

Information Notice



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**By email only to:** [Chief.Executive@environment-agency.gov.uk](mailto:Chief.Executive@environment-agency.gov.uk)

**CMS-343**

7 September 2023

Dear Mr Duffy,

**Investigation of potential failures to comply with environmental law by the Environment Agency – 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 Environment Agency. This concerns specific duties under the Urban Waste Water Treatment (England and Wales) Regulations 1994 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 Secretary of State for Environment, Food and Rural Affairs 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](http://www.theoep.org.uk)

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

**Public Authority:** Environment Agency

**Date of this Notice:** 7 September 2023

**Case name:** Investigation of potential failures to comply with environmental law by the Environment Agency – untreated sewage discharge by sewerage undertakers via network Combined Sewer Overflows.

**Case reference:** CMS-343

**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 Environment Agency to comply with environmental law:

2.1.1 unlawful failure to take proper account of environmental law when exercising its functions, in devising guidance on setting permit conditions for combined sewer overflows on the sewerage network ('network CSOs') without proper understanding of and/or regard to the requirements of the Urban Waste Water Treatment (England and Wales) Regulations 1994 ('the 1994 Regulations') and/or the Urban Waste Water Treatment Directive 1991 (91/271/EEC) ('UWWTD'), in particular regulation 6(2)(c) and/or Schedule 2;

2.1.2 (as a result of 2.1.1), unlawfully exercising its function of setting permit conditions for discharges from network CSOs pursuant to the Environmental Permitting (England and Wales) Regulations 2016 ('the 2016 Regulations') and their predecessors, by setting conditions which were in fact insufficient to achieve compliance:

2.1.2.1 with the requirements of the 1994 Regulations, in particular regulation 6(2)(c) and/or Schedule 2;

2.1.2.2 (as a result of 2.1.2.1), with the requirements of regulations 3(1) and/or 3(2) of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 ('the 2017 Regulations');

2.1.3 unlawful failure to exercise properly or at all, in relation to discharges from network CSOs, its functions of:

2.1.3.1 investigative monitoring pursuant to its duties under regulation 3(1) of the 2017 Regulations and paragraph 1.3.3 of Annex V to the Water Framework Directive (2000/60/EC) ('WFD') and/or regulation 34(2) of the 2016 Regulations to ascertain the magnitude and impacts of accidental pollution from discharges from network CSOs;

2.1.3.2 review and/or modification and/or revocation of permits pursuant to its duty under regulation 6(3) of the 1994 Regulations and regulation 34(1) of the 2016 Regulations;

2.1.3.3 enforcement pursuant to its powers in section 37 of the Environment Act 1995 ('the 1995 Act') and elsewhere;

in each case so as to achieve compliance with regulation 6(2)(c) of and Schedule 2 to the 1994 Regulations.

***Failure to understand and/or to apply the requirements of the UWWTD and/or the 1994 Regulations***

2.2 The alleged failures at 2.1.1 and 2.1.2 above appear to have arisen due to a failure properly to understand and to implement the requirements of the UWWTD (and thus the 1994 Regulations) as explained in the decision of the Court of Justice of the European Union's ('the CJEU') judgment in *Commission v United Kingdom* Case C-301/10 ('Case C-301/10'). The effect of that judgment on the correct interpretation of the 1994 Regulations and other relevant legislation is set out below.

2.3 The alleged failures at 2.1.1 and 2.1.2 relate to the setting of permit conditions in a manner not compliant with the requirements of Regulation 6(2)(c) and/or Schedule 2 of the 1994 Regulations.

2.4 Regulation 6(2)(c) of the 1994 Regulations imposes a duty on the EA to secure:

*"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."*

2.5 Schedule 2 of the 1994 Regulations stipulates at paragraph 2 that:

*“The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding... limitation of pollution of receiving waters due to storm water overflows.”*

This provision replicates Section A of Annex 1 to the UWWTD.

- 2.6 This section of the UWWTD, together with others related to it, were considered in Case C-301/10. The CJEU held that the UWWTD must be interpreted as providing for 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, 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 wastewater occurred regularly.”*

The judgment also indicates that the concept of best technical knowledge not entailing excessive cost (‘BTKNEEC’) (used in section A of Annex 1 to the UWWTD and paragraph 2 of Schedule 2 to the 1994 Regulations) is limited in operation to a form of exclusion, to be used “by way of exception only”.<sup>1</sup>

- 2.7 We understand that the relevant guidance issued by the Environment Agency in relation to the permitting of network CSOs<sup>2</sup> is based on guidance from the Department of the Environment, Transport and the Regions from 1997 (‘the 1997 Guidance’).<sup>3</sup>
- 2.8 The 1997 Guidance appears to be based on an incorrect interpretation of the 1994 Regulations and the UWWTD as it effectively places the burden on the Environment Agency as regulator to show that any individual discharge is ‘unsatisfactory’ rather than for 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 any 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.

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<sup>1</sup> Case C-301/10, judgment at [65].

<sup>2</sup> For example, September 2018 - Water companies: environmental permits for storm overflows and emergency overflows and the June 2018 Storm Overflow Assessment Framework (SOAF).

<sup>3</sup> 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).

- 2.9 Since the judgment in Case C-301/10, the Environment Agency has continued to operate essentially the same methodology as is contained in the 1997 Guidance in determining whether network CSOs are ‘unsatisfactory’, in a manner which is incompatible with that judgment.
- 2.10 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.
- 2.11 In answer to a question from the OEP about its response to the judgment in Case C-301/10, the Environment Agency stated:

*“The CJEU also made reference to limiting spill frequency as far as “best technical knowledge not entailing excessive costs” (‘BTKNEEC’), but suggested that the test of proportionality was an acceptable test rather than “exceptional” by saying “enable examination as to whether or not the costs that must be incurred to carry out the works necessary in order for all urban waste water to be treated are proportionate to the benefit that that would yield for the environment. [paragraph 68].”*

We consider this to be an incorrect reading of paragraph [68], which does not propose an alternative test to “exceptional” as suggested. Exceptionality remains relevant to determining both acceptable frequency of discharge and successful application of the concept of BTKNEEC. This is made clear in paragraph [69] of Case C-301/10:

*“Should it prove impossible or very difficult to collect and treat all the waste water, it will be for the Member State concerned to demonstrate that the conditions for applying the concept of BTKNEEC are met.”*

- 2.12 This incorrect interpretation of paragraph [68] of the judgment flows through to the Environment Agency’s Storm Overflow Assessment Framework (‘the SOAF’) methodology. On a proper reading of the judgment in Case C-301/10, the *only* basis on which spills are acceptable is due to exceptional weather conditions, save where BTKNEEC is available by way of exception only. The effect of the SOAF is (1) to exclude spills from count altogether on a block annual basis in years of heavy rainfall (regardless of their individual frequency or their temporal relationship with rainfall) and (2) in remaining years (i.e. those in which, on the SOAF’s own approach, rainfall has not been “exceptional” at all), to treat 40 spills per year as an acceptable threshold for triggering investigation. This approach is (a) irrational; and (b) inconsistent with a proper understanding and application of Case C-301/10.

2.13 For the reasons set out above, the 1997 Guidance was inadequate to achieve compliance with the UWWTD and the 1994 Regulations. The Environment Agency's subsequent guidance is based on much the same erroneous approach as the 1997 Guidance and therefore remains flawed. This should have been apparent following the judgment in Case C-301/10, but no significant changes to methodology were made following that judgment meaning that the Environment Agency's guidance on setting permit conditions for network CSOs is based on a misinterpretation of the 1994 Regulations, in particular regulation 6(2)(c) and/or Schedule 2. The SOAF is expressed to be made "in accordance with" the 1997 Guidance and makes no reference to the decision in Case C-301/10.

### ***The particular case of Whitburn***

2.14 The failure alleged at 2.1.2 to set appropriate conditions is clearly demonstrated in relation to the CSO discharges at Whitburn which were the subject of Case C-301/10. The decision in Case C-301/10 demonstrates that even after the improvements completed in 2004 the discharges at Whitburn, even if compliant with the permitted conditions imposed by the Environment Agency, have continued to be non-compliant with the UWWTD and the 1994 Regulations. This non-compliance has persisted despite further improvements completed in 2017.

2.15 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 in that letter and within the judgement in Case C-301/10 (attached as Appendix 2 hereto).

### ***Failure to monitor and to review permit conditions***

2.16 The alleged failure at 2.1.3 above arises from the fact that the Environment Agency has not demonstrated any evidence of a system for the carrying out of investigative monitoring pursuant to paragraph 1.3.3 of Annex V of the WFD to 'ascertain the magnitude and impacts of accidental pollution' nor is there any evidence of a system for carrying out the review of permits for network CSOs in order to achieve compliance with regulation 6(3) of the 1994 Regulations, nor for the periodic inspection of CSOs as regulated facilities pursuant to regulation 34(2) of the 2016 Regulations. We request further specific information in relation to this alleged failure at 4.1.3 and 4.1.4 below.

### ***Failure to enforce***

2.17 The Environment Agency is empowered by section 37(1) of the Environment Act 1995 to institute criminal proceedings generally. It is responsible for the enforcement of the 2016 Regulations, including the criminal offences created therein, by both the acceptance of enforcement undertakings and the prosecution of criminal offences. It also has miscellaneous other powers of

enforcement including a range of civil sanctions introduced by the Regulatory Enforcement and Sanctions Act 2008 and the Environmental Civil Sanctions (England) Order 2010.

- 2.18 The Environment Agency's Enforcement and Sanctions Policy (updated 17 March 2022) sets out the principles upon which the Environment Agency will exercise its relevant powers.
- 2.19 The view of the OEP is that in respect of discharges from network CSOs in breach of permit conditions the exercise of these powers is an aspect of the Environment Agency's duty under regulation 6(2)(c) of the 1994 Regulations so to exercise its functions under the 2016 Regulations in relation to pollution offences as to secure the limitation of pollution of receiving waters due to storm water overflows.
- 2.20 It appears to us that the apparent neglect by the Environment Agency of its duties of inspection and review has led to, and is supplemented by, an absence of any enforcement in practice of the terms of the environmental permits governing discharges from network CSOs, in a manner and to an extent which may be unlawful and may also constitute a breach of the Environment Agency's duties under regulation 6(2)(c) of the 1994 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 failure raises points of law of general public importance as it relates to the overall regulation of network CSOs in England. As set out at paragraph 2 above, the misunderstanding and/or misinterpretation of environmental law, and in particular the decision in Case C-301/10, appears to have led to an approach to permitting of network CSOs and the actual permitting of network CSOs by the Environment Agency in a manner that is not compliant with the UWWTD.
- 3.2.2 Frequency of conduct – We consider that the conduct has been frequent and is ongoing to the extent that the guidance and permitting of all network CSOs by the Environment Agency is affected by the alleged failure. The 1997 Guidance and the SOAF and guidance on 'Water companies: environmental permits for storm overflows and emergency overflows' from 2018 which perpetuates 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 no effective response by the Environment Agency.

3.2.3 Behaviour of the public authority – On 18 November 2021, the Environment Agency launched a major investigation into potential widespread non-compliance by water and sewerage companies in respect of permit breaches at sewage treatment works. Whilst this indicates that the Environment Agency is aware of potentially serious non-compliance with permits by water and sewerage companies, there has not been a focus on network CSOs. This is despite increasing Event Duration Monitoring data suggesting spills occur routinely and in normal climatic conditions. 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 Environment Agency or an attempt to remedy such failures.

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 properly to implement the UWWTD and the 1994 Regulations even following the judgment of the CJEU has resulted in too lax a standard when permitting discharges from network CSOs. Without an effective permitting and associated review system there is potential for widespread non-compliance in the form of excessive discharge of untreated effluent to receiving water bodies.

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.

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 Environment Agency'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 steps the Environment Agency 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.

4.1.3 Any evidence of a system of investigative monitoring pursuant to regulation 3(1) of the 2017 Regulations and Paragraph 1.3.3 of Annex V to the WFD and/or regulation 34(2) of the 2016 Regulations;

4.1.4 Any evidence of a system of review by the Environment Agency of network CSO permits in order to comply with regulation 6(3) of the 1994 Regulations.

4.1.5 As to the SOAF:

- 4.1.5.1 Whether it is correct, pursuant to Stage 1(a) on p4, that 'exceptional weather' can be a ground for excluding the spills in question on an annual basis.
- 4.1.5.2 The number of network CSOs which have spilled sufficiently in the last three years for the SOAF 'investigation trigger' to be engaged.
- 4.1.5.3 The number of investigations under SOAF which have been triggered for each of the sewerage undertakers and whether any investigations under SOAF have led to a review of permits by the EA.
- 4.1.6 Details of all prosecutions or other enforcement actions brought by the Environment Agency for breach of permit conditions by sewerage companies in relation to network CSOs in the last ten years, identifying all instances in which such circumstances fell to be considered for such actions, whether such actions followed or not.

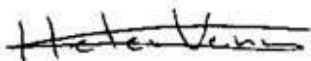
4.2 We draw your attention to your obligations under section 27 of the Environment Act 2021 regarding cooperation and the candid disclosure of information. You should also note section 43 of the Environment Act 2021, concerning the confidential handling of any information you provide to us.

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