMS-384**

13 November 2024

Dear Secretary of State,

**Complaint against the Secretary of State for Environment, Food and Rural Affairs – statutory guidance on the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 (the Farming Rules for Water) – investigation and Information Notice**

I write in respect of alleged failures to comply with environmental law by the Secretary of State. This concerns statutory guidance issued by the Secretary of State under Regulation 15 of the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 ('the Farming Rules for Water').

I welcome your continued commitment to cleaning up our waterways and the recovery of nature in Minister Hardy's letter to us dated 5 November 2024. I also note that you are undertaking a rapid review of the statutory guidance based on the Terms of Reference you have provided to us and that your officials will take the OEP's legal position into consideration during the review. However, our role is to hold Government to account for compliance with environmental law. While the information you have provided addresses some of our concerns, it does not meet or address in full the actions and concerns referred to most recently in our letters of 24 September and 17 October 2024.

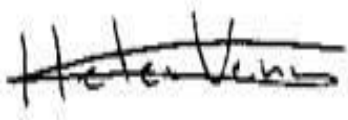
Following assessment, the OEP has decided to launch an investigation in accordance with section 33 of the Environment Act 2021 (the Act) on the basis that you may have failed to comply with environmental law and, if so, the failures would be serious. Furthermore, I enclose an Information Notice in connection with the same alleged failures to comply with environmental law which sets out the allegations, why the OEP

considers the failures, if they occurred, would be serious and the information you are requested to provide.

Under section 35(3) of the Act, you are required to respond in writing to this Information Notice and, so far as is reasonably practicable, provide the information requested in the notice. Under section 35(5) of the Act, your response should also respond to the alleged failures to comply with environmental law described in the notice and set out what, if any, steps you intend to take in relation to the allegations. You must respond to this Information Notice by 13 January 2025, which is two months from the date of this notice, in accordance with section 35(4) of the Act.

I look forward to hearing from you.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Helen Venn', with a horizontal line drawn through the middle of the signature.

Helen Venn

Chief Regulatory Officer

For and on behalf of the Office for Environmental Protection



[www.theoep.org.uk](http://www.theoep.org.uk)

**Information Notice**  
**Section 35, Environment Act 2021**

**Public Authority:** Secretary of State for Environment, Food and Rural Affairs

**Date of this Notice:** 13 November 2024

**Case name:** Investigation of potential failures to comply with environmental law by the Secretary of State for Environment, Food and Rural Affairs – statutory guidance on the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 (the Farming Rules for Water).

**Case reference:** CMS-384

## **1. Background**

1.1 The Office for Environmental Protection ('the OEP') may give an information notice to a public authority if the OEP has "*reasonable grounds*" for suspecting that the authority has failed to comply with environmental law and "*it considers that the failure, if it occurred, would be serious*" (section 35(1) Environment Act 2021). An information notice "*describes an alleged failure of a public authority to comply with environmental law*", "*explains why the OEP considers that the alleged failure, if it occurred, would be serious*" and requests information relating to the allegation (section 35(2) Environment Act 2021).

## **2. Description of alleged failures**

2.1 This Information Notice relates to the following alleged failures by the Secretary of State for Environment, Food and Rural Affairs (hereafter referred to as the Secretary of State) to comply with environmental law:

2.1.1 Unlawfully exercising and continuing to unlawfully exercise its power to give statutory guidance<sup>1</sup> to the Environment Agency ('the Guidance') pursuant to Regulation 15 of the Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 ('the Farming Rules for Water') when respectively issuing and promulgating the Guidance. This is because the Guidance contains the following statements which are inconsistent with the Farming Rules for Water:

2.1.1.1 Section 2.2 states that land managers should consider soil and crop need for nitrogen and phosphorus based on an annual crop cycle or rotation. This is inconsistent with the correct interpretation of Regulation 4(1)(a)(i) of the Farming Rules for Water, which requires that soil and crop need must be considered at the time of application of organic manure or manufactured fertiliser.

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<sup>1</sup> [Applying the farming rules for water - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/applying-the-farming-rules-for-water)

- 2.1.1.2 Section 2.2 states that land managers should plan to avoid applying organic manures that raise the Soil Phosphorus Index above target levels unless they can demonstrate that it is “*not reasonably practicable to do so*” or “*they have taken all appropriate reasonable precautions to help mitigate against the risk of diffuse agricultural pollution*”. This is inconsistent with Regulation 4(1)(a) of the Farming Rules for Water, which imposes an unqualified obligation on land managers to ensure that each application of organic manure and manufactured fertiliser is planned so that it does not exceed the needs of the soil and crop on that land or give rise to a significant risk of agricultural diffuse pollution.
- 2.1.2 Unlawfully exercising and continuing to unlawfully exercise its power to give statutory guidance to the Environment Agency pursuant to Regulation 15 of the Farming Rules for Water when respectively issuing and promulgating the Guidance. This is because the Guidance fails to take proper account of Regulation 4(1)(a) of the Farming Rules for Water and encourages land managers to act in a way which contradicts the requirements of the Farming Rules for Water.

### ***The Farming Rules for Water***

2.2 Regulation 4 of the Farming Rules for Water provides that:

*(1) A land manager must ensure that, for each application of organic manure or manufactured fertiliser to agricultural land, the application –*

*(a) is planned so that it does not –*

*(i) exceed the needs of the soil and crop on that land, or*

*(ii) give rise to a significant risk of agricultural diffuse pollution, and*

*(b) takes into account the weather conditions and forecasts for that land at the time of the application.*

*(2) When planning under paragraph (1)(a)(ii), the land manager must ensure that any factors which mean there would be a significant risk of agricultural diffuse pollution from the application are taken into account, including –*

*(a) the slope of the land, in particular if greater than 12 degrees,*

*(b) any ground cover,*

*(c) proximity of the land to inland freshwaters, coastal waters, wetlands, or to a spring, well or borehole,*

*(d) the soil type and condition of the land, and*

*(e) the presence and condition of any agricultural land drains.*

*(3) In addition to paragraphs (1) and (2), the land manager must ensure that reasonable precautions are taken to prevent agricultural diffuse pollution resulting from applications.*

*(4) Without limiting what may otherwise be done to comply with paragraph (3), examples of reasonable precautions must include –*

*(a) checking spreading equipment for leaks and correct calibration,*

*(b) incorporating organic manure and manufactured fertiliser into the soil within 12 hours of, or as soon as possible after, its application, and*

*(c) checking the organic matter content in, and moisture levels of, the soil.*

*(5) In this regulation-*

*"spreading equipment" means any machinery used for the application of organic manure or manufactured fertiliser to agricultural land and includes precision spreading equipment;*

*"wetlands" means land that is covered with or saturated by water permanently or for a significant part of the year.*

2.3 The Guidance was made under Regulation 15 of the Farming Rules for Water which states so far as relevant:

*(1) The Secretary of State may issue guidance to the Agency with respect to the exercise of the Agency's functions under these Regulations.*

*(2) In the exercise of its functions, the Agency must have regard to any guidance issued under paragraph (1)...*

2.4 Section 2.2 of the Guidance states:

*"Land managers should plan to avoid significant risk of diffuse agricultural pollution. This includes not exceeding the needs of the soil and crop on the land.*

*Land managers should consider soil and crop need for nitrogen (N) based on an annual crop cycle.*

*As a general guide, land managers should plan to avoid applying organic manures that raise the Soil Phosphorus Index (soil P index) above target levels for soil and crop on land over a crop rotation, unless they can demonstrate that:*

- it is not reasonably practicable to do so*
- they have taken all appropriate reasonable precautions to help mitigate against the risk of diffuse agricultural pollution*

*Examples of when it would not be reasonably practicable to do so include if a farm:*

- *produces and applies its own organic manure to its own land and cannot reasonably take measures to treat or manage the manure (for example, if it exports it) to avoid applications that risk raising the soil P index level of soil above crop and soil need target levels over a crop rotation*
- *imports organic manure as part of an integrated organic and manufactured fertiliser system and cannot reasonably import organic manures that would not risk raising the soil P index level of the soil above crop and soil need target levels over a crop rotation.”*

### ***Inconsistency of the Guidance with Regulation 4(1)(a)***

2.5 Section 2.2 of the Guidance contains statements which are inconsistent with Regulation 4(1)(a).

2.6 The first inconsistency arises from the following statements: (i) “*Land managers should plan to avoid significant risk of diffuse agricultural pollution. This includes not exceeding the needs of the soil and crop on the land. **Land managers should consider soil and crop need for nitrogen (N) based on an annual crop cycle***”; and (ii) “*As a general guide, land managers should plan to avoid applying organic manures that raise the Soil Phosphorus Index (soil P index) **above target levels for soil and crop on land over a crop rotation***” (emphasis added). Regulation 4(1)(a)(i) was considered in *R (River Action UK) v Environment Agency* [2024] EWHC 1279 (Admin) (‘the River Action Judgment’). The Judge held, at §§104 to 107, that the correct interpretation of Regulation 4(1)(a)(i) is that each application should be planned so as not to exceed the needs of the soil and crop on the land at the time of the application. In reaching this conclusion, the Judge considered and rejected the argument advanced by the Secretary of State that Regulation 4(1)(a)(i) should be interpreted so as to entitle consideration of the soil and crop needs over a longer period, such as an annual crop cycle or rotation.

2.7 The second inconsistency is the statement that land managers should plan to avoid applying organic manures that raise the Soil Phosphorus Index above target levels unless they can demonstrate that it is “*not reasonably practicable to do so*” or “*they have taken all appropriate reasonable precautions to help mitigate against the risk of diffuse agricultural pollution*”. The Guidance then provides examples of when it would not be reasonably practicable to do so. While it would not be objectionable to have guidance to address what land managers may do to demonstrate they have taken reasonable steps and acted with due diligence for the purposes of Regulation 12, this is not what section 2.2 of the Guidance does. It states that the requirement in Regulation 4(1)(a) to plan to avoid applying organic manure above target levels for crop and soil needs does not apply in certain circumstances.

- 2.8 This is inconsistent with Regulation 4(1)(a) of the Farming Rules for Water, which imposes an unqualified obligation on land managers to ensure that each application of organic manure and manufactured fertiliser is planned so that it does not exceed the needs of the soil and crop on that land or give rise to a significant risk of agricultural diffuse pollution. It is not a mere obligation to take 'reasonable steps' to avoid exceeding soil and crop needs.
- 2.9 The Guidance therefore purports to qualify the requirements of Regulation 4(1)(a) in a way which is not provided for in the Farming Rules for Water.

***Unlawful exercise of power under Regulation 15 of the Farming Rules for Water***

- 2.10 As stated above, Regulation 15 confers a power on the Secretary of State to issue guidance to the Environment Agency with respect to the exercise of the Agency's functions under the Farming Rules for Water. The power under Regulation 15 must be exercised consistently with, and in a way which furthers the objectives of, the Farming Rules for Water. It is thus *ultra vires* the scope of the power conferred by Regulation 15 to issue and promulgate guidance which contains statements which are inconsistent with Regulation 4(1)(a) and the overall objective of the Farming Rules for Water. As the Court observed at §105 of the River Action Judgment, the clear purpose of enacting the Farming Rules for Water is to ensure that applications of organic manure or manufactured fertiliser are tailored to the known and established needs of the existing soil and crops so as to avoid the risks of overprovisions and subsequent leaching or run-off of unabsorbed nutrients into water courses giving rise to environmental damage. The inconsistent statements in section 2.2 of the Guidance run contrary to that objective, by increasing the risk that land managers will apply manure or fertiliser to crop and soil in excess of its actual need at the time of application.
- 2.11 In addition, as stated above, the Guidance is unlawful insofar as it contains incorrect statements about the Farming Rules for Water which encourage land managers to act in a way which contradicts the requirements of the Farming Rules for Water. As the Supreme Court held in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, applying the test in *Gillick* [1986] AC 112, policy guidance which contains a misstatement of law and induces a person to act in a way which contradicts the law, is unlawful.
- 2.12 Department for Environment, Food and Rural Affairs ('Defra') officials stated in a letter to the OEP dated 22 February 2024 that the Guidance does not induce a land manager to act in a way that breaches their legal duties because it relates to criteria for the Environment Agency to keep in mind when considering enforcement action against a land manager who is already in breach of Regulation 4(1)(a) and that it is not a positive statement of what the rule means.
- 2.13 Although the Guidance's aim is to provide guidance to the Environment Agency on the exercise of its enforcement functions under the Farming Rules for Water, the Guidance is publicly available, and it is clearly envisaged that it will

be read and followed by land managers. For example, the introduction contains the statement “*If the Environment Agency determines that land managers have followed this guidance then the Secretary of State does not normally expect them to take enforcement action*”. In addition, section 2.2 reads as a statement to land managers as to the steps which they should take to comply with the Farming Rules for Water. Contrary to Defra’s assertions, it is not formulated solely as advice on enforcement but rather as a positive statement of what the Farming Rules for Water require.

- 2.14 The risk is even greater in relation to the approach to measuring soil and crop needs. The Guidance positively asserts that a land manager “should consider soil and crop need for nitrogen (N) based on an annual crop cycle” and “should plan to avoid applying organic manures that raise the Soil Phosphorus (soil P index) above target levels for soil and crop on land over a crop rotation” (emphasis added). A land manager reading this document would understandably consider it to contain an accurate statement of their obligations under the Farming Rules for Water. Applying the test in *Gillick*, as summarised by the Supreme Court at §41 in *R (A) v Secretary of State for the Home Department*, what is required is a comparison of what the relevant law requires – here the Farming Rules for Water – and what a policy statement says regarding what a person – here the land manager – should do. If the policy induces them to act in a way which contradicts the law, it is unlawful.
- 2.15 In view of the above and the analysis set out at paragraphs 2.5 - 2.9, the OEP is of the view that the Guidance may induce a land manager to think it is lawful to plan to apply organic manure or manufactured fertiliser: (i) in consideration of the soil and crop need over a longer period, such as an annual crop cycle; and (ii) where it exceeds the needs of the soil and crop at the time of application where it can be demonstrated that it is not reasonably practicable to meet target levels. In other words, the Guidance may induce a land manager to believe it is lawful to breach the obligations in Regulation 4(1)(a) in the circumstances set out in section 2.2 of the Guidance.
- 2.16 The OEP therefore alleges that the Guidance is unlawful. It follows that the OEP alleges that the Secretary of State failed to comply with environmental law and continues to fail to comply with environmental law when respectively issuing and promulgating the Guidance under Regulation 15 of the Farming Rules for Water.

### 3. Seriousness

- 3.1 Our Enforcement Policy explains how we will assess the seriousness of an alleged failure to comply with environmental law and can be found in Annex A of our Strategy: [Here](#)
- 3.2 We consider that the alleged failures at 2.1.1 and 2.1.2, if they occurred, would be serious for the following reasons:

- 3.2.1 Point of law – the alleged failures raise a point of law of general public importance: namely whether it is lawful for the Secretary of State to issue and maintain guidance under Regulation 15 of the Farming Rules for Water which contains statements which are inconsistent with obligations under the Farming Rules for Water and which induces a land manager to act in a way that breaches their legal duties.
- 3.2.2 Frequency of conduct – the alleged failures concern the lawfulness of Guidance issued by the Secretary of State which is current, and which is likely to influence the way in which land managers understand their obligations under the Farming Rules for Water. It is therefore a systemic issue relating to ongoing conduct, rather than isolated incidents.
- 3.2.3 Behaviour of public authority – in response to the OEP’s correspondence to date there has been no acceptance of any failure to comply with environmental law by the Secretary of State. This is even though the Secretary of State has been on notice that the OEP considers the Guidance to be unlawful since January 2024 and has been aware that the Guidance was produced based on an incorrect interpretation of Regulation 4(1)(a)(i) since the River Action Judgment was handed down on 24 May 2024. Defra officials are currently undertaking a rapid review of the Guidance to ensure that it is effective in progressing the Farming Rules for Water’s objectives. Defra anticipates that the review will be concluded in late November/early December and there has been an acknowledgement that the OEP’s legal position will be considered during the review. The Terms of Reference for the review state that recommendations for the Guidance moving forward will be based on the findings of the review and that options for consideration will include maintaining the Guidance in its current form, amending the Guidance, withdrawal of the Guidance and transitional arrangements to support an effective implementation and communication to all affected parties. However, there has been no evidence provided to indicate that the review will adequately address the inconsistencies with Regulation 4(1)(a) of the Farming Rules for Water, that the Guidance will be withdrawn while the review is being carried out, nor any information as to how land managers will be provided with correct information on how to comply with the Farming Rules for Water until such time as the Guidance is reviewed.
- 3.2.4 Risk of harm – the Environment Agency’s inspection data shows widespread failure by land managers to comply with the law in this area by land managers and the water environment in England is under significant pressure from agricultural diffuse pollution.<sup>2</sup> If the Statutory Guidance is left unamended, there is an increased risk of diffuse nitrogen and phosphorus pollution by inducing land managers to believe that they can measure soil and crop needs on an annual crop cycle basis and or/to believe that they will be acting lawfully if they continue to apply manure in excess of target

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<sup>2</sup> As detailed in [Review of activities regulated by the Environment Agency, 2022 - GOV.UK](#) and [Challenges data for England | Catchment Data Explorer](#)

soil and crop need levels because it would not be reasonably practicable to do otherwise.

#### **4. Our request for information**

4.1 Please provide the following information in relation to the alleged failures:

4.1.1 The Secretary of State's response to the alleged failures to comply with environmental law set out at 2.1.1 and 2.1.2 above.

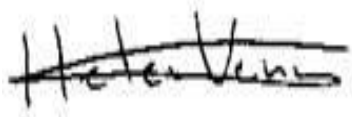
4.1.2 Any assessment of the Guidance by the Secretary of State and any specific updates intended in the planned review of the Guidance in view of the alleged failures to comply with environmental law set out at 2.1.1 and 2.1.2 above.

4.1.3 Any further steps the Secretary of State intends to take in relation to the alleged failures to comply with environmental law set out at 2.1.1 and 2.1.2 above, including confirmation of whether the Secretary of State intends to withdraw the Guidance and within what timeframe.

4.2 We draw your attention to your obligations under section 27 of the Environment Act 2021 regarding cooperation and the candid disclosure of information. You should also note section 43 of the Environment Act 2021, concerning the confidential handling of any information you provide to us.

#### **5. Date for response**

5.1 You must respond to this Information Notice within two months of the date it is given, which in this case is by 13 January 2025.



Helen Venn

For and on behalf of the Office for Environmental Protection

Chief Regulatory Officer | Office for Environmental protection

The Office for Environmental Protection

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