

Information Notice



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

By email only to: Secretary.State@defra.gov.uk

CMS-255

7 September 2023

Dear Secretary of State,

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

I write in respect of alleged failures to comply with environmental law by the Secretary of State. This concerns specific duties under the Water Industry Act 1991 and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017. Following a decision of the OEP's Board, I enclose an Information Notice in connection with this which sets out the allegations, why these are considered to be serious and the information you are requested to provide.

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

Under section 35(3) of the Environment Act 2021, you are required to respond in writing to this Information Notice and, so far as is reasonably practicable, provide the information requested. Your response should also address the alleged failures to comply with the law described in the notice and set out what, if any, steps you intend to take in relation to each allegation. You must respond to this Information Notice by 7 November 2023, which is two months from the date of this notice, in accordance with section 35(4) of the Environment Act 2021.

I look forward to hearing from you.

Yours sincerely,



Natalie Prosser

Chief Executive

For and on behalf of the Office for Environmental Protection



www.theoep.org.uk

Information Notice

Section 35, Environment Act 2021

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

Date of this Notice: 7 September 2023

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

Case reference: CMS-255

1. Background

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

2. Description of alleged failures

- 2.1 This Information Notice relates to the following alleged failures of the Secretary of State for Environment, Food and Rural Affairs (hereafter referred to as the Secretary of State) to comply with environmental law:
- 2.1.1 unlawful failure to take proper account of environmental law when exercising the Secretary of State's functions, by:
- 2.1.1.1 drafting guidance¹ ('the 1997 Guidance') which did not reflect the true legal extent of the duties upon sewerage undertakers under section 94 of the Water Industry Act 1991 ('the 1991 Act') (as extended by the Urban Waste Water Treatment (England and Wales) Regulations 1994 ('the 1994 Regulations'));
- 2.1.1.2 failing to amend or replace the 1997 Guidance after the decision of the Court of Justice of the European Union ('the CJEU') in *Commission v United Kingdom Case C-301/10* ('Case C-301/10');²

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

² Judgment, 18 October 2012.

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

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

- 2.1.2 (whether as a result of 2.1.1 or otherwise) unlawfully failing to exercise the Secretary of State's functions under section 18 of the 1991 Act by the making of enforcement orders in respect of known contraventions of section 94, when the Secretary of State was under a legal duty to do so;
- 2.1.3 unlawful failure to discharge the Secretary of State's duty under regulation 3(1) of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 ('the 2017 Regulations') to secure compliance with article 10(2)(a) of the Water Framework Directive 2000 (2000/60/EC) ('WFD') (by failing in respect of network CSOs to establish or implement the permit conditions required to satisfy the requirements of the Urban Waste Water Treatment Directive 1991 (91/271/EEC) ('UWWTD') that they should discharge only in "exceptional circumstances" as clarified in Case C-301/10).

Making and/or failing to amend the 1997 Guidance

- 2.2 The alleged failures at 2.1.1.1 and 2.1.1.2 above appear to have arisen due to a failure properly to understand and to implement the UWWTD and/or the CJEU decision in Case C-301/10. The effect of that judgment on the correct interpretation of the UWWTD and section 94 of the 1991 Act as supplemented by regulation 4 of the 1994 Regulations is set out below.

- 2.3 Section 94(1) of the 1991 Act imposes a duty on sewerage undertakers:

- (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.*

- 2.4 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.*

These dates replicated similar requirements imposed upon Member States by the UWWTD. Thus, full compliance with the UWWTD and the 1994 Regulations was required by 31st December 2005.

2.5 Schedule 2 in turn 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.*

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

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

The court also held at paragraph [65] that the concept of best technical knowledge not entailing excessive cost (BTKNEEC) (as used in section A of Annex 1 to the UWWTD and paragraph 2 of Schedule 2 to the 1994 Regulations) is to be invoked “by way of exception only”.³

³ Case C-301/10, judgment at [65].

- 2.7 The Secretary of State's power to give the 1997 Guidance appears to come from section 40(2) Environment Act 1995. Section 40(8) requires the Environment Agency to comply with directions given under section 40. The 1997 Guidance appears to be based on an incorrect interpretation of the 1994 Regulations and the UWWTD as its effect is to place the burden on the Environment Agency as regulator to show that any individual discharge is 'unsatisfactory' rather than on the discharger to show that it is 'satisfactory', by application of a pragmatic system of classification founded largely upon impact on receiving waters rather than the quality, quantity or frequency of emissions. This misinterpretation is apparent in light of the findings of the CJEU in Case C-301/10 to the effect that the discharges in the absence of exceptional circumstances were *prima facie* non-compliant unless, by way of exception only, the discharger could justify the rejection of improvements on BTKNEEC grounds.
- 2.8 Following the judgment in Case C-301/10, it should have been apparent that the methodology set out in the 1997 Guidance was not sufficient to achieve compliance with the requirements of the 1994 Regulations and the UWWTD with respect to the limitation of pollution of receiving waters due to network CSOs. Notwithstanding that, the Secretary of State has unlawfully failed to revise the 1997 Guidance to reflect accurately the true legal extent of the requirements of the UWWTD and the 1994 Regulations.
- 2.9 For the avoidance of doubt, the view of the OEP is that the decision in Case C-301/10, whilst directly concerned with specific discharges at Whitburn and London, was of general relevance to the approach of the United Kingdom to the limitation of pollution from storm water overflows. It was apparent from its terms that the approach of the United Kingdom was fundamentally flawed in a manner which was bound to be reflected by failures of compliance not only at Whitburn and on the Thames but generally and in a widespread manner, since the approach in the 1997 Guidance was irreconcilable with that adopted in the judgment.

Failure to understand and/or to exercise the power to make enforcement orders

- 2.10 The alleged failure at 2.1.1.3 arises from a failure to properly understand the nature and extent of the Secretary of State's duty under section 18 of the 1991 Act. The Secretary of State's approach to the discharge of their duty under section 18 of the 1991 Act appears to be to state that Ofwat is the "lead" enforcement agency, with the Secretary of State having merely an oversight role.
- 2.11 Section 18 of the 1991 Act provides, so far as is relevant:

- (1) ... where ...the Secretary of State or the Authority is satisfied—
 (a) that that company ... is contravening—

- (i) *any condition of the company's appointment ... in relation to which he or it is the enforcement authority; or*
 - (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 condition or requirement, he or it shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.*

2.12 By virtue of section 18(6)(c), both the Secretary of State and Ofwat are appointed “the enforcement authority” for the purposes of section 18(1)(b).

2.13 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 of the 1991 Act imposes a duty on the Secretary of State (and Ofwat) to make a final enforcement order against a sewerage undertaker where they are satisfied that the undertaker is contravening certain conditions or statutory requirements, including the duty 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.

2.14 There is nothing in the language of section 18 which suggests that Ofwat is the “lead” enforcement authority in this area, and such a division of authority is not reflected in the Memorandum of Understanding between the Secretary of State and Ofwat dated October 2008. The duty on the Secretary of State under section 18 is non-delegable and is to secure compliance by sewerage undertakers by enforcement notice when there is requisite non-compliance.

2.15 Save for Ofwat’s current investigation concerning South West Water, during the preceding period of over 30 years since the duty under section 18 (and its predecessor, section 20 of the Water Act 1989) has been imposed upon the Secretary of State and Ofwat, neither body has, so far as the OEP is aware, ever exercised its related powers of enforcement in relation to the operation of network CSOs, notwithstanding the decision in Case C-301/10 and subsequent acknowledgement and recognition by the then Secretary of State in his letter dated 18 July 2013 to sewerage undertakers that:

“Discharges from combined sewer overflows (CSOs) are increasingly becoming a reputational issue for water companies in a way not dissimilar to leakage from supply a few years ago. Whilst much has been done and considerable investment made to improve the performance of CSOs their management and operation remains a regular cause for concern for both water users and the wider public.”

- 2.16 The alleged failure at 2.1.2 can be seen specifically in relation to the CSO discharges at Whitburn that were the subject of Case C-301/10. Following the judgment in that case, the Secretary of State was aware that discharges at Whitburn were occurring outside of “exceptional circumstances” and were occurring on numerous occasions a year such that the UK was in continuing breach of its obligations under the UWWTD. The Secretary of State was therefore aware that Northumbrian Water Ltd was not effectually dealing with the contents of the sewers at Whitburn, in breach of its duty under section 94 of the 1991 Act. The Secretary of State should accordingly have acted (either by itself or by Ofwat) under section 18 of the 1991 Act following the judgment in Case C-301/10.
- 2.17 The fact that works were being undertaken at Whitburn to improve the situation, did not absolve the Secretary of State of their duty to serve an enforcement order under section 18 of the 1991 Act (subject to consideration of any exceptions under section 19 of that Act).
- 2.18 In arriving at the above view, the OEP has had particular regard to (1) the contents of the letter dated 3 February 2023 from the Directorate-General Environment of the European Commission to Mr. Robert Latimer concerning spills of untreated waste water at Whitburn (attached as Appendix 1 hereto) and (2) the data concerning spills at Whitburn found within that letter and in the judgement in Case C-301/10 (attached as Appendix 2 hereto).

Failure to discharge the duty under regulation 3 of the 2017 Regulations

- 2.19 The alleged failure at 2.1.3 arises from a failure to establish or implement the relevant permit conditions for network CSOs to ensure that they only discharge in “exceptional circumstances” in accordance with the UWWTD.
- 2.20 Article 10(2)(a) of the WFD requires Member States to ensure the establishment and/or implementation of emissions controls based on best available techniques in measures including the UWWTD. As set out above, the CJEU has made clear that the proper interpretation of the UWWTD (as transposed in the UK by the 1994 Regulations) is that overflows are permitted to spill only in “exceptional situations”. The Secretary of State’s duty to secure compliance with the WFD is contained in regulation 3(1) of the 2017 Regulations. By failing to adhere to their duty to take action against undertakers under the enforcement mechanism set out in sections 94(3)/18 of the 1991 Act, the Secretary of State is in breach of the duty under regulation 3(1) of the 2017 Regulations.

3. Seriousness

- 3.1 Our Enforcement Policy explains how we will assess the seriousness of an alleged failure to comply with environmental law and can be found in Annex A of our Strategy: [Here](#)

3.2 We consider that the alleged failure at 2.1.1, if it occurred, would be serious for the following reasons:

- 3.2.1 Point of law – the alleged failures raise points of law of general public importance as they relate to the overall regulation of network CSOs in England. As set out in section 2 above, the misunderstanding and/or misinterpretation of environmental law has affected both the guidance given by and the regulatory approach of the Secretary of State. The coherent enforcement of the duty under section 94(1) of the 1991 Act, as supplemented by regulation 4 of the 1994 Regulations, is of increased importance since only the Secretary of State and Ofwat can take enforcement action against sewerage undertakers for breaches of that duty by virtue of section 18(8) of the 1991 Act. Any errors in the application of section 18 have the potential to remove the possibility of securing compliance through enforcement on a national scale.
- 3.2.2 Frequency of conduct – the conduct is frequent and ongoing to the extent that the Secretary of State’s guidance and approach to enforcement of network CSOs is affected by the alleged failure. The 1997 Guidance is inadequate to achieve compliance with the UWWTD. This was made apparent by the decision of the CJEU in 2012 yet there has been limited response to the judgment. The Secretary of State’s assertion that Ofwat is the ‘lead’ enforcement authority in this area is still, apparently, maintained despite examples of potential instances where enforcement functions under s.18 could have been engaged.
- 3.2.3 Behaviour of public authority – In response to the OEP’s investigation and in correspondence to date there has been no acceptance of any failure to comply with environmental law by the Secretary of State. Whilst there is acceptance that the 1997 Guidance is “requiring an update”, there has been no evidence provided to indicate that this will adequately address the incompatibility with the UWWTD.
- 3.2.4 Risk of harm – The discharge of untreated sewage can harm the environment, human health and the amenity value of water bodies. The failure to adequately implement the UWWTD, particularly following the judgment of the CJEU, has resulted in inadequate guidance. The 1997 Guidance formed the basis for supplementary guidance and conduct by regulators when setting, reviewing and modifying permit conditions in respect of discharges from network CSOs. A failure to implement fully a system of emission standards has the potential to allow for excessive discharge to receiving water bodies. In addition, any failure to enforce adequately an effective sewage system and to ensure compliance with the requirements of section 94 of the 1991 Act (as extended by the 1994

Regulations) has the potential to have serious implications for the environment.

3.3 We consider that the alleged failure at 2.1.2, if it occurred, would be serious for the same reasons as outlined at 3.2 above. The breaches of section 94 of the 1991 Act which were occurring at Whitburn appear to be frequent and ongoing and this is, in addition to what is said above, a reason why this alleged failure is serious.

3.4 We consider that the alleged failure at 2.1.3, if it occurred, would be serious for the same reasons as outlined at 3.2 above.

4. Our request for information

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

4.1.1 The Secretary of State's response to each of the alleged failures to comply with environmental law set out at 2.1.1 to 2.1.3 above.

4.1.2 Any regulatory action which the Secretary of State has taken since 2012 in relation to network CSOs, whether by means of an enforcement order under section 18 of the 1991 Act or otherwise.

4.1.3 Any steps the Secretary of State intends to take in relation to each of the alleged failures to comply with environmental law set out at 2.1.1 to 2.1.3 above.

4.1.4 Any assessment of the 1997 Guidance by the Secretary of State and any specific updates intended and/or a description of any '*aspects of it [that] are now outdated*'.⁴

4.1.5 Any assessment by the Secretary of State of why they contend that '*by design [Ofwat is] the lead enforcement authority*'⁵ and what it considers to be the extent of their duty under section 18 of the 1991 Act to issue an enforcement order where the Secretary of State is satisfied that a water company is contravening, or likely to contravene, its duty under section 94(1)(b) of the 1991 Act.

4.1.6 The view of the Secretary of State as to what constitutes a breach of section 94 of the 1991 Act, as supplemented by regulation 4 of the 1994 Regulations, so as *prima facie* to invoke the duty of the Secretary of State under section 18 to make an enforcement order in respect of the performance of a network CSO.

⁴ Letter from Amira Amzour, Deputy Director for Water Quality, Defra to Helen Venn, OEP (3 May 2023) para.18.

⁵ *ibid*, para.33.

4.1.7 Any assessment of the Secretary of State's duty under regulation 3(1) of the 2017 Regulations to secure compliance with the WFD and in particular article 10(2)(a) of the WFD, to establish and/or implement emission controls based on best available techniques to satisfy the requirements of the UWWTD.

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

5. **Linked Notices**

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

6. **Date for response**

6.1 You must respond to this Information Notice within two months of the date it is given, which in this case is by 7 November 2023.



Helen Venn

For and on behalf of the Office for Environmental Protection

Chief Regulatory Officer | Office for Environmental protection

The Office for Environmental Protection

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