Decision Notice

Office for Environmental Protection

David Black
Chief Executive Officer
Ofwat
Centre City Tower
7 Hill Street
Birmingham, B5 4UA

By email only to: David.Black@ofwat.gov.uk

CMS-256

12 December 2024

Dear Mr Black,

Investigation of complaint against Ofwat – 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 Ofwat. 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 Secretary of State for Environment, Food and Rural Affairs and the Environment Agency 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: Ofwat

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-256

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 Ofwat to comply with environmental law which was refined in the OEP's Position Statement of 28 June 2024. Having considered Ofwat's response to that Information Notice as well as Ofwat's response to the OEP's Position Statement, the OEP concludes on a balance of probabilities that there has been a serious failure to comply with environmental law as set out below.

   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 Urban Waste Water Treatment (England & Wales) Regulations 1994 ('the 1994 Regulations'), Ofwat 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 its functions, by misunderstanding:
      i. the true legal extent of the duties upon sewerage undertakers under section 94 of the 1991 Act (as supplemented by the 1994 Regulations), and

ii. the true legal extent of its duty under section 18 of the 1991 Act (as qualified by section 19) to investigate and make enforcement orders in the case of contraventions or likely contraventions by sewerage undertakers of section 94 of the 1991 Act, and

(b) (whether as a result of (a) or otherwise) unlawfully failing to exercise its 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, when it was under a legal duty to do so.

4. For the purposes of this Decision Notice:

(a) the grounds at paragraph 3(a) shall be referred to as "Ground One" and
(b) the ground at paragraph 3(b) shall be referred to as "Ground Two".

5. The periods of failure are:

(a) for Ground One, from the expiry of the applicable deadlines set by regulation 4(2) of the 1994 Regulations to 27 June 2022;

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

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:

(2) Subject to paragraph (3) below, 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…

8. The dates in regulation 4 implement similar requirements imposed upon EU Member States by the Urban Wastewater Treatment Directive ('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 31 December 2000 and in the case of sensitive areas the earlier date still of 31 December 1998.

9. Schedule 2 to the 1994 Regulations implements Annex 1 to the UWWTD and 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.

10. Footnote 1 in Annex 1 of the UWWTD provides that:

"Given that it is not possible in practice to construct collecting systems and treatment plants in a way such that all waste water can be treated during situations such as unusually heavy rainfall, Member States shall decide on measures to limit pollution from storm water overflows. Such measures could be based on dilution rates or capacity in relation to dry weather flow, or could specify a certain acceptable number of overflows per year."

11. 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.

12. 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,[1] Ofwat is authorised to act as "the enforcement authority" for the purposes of section 18(1).

GROUND ONE

13. ***At all material times prior to 27 June 2022 and in the context of discharges by sewerage undertakers from network CSOs in breach of the requirements of the 1994 Regulations, Ofwat committed a serious failure to comply with environmental law by unlawfully failing to take proper account of environmental law when exercising its functions, by misunderstanding:***
    (a) the true legal extent of the duties upon sewerage undertakers under section 94 of the 1991 Act (as supplemented by the 1994 Regulations);
    (b) the true legal extent of its duty under section 18 of the 1991 Act (as qualified by section 19) to make enforcement orders in the case of contraventions or likely contraventions by sewerage undertakers of section 94 of the 1991 Act.

Misunderstanding the legal position

14. The OEP considers that the failures at Ground One have arisen from Ofwat adopting an unduly restrictive approach to the interpretation of the duties on sewerage undertakers under section 94 of the 1991 Act and a misinterpretation of the extent of Ofwat's duty under section 18 of that Act. The effect of these interpretations on the implementation of Ofwat's duties is set out below.

15. While section 19 of the 1991 Act qualifies section 18 so as to exclude the duty being engaged where, for instance, the contravention is trivial or where other duties in Part I of the 1991 Act preclude its exercise, section 18 otherwise imposes a duty on Ofwat (and the Secretary of State) to make a final enforcement order against a sewerage undertaker where it is satisfied that the undertaker is contravening, or is likely to contravene, certain conditions or statutory requirements, including the duties set out in section 94(1) of the 1991 Act, as supplemented by regulation 4 of the 1994 Regulations. Section 18 makes provision for the making of provisional enforcement orders in certain circumstances.

16. Ofwat's characterisation of the duties on sewerage undertakers under section 94 of the 1991 Act and its duty under section 18 has changed over the course of the OEP's investigation.

17. The duties on a sewerage undertaker under section 94(1) of the 1991 Act (as supplemented by regulation 4 of the 1994 Regulations) are to provide collecting systems which ensure that the undertaker's area is and continues to be effectually drained and to provide that sewage is effectually dealt with, including

[1] 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.

through those systems being compliant with Schedule 2 to the 1994 Regulations. These are specific duties, accompanied by the specific enforcement mechanism in section 18 of the 1991 Act.

18. In its response to the complaint from Salmon and Trout Conservation UK (now WildFish) on 3 February 2022, Ofwat referred to its final decision to impose a financial penalty on Southern Water as providing an explanation of its approach to determining whether a breach of the duties on sewerage undertakers under section 94 of the 1991 Act had taken place. The Final Decision dated 10 October 2019 stated (so far as is material):

> *4.22 In considering whether a company may have breached its obligations under section 94(1) of the WIA91, we will look at whether:*
> - *there has been a systemic failure by the company to comply with its obligations; and*
> - *the actions of the company were the actions to be expected of a reasonable company*
>
> *4.24 All breaches of permit conditions are subject to the Environment Agency's enforcement policy. Our focus is different. We are unlikely to consider individual breaches as being indicative of a breach of a sewerage company's general duty under section 94 of the WIA91.*
>
> *4.25 However, where breaches or risks of breaches are numerous, widespread or persist over an extended period, we are likely to view this as being indicative of a systemic failure to make appropriate provision for effectually dealing with the contents of sewers, constituting a breach of section 94 of the WIA91.*

19. While the above letter to Salmon and Trout Conservation UK (now WildFish) was not an attempt by Ofwat to set out its complete position on the subject of an undertaker's duties under section 94 of the 1991 Act, Ofwat's letter properly encapsulates Ofwat's understanding of its position from the coming into force of the 1991 Act on 1 December 1991 until shortly after the letter to Salmon and Trout Conservation UK, when in June 2022, Ofwat's understanding of these duties appears to have changed. At that time, it requested, as part of its enforcement undertaking, Event Duration Monitoring ('EDM') information from all undertakers in respect of all network CSOs as set out below. During the course of this investigation Ofwat has not referred to any correct particularisation of the duty under section 94 of the 1991 Act in correspondence or in its internal policies or guidance prior to June 2022.

20. For the purposes of this Ground One (which is concerned with the supplementary aspects to undertakers' duties under section 94 of the 1991 Act, introduced by the 1994 Regulations) the OEP considers that Ofwat's approach as set out at paragraph 18 above, amounts to the following errors of law:

    (a) **Error as to the essential character of the duties under section 94 of the 1991 Act.** Ofwat's above approach confuses the question of what constitutes a breach of the duties under section 94 with the question of whether circumstances exist which qualify Ofwat's duty to make an enforcement order in respect of that breach. In particular, Ofwat interpreted

its section 18 duty as meaning that only 'systemic' failures by sewerage undertakers are breaches at all. This is an erroneous approach; the question of whether a sewerage undertaker has breached its duties to 'effectually drain' its area pursuant to section 94(1)(a) of the 1991 Act is a question of fact. For the purposes of the supplementary application of section 94 of the 1991 Act introduced by the 1994 Regulations, if untreated sewage has been discharged outside of the 'exceptional circumstances' permitted under those regulations (as confirmed by the Court of Justice of the European Union ('the CJEU') in *Commission v United Kingdom* Case C-301/10 ('Case C-301/10')), then there is a *prima facie* breach of those duties.[2] This is separate from the question of whether Ofwat must then enforce, which must be considered by properly complying with the duty to enforce under section 18 of the 1991 Act and consideration of the exceptions under section 19 of that Act. The correct approach to the interpretation of the duty under section 18 of the 1991 Act is set out further below.

(b) **Error as to what is required to discharge the supplement to the duty under section 94(1)(a) of the 1991 Act imposed by regulation 4(2) of the 1994 Regulations**. Regulation 4(2) of the 1994 Regulations places a duty on sewerage undertakers to ensure the provision of urban collecting systems that are compliant with Schedule 2 to the 1994 Regulations, including the requirements of paragraph 2(c) of that Schedule concerning limitation of pollution of receiving waters due to storm overflows in the manner explained in Case C-301/10. Ofwat misunderstood the law by considering that discharges from CSOs that are in accordance with permits issued by the Environment Agency are necessarily also compliant with the duty under section 94 of the 1991 Act. This is a misinterpretation of the section 94 duty, including as supplemented by regulation 4 of the 1994 Regulations. It further assumes that in every case the Environment Agency (1) initially included conditions in its permits sufficient to achieve such compliance and (2) thereafter properly and timeously reviewed and if necessary modified such conditions so as to ensuring continuing compliance in the light of subsequent changes in circumstances.

21. In relation to the failure at paragraph 20(a) above, Ofwat took the approach that its duty to take action under section 18 of the 1991 Act in the event of a breach of the section 94(1)(a) duty of effectual drainage is a duty which only arises if the breach is 'systemic'. Even in that event, Ofwat then considered that it had a general, broad discretion whether to act under section 18. However, any discretion enjoyed by Ofwat is created by, and consists solely of, the exceptions found in section 19 of the 1991 Act to what is otherwise a duty upon Ofwat to act. Section 18 is engaged whenever Ofwat is presented with evidence of an actual

[2] 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.

or likely failure effectually to drain a particular sewer. Ofwat must then consider whether any of the exceptions in section 19 of the 1991 Act are engaged in order to determine whether it must take enforcement action under section 18.

The OEP's analysis of the way in which Ofwat's jurisdiction under section 18 of the 1991 Act is engaged

22. For the purposes of Ground One, Ofwat's jurisdiction under section 18 of the 1991 Act is *prima facie* engaged whenever a discharge from a network CSO occurs in non-exceptional circumstances. This will amount to a breach of the UWWTD and the 1994 Regulations, which, in turn, will amount to a breach of section 94(1)(a) of the 1991 Act unless the undertaker can demonstrate the absence of a solution applying best technical knowledge not entailing excessive costs ('BTKNEEC'). Such breaches will engage section 18 of the 1991 Act and Ofwat's jurisdiction.

23. The question of whether an undertaker has breached its duty under section 94(1)(a) of the 1991 Act is a question of fact which will determine whether Ofwat's jurisdiction under section 18 of the 1991 Act is engaged. For the purposes of Ground One, even if the discharge is in accordance with the network CSO's environmental permit, if untreated sewage has been discharged outside of 'exceptional circumstances' permitted under the 1994 Regulations (as confirmed by the CJEU in Case C-301/10) then there is a *prima facie* breach of the section 94(1) duty. An undertaker may seek to invoke 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) and the absence of any BTKNEEC solution as a defence to an allegation of breach. However, the CJEU in Case C-301/10 at [65] noted that such a defence is to be invoked "by way of exception only". These two tests (that of "exceptional circumstances" and the BTKNEEC assessment) create a methodology prescribed by the CJEU for determining compliance with the UWWTD and 1994 Regulations in respect of discharges from network CSOs.

24. Ofwat now accepts that this characterisation by the OEP of the section 18 duty is accurate (see Ofwat's response of 7 November 2023 to the OEP's Information Notice):

> *(p5) … we agree that we have a duty to take enforcement action when we are satisfied that a breach is occurring or is likely to occur in the future. We do not think that we have a discretion as to whether to act under section 18 if we are so satisfied (contrary to the OEP's suggestion at paragraph 2.12 of the Information Notice). We also agree that, if we become aware through our monitoring activities, or are made aware of, evidence sufficient to suggest that a company is not effectually dealing with the contents of a sewer or meeting the requirements of the 1994 Regulations, we have a duty to take reasonable steps to satisfy ourselves as to whether or not there is (or is likely to be) a breach.*

25. The above position was repeated in Ofwat's response of 19 August 2024 to the OEP's Position Statement:

*(p2) Ofwat agrees that "*a one-off discharge from a CSO which is in breach of the 1991 Act*" would engage its enforcement jurisdiction under section 18. Such a breach would engage that jurisdiction in the same way as any other breach.*

26. It also appears from Ofwat's response to the Information Notice (see p5) that Ofwat now accepts its duty to take enforcement action may arise, amongst other circumstances, when '*for instance, a CSO is discharging outside exceptional circumstances and the company has failed to demonstrate that it has applied a BTKNEEC options appraisal to resolving the issue.*' This confirms Ofwat's view, with which the OEP agrees, that it is for the sewerage undertaker to demonstrate that a BTKNEEC options appraisal has been properly carried out and that "by way of exception" no BTKNEEC solution is available.

Ofwat's previous understanding of the way in which its jurisdiction under section 18 of the 1991 Act is engaged

27. The OEP considers that Ofwat's stated position prior to 27 June 2022 did not reflect a proper understanding of the full extent of the duties on sewerage undertakers under section 94 of the 1991 Act or the true nature of its duty under section 18. Further, as set out in Ground Two, there is no evidence that, to date, Ofwat has properly exercised its functions in accordance with a proper understanding of its legal duty under section 18 of the 1991 Act by (subject to the exemptions set out in section 19) serving an enforcement order that "*makes such provision as is requisite for the purpose of securing compliance*".[3] In addition, the documentary evidence set out below confirms that Ofwat both (1) erroneously interpreted the duties on sewerage undertakers under section 94 as supplemented by the 1994 Regulations and its duty under section 18 and (2) confused the question of what constitutes a breach of the duties under section 94 with the question of whether circumstances exist which qualify Ofwat's duty to make an enforcement order in respect of that breach:

    (a) First, as set out above at paragraph 18, in its decision of October 2019 in the Southern Water case Ofwat suggested that '*We are unlikely to consider individual breaches as being indicative of a breach of a sewerage company's general duty under section 94 of the WIA91.'* Ofwat appeared to characterise a breach of section 94 of the 1991 Act as occurring when there was a systemic failure to make appropriate provision for effectually dealing with the contents of sewers which may arise when breaches are '*numerous, widespread or persist over an extended period'.* This mischaracterises the correct legal position which is that a breach of section 94 of the 1991 Act can occur after a single discharge.

    (b) Secondly, in Ofwat's 2006 letter to Companies' Regulatory Directors (RD 03/06 16 March 2006), it suggested that it may consider that a breach of section 94 has not occurred as a result of an unintended escape from the sewerage network on the basis of the consideration of a wide variety of

[3] Section 18(1) of the 1991 Act.

factors:

> *"Has a breach of the duty in section 94 WIA91 occurred?*
> *We will consider each case on its facts. In terms of sewer flooding, the factors which we are likely to consider when assessing whether the company is in breach include the following:*
> - *Physical factors relevant to the flooding, for example, the location of the property.*
> - *The severity of the weather at the time of flooding. – Factors outside the company's control which are contributing to the flooding. These could include inadequate drainage arrangements, for which the company is not responsible…*
> - *The number of properties affected.*
> - *The frequency and extent of the flooding.*
> - *Whether the flooding is internal (inside the building) or external (eg restricted to gardens or outbuildings). – Usage of the property – for example, whether it is domestic or non-domestic.*
> - *Whether the company has a scheme of works reasonably prioritised.*
>
> *We will look at all the relevant factors in each case. An example of a case where we are more likely to conclude that there has been a breach of section 94 WIA 91 would be where several properties have been flooded, internally, several times annually.*
>
> *Examples of cases where we are less likely to conclude there has been a breach of section 94 WIA 91 would be a single property, which has experienced one incident of internal or external flooding, or several properties flooded once internally or externally, or flooding events that are caused by exceptional weather."*

This erroneous approach is replicated in the 'Casework Sewer Flooding Template' which Ofwat relied upon as recently as July 2022. (Q1, Answer 1 Response from Ofwat 25/7/22). The 2006 letter to Companies' Regulatory Directors was referred to and relied upon by Ofwat in its response to Salmon and Trout Conservation UK at §§3.5-3.6 of that letter in or around May 2021. While Ofwat's 2006 letter and the Casework Sewer Flooding Template relate to sewer flooding rather than network CSOs which is the scope of this Decision Notice, the documents are relevant because they describe Ofwat's then general understanding of section 94 of the 1991 Act in demonstrably erroneous terms.

(c) Thirdly, in its response to the initial complaint by Salmon and Trout Conservation UK, Ofwat referred to the approach it had taken in its October 2019 decision regarding Southern Water, and confirmed at §3.27 that it was assessing Salmon and Trout Conservation UK's complaint by considering '*the extent to which Ofwat may have had evidence from our monitoring activities which could have pointed to more widespread or systemic issues in relation to companies' obligations under section 94*'. Ofwat goes on to say (at §3.36) that in relation to an investigation into Thames Water '*As*

Thames Water had already been the subject of a criminal fine of £20m for the relevant pollution incidents, and given the focus of the two major investigations that Ofwat was planning to undertake (which would address issues around asset health and companies' systems and controls), and having considered Ofwat's published criteria as set out in our approach to enforcement, the decision was taken on administrative priority grounds to prioritise those investigations.' These are admissions that Ofwat did not adhere to its section 18 duty as properly understood.

(d) Fourthly, Ofwat's response of 7 November 2023 to the OEP's Information Notice confirms (at p6) that Ofwat '*intend[s] to clarify some potentially unhelpful wording in the existing guidance which suggests we have more discretion in the exercise of our enforcement duty than in fact we consider we do, or operate in practice*.' Ofwat also accepts at p8 of its response of 7 November 2023 to the OEP that it has not undertaken any reasonable enquiries to understand whether enforcement action is required in respect of alleged breaches of the section 94 duties by Northumbrian Water Ltd in respect of the outfalls at Whitburn. A similar admission is made by Ofwat at p5 of its response of 19 August 2024 to the OEP's Position Statement where Ofwat stated that '*We accept that we should have gone further with respect to our October 2019 enforcement decision against Southern Water by making explicit findings in relation to breaches of the 1994 Regulations as well as the systemic breaches we identified under section 94*'.

28. It appears that Ofwat now accepts that a discharge occurring outwith exceptional circumstances for which there is a BTKNEEC solution can amount to a breach of section 94(1)(a) which will engage its jurisdiction under section 18 of the 1991 Act and that, in those circumstances, an enforcement order must be made unless at least one of the exceptions set out in section 19(1)(a)-(c) applies. This acceptance confirms the OEP's view that Ofwat's previous approach was legally erroneous and that this coloured its approach to its duty under section 18 of the 1991 Act which was also accordingly erroneous.

29. Regulation 4(2) of the 1994 Regulations places a duty on sewerage undertakers to ensure the provision of urban collecting systems that are compliant with Schedule 2 of the 1994 Regulations, including the requirements of paragraph 2(c) of that Schedule concerning limitation of pollution of receiving waters due to storm overflows in the manner explained in Case C-301/10. Breach of regulation 4(2) of the 1994 Regulations is necessarily also a breach of section 94(1)(a) of the 1991 Act.

30. The OEP notes that Ofwat now accepts that a one-off discharge from a network CSO can amount to a breach of the 1994 Regulations (and the 1991 Act) and that compliance with a permit does not necessarily mean that an undertaker is compliant with the 1994 Regulations and that it must look beyond permit compliance when executing its duties to consider compliance with the 1994 Regulations (see pp3-4 of Ofwat's response to the OEP's Information Notice):

Nevertheless, we do not consider that compliance with a permit necessarily means that a company is compliant with the 1994 Regulations and we

> *recognise that we must reach an independent view on compliance with Regulation 4 when exercising our duty under section 18 of the 1991 Act. This is why Ofwat's current enforcement investigations are looking beyond permit compliance as illustrated by our previous responses, supporting documents to date, and the extract from our website set out below. This is also why we have reminded companies that it is their responsibility to ensure that their assets comply with section 94 and Regulation 4, irrespective of the requirements in their permits, actively to engage with the EA to ensure that their permits remain consistent with these requirements, and to remedy any breaches [of these requirements].*
>
> *…no such evidence of systemic issues is required to establish a breach of section 94(1)(a) as supplemented by Regulation 4(2) of the 1994 Regulations, rather these relate to failures at individual collecting systems. A single event at one CSO may point to a breach of Regulation 4(2) at a collecting system if it appears to be symptomatic of the CSO discharging outside of exceptional circumstances where a BTKNEEC solution is available.*

31. The OEP notes and accepts that Ofwat's more recent investigations into suspected failures by a number of undertakers in relation to storm overflow discharges particularise a legally correct understanding of section 94 of the 1991 Act and its duty under section 18 of the 1991 Act. However, it is only from 27 June 2022, when Ofwat sought EDM data from undertakers in respect of all network CSOs, that Ofwat unequivocally acted in accordance with a legally correct understanding of section 94 of the 1991 Act as supplemented by the 1994 Regulations.

32. In light of all of the above and what Ofwat states about its current approach to enforcement (which is set out further below), the OEP has found that Ofwat's previous understanding of the way in which its jurisdiction under section 18 of the 1991 Act was engaged was wrong but that as from 27 June 2022 when Ofwat sought further information from undertakers in respect of all network CSOs, there is no longer any dispute between the parties as to the correct legal interpretation of an undertaker's section 94 duties, as supplemented by regulation 4 of the 1994 Regulations. Nor, from 27 June 2022, is there any dispute about Ofwat's jurisdiction under section 18 of the 1991 Act.

33. In summary therefore the OEP has found that Ofwat has failed to take proper account of environmental law by misunderstanding the true legal extent of the duties on sewerage undertakers under section 94 of the 1991 Act as supplemented by regulation 4 of the 1994 Regulations and the true legal extent of its duty under section 18 of the 1991 Act to make enforcement orders. In relation to network CSO discharges in breach of the requirements of the 1994 Regulations, the OEP holds the view that Ofwat's jurisdiction under section 18 is engaged whenever there is a discharge which occurs in non-exceptional circumstances unless the absence of a BTKNEEC solution is demonstrated. Contrary to Ofwat's assertions prior to June 2022, a breach can occur even if there are no systemic problems and such jurisdiction can be engaged after a one-off discharge from a CSO which is in breach of the 1991 Act.

GROUND TWO

Failure to enforce

34. ***In the context of discharges by sewerage undertakers from network CSOs in breach of the requirements of the 1994 Regulations, and whether as a result of Ground One or otherwise, Ofwat committed a serious failure to comply with environmental law by unlawfully failing to exercise its 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, when it was under a legal duty to do so.***

35. The result of the error identified in Ground One above appears to explain Ofwat's failure properly to exercise its functions under section 18 of the 1991 Act as it had proceeded on the basis that it should act under section 18 only as a last resort in the most serious cases. For the reasons set out above, this is an incorrect interpretation of the duty under section 18. The correct position is that any identified current or likely future breach of the duties in section 94 of the 1991 Act by the sewerage undertaker engages the section 18 enforcement duty, subject only to the exceptions in section 19.

36. Prior to 27 June 2022, Ofwat's enforcement activities have proceeded on an incorrect understanding of the law as set out above.

37. 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 Ofwat and the Secretary of State, 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 not doing so after the decision in Case C-301/10.

38. As demonstrated in Annex 1 there is ample data, particularly following the addition of 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 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. Once engaged, Ofwat was and is under a duty (subject to the exemptions set out in section 19) to serve an enforcement order that "*makes such provision as is requisite for the purpose of securing compliance*". The OEP acknowledges the proposed draft section 18 enforcement orders on which Ofwat has invited consultation in August 2024 in respect of Thames Water, Yorkshire Water and Northumbria Water. However, no enforcement order under section 18 of the 1991 Act has been served, these enforcement orders relate to only three sewerage undertakers and the promulgation of these draft orders do not in

themselves amount to the securing of compliance with the obligations under the 1991 Act as the consultation process may result in substantial changes and, even if passed by Ofwat in unchanged form, may not actually secure compliance with section 94 of the 1991 Act. Accordingly, this breach remains ongoing.

WHY THE FAILURES IDENTIFIED ABOVE ARE SERIOUS

39. The OEP considers that the failures identified above are serious and that Ground Two is continuing.

40. 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.

41. The OEP considers that Ofwat's failures at Grounds One and Two 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 the failures above, the misunderstanding and/or misinterpretation of environmental law has affected the regulatory approach of Ofwat and Ofwat has not made enforcement orders under section 18 of the 1991 Act (or invoked section 19 exceptions) in respect of non-compliance with section 94 of the 1991 Act by undertakers in relation to network CSOs. The coherent enforcement of the duties 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 those duties 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.

(b) **Frequency of conduct** – the OEP considers that the conduct has been frequent because it covers the entire period from the expiry of the applicable deadlines set by regulation 4(2) of the 1994 Regulationsuntil, in respect of Ground One, Ofwat acted on a proper understanding of its duties in June 2022. This long-lasting failure applied across all network CSOs whenever they discharged outwith the provisions of regulation 4 of the 1994 Regulations and/or section 94 of the 1991 Act and for which Ofwat erroneously failed to act on the basis that its jurisdiction was engaged. The OEP accepts that the legal position in relation to how the 1994 Regulations supplement the 1991 Act 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 none of the thousands of network CSOs were properly regulated by Ofwat in accordance with that supplementary application of the 1991 Act. In respect of Ground Two, the breach continues to date because while Ofwat appears now to understand its obligation to serve orders for securing compliance with the section 94

duty, it has not yet done so.

(c) **Behaviour of public authority** – In response to the OEP's investigation and in correspondence with the OEP Ofwat has accepted that it failed to comply with environmental law and Ofwat has indicated that it will attempt to remedy such failures by (1) amending its 'approach to enforcement' guidance, (2) continuing to investigate, and if appropriate take enforcement action against, undertakers for breach of their duties under section 94 of the 1991 Act and (3) using best endeavours to agree memoranda of understanding with the Environment Agency and Secretary of State to ensure the proper enforcement of section 94 of the 1991 Act as supplemented by regulation 4 of the 1994 Regulations. Accordingly, Ofwat's behaviour is neutral when assessing seriousness as it neither exacerbates nor minimises the failures 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 to adequately enforce an effective sewerage system or to ensure compliance with the requirements of section 94(1) of the 1991 Act as supplemented by the 1994 Regulations has the potential to have serious implications for the environment. Ofwat's self-limiting approach to considering 'systemic' breaches for many years prior to 2022 meant that any singular or localised failure, even if far from trivial, was removed from consideration. Ofwat appears to have regarded such a breach as being the sole province of the Environment Agency, even though the only bodies empowered to act in respect of it are Ofwat and the Secretary of State. A failure to act increases the likelihood of recurrence of unlawful spills to the environment.

On the present facts, the OEP is satisfied on a balance of probabilities that the above failures on the part of Ofwat (in conjunction with those of the Secretary of State and the Environment Agency) materially contributed to the current, chronic and unacceptable state of affairs, clearly demonstrated by 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 1991 Act and the UWWTD. It appears inevitable that the consequences for the environment will not be fully remedied for a long period into the future.

42. Therefore, notwithstanding Ofwat's welcome acknowledgement of its legal failings, the OEP finds that the failures to comply with environmental law referred to above are serious.

STEPS WHICH OFWAT SHOULD TAKE TO REMEDY, MITIGATE OR PREVENT REOCCURRENCE OF THE FAILURES

43. The OEP will first set out the background to the OEP's proposed steps and will then set out the steps which it requires Ofwat to take.

44. Subject to exceptions in section 19 of the 1991 Act, Ofwat has a duty to take enforcement action when it is satisfied that a breach of section 94 of the 1991 Act, as supplemented by regulation 4 of the 1994 Regulations, is occurring or is likely to occur in the future. If Ofwat becomes aware through its monitoring activities, or is otherwise made aware, of evidence sufficient to suggest that an undertaker is not effectually draining an area or meeting the requirements of the 1994 Regulations, then it has a duty to take reasonable steps to satisfy itself as to whether or not there is (or is likely to be) a breach. A *prima facie* case of breach arises whenever a CSO is discharging outside exceptional circumstances unless the undertaker has demonstrated to the satisfaction of Ofwat the absence of any BTKNEEC solution.

45. Ofwat must reach an independent view on compliance with section 94 of the 1991 Act and/or regulation 4 of the 1994 Regulations when exercising its duty under section 18 of the 1991 Act. In practical terms this will require Ofwat to review and update its published guidance document, "Approach to Enforcement", to reflect developments and Ofwat's ongoing evolution of its strategy and approach to regulation as well as to agree, with the Environment Agency and the Secretary of State, memoranda of understanding which reflect the proper regulation of discharges.

46. In 2021 Ofwat opened investigations into all sewerage undertakers in England and Wales. Ofwat must, in respect of those investigations, which consider discharges from network CSOs, consider whether individual sites are compliant with section 94 of the 1991 Act as supplemented by the 1994 Regulations.

47. Finally, as set out in Annex 1, many CSOs have been subjected to the Environment Agency's Storm Overflows Assessment Framework process and identified as 'unsatisfactory' but with a BTKNEEC compliant solution. With regard to these CSOs, Ofwat should ensure, liaising with the Environment Agency as appropriate, that the process of assessing BTKNEEC compliance has been properly carried out and that the relevant sewerage undertaker implements BTKNEEC compliant schemes forthwith so as to avoid continuing discharges which are in breach of the 1991 Act and/or the 1994 Regulations. If a sewerage undertaker declines or fails to carry out the necessary works, Ofwat is required by section 18 of the 1991 Act to take or cause to be taken enforcement action (absent an exception as set out in section 19). The OEP notes that in its response of 30 September 2024 to the OEP's Position Statement Ofwat states that it will '*ensure[…] that those storm overflows that have already been assessed through the EA's SOAF have been subject to a proper BTKNEEC assessment, and where BTKNEEC remedies have been identified, that those are delivered within a set deadline*'. Ofwat goes on to say that it intends to serve some form of omnibus enforcement order under section 18 of the 1991 Act on undertakers in respect of all CSOs which are deficient in terms of the 1994 Regulations: '*Our proposed enforcement order therefore requires companies to develop a plan to review, and to keep under review, their entire storm overflow portfolio to ensure that any sites*

spilling 20 times or more in a year are investigated, and if those spills cannot be attributed to exceptional circumstances, they are remedied to the extent that a BTKNEEC compatible remediation option is available.' Ofwat then goes on to set out how companies will be required to report to Ofwat on their compliance.

48. While the OEP welcomes Ofwat's approach to remedying the identified breach by serving enforcement orders, the OEP notes that no date is provided for adhering to this requirement to serve enforcement orders when a CSO is discharging more than 20 times a year and a BTKNEEC compatible remediation option is demonstrably available. Given that CSOs discharging in such a fashion amount to an active breach by the undertaker of section 94 of the 1991 Act and the 1994 Regulations, the proper remedy for such a CSO is the service of an enforcement order forthwith (absent an exception set out in section 19) so as to secure compliance with section 94 of the 1991 Act as supplemented by Regulation 4 of the 1994 Regulations.

49. In light of the above the OEP considers that Ofwat should:

    (a) adopt and publish an updated version of its guidance document "Approach to Enforcement" by 30 April 2025 (this being a relevant step to remedy and prevent reoccurrence of the failure under Ground One)

    (b) ensure that the updated guidance properly and adequately sets out Ofwat's functions consistent with the legal position set out at paragraphs 14 - 33 above (this being a relevant step to remedy and prevent reoccurrence of the failure under Grounds One and Two)

    (c) forthwith, and whether or not it has adopted or published updated guidance, operate in accordance with the legal position set out at paragraphs 14 - 33 above (this being a relevant step to remedy and prevent reoccurrence of the failure under Ground Two)

    (d) use best endeavours to agree with the Environment Agency and the Secretary of State, and to publish, as soon as practicable (and in any event by 30 April 2025) revised memoranda of understanding between them:

        i. which reflect proper regulation of discharges from network CSOs, in line with the legal position set out in paragraphs 14 - 33 above, and
        ii. which include arrangements for improved cooperation and the exchange of information on the performance of sewerage undertakers under section 94 of the 1991 Act and regulations 4 and 5 and Schedule 2 of the 1994 Regulations which effectively support all parties in regulating network CSO discharges in accordance with that legal position.

    (e) If Ofwat chooses to delegate to the Environment Agency the investigation of relevant breaches of section 94 of the 1991 Act, then it must satisfy itself that the Environment Agency is properly fulfilling that function (this being a

relevant step to remedy and prevent reoccurrence of the failure under Grounds One and Two)

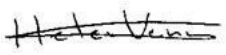
(f) For those network CSOs which have been subjected to the Environment Agency's Storm Overflows Assessment Framework process and identified as unsatisfactory and for which a BTKNEEC compliant solution has been identified, Ofwat should ensure that the process of assessing BTKNEEC compliance has been properly carried out and that the relevant sewerage undertaker implements those BTKNEEC compliant solutions forthwith so as to avoid continuing discharges which are in breach 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, Ofwat is required by section 18 of the 1991 Act to take or cause to be taken enforcement action (absent an exception as set out in section 19).

LINKED NOTICES

50. 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 Secretary of State for Environment, Food and Rural Affairs and the Environment Agency 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 Ofwat will also be sent to the Secretary of State for Environment, Food and Rural Affairs and the Environment Agency.

DATE FOR RESPONSE

51. 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

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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".

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[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."