Decision 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
Amira.Amzour@defra.og.uk

CMS-255

12 December 2024

Dear Secretary of State,

Investigation of complaint against the Secretary of State for Environment, Food and Rural Affairs – untreated sewage discharge by sewerage undertakers via network Combined Sewer Overflows – Decision Notice

I write in respect of the above investigation into failures to comply with environmental law by the Secretary of State. Following a decision of the OEP's Board, I enclose a Decision Notice in connection with this which sets out the failures to comply, why these are considered to be serious and steps the OEP considers you should take in relation to the failures.

The enclosed Decision Notice is linked to two other decision notices, pursuant to section 37 of the Environment Act 2021, which have been issued to the Environment Agency and Ofwat respectively. Copies of the linked notices, and relevant correspondence between the OEP and the recipients of the linked notices, are also enclosed.

Under section 36(4) of the Environment Act 2021, you are required to respond in writing to the enclosed Decision Notice. Your response should set out:

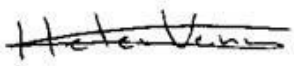
- whether you agree that the failure described in the notice occurred
- whether you intend to take the steps set out in the notice

- what, if any, other steps you intend to take in relation to the failure described in the notice.

You must respond to this Decision Notice by 12 February 2025, which is two months from the date of this notice, in accordance with section 36(3) of the Environment Act 2021.

I look forward to hearing from you.

Yours sincerely,



Helen Venn

Chief Regulatory Officer

For and on behalf of the Office for Environmental Protection

Office for Environmental Protection

www.theoep.org.uk

DECISION NOTICE

Section 36 Environment Act 2021

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

Date of this Notice: 12 December 2024

Case name: Investigation of potential failures to comply with environmental law by Ofwat, the Secretary of State for Environment, Food and Rural Affairs and the Environment Agency – untreated sewage discharge by sewerage undertakers via network Combined Sewer Overflows.

Case reference: CMS-255

BACKGROUND

1. The Office for Environmental Protection ('the OEP') may give a Decision Notice to a public authority if the OEP is satisfied, on the balance of probabilities, that the authority has failed to comply with environmental law and it considers that the failure is serious (section 36(1) Environment Act 2021). The Decision Notice is a notice which "*describes a failure of a public authority to comply with environmental law*", "*explains why the OEP considers that the failure is serious*" and "*sets out the steps the OEP considers the authority should take in relation to the failure (which may include steps designed to remedy, mitigate or prevent reoccurrence of the failure)*" (section 36(2) Environment Act 2021).

2. The legal background, legislative framework and factual context to this Decision Notice is set out in detail at Annex 1.

THE GROUNDS

3. The Information Notice of 7 September 2023 set out the OEP's description of alleged failures by the Secretary of State for Environment, Food and Rural Affairs ('the Secretary of State') to comply with environmental law which was refined in the OEP's Position Statement of 28 June 2024. Having considered the Secretary of State's response to that Information Notice, as well as the Secretary of State's response to the OEP's Position Statement of 28 June 2024, the OEP concludes on a balance of probabilities that there has been a serious failure to comply with environmental law as set out below.

   The Secretary of State has committed a serious failure to comply with environmental law in the following ways:

   (a) unlawfully failing to take proper account of environmental law when exercising the Secretary of State's functions, by:

i. drafting and promulgating guidance[1] ('the 1997 Guidance') which did not reflect the true legal extent of the duties upon sewerage undertakers under section 94 of the Water Industry Act 1991 ('the 1991 Act') (as supplemented by the Urban Waste Water Treatment (England and Wales) Regulations 1994 ('the 1994 Regulations'))

ii. failing to amend or replace the 1997 Guidance after the decision of the Court of Justice of the European Union ('the CJEU') in Commission v United Kingdom Case C-301/10 ('Case C-301/10'); and

iii. misunderstanding the true legal extent of the Secretary of State's duty under section 18 of the 1991 Act to make enforcement orders in the case of contraventions or likely contraventions by sewerage undertakers of section 94 of the 1991 Act;

in the context of discharges by sewerage undertakers from combined sewer overflows on the sewerage network ('network CSOs') in breach of the requirements of the 1994 Regulations; and

(b) Whether as a result of (a) or otherwise, unlawfully failing to exercise the Secretary of State's functions under section 18 of the 1991 Act by the making of enforcement orders in respect of known actual or likely contraventions of section 94 of the 1991 Act, when the Secretary of State was under a legal duty to do so; and

(c) Unlawfully failing to discharge the Secretary of State's duty under regulation 3(1) of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 ('the 2017 Regulations') to exercise the Secretary of State's functions so as to secure compliance with article 10(2)(a) of the Water Framework Directive 2000 (2000/60/EC) ('the WFD') by failing in respect of network CSOs to ensure the establishment and implementation of the permit conditions required to satisfy the requirements of the Urban Waste Water Treatment Directive 1991 (91/271/EEC) ('the UWWTD') for the limitation of pollution of receiving waters as clarified in Case C-301/10.

4. For the purposes of this Decision Notice:

(a) the grounds at paragraph 3(a)(i), (a)(ii) and (a)(iii) shall be referred to as "Ground One"
(b) the ground at paragraph 3(b) shall be referred to as "Ground Two" and
(c) the ground at paragraph 3(c) shall be referred to as "Ground Three".

5. The periods of failure are:

(a) for Ground One, from July 1997 to date;

(b) for Ground Two, from the expiry of the applicable deadlines set by regulation 4(2) of the 1994 Regulations to date;

[1] The Urban Wastewater Treatment (England and Wales) Regulations 1994 - Working document for Dischargers and Legislators. A Guidance Note issued by the Department of the Environment, Transport and the Regions and the Welsh Office (dated July 1997 and updated in April 2009).

(c) for Ground 3, from 2 January 2004 until December 2020 (being the period during which the duty in article 10 of the WFD applied in the United Kingdom).

6. Section 94(1) of the 1991 Act imposes duties on sewerage undertakers as follows:

(1) It shall be the duty of every sewerage undertaker-

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and
(b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.

7. Regulation 4 of the 1994 Regulations provides so far as relevant that:

(1) This regulation supplements the duty imposed on every sewerage undertaker by section 94 of the Water Industry Act 1991 (general duty to provide sewerage system) and any contravention of the requirements of this regulation shall be treated for the purposes of that Act as a breach of that duty.

(2) the duty imposed by subsection (1)(a) of the said section 94 shall include a duty to ensure that collecting systems which satisfy the requirements of Schedule 2 are provided—

(a) where the urban waste water discharges into receiving waters which are a sensitive area, by 31st December 1998 for every agglomeration with a population equivalent of more than 10,000; and
(b) without prejudice to sub-paragraph (a) above-
(i) by 31st December 2000 for every agglomeration with a population equivalent of more than 15,000; and
(ii) by 31st December 2005 for every agglomeration with a population equivalent of between 2,000 and 15,000

…

(4) The duty imposed by subsection (1)(b) of the said section 94 shall include a duty to ensure that urban waste water entering collecting systems is, before discharge, subject to treatment provided in accordance with regulation 5, and to ensure that—

(a) plants built in order to comply with that regulation are designed (account being taken of seasonal variations of the load), constructed,

operated and maintained to ensure sufficient performance under all normal local climatic conditions

(b) treated waste water and sludge arising from waste water treatment are reused whenever appropriate; and

(c) disposal routes for treated waste water and sludge minimise the adverse effects on the environment.

The dates in regulation 4 implement in law requirements imposed upon EU Member States by the UWWTD. Thus, full compliance with the UWWTD and the 1994 Regulations was required by 31 December 2005, in the case of all significant urban areas by the earlier date of 31 December 2000 and in the case of sensitive areas the earlier date still of 31 December 1998.

8. Schedule 2 to the 1994 Regulations sets out requirements for collecting systems as follows:

1. Collecting systems shall take into account waste water treatment requirements.

2. The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding—

(a) volume and characteristics of urban waste water;
(b) prevention of leaks;
(c) limitation of pollution of receiving waters due to storm water overflows.

9. Section 18 of the 1991 Act provides, so far as relevant:

(1). …where in the case of any company holding an appointment under Chapter I of this Part …the Secretary of State or the Authority is satisfied-

(a) that that company... is contravening—
(i) …
(ii) any statutory or other requirement which is enforceable under this section and in relation to which he or it is the enforcement authority;

or

(b) that that company… is likely to contravene any such … requirement, he or it shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that … requirement.

10. By virtue of sections 18(6)(c) and 94(3) of the 1991 Act the Secretary of State is the enforcement authority and, in accordance with the Secretary of State's

authorisation dated 27 November 1990 to Ofwat,[2] Ofwat is authorised to act as "the enforcement authority" for the purposes of section 18(1).

11. Regulation 3 of the 2017 Regulations (and, prior to these coming into force, regulation 3 of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 which was in similar terms) is as follows:

    (1) The Secretary of State, the Welsh Ministers, the Agency and NRW must exercise their relevant functions so as to secure compliance with the requirements of the WFD, the EQSD and the GWD.

12. Schedule 2 to the 2017 Regulations defines "relevant functions" so as to include those in relation to the 1994 Regulations and under Part 4 of the 1991 Act as well as the Environment Act 1995 and the Environmental Permitting (England and Wales) Regulations 2016 which empower the Secretary of State to provide directions to the Environment Agency.

13. Article 10(2)(a) of the WFD requires Member States to ensure the establishment and/or implementation of the emission controls based on best available techniques contained in measures which include the UWWTD albeit from 31 December 2020 (IP Implementation Day) this obligation was no longer in place in the UK (see paragraph 6 of Schedule 5 of the 2017 Regulations).

14. The requirements of the UWWTD concerning the limitation of pollution from storm water overflows are "emission controls based on best available techniques" within the meaning of article 10(2)(a) of the WFD.

GROUND ONE

15. ***Unlawfully failing to take proper account of environmental law when exercising the Secretary of State's functions, by:***
    - ***drafting and promulgating the 1997 Guidance which did not reflect the true legal extent of the duties upon sewerage undertakers under section 94 of the 1991 Act (as supplemented by the 1994 Regulations);***
    - ***failing to amend or replace the 1997 Guidance after the decision of the CJEU in Case C-301/10; and***
    - ***misunderstanding the true legal extent of the Secretary of State's duty under section 18 of the 1991 Act to make enforcement orders in the case of contraventions or likely contraventions by sewerage undertakers of section 94 of the 1991 Act;***

    in the context of discharges by sewerage undertakers from network CSOs in breach of the requirements of the 1994 Regulations.

16. The OEP will particularise this ground with reference to three issues:

    (a) First, the correct interpretation of the duties upon sewerage undertakers under the 1994 Regulations, the UWWTD (and accordingly section 94 of

[2] The Secretary of State's authorisation dated 27 November 1990 was originally given in relation to the Water Act 1989 and the authorisation was later updated to cover section 94 of the 1991 Act.

the 1991 Act) with reference to the findings of the CJEU in Case C-310/10 and with reference to the decision of the High Court in *R (WildFish) v Secretary of State* [2023] EWHC 2285 (Admin) ('*WildFish*');

(b) Secondly, consideration of the 1997 Guidance and the OEP's reasons for finding that the 1997 Guidance fails properly to take account of section 94 of the 1991 Act and the 1994 Regulations; and

(c) Thirdly, the Secretary of State's failure to comply with environmental law with regard to the 1997 Guidance.

The correct interpretation of the duties upon sewerage undertakers under section 94 of the 1991 Act and the 1994 Regulations

17. In summary, the correct interpretation of the duties on sewerage undertakers under the UWWTD and the 1994 Regulations (and, accordingly, under section 94 of the 1991 Act) is that for every discharge of a CSO, in order to determine whether there has been a breach of the 1994 Regulations, it is necessary to consider a two-stage test. First, is the discharge occurring only in "exceptional circumstances"? Second, if it is not, is there a solution to the non-exceptional discharges by the application of the 'best technical knowledge not entailing excessive cost' ('BTKNEEC') concept?

The OEP's contention

18. In order to consider the correct interpretation of the 1994 Regulations and the UWWTD (and, accordingly, section 94 of the 1991 Act) it is necessary to consider the CJEU's judgment in Case C-301/10 which is authority of the highest level about the interpretation of the UWWTD. It sets out the methodology to be followed in order to achieve compliance with the UWWTD and is therefore applicable to all storm water overflows. The legal approach articulated by the CJEU was intended to be and is of general application and cannot be dismissed as the CJEU's opinion about the specific facts present at Whitburn and London (being the English sites with which the case was concerned).

19. In Case C-301/10 the CJEU held that the provisions of the UWWTD imposed an obligation in all ordinary circumstances to avoid spills from storm water overflows. Specifically, the judgment states at paragraph [53] to [54]:

> *"…under usual climatic conditions and account being taken of seasonal variations, all urban waste water must be collected and treated. Consequently, failure to treat urban waste water can be tolerated only where the circumstances are out of the ordinary, and it would run counter to Directive 91/271 if overflows of untreated urban waste water occurred regularly."*

20. See also para [65] of the CJEU judgment:

> *However, in order not to undermine the principle set out in paragraph 53 of the present judgment that all waste water must be collected and treated, the Member States must invoke disproportionate costs of that kind by way of exception only.*

[emphasis added]

21. This means that any qualification to the proposition in paragraphs [53] and [54] by application of the concept of BTKNEEC (as used in section A of Annex 1 to the UWWTD and paragraph 2 of Schedule 2 to the 1994 Regulations) is to be invoked "by way of exception only".

22. At paragraph [73] of the judgment, the CJEU set out a two-stage test or methodology to be followed when considering whether discharges from a CSO are compliant with the UWWTD:

> *"Accordingly, for the purpose of examining the present action, the Court must, first of all, examine whether the discharges from the collecting systems or the treatment plants of the various agglomerations in the United Kingdom are due to circumstances of an exceptional nature, and then, if that is not the case, establish whether the United Kingdom has been able to demonstrate that the conditions for applying the concept of BTKNEEC were met."*

23. The two-stage test approach was acknowledged and accepted in the recent decision of the High Court in *WildFish*. In summary, the OEP holds the view that the two-stage test requires that a discharge from a network CSO will only be compliant with the UWWTD if it occurs in exceptional circumstances or, by way of an exception, the member state can demonstrate that there is no BTKNEEC solution to the discharge.

The proper application of the two-stage test and the relevance of the decision of the High Court in WildFish

24. The Secretary of State and the OEP agree that there is a two-stage test to be applied. The first stage is whether discharges are due to circumstances of an exceptional nature and the second stage is whether the conditions for applying the concept of BTKNEEC have been met. These stages will operate sequentially (i.e. it is only if the discharges are occurring outwith exceptional circumstances that the question of whether there is a BTKNEEC solution is considered).

25. However, the difference between the parties lies in the correct application of the concept of "exceptional circumstances" at the first stage in practice and, at the second stage, whether the application of the concept of BTKNEEC resulting in a finding that there is no cost beneficial solution should operate by way of exception only and thus only relatively rarely (the OEP's contention) or whether the application of the concept of BTKNEEC may result in there being no cost beneficial solution for particular CSOs as a matter of course (the Secretary of State's contention). The parties also disagree on the related question of whether the BTKNEEC assessment operates as a form of "defence" with the burden of raising and demonstrating the absence of any cost beneficial solution lying on the companies (the OEP's contention) or whether the BTKNEEC assessment does not operate as a form of "defence" and that there is no such burden (the Secretary of State's contention).

26. The relevance of the dispute about the operation of the second stage of the two-stage test is that, if the Secretary of State is right, then the 1994 Regulations import no limit on the number or proportion of CSOs for which a BTKNEEC solution cannot be identified. Whereas, if the OEP is right, then CSOs for which there is no cost beneficial solution must be the exception rather than the rule and this will accordingly mean that if guidance or policy suggests that CSOs which spill in properly-defined non-exceptional circumstances will frequently not have a cost-beneficial solution, or if guidance or policy prescribes a particular cost benefit analysis methodology which, when followed, results in routine findings that such CSOs lack any BTKNEEC solution, then it follows that the guidance and the cost benefit analysis methodology are not appropriately constructed.

27. As to the first stage of the two-stage test (whether discharges are due to circumstances of an exceptional nature) the UWWTD does not define, nor even use, the term "exceptional circumstances". It is the judgment in Case C-301/10 which uses the term in the course of construing the words "*such as unusually heavy rainfall*" (Footnote 1 to Annex 1 Sections A & B of the UWWTD) and it is adopted in contra-distinction to overflows occurring "*under usual climatic conditions and account being taken of seasonal variation*" (judgment at [53]). It is not necessary for the definition of 'exceptional' to be settled at this stage (although this issue is discussed further in the section of this Decision Notice setting out the steps to be taken to remedy, mitigate or prevent reoccurrence of the failure). The critical issue at this point is that both the OEP and the Secretary of State accept that the first stage of the two-stage test is whether the discharges under examination are occurring only in "exceptional" circumstances.

28. As to the second stage of the two-stage test (whether the application of the concept of BTKNEEC resulting in a finding that there is no cost beneficial solution should operate by way of exception only and thus relatively rarely), the Secretary of State suggests that the decision of the High Court in *WildFish* answers the question of how the second stage of the two-stage test is meant to operate (§10 of Response of 7 November 2023 to the Information Notice and §6 of Response of 26 September 2024 to the Position Statement) because the judgment in *WildFish* contains the following passages:

> *"It is important to keep in mind that, according to the principles laid down in the UK case, the mere fact that a storm overflow discharges to a waterway in non-exceptional circumstances does not necessarily involve a breach of the 1994 Regulations. If there is no remedy for that occurrence which satisfies the BTKNEEC test, then the discharge is lawful under the 1994 Regulations".* (judgment at [162])

and

> "*CJEU did not indicate that discharges will only satisfy BTKNEEC exceptionally*" (judgment at [172])

29. The Secretary of State suggests that there is no requirement that the proper application of the concept of BTKNEEC will result in a finding that there is no cost

beneficial solution in relatively rare circumstances only and that there may be many cases where the cost of remedying a discharge is not worth it as it would entail excessive costs (see §6 of the Secretary of State's response of 26 September 2024 to the Position Statement and §11 of the Secretary of State's response of 7 November 2024 to the Information Notice). The Secretary of State suggests that the words "*by way of exception only*" at paragraph [65] of Case C-301/10 are to be understood merely to mean an exception in the sense of a set of circumstances to which the general rule does not apply, rather than something necessarily extraordinary or uncommon. The Secretary of State suggests that paragraphs [162] and [172] of the *WildFish* judgment referred to above are part of the *ratio* of the decision and notes that there has been no appeal against it.

30. The OEP maintains that the judgment in *WildFish* does not provide a complete answer to the question of how the second stage of the two-stage test should be interpreted.

31. In *WildFish*, the sole issue was the legality of the Government's Storm Overflows Discharge Reduction Plan (the "SODRP"). The Secretary of State in that case contended that the SODRP was not a plan to bring water companies into compliance with existing legal duties but sought to set new standards higher than those set by the existing legislation applicable to the management of sewage by water companies. At paragraph [169] of his judgment, Holgate J concluded that, in that respect, "*The Plan goes further than the 1994 Regulations"*. That conclusion was founded entirely on the absence of any BTKNEEC exception in the SODRP.

32. However, this does not consider whether the requirements otherwise imposed by the SODRP are themselves adequate, either in the standards which they set or in the timescale for their implementation, for the quite distinct purposes of identifying and rectifying current UWWTD non-compliance, when compliance should have been achieved in most cases more than twenty years ago. The Court's conclusion was simply that since the SODRP did not purport in any way to detract from the existing regulatory requirements and in one respect exceeded them, it could not be and was not unlawful. That leaves unconsidered the question with which the OEP's investigation is concerned, namely whether those other requirements of the 1991 Act and the 1994 Regulations have to date been properly understood and implemented in accordance with the provisions of the UWWTD, as elucidated in Case C-301/10. It also leaves entirely unaffected and unaddressed the determination of whether past or current discharges have been compliant and whether there has been proper enforcement in respect of non-compliance.

33. In light of the limited scope of the *WildFish* judgment, the OEP holds the view that it does not provide a complete answer to the correct interpretation of the decision in Case C-301/10 and direct consideration of the CJEU's decision in Case C-301/10 is necessary. The judgment in Case C-301/10 articulates that the concept of BTKNEEC is limited in operation to a form of "defence", to be used "by way of exception only" (judgment [65]). The Advocate-General shared this opinion and stated that the BTKNEEC mechanism must operate (opinion, paragraph 60):

"by way of exception and…may not be employed in order to undermine the principle that, as a rule, the collection and treatment processes must cover all waste water. Its exceptional nature should be stressed ..."

34. Further, the CJEU was concerned to respect the general principle that it was for the Commission to prove every failure to fulfil obligations (judgment at [70]). It did however note the duty upon EU Member States to assist the achievement of the Commission's tasks (judgment at [71] – [73]). The judgment in Case C-301/10 holds that, at the European level, it is for the EU Member State to demonstrate, with precision, why "by way of exception" improvements which would prevent the discharge from a CSO do not satisfy the BTKNEEC requirement. When that part of the judgment in Case C-301/10 is applied domestically, it can only be interpreted on the basis that once it is established that discharges occur other than in "exceptional circumstances", there is a *prima facie* case of non-compliance, whereupon the burden passes to the discharger to satisfy the regulator that "by way of exception", there is no BTKNEEC solution. This is consistent with:

    (a) the Environment Agency's view that '*the discharger is required to investigate whether a BTKNEEC solution exists*' (§19 Environment Agency response of 01 October 2024 to the Position Statement);

    (b) the terms of paragraph [69] of *WildFish* that '*the second question is whether [the] discharge can be justified by cost-benefit analysis so as to satisfy the BTKNEEC test.*' If *the discharge* has to be justified, then the burden is on the discharger whereas, if *the presence of a BTKNEEC compliant solution* has to be demonstrated, the burden would be on the regulator; and

    (c) the Secretary of State's assertion at §7 of its response of 26 September 2024 to the Position Statement that the duty to ensure that CSOs satisfy the requirements of Schedule 2 to the 1994 Regulations '*falls upon water companies….[b]oth legally and in practice, therefore, the primary responsibility for meeting the legal requirements – and co-operating with regulators in the provision of information (etc.) – falls upon water companies; and this applies to both parts of the two-stage test*'.

35. Finally, this approach is also consistent with the precautionary principle in environmental law (on which the UWWTD, and hence also the 1994 Regulations, are based pursuant to Article 191(2) of the Treaty on the Functioning of the European Union) that, where there is a lack of data about the long-term impacts of an act or omission, decision makers should act in a precautionary manner and may require that the burden of proving that the procedure is safe will fall upon the body undertaking the action in question.

36. Notwithstanding the above, it is not necessary or appropriate in this Decision Notice to reach any conclusions upon the correct application of the BTKNEEC test in any particular instance (although this issue is discussed further in the section on steps to be taken to remedy, mitigate or prevent reoccurrence of the

failure). The OEP nevertheless holds the view that the lawful exercise of the Secretary of State's functions requires the establishment of a system of regulation in which the simple fact of discharges other than in succinctly defined and readily detectable "exceptional circumstances" raises a *prima facie* case of breach of the UWWTD/1994 Regulations, to be enforced as such unless and until the discharger demonstrates the absence of any BTKNEEC solution.

37. In summary therefore, both the OEP and the Secretary of State accept that there is a two-stage test, that the first stage of the two stage-test is whether the discharges are due to circumstances of an exceptional nature and that the second stage of the two-stage test is whether it can be demonstrated that the conditions for applying the concept of BTKNEEC are met. The OEP holds the view that in order to achieve compliance with the UWWTD and the 1994 Regulations, the two-stage test requires that a discharge from a network CSO will only be compliant if it occurs (1) in exceptional circumstances or, (2) '*by way of an exception only'*, that it can be demonstrated that there is no BTKNEEC solution to the discharge with the burden on the water company to demonstrate that no BTKNEEC solution to the discharge is possible.

The 1997 Guidance

What the 1997 Guidance says

38. Ground One relates to the 1997 Guidance. Appendices 8(i) and 8(ii) to Annex 8 of the 1997 Guidance set out how consent conditions for both existing and new discharges are to be calculated and determined.

39. Annex 8 of the 1997 Guidance, titled "Framework for Consenting Intermittent Discharges", is the key section in relation to sewage discharges from CSOs. It sets out a number of principles, including the definition of "unsatisfactory" CSOs for the purpose of identifying existing CSOs in need of improvement to comply with the 1994 Regulations. Paragraph 4.1 of Annex 8 is as follows:

> *4.1 The following criteria are to be used in deciding which CSOs are unsatisfactory and, therefore, subject to consent review to drive improvements:*
> *(i) causes significant visual or aesthetic impact due to solids, fungus and has a history of justified public complaint;*
> *(ii) causes or makes a significant contribution to a deterioration in river chemical or biological class;*
> *(iii) causes or makes a significant contribution to a failure to comply with Bathing Water Quality Standards for identified bathing waters;*
> *(iv) operates in dry weather conditions;*
> *(v) operates in breach of consent conditions provided that they are still appropriate; and/or*
> *(vi) causes a breach of water quality standards (EQS) and other EC Directives.*

40. If any of the above criteria exist, then the CSO in question is subjected to the methodology of the Urban Pollution Management (UPM) Manual (now in its 3rd

edn.) which ultimately should produce a compliant solution. However, unless any of the criteria at paragraph 4.1 of Annex 8 are engaged, the UPM methodology will never be applied and there is no further scrutiny of the CSO.

The legal error in the approach taken in the 1997 Guidance

41. The criteria in Paragraph 4.1 of Annex 8 of the 1997 Guidance do not reflect any version of the CJEU's two-stage test, in which, as set out above, the first stage addresses the question of whether the discharge occurs in exceptional circumstances and the second stage addresses the existence of a BTKNEEC solution.

42. Of the criteria in Paragraph 4.1 of Annex 8 of the 1997 Guidance, only (iv) and (v) relate to *performance* or *operation* of the CSO (as opposed to the impact on receiving watercourses). Criterion (v) does not substantively assist in the determination of compliant conditions; it merely asks whether there is compliance with existing consent conditions. Criterion (iv) – discharges in dry weather – is patently inadequate in comparison with the requirements of the UWWTD and the 1994 Regulations and at the opposite end of the performance scale from "exceptional circumstances". Together, such criteria cannot amount to a proper application of the first stage of the two-stage test.

43. Criteria (i), (ii), (iii) and (vi) of paragraph 4.1 all address consequences of inferior performance of the CSO by reference to impact on receiving waters. Such matters can only be relevant to the second stage of the two-stage test i.e., whether there is a BTKNEEC solution, but even within this context, these criteria are not a sound basis for its application.

44. With regard to criterion (vi), the reference to 'other' EC Directives plainly and obviously excludes the UWWTD as that is the very Directive with which the 1997 Guidance itself is concerned. This is plain from the content of Appendix 7(i) to Annex 7 of the 1997 Guidance.

45. The 1997 Guidance requires application of a pragmatic system of classification founded largely upon impact on receiving waters rather than the quality, quantity or frequency of discharges. The OEP holds the view that such considerations, which cannot easily be established, can be relevant only to the second stage of the CJEU test as part of a BTKNEEC assessment. To require them to be established as part of the identification of a CSO as "unsatisfactory" renders it inevitable that many CSOs which are not compliant with the UWWTD and the 1994 Regulations will not be so identified, so long as they merely do not discharge in dry weather and are not in breach of the conditions of their discharge consents. Such criteria taken alone are manifestly inadequate to demonstrate, far less to constitute, UWWTD and 1994 Regulations compliance. Thus, whilst the criteria used in Annex 8 may have been an acceptable means of identifying "worst offenders", they do not represent an adequate or acceptable means of determining UWWTD and 1994 Regulations compliance, nor a comprehensive means of identifying CSOs in need of improvement.

46. In addition, and yet further, the 1997 Guidance was not revised or even updated

after the CJEU handed down its decision in Case C-301/10 and therefore has never contained an accurate interpretation of the UWWTD or 1994 Regulations.

47. The methodology adopted in the 1997 Guidance is plainly not in accordance with the UWWTD, as interpreted in Case C-301/10, and is therefore unlawful. While the criteria set out in Annex 8 may identify *some* unsatisfactory CSOs this is irrelevant as it does not amount to a legally correct approach to assessing unsatisfactory CSOs.

The Secretary of State's failure to comply with environmental law with regard to the 1997 Guidance

48. It is common ground that the 1997 Guidance is relevant and that the lawfulness of the 1997 Guidance should be considered with reference to the test for the unlawfulness of guidance set out in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ('*Gillick*') and *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 ('*R (A)*').

49. The Secretary of State asserts that the 1997 Guidance was given under the Crown's prerogative powers to issue guidance and is therefore non-statutory. However, even if the Secretary of State's position is that the 1997 Guidance is non-statutory guidance, it is still wrong as a matter of law in the way in which it characterises the approach to unsatisfactory discharges for the reasons set out in paragraphs 38-47 above.

50. As to the test for the unlawfulness of guidance, in accordance with the *Gillick* and *R (A)* cases, the question is whether the 1997 Guidance (under point (i) in *R (A)*) induces a person to breach their legal duty or (under point (iii)) mis-states the law or provides a misleading picture of the legal position as set out at paragraph [46] of *R (A)*:

> *"In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others:*
> *(i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i e the type of case under consideration in Gillick [1986] AC 112);*
> *(ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and*
> *(iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position.*
>
> *In a case of the type described by Rose LJ, where a Secretary of State*

issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis."

51. The critical first question is whether, as a matter of law, the statements contained in the 1997 Guidance are wrong or provide a misleading picture of the true legal position. For the reasons set out in paragraphs 38-47 above, the 1997 Guidance is legally wrong as it sets out a process for CSOs to be dealt with which is incompatible with achieving compliance with the UWWTD and the 1994 Regulations and which does not satisfactorily consider or apply the two-stage process set out in Case C-310/10.

52. The second question (with specific reference to point (i) and (iii) in the categorisation set out by the Supreme Court in *R(A)*), is whether the 1997 Guidance provides a positive statement of law or a specific mis-statement of law. Whilst the 1997 Guidance is described overall as a "working document" (paras. 1.1 and 2.2) the following statements are also made specifically about the guidance relating to CSOs:

- at paragraph 1.4 of Annex 8:
  "This annex and the supporting Appendices set down in general terms, the requirements which are to be met to ensure compliance with the Regulations."
- At paragraph 1.2 of Appendix 8(i) and paragraph 1.1 of Appendix 8(ii):
  "…the standards set down in this Appendix are considered to meet the provisions of the Regulations…"

53. In the context of CSOs, the 1997 Guidance therefore is intended to present a picture of compliance with the requirements of the 1994 Regulations and is a positive statement of law. The Secretary of State has accepted that the role of Defra is one of '*standard-setting*' and that it '*leads on the development of national water policies*' (pp47 and 53 of "The Development of the Water Industry in England and Wales" prepared by Ofwat and Defra dated 27 January 2006). The 1997 Guidance was therefore plainly intended to be guidance that set out standards that should be followed in order to comply with the law.

54. Thirdly, the question is whether the 1997 Guidance would induce someone to breach their legal duty in some way. In considering this third question it is relevant to note that the 1997 Guidance was specifically addressed to dischargers (i.e. those undertakers who control discharges from CSOs) and the Environment Agency. In addition, the appeals held under section 91 Water Resources Act

1991 into Unsatisfactory Intermittent Discharges ('the UID Appeals')[3] in 2006 demonstrate not only that the 1997 Guidance *could* induce someone to breach their legal duty but that it *did* do so as an Inspector appointed by the Secretary of State and acting on the Secretary of State's behalf (section 114 Environment Act 1995) followed the 1997 Guidance and strongly encouraged others to do the same. At paragraphs [20] and [28] of the UID Appeals the Inspector states:

> *"20. Neither the UWWTD nor the UWWTR give guidance on what is meant by BTKNEEC; by 'unusually heavy rainfall'; or, by 'limit(ing) pollution'. In 1997, the government issued guidance, which had been agreed by the sewerage undertakers, by the EA and by OFWAT. This is non-statutory, but has been communicated to the EC as a demonstration of compliance with the UWWTD and the government evidently considers that it should form the basis for decisions concerning CSOs.*
>
> *....*
>
> *28. These considerations lead me to conclude that the 1997 Guidance, together with the UPM2, provide the appropriate framework, in England and Wales, for deciding whether sewerage systems need improvement to comply with the UWWTR and for determining the improvements that are required on the basis of BTKNEEC. The EA are not compelled, by law, to consent discharges in accordance with this framework. However, there would need to be truly exceptional reasons to depart from this approach and those reasons might be subject to EC scrutiny, because the framework gives expression to current government policy."*

55. In the subsequent appeals concerning unsatisfactory intermittent discharges in Preston,[4] ('Preston Appeals') in 2007-8 a different Inspector also adopted at paragraph 18 the same approach to the 1997 Guidance:

> *"18. In 1997, the Government issued a Guidance Note on the implementation of the UWWTR. The Guidance has been drawn up with the assistance of the EA, the Water Services Association and Ofwat. It is to be used to ensure a common approach on meeting the requirements of the Regulations."*

56. The logical point at which the Secretary of State should have reviewed and redrafted the 1997 Guidance to amount to lawful guidance for complying with the UWWTD was after case C-301/10 was handed down by the CJEU in 2012. However, this did not occur and an only slightly modified version of the 1997 Guidance is used in the still extant Environment Agency guidance document "Water companies: environmental permits for storm overflows and emergency overflows" which was updated in September 2018.

57. It follows that the 1997 Guidance was a document which was *intended* to be

[3] Discharge Consent Appeals APP/WQ/04/1660, APP/WQ/04/1832 and APP/WQ/04/1836 - decision letter 4 January 2007.

[4] Discharge Consent Appeals APP/WQ/04/1829, APP/WQ/04/2428, APP/WQ/04/2429, APP/WQ/04/2430, APP/WQ/04/2431, APP/WQ/04/2432, APP/WQ/04/2433 - decision letter 14 February 2008.

followed (see, for instance paragraph 2.1 of the 1997 Guidance), which the Secretary of State (through his Inspector) determined *should* be followed in all but "truly exceptional" cases and which *did* induce the Environment Agency to adhere to it which, as set out in the Decision Notice relating to the Environment Agency, was a breach of regulation 6(2)(c) and/or Schedule 2 of the 1994 Regulations. Therefore, the 1997 Guidance is unlawful applying the tests in *Gillick* and *R (A).*

58. The Secretary of State asserts that the regulated parties will have understood the requirement on them to adhere to the law irrespective of what may have appeared in the 1997 Guidance (see §§15-22 of the Secretary of State's response of 26 September 2024 to the OEP's Position Statement). However, it is plain from a full reading of the UID Appeals decision letter from 2007 and the Preston Appeals decision letter in 2008 that these were intended to be test appeals (see para 2 of the UID appeals Inspector's Decision Letter: "*These 3 were selected by UU and the EA from a large number of CSO appeals that have been lodged by UU, in order to address some common matters of principle*.") In both the UID Appeals and the Preston Appeals a number of discrete appeals were determined together in order to test wider principles, on which the ruling of the Secretary of State by his appointed Inspector was sought and obtained.

59. It is accordingly simply wrong of the Secretary of State to assert (c.f. §18 Secretary of State response of 26 September 2024 to the OEP Position Statement) that there is no evidence of parties following the 1997 Guidance. The Environment Agency and the regulated entities were explicitly encouraged, by the Secretary of State acting through his Inspector, to rely on the 1997 Guidance. In the case of the CSOs that were the subject-matter of the appeals, the Environment Agency was *directed* to act in accordance with it. It also found expression in the AMP3 Guidelines issued by the Environment Agency.[5]

60. It is striking that the Secretary of State refers to no other guidance which decision-makers were pointed towards instead of, or in addition to, the 1997 Guidance. The documents which the Secretary of State *does* refer to, at for instance §§16-17 of the Secretary of State's Response to the Position Statement, do not, even arguably, displace the 1997 Guidance as the sole way in which the Secretary of State gave guidance on how to follow the relevant requirements of the 1991 Act as supplemented by the 1994 Regulations:

    (a) A letter from the Secretary of State issued to water companies on 24 August 2015 correctly refers to the requirement on CSOs to spill only in exceptional circumstances and, if it cannot do so, refers to the requirement to address spills in the context of BTKNEEC. This is accurate so far as it goes but it is not guidance and cannot be said to have supplanted, or been intended to supplant, the 1997 Guidance which

[5] See "Environment Agency Guidelines for Identifying Environmental Improvements Qualifying for AMP3 Investment, version 6.0, November 1997" at p10 which was also said to have been developed in consultation with DETR. The OEP has not been provided with earlier versions of this Guideline although the document does refer to the section 4.4.2 of the AMP2 Guidelines which is in identical form to the relevant section of the 1997 Guidance.

actually covers how decision-makers should identify unsatisfactory CSOs.

(b) Guidance from other public bodies such as the Environment Agency's Storm Overflows Assessment Framework and its associated guidance "*Water companies: environmental permits for storm overflows and emergency overflows"* (both updated in 2018) each repeat the errors set out above in the 1997 Guidance.

(c) It is particularly striking that the Secretary of State refers at §19 of their response to the OEP's Position Statement to paragraph [63] of the Inspector's decision in the UID Appeals which, the Secretary of State suggests, shows that there was other departmental guidance before the Inspector. However, that allegedly additional guidance is not provided by the Secretary of State and it is entirely unclear what, if anything, of relevance this additional guidance purportedly provided. Furthermore, in the very same paragraph [63] of the UID Appeals decision letter which the Secretary of State refers to, the Inspector (acting as the Secretary of State) emphasises the importance of the 1997 Guidance '*The government is clearly committed to obtaining the best value for money, from the statutory elements, but does not suggest that this detracts from its advice in the 1997 guidance*.'

61. The Secretary of State has conceded in their response to the Information Notice that the 1997 Guidance "*would benefit from being updated*" and that "*some aspects of it are now outdated*". Indeed, the Secretary of State has since provided the OEP with draft updated information and guidance on storm overflows which, when finalised, is intended to withdraw and replace parts of Annex 3 and all of Annex 8 of the 1997 Guidance.[6] That this has been done is consistent with the OEP's position that the 1997 Guidance was legally inadequate.

The Secretary of State's misunderstanding of the true legal extent of the Secretary of State's duty under section 18 of the 1991 Act to make enforcement orders in the case of contraventions or likely contraventions by sewerage undertakers of section 94 of the 1991 Act

62. On the basis of the legal analysis set out above, this allegation contained in Ground One can be put shortly. In sum, because the Secretary of State's understanding of the law, as revealed in the 1997 Guidance, does not adequately address the two-stage test required to achieve compliance with the UWWTD and the 1994 Regulations (as articulated by the CJEU in Case C-301/10), this has inevitably led the Secretary of State into erroneously failing to recognise that their jurisdiction under section 94(3)(a) of the 1991 Act was engaged and failing to consider, let alone to serve, enforcement orders as required under section 18 of the 1991 Act.

The Secretary of State is wrong to suggest that the duty lies only on Ofwat and not also on the Secretary of State

[6] The new guidance is currently being consulted on - Draft information and guidance on storm overflows - GOV.UK.

63. The OEP considers that the Secretary of State has not fully understood the duties imposed by the operation of section 94(3) of the 1991 Act and the section 18 enforcement mechanism. Instead, the Secretary of State has asserted that they were entitled to delegate the duty of enforcing section 94 of the 1991 Act to Ofwat.

64. The Secretary of State essentially asserts three reasons why the duty lies only on Ofwat and not on the Secretary of State (see, for instance §§34-39 of the Secretary of State's response of 26 September 2024 to the Position Statement).

65. First, the Secretary of State asserts that the language of section 94(3) of the 1991 Act and the general authorisation made by the Secretary of State to Ofwat's predecessor on 27 November 1990 authorises Ofwat specifically, and as a lawful alternative to the Secretary of State, to enforce section 94(1) under section 18 of the 1991 Act. However, the obligation in section 94(3) is to enforce the duties on sewerage undertakers. That duty can be enforced by Ofwat but the duty to enforce remains also on the Secretary of State as the primary duty-holder under section 94(3). The general authorisation of 27 November 1990 authorises Ofwat to enforce against undertakers but does not displace the statutory duty on the Secretary of State. That this is the case is also clear from paragraph [73] of *WildFish*: *'By s.18 of that Act both Ofwat and the Secretary of State are responsible for taking enforcement action for breaches of regs.4 or 5 of the 1994 Regulations. The court was informed that in practice Ofwat is expected to take the lead in enforcing the 1994 Regulations in individual cases.'*

66. Secondly, reference is made to Ofwat as a specialist body and to the Secretary of State's 'residual role of oversight'. This may be how the public authorities perceived their respective positions but, given the legislative framework set out above, the position, in law, is that the Secretary of State was and remains under a duty to enforce the provisions of section 94(1) of the 1991 Act.

67. Thirdly, the Secretary of State suggests that '*the principle'* established in the case of *Robertson v DEFRA* [2005] EWCA Civ 138 ('*Robertson*') at [45], is that where the Secretary of State delegates power, absent some express or implied retention, '*it will not be regarded as appropriate for a delegator to go off and do himself, without notice to the delegate, what he has just delegated.'* The OEP does not accept that *Robertson* does establish any such principle of law. In any event, even if the Secretary of State is correct to treat this as a principle of law, *Robertson* establishes simply that it is not appropriate for the delegator to go off and do what has just been delegated. The OEP is not suggesting that the Secretary of State is prevented from authorising Ofwat to execute the duty imposed in section 94 of the 1991 Act or that the Secretary of State is required to go off and undertake performance of the duty itself concurrently with Ofwat; the issue is whether the Secretary of State remains the duty-holder and whether they will be in breach of that duty if it is not discharged by their delegate. The OEP holds the view that as the obligation under the legislation remains on the Secretary of State, if the delegate does not perform the duty as required then the Secretary of State is in breach. Further, the purported principle in *Robertson* is confined to circumstances where the delegator goes off and does the duty *'without notice to the delegate*'. That is not what is at issue in this case.

68. In summary, the OEP maintains that:

    (a) the effect of the statutory scheme and the authorisation of 27 November 1990 is straightforward and retains a duty on the Secretary of State;
    (b) the Secretary of State may authorise the execution of that duty by Ofwat but they remain a duty-holder and will be in breach if the duty is not executed; and
    (c) the Secretary of State is wrong to suggest that *Robertson* establishes a principle of law which is relevant.

GROUND TWO

69. ***Whether as a result of (a) or otherwise, unlawfully failing to exercise the Secretary of State's functions under section 18 of the 1991 Act by the making of enforcement orders in respect of known or likely contraventions of section 94 of the 1991 Act, when the Secretary of State was under a legal duty to do so***

70. In accordance with the legal analysis set out above in Ground One, in every case where there was a breach of the 1994 Regulations because a discharge occurred outwith exceptional circumstances and there was a BTKNEEC solution, the Secretary of State's enforcement duty became engaged.[7] Unless Ofwat itself took enforcement action, the Secretary of State should have discharged their duty by themselves initiating investigations or requiring Ofwat to do so (pursuant to the authorisation dated 27 November 1990) and if necessary serving an order under section 18 of the 1991 Act (provided that the exceptions in section 19 of the 1991 were both considered and found not to apply).

71. Save for Ofwat's recent current investigations starting with Ofwat's case against Southern Water in 2019, during the preceding period of over 30 years since the duty under section 18 (and its predecessor, section 20 of the Water Act 1989) has been imposed upon the Secretary of State and Ofwat, neither body has, so far as the OEP is aware, ever sought to exercise its related functions of enforcement in relation to the unlawful operation of network CSOs. This includes failing to do so after the decision in Case C-301/10 and subsequent acknowledgement and recognition by the then Secretary of State in his letter dated 18 July 2013 to sewerage undertakers that:

> "*Discharges from combined sewer overflows (CSOs) are increasingly becoming a reputational issue for water companies in a way not dissimilar to leakage from supply a few years ago. Whilst much has been done and considerable investment made to improve the performance of*

[7] It is also a breach of section 94(1)(b) of the 1991 Act for a sewerage undertaker to fail to make provision for effectually dealing with sewer contents. Ofwat holds the view that this is *prima facie* the case where discharges of untreated sewage from CSOs are not rendered "reasonably harmless" (see Ofwat's letter of 18 October 2024 to the OEP in response to the Position Statement). For the purposes of this Decision Notice, the OEP does not come to any conclusion about the scope of the section 94(1)(b) general duty in respect of network CSOs. This Decision Notice is founded upon the duty under section 94(1)(a) as supplemented by regulation 4(2) of the 1994 Regulations.

CSOs their management and operation remains a regular cause for concern for both water users and the wider public."

72. As demonstrated in Annex 1 there is ample data, particularly following the addition of Event Duration Monitoring ('EDM') to network CSOs, to demonstrate that a significant number of network CSOs are spilling frequently and therefore it is more likely than not that there are a significant number of network CSOs that do not meet the requirements of section 94 of the 1991 Act (as supplemented by the 1994 Regulations) and therefore ought to have led Ofwat and the Secretary of State to undertake sufficient enquiries to understand whether the section 18 duty was engaged.

73. The Secretary of State has not demonstrated, in respect of any discharges from any CSO, that they ever considered whether there was a breach of the 1991 Act or the 1994 Regulations which engaged the jurisdiction under section 18 of the 1991 Act and required that they should consider whether to serve an order for securing compliance.

GROUND THREE

74. ***Unlawfully failing to discharge the Secretary of State's duty under regulation 3(1) of the 2017 Regulations to exercise the Secretary of State's functions so as to secure compliance with article 10(2)(a) of the WFD by failing in respect of network CSOs to ensure the establishment and implementation of the permit conditions required to satisfy the requirements of the UWWTD for the limitation of pollution of receiving waters as clarified in Case C-301/10.***

75. Article 10(2)(a) of the WFD requires EU Member States to ensure the establishment and/or implementation of emission controls based on best available techniques, found in measures including the UWWTD. The Secretary of State's duty to secure compliance with the WFD is contained in regulation 3(1) of the 2017 Regulations albeit from 31 December 2020 (IP Implementation Day) this obligation was no longer in place in the UK (see paragraph 6 of Schedule 5 of the 2017 Regulations).

76. Regulation 3(1) of the 2017 Regulations thus imposes a specific duty upon the Secretary of State to exercise their functions in relation to the 1994 Regulations and the 1991 Act so as to secure compliance with the WFD which, in turn, requires the establishment and/or implementation of emission controls based on best available techniques in measures including the UWWTD to achieve the requisite degree of limitation of pollution of receiving waters. As set out above, this requires that overflows are permitted to spill only in "exceptional circumstances" unless the absence of a BTKNEEC solution is demonstrated. Regulations 62 and 65 of the Environmental Permitting (England and Wales) Regulations 2016 as well as section 40 of the Environment Act 1995 empower the Secretary of State to give directions to the Environment Agency with respect to the carrying out of its functions to direct it to exercise or not exercise its powers in specified circumstances and in a specified manner.

77. The Secretary of State breached the duty under regulation 3(1) of the 2017 Regulations by failing:

    (a) to secure that the Environment Agency established and implemented the relevant permit conditions for network CSOs to ensure that they were only permitted to discharge in "exceptional circumstances" in accordance with the UWWTD unless the absence of a BTKNEEC solution had been demonstrated, and
    (b) to adhere to their duty to take action against undertakers under the enforcement mechanism set out in sections 94(3)/18 of the 1991 Act, or secure that Ofwat did so on their behalf.

78. While the allegation in paragraph 77(a) above is dependent upon the OEP making good its case on Ground One (i.e. that, in the 1997 Guidance, the Secretary of State has misinterpreted the requirements of section 94(1) 1991 Act and/or Regulation 4 of the 1994 Regulations) this is a discrete failure because, as set out in paragraphs 75 - 76 above, the legislation imposes a distinct and specific duty on the Secretary of State to secure compliance with the WFD and thus with the UWWTD. Put another way, this breach is made out unless the Secretary of State can demonstrate that the proper application, operation of and adherence to the criteria in the 1997 Guidance would have captured and identified all CSOs which were discharging in breach of the 1994 Regulations and resulted in their improvement so as to achieve compliance by 31 December 2005 at the latest (and by 31 December 2000 in the case of agglomerations with population equivalents larger than 15,000 and by 31 December 1998 for sensitive waters) and to remain compliant thereafter. The OEP considers that this state of affairs has still not been achieved at the date of this Decision Notice albeit the position may start to change when the Secretary of State issues new guidance.

WHY THE FAILURES IDENTIFIED ABOVE ARE SERIOUS

79. The OEP considers that the failures identified above are continuing ones (save in respect of Ground Three as set out above) and are serious.

80. The OEP's Enforcement Policy explains how it assesses the seriousness of a failure to comply with environmental law and can be found in Annex A of the OEP's Strategy.

81. The OEP considers that the Secretary of State's failures set out in Grounds One to Three are serious for the following reasons:

    (a) **Point of law** – the failures raise points of law of general public importance as they relate to the overall regulation of thousands of network CSOs in England. As set out in the descriptions of breach above, the misunderstanding and/or misinterpretation of environmental law has affected the way in which the Secretary of State has exercised their functions through the provision of guidance and/or the making of enforcement orders under section 18 of the 1991 Act (Grounds One and Two). The coherent enforcement of the duty under section 94(1) of the

1991 Act, as supplemented by regulation 4 of the 1994 Regulations, is of increased importance since only the Secretary of State and Ofwat can take enforcement action against sewerage undertakers for breaches of that duty by virtue of section 18(8) of the 1991 Act. Any errors in the application of section 18 have the potential to remove the possibility of securing compliance through enforcement on a national scale. As to Ground Three, the Secretary of State's failure to achieve compliance with the WFD also appears to emanate from a failure to understand the true legal position.

(b) **Frequency of conduct** – the OEP considers that the conduct has been frequent because it covers the entire periods set out at paragraph 5 above. In respect of Grounds One and Two, the OEP accepts that the legal position may, justifiably, have been considered to have been unsettled until such time as the CJEU passed judgment in 2012 on the proper interpretation of the UWWTD. From that point for the following ten years the failure to amend the 1997 Guidance was inexcusable and affected all network CSOs whose performance was assessed. Fundamentally, with reference to Grounds One and Two, the 1997 Guidance and the OEP's criticism thereof are still relevant and amount to a continuing breach because the 1997 Guidance, as set out above, forms the basis of the approach to the regulation of network CSOs as set out in, for instance, the Environment Agency's SOAF and the Environment Agency's September 2018 guidance *'water companies: environmental permits for storm overflows and emergency overflows'*. The failure is ongoing in respect of Grounds One and Two and will remain so unless and until the 1997 Guidance is withdrawn or is replaced by alternative guidance. As to Ground Three, this long-lasting failure applied across all network CSOs whenever they discharged in such a way that compliance with article 10 of the WFD was not achieved.

(c) **Behaviour of public authority** – In response to the OEP's investigation and in correspondence with the OEP the Secretary of State has not accepted that they failed to comply with environmental law. The Secretary of State has indicated that they will make certain welcome changes to, for instance, the 1997 Guidance and will seek to agree memoranda of understanding with the EA and Ofwat. However, these proposed changes have been made without any concession that a serious failure to comply with environmental law has occurred and this refusal to concede that any legal error has occurred aggravates the impact of the failure to comply with environmental law which the OEP has identified.

(d) **Risk of harm and actual harm** – The discharge of untreated sewage from network CSOs can harm the environment, human health and the amenity value of water bodies. Any failure adequately to provide guidance which sets out the law correctly and to act on a correct understanding of the law has the potential to have serious implications for the environment. On the present facts, the OEP is satisfied on a balance of probabilities that the above failures on the part of the Secretary of State (in conjunction with those of Ofwat and the Environment Agency)

materially contributed to the current, chronic and unacceptable state of affairs, now clearly demonstrated by the roll-out of EDM data, concerning the frequency of discharges from network CSOs and their effect upon receiving waters and the lack of any effective regulatory activity, individually or collectively, by any of those regulators to prevent such a state of affairs from arising or persisting after the long past deadlines for implementation of the UWWTD. It appears inevitable that the consequences for the environment will not be fully remedied for an equally long period into the future.

STEPS WHICH THE SECRETARY OF STATE SHOULD TAKE TO REMEDY, MITIGATE OR PREVENT REOCCURRENCE OF THE FAILURE

82. The Secretary of State should by 30 April 2025 either replace or revise and update those parts of the 1997 Guidance which apply to CSOs. This is a necessary step to remedy and prevent reoccurrence of all of the Grounds set out above. The new guidance should properly and adequately set out the Secretary of State's functions in a manner which is consistent with the legal position set out above at paragraphs 16-61 and include (1) an accurate statement of the legal requirements upon undertakers arising from the 1994 Regulations and (2) criteria for identification of non-compliant discharges which are compatible with those legal requirements and sufficient to ensure that all actual or potential non-compliant discharges are identified.

83. The OEP considers that the Secretary of State should use best endeavours to agree, respectively, with Ofwat and with the Environment Agency, and to publish, as soon as practicable (and in any event by 30 April 2025) updated memoranda of understanding with each of them:

    (a) which reflects proper regulation of discharges from network CSOs, in line with the legal position set out in paragraphs 16-61 above, and
    (b) which include arrangements for improved cooperation and exchange of information on the performance of the sewerage undertakers under section 94 of the 1991 Act and the 1994 Regulations which effectively support all parties in regulating network CSO discharges in accordance with that legal position.

84. If the Secretary of State chooses to delegate to Ofwat the execution of the obligations which arise from the Secretary of State's jurisdiction under sections 94(3) and 18 of the 1991 Act being engaged, then it must ensure that Ofwat fulfils the duties on the Secretary of State.

85. As set out in Annex 1, many CSOs have been subjected to the Environment Agency's Storm Overflows Assessment Framework ('SOAF') process, identified as unsatisfactory, and a BTKNEEC-compliant solution has been identified for them. With regards to these CSOs, the Secretary of State should ensure, directing the Environment Agency as appropriate, in each case that permit conditions are appropriately modified and that the permit-holder implements that BTKNEEC-compliant solution forthwith so as to avoid discharges which are in

breach of section 94 of the 1991 Act and/or the 1994 Regulations. If a sewerage undertaker declines or fails timeously to take all proper steps to implement the necessary works, the Secretary of State is required to give or cause to be given proper consideration to the performance of the enforcement duty under section 18 of the1991 Act.

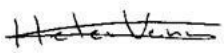
86. As set out in Annex 1, the Environment Agency's SOAF has identified CSOs for investigation based on exceedance of a certain number of spills per year (ranging from 60 spills per year based on one year's data down to 40 spills per year based on three or more years' data). The Secretary of State should amend guidance so as to identify a global single annual spill limit above which a CSO is deemed 'unsatisfactory' for the purpose of further investigation and improvement and which should be incorporated into permit conditions by the Environment Agency. The limit should have regard to and be consistent with, both the requirement that discharges must occur only in "exceptional circumstances'" and the requirement that it will be "by way of exception only" that there is no BTKNEEC solution. The OEP suggests, in the first instance, that such a figure is informed by the reference in Case C-301/10 to 20 spills per year (judgment at [79], Advocate-General's opinion at [81] – [84]). There is nothing to prevent the setting of a minimum requirement in the guidance which will, in most cases, achieve compliance and the setting of such a minimum threshold for compliance will also have obvious benefits in terms of providing both regulators and the industry with a clear and testable threshold for compliance. Such an approach is expressly countenanced by footnote 1 to sections A and B of Annex 1 to the UWWTD.

LINKED NOTICES

87. This Decision Notice is linked to two other decision notices of the same date as this Notice, pursuant to section 37 of the Environment Act 2021, and which have been issued to the Environment Agency and Ofwat respectively. Copies of the linked notices, and relevant correspondence between the OEP and the recipients of the linked notices, are enclosed. A copy of this Decision Notice and relevant correspondence between the OEP and the Secretary of State will also be sent to the Environment Agency and Ofwat.

DATE FOR RESPONSE

88. The recipient of a decision notice must respond within two months of the date it is given (section 36(3) Environment Act 2021). Therefore, a response to this Decision Notice is required by 12 February 2025.



Helen Venn

For and on behalf of the Office for Environmental Protection

Chief Regulatory Officer

The Office for Environmental Protection

Email: Helen.Venn@theoep.org.uk

Office for Environmental Protection

www.theoep.org.uk

ANNEX 1

THE LEGAL FRAMEWORK

The Water Industry Act 1991

Section 2 ("General duties with respect to the water industry")

1. Section 2 imposes duties on the Secretary of State for the Environment, Food and Rural Affairs ("***Defra***") and the Water Services Regulation Authority (known as "***Ofwat***") as to when and how they should exercise and perform the powers and duties conferred or imposed upon them by certain provisions of the Water Industry Act 1991 ("***the 1991 Act***"). Those provisions have at all material times included section 18.

2. As originally enacted, section 2(2) required the Secretary of State and/or Ofwat (then "***the Director***") to act in the manner they considered best calculated:

> "(a) to secure that the functions of ... a sewerage undertaker are properly carried out as respects every area of England and Wales; and
>
> (b) without prejudice to the generality of paragraph (a) above, to secure that companies holding appointments under Chapter I of Part II of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of the functions of such undertakers."

3. From 1 April 2005, subsection (2) was repealed and re-enacted with amendments as subsections (2A) to (2E). So far as relevant, the requirements contained in the former subsection (2) were re-enacted in subsection (2A) as paragraphs (b) and (c), with the addition of a new paragraph (a):

> "(a) to further the consumer objective".

4. From 18 December 2015, subsection (2A) was amended to include a further requirement:

> "(e) to further the resilience objective."

Section 18 ("Orders for securing compliance with certain provisions")

5. As originally enacted, section 18(1) provided that:

> "Subject to subsection (2) and sections 19 and 20 below, where in the case of any company holding an appointment under Chapter I of this Part the Secretary of State or the Director is satisfied-
>
> (a) that that company is contravening-
>
> (i) ... ...
> (ii) any statutory or other requirement which is enforceable under this section and in relation to which he is the enforcement authority
>
> or
>
> (b) that that company has contravened any such ... requirement and is likely to do so again,
>
> he shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that ... requirement."

6. From 1 October 2004, subsection (1) was amended to provide that:

> "Subject to subsection (2) and sections 19 and 20 below, where in the case of any company holding an appointment under Chapter I of this Part ... the Secretary of State or the Director is satisfied -
>
> (a) that that company ... is contravening-
>
> (i) ... ...
> (ii) any statutory or other requirement which is enforceable under this section and in relation to which he is the enforcement authority
>
> or
>
> (b) that that company ... is likely to contravene any such ... requirement,
>
> he shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that ... requirement."

7. Subsection (1) has been further amended *inter alia* to amend references to "the Director" to "the Authority" (i.e. Ofwat).

Section 19 ("Exceptions to duty to enforce")

8. As enacted, s.19(1) provided that:

> "19.--(1) Neither the Secretary of State nor the Director shall be required to make an enforcement order in relation to any company ... if he is satisfied-
>
> (a) that the contraventions were, or the apprehended contraventions are, of a trivial nature;
>
> (b) that the company has given, and is complying with, an undertaking to take all such steps as it appears to him for the time being to be appropriate for the company to take for the purpose of securing or facilitating compliance with the ... requirement in question; or
>
> (c) that the duties imposed on him by Part I of this Act preclude the making ... of the order."

9. The reference in paragraph (c) to "the duties imposed on him by Part I of this Act" includes the duties imposed by section 2 and set out above.

10. Subsection (1) was amended from 1 December 2005 by the addition after paragraph (a) of paragraph (aa):

> "(aa) that the extent to which the company caused or contributed to, or was likely to cause or contribute to, a contravention was trivial."

11. Subsection (1) has been further amended *inter alia* to amend references to "the Director" to "the Authority" (i.e. Ofwat).

Section 94 ("General Duty to provide sewerage system")

12. As enacted, section 94 provided so far as relevant that:

> "(l) It shall be the duty of every sewerage undertaker-
>
> (a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers as to ensure that that area is and continues to be effectually drained; and
>
> (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers."

13. Subsection (1) has not been amended in any material respect.

14. Subsection (3) as enacted provided that:

> "The duty of a sewerage undertaker under subsection (I) above shall be enforceable under section 18 above-
>
> (a) by the Secretary of State; or
>
> (b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Director."

15. Subsection (3) has been amended to amend the reference to "the Director" to "the Authority" (i.e. Ofwat).

The Water Resources Act 1991

Section 85 ("Offences of polluting controlled waters")

16. In Chapter II of Part III, section 85(1) created the criminal offence of causing or knowingly permitting any poisonous, noxious or polluting matter or any solid waste matter to enter controlled waters.

Section 88 ("Defence to principal offences in respect of authorised discharges")

17. Section 88(1) created a defence to the offence created by section 85(1) in the case of a discharge made under and in accordance with the terms of *inter alia* a consent given under the relevant provisions of the Water Resources Act 1991 by "the Authority", being until 1 April 1996 the National Rivers Authority and thereafter the Environment Agency.

Section 91 ("Appeals in respect of consents under Chapter II")

18. Section 91 created a system of appeals to the Secretary of State against decisions of "the Authority", including, at section 91(1), where the Authority:

> "(b) in giving a discharge consent, has made that consent subject to conditions"
>
> "(c) has revoked a discharge consent, modified the conditions of any such consent or provided that any such consent which was unconditional shall be subject to conditions".

19. Section 91(5) empowered the Secretary of State in determining such an appeal *inter alia* to direct "the Authority" to give a discharge consent subject to specified conditions.

The Urban Waste Water Treatment (England and Wales) Regulations 1994

20. The Urban Waste Water Treatment (England and Wales) Regulations 1994 ("***the 1994 Regulations***") transposed the requirements of the Urban Waste Water Treatment Directive ("***the UWWTD***") into domestic law, in the manner set out in more detail below.

Regulation 4 ("Duty to provide and maintain collecting systems and treatment plants")

21. Regulation 4 supplemented the duties owed by sewerage undertakers under section 94 of the 1991 Act. It did so:

    (1) in regulation 4(2) by including within the duty created by section 94(1)(a) a duty to ensure that collecting systems satisfying the provisions of Schedule 2 were provided in respect of all urban discharges by, at the latest (in respect of the smallest qualifying agglomerations) 31 December 2005;

    (2) in regulation 4(4) by including within the duty created by section 94(1)(b) a duty to ensure that urban waste water enter collecting systems is, before discharge, subject to secondary or equivalent treatment at treatment plants.

Regulation 6 ("Discharges of treated urban waste water")

22. As enacted, regulation 6(2)(c) required "the Authority" (i.e. initially the National Rivers Authority, since 1 April 1996 the Environment Agency), in exercising its functions under Chapter II of Part III of the Water Resources Act 1991 (pollution offences) (and thus including sections 85 to 91) to secure:

> "(c) with respect to any discharge from a collecting system described in regulation 4 or an urban waste water treatment plant described in regulation 5, the limitation of pollution of receiving waters due to storm water overflows".

23. Regulation 6(3) provided that "the Authority":

> "... shall at regular intervals review and, if necessary for the purpose of complying with this regulation, modify or revoke consents granted under the said Chapter II."

24. Regulation 6(2) was amended in 2010 to reflect the replacement of the provisions of Chapter II of Part III of the Water Resources Act 1991 by provisions of the Environmental Permitting (England and Wales) Regulations 2010 (see below). The corresponding amendment was not made to regulation 6(3) but the OEP considers that the duty under regulation 6(3) subsists and is applicable both to discharge consents issued under the Water Resources Act 1991 and to environmental permits issued under the 2010 regulations and their successors.

Schedule 2 ("Requirements for Collecting Systems")

25. Paragraph 2 of Schedule 2 required that:

> "The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive cost, notably regarding:
>
> (a) ... ...
>
> (b) ... ...
>
> (c) limitation of pollution of receiving waters due to storm water overflows."

The Environment Act 1995

Section 1 ("The Environment Agency")

26. Section 1 established the Environment Agency.

Section 40 ("Ministerial directions to the new Agencies")

27. Section 40(2) gave the Secretary of State power to give the Environment Agency such directions of a general or specific character as they considered appropriate for the implementation of *inter alia* any European Union Directive (and thus including the UWWTD). Section 40(8) imposed a duty upon the Environment Agency to comply with any such direction.

Section 114 ("Power of Secretary of State to delegate his functions of determining, or to refer matters involved in, appeals")

28. Section 114 enabled the Secretary of State to appoint any person to exercise on their behalf functions which included the determining of appeals under section 91 of the Water Resources Act 1991.

Water Environment (Water Framework Directive) (England and Wales) Regulations 2003

Regulation 3 ("The general duties")

29. Regulation 3(1) of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 ("the 2003 Regulations") imposed a duty upon the Secretary of State and the Environment Agency to exercise their "relevant functions" so as to secure compliance with the Water Framework Directive ("the WFD").

30. The WFD at article 10(2)(a) requires that Member States shall ensure the establishment and/or implementation of, *inter alia*, the emissions controls based on best available techniques contained in the UWWTD (and thus those transposed in paragraph 2 of Schedule 2 to the 1994 Regulations).

Schedule 2 ("Enactments in Relation to Which Duties in Regulation 3 Apply")

31. In the case of the Secretary of State, by virtue of Schedule 2, their "relevant functions" included:

    (1) those under Part 4 of the 1991 Act (sewerage services) (item 5); and

    (2) those under the 1994 Regulations (item 14).

The Environmental Permitting (England and Wales) Regulations 2007/2010/2016

The 2007 Regulations

32. The Environmental Permitting (England & Wales) Regulations 2007 ("the 2007 Regulations") introduced the concept of environmental permitting in respect of those activities regulated by the Environment Agency which were stipulated in the 2007 Regulations.

The 2010 Regulations

33. The Environmental Permitting (England and Wales) Regulations 2010 ("the 2010 Regulations"):

(1) repealed and replaced the 2007 Regulations;

(2) repealed section 85 of the Water Resources Act 1991 and associated provisions; (Part 1 of Schedule 26);

(3) replaced the discharge consent regime formerly found in the above-mentioned provisions of the Water Resources Act 1991 with the inclusion within the environmental permitting regime of "water discharge activities" (see Schedule 21); existing discharge consents became environmental permits;

(4) amended regulation 6(2) of the 1994 Regulations by substituting for the reference to "Chapter II of Part III of the Water Resources Act 1991 (pollution offences)" reference to "the Environmental Permitting Regulations";

(5) omitted by oversight to make the corresponding amendment to regulation 6(3) of the 1994 Regulations; as stated above, the OEP considers that the duty under regulation 6(3) subsists and is applicable both to discharge consents issued under the Water Resources Act 1991 and to environmental permits issued under the 2010 Regulations and their successors;

34. The 2010 Regulations provided at regulation 12:

> "12.—(1) A person must not, except under and to the extent authorised by an environmental permit—
>
> (a) ... ;
>
> (b) cause or knowingly permit a water discharge activity ..."

35. Regulation 20(1) empowered the Environment Agency to vary an environmental permit.

36. Regulation 38 created the criminal offence of contravention of regulation 12(1).

37. Schedule 5 ("Grant, variation, transfer and surrender of environmental permits") empowers the Environment Agency to act in relation to the matters listed in its description.

The 2016 Regulations

38. The Environmental Permitting (England and Wales) Regulations 2016 ("the 2016 Regulations"):

    (1) repealed and replaced the 2010 Regulations;

    (2) remain extant;

    (3) are, so far as relevant, of similar effect to the 2010 Regulations.

Water Environment (Water Framework Directive) (England and Wales) Regulations 2017

39. The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 ("***the 2017 Regulations***") repealed and replaced the 2003 Regulations.

Regulation 3(1)

40. Regulation 3(1) imposed a duty upon the Secretary of State and the Environment Agency to exercise their "relevant functions" so as to secure compliance with the WFD.

41. The WFD at article 10(2)(a) requires that Member States shall ensure the establishment and/or implementation of, *inter alia*, the emissions controls based on best available techniques contained in the UWWTD (and thus those transposed in paragraph 2 of Schedule 2 to the 1994 Regulations).

Schedule 2 ("Enactments in relation to which duties in regulation 3 apply")

42. In the case of the Secretary of State, by virtue of Schedule 2, their "relevant functions" included:

    (1) those under Part 4 of the 1991 Act (sewerage services) (item 4); and

    (2) those under the 1994 Regulations (item 13).

The Environment Act 2021

Section 80

43. Section 80 of the Environment Act 2021 ("***the 2021 Act***") made amendments to the 1991 Act including the addition of section 141A requiring the Secretary of

State to prepare a storm overflow discharge reduction plan for the purposes of reducing the frequency, duration and volume of discharges from storm overflows and reducing adverse impacts of such discharges on the environment and public health.

THE FACTUAL FRAMEWORK

44. In this section, the OEP will identify and summarise relevant facts and documents, and explain their relevance.

45. On 27 November 1990 the Secretary of State for the Environment acting pursuant to section 67(4) of the Water Act 1989 authorised Ofwat to enforce under section 20 of that Act the duty of a sewerage undertaker under section 67(1) of that Act. This authorisation has continued following the consolidation of these provisions within the 1991 Act (sections 94 and 18).

46. On 21 May 1991 the UWWTD was made.

47. In July 1994 in its document "Future charges for Water and Sewerage Services; The outcome of the Periodic Review", Ofwat reported an allowance of capital expenditure on achieving compliance with the UWWTD over the next 10 years of c. £6 billion, to include the upgrading of over 2,400 combined sewer overflows ("***CSOs***") to reduce the environmental impact of their discharges to coastal, estuarial and freshwaters.

48. The Asset Management Programme 2 ("AMP2") (1995 - 2000) included schemes for the improvement of c. 1,200 "unsatisfactory" CSOs during AMP2.

49. The AMP2 Guidelines prepared by the Environment Agency include the following section[1]:

> 4.4 DEFINITION OF UNSATISFACTORY COMBINED SEWER OVERFLOWS
>
> 4.4.1 The following criteria are to be used in deciding which CSOs are unsatisfactory and, therefore, subject to consent review to drive improvements.
>
> (i) causes significant visual or aesthetic impact due to solids, fungus and has a history of justified public complaint;
>
> (ii) causes or makes a significant contribution to a deterioration in river chemical or biological class;

[1] This in turn seems to be based on identical wording contained at paragraph 4.4 of the NRA Guidance on 'AMP(2) / Effluent Quality, NRA Guidance Note for Preparation work for AMP(2)' dated March 1993

(iii) causes or makes a significant contribution to a failure to comply with Bathing Water Quality Standards for identified bathing waters;

(iv) operates in dry weather conditions;

(v) operates in breach of consent conditions provided that they are still appropriate; and/or

(vi) causes a breach of water quality standards (EQS) and other EC Directives.

50. On 30 November 1994 the 1994 Regulations came into force.

51. On 1 April 1996 the Environment Agency came into being.

52. In July 1997, Defra's predecessor, the Department for Environment, Transport and the Regions ("***the DETR***"), provided guidance ("***the 1997 Guidance***") to undertakers and regulators upon the practical implementation of the 1994 Regulations.

53. Paragraph 2.1 of the 1997 Guidance sets out the involvement of various public authorities in the creation of the guidance:

> "Much of the guidance has been drawn up with the assistance or advice of the National Rivers Authority (NRA) and the Environment Agency, into which the NRA was subsumed on 1 April 1996; the Office of the Director General of Water Services {OFWAT); other government departments; and the Water Services Association, as representatives of the water service companies, who are the statutory sewerage undertakers (referred to throughout the rest of this document as the water companies). They have all agreed its detail."

54. Paragraph 2.2 of the 1997 Guidance (p.2) states that:

> "The guidance does not have statutory force and it may be updated and amended to reflect experience gained in the practical implementation of the Regulations."

55. Annex 3 to the 1997 Guidance is introduced in the contents section (p.i) in the following terms:

> The standards for the design, construction, operation and maintenance of collecting systems which are to apply to the systems themselves are set out in Schedule 2 to the Regulations. The provisions mirror the Directive, which

> sets out only minimum standards, and does not indicate how they might be achieved. Annex 3 to the guidance document gives some practical and useful elaboration. It lists reference material which together reflects current practice in England and Wales and which the Secretary of State considers should be used as guidelines for satisfying the requirements of the Regulations."

This text is repeated at paragraph 5.3 (p.4).

56. Annex 3 at paragraph 1.6 (p.37) requires the adoption of the Urban Pollution Management Manual methodology to the planning of CSO improvements.

57. Annex 8 to the 1997 Guidance is introduced in the contents section (p.iii) in the following terms:

> "**Duty on the Environment Agency to ensure that pollution from storm water overflows is limited by Regulation 6(2**). The Directive acknowledges the impracticability of constructing collecting systems and treatment works such as to treat all waste water during situations such as unusually heavy rainfall. The considerations set out in Annex 8 to this paper will govern the limitation of pollution from storm water overflows. The annex sets out a framework and is supported by two, more detailed, appendices."

58. Annex 8 is entitled "Framework for Consenting Intermittent Discharges". It contains criteria for the identification of "unsatisfactory" CSOs. At paragraph 1.8 (p.53) it is stated that:

> "This guidance contributes to the definition of "best technical knowledge", as referred to *[in]* paragraph 2 of Schedule 2 of the Regulations, particularly in the context of limitation of pollution."

59. Section 4 of Annex 8 (pp.54-55) sets out the criteria for identification of a CSO as unsatisfactory:

> "4.1 The following criteria are to be used in deciding which CSOs are unsatisfactory and, therefore, subject to consent review to drive improvements:
>
> (i) causes significant visual or aesthetic impact due to solids, fungus and has a history of justified public complaint;
>
> (ii) causes or makes a significant contribution to a deterioration in river chemical or biological class;
>
> (iii) causes or makes a significant contribution to a failure to comply with Bathing Water Quality Standards for

identified bathing waters;

(iv) operates in dry weather conditions;

(v) operates in breach of consent conditions provided that they are still appropriate; and/or

(vi) causes a breach of water quality standards (EQS) and other EC Directives."

60. Section 5 of Annex 8 (pp.55-56) addresses the consenting of "satisfactory" CSOs and states:

> "5.1 Only consents for unsatisfactory existing CSOs as defined in Section 4.1 need to be reviewed. Those that are satisfactory will therefore meet the requirements of the Regulations and consequently there is no need to review their consents to incorporate the requirements of the appropriate Appendix. A consent may exist which is adequate or a discharge may require a consent because it is currently unconsented or is one of the scheduled consents issued by schedule at the time of water privatisation in England and Wales.
>
> 5.2 If a new consent is required for an existing satisfactory CSO that is not subject to change, it need only specify current conditions. These should include a statement of carry-forward flow where this information is available and should include any other facilities such as screens etc, currently installed."

61. Section 6 of Annex 8 (pp.56-57) addresses the consenting of unsatisfactory, new and altered CSOs.

62. Section 7 of Annex 8 (pp.56-57) contains the procedure for reviewing CSOs to freshwaters, by reference to Appendix 8(i). Table A8.1 (p.58) ("Indicative Impact Assessment Criteria for Setting Consents for CSOs to Freshwaters") sets out the differing approaches to be adopted according to the significance of the discharge.

63. Appendix 8(i) ("Consenting Intermittent Sewage Discharges Into Freshwaters") (pp.60-68) supplements Annex 8. Paragraph 1.2 (p.60) states that "... the standards set down in the Appendix are considered to meet the provisions of the Regulations". Paragraph 4.1 (p.61) applies the Appendix to "all new and unsatisfactory intermittent sewage discharges to any fresh water in the UK". It contains detailed provision for methods of assessment, including assessment of impact upon receiving waters.

64. During the price review process in 1999 c. 5,500 further "unsatisfactory" CSOs

were identified for improvement during AMP3 (2000 - 2005).[2] In its publication "Final Determinations. Future water and sewerage charges 2000 - 2005", Ofwat noted that "almost four times more improvements are planned for 2000–05 than were originally envisaged." it also noted that nevertheless:

> The EA has expressed concerns about the scale and timing of the environmental programme included in draft price limits. It did not accept that the schemes submitted for re-appraisal were not cost effective although it welcomed investigations into solutions that were more cost-effective. It also suggested that the assumed profiling of schemes introduced a risk that the UK would not meet statutory deadlines in 2005 under the UWWTD."

Despite this, Ofwat remained of the view that:

> ".. a small number of the proposed schemes have not been included, either because the company has not properly defined them, the solution proposed requires reappraisal or the financial constraints on the company have necessitated a slight lengthening of the timescale for completion of the work. Even these schemes delayed to beyond March 2005 would be completed before the statutory EU deadlines."

65. Pursuant to the AMP3 programme, the Environment Agency made prospective variations to the discharge consents of the CSOs the subject of identified and agreed improvement work. United Utilities Water plc ("***UU***") sought to challenge by appeal on grounds of general principle the variations made to hundreds of consents relating to its discharges from CSOs in the North West of England, which variations were specifically concerned with achieving the standards required to achieve UWWTD compliance.

66. On 2 January 2004 the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 came into force.

67. By 31 December 2005:

    (1) the United Kingdom was required by the terms of the UWWTD to have achieved full compliance with the requirements of the UWWTD;

    (2) sewerage undertakers were required pursuant to their duties:

        (a) under regulation 4(2) of the 1994 Regulations (as part of their general duty of effectual drainage under section 94(1)(a) of the

[2] in the event, it appears that 3,174 CSOs were actually improved during AMP3 and a further 1,849 during AMP4.

1991 Act) to have ensured that collecting systems which satisfied the requirements of Schedule 2 to the 1994 Regulations were provided in urban areas;

(b) under regulation 4(4) of the 1994 Regulations (as part of their general duty of effectual treatment under section 94(1)(b) of the 1991 Act) to have ensured that waste water entering those collecting systems was, before discharge, subject to treatment at a treatment works in accordance with regulation 5.

(3) the Environment Agency was required pursuant to its duties under regulation 6(2)(c) of the 1994 Regulations to have exercised its functions under the then requirements of Chapter II of Part III of the Water Resources Act 1991 so as to secure with respect to discharges from those collecting systems, the limitation of pollution of receiving waters due to storm water overflows;

(4) the Defra Secretary of State was required pursuant to their duties under regulation 3 of the 2003 Regulations to have exercised their functions in relation to the 1991 Act and the 1994 Regulations so as to secure compliance with the requirements of the WFD, which in turn required in article 10(2)(a) the establishment and/or implementation of the emission controls contained in, *inter alia*, the UWWTD.

68. In January 2006 the Secretary of State and Ofwat published a document entitled 'The Development of the Water Industry in England and Wales'. This states that '*England and Wales benefits from an efficient and effective water and sewerage industry*' (p1). Further:

(1) The role of Defra is said to be one of '*standard-setting*' and that it '*leads on the development of national water policies*' (pp47 and 53),
(2) Ofwat is described as the '*Economic Regulator*' with responsibilities to '*protect customers, set price limits, secure that companies can finance and fulfil their functions; monitors compliance with licence conditions; standards of service*' (p47)
(3) The Environment Agency is described as the '*Environmental Regulator*' with responsibilities as '*Principal adviser to the government on the environment, leading public body protecting and improving the environment of England and Wales; competent authority for implementation of the Water Framework Directive.*' (p47)

69. On 4 January 2007, a Defra Inspector appointed by the Secretary of State

issued a decision letter in respect of three joined appeals by UU (the "***UID[3] Appeals***")[4], "to address some common matters of general principle".[5] Whilst all three appeals succeeded, two of them[6] were described by the Inspector as "unsuccessful, in terms of [their] aims". That "aim" was to challenge the requirements of the 1997 Guidance as going beyond those necessary to achieve compliance with the 1994 Regulations (and thus the UWWTD). The Inspector noted that:

> "16. .... OFWAT expect UU to test and challenge fully the basis for any new requirement placed on them; this may involve an appeal."

70. The essence of the Inspector's decision was:

> "20. Neither the UWWTD nor the UWWTR give guidance on what is meant by BTKNEEC; by "unusually heavy rainfall"; or, by "limit(ing) pollution". In 1997, the government issued guidance, which had been agreed by the sewerage undertakers, by the EA and by OFWAT. This is non-statutory, but has been communicated to the EC as a demonstration of compliance with the UWWTD and the government evidently considers that it should form the basis for decisions concerning CSOs. This has particular significance in the light of the EC's recent (April 2006) decision to pursue legal action against the UK over a breach of the EU rules in relation to the collection and treatment facilities at 4 urban centres; the EC has now sent a second (and final) written warning to the UK."

> "28. ... the 1997 guidance, together with the UPM2, provide the appropriate framework, in England and Wales, for deciding whether sewerage systems need improvement to comply with the UWWTR and for determining the improvements that are required on the basis of BTKNEEC. The EA are not compelled, by law, to consent discharges in accordance with this framework. However, there would need to be truly exceptional reasons to depart from this approach and those reasons might be subject to EC scrutiny, because the framework gives expression to current government policy."

"***UPM***" stands for "Urban Pollution Management". The UPM Manual is published by the Foundation for Water Research and describes itself as "A planning guide for the management of urban wastewater discharges during wet weather".

---

[3] "Unsatisfactory Intermittent Discharges".

[4] Discharge Consent Appeals APP/WQ/04/1660, APP/WQ/04/1832 and APP/WQ/04/1836 - decision letter 4 January 2007

[5] *Ibid,* Decision letter paragraph 2.

[6] APP/WQ/04/1660 and APP/WQ/04/1832.

71. This decision was followed in subsequent appeals, in particular "***the Preston 7 Appeals***"[7] and was the basis upon which the Environment Agency and undertakers thereafter continued to proceed in the determination of conditions applicable to discharges from CSOs.

72. On 21 June 2007 Ofwat and the Environment Agency entered into a Memorandum of Understanding pursuant to section 52(4) of the Water Act 2003.

73. On 7 October 2008 Defra and Ofwat entered into a Memorandum of Understanding pursuant to section 52(4) of the Water Act 2003.

74. On 13 January 2009 the Environment Agency issued Operational Guidance OI 16_02 v.2. The Environment Agency states[8] that this document was the genesis of the Environment Agency's requirement of self-reporting by sewerage undertakers. Modern permit conditions require self-reporting of incidents causing "significant pollution" (Category 1 or Category 2) but it is only by means of this Operational Guidance that the Environment Agency sought to procure voluntary self-reporting of minor incidents (Category 3 and Category 4).

75. In April 2009 the 1997 Guidance was updated in immaterial respects. It has not been updated since.

76. On 10 March 2010 the 2010 Regulations came into force, replacing the provisions of Chapter 2 of Part III of the Water Resources Act 1991 in relation to water pollution. Discharge consents were brought within the environmental permitting regime.

77. In 2011 the Environment Agency introduced the system of Environmental Performance Assessment ("***EPA***") as a means of comparison of environmental performance between sewerage undertakers. This created a number of "metrics" by which the comparative performance of sewerage undertakers is judged. The Environment Agency describes the process as follows:

> "The Environmental Performance Assessment (EPA) was introduced in 2011 as a non-statutory tool for comparing performance between water and sewerage companies (WaSCs). It uses measurable environmental indicators to provide a

[7] Discharge Consent Appeals APP/WQ/04/1829, APP/WQ/04/2428, APP/WQ/04/2429, APP/WQ/04/2430, APP/WQ/04/2431, APP/WQ/04/2432, APP/WQ/04/2433 - decision letter 14 February 2008.

[8] "Environment Agency Response to the Office for Environmental Protection (OEP) letter of the 9th December 2022 regarding - Investigation of potential failures to comply with environmental law by the Environment Agency - untreated sewage discharge by sewerage undertakers", 31 January 2023, answer to question 41.

meaningful comparison of performance across the nine WaSCs. It forms part of a wider assessment, including discussion of strategic and non-metric performance at the annual review meetings and ongoing engagement. It is reported annually.

"The following four key performance indicators (KPIs) developed by the EA were published by Ofwat on their website in March 2012 in the "Key performance indicators - guidance" document covering:

- Pollution incidents (sewerage)
- Serious pollution incidents (sewerage)
- Discharge permit compliance
- Satisfactory sludge disposal

We released two additional KPIs:

- Pollution incidents self reporting
- Asset Management Programme/National Environment Programme (AMP/NEP) delivery"

78. On 18 October 2012 the Court of Justice of the European Union ("***the CJEU***") delivered judgment in the case of ***Commission v United Kingdom*** **C-301/10** ("***Case C-301/10***"). That case concerned discharges from urban CSOs into the Thames in London and into the North Sea from a CSO at Whitburn, Tyne & Wear. The Commission alleged that the frequency and volume of those discharges represented failures by the United Kingdom to fulfil its obligations under the UWWTD. The CJEU held that on a proper construction of the UWWTD, in particular Annex I(A):

(1) "failure to treat urban waste water cannot be accepted under usual climatic and seasonal conditions"; [52]

(2) "under usual climatic conditions and account being taken of all variations, all urban waste water must be collected and treated"; [53]

(3) " ... it would run counter to *[the UWWTD]* if overflows of untreated urban waste water occurred regularly." [54]

(4) the objectives of the Directive do not permit the inference that "situations such as unusually heavy rainfall" in footnote 1 to Annex 1 can be "normal and common"; [58]

(5) the concept of BTKNEEC should be invoked "by way of exception only"; [65]

(6) the proper approach was (1) to "examine whether the discharges ... are due to circumstances of an exceptional nature"; (2) "if that is not the case, [to] establish whether the United Kingdom has been able to demonstrate that the conditions for applying the concept of BTKNEEC were met." [73]

79. In October 2012 by its document "Additional Guidance. Water Discharge and Groundwater (from point source) Activity Permits (EPR 7.01)", which remained extant until 8 May 2018, the Environment Agency provided guidance upon the categorisation of CSOs as "unsatisfactory", using essentially the same methodology as the 1997 Guidance.[9] The document stated:

(1) at paragraph 2.3.3.1:

> "You must make sure your existing storm overflows do not become unsatisfactory. Where a storm overflow does become unsatisfactory we will take enforcement action or review your permit as appropriate. We will require you to remedy the problems as soon as reasonably practical";

(2) at paragraph 2.3.3.6:

> "We expect that improvements in CSO performance in AMP rounds will be maintained. We expect that companies will periodically check actual performance of their CSOs and sewerage systems against design horizon predictions made at the time of the permit application. We anticipate the results will be reported through the MD109 process.
>
> It is for the individual companies to decide how they will effectively monitor and review future performance against design horizon predictions. We anticipate the methods may vary depending on whether there are monitors in place and on the sensitivity of the receiving water. For example companies may report actual spill frequencies against design assumptions for bathing waters or continued compliance with population assumptions for less sensitive sites";

(3) In Annex 1:

> "The Water Companies should also ensure no storm overflow

[9] The Environment Agency conference paper "CSOs - The past, The Present and the Future", autumn 2014 acknowledges at p.2 that "Criteria that defined unsatisfactory CSOs were introduced in the AMP2 Guidelines and can be found today relatively unchanged in the Environment Agency's Guidance EPR 7.01".

> discharges become unsatisfactory. We expect companies to identify storm overflows discharges at risk of becoming unsatisfactory and to address these as part of their capital maintenance programmes, or by other means. We would support the case for capital maintenance expenditure in AMP that identifies specific outputs to address these risks."

80. In May 2013 Defra issued a strategic policy statement[10] to Ofwat pursuant to section 2A of the 1991 Act. This included:

(1) at paragraph 3.7, the recognition that "longer-term planning for sewerage infrastructure has had less focus than that for water supply";

(2) at paragraph 3.33, a requirement that "Ofwat must satisfy themselves that water and sewerage companies are in compliance with their duties to provide public sewers which ensure effectual drainage";

(3) at paragraph 3.35, as part of "Priority VII":

> "Ofwat shall, as a matter of priority, keep under review the impact of their regulatory approach on the overall resilience of water companies' networks. This should embrace their approach . .. to risk management, in the context of their duties to provide public sewers which ensure effectual drainage.
>
> Ofwat will report regularly to the Secretary of State with an assessment of the impact of their regulatory framework on sustainable water management by water and sewerage companies, setting out key risks and mitigation."

81. The same document provided "Social and Environmental Guidance", including at paragraph 3.10.1 that:

> "Water and Sewage Companies should continue to actively plan for new development and increasing demands on the sewer system, and to ensure that the system is resilient and capable of supporting sustainable growth and meeting the challenges of increased rainfall from climate change."

82. Also in May 2013, the Environment Agency and Ofwat published a joint "Drainage Strategy Framework For water and sewerage companies to prepare Drainage Strategies". This:

(1) in section 1.1 acknowledged the lack of focus upon longer term planning focus on water and sewerage company drainage infrastructure;

[10] The 2013 strategic policy statement has since been replaced by updated policy statements in 2017 and in 2022.

(2) in section 1.5:

(a) summarised the “key legislative driver” as being section 94 of the 1991 Act “because it explicitly indicates that the sewerage system should be improved to keep pace with growing pressures over the long term” and the UWWTD;

(b) stated that “the Environment Agency (in England) and Natural Resources Wales will use permit and license conditions to ensure that water and sewerage companies deliver their agreed contributions”, noting CSOs as one potential cause of deterioration of water quality;

(c) noted within the table of “Recommended good practice” in paragraph 2.2.1 that “Population growth, new homes and businesses, climate change and urban creep combine to make the future highly uncertain but will almost certainly increase flooding and pollution risks from drainage systems.”

83. In a letter dated 18 July 2013 to the chief executives of water companies, copied to the Environment Agency and Ofwat, the then Secretary of State Mr. Richard Benyon identified discharges from CSOs due to climate change, population growth and increase in impermeable surfaces as “rapidly becoming a reputational issue”, which required increased monitoring. This was adopted by the Environment Agency in its “Letter to Water Companies regarding Environment Agency expectations” dated August 2013 and was the genesis of the recently completed programme of installation of event duration monitors (“EDMs”) at CSOs.

84. On 30 September 2013, following consultation with water companies, the Environment Agency published its “Risk Based Approach to the Monitoring of Storm Discharges v.5.0 (FINAL)”. This included a “Significance Matrix and Monitoring Requirements” table which ranked the need for monitoring by reference to amenity and number of spills *per annum.* The highest category of annual spills was “20 or more”, with a note explaining that “The 20 or more spills per annum figure is based on the threshold figure raised by the Commission as part of the discussions on the London and Whitburn UWWTD Infraction case.”

85. In its conference paper "CSOs - The Past, The Present and the Future" (autumn 2014), the Environment Agency stated:

(1) “The NEP prioritised investment by targeting on the basis of environmental impact rather than substandard assets. CSOs that were identified and confirmed as being unsatisfactory were brought up to a minimum standard under an Urban Wastewater Treatment Directive

(UWWTD) driver to achieve a Formula A equivalent performance and screening, primarily through AMP2 and AMP3. It took 15 years to catch up from our pre-privatisation past. The Agency's position is that any future works required to meet the requirements of these minimum UWWTD requirements would now be funded from outside the NEP."

(2) "WaSCs must make sure existing storm overflows do not become unsatisfactory. Where a storm overflow does become unsatisfactory we will take enforcement action or review the permit and will require remedial action to resolve the problems as soon as reasonably practical outside the NEP"; p.4

(3) "We expect WaSCs to adequately deal with external pressures (climate, growth and creep) on sewerage to prevent the need for new proposed CSOs or existing ones deteriorating. Inadequate sewer design or maintenance is not an acceptable reason for a proposed new or deterioration of an existing CSO"; p.4

(4) "The Agency's involvement is to seek sufficient confidence to issue a permit to discharge. However the Agency's role is not one of checking or of Quality Assurance. It is the WaSCs responsibility to derive a scheme that delivers the environmental and/or performance targets set. If the scheme does not deliver the required performance then we expect this to be rectified as soon as practicable"; p.4.

86. During 2015, the collection of EDM data began.

87. In July 2015:

> ""a group was set up under workstream 3 of the 21st Century Drainage Programme ... The group included representatives from the environmental regulators and water and sewerage companies in England and Wales, and was tasked with working together to develop a process for addressing high frequency discharges. Over the last two years the group has developed a draft 5 stage process to achieve this known as the Storm Overflows Assessment Framework (SOAF)."[11]

88. On 24 August 2015 Defra wrote a letter[12] to water companies concerning the "21st Century Drainage" programme and its objectives. Defra's recommendations included:

> "**For 21st Century Drainage to develop a robust approach to address 'too many' spills now.** This should, in particular, be compatible with any case law such as the breaches of UWWTD

[11] Environment Agency abstract "21st Century Drainage Programme – Storm Overflows Environmental Impact Assessment" for Chartered Institution of Water and Environmental Management Autumn Conference 2017, section 1.
[12] Defra response to OEP 3/5/23, Annex 14

> by the UK identified by the Court of Justice in its Judgment of October 2012. In short, if it cannot be demonstrated that the level of spills is due to circumstances of an exceptional nature, then action to address spills should be examined in the context of BTKNEEC. This means a wider examination of the cost and benefit of reducing spills than a straightforward focus on environmental outcomes. Public acceptability should also be included as a measure against which spills are assessed."

89. On 24 February 2017 the Environment Agency published its "PR19 Driver Guidance Frequently Spilling Storm Overflows (WINEP)". Its purpose was stated to be:

> "To identify those storm overflows that spill too frequently and review their performance against cost benefit criteria to drive a reduction in spill frequency where this is cost beneficial. This work will be included within the WINEP."

The guidance further stated that:

> "It will demonstrate to potential challengers that the industry has a robust approach to frequently spilling overflows. This objective extends beyond UWWTR needs, to addressing public acceptability and environmental / amenity benefits."

The document proposed support for AMP7 (2020 - 2025) funding in the case of CSOs whose EDM data disclosed frequent spills exceeding the thresholds set out immediately below. It stated that:

> "Overflows that do not fit the above criteria, but are unsatisfactory, not due to new legislation, designations, AMP5/6 WFD investigations or Ministerial agreements, must be improved as soon as reasonably practicable to meet UWWTR requirements. These storm overflows will not be included in the PR19 WINEP. Changes that are needed to the permits to resolve the unsatisfactory nature of these discharges should be highlighted for inclusion by water companies within capital maintenance programmes".
>
> ... ...
>
> "We recognise that spill frequency for a particular storm overflow can vary between years and certainty increases, of average spill frequency with the greater the number of years of data available. We are also aware that at the start of AMP7 there will only be a limited amount of EDM data available. We want to set the trigger high enough to be certain that the overflow is truly a high spiller. We propose to set thresholds for the U_INV driver dependant *[sic]*

on the number of years of data available:

Number of years of EDM data	Threshold for U-INV driver
1 year	60 spills or more
2 years	50 spills or more
3 years	40 spills or more"

... ...

"Improvements under this driver will contribute to complying with the requirements of the Urban Wastewater Treatment Regulations. Additional measures may be required to reduce the frequency of spills to the environment, where identified under other Urban Wastewater Treatment Regulations or Water Quality drivers."

90. In November 2017 the Environment Agency published its "Environmental Performance Assessment (EPA) methodology (v.3)", applicable to data collected from 1 January 2016. In this document:

(1) metric 2.1 ("Pollution Incidents (sewerage)") was defined by reference to the annual number of pollution incidents (categories 1 to 3) from discharges or escapes from assets including CSOs;

(2) metric 2.2 ("Serious Pollution Incidents (sewerage)") was defined by reference to the annual number of serious pollution incidents (categories 1 and 2) from discharges or escapes from assets including CSOs. The sources of the underlying obligations on water companies were stated to include the 2010 Regulations and section 94 of the 1991 Act;

(3) metric 2.5 "Delivery of the National Environment Programme (NEP) as part of Asset Management Programme (AMP)") excluded EDM data ("as the number of monitors are several thousand and would affect the overall figures too greatly"). In other words, the failures to fit EDMs might be so numerous as to skew the overall result. The sources of the underlying obligations on water companies were stated to include the 2010 Regulations and section 94 of the 1991 Act;

(4) metric 6 ("Self Reporting of Pollution Incidents") was defined as "The percentage of self reporting by the water company of pollution incidents (category 1, 2 and 3) in a calendar year for sewerage and water supply services" from assets including CSOs. The sources of the underlying obligations on water companies were stated to include the 2010 Regulations and section 94 of the 1991 Act.

91. The sources of the underlying obligations on water companies were stated to include the 2010 Regulations and section 94 of the 1991 Act. Whilst the first of these sources related to functions of the Environment Agency (and not of Defra or Ofwat) in relation to the setting and enforcement of conditions on

environmental permits, the second related to a distinct duty imposed upon the undertakers (in relation to the effectual drainage of their areas and effectual treatment of sewage), enforceable by Defra and Ofwat (but not the Environment Agency).

92. In June 2018, shortly following the withdrawal of "Additional Guidance. Water Discharge and Groundwater (from point source) Activity Permits (EPR 7.01)", the Environment Agency issued the (still extant) SOAF.[13] This created a 5-stage framework for addressing high frequency discharges from storm overflows for the purposes of the 1994 Regulations. Stage 1 uses EDM data to identify "high frequency spillers" by reference to the same thresholds contained in the PR19 driver guidance summarised above. We have seen no evidence to suggest that prior to this, the number of discharges were said to be relevant to an assessment of the performance of a CSO. If a CSO is identified as a "high frequency spiller" due to lack of hydraulic capacity its "Environmental Impact" is then considered at Stage 2. If it either has an Environmental Impact *or* is in an urban area subject to the 1994 Regulations, then, at Stage 3, options for its improvement are subjected to cost-benefit assessment (including BTKNEEC analysis). Stage 4 is a determination of whether the cost of improvement is proportionate to the resulting environmental benefits; if so, then Stage 5 is the delivery of the most cost-beneficial solution.

93. The SOAF explains its purposes as follows:

> "In accordance with longstanding guidance (DETR, 1997) where such overflows have an adverse environmental impact, measures are required to address these problems.
>
> More latterly, there have been concerns expressed regarding the frequency of discharge as well as the environmental impact. Population growth, urban creep, infiltration and changing rainfall patterns will further increase the likelihood of discharges from storm overflows.
>
> The assessment framework set out in Figure 1 and described in stages 1-5 below, is intended to address the problems caused by discharges from storm overflows considered to operate at too high a frequency. The framework will ensure that the water industry is proactively monitoring and managing the performance of its overflows in light of the pressures of growth, urban creep and changing rainfall patterns. It is also intended to

[13] see "Environment Agency Response to the Office for Environmental Protection (OEP) letter of the 9th December 2022 regarding - Investigation of potential failures to comply with environmental law by the Environment Agency - untreated sewage discharge by sewerage undertakers", 31 January 2023, answer to question 4: "The published version of the SOAF SOAF.pdf (water.org.uk) is the current version dated (June 2018 Version 1.6). This is the only published version that Water and Sewerage Companies (WaSCs) have based their planning, investigations and schemes on under the frequently spilling Water Industry National Environment Programme (WINEP) drivers of PR19. Previous versions of the SOAF were working drafts at the development stage".

demonstrate that sewerage systems are compliant with relevant legislation such as the UWWTR."

94. On 13 September 2018 the Environment Agency issued their guidance "Water companies: environmental permits for storm overflows and emergency overflows", as a direct replacement for "Additional Guidance. Water Discharge and Groundwater (from point source) Activity Permits (EPR 7.01)".[14] The purpose of the document ("***the September 2018 Guidance***") is to set out the principles upon which the Environment Agency will act in exercising its environmental permitting functions. This document:

(1) defines "unsatisfactory overflows" in terms essentially the same as in the 1997 Guidance; p.4/30

(2) entrusts to sewerage undertakers the task of classification of their CSOs and review of such classification; p.5/30.

95. On 18 June 2020 the Environment Agency published internal Instruction LIT 12013 "Environmental Permitting: undertaking periodic permit reviews". Its express purposes included a description of:

> "how we review environmental permits to ensure that they:
>
> ● meet current legislative requirements;
>
> ● continue to reflect current, appropriate standards;
>
> ● continue to provide a high level of protection for the environment as a whole; and
>
> ● that we fulfil our duty to periodically review all permits."

96. The document stipulates that:

> "A permit review programme should be in place covering all permit types within each regime. Permit review programmes will ensure permits are reviewed at an appropriate frequency and take account of regime specific issues and pressures." p.5/19

The document makes no reference to the specific duty of review "at regular intervals" under regulation 6(3) of the 1994 Regulations. The

[14] The Environment Agency has informed the OEP that this is the only published version ("Environment Agency Response to the Office for Environmental Protection (OEP) letter of the 9th December 2022 regarding - Investigation of potential failures to comply with environmental law by the Environment Agency - untreated sewage discharge by sewerage undertakers" 31 January 2023, answer to questions 2 and 5).

OEP is not aware of any document which does specifically address the practical implementation of this requirement in the 1994 Regulations.

97. In October 2020 the Environment Agency published its "Environmental Performance Assessment (EPA) methodology (v.8) for 2021 to 2025". It includes the following:

(1) metric 2.1 ("Total pollution incidents (category 1 to 3 from sewerage assets as normalised)") was defined by reference to the annual number of pollution incidents (categories 1 to 3) from discharges or escapes from assets including CSOs. The sources of the underlying obligations on water companies were stated to include the 2016 Regulations and section 94 of the 1991 Act. The document stated that:

> "This metric has been adopted as a common performance commitment by Ofwat for 2020 to 2025.
>
> "Incidents from combined sewer overflows that are satisfactory/compliant, deemed not be having an unacceptable impact on the environment, will not be included in the EPA. Those which are assessed as having an unacceptable impact on the environment[15] will be reported in the EPA."

(2) metric 2.2 ("Serious pollution incidents (category 1 and 2 from sewerage and water supply assets)") was defined by reference to the annual number of pollution incidents (categories 1 and 2) from discharges or escapes from assets including CSOs. The sources of the underlying obligations on water companies were stated to include the 2016 Regulations and section 94 of the 1991 Act.

(3) metric 2.4 ("Self-reporting of pollution incidents (category 1 to 3 from sewerage and water supply assets)") was defined by reference to proportion of incidents self-reported by companies relating to assets including CSOs. The sources of the underlying obligations on water companies were stated to include the 2016 Regulations and section 94 of the 1991 Act. The document states that:

> "Incidents from combined sewer overflows that are satisfactory/compliant, deemed not be having an unacceptable impact on the environment, will not be included in the EPA. Those which are assessed as having an unacceptable impact on the environment[16] will be

[15] i.e. incidents in categories 1 to 3
[16] i.e. incidents in categories 1 to 3

reported in the EPA."

98. By its letter dated 5 February 2021 to Mr. Steve Lavelle (concerning the performance of the long sea outfall at Whitburn) the Environment Agency stated:

> "At this moment in time the Environment Agency are only resourced to review water quality permits where there are significant changes to a system, for example where they are part of an Asset Management Plan review or where we consider there is a potential environmental risk."

99. In May 2021 the Environment Agency published its "Environmental Performance Assessment (EPA) methodology (v.9) for 2021 to 2025", in terms essentially similar to version 8.

100. In its letter dated 18 June 2021 to the chief executives of water companies, Ofwat stated that:

> "... it is imperative that each company has a strong understanding of its own performance on storm overflow discharges, and is proactively managing and communicating that performance. As well as being relevant to a company's compliance with individual discharge permits, this is integral to sewerage companies' general duty under section 94 Water Industry Act 1991, supplemented by the Urban Waste Water Treatment (England and Wales) Regulations 1994, and the annual certificates company boards provide to Ofwat to provide assurance that they have sufficient systems of planning and internal control and resources to carry out their regulated activities. These are obligations Ofwat has a duty to enforce if we have sufficient grounds to consider a company is contravening or is likely to contravene them."

101. The September 2021 report of the National Audit Office "Understanding Storm Overflows: Exploratory analysis of Environment Agency data" reveals that:

(1) "The last five years have seen an increase in both the number of monitors and the proportion of overflows spilling more than 50 times per year. This is due to an increase in the average number of spills per year, across overflows with both new and existing monitors"; p.8

(2) the distribution of annual spills in 2020 was (from 12,286 monitored overflows): p.8

<5	30.7%
5 - 19	24.0%
20 - 49	22.2%

50 - 100	15.1%
> 100	8.1%

(3) "Work on storm overflows make up a very minor part of the Environment Agency's (EA)'s water quality archive. Since 2013, the number of reactive inspections at storm overflows has dropped significantly."p.19

102. In its October 2021 publication "Pollution from water industry wastewater: challenges for the water environment", the Environment Agency stated that:

> "Wastewater problems aren't just associated with discharges from sewage treatment works. Throughout the sewer network there are overflows that discharge either surface water or a combination of surface water and sewage during extreme rainfall events. There are approximately 15,000 of the combined sewer overflows (CSOS) and incidents from these have biggest impacts on rivers and coasts. Overflows remain associated with poor water quality at bathing beaches and shellfisheries. While the number *[of]* sites failing water quality standards each year has dropped significantly wastewater discharges from the water industry continue to contribute to failures."

103. On 25 October 2021 Defra stated in a press release that:

> "The amount of sewage discharged by water companies into our rivers is unacceptable. We have made it crystal clear to water companies that they must significantly reduce sewage discharges from storm overflows as a priority"

104. On 4 November 2021 a Water UK publication by Stantec "Storm Overflow Evidence Project Final Report" commissioned by the Storm Overflow Taskforce (including representatives of Defra, the Environment Agency and Ofwat) stated:

(1) " ... over time, as new development has occurred upstream, housing densities have increased, impermeable surfaces have been paved over, rainfall patterns may have changed and ingress from groundwater has increased as sewers age, some overflows now operate too frequently causing harm to water bodies and concern from the public. Overflows may also operate because of operational problems such as blockages or equipment failure and because of capacity issues downstream. Furthermore, our sewer system has not been consistently upgraded or managed differently to keep up with these changes in inflows or customer behaviours"; section 2.1

(2) "The overflows are legal, under environmental permits issued by the Environment Agency and are increasingly monitored with devices which measure the frequency and duration of spills. Permits are only issued where the overflow causes no harm but many permits are historical and the cost of revising them heavily (for example by implementing spill frequency standards) is significant, as this report will show"; section 2.1

(3) “The Environment Agency estimates that approximately 402 inland river water bodies fail to achieve Good Ecological Status because of intermittent discharges through storm overflows”; section 2.2

(4) “Whilst it is not possible to attribute the exact mix of causes of overflow at each location in this research, the most common cause is rainwater entering sewers of insufficient capacity. This is the mechanism represented in hydraulic network models which, overall, can explain approximately 74% of measured spill incidents”; section 3.2

105. On 18 November 2021 the Environment Agency and Ofwat announce major investigations into suspected widespread non-compliance by water and sewerage companies at sewage treatment works.

106. On 9 January 2022 section 81 of the 2021 Act came into force, creating a new section 141A to the 1991 Act requiring the Secretary of State to prepare and publish a storm overflow discharge reduction plan by 1 September 2022.

107. On 14 January 2022 the Environment Agency published its report “Research and analysis. Water and sewerage companies in England: environmental performance report for 2020". This reported that for WFD purposes, 7% of water bodies were failing to achieve good ecological status due to storm overflows.

108. In a letter dated 1 March 2022 to the chief executives of water companies, Ofwat stated that:

> “... there are significant concerns that the sector is not meeting its obligations or public expectations on the safe treatment and return of wastewater to the environment. The roll out of comprehensive monitoring has revealed the frequent use of storm overflows as part of the day-to-day operation of the wastewater system. This cannot continue”
>
> “Companies must act now – there is nothing in regulatory regime that prevents companies from tackling these issues immediately.”

109. In its response dated 22 June 2022 to the water companies’ river water quality action plans, Ofwat stated that:

> “Where storm overflow discharges are the result of companies failing to meet the legal obligations that we are responsible for enforcing, we will not hesitate to take action. All wastewater companies are still being scrutinised as part of our ongoing investigation on how they manage their sewage treatment works and we have opened five enforcement cases against specific

companies."

The OEP is unaware of any instance in which Ofwat has since 2005 exercised its duty under section 18 in respect of discharges from network CSOs which are non-compliant with the UWWTD and the 1994 Regulations by either making an enforcement order or accepting undertakings.

110. On 28 June 2022 the OEP commenced this investigation under section 33 of the 2021 Act.

111. In July 2022 the Environment Agency published "PR24 WINEP driver guidance - Storm overflow reductions v.0.3" introducing new drivers arising out of the enactment and coming into force of the relevant provisions of the 2021 Act. That document:

(1) recognised the need to update the September 2018 Guidance "and core industry standard practice", but stated that "These are updates rather than rewrites to reflect the Storm Overflow Discharge Reduction Plan and these WINEP drivers and in most cases changes will be minimal. The Environment Agency will work with the WaSCs and other organisations to update these enabling tools, with a target date for completion in Summer 2023"; p.6/21

(2) extended the scope of eligibility of CSO improvements for inclusion within the WINEP beyond those identified as contributing towards target failures; "The spill targets in PR19 to trigger SOAF investigations are no longer relevant nor is the cost benefit appraisal (CBA) test which was routine within the SOAF process"; p.10/21

(3) stated that: "Spill targets (10 per annum) are new to inland storm overflows. Unlike the SOAF the new target is the same as the trigger (10 spills or less) and no CBA test is required. 12/24 hour counting shall be applied for all spills. No discounting of spills less than $50m^3$ shall be performed. All spills are considered significant."; p.10/21.

112. On 26 August 2022 Defra published the SODRP. This document:

(1) states in its foreword that: "The Victorians introduced storm overflows as a safety valve for combined sewage systems. Now, under pressure from climate change and population growth, water companies use them far too often. This harms the environment, wildlife, and everyone who enjoys our seas and rivers. That's why this plan sets out a mandatory £56bn investment programme to sort the problem out"; p.7

(2) states that: "This plan sets, for the first time, clear and specific targets for water companies, regulators and the Government, to work towards the long-term ambition of eliminating the harm from storm overflows;" p.8

(3) sets ambitious targets, which, once fully implemented by 2050, and if achieved and thereafter maintained, will almost certainly result in compliance by the sewerage undertakers with their duties under section 94 of the 1991 Act and the 1994 Regulations (and may in some cases go further); pp.10-14

(4) states that: "Water companies must comply with all their existing regulatory obligations and duties, including permits issued by the Environment Agency If water companies are found not to comply with their legal responsibilities, Ofwat and the EA can take robust action. This may result in, for example:

- Fines for water companies responsible for serious and deliberate pollution incidents, to be taken from water company profits, and
- Potential prison sentences following successful prosecution for Chief Executives and Board members whose companies are responsible for the most serious incidents"; p.18

(5) states that: "The new monitoring and reporting framework will support Ofwat's ability to decide when to take enforcement action as it will be clear to all when storm overflow discharges exceed the legal limits"; p.28

113. There are approximately 8,394 network CSOs in operation in England.[17]

114. Using the current upper threshold figure in the SOAF of 60 spills/year, the number of network CSOs which spilled at least that frequently were:[18]

Year	**No of CSOs**
2020	955
2021	787
2022	526

115. Of the 1606 network CSOs which had by November 2023 been assessed or were in the process of being assessed under the SOAF, 283 had been found to be in need of improvement for which a BTKNEEC solution exists.[19]

116. By 27 December 2023 the number of SOAF assessments indicating a need for improvement with a BTKNEEC solution had risen to 419.[20]

[17] Environment Agency Response 6/11/23 to OEP Information Notice, p.18 of 22, in answer to OEP information request 4.1.5.2 (2022 data).
[18] Data from Environment Agency Response 6/11/23 to OEP Information Notice, p.18 of 22, in answer to OEP information request 4.1.5.2.
[19] Environment Agency Response 6/11/23 to OEP Information Notice, p.18 of 22, in answer to OEP information request 4.1.5.3.
[20] Letter 27/12/23 from Environment Agency (Philip Duffy, CEO) to WildFish Conservation

117. As Holgate J. has observed in ***R (WildFish) v Secretary of State for Environment, Food and Rural Affairs*** **[2023] EWHC 2285 (Admin)**:

(1) "... reg.6(2)(c) imposes a duty upon the EA to secure through the environmental permitting regime that discharges from a collecting system or a treatment plant meet the requirements of regulations 4 and 5 read together with the principles in *[C-301/10]"*; [74]

(2) "... in my judgment the effect of reg.6(2)(c) is to impose a *duty* on the EA to enforce ongoing compliance with the 1994 Regulations"; [88]

(3) "Ofwat is investigating whether systems have adequate capacity, including whether "actual demand is exceeding the demand assumptions against which the plant was built", storm tank capacity and spills performance. This information is being sought to address the issue of whether WaSCs are in breach of reg.4 of the 1994 Regulations. Ofwat accepts that if they find that capacity at a particular site breaches that regulation, their duty under section 18 of the WIA 1991 is to take enforcement action"; [141]

(4) "... the 1994 Regulations do require discharges to be remedied if they occur in circumstances which are not exceptional (in the sense explained in the UK case) and there is a remedial solution satisfying the BTKNEEC test. That obligation upon WaSCs includes the remedying of inadequate physical capacity in sewerage and treatment systems as well as operational issues"; [163]

(5) "It is impossible to read the third policy target in the Plan as allowing a WaSC until 2050 to comply with regulations 4 and 5 of the 1994 Regulations or to remedy any breach of those regulations. Equally neither of the other two targets allows a breach of the 1994 Regulations to continue until the target years to which they refer"; [170]

(6) "Page 18 of the Plan ... states that WaSCs must inter alia upgrade their sewage systems to keep pace with "all the pressures that add surface water to the combined sewer network". They must comply with all relevant legislation and permits, which includes the making of those "upgrades". That would include upgrades which are BTKNEEC for the purposes of the 1994 Regulations"; [175]

(7) "The EA and Ofwat are in the course of investigating issues concerned with lack of physical capacity in existing systems and have taken some steps to require improvements ([84] to [86] and [140] to [141] above). This may be an issue which the Office for Environmental Protection will consider"; [180]

(8) "The Plan contains measures to improve the performance of storm overflows. It does not prejudice the need for WaSCs to comply with existing statutory requirements, including environmental permit conditions and the 1994 Regulations. That is the subject of an on-going, large scale investigation by the EA and Ofwat. Any issue about that

process, such as whether those regulatory bodies are taking sufficient action, or whether the cost-benefit approach is sufficiently robust (e.g. with regard to the valuation of harm to ecology, or to human health and amenity, or to a business use) is not a matter for the Court in these proceedings"; [237].

118. On 13 December 2022, in its publication "Creating tomorrow, together: our final methodology for PR24", Ofwat stated that:

> "... Ofwat recognise that the reduction of spills from storm overflows will come from base and enhancement expenditure. Companies are required, through their statutory obligations, to have systems in place to ensure catchments are effectually drained and sewage is effectually dealt with. Companies have long-standing environmental obligations including, for example, environmental permits set by the Environment Agency and their general duty under section 94 WIA 1991, supplemented by the Urban Wastewater Treatment (England and Wales) Regulations 1994 (UWWTR)), compliance with which is funded through base revenue. Ofwat note that companies should only seek enhancement investment when they can demonstrate that the investment is needed to meet a requirement beyond these pre-existing legal obligations, and they will require evidence for instance, that enhancement revenue is not being sought in relation to a compliance issue on a pre-existing permit or other UWWTR related requirement."