

INVESTIGATION REPORT

**addressed to the Secretary of State for Environment, Food and
Rural Affairs in relation to their compliance with the Water
Industry Act 1991 and the Water Environment (Water Framework
Directive) (England and Wales) Regulations 2017 regarding the
regulation of network combined sewer overflows**

December 2025

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Executive summary

Executive summary

Water pollution is a serious challenge, driven by multiple factors, including discharges from combined sewer overflows (CSOs). Our principal objective in exercising all our functions, including enforcement, is to protect and enhance the natural environment. Through our investigation function, we tackle serious non-compliance with environmental law and ensure accountability where failures are identified. We are outcomes focused, and our goal is to deliver sustainable, long-term improvements in water quality.

This report concludes the Office for Environmental Protection's (OEP) investigation into whether the Secretary of State for Environment, Food and Rural Affairs (Defra) has failed to comply with environmental law in relation to its regulation of network CSOs in England. It is published alongside similar reports addressed to Ofwat, and the Environment Agency. Together, the three reports examine whether these public authorities have fulfilled their respective legal duties in overseeing, permitting, and enforcing the operation of CSOs by Water and Sewerage Companies (WaSCs).

Combined sewers are designed to carry both sewage and surface water to wastewater treatment works. In England, while many areas have separate systems, these often connect into older combined networks prior to treatment. During heavy rainfall, the system's capacity can be exceeded, risking sewage backing up into homes and streets. CSOs act as safety valves, discharging into rivers, lakes or coastal waters to prevent flooding. However, frequent or prolonged discharges of untreated sewage pose significant environmental risks, such as damage to ecosystems, degradation of water quality, harm to biodiversity, and create risks for human health and recreation. Effective regulation is therefore essential to protect waterbodies and the communities that depend on them. Our investigation aimed to ensure that the legal framework governing CSOs (figure 1) is not only properly understood but also complied with, properly implemented, monitored, and enforced by the authorities responsible.

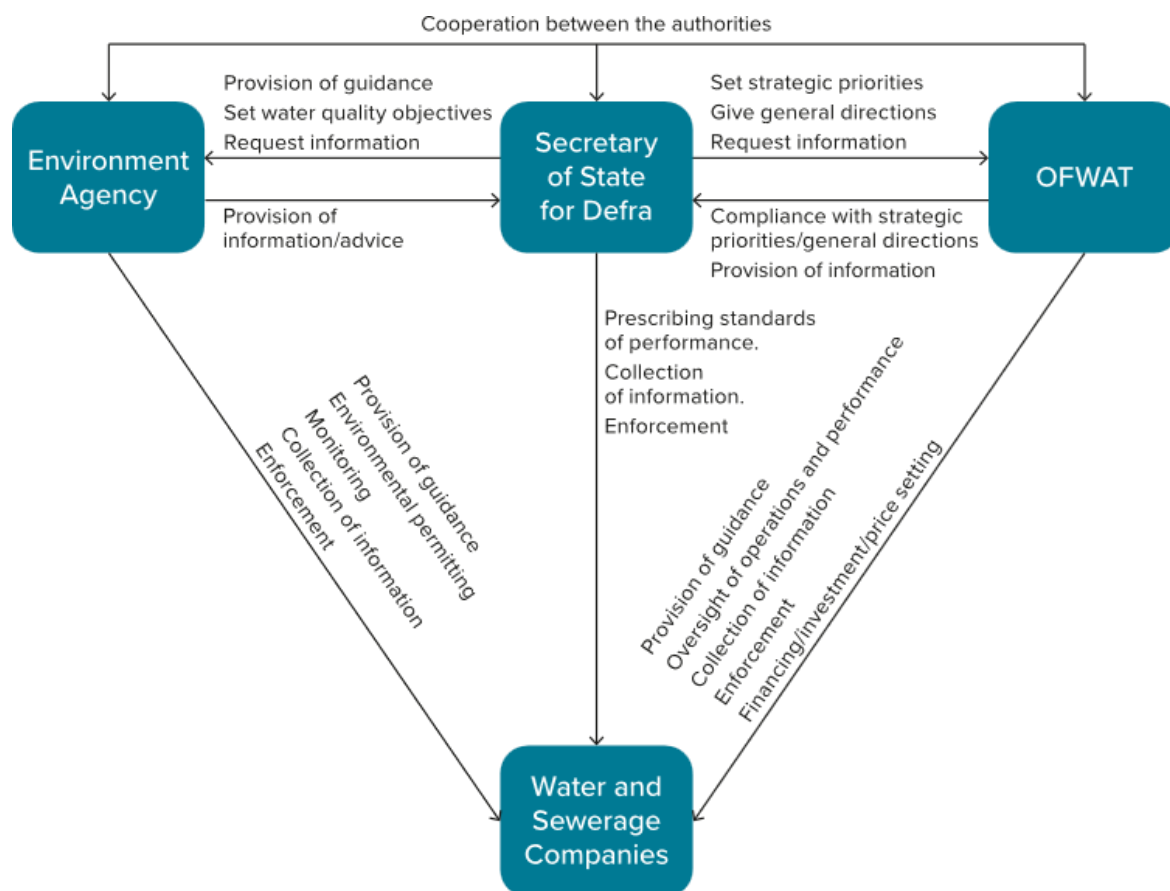


Figure 1: Overview of the interactions between the authorities and the WaSCs

The Water Industry Act 1991 (the '1991 Act') sets out the core duties on WaSCs to provide and maintain effective sewerage systems. The Urban Waste Water Treatment (England and Wales) Regulations 1994 (the '1994 Regulations') build on these duties by requiring public sewers and waste water treatment works to be designed and maintained using a form of cost-benefit analysis referred to as best technical knowledge not entailing excessive costs ('BTKNEEC') and to limit pollution from storm overflows.

The Environment Agency is responsible for securing these outcomes through permitting, monitoring compliance and enforcement if necessary.

Ofwat, while primarily an economic regulator, also has environmental responsibilities and enforcement duties under the 1991 Act. Defra sets national policy and has enforcement duties under the 1991 Act.

In 1997, Defra issued guidance on CSO operation, defining what constituted satisfactory and unsatisfactory performance (the '1997 Guidance'). This guidance focused on the environmental impact of CSOs on receiving waters and relied heavily on regulatory monitoring. Critically, it described discharges in dry weather as unsatisfactory, alongside other predominately impact-based criteria. The Environment Agency continued to apply these principles in discharge permits and later embedded them in its own guidance on the operation of CSOs.

In 2012, the Court of Justice of the European Union (the ‘CJEU’) ruled that the UK was in breach of the Urban Waste Water Treatment Directive in respect of two specific sites (Case C-301/10). The judgment clarified that CSOs should discharge only in exceptional circumstances, such as unusually heavy rainfall, unless preventing such discharges would impose disproportionate costs. This established the “two-stage test”: first, assess whether a discharge is exceptional; second, apply a cost-benefit analysis approach (‘BTKNEEC’) to determine proportionality of any intervention.

Despite this, the UK Government’s framework for regulating CSOs remained largely unchanged. The 1997 Guidance was not updated, and Environment Agency permits were not revised to reflect the two-stage test. As public concern grew, regulators introduced Event Duration Monitoring (‘EDM’) to track CSO activity. By 2018, EDM data was beginning to demonstrate that many CSOs were discharging far more frequently than they should have been.

In 2018, the Environment Agency introduced the Storm Overflow Assessment Framework (‘SOAF’) to specifically assess spill frequency. However, the thresholds used to satisfy the first stage of the two-stage test remained too lenient and failed to align with any reasonable definition of “exceptional circumstances”. Where CSOs did progress to the second stage, there were inconsistencies and gaps in cost-benefit assessments undertaken by WaSCs, undermining the integrity of the test and the overall outcome.

Ofwat, meanwhile, interpreted its enforcement duties as applying only in cases of systemic company failure. It placed a heavy reliance on Environment Agency permits, appearing to operate on the basis that compliance with a permit equated to legal compliance with the 1991 Act and 1994 Regulations. This was an incorrect position given Ofwat’s own duties under section 18 of the 1991 Act and the permissive standards described above. Ofwat failed to act on evidence of discharges from network CSOs until at least June 2022 and did not exercise its enforcement powers despite having both the authority and a duty to do so.

Defra, which shares enforcement responsibilities under the 1991 Act, also failed to intervene when Ofwat did not act, allowing these breaches to persist and contributing to ongoing environmental harm and public dissatisfaction.

Our Investigation

We launched our investigation in June 2022 following a complaint submitted by the Salmon and Trout Conservation Trust (now WildFish). After a period of evidence gathering, information requests and analysis, we issued Information Notices to each public authority in September 2023, setting out our concerns and requesting detailed responses and supporting evidence. Our approach is designed to resolve issues effectively, often starting with dialogue and cooperation to help narrow the issues and clarify any differences of opinion. Where necessary, we will escalate through our formal enforcement functions to secure compliance and protect the environment. After reviewing submissions, we considered that serious failures to comply with

environmental law had occurred and issued Decision Notices to each public authority in December 2024, describing the failures and recommending corrective steps. Throughout this process, all public authorities engaged constructively, with a focus on the outcome of protecting the environment.

Findings

We found that there had been three failures to comply with environmental law by Defra:¹

1. Failing to take proper account of environmental law by:
 - Drafting guidance for WaSCs and regulators which did not reflect the true legal extent of sewerage undertaker duties
 - Failing to amend or replace the guidance after a relevant CJEU decision in 2012
 - Misunderstanding its legal duty under environmental law to make enforcement orders.
2. Failing to exercise its duty under environmental law to make enforcement orders.
3. Failing to discharge its duty to secure compliance with environmental law relating to emissions controls. (NB the OEP's view is that this ceased to be an issue in 2020 due to a change in the law).

We found that there had been three failures to comply with environmental law by the Environment Agency:²

1. Failing to take proper account of environmental law in devising guidance relating to permit conditions.
2. (As a result of the point above) setting permit conditions that were insufficient to comply with environmental laws.
3. Failing to exercise permit review functions in relation to discharges from CSOs.

¹ Sections 18 and 94 of the Water Industry Act 1991 (as supplemented by the Urban Waste Water Treatment (England and Wales) Regulations 1994 which implement the Urban Waste Water Treatment Directive 1991 ((91/271/EEC)) and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 which implement the Water Framework Directive 2000 (2000/60/EC).

² The Urban Waste Water Treatment (England and Wales) Regulations 1994, the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 and the Environmental Permitting (England and Wales) Regulations 2016.

We found that there had been two failures to comply with environmental law by Ofwat:³

1. Failing to take proper account of environmental law with regards to duties on WaSCs and its duty to make enforcement orders.
2. Failing to exercise its duty under environmental law to make enforcement orders.

Actions

Since our investigation began, corrective actions by the public authorities have both commenced and gathered momentum. The Storm Overflow Discharge Reduction Plan (SODRP), published by Defra in August 2022 and most recently updated in September 2023, sets out targets to reduce discharges from CSOs. In line with the steps set out in our Decision Notice, Defra published ‘Storm Overflows: policy and guidance’ in March 2025, expressly withdrawing the relevant parts of the 1997 Guidance and clarifying the legal position and roles of each public authority. A new Memorandum of Understanding, specifically on storm overflows, agreed in September 2025 between Defra, the Environment Agency and Ofwat codifies coordination, escalation routes and respective responsibilities (the ‘MoU’).

The Environment Agency published a revised SOAF in March 2025, reducing spill-count investigation triggers and initiated a Storm Overflow Permit Review Plan to vary permits and embed specific spill-frequency trigger conditions. It also issued updated BTKNEEC practitioner guidance to standardise inputs, benefits valuation, and scenario testing.

In April 2025 Ofwat updated its ‘Approach to Enforcement’ guidance. Between March and September 2025, it completed several investigations against WaSCs, demonstrating that it now treats frequent non-exceptional CSO discharges as within its enforcement remit, aligned to the two-stage test.

Taken together, these steps have addressed the previous failures related to guidance, misunderstandings of the law and exercise of enforcement duties. The Environment Agency’s permit-review programme remains a multi-year effort and will continue to be monitored as the Agency works toward achieving full compliance.

Next Steps

In addition to the specific steps required to address the failures identified, we have made broader recommendations to strengthen regulation and prevent reoccurrence of the failures identified.

³ Sections 18 and 94 of the Water Industry Act 1991 (as extended by the Urban Waste Water Treatment (England and Wales) Regulations 1994).

Defra should:

1. Establish a process to monitor implementation of the new Storm Overflows Guidance and incorporate this into the 5 yearly statutory review of the SODRP.
2. Monitor the implementation of the SODRP requirements through Environment Agency permitting.
3. Together with the Environment Agency and Ofwat, review the MoU in line with the SODRP review cycle, after 12 months, and following any reforms arising from the Independent Water Commission.

The Environment Agency should:

1. Update its document “Water companies: environmental permits for storm overflows and emergency overflows” 13 September 2018 (the ‘September 2018 Guidance’) to properly and adequately set out the revised approach to regulating CSOs following updates to the SOAF, spill frequency threshold permitting and Defra’s 1997 Guidance.
2. Review the SOAF 2025 every five years, or earlier if appropriate.
3. Together with Defra and Ofwat, review the MoU 12 months after the date of signature, or earlier if required.
4. Establish a robust and transparent methodology for consistent data collection and reporting. This framework should enable clear tracking of progress for each CSO and provide structured summaries at each stage of the SOAF process. It must also support accurate reporting of BTKNEEC assessment outcomes, ensuring that data is both reliable and comparable across submissions.
5. Use better data to regularly monitor and review the proportion of CSOs that are not progressed for improvement following BTKNEEC assessments.
6. Strengthen its regulatory oversight of BTKNEEC assessments and their outcomes. Greater scrutiny is needed to ensure that, in cases where CSOs are not improved, the concept of excessive costs is being correctly applied through robust cost-benefit analysis.

Ofwat (or any subsequent authority) should:

1. Together with Defra and the Environment Agency, review the storm overflows MoU 12 months after the date of signature, or earlier if required.
2. Collaborate with the Environment Agency on the above data collection and reporting methodology.

The publication of this report marks the conclusion of our investigation and represents a proportionate and transparent mechanism for accountability. The investigation has reinforced the need for coordinated action, with all three public authorities working together to deliver long lasting improvements and address the issues identified. We will continue to monitor compliance through regular engagement with all three authorities, and through assessment of progress against statutory requirements and the commitments made in response to this investigation.

The initial monitoring stage will take place six months after the publication of this report. We will also remain engaged with sector reforms arising from the government's response to the Independent Water Commission's recommendations and consider how these developments influence our own recommendations.



Introduction

1. Introduction

- 1.1 This report concludes the OEP's investigation into the role of the Secretary of State for Environment, Food and Rural Affairs (the 'Secretary of State') in the regulation of network combined sewer overflows ('CSOs'). Reports relating to the conclusion of the concurrent investigations into the Environment Agency and Ofwat have been sent to those public authorities and are published alongside this report.
- 1.2 On 13 September 2021, the Interim OEP⁴ received a complaint from the Salmon and Trout Conservation Trust (now WildFish) alleging that the Secretary of State and Ofwat had failed to meet legal duties under the Water Industry Act 1991 (the '1991 Act') and the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 (the '2017 Regulations') relating to the monitoring and enforcement of water and sewerage companies' (WaSCs) management of sewage.⁵ The issues were assessed together with other information and, on 28 June 2022, the OEP launched an investigation into the roles of Ofwat, the Environment Agency, and the Secretary of State in regulating CSOs in England. Further detail on the initiation of the investigation is provided in Chapter 3.
- 1.3 We limited the scope of the investigation to network CSOs to minimise regulatory overlap with investigations by Ofwat and the Environment Agency.⁶ Also, discharges from network CSOs are typically untreated and this therefore removed the complexity of evaluating treatment efficacy in our investigation.
- 1.4 In accordance with section 33 of the Environment Act 2021 (the '2021 Act'), we set out our findings in this report that the Secretary of State failed to comply with relevant environmental laws in the regulation of network CSOs.
- 1.5 To do this, we first provide a high-level overview of sewer overflows in the context of the sewerage system and the roles of the different regulators. Chapter 2 outlines the key legislative provisions applicable to the investigation and Chapter 3 provides the factual background to the investigation and relevant contextual information. In Chapter 4 we set out our analysis and

⁴ The OEP was legally formed in November 2021. On 24 January 2022, relevant provisions in the Environment Act 2021 were formally commenced and the OEP's functions came into effect.

⁵ The complaint also alleged that Ofwat had failed to exercise its functions to provide for sufficient investment in sewerage infrastructure but we considered this to be outside the OEP's remit.

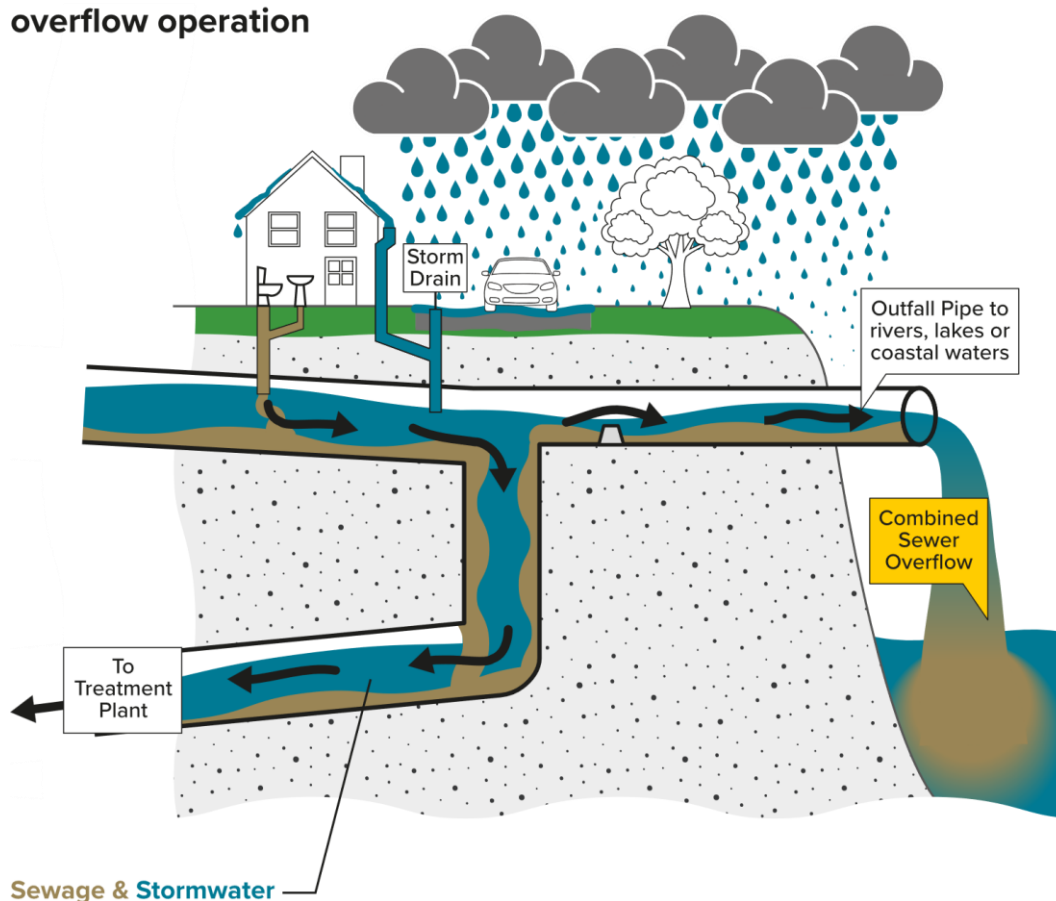
⁶ The complaint and information reviewed related to various issues regarding the regulation of wastewater by WaSCs. In November 2021, Ofwat and the Environment Agency launched investigations into the management of sewage treatment works by all WaSCs - Ofwat, 'Water companies could face legal action after investigation launched into sewage treatment works' (18 Nov 21) < <https://www.ofwat.gov.uk/joint-ofwat-environment-agency-and-defra-announcement-november-2021/> > accessed 03/12/2025; and Department for Environment, Food & Rural Affairs, 'Water companies could face legal action after investigation launched into sewage treatment works' (18 November 2022) < <https://www.gov.uk/government/news/water-companies-could-face-legal-action-after-investigation-launched-into-sewage-treatment-works> > accessed 03/12/2025.

findings, and in Chapter 5 we provide our rationale for concluding the investigation via this report, together with recommendations.

Overflows from the sewerage system⁷

- 1.6 A combined sewerage system carries both sewage and surface water runoff to wastewater treatment works for processing. In England, whilst much of the modern sewerage system is separate, it often connects into older combined systems before reaching wastewater treatment works.
- 1.7 During times of unusually heavy rainfall, wastewater is discharged through CSOs to the water environment to prevent the capacity of the network and wastewater treatment works being overwhelmed, or else sewage backing up and causing flooding of properties, including people's homes. In this way, CSOs are an important part of a combined sewerage system and they are generally effective as a relief mechanism.

Combined sewer overflow operation



⁷ In addition to treated sewage discharges from a wastewater treatment works, sewage can flow into a water body, either untreated or partially treated, from different points in the sewerage system. There are four types of storm overflow of which CSOs as storm overflows on the sewer network (network CSOs) are one type. The other three are storm tank overflows, inlet storm overflows and pumping station storm overflows.

- 1.8 During periods of high rainfall, receiving watercourses may be swollen with water runoff, providing additional dilution and thereby tending to reduce the impact of CSO discharges on water quality and ecosystems. If CSOs operate during periods of dry weather, or in response to only light or moderate rainfall, however, the negative impacts can be more significant.
- 1.9 Discharges from network CSOs give rise to a range of impacts to the water bodies themselves and to those who interact with them.⁸
- 1.10 Event Duration Monitoring (EDM) is a system used by WaSCs to measure and record how often and for how long CSOs discharge into the environment. This data enables both regulators and WaSCs to understand the frequency and duration of untreated sewage releases, supporting compliance and transparency. EDM is now deployed across all sewer overflow locations in England, providing valuable insight into how overflows respond to rainfall. Analysis shows a strong positive correlation between rainfall and spill occurrence, with even small variations in rainfall leading to significant changes in discharge patterns.⁹ Throughout this investigation, EDM data has varied considerably, reflecting the complexity of influencing factors. It will take time before the full impact of regulatory actions, company interventions, and measures implemented through this investigation can be determined in reducing spills from CSOs.

The regulatory framework

Secretary of State for Environment, Food and Rural Affairs

- 1.11 The Secretary of State is the minister with responsibility for the water industry in England. The functions vested in this office are somewhat removed from the practical day-to-day operation of the industry. The Secretary of State has the responsibility for setting expectations and the strategic framework within which the other public authorities deliver on their obligations.
- 1.12 Many powers and duties of the Secretary of State are legislative (being exercised or discharged by the making of further subordinate legislation) or strategic (being exercised or discharged by the giving of directions or the issuing of guidance), although the Secretary of State does also have certain regulatory (including enforcement) duties and powers. In addition, the

⁸ The release of treated and untreated wastewater can introduce pollutants such as pharmaceuticals, nutrients, heavy metals and bacteria into water bodies. CSOs only provide basic screening of untreated wastewater, the discharges of which can worsen water chemistry leading to intermittently low levels of oxygen and high levels of ammonia. Whilst discharges from CSOs are typically intermittent, repeated releases can have long term impacts on the recovery of the water environment to a more desirable state. CSO discharges can also increase the levels of bacteria and hazardous chemicals in water bodies which can make bathing (or other recreational uses such as angling) unsafe.

⁹ OEP - Progress in improving the natural environment in England 2023/2024, page 74.

Secretary of State has various appellate functions in the determination of the appropriate practical application of the relevant legislation.

Environment Agency

- 1.13 The Environment Agency is an executive non-departmental public body sponsored by Defra, created by the Environment Act 1995 (the '1995 Act'). The Environment Agency was established to contribute towards sustainable development by protecting or enhancing the environment as a whole. The Environment Agency receives charging income from the industries that it regulates and funding from Defra. It is required by statute to comply with ministerial directions and to have regard to ministerial guidance from Defra. There is also a broad provision allowing the Secretary of State and the Environment Agency to enter into agreements authorising the Environment Agency to exercise any of the Secretary of State's eligible functions on their behalf.¹⁰
- 1.14 The Environment Agency has numerous functions concerning water quality and protection of the water environment. Through its regulatory functions, it is responsible for granting environmental permits and setting conditions for those permits, the inspection of the sites it regulates including CSOs, analysis of data provided by the operators it regulates (including WaSCs) concerning the operation of their sites and infrastructure, and the criminal and civil enforcement of environmental legislation.

Ofwat

- 1.15 Ofwat is a non-ministerial government department responsible for the economic regulation of the water industry in England and Wales. It is responsible for enforcing certain requirements on WaSCs about how, overall, they must operate, manage and report on their performance. While Ofwat does not have a role in monitoring or enforcing environmental permits (which is a matter for the Environment Agency), it may have a role if a WaSC is breaching the conditions of its environmental permits in such a way that suggests that the company might also be breaching its conditions of appointment or failing to comply with other relevant legal requirements which Ofwat is responsible for enforcing.
- 1.16 Through its five-yearly cycle of price controls, Ofwat sets the price, service and incentive package that customers receive from their water company. Ofwat's price control determinations include cost allowances for the efficient delivery of the company's functions and incentives in the form of performance commitments which reflect companies' legal obligations and customers' preferences. The "strategic priorities and objectives" of Ofwat can be set out

¹⁰ Section 38 of the Environment Act 1995.

by the Secretary of State in a statement, and Ofwat must carry out its functions in accordance with the statement.

- 1.17 Figure 1 below provides a high-level view of the interactions between each of the authorities and the WaSCs in relation to the environmental regulation of network CSOs.

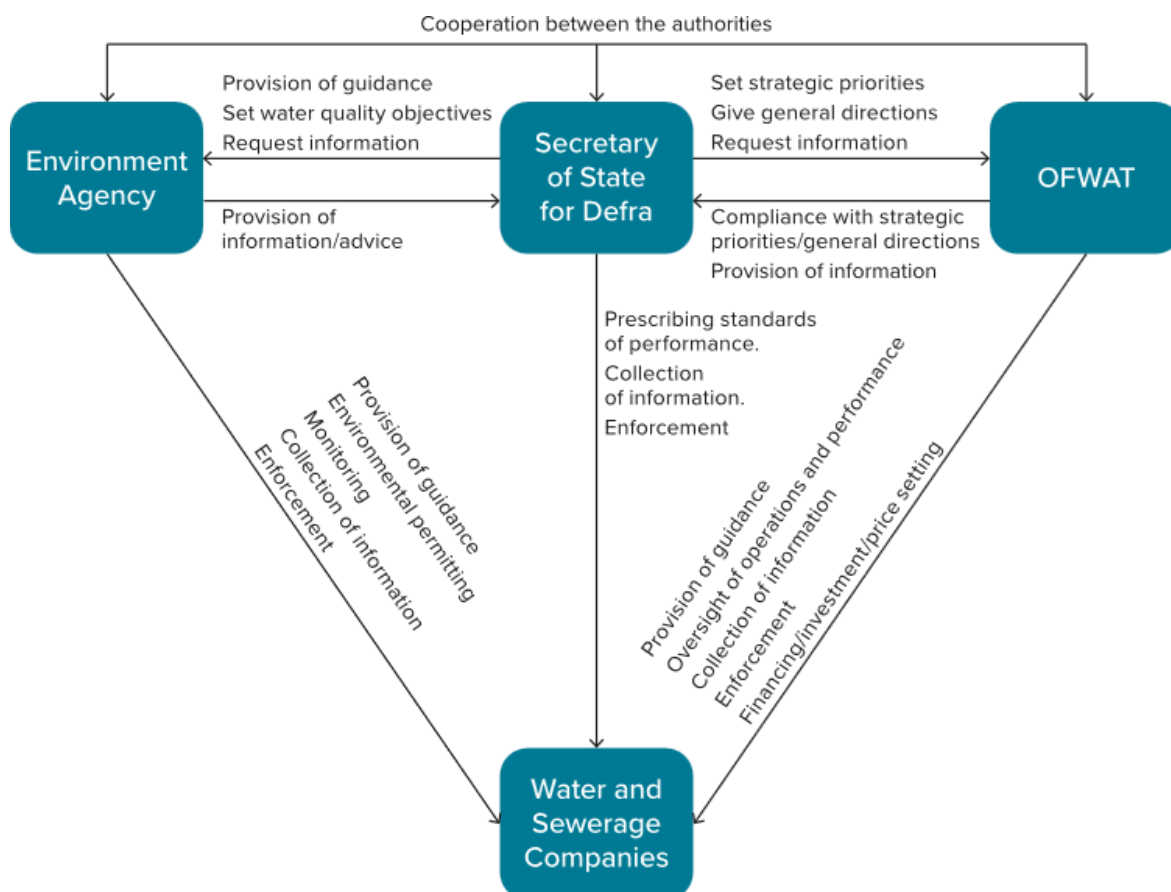


Figure 1: Overview of the interactions between the authorities and the WaSCs



Legal framework

2. Legal framework

- 2.1 In this chapter we set out the legislative framework and the specific legal provisions relevant to our investigation into the Secretary of State's role in the regulation of network CSOs.

The Water Industry Act 1991

- 2.2 The 1991 Act is a key piece of legislation that was introduced post-privatisation of the water industry in England and Wales. It consolidates previous legislation in relation to water supply and wastewater services and contains the main powers and duties on WaSCs. It also established the modern regulatory framework for the water sector which includes the Water Services Regulation Authority, known as Ofwat.¹¹
- 2.3 Section 2 of the 1991 Act imposes general duties on the Secretary of State and Ofwat with respect to the water industry. For example, when exercising certain powers and duties under the 1991 Act, they are under a duty to secure that the functions of WaSCs are properly carried out and to secure that such companies can finance (including by securing reasonable returns on their capital) the carrying out of these functions.¹² The Secretary of State and Ofwat also have duties under section 2 to further the consumer objective¹³ and the resilience objective.¹⁴
- 2.4 Section 94 of the 1991 Act places a general duty on WaSCs to provide, cleanse and maintain a sewer system. In particular, section 94(1) states:

(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... as to ensure that that area is and continues to be effectually drained; and

¹¹ The office of Director General of Water Services was created by the Water Act 1989 which was consolidated into the 1991 Act.

¹² Section 2(2A)(b)-(c) of the 1991 Act.

¹³ Section 2(2A)(a) of the 1991 Act. Section 2(2B) states that the consumer objective is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services.

¹⁴ Section 2(2A)(e) of the 1991 Act. Section 2(2DA) states that the resilience objective is (a) to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour; and (b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers.

(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.

2.5 Section 94(3) provides that:

(3) The duty of a sewerage undertaker under subsection (1) 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 Authority.

2.6 In section 94(3)(b) the reference to ‘the Authority’ is to the Water Services Regulation Authority (i.e. Ofwat).

2.7 Section 18 places a duty on the Secretary of State and Ofwat to make enforcement orders for securing compliance with certain provisions of the 1991 Act. Section 18(1) 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.

2.8 Section 18(6)(c) is relevant to identifying the appropriate enforcement authority. It provides that the enforcement authority shall be the Secretary of State, Ofwat or either of them according to the specific provision in the legislation that is enforceable in this way.

2.9 There are exceptions to the enforcement duty and these are set out in section 19. Specifically, the Secretary of State or Ofwat should not enforce if satisfied that (i) the contraventions were of a trivial nature; (ii) the company has given an undertaking for the purpose of securing compliance and is complying with

it; or (iii) if it is precluded by another duty contained in the legislation (such as the general duties under section 2 as noted above).¹⁵

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

2.10 The Urban Waste Water Treatment Directive¹⁶ (the 'UWWTD') was made by the European Union in 1991. The objective of the UWWTD was to protect the environment from the adverse effects of urban waste water and certain industrial discharges.¹⁷ It sought to do so by setting standards for the collection, treatment and discharge of urban waste water. It was transposed into domestic law in England and Wales through the Urban Waste Water Treatment (England and Wales) Regulations 1994 (the '1994 Regulations').

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

- (1) *This regulation supplements the duty imposed on every sewerage undertaker by section 94 of the Water Industry Act 1991 (general duty to provide sewerage system) and any contravention of the requirements of this regulation shall be treated for the purposes of that Act as a breach of that duty.*
- (2) *...the duty imposed by subsection (1)(a) of the said section 94 shall include a duty to ensure that collecting systems which satisfy the requirements of Schedule 2 are provided—*
 - (a) *where the urban waste water discharges into receiving waters which are a sensitive area, by 31st December 1998 for every agglomeration with a population equivalent of more than 10,000; and*
 - (b) *without prejudice to sub-paragraph (a) above—*
 - (i) *by 31st December 2000 for every agglomeration with a population equivalent of more than 15,000; and*
 - (ii) *by 31st December 2005 for every agglomeration with a population equivalent of between 2,000 and 15,000*
- ...
- (4) *The duty imposed by subsection (1)(b) of the said section 94 shall include a duty to ensure that urban waste water entering collecting systems is, before discharge, subject to treatment provided in accordance with regulation 5, and to ensure that—*
 - (a) *plants built in order to comply with that regulation are designed (account being taken of seasonal variations of the load), constructed, operated and maintained to ensure sufficient performance under all normal local climatic conditions*

¹⁵ Section 19(1)(a)-(c) of the 1991 Act.

¹⁶ Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment [1991] OJ L 135/40.

¹⁷ See art.1 of the UWWTD.

- (b) *treated waste water and sludge arising from waste water treatment are reused whenever appropriate; and*
- (c) *disposal routes for treated waste water and sludge minimise the adverse effects on the environment.*

2.12 Schedule 2 provides that:

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.*

The concept of 'best technical knowledge not entailing excessive costs' is referred to hereinafter as 'BTKNEEC'.

2.13 By 31 December 2005:

- (1) the UK 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 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.

Relevant case law

2.14 The relevant provisions of the 1994 Regulations set out above are based on equivalent provisions in the UWWTD. These provisions of the UWWTD were interpreted by the Court of Justice of the European Union ('CJEU') in 2012, in the case of *Commission v United Kingdom* (the '2012 Case').¹⁸ Although the facts of the case related to discharges from specific CSOs in London and at

¹⁸ Case C-301/10 *European Commission v United Kingdom of Great Britain and Northern Ireland* [2012] OJ C 379.

Whitburn, Tyne and Wear, it is nevertheless an important authority of general application to the interpretation of the UWWTD. It set out a methodology to be followed for assessing compliance with the UWWTD that is applicable to all sewer overflows.

- 2.15 In its judgment, the CJEU interpreted the provisions of the UWWTD in relation to waste water treatment plants and found that to meet the environmental objectives of the legislation there must be a general obligation in ordinary circumstances to treat all waste water.¹⁹ Further, the CJEU stated that it would run counter to the Directive if “overflows of untreated urban waste water occurred regularly”.²⁰
- 2.16 The Court also noted that the legislation allowed for situations when it would not be possible to collect and treat all urban waste water, such as “unusually heavy rainfall”.²¹ However, it clarified and reinforced that this cannot occur in normal circumstances.²²
- 2.17 The BTKNEEC requirement, noted at 2.12 above, was also considered by the CJEU. It was described by the Court as a concept that enabled compliance with the Directive without imposing unachievable obligations.²³ However the CJEU also stated at paragraph [65] of the judgment:

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

- 2.18 At paragraph [73] of the judgment, the CJEU set out a methodology to follow when considering whether discharges are compliant with the UWWTD:

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

- 2.19 Therefore, when assessing whether individual discharges are compliant with regulation 4(2) or 4(4) of the 1994 Regulations, it is necessary to consider the above two-stage test. The questions asked by the test can be summarised as follows:
- (i) is the discharge occurring only in exceptional circumstances?
 - (ii) if it is not, can a solution be found by applying the BTKNEEC concept?

¹⁹ *ibid* [52].

²⁰ *ibid* [54].

²¹ *ibid* [56].

²² *ibid* [58].

²³ *ibid* [64].

- 2.20 This approach was acknowledged and accepted in the decision of the High Court in *R (WildFish) v Secretary of State*²⁴ (the ‘WildFish Judgment’). This case considered the legality of the Government’s Storm Overflow Discharge Reduction Plan (‘SODRP’)²⁵ but the judgment includes a summary of the 2012 Case and concludes that the two-stage test should be applied on a case-by-case basis.²⁶

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

- 2.21 The Water Framework Directive (the ‘WFD’)²⁷ is an important piece of environmental legislation in relation to water and was also relevant to our investigation. The WFD was transposed into domestic law and in its latest form is found in the 2017 Regulations.
- 2.22 Regulation 3 of the 2017 Regulations provides that:
- (1) *The Secretary of State, the Welsh Ministers, the Agency and NRW must exercise their relevant functions so as to secure compliance with the requirements of the WFD, the [Environmental Quality Standards Directive²⁸] and the [Ground Water Directive²⁹].*³⁰
- 2.23 The ‘relevant functions’ of the Secretary of State are defined in Schedule 2 and include those under Part IV of the 1991 Act (sewerage services)³¹ and the 1994 Regulations.³²
- 2.24 Article 10(2)(a) of the WFD requires that Member States ensure the establishment and/or implementation of emissions controls based on best available techniques contained in measures including the UWWTD.

²⁴ *R (on the application of WildFish Conservation) v Secretary of State for Environment, Food and Rural Affairs; R (on the application of Marine Conservation Society and others) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 2285 (Admin).

²⁵ Defra, *Storm Overflows Discharge Reduction Plan* (26 August 2022)

<https://assets.publishing.service.gov.uk/media/631063778fa8f5448a3836e4/Storm_Overflows_Discharge_Reduction_Plan.pdf> accessed 03/12/2025. See 3.33 of this report for a summary of the SODRP.

²⁶ *R (on the application of WildFish Conservation) v Secretary of State for Environment, Food and Rural Affairs; R (on the application of Marine Conservation Society and others) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 2285 (Admin), at [63] – [70].

²⁷ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327/1.

²⁸ Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy [2008] OJ L 348/84.

²⁹ Directive 2006/118/EEC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration [2006] OJ L 372/19.

³⁰ Prior to the 2017 Regulations coming into force, regulation 3 of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 was in similar terms.

³¹ Paragraph 4, sch 2 of the 2017 Regulations.

³² Paragraph 13, sch 2 of the 2017 Regulations.

- 2.25 The requirements of the UWWTD concerning the limitation of pollution from storm water overflows are “emission controls based on best available techniques” within the meaning of article 10(2)(a) of the WFD.
- 2.26 On 31 December 2020 the obligation to comply with Article 10 of the WFD ceased to apply in the UK following amendments made to the 2017 Regulations by the Floods and Water (Amendment etc.) (EU Exit) Regulations 2019.³³
- 2.27 The Secretary of State was therefore required by regulation 3(1) of the 2017 Regulations, and earlier versions of these regulations, to comply with Article 10(2)(a) of the WFD from 2 January 2004³⁴ until 31 December 2020 when this obligation was no longer in force in the UK.

The Environment Act 1995

- 2.28 The Environment Agency was established under the 1995 Act. Section 40(2) of the 1995 Act grants the Secretary of State power to give the Environment Agency directions of a general or specific nature for the implementation of any obligation under assimilated European Union law. This would include the UWWTD. Section 40(8) imposes a duty on the Environment Agency to comply with any such direction.
- 2.29 Section 114 of the 1995 Act allows 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 1991.³⁵

The Environmental Permitting (England and Wales) Regulations 2016

- 2.30 The Environmental Permitting (England and Wales) Regulations 2016 (the ‘2016 Regulations’) set out an environmental permitting regime that applies to various activities and industries, including the regulation of network CSOs, replacing earlier provisions to similar effect.
- 2.31 Although the regulation of environmental permits is primarily the responsibility of the Environment Agency, the 2016 Regulations grant the Secretary of State powers to direct the Environment Agency with respect to the carrying out of its functions under the regulations.
- 2.32 Regulation 62 of the 2016 Regulations grants the Secretary of State the power to give directions to a regulator with respect to carrying out its

³³ Paragraph 6, sch 5 of the 2017 Regulations.

³⁴ Commencement date of the equivalent provision in the Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, SI 2003/3242 (revoked).

³⁵ This latter provision has since been repealed and replaced by similar provisions in the Environmental Permitting (England and Wales) Regulations 2016.

functions, including a direction to exercise its powers in specified circumstances and in a specified manner. Similarly, regulation 65 provides the Secretary of State with power to issue guidance to a regulator with respect to the exercise of its functions under the 2016 Regulations. The regulator must comply with any direction, or have regard to any guidance, given under these Regulations.

The background is a solid teal color with a repeating pattern of stylized, overlapping leaf or feather shapes. The pattern is created using different shades of teal, with darker outlines and lighter fills for the leaf shapes, giving it a textured, layered appearance.

Factual background

3. Factual background

Background to the investigation

- 3.1 In Chapter 1 we note that a complaint was received by the Interim OEP on 13 September 2021 from the Salmon and Trout Conservation Trust (now known as WildFish).
- 3.2 Between April 2021 and November 2021, we also received complaints alleging failures by the Environment Agency to enforce permit conditions at two specific CSO sites.³⁶ We assessed the issues raised by these complaints together with those in the complaint from WildFish. We noted the commencement of a joint investigation by the Environment Agency and Ofwat into sewage treatment works in November 2021.³⁷ Also, in March 2022, Defra launched a consultation on the SODRP.³⁸ Tackling storm overflows in England was noted as a government priority and producing such a plan was a legal requirement introduced under section 80 of the 2021 Act.
- 3.3 The OEP published its first strategy and enforcement policy on 23 June 2022.³⁹
- 3.4 We considered the complaints noted above and other publicly available information and determined that there were indications of potential failures to comply with environmental law by the Secretary of State, Ofwat and the Environment Agency in relation to monitoring and enforcement of the management of sewage by WaSCs. We also determined that, if they had occurred, those failures would be serious given that the issues were of public importance, had been on-going for many years, and the pollution of watercourses by untreated sewage causes serious harm to the environment.
- 3.5 On 28 June 2022, the OEP launched an investigation under section 33 of the 2021 Act into potential failures to comply with environmental law by Ofwat, the Environment Agency and the Secretary of State in the regulation of CSOs in England. For the Secretary of State, there was an indication of failures to comply with the enforcement duty under section 18 of the 1991 Act and with ensuring compliance with the WFD under regulation 3(1) of the 2017 Regulations.

³⁶ Hendon Wastewater Treatment Works and Whitburn CSO.

³⁷ Ofwat, 'Water companies could face legal action after investigation launched into sewage treatment works' (18 Nov 21) < <https://www.ofwat.gov.uk/joint-ofwat-environment-agency-and-defra-announcement-november-2021/> > accessed 03/12/2025; and [Department for Environment, Food & Rural Affairs](#), 'Water companies could face legal action after investigation launched into sewage treatment works' (18 November 2022) <<https://www.gov.uk/government/news/water-companies-could-face-legal-action-after-investigation-launched-into-sewage-treatment-works>> accessed 03/12/2025.

³⁸ Defra, 'Consultation on the Government's Storm Overflow Discharge Reduction Plan' (2022) <<https://consult.defra.gov.uk/water-industry/storm-overflows-discharge-reduction-plan/>> accessed 03/12/2025.

³⁹ OEP, 'Our Strategy and Enforcement Policy' (23 June 2022) <<https://www.theoep.org.uk/report/our-strategy-and-enforcement-policy>> accessed 03/12/2025.

- 3.6 From June 2022 to September 2023 we engaged with the public authorities, via meetings and correspondence, to gather information and further assess the issues. We received and reviewed a significant amount of detailed information from multiple information requests.
- 3.7 We can give an information notice where we have reasonable grounds for suspecting a serious failure to comply with environmental law by a public authority.⁴⁰ Public authorities must respond in writing to such notices and must provide the information requested so far as it is reasonably practicable to do so.
- 3.8 Having considered the evidence available, we determined that we had reasonable grounds for suspecting failures to comply with environmental laws by all three of the public authorities.
- 3.9 We gave information notices to each of the public authorities on 7 September 2023 ('the Information Notices') setting out the details of those alleged failures.
- 3.10 A copy of the Information Notice sent to the Secretary of State is published alongside this report. In summary, the notice set out the following grounds:
- i) Failure to take proper account of sections 18 and 94 of the 1991 Act (as supplemented by the 1994 Regulations) by:
 - a. Drafting guidance which did not reflect the true legal extent of WaSCs' duties.
 - b. Failing to amend or replace such guidance after the 2012 Case.
 - c. Misunderstanding the Secretary of State's legal duty under section 18 of the 1991 Act.
 - ii) Failing to exercise the Secretary of State's duty under section 18 of the 1991 Act to make enforcement orders.
 - iii) Failure to discharge the Secretary of State's duty to secure compliance with the WFD under regulation 3(1) of the 2017 Regulations.
- 3.11 The recipients of an information notice are required to respond within two months. The Secretary of State responded to the Information Notice on 7 November 2023 and denied that there had been any failure to comply with environmental law as set out in the notice, with reasons.

⁴⁰ Section 35 of the Environment Act 2021.

- 3.12 As set out in our Enforcement Policy, we take a proportionate approach and aim to resolve any non-compliance through cooperation, dialogue and agreement at every stage of the investigatory and enforcement processes. We held several meetings with the public authorities between March and September 2024 to understand in greater detail the respective positions of the parties in relation to the legal issues identified in the Information Notices.
- 3.13 The OEP may give a decision notice to a public authority if the OEP is satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law, and it considers that the failure is serious.⁴¹ A decision notice may only be given after an information notice.⁴² It must contain a description of the failure to comply, an explanation as to why the OEP considers it to be serious and steps the OEP considers the authority should take in relation to the failure identified.⁴³
- 3.14 Having considered the evidence available and the responses from the public authorities, we determined that on the balance of probabilities, all three public authorities had failed to comply with environmental law and that these failures were serious and mostly ongoing. The OEP gave decision notices accordingly to each of the public authorities on 12 December 2024 (the ‘Decision Notices’).
- 3.15 A copy of the Decision Notice given to the Secretary of State is published alongside this report. The notice made findings of failure to comply with environmental law in relation to each of the three grounds set out in the Information Notice and summarised at 3.10 above.⁴⁴ The Decision Notice also explained why we considered these failures to be serious. This related to points of law of general public importance, the risk of harm to the natural environment, the frequency of conduct over time, and the behaviour of the public authority:
- i) We considered that the misunderstanding or misapplication of environmental law had affected how the Secretary of State has exercised their functions both in the issuing of guidance and the use of their enforcement duty. This is an important consideration because only the Secretary of State and Ofwat can take enforcement action against WaSCs for certain breaches of the law. If the law is applied incorrectly, it could prevent enforcement from taking place and weaken compliance across the sector. The failure to meet obligations under the WFD also appeared to result from a misinterpretation of the legal framework.

⁴¹ Section 36(1) of the Environment Act 2021.

⁴² Section 36(5)(a) of the Environment Act 2021.

⁴³ Section 36(2) of the Environment Act 2021.

⁴⁴ The Decision Notice was founded upon the duty under section 94(1)(a) of the 1991 Act as supplemented by regulation 4(2) of the 1994 Regulations. 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 but, for the purposes of this investigation, we did not come to any conclusion about the scope of the section 94(1)(b) general duty in respect of network CSOs.

- ii) We considered the conduct to be frequent and long-standing, not only because it spanned the entire period referenced in the notice, but because its effects are embedded in the current regulatory framework. The continued reliance on outdated guidance had influenced the assessment and management of all network CSOs whose performance was assessed. Although the WFD obligation noted at 2.24 above no longer applied at the time of the notice, this long-lasting failure applied across all network CSOs whenever they discharged in such a way that compliance with the WFD was not achieved.
 - iii) The Secretary of State did not accept that they had failed to comply with environmental law at any stage of the investigation. Any proposed changes to address the issues identified had been made without acknowledging that any legal error occurred.
 - iv) We considered that the discharge of untreated sewage from CSOs posed risks to the environment, human health, and the amenity value of water bodies. Any failure to provide accurate guidance and to act on a correct understanding of the law has the potential to cause serious environmental harm. The consequences for the environment are likely to persist for a significant period.
- 3.16 The recipients of a decision notice are required to respond within two months. The Secretary of State responded to the Decision Notice on 12 February 2025 and denied that they had failed to comply with environmental law as described in the notice.⁴⁵
- 3.17 Chapter 4 of this report sets out more detailed analysis of our findings in the Decision Notice together with key points from the response of the Secretary of State.

Key Documents and Evidence

- 3.18 In this section, we identify and summarise key documents and evidence and explain their relevance to this investigation.

Documents - The 1997 Guidance

- 3.19 In July 1997, Defra's predecessor, the Department for Environment, Transport and the Regions, and the Welsh Office issued guidance (the '1997 Guidance') to WaSCs and regulators on the practical implementation of the 1994 Regulations. Much of the guidance was drawn up with the assistance or

⁴⁵ The Secretary of State also noted in their response that the Annex to the Decision Notice was not agreed.

advice of the National Rivers Authority,⁴⁶ the Environment Agency, Ofwat, other government departments and representatives of the WaSCs.⁴⁷

- 3.20 During the investigation, Defra stated that the 1997 Guidance was drafted to advise organisations, in particular operators of sewage treatment works and the regulators, on the implementation of the 1994 Regulations, including the provision of appropriate collection systems by specified dates.
- 3.21 The 1997 Guidance covers many aspects of water regulation including discharges from CSOs. Annex 8 of the Guidance is entitled “Framework for Consenting Intermittent Discharges” and it sets out a framework for the limitation of pollution from storm water overflows. This includes criteria for the identification of CSOs which are “unsatisfactory”.
- 3.22 Paragraph 4.1 of Annex 8 is as follows:
- 4.1 *The following criteria are to be used in deciding which CSOs are unsatisfactory and, therefore, subject to consent review to drive improvements:*
- (i) *causes significant visual or aesthetic impact due to solids, fungus and has a history of justified public complaint;*
 - (ii) *causes or makes a significant contribution to a deterioration in river chemical or biological class;*
 - (iii) *causes or makes a significant contribution to a failure to comply with Bathing Water Quality Standards for identified bathing waters;*
 - (iv) *operates in dry weather conditions;*
 - (v) *operates in breach of consent conditions provided that they are still appropriate; and/or*
 - (vi) *causes a breach of water quality standards (EQS) and other EC Directives.*
- 3.23 An earlier version of the same criteria appeared in guidance prepared by the National Rivers Authority (the Environment Agency’s predecessor) in 1993.⁴⁸
- 3.24 These criteria are important because the Guidance only requires the consents for “unsatisfactory” CSOs to be reviewed. Indeed, the Guidance positively states that satisfactory CSOs “will therefore meet the requirements of the [1994] Regulations”.⁴⁹

⁴⁶ The National Rivers Authority was subsumed into the Environment Agency on 1 April 1996.

⁴⁷ Department for Environment, Transport and the Regions and the Welsh Office, *The Urban Waste Water Treatment (England and Wales) Regulations 1994 – Working Document for Dischargers and Regulators – A Guidance Note Issued by the Department for Environment, Transport and the Regions and the Welsh Office* (July 1997), paragraph 2.1.

⁴⁸ National Rivers Authority, *AMP(2) / Effluent Quality, NRA Guidance Note for Preparation work for AMP(2)* (March 1993).

⁴⁹ Department for Environment, Transport and the Regions and the Welsh Office, *The Urban Waste Water Treatment (England and Wales) Regulations 1994 – Working Document for Dischargers and*

- 3.25 The 1997 Guidance received minor updates in April 2009, but these were not materially significant. At the time of commencing this investigation, Defra confirmed that the 1997 Guidance had not been withdrawn and had not been updated since 2009.

Environment Agency guidance

- 3.26 The importance of the criteria set out in the 1997 Guidance can also be seen in how it was subsequently used by the Environment Agency as it took a more direct role in regulating CSOs. In October 2012, the Environment Agency produced guidance entitled “Additional guidance for: Water Discharge and Groundwater (from point source) Activity Permits (EPR 7.01)”, which remained in force until 8 May 2018. This guidance used a very similar methodology and set of criteria regarding the categorisation of CSOs as “unsatisfactory”.
- 3.27 In 2018, the Environment Agency withdrew the above guidance and published two documents: “Storm Overflow Assessment Framework v.1.6” June 2018 (the ‘SOAF’) and “Water companies: environmental permits for storm overflows and emergency overflows” 13 September 2018 (the ‘September 2018 Guidance’). These documents addressed the identification and classification of CSOs in need of improvement and were intended to enable WaSCs to demonstrate compliance with relevant legislation including the 1994 Regulations.⁵⁰
- 3.28 The SOAF and the September 2018 Guidance reproduced, in some cases word-for-word, the criteria for identifying unsatisfactory CSOs which are set out in the 1997 Guidance. These criteria were not the only method used to identify CSOs in need of improvement, but they nevertheless formed a key part of the process.
- 3.29 The SOAF details the approach that should be taken where a CSO is found to be spilling ‘too frequently’.⁵¹ At Stage 1 it uses EDM data to determine if a CSO discharges above a threshold for further investigation. The spill thresholds used in the SOAF were as follows:

Stage 1: overflows will be identified for investigation using the following spill frequency triggers depending on the number of years for EDM data collected (Table 1);

Regulators – A Guidance Note Issued by the Department for Environment, Transport and the Regions and the Welsh Office (July 1997), paragraph 5.1 of Annex 8.

⁵⁰ Environment Agency, *Storm Overflow Assessment Framework v.1.6*. (June 2018) p1.

⁵¹ *ibid* p2.

Table 1. Spill frequency investigation triggers,

No. of years EDM data	Investigation trigger (average no. spills/year)
1	>60
2	>50
3	>40

- 3.30 The same spill thresholds first appeared in guidance published by the Environment Agency in 2017.⁵² We did not find any evidence prior to this that suggested the number of discharges was relevant to an assessment of the performance of a CSO (save for the criterion of “operates in dry weather conditions”).
- 3.31 If a CSO met one of the above spill triggers due to a lack of hydraulic capacity,⁵³ the remaining stages of the SOAF would consider its environmental impact and potential improvements based on a cost benefit assessment.
- 3.32 However, if a CSO did not meet these spill trigger thresholds then it likely would not be considered for improvement under the SAOF.⁵⁴

The Storm Overflow Discharge Reduction Plan

- 3.33 The Secretary of State published the SODRP, as required under section 141A of the 1991 Act, on 26 August 2022 (updated 25 September 2023). It primarily set new targets for WaSCs to reduce sewage discharges from storm overflows. According to the plan, by 2050, no storm overflows will be permitted to operate outside of unusually heavy rainfall or to cause any adverse ecological harm.⁵⁵ To achieve this, storm overflows will not be permitted to discharge above an average of 10 rainfall events per year by 2050.⁵⁶

⁵² Environment Agency, *PR19 Driver Guidance Frequently Spilling Storm Overflows (WINEP)* (24 February 2017).

⁵³ CSOs that meet the trigger due to exceptional rainfall or asset maintenance are usually dealt with outside the SOAF process.

⁵⁴ Section 7 of the SOAF contained additional reasons that a CSO may be investigated, other than exceeding the spill trigger thresholds, though these were discretionary and required the Environment Agency to establish its impact on receiving waters.

⁵⁵ Defra, *Storm Overflows Discharge Reduction Plan* (25 September 2023)

<https://assets.publishing.service.gov.uk/media/631063778fa8f5448a3836e4/Storm_Overflows_Discharge_Reduction_Plan.pdf> accessed 03/12/2025, p11.

⁵⁶ *ibid* p14.

Evidence – Enforcement

- 3.34 On 27 November 1990 the Secretary of State for the Environment authorised Ofwat to act as an enforcement authority under the relevant sections of the Water Act 1989.⁵⁷ This authorisation was updated and continued following the consolidation of these provisions within the 1991 Act (sections 94 and 18).
- 3.35 In Chapter 2 we set out the importance of the 2012 Case in respect of interpreting the UWWTD. On the facts of the case, the CJEU found that the UK had failed to fulfil its obligations under that Directive. However, following this case, no subsequent enforcement action was taken domestically against the relevant WaSCs. In 2023, the EU Commission remained of the opinion that the UK was not in compliance with the 2012 Case at one of the original sites.⁵⁸
- 3.36 The then Secretary of State wrote to WaSCs on 18 July 2013, copying in the Environment Agency and Ofwat, acknowledging the issue of CSO discharges. They stated:
- “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.”*⁵⁹
- 3.37 EDM was rolled-out to all network CSOs beginning in 2015 and 100% coverage of all known network CSOs was achieved by the end of 2023. Prior to this, EDM had only been required for storm overflows associated with designated bathing waters and shellfish waters. EDM is intended to record the frequency (i.e. the number of times a discharge occurs) and duration (i.e. the length of time for which the discharge continues) of spills. This allows WaSCs to collect and report data to the regulators about the operation of CSOs.
- 3.38 By 2020, the Environment Agency began to publish EDM data on an annual basis. According to data provided by the Environment Agency in response to our Information Notice, the number of network CSOs that discharged more than 60 times per year (i.e. the upper investigation trigger threshold under the SOAF) between 2020 – 2022 was as follows:

Year	No of CSOs
2020	955
2021	787

⁵⁷ Sections 67 and 20.

⁵⁸ Letter from the Directorate-General Environment of the European Commission to the original complainant (3 February 2023).

⁵⁹ Letter from Richard Benyon MP to the Chief Executives of water companies (18 July 2013).

- 3.39 Further information and data in relation to discharges from network CSOs can be found in the Annex to our Decision Notice.
- 3.40 In 2019, Ofwat completed an investigation into Southern Water Services Limited ('Southern Water') in relation to the management of its wastewater treatment works by accepting undertakings from the company under section 19 of the 1991 Act.⁶⁰ In its final decision dated 10 October 2019, Ofwat found that Southern Water had contravened section 94(1)(b) of the 1991 Act by failing to make provision for effectually dealing with and treating wastewater. During our related investigation into Ofwat, it accepted that it considered compliance with the 1994 Regulations during the Southern Water case but did not make any explicit findings on such in its final decision.⁶¹
- 3.41 On 18 November 2021 Ofwat and the Environment Agency announced investigations into all WaSCs in England and (in relation to Ofwat only) Wales.⁶² Initially the investigations were to look at how WaSCs managed their sewage treatment works. By July 2022 the scope of Ofwat's investigations had widened to include consideration of pollution incidents at network CSOs.⁶³
- 3.42 As part of its investigations, Ofwat published notices of its proposals to issue enforcement orders against three WaSCs in August 2024.⁶⁴ Public consultations on the proposed decisions and enforcement orders closed in September 2024. As at the date of our Decision Notice, 12 December 2024, Ofwat had not issued final decisions or enforcement orders, or accepted undertakings in lieu, in relation to any WaSCs under investigation.⁶⁵

⁶⁰ Although this case concerned failings in respect of wastewater treatment works, the same legislative provisions apply to network CSOs. This case was the earliest evidence we reviewed of enforcement of these provisions by Ofwat.

⁶¹ OEP Investigation report addressed to Ofwat in relation to its compliance with the Water Industry Act 1991 regarding the regulation of network combined sewer overflows December.

⁶² Ofwat, 'Water companies could face legal action after investigation launched into sewage treatment works' (18 Nov 21) < <https://www.ofwat.gov.uk/joint-ofwat-environment-agency-and-defra-announcement-november-2021/> > accessed 04/12/2025; and [Department for Environment, Food & Rural Affairs](https://www.gov.uk/government/news/water-companies-could-face-legal-action-after-investigation-launched-into-sewage-treatment-works), 'Water companies could face legal action after investigation launched into sewage treatment works' (18 November 2022) <<https://www.gov.uk/government/news/water-companies-could-face-legal-action-after-investigation-launched-into-sewage-treatment-works>> accessed 04/12/2025.

⁶³ Letter from Ofwat to South West Water Limited (27 June 2022). Letter from Ofwat to all WaSCs (12 July 2022).

⁶⁴ See for example Ofwat, '[Notice of Ofwat's proposal to issue an enforcement order and impose a financial penalty on Thames Water](https://www.ofwat.gov.uk/consultation/notice-of-ofwats-proposal-to-issue-an-enforcement-order-and-impose-a-financial-penalty-on-thames-water/)' (6 August 2024) <<https://www.ofwat.gov.uk/consultation/notice-of-ofwats-proposal-to-issue-an-enforcement-order-and-impose-a-financial-penalty-on-thames-water/>> accessed 04/12/2015.

⁶⁵ See para 4.63 for information on Ofwat investigations as at the date of this report.



Analysis and findings

4. Analysis and Findings

- 4.1 In this chapter we set out our legal analysis of the relevant environmental laws and our findings in this investigation. We set out our understanding of the law first and then deal with each of the three grounds set out in the Decision Notice summarised broadly as follows: (i) the 1997 Guidance; (ii) enforcement; and (iii) WFD compliance.

The 1994 Regulations and the 2012 Case

- 4.2 In Chapter 2 we set out the two-stage test, as articulated in the 2012 Case, which provides a methodology to follow when considering whether discharges are compliant with the 1994 Regulations.⁶⁶

First stage – exceptional circumstances

- 4.3 The first stage of the test is to consider whether the discharge is occurring only in exceptional circumstances.
- 4.4 The UWWTD does not define, or even use, the term “exceptional circumstances”. The judgment in the 2012 Case used the term to interpret a footnote in the UWWTD that accepts it will not be possible to collect and treat all waste water during situations “such as unusually heavy rainfall”.⁶⁷ The judgment did not provide a definition of ‘exceptional’, and the Commission did not propose a strict 20 spills per year rule, but pointed out that the more an overflow spills, particularly during periods when there is only moderate rainfall, the more likely it is that the overflow’s operation is not in compliance with the Directive.⁶⁸
- 4.5 An analysis of the first stage of the two-stage test was set out in the Decision Notice⁶⁹ and the Secretary of State agreed with the position that as regards the first stage, the test is whether the discharges under examination are occurring only in “exceptional” circumstances.
- 4.6 In Chapter 3 we explain the role of the Environment Agency and the SOAF in relation to identifying CSOs for improvement. In our investigation into the Environment Agency we found that the spill trigger thresholds in the SOAF did not comply with the first stage of the two-stage test. This potentially led to

⁶⁶ See 2.18 – 2.19.

⁶⁷ Footnote 1 to Annex 1 Sections A & B UWWTD.

⁶⁸ The 2012 Case, at [28]. The idea of a 20 spill rule was raised by the EU Commission in pre-litigation and before the CJEU. However, the Commission did not propose a strict 20 spill rule but instead indicated that discharges over this number would be a cause for concern and indicate a possible failure to fulfil obligations.

⁶⁹ Decision Notice, paragraph 27. In the Decision Notice, the 2012 Case is referred to as Case C-301/10.

more CSOs spilling outside of exceptional circumstances than should have been allowed.

- 4.7 Whilst acknowledging that the SOAF was the responsibility of the Environment Agency, we determined that the Secretary of State could have used their supervisory role in respect of water regulation to assist regulators and the industry in achieving compliance. Paragraph 86 of the Decision Notice recommended that the Secretary of State should amend guidance and identify a global single annual spill limit above which a CSO is conclusively deemed ‘unsatisfactory’ for the purpose of further investigation and improvement. The recommendation further considered that such a spill limit should have regard to the two-stage test and could be incorporated into permit conditions by the Environment Agency.
- 4.8 In response to this recommendation, the Secretary of State noted that the SOAF was not the subject of this investigation but that they were supportive of the Environment Agency’s proposal to update the SOAF and to implement indicative spill thresholds for investigation. The Secretary of State indicated their preference for updating policy in this way and further noted that, although there were no plans to reform the 1994 Regulations at the time of writing, this would be covered in the wider review of the water sector by the Independent Water Commission.⁷⁰

Second stage – BTKNEEC (exceptionality)

- 4.9 If a CSO is found to be discharging outside of exceptional circumstances, the second stage of the two-stage test is to consider whether a solution, or partial solution can be found by applying the BTKNEEC concept.
- 4.10 The importance of the BTKNEEC test is clear as the result of applying a cost-benefit analysis may determine whether a discharge is compliant with the law or requires remediation to become compliant.
- 4.11 In the 2012 Case, the CJEU held that:

[64] The concept of BTKNEEC thus enables compliance with the obligations of Directive 91/271 to be secured without imposing upon the Member States unachievable obligations which they might not be able to fulfil, or only at disproportionate cost.

[65] However, in order not to undermine the principle set out in paragraph 53 of the present judgment that all waste water must be collected and treated,

⁷⁰ The Independent Water Commission published its review on 21 July 2025 and recommended that the UK and Welsh governments should update and reform the 1994 Regulations ‘to deliver better outcomes and a more sustainable approach to drainage and wastewater management’ (Recommendation 9, p110).

the Member States must invoke disproportionate costs of that kind by way of exception only.

4.12 We understand the words ‘by way of exception only’ to mean ‘rarely’, so that non-exceptional discharges, for which there is no cost-beneficial solution are the exception rather than the rule.

4.13 Advocate General Mengozzi in his Opinion in the 2012 Case described the BTKNEEC clause as a “safety valve” that “operates by way of exception”.⁷¹ He also stated at [61] that:

“...The BTKNEEC clause in fact requires, always and in any event, a comprehensive assessment of all the circumstances of each specific case and must necessarily be adjusted to take account of those circumstances.”

4.14 However, in the WildFish Judgment, the High Court interpreted the 2012 Case and the Advocate General’s Opinion as follows:

“It is important to keep in mind that, according to the principles laid down in the UK case, the mere fact that a storm overflow discharges to a waterway in non-exceptional circumstances does not necessarily involve a breach of the 1994 Regulations. If there is no remedy for that occurrence which satisfies the BTKNEEC test, then the discharge is lawful under the 1994 Regulations”.⁷²

and

“CJEU did not indicate that discharges will only satisfy BTKNEEC exceptionally. The Advocate General stated that there must be a comprehensive assessment of the circumstances of each case...”⁷³

4.15 We agree that a comprehensive assessment of each case is necessary but if disproportionate costs are found to exist other than “by way of exception” then, in our view this would be inconsistent with the proper interpretation of the UWWTD.

4.16 The WildFish Judgment concerned the legality of the SODRP and concluded that since the plan did not purport to detract from the existing regulatory requirements and in one respect exceeded them, it could not be and was not unlawful.⁷⁴ The decision did not consider whether the existing law had been properly understood and implemented to date.

4.17 The Decision Notice states at paragraph 33:

⁷¹ Paras [59]-[60].

⁷² The WildFish Judgment at [162].

⁷³ *ibid* at [172].

⁷⁴ Decision Notice, para 32.

“In light of the limited scope of the WildFish judgment, the OEP holds the view that it does not provide a complete answer to the correct interpretation of the decision in Case C-301/10 and direct consideration of the CJEU’s decision in Case C-301/10 is necessary.”

- 4.18 The Secretary of State disagreed with this position in their response to the Decision Notice. They submitted that the WildFish Judgment carefully considered the proper interpretation of the 1994 Regulations following the 2012 Case and ruled upon this as part of the case. Further, they interpreted the paragraphs of the judgment quoted at 4.14 above as countering the argument that an “exceptionality” criterion applied to the consideration of BTKNEEC.
- 4.19 We conclude that CSOs spilling outside of exceptional circumstances and for which there is no cost beneficial solution must be the exception rather than the rule i.e. that this must be the outcome in only a minority of cases. If otherwise, it is suggestive of too conservative an approach to the exercise of cost-benefit assessment.

Second stage – BTKNEEC (as a defence)

- 4.20 The 2012 Case established that, at a European level, it is for an EU Member State to demonstrate why CSO improvements do not satisfy the BTKNEEC requirement. Therefore, in the domestic context, this must mean that if a CSO is discharging outside of exceptional circumstances, it is evidently not compliant with the 1994 Regulations and it is up to the discharger to satisfy the regulator that there is no BTKNEEC solution.⁷⁵
- 4.21 The Decision Notice determined accordingly that the BTKNEEC concept is limited in operation to a form of “defence”.⁷⁶ The Decision Notice states at paragraph 35 that: “this approach is also consistent with the precautionary principle in environmental law.”
- 4.22 In response to the Decision Notice, the Secretary of State disagreed with this interpretation of the BTKNEEC concept. They stated that the statutory language does not impose a burden on either side and that primary responsibility for meeting the legal requirements falls upon WaSCs.
- 4.23 We recognise the difference of legal opinion in relation to the description of the BTKNEEC concept. However, this difference appears to us to be theoretical and, in practical terms, the OEP and the Secretary of State agree that if a storm overflow is discharging outside exceptional circumstances the relevant WaSC has a duty to investigate by undertaking a BTKNEEC assessment which, under the relevant policy mechanisms, should be

⁷⁵ Decision Notice, para 34.

⁷⁶ Decision Notice, para 33.

completed in a timely way. Whether or not an undertaker is acting in breach of that duty will turn on the particular facts of a given case.

The 1997 Guidance – failure to take proper account of environmental law

- 4.24 In Chapter 2 we set out the relevant legal provisions in relation to network CSOs. This includes the duties on WaSCs under section 94 of the 1991 Act as supplemented by regulation 4 of the 1994 Regulations. We also set out above the findings of the 2012 Case and the two-stage test.
- 4.25 In Chapter 3 we explain the context and importance of the 1997 Guidance with respect to network CSOs, including the criteria used to identify unsatisfactory CSOs⁷⁷ and the positive statement in the Guidance that satisfactory CSOs were compliant with the 1994 Regulations.⁷⁸
- 4.26 We reviewed the 1997 Guidance and found legal errors in the approach taken. We detailed our findings in the Decision Notice and specifically noted that the criteria used to identify unsatisfactory CSOs were not an adequate or acceptable means of determining compliance with the law:

“The 1997 Guidance requires application of a pragmatic system of classification founded largely upon impact on receiving waters rather than the quality, quantity or frequency of discharges. The OEP holds the view that such considerations, which cannot easily be established, can be relevant only to the second stage of the CJEU test as part of a BTKNEEC assessment. To require them to be established as part of the identification of a CSO as “unsatisfactory” renders it inevitable that many CSOs which are not compliant with the UWWTD and the 1994 Regulations will not be so identified, so long as they merely do not discharge in dry weather and are not in breach of the conditions of their discharge consents. Such criteria taken alone are manifestly inadequate to demonstrate, far less to constitute, UWWTD and 1994 Regulations compliance.”⁷⁹

- 4.27 The Decision Notice also stated at paragraph 47:

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

- 4.28 Following the CJEU’s decision in the 2012 Case, it should have been apparent that the methodology set out in the 1997 Guidance was not sufficient to achieve compliance with the 1994 Regulations. However, the Guidance

⁷⁷ See para 3.22.

⁷⁸ See para 3.24.

⁷⁹ Decision Notice, para 45.

was not revised or even updated to reflect the 2012 Case and therefore the Guidance never contained an accurate interpretation of the law.

- 4.29 The practical effect of these flawed criteria may have led to CSOs being treated as satisfactory despite discharging outside of exceptional circumstances and potentially being unlawful. For example, in relation to the first stage of the two-stage test discussed above, the only criteria in Annex 8 relating to the operation of a CSO ask whether it is discharging in dry weather or in breach of consent conditions. These are clearly inadequate for determining legal compliance with the 1994 Regulations and at the opposite end of the performance scale from “exceptional circumstances”.
- 4.30 Although the 1997 Guidance is described as not having ‘statutory force’⁸⁰ we found that it misstated the law as set out above. It also could have led others to breach their legal duties, most notably the Environment Agency, who followed the Guidance and used an only slightly modified version in its September 2018 guidance to WaSCs.⁸¹ In our related investigation into the Environment Agency, we found that this led the Environment Agency to fail to comply with regulation 6(2)(c) and/or Schedule 2 of the 1994 Regulations.⁸²
- 4.31 The Decision Notice also set out evidence of the 1997 Guidance being followed and endorsed by inspectors acting on behalf of the Secretary of State in two separate appeals, determined in 2007 and 2008, under section 91 of the Water Resources Act 1991.⁸³ In these appeal cases, the Environment Agency and WaSCs were explicitly encouraged to rely on the 1997 Guidance by the inspectors acting on behalf of the Secretary of State, one of whom stated that “... there would need to be truly exceptional circumstances to depart from this approach ...”.⁸⁴
- 4.32 As the Supreme Court held in *R (A) v Secretary of State for the Home Department*,⁸⁵ applying the test in *Gillick*,⁸⁶ policy guidance which contains a misstatement of law and induces a person to act in a way which contradicts the law, is unlawful.

⁸⁰ The 1997 Guidance, para 2.2.

⁸¹ Decision Notice, para 57.

⁸² The OEP Investigation report addressed to the Environment Agency in relation to its compliance with the Urban Waste Water Treatment (England and Wales) Regulations 1994, the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 and the Environmental Permitting (England and Wales) Regulations 2016 regarding the regulation of network combined sewer overflows December 2025.

⁸³ Decision Notice, para 54; the three appeals determined in 2007 were described by the Inspector as having been selected from many similar ones “in order to address some common matters of principle” in relation to UWWTD compliance, see Appeal Decisions APP/WQ/04/1660, 1832 & 1836, para 2.

⁸⁴ Decision Notice, para 59; Appeal Decisions APP/WQ/04/1660, 1832 & 1836, para 28.

⁸⁵ *R (A) v Secretary of State for the Home Department* [2021] UKSC 37.

⁸⁶ *Gillick v West Norfolk and Wisbech AHA* [1986] AC 112.

- 4.33 Paragraph 3(a) of the Decision Notice concluded that the Secretary of State had unlawfully failed to take proper account of environmental law when exercising their functions, by:

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

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

iii. ...

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;”

- 4.34 At paragraph 82 of the Decision Notice, we recommended that the Secretary of State either replace or revise and update those parts of the 1997 Guidance which applied to CSOs. We stated that this was a necessary step to remedy and prevent reoccurrence of the identified failure to comply with environmental law.
- 4.35 The Secretary of State responded to the Decision Notice and denied that they had failed to comply with environmental law in respect of the 1997 Guidance.
- 4.36 The Secretary of State in response, stated that the 1997 Guidance was historic and that parts of it had been substantially overtaken by both case law and newer guidance. They also stated that the 1997 Guidance did not dictate how compliance with the 1994 Regulations should be determined. The Secretary of State relied on the description of the 1997 Guidance as a “working document” lacking statutory force to highlight that they were under no statutory duty to issue, amend or withdraw it.
- 4.37 It was not accepted by the Secretary of State that the lack of reference to the two-stage test in the 1997 Guidance or the articulation of the criteria at paragraph 4.1 of Annex 8 was unlawful.
- 4.38 Nevertheless, and without prejudice to this position, the Secretary of State in their response to the Decision Notice agreed to replace or revise and update those parts of the 1997 Guidance which applied to CSOs so that they would properly and adequately reflect the law. The Secretary of State had already committed to this prior to the issue of the Decision Notice by publishing draft guidance for public consultation in November 2024.

- 4.39 On 24 March 2025 the Secretary of State published “Storm overflows: policy and guidance” (the ‘Storm Overflows Guidance’) and expressly withdrew Annex 8 of the 1997 Guidance to the extent that it had not already been superseded.⁸⁷
- 4.40 We have reviewed the Storm Overflows Guidance and consider that it reflects the recommended step noted at 4.34 above, and further set out in the Decision Notice, to prevent reoccurrence of the failure. The new guidance properly and adequately sets out the Secretary of State’s functions in a manner which is consistent with the law and includes an accurate statement of the legal requirements upon WaSCs arising from the 1994 Regulations.
- 4.41 We maintain that the Secretary of State failed to comply with environmental law as set out in the Decision Notice in relation to the 1997 Guidance. We conclude that the publication of the new Storm Overflows Guidance has brought this failure to an end and will prevent the failure from reoccurring.

Enforcement – failure to take proper account of environmental law

- 4.42 In Chapter 2 we note that the duties on WaSCs under section 94 of the 1991 Act are enforceable by either the Secretary of State or Ofwat under section 18 of the same Act.⁸⁸
- 4.43 The Secretary of State’s misunderstanding of section 94(1)(a) of the 1991 Act (as supplemented by the 1994 Regulations), is revealed in the 1997 Guidance and set out above. The Guidance did not adequately address the two-stage test and this inevitably led the Secretary of State to fail to recognise that their jurisdiction under section 94(3)(a) of the 1991 Act was engaged. Consequently, the Secretary of State failed to consider whether their section 18 duty to enforce was engaged.⁸⁹
- 4.44 We reviewed sections 18 and 94 of the 1991 Act and found that the effect of the statutory scheme was to appoint both the Secretary of State and Ofwat as an ‘enforcement authority’ for the purposes of section 18(1)(b). Although the Secretary of State may authorise Ofwat to exercise the duty, the general authorisation of 27 November 1990 did not displace the statutory duty on the Secretary of State.⁹⁰
- 4.45 The Decision Notice stated at paragraph 68(b) that:

⁸⁷ Defra ‘Storm Overflows: policy and guidance’ (24 March 2025) <<https://www.gov.uk/government/publications/storm-overflows-policy-and-guidance/storm-overflows-policy-and-guidance>> accessed 04/12/2025. We found no evidence prior to this to suggest that the 1997 Guidance had been superseded in any respect.

⁸⁸ Section 94(3) of the 1991 Act.

⁸⁹ Decision Notice, para 62.

⁹⁰ Decision Notice, para 65.

“the Secretary of State may authorise the execution of that duty by Ofwat but they remain a duty-holder and will be in breach if the duty is not executed...”

- 4.46 Paragraph 3(a)(iii) of the Decision Notice concluded that the Secretary of State had unlawfully failed to take proper account of environmental law when exercising their functions, by:

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

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

- 4.47 In the Decision Notice we recommended that the Secretary of State agree and publish new memoranda of understanding (MoUs) with Ofwat and the Environment Agency which reflected proper regulation of discharges from network CSOs and included arrangements for improved cooperation.⁹¹ This step was included to prevent reoccurrence of relevant failures set out in the Decision Notice and to clarify the roles and responsibilities of the public authorities more generally in relation to the regulation of discharges from network CSOs.
- 4.48 The recommendation to agree a new MoU with Ofwat was particularly relevant to our finding of a misinterpretation of the law by the Secretary of State in relation to their enforcement duty.
- 4.49 In response to the Decision Notice, the Secretary of State denied that they had misunderstood or misinterpreted the law and set out an alternative position on the relevant provisions. We have already set out above the Secretary of State’s position on section 94(1)(a) of the 1991 Act (as supplemented by regulation 4 of the 1994 Regulations) as revealed in their response to the 2012 Case and the 1997 Guidance.
- 4.50 In respect of the enforcement duty, the Secretary of State interprets the statutory scheme in relation to sections 18 and 94 of the 1991 Act as proposing alternatives: the enforcement authority is either the Secretary of State or Ofwat. In the Secretary of State’s view, the general authorisation made Ofwat the sole enforcement authority for the purposes of section 18. The Secretary of State set out that they had a residual role of oversight by virtue of their power to revoke Ofwat’s authorisation at any time. In such circumstances, the Secretary of State would then themselves become the enforcement authority.

⁹¹ Decision Notice, para 83.

- 4.51 Notwithstanding this position, the Secretary of State agreed to draft a new MoU with Ofwat and the Environment Agency to ensure clarity regarding the approach to oversight, cooperation and engagement.
- 4.52 On or around 10 September 2025, Defra, the Environment Agency and Ofwat signed an MoU with respect to the regulation of storm overflows in England.
- 4.53 We acknowledge that the MoU reflects proper regulation of discharges from CSOs so as to fulfil the recommended step and should help to avoid reoccurrence of the failures.
- 4.54 We conclude that the Secretary of State failed to comply with environmental law in respect of their misinterpretation of the duty under section 18 of the 1991 Act to make enforcement orders in the case of contraventions or likely contraventions by WaSCs of section 94 of the 1991 Act. At 4.23 above, we note that the OEP and the Secretary of State now agree on the practical interpretation of section 94(1)(a) of the 1991 Act (as supplemented by regulation 4 of the 1994 Regulations) in relation to assessing compliance. Therefore, we conclude that the Secretary of State is no longer failing to comply with the law in this respect. In addition, we consider that the new MoU will help to clarify the roles and responsibilities of the parties regarding enforcement.

Enforcement – failure to exercise the section 18 enforcement duty

- 4.55 In addition to misunderstanding the extent of their enforcement duty under section 18 of the 1991 Act, we found that the Secretary of State had failed to exercise this duty in relation to the unlawful operation of network CSOs.⁹²
- 4.56 We note in Chapter 3 Ofwat's investigation into Southern Water in 2019 and its investigations into all WaSCs launched in 2021. However, we have found no evidence that, prior to these cases, either the Secretary of State or Ofwat had ever sought to exercise their enforcement functions in relation to unlawful discharges from CSOs.⁹³ This includes failing to do so after the decision in the 2012 Case despite acknowledging the issue of CSO discharges in a letter to WaSCs in 2013.⁹⁴
- 4.57 Following the introduction and rollout of EDM to CSOs in 2015, there has been ample data to demonstrate that a significant number of network CSOs are spilling frequently and therefore it is more likely than not that a significant number of network CSOs are not compliant with the law.⁹⁵

⁹² Decision Notice, para 71.

⁹³ *ibid.*

⁹⁴ See para 3.36 above.

⁹⁵ Decision Notice, para 72.

- 4.58 In the Decision Notice, we found that unless Ofwat itself had taken enforcement action, the Secretary of State should have discharged their duty by themselves initiating investigations or requiring Ofwat to do so (pursuant to the authorisation dated 27 November 1990) and if necessary making an enforcement order under section 18 of the 1991 Act (provided that the exceptions in section 19 of the 1991 Act were both considered and found not to apply).⁹⁶
- 4.59 Although Ofwat launched its investigation into all WaSCs in November 2021,⁹⁷ it had still not made any final enforcement orders (or accepted undertakings) when the Decision Notice was given in December 2024. Therefore, we found that the Secretary of State had also failed to exercise their enforcement duty as at the date of the Decision Notice.
- 4.60 At paragraph 3(b) of the Decision Notice we determined that the Secretary of State had committed a serious failure to comply with environmental law by:
- “(b) ... unlawfully failing to exercise the Secretary of State’s functions under section 18 of the 1991 Act by the making of enforcement orders in respect of known actual or likely contraventions of section 94 of the 1991 Act, when the Secretary of State was under a legal duty to do so;”*
- 4.61 In respect of the enforcement duty, we recommended that if the Secretary of State chose to delegate the execution of its duty under section 18 of the 1991 Act to Ofwat, then they should take such steps as may be necessary to ensure that Ofwat fulfils that duty.
- 4.62 The Secretary of State responded to the Decision Notice and denied that they had failed to comply with environmental law regarding the exercise of the section 18 enforcement duty. As set out at 4.50 above, the Secretary of State disagreed that they were subject to the duty having made the general authorisation to Ofwat in 1990. In addition, the Secretary of State did not accept that Ofwat had not exercised its power of enforcement and cited action taken against Southern Water in 2019 and the investigation into all WaSCs opened in 2021.
- 4.63 Between March and September 2025, Ofwat made final decisions in its investigations into Yorkshire Water Services Limited, Thames Water Services Limited (‘Thames Water’), Northumbrian Water Limited, Anglian Water Services Limited and South West Water Limited. It has accepted undertakings from each of these companies except Thames Water, against which it has

⁹⁶ Decision Notice, para 70.

⁹⁷ See para 3.41 above.

issued an enforcement order under section 18 of the 1991 Act.⁹⁸

Investigations relating to all other WaSCs in England remain ongoing as at the date of this report.

- 4.64 In our view, the enforcement duty under section 18 of the 1991 Act applies to both the Secretary of State and Ofwat, and we conclude that the Secretary of State failed to comply with environmental law, at the time of the Decision Notice, by failing to exercise this duty. In the alternative, adopting the Secretary of State's own interpretation of the law, as set out at 4.50 above, we conclude that the Secretary of State should have considered withdrawing the authorisation from Ofwat given its failure to exercise the duty under section 18.
- 4.65 The Secretary of State continues to dispute our finding and therefore has not remedied this failure. However, we do not consider that this dispute leads to any significant difference in practical terms given Ofwat's demonstration of its current understanding of the law and exercise of its duty to enforce. Further, we consider that Ofwat's recent and ongoing enforcement action noted above means that the Secretary of State is no longer failing to comply as set out in the Decision Notice.

WFD – failure to exercise functions in compliance with the WFD

- 4.66 In Chapter 2 we note that the Secretary of State is under a duty to exercise their relevant functions under the 1991 Act and the 1994 Regulations so as to secure compliance with the WFD.⁹⁹
- 4.67 Article 10(2)(a) of the WFD requires EU Member States to ensure the establishment and/or implementation of emission controls based on best available techniques, which are found in measures including the UWWTD. In the context of CSOs, this requires that they are permitted to discharge only in "exceptional circumstances" unless the absence of a BTKNEEC solution is demonstrated.
- 4.68 In our investigation into the Environment Agency, we concluded that it had failed to carry out the permitting of CSOs so as to secure the limitation of pollution of receiving waters.¹⁰⁰ Although permitting is the responsibility of the Environment Agency, the Secretary of State has powers to direct the

⁹⁸ Ofwat, '[Investigation into sewage treatment works and sewerage networks](https://www.ofwat.gov.uk/investigation-into-sewage-treatment-works/)' (last updates 9 September 2025) <<https://www.ofwat.gov.uk/investigation-into-sewage-treatment-works/>> accessed 04/12/2025.

⁹⁹ See para 3.22.

¹⁰⁰ The OEP Investigation report addressed to the Environment Agency in relation to its compliance with the Urban Waste Water Treatment (England and Wales) Regulations 1994, the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 and the Environmental Permitting (England and Wales) Regulations 2016 regarding the regulation of network combined sewer overflows December 2025.

Environment Agency and to provide guidance to it¹⁰¹ and could have used such powers to ensure the establishment and/or implementation of emission controls as required above.

- 4.69 Therefore, we determined in this investigation that the Secretary of State had failed to comply with their duty under regulation 3(1) of the 2017 Regulations by failing to secure that the Environment Agency established and implemented the relevant permit conditions for network CSOs to ensure that they were only permitted to discharge in accordance with the UWWTD.¹⁰² We also found that the Secretary of State's failure to exercise their enforcement duty under section 18 of the 1991 Act (or to secure that Ofwat exercised it on their behalf) had contributed to the breach of the duty under regulation 3(1) of the 2017 Regulations.¹⁰³
- 4.70 The Decision Notice acknowledged that these findings were reliant on the earlier grounds against the Secretary of State but also noted that regulation 3(1) of the 2017 Regulations provides a distinct and specific legal duty on the Secretary of State to secure compliance with the WFD, and thus the UWWTD.¹⁰⁴ It was also determined in the Decision Notice that this failure had existed from 2 January 2004 (the commencement date for the relevant WFD provisions) until 31 December 2020.¹⁰⁵
- 4.71 Paragraph 3(c) of the Decision Notice concluded that the Secretary of State had committed a serious failure to comply with environmental law by:
- “Unlawfully failing to discharge the Secretary of State’s duty under regulation 3(1) of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 (‘the 2017 Regulations’) to exercise the Secretary of State’s functions so as to secure compliance with article 10(2)(a) of the Water Framework Directive 2000 (2000/60/EC) (‘the WFD’) by failing in respect of network CSOs to ensure the establishment and implementation of the permit conditions required to satisfy the requirements of the Urban Waste Water Treatment Directive 1991 (91/271/EEC) (‘the UWWTD’) for the limitation of pollution of receiving waters as clarified in Case C-301/10.”*
- 4.72 In response, the Secretary of State denied that they had failed to comply with environmental law as described in the Decision Notice. It was highlighted that the allegations were historic and dependent on the other grounds. The Secretary of State stated that the implementation of emission controls based on best available techniques had been achieved through the 1994 Regulations and regulation of storm overflows by the Environment Agency and Ofwat.

¹⁰¹ See para 2.28.

¹⁰² Decision Notice, para 77.

¹⁰³ Decision Notice, para 77.

¹⁰⁴ Decision Notice, para 78.

¹⁰⁵ Decision Notice, para 78.

- 4.73 We conclude that the Secretary of State failed to comply with environmental law, as set out at para 4.71 above, from 2 January 2004 until 31 December 2020. This failure ended on 31 December 2020 when the obligation to comply with article 10 of the WFD ceased to apply in the UK following the UK's exit from the EU.¹⁰⁶ This failure was included in the Decision Notice due to its seriousness and duration.
- 4.74 Although the failure detailed above was no longer continuing, the Decision Notice included a recommendation, arising from the issues identified, for the Secretary of State to ensure, by directing the Environment Agency if appropriate, that permit conditions are modified and BTKNEEC solutions are implemented where necessary to avoid discharges in breach of section 94 of the 1991 Act (as supplemented by the 1994 Regulations).¹⁰⁷ We also recommended that the Secretary of State should give or cause to be given proper consideration to the enforcement duty under section 18 of the 1991 Act if a WaSC declines or fails to implement necessary works.¹⁰⁸
- 4.75 With regard to the recommendation above, the Secretary of State stated that permit conditions were not the subject of this investigation but noted that they were relevant to whether it is appropriate to take enforcement action under section 18 of the 1991 Act. The Secretary of State also advised that the updated guidance, as detailed at 4.39 above, would set out an approach to the regulation of storm overflows to ensure compliance with the law and the targets in the SODRP.

¹⁰⁶ See para 2.26.

¹⁰⁷ Decision Notice, para 85.

¹⁰⁸ Decision Notice, para 85.



Conclusion and recommendations

5. Conclusion and recommendations

- 5.1. For the reasons set out in Chapter 4, we conclude that the Secretary of State failed to comply with environmental law as set out in the Decision Notice. As a result of actions taken, setting aside the differences of legal opinion explained in Chapter 4, we no longer maintain that these failures are ongoing.
- 5.2. The Secretary of State has made meaningful progress in addressing the issues raised during the investigation, and the current regulatory landscape reflects a significant shift towards compliance and improved oversight. The publication of the Storm Overflows Guidance in March 2025 has corrected longstanding legal ambiguities and clarified the roles of key regulatory bodies, contributing to a more coherent and enforceable framework.
- 5.3. Although the Secretary of State does not agree with our determination that, as a matter of law, BTKNEEC should be applied only rarely, this disagreement is not determinative of the lawfulness of the updated guidance. The Storm Overflows Guidance allows Ofwat and the Environment Agency to interpret and operationalise the application of BTKNEEC. Further, the implementation of the SODRP, revised SOAF¹⁰⁹ and BTKNEEC guidance¹¹⁰ are likely in practice to mean that non-exceptional discharges, for which there is no cost-beneficial solution, are the exception.
- 5.4. While some differences in legal interpretation remain, in our view, they do not materially affect the practical outcomes. Enforcement responsibilities are now being actively fulfilled by the appropriate authorities, and mechanisms are in place to prevent reoccurrence of the failures identified. The new MoU noted at 4.52 above further supports this by delineating responsibilities and promoting coordinated action.
- 5.5. Concluding our investigation by publishing this report offers a proportionate and effective means of securing accountability and maintaining transparency. We will continue to monitor compliance with the relevant legal and regulatory obligations by the Secretary of State. This monitoring will include engagement with Defra, review of performance data, and assessment of progress against statutory requirements and commitments made in response to this investigation. The initial monitoring stage will take place six months after the publication of this report. We will also maintain appropriate oversight as sector

¹⁰⁹ EA, 'Storm overflow assessment framework 2025' (24 March 2025)

<<https://www.gov.uk/government/publications/storm-overflow-assessment-framework-2025/storm-overflow-assessment-framework-2025>> accessed 04/12/2025.

¹¹⁰ Environment Agency, *Valuing the Benefits of Storm Discharge Improvements for use in BTKNEEC Analysis version 3.0* (August 2025).

reforms are implemented, including those arising from the government's response to the Independent Water Commission recommendations.¹¹¹

Recommendations

- 5.6. In addition to setting out the specific steps we consider a public authority should take in relation to any failure identified in an investigation report, we may also make broader, general recommendations arising from our investigation or its conclusions. We have set out our recommendations below but first provide some additional context regarding the SODRP and Independent Water Commission.
- 5.7. The SODRP states that, by 2050, storm overflows will not be permitted to discharge more than an average of 10 rainfall events per year.¹¹² This measure is intended to ensure that storm overflows only operate during periods of unusually heavy rainfall. We have considered the implementation of this measure and its impact on the use of BTKNEEC assessments, particularly in cases where these assessments result in no improvements to CSOs. We consider that the direction set by the SODRP will ultimately support compliance with BTKNEEC save by way of exception only, especially when combined with other actions taken by the Environment Agency¹¹³ and Ofwat.
- 5.8. The final report by the Independent Water Commission makes several references to the SODRP. The Commission recommends that government “review and rationalise the legislative framework, including the SODRP, UWWTR, and related requirements, to create a single, clear set of targets and objectives for each jurisdiction”.¹¹⁴ It further suggests that “a new, consolidated approach should clarify the relationship between SODRP and statutory requirements, and support more innovative and nature-based solutions for stormwater management”.¹¹⁵ While this report does not comment on the merits of that conclusion, it is noted that the SODRP targets are currently planned to be implemented via environmental permits, as confirmed in updated Defra guidance.

¹¹¹ ‘Independent Water Commission: review of the water sector’ (Published 3 June 2025, last updated 29 July 2025) <[Independent Water Commission: review of the water sector - GOV.UK](#)> accessed 04/12/2025.

¹¹² Defra, *Storm Overflows Discharge Reduction Plan* (25 September 2023) <https://assets.publishing.service.gov.uk/media/631063778fa8f5448a3836e4/Storm_Overflows_Discharge_Reduction_Plan.pdf> accessed 04/12/2025, p14.

¹¹³ Environment Agency, *Valuing the Benefits of Storm Discharge Improvements for use in BTKNEEC Analysis version 3.0* (August 2025).

¹¹⁴ Independent Water Commission: review of the water sector’ (Published 3 June 2025, last updated 29 July 2025) <[Independent Water Commission: review of the water sector - GOV.UK](#)> accessed 04/12/2025, p104.

¹¹⁵ *ibid*, pp110-111.

5.9. We make the following recommendations to the Secretary of State in relation to our findings in the Decision Notice and subsequent actions taken:

Recommendation 1 - establish a process to monitor and review the implementation of the Storm Overflows Guidance. Such a review could be incorporated into the Secretary of State's statutory review of the SODRP, required every five years.¹¹⁶ This would help to ensure that the BTKNEEC concept is applied by way of exception only and prevent reoccurrence of the failures identified.

Recommendation 2 - monitor the implementation of the SODRP requirements through Environment Agency permitting. If regulatory responsibilities change following the Independent Water Commission's recommendations, the Secretary of State should maintain clear lines of accountability in the implementation and oversight of SODRP. Additionally, the Secretary of State should regularly review and update relevant guidance as needed to reflect changes in the legislative and regulatory framework, ensuring continued clarity and effective delivery.

Recommendation 3 - the Secretary of State, working with Ofwat¹¹⁷ and the Environment Agency, should ensure that the MoU is reviewed 12 months after the date of signature, or earlier if required. Such reviews could be coordinated with and included in the Secretary of State's statutory review of the SODRP. If regulatory responsibilities change following the Independent Water Commission's recommendations the MoU should also be reviewed and revised as part of that transition process.

¹¹⁶ Section 141B of the 1991 Act.

¹¹⁷ Or any subsequent authority

Annex

Annex: Glossary

Term	Description
Best Technical Knowledge Not Entailing Excessive Cost (BTKNEEC)	An assessment that considers the most effective technical solution available that avoids disproportionate costs, typically applied in environmental regulation.
Combined Sewer Overflow	A structure that releases excess stormwater and to prevent sewer system flooding.
Decision Notice	A formal document used when the OEP concludes that a public authority has failed to comply with environmental law.
Environmental Permits	Legal authorisations required to carry out activities that may impact the environment, such as discharges to water.
Event Duration Monitoring (EDM)	The tracking of how often and how long discharge events occur, especially from storm overflows.
Executive Non-Departmental Public Body	A public organisation operating independently of government departments, tasked with delivering specific services or regulatory functions.
Independent Water Commission	Established in October 2024 by the UK and Welsh governments to conduct a comprehensive review of the water sector. Chaired by Sir Jon Cunliffe, the Commission made recommendations to government to restore public trust, improve

	regulation, and ensure the sector is equipped to meet future challenges.
Information Notice	A formal document issued by the OEP when it suspects that a public authority may have failed to comply with environmental law.
Inlet Storm Overflow	An overflow point at the entrance of a treatment facility, used to manage excess flow during heavy rainfall.
Network Combined Sewage Overflow (CSO)	A discharge point where a combined sewer system (which carries both stormwater and sewage in the same pipes) releases excess flow directly into nearby water bodies—such as rivers, lakes, or coastal waters.
Non-Ministerial Government Department	A government agency that operates independently of direct ministerial control.
Price Control	Regulatory limits set on the prices utilities can charge customers, ensuring fair and affordable services.
Sewage Treatment Works	Facilities where wastewater is treated before being safely discharged or reused.
Storm Overflow	An engineered outlet that releases excess water from sewer systems to prevent flooding.
Storm Overflow Assessment Framework (SOAF)	Environment Agency issued guidance document detailing the approach for evaluating and improving the performance of storm overflows.

Storm Overflow Discharge Reduction Plan (SODRP)	A strategic framework developed by the UK Government—specifically Defra—to tackle pollution from storm overflows in England.
Storm Tank Overflow	An overflow from temporary storage tanks designed to hold surplus stormwater during peak flow periods.
Water and Sewerage Company (WaSC) Or Sewage Undertaker	A legally appointed organisation responsible for managing public sewerage services within a defined geographical area in the UK. These organisations are typically regional water and wastewater companies.