**Decision Notice**

Office for Environmental Protection

Philip Duffy
Chief Executive
Environment Agency
Horizon House
Deanery Road
Bristol
BS1 5AH

**By email only to:** Chief.Executive@environment-agency.gov.uk

**CMS-343**

12 December 2024

Dear Mr Duffy,

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

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

The enclosed Decision Notice is linked to two other information notices, pursuant to section 37 of the Environment Act 2021, which have been issued to the Secretary of State for Environment, Food and Rural Affairs and Ofwat respectively. Copies of the linked notices, and relevant correspondence between the OEP and the recipients of the linked notices, are also enclosed.

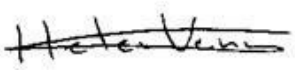
Under section 36(4) of the Environment Act 2021, you are required to respond in writing to the enclosed Decision Notice. Your response should set out:

- whether you agree that the failure described in the notice occurred
- whether you intend to take the steps set out in the notice
- what, if any, other steps you intend to take in relation to the failure described in the notice.

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

I look forward to hearing from you.

Yours sincerely,



Helen Venn

Chief Regulatory Officer

For and on behalf of the Office for Environmental Protection

Office for Environmental Protection

www.theoep.org.uk

# DECISION NOTICE

## Section 36 Environment Act 2021

**Public Authority:** Environment Agency

**Date of this Notice:** 12 December 2024

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

**Case reference:** CMS-343

## BACKGROUND

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

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

## THE GROUNDS

3. The Information Notice of 7 September 2023 set out the OEP's description of alleged failures by the Environment Agency to comply with environmental law which was refined in the OEP's Position Statement of 28 June 2024. Having considered the Environment Agency's response to that Information Notice as well as the Environment Agency's response of 1 October 2024 to the OEP's Position Statement, the OEP is satisfied on a balance of probabilities that there has been a serious failure to comply with environmental law as set out below.

   *The Environment Agency has committed a serious failure to comply with environmental law in the following ways*:

   *(a) unlawfully failing to take proper account of environmental law when exercising its functions, in devising guidance on setting permit conditions for combined sewer overflows on the sewerage network ('network CSOs') without proper understanding of and/or regard to the requirements of the Urban Waste Water Treatment (England and Wales) Regulations 1994 ('the 1994 Regulations') and/or the Urban Waste Water Treatment Directive*

*1991 (91/271/EEC) ('the UWWTD'), in particular regulation 6(2)(c) and/or Schedule 2 of the 1994 Regulations*

*(b) As a result of (a), unlawfully exercising or failing to exercise its function of setting permit conditions for discharges from network CSOs pursuant to the Environmental Permitting (England and Wales) Regulations 2016 ('the 2016 Regulations') and their predecessors, by setting or allowing to persist conditions which were in fact insufficient to achieve compliance:*

*(i) with the requirements of the 1994 Regulations, in particular regulation 6(2)(c) and/or Schedule 2*
*(ii) (as a result of (b)(i)), with the requirements of regulations 3(1) and/or 3(2) of the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 ('the 2017 Regulations')*

*(c) Unlawfully failing to exercise properly or at all, in relation to discharges from network CSOs, its functions of review, inspection and/or modification and/or revocation of permits pursuant to its duty under regulation 6(3) of the 1994 Regulations and regulation 34(1) and (2) of the 2016 Regulations so as to achieve compliance with regulation 6(2)(c) of and Schedule 2 to the 1994 Regulations.*

4. For the purposes of this Decision Notice:

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

5. The periods of failure are:

(a) for Ground One, from 30 November 1994 (the date of coming into force of the 1994 Regulations) to date;

(b) for Ground Two(i), from 30 November 1994 (the date of coming into force of the 1994 Regulations) to date;

(c) for Ground Two(ii), from 2 January 2004 until December 2020 (being the period during which the duty in article 10 applied in the United Kingdom);

(d) for Ground Three, from 30 November 1994 (the date of coming into force of the 1994 Regulations) to date.

6. Regulation 6(2)(c) of the 1994 Regulations imposes the following duty on the Environment Agency:

*(2) It shall be the duty of the Environment Agency … in exercising their functions under the Environmental Permitting Regulations, to secure—*
…

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

7. Schedule 2 to the 1994 Regulations stipulates at paragraph 2 that:

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

8. This provision implements in law Section A of Annex 1 to the UWWTD:

> *"A. Collecting systems(1)*
> *Collecting systems shall take into account waste water treatment requirements.*
> *The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding:*
> - *volume and characteristics of urban waste water,*
> - *prevention of leaks,*
> - *limitation of pollution of receiving waters due to storm water overflows.*
>
> *…*
> *(1) Given that it is not possible in practice to construct collecting systems and treatment plants in a way such that all waste water can be treated during situations such as unusually heavy rainfall, Member States shall decide on measures to limit pollution from storm water overflows. Such measures could be based on dilution rates or capacity in relation to dry weather flow, or could specify a certain acceptable number of overflows per year."*

9. Regulation 6(3) of the 1994 Regulations states that the Environment Agency:

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

The relevant provisions in Chapter 2 of the Water Resources Act 1991 have been repealed and re-enacted, currently in the 2016 Regulations.

10. Regulations 12 and 38 of the 2016 Regulations are as follows:

> ***Requirement for an environmental permit***
> *12.— (1) A person must not, except under and to the extent authorised by an environmental permit—*
> *(a) operate a regulated facility, or*
> *(b) cause or knowingly permit a water discharge activity or groundwater activity*

and

> ***Offences***
> *38.— (1) It is an offence for a person to—*
> *(a) contravene regulation 12(1), or*
> *(b) knowingly cause or knowingly permit the contravention of regulation 12(1)(a).*
> *(2) It is an offence for a person to fail to comply with or to contravene an environmental permit condition.*

11. Regulation 34 of the 2016 Regulations requires the Environment Agency to review permits:

> *(1) The regulator must periodically review environmental permits.*
> *(2) The regulator must make appropriate periodic inspections of regulated facilities.*

12. Regulation 3 of the 2017 Regulations is as follows:

> *(1) The Secretary of State, the Welsh Ministers, the Agency and NRW must exercise their relevant functions so as to secure compliance with the requirements of the WFD, the EQSD and the GWD.*
> *(2) Without prejudice to the generality of paragraph (1), the Secretary of State, the Welsh Ministers, the Agency and NRW must determine an authorisation so as, in particular—*
> *(a) to prevent deterioration of the surface water status or groundwater status of a body of water (subject to the application of regulations 18 and 19), and*
> *(b) otherwise to support the achievement of the environmental objectives set for a body of water (subject to the application of regulations 16 to 19).*

## THE UNDERLYING LEGAL ERROR IN RESPECT OF THE ENVIRONMENT AGENCY'S INTERPRETATION OF THE 1994 REGULATIONS AND THE UWWTD

13. The legal error underlying Grounds One and Two requires consideration of two issues:

(a) first, the duties imposed on the Environment Agency by the 1994 Regulations in implementation of the UWWTD
(b) secondly, the Court of Justice of the European Union's ('CJEU's') interpretation of those duties in *Commission v UK* Case C-301/10 ('Case C-301/10').

### *(a) The duties imposed on the Environment Agency by the 1994 Regulations and the UWWTD*

14. As set out above at paragraph 6, regulation 6(2)(c) of the 1994 Regulations imposes duties on the Environment Agency when exercising its functions

under the 2016 Regulations in respect of discharges from collecting systems and storm water overflows.

15. Schedule 2 of the 1994 Regulations as set out at paragraph 7 above introduces the 'best technical knowledge not entailing excessive cost' ('BTKNEEC') concept which replicates what is contained in Section A of Annex 1 to the UWWTD (see paragraph 8 above).

16. An authoritative and binding interpretation of these provisions has been provided by the CJEU in Case C-301/10.

***(b) The CJEU's interpretation of those duties in Case C-301/10***

17. In summary, the CJEU in Case C-301/10 confirmed that the correct interpretation of the duties on the Environment Agency under the UWWTD and the 1994 Regulations is that for every discharge of a CSO, in order to determine whether there has been a breach of the 1994 Regulations, it is necessary to apply a two-stage test. First, is the discharge occurring only in "exceptional circumstances"? Second, and if it is not, is there a solution to the non-exceptional discharges by the application of the BTKNEEC concept?

*The OEP's contention*

18. The CJEU's judgment in Case C-301/10 is authority of the highest level about the interpretation of the UWWTD. It sets out the way in which compliance with the UWWTD can be assessed. It is therefore applicable to all storm water overflows albeit, as set out further, the details of the test and how the test is to operate in practice are not fleshed out in the judgment.

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

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

20. The court also held at paragraph [65] that any qualification to that proposition by application of the concept of BTKNEEC (as used in section A of Annex 1 to the UWWTD and paragraph 2 of Schedule 2 to the 1994 Regulations) is to be invoked "by way of exception only":

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

[emphasis added]

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

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

22. The two-stage test approach was considered in the recent decision of the High Court in *R (WildFish) v Secretary of State* [2023] EWHC 2285 (Admin) ('*WildFish'*). In summary, the OEP asserts that the two-stage test requires that a discharge from a network CSO will only be compliant with the UWWTD and thus the 1994 Regulations, if it occurs in exceptional circumstances or, by way of an exception, the discharger can demonstrate the absence of any BTKNEEC solution.

*The Environment Agency's contention and the OEP's response to that contention*

23. Both parties accept that the assessment of whether discharges from CSOs are compliant will require the application of the two-stage test. However, the Environment Agency asserts that what, as a matter of fact, is required to comply with both parts of the two stage test has not been determined by the courts and, secondly, that the circumstances in which the outcome of the second stage of the two stage test will be the absence of any BTKNEEC solution may be quite common, whereas the OEP maintains that the absence of any BTKNEEC solution must occur 'by way of exception only' i.e. rarely.

24. With reference to the question of what, as a matter of fact, is required to pass the two-stage test in any given case, the parties agree that this has not been fleshed out in the caselaw and does not fall for determination in this Decision Notice. The UWWTD does not define, nor even use, the term "exceptional circumstances". It is the judgment in Case C-301/10 which uses the term in the course of construing the words "*such as unusually heavy rainfall*" (as set out in footnote 1 to Parts A and B of Annex 1 to the UWWTD) and it is adopted in contra-distinction to overflows occurring "*under usual climatic conditions and account being taken of seasonal variation*" (Judgment at [53]). It is not necessary for the definition of 'exceptional' or the detailed application of the BTKNEEC test in any given case to be settled at this stage (although this issue is discussed further in the section on steps to be taken to remedy, mitigate or prevent reoccurrence of the failure).

25. The critical issue at this point is that both the OEP and the Environment Agency accept that the first stage of the two-stage test is whether the discharges under examination are occurring only in "exceptional" circumstances.

26. With reference to the question of what is involved in the second stage of the two-stage test, close consideration of the CJEU's decision in Case C-301/10 is necessary. The judgment in Case C-301/10 articulates that the concept of BTKNEEC is limited in operation to a form of defence, to be used "by way of exception only" (Judgment [65]). The Advocate-General shared this opinion and stated that the BTKNEEC mechanism must operate (Opinion, paragraph 60):

> *"…by way of exception and…may not be employed in order to undermine the principle, confirmed by the Court's case-law itself, that, as a rule, the collection and treatment processes must cover all waste water."*

27. That principle is articulated in the judgment at [54] (referred to above at paragraph 19). The proposition therein that *"it would run counter to Directive 91/271 if overflows of untreated urban waste water occurred regularly*" is thus applicable to the performance of CSOs in respect of both the concept of "exceptional circumstances" ***and*** the concept of BTKNEEC. The underlying purpose of the UWWTD is relevant and is made clear by the court at [58]:

> *"However, contrary to the United Kingdom's assertions, the objective pursued by Directive 91/271 does not permit the inference that it is normal and common for those other circumstances to arise, in particular as the word 'unusually' clearly indicates that failure to collect or treat waste water cannot occur in normal circumstances."*

28. The Environment Agency asserts at §20 of its response of 1 October 2024 to the OEP's Position Statement that '*it may be that, on their particular facts, many cases can demonstrate BTKNEEC such that its application is not 'exceptional'. That is inherent in the concept of a cost benefit analysis*'. First, the OEP understands the reference to "*can demonstrate BTKNEEC*" to mean "*can demonstrate the absence of any BTKNEEC solution*". Nevertheless, such a proposition must be wrong. If the cost benefit analysis process in a BTKNEEC assessment is such that CSOs which are discharging other than in properly-defined 'exceptional circumstances' are regularly found to lack any cost beneficial solution, then it follows that the application of the second step is inadequate as the concept of BTKNEEC is not being invoked 'by way of exception' only (see also [58] of the CJEU's decision in Case C-301/10).

29. The Environment Agency in its response to the OEP's Information Notice and its response of 1 October 2024 to the OEP's Position Statement contends that the decision in *WildFish* has clarified the law and supports the assertion that '*many cases can demonstrate BTKNEEC*'. Specific reference is made to passages from Holgate J's judgment:

> *"The CJEU decided that the relevant provisions of the Directive (and therefore the 1994 Regulations) involve two tests. First, is the discharge from a collecting system or a treatment plant due to circumstances of an exceptional nature? If the answer is yes, there is no breach of either reg.4(2) read with para.2 of sched.2, or reg.4(4)(a) read with reg.5, of the 1994 Regulations. If the answer is no, the second question is whether*

> *discharge can be justified by cost-benefit analysis so as to satisfy the BTKNEEC test. If the answer is yes, then there is no breach of reg.4(2) or reg.4(4), but if the answer is no, then there is a breach (see [73]).”* (Judgment at [69])

and

> “[the] *CJEU did not indicate that discharges will only satisfy BTKNEEC exceptionally*” (Judgment at [172])

30. The OEP, by contrast, holds the view that the judgment in *WildFish* does not answer the question of how the second stage of the two-stage test should be interpreted or how it should be implemented in practice.

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

32. However, this does not consider whether the requirements otherwise imposed by the SODRP are themselves adequate, either in the standards which they set or in the timescale for their implementation, for the quite distinct purposes of identifying and rectifying current UWWTD non-compliance, when compliance should have been achieved in most cases more than twenty years ago. The Court’s conclusion was simply that since the SODRP did not purport in any way to detract from the existing regulatory requirements and in one respect exceeded them, it could not be and was not unlawful. That leaves unconsidered the question with which this Decision Notice is concerned, namely whether those other requirements of the 1994 Regulations have to date been properly understood and implemented in accordance with the provisions of the UWWTD, as elucidated in Case C-301/10. It also leaves unaffected and unaddressed the determination of whether past or current discharges have been or are compliant with those measures and whether there has been proper identification and enforcement in respect of non-compliance. In order to understand fully the obligations set out in the UWWTD, consideration must be given to Case C-310/10 itself as has been set out above.

33. Further, whilst the CJEU was concerned to respect the general principle that it was for the Commission to prove every failure to fulfil obligations (Judgment at [70]), it did however note the duty upon EU Member States to assist the achievement of the Commission’s tasks (Judgment at [71] – [73]). The judgment in Case C-301/10 holds that, at the European level, once it has been demonstrated that discharges are occurring otherwise than in ’exceptional circumstances’, it is then for the EU Member State to demonstrate, with precision, why “by way of exception” improvements which would prevent non-exceptional

discharges from a CSO do not satisfy the BTKNEEC requirement. When that part of the judgment in Case C-301/10 is applied domestically, it can only be interpreted on the basis that once it is established that discharges occur other than in "exceptional circumstances", there is a *prima facie* case of non-compliance, which can only be displaced by the discharger satisfying the regulator that "by way of exception", there is no BTKNEEC solution.

34. Notwithstanding the above, it is not necessary for the OEP in this Decision Notice to reach any conclusions upon the correct formulation and application of the BTKNEEC test in any particular instance (although this issue is discussed further in the section on steps to be taken to remedy, mitigate or prevent reoccurrence of the breach). Nevertheless, both the OEP and the Environment Agency accept that the second stage of the two-stage test is whether the absence of a BTKNEEC solution can be demonstrated by the discharger. The Environment Agency and the OEP also agree that it is for the discharger to investigate whether a BTKNEEC solution exists and to establish the absence of such a solution.

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

**GROUND ONE**

36. ***Unlawfully failing to take proper account of environmental law when exercising its functions, in devising guidance on setting permit conditions for network CSOs without proper understanding of and/or regard to the requirements of the 1994 Regulations and/or UWWTD, in particular regulation 6(2)(c) and/or Schedule 2 of the 1994 Regulations.***

37. Ground One relates to the Environment Agency drafting guidance for the setting of permit conditions in a manner not compliant with the requirements of Regulation 6(2)(c) and/or Schedule 2 of the 1994 Regulations. It is the OEP's case that the Environment Agency has failed, when devising guidance for the permit conditions to network CSOs, to adhere to the obligation to secure the limitation of pollution of receiving waters due to storm water overflows.

38. This ground considers:

    (a) first, what the Environment Agency's guidance relevant to the setting of permit conditions says, and
    (b) secondly, the legal errors which underpin the Environment Agency's guidance.

***(a) The guidance which the Environment Agency has issued in relation to the permitting of network CSOs***

39. The current relevant guidance issued by the Environment Agency in relation to the permitting of network CSOs is contained in the Environment Agency's documents entitled "*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'). Both these documents address the identification and classification of CSOs in need of improvement to achieve UWWTD and 1994 Regulations compliance and explicitly are intended to be used as tools for setting permit conditions which are legally compliant as p1 of the SOAF makes clear:

> *"The assessment framework set out in Figure 1 and described in stages 1 – 5 below, is intended to address the problems caused by discharges from storm overflows considered to operate at too high a frequency. ... It is also intended to demonstrate that sewerage systems are compliant with relevant legislation such as the UWWTR."*

40. These guidance documents are based, in turn, on guidance from the Department of the Environment, Transport and the Regions (the forerunner of Defra) entitled "*The Urban Wastewater Treatment (England and Wales) Regulations 1994 - Working document for Dischargers and Legislators. A Guidance Note"* (dated July 1997 and updated in April 2009) ('the 1997 Guidance').

41. The Environment Agency correctly asserts that the 1997 Guidance is not its guidance and was issued by Defra (§24 of the Environment Agency's response of 1 October 2024 to the Position Statement). However, paragraph 2.1 of the 1997 Guidance states as follows:

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

42. Indeed, the genesis of the methodology in the 1997 Guidance for identifying unsatisfactory CSOs appears to be the Environment Agency's Asset Management Plan (AMP) 2 Guidelines from 1994 which, at section 4.4.1, identify precisely the same criteria for identifying unsatisfactory CSOs.

43. It is the OEP's case that, from 1994 until the Environment Agency promulgated the SOAF and the September 2018 Guidance, the Environment Agency relied on the same criteria for identifying CSOs which were discharging unsatisfactorily

and, from 2018 to date through the SOAF and the September 2018 Guidance, continued to rely on criteria which were, essentially, the same.

44. A side-by-side comparison of the documents is set out below:

<table>
<tr><th>1994 AMP2 Guidelines</th><th>1997 Guidance</th><th>The SOAF</th><th>The September 2018 Guidance</th></tr>
<tr><td>4.4.1 The following criteria are to be used in deciding which CSOs are unsatisfactory and, therefore, subject to consent review to drive improvements</td><td>4.1 The following criteria are to be used in deciding which CSOs are unsatisfactory and, therefore, subject to consent review to drive improvements:</td><td>Stage 1 overflows will be identified for investigation using the spill frequency triggers depending on the number of years for of [sic] EDM data collected (Table 1):<br><br>Table 1 Spill frequency investigation triggers.<br><br><table><tr><td>No of years EDM data</td><td>Investigation trigger (average no. spills/year)</td></tr><tr><td>1</td><td>>60</td></tr><tr><td>2</td><td>>50</td></tr><tr><td>3 or more</td><td>>40</td></tr></table></td><td>The Environment Agency classes storm overflows as unsatisfactory when they:[1]</td></tr>
<tr><td></td><td></td><td>Stage 1a – Exceptional rainfall<br>Catchment rainfall should be reviewed to determine whether rainfall was exceptional during any of the EDM reporting years. If rainfall was exceptional, the relevant calendar year of EDM data should be marked accordingly and not used. The remaining years of data is assessed against the triggers (Table 1). This is intended to avoid carrying out investigations when frequent spills have been driven by exceptional wet weather, in order to prioritise investigations to assets which spill</td><td></td></tr>
</table>

[1] The order of the following factors has been changed to aid readability.

| 1994 AMP2 Guidelines | 1997 Guidance | The SOAF | The September 2018 Guidance |
|---|---|---|---|
| | | frequently in more typical years. | |
| (i) causes significant visual or aesthetic impact due to solids, fungus and has a history of justified public complaint; | (i) causes significant visual or aesthetic impact due to solids, fungus and has a history of justified public complaint; | **Stage 2 – Does the storm overflow cause an environmental impact?** The following impact assessment will be used to quantify the environmental impact of the storm overflow. The assessment is divided into three main components:<br>• Aesthetic impact including amenity and public complaint<br>• Invertebrate (biological) impact<br>• Water quality impact | cause significant visual or aesthetic impact due to solids or sewage fungus |
| (ii) causes or makes a significant contribution to a deterioration in river chemical or biological class; | (ii) causes or makes a significant contribution to a deterioration in river chemical or biological class; | | cause or significantly contribute to a deterioration in the biological or chemical status of the receiving water |
| (iii) causes or makes a significant contribution to a failure to comply with Bathing Water Quality Standards for identified bathing waters; | (iii) causes or makes a significant contribution to a failure to comply with Bathing Water Quality Standards for identified bathing waters; | | cause or significantly contribute to failures in bathing water quality standards for identified bathing waters |
| (iv) operates in dry weather conditions; | (iv) operates in dry weather conditions; | | operate in dry weather conditions |
| (v) operates in breach of consent conditions provided that they are still appropriate; and/or | (v) operates in breach of consent conditions provided that they are still appropriate; and/or | | operate in breach of permit conditions |
| (vi) causes a breach of water quality standards (EQS) and other EC Directives. | (vi) causes a breach of water quality standards (EQS) and other EC Directives. | | cause or significantly contribute to failures in shellfish quality standards for identified shellfish waters<br><br>cause or significantly contribute to failures in water quality |

| 1994 AMP2 Guidelines | 1997 Guidance | The SOAF | The September 2018 Guidance |
|---|---|---|---|
| | | | standards in coastal and transitional waters<br><br>cause pollution of groundwater |
| | | **4. Stage 3 – Assess options**<br><br>An economic assessment of improvement options for storm overflows will be made under two circumstances:<br><br>i) The overflow causes an environmental impact as assessed under SOAF Stage 2. An overflow has an environmental impact if its aesthetic, invertebrate, or water quality impact classification is 'very low' or greater.<br><br>ii) The overflow does not cause an environmental impact as assessed under SOAF Stage 2, but the overflow is located within an agglomeration which has a PE of 2000 or more. The UWWTR require sewer networks for agglomerations with a PE of 2000 or more to be designed, constructed and maintained according to BTKNEEC. Consequently, where frequently spilling overflows in these drainage areas do not cause environmental impacts, BTKNEEC still needs to be considered through an assessment of the costs and benefits of reducing spill frequency. | |

| 1994 AMP2 Guidelines | 1997 Guidance | The SOAF | The September 2018 Guidance |
|---|---|---|---|
| | | The interpretation and definition of 'agglomeration' and 'population equivalent' is described in Appendix H. | |
| | | **Stage 4:** a decision is made based on the cost benefit results; | |
| | | **Stage 5:** delivery of the most cost beneficial solution (subject to appropriate funding and prioritisation) to reduce environmental impact and/or reduce the frequency of discharges. | |

***(b) The legal errors which underpin the Environment Agency's guidance***

45. In order to appreciate the errors which underpin the Environment Agency's guidance it is necessary to consider, in detail:

    (i) what the 1997 Guidance (and the AMP2 Guidelines which preceded it) says
    (ii) what the legal errors in the 1997 Guidance / AMP2 Guidelines are
    (iii) the reason why various matters said by the Environment Agency to undermine the OEP's case and to demonstrate that the 1997 Guidance is legally correct and adequate do not, in fact, do so
    (iv) why the errors in the 1997 Guidance are not remedied in the SOAF, and the relationship between the 1997 Guidance, the SOAF and the September 2018 Guidance.

*(i) What the 1997 Guidance (and the AMP2 Guidelines which preceded it) says*

46. Annex 8 of the 1997 Guidance, titled "Framework for Consenting Intermittent Discharges", is the key section in relation to sewage discharges from CSOs. It sets out a number of principles, including the definition of "unsatisfactory" CSOs for the purpose of identifying existing CSOs in need of improvement to comply with the 1994 Regulations. Appendices 8(i) and 8(ii) to Annex 8 then set out how consent conditions for both existing and new discharges are to be calculated and determined in order, in the case of existing CSOs, to drive that improvement.

47. Paragraph 4.1 of Annex 8 of the 1997 Guidance provides for the identification of "unsatisfactory CSOs" 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."*

48. If any of the above criteria exist then the CSO in question is subjected to the methodology of the Urban Pollution Management (UPM) Manual 2nd edn ('UPM methodology') which ultimately should produce a compliant solution. However, unless any of the criteria at paragraph 4.1 of Annex 8 are engaged, the UPM methodology will never be applied and there will be no further scrutiny of the CSO. Further, the 1997 Guidance equates the absence of any of the above criteria with compliance of the CSO as it exists with the UWWTD and the 1994 Regulations.

*(ii) The legal error in the approach taken in the 1997 Guidance (and the AMP2 Guidelines which preceded it)*

49. The criteria in the 1997 Guidance do not reflect any version of the CJEU's two-stage test, in which the first stage addresses the question of whether the discharge occurs in exceptional circumstances and the second stage addresses the existence of a BTKNEEC solution.

50. Of the criteria in the 1997 Guidance, only criteria (iv) and (v) relate to *performance* or *operation* of the CSO (as opposed to its impact on receiving waters). Of these, criterion (v) does not substantively assist in the determination of compliant conditions; it merely asks whether there is compliance with existing consent conditions and the proviso ("provided that they are still appropriate") can only, as a matter of language, operate as a *limitation* on the operation of that criterion rather than an expansion in its reach. Criterion (iv) – "operates in in dry weather conditions" – is patently inadequate to satisfy the requirements of the UWWTD and the 1994 Regulations and at the opposite end of the performance scale from operation only in "exceptional circumstances". Together, such criteria cannot amount to a proper application of the first stage of the two-stage test.

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

52. With regard to criterion (vi), the reference to 'other' EC Directives plainly and obviously excludes the UWWTD as that is the Directive with which the 1997

Guidance itself is concerned. That this is so, is plain from the content of Appendix 7(i) to Annex 7 of the 1997 Guidance.

53. The 1997 Guidance therefore requires the 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 two-stage 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 1994 Regulations will not be so identified, so long as they merely do not discharge in dry weather and are not demonstrably in breach of the conditions of their permits. Such criteria taken alone are manifestly inadequate to demonstrate UWWTD/1994 Regulations compliance. Thus, whilst the criteria used in Annex 8 may have been an acceptable means of identifying "worst offenders", they do not represent an adequate or acceptable means of determining UWWTD/1994 Regulations compliance, nor a comprehensive means of identifying CSOs in need of improvement to achieve such compliance.

54. In addition, the 1997 Guidance was not revised or even updated after the CJEU handed down its decision in Case C-301/10 and therefore does not contain an accurate interpretation of the UWWTD or 1994 Regulations.

55. 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. It is further manifest that the result of its application was not, as intended, the achievement by 31 December 2005 (at the latest) and continuation thereafter of comprehensive compliance with the UWWTD and the 1994 Regulations.

*(iii) Various matters said by the Environment Agency to undermine the OEP's case and to demonstrate that the 1997 Guidance/AMP2 Guidelines are legally adequate do not, in fact, do so*

56. The Environment Agency has suggested in its response to the OEP's Information Notice that (at p3), "*the criteria [in the 1997 Guidance] can be said to cover, in terms, both the impact on receiving waters and the frequency and quantity of emissions (see para. 4.1 (iv) - an overflow operating in "dry weather conditions" is likely to be a higher frequency or quantity discharge)*." However, as articulated above, whether a CSO discharges in dry weather conditions is an insufficient test for establishing whether it is discharging only in "exceptional circumstances". A CSO that does not spill in dry weather, but spills after even slight rainfall, satisfies criterion (iv) in the 1997 Guidance but cannot satisfy the "only in exceptional circumstances" criterion.

57. It was inevitable that numerous non-compliant CSOs would slip through the imperfect net of the criteria in the 1997 Guidance because:

(a) they did not discharge in dry weather;
(b) there was no demonstrable breach of any permit condition; and/or
(c) none of the remaining criteria, based as they are upon environmental impact, could readily be demonstrated simply because of the complexity of demonstrating an adverse impact on the receiving waters arising from an intermittent discharge.

58. Because of the defective way in which the first stage of the two-stage test is articulated, in many instances of even frequent discharges in non-exceptional circumstances, the second stage does not fall to be considered. Unless at least one of its six criteria is engaged, UPM methodology will never be applied at all, nor will there be any other scrutiny of the CSO. Whilst this approach may have provided a rough-and-ready method of identifying the "worst offenders", it was not a lawfully sound basis for determining compliance with the UWWTD and the 1994 Regulations.

*(iv) The errors in the 1997 Guidance are not remedied in the SOAF*

59. The SOAF and the September 2018 Guidance were based on the 1997 Guidance (which in turn was based on the Environment Agency's AMP2 Guidelines from 1994). It cannot be right (cf §25 of the Environment Agency's response of 1 October 2024) that the SOAF and the September 2018 Guidance were not based on the 1997 Guidance and were actually part of a 'package of guidance' produced following the judgment in Case C-301/10 to 'supplement the 1997 Guidance' because:

(a) the SOAF and the September 2018 Guidance do not refer to the judgment in Case C-301/10 or the two-stage test as articulated therein;
(b) the SOAF and the September 2018 Guidance do not refer to themselves as being designed to 'supplement the 1997 Guidance'; and
(c) the SOAF and the September 2018 Guidance reproduce, in some cases word-for-word, the criteria for identifying unsatisfactory criteria which are set out in the 1997 Guidance.

60. There is therefore no doubt that the SOAF and the September 2018 Guidance are based on the 1997 Guidance as is plain from the side-by-side comparison table at paragraph 44 above.

61. Conspicuously, the Environment Agency does not refer to any alternative guidance which it produced which is said to identify and set permit conditions for CSOs which would achieve compliance with the 1994 Regulations and the UWWTD other than the 1997 Guidance and, from 2018, the SOAF and the September 2018 Guidance. That is unsurprising as the Inspector appointed by the Secretary of State to exercise his powers in the test Appeals held under section 91 Water Resources Act 1991 into Unsatisfactory Intermittent Discharges

('the UID Appeals')[2] in 2006 strongly encouraged the Environment Agency to follow the 1997 Guidance:

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

62. In the subsequent appeals into unsatisfactory intermittent discharges in Preston,[3] in 2007-8 a different Inspector also adopted at paragraph 18 the same approach to the 1997 Guidance:

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

63. Following the SOAF and September 2018 Guidance methodology, once a CSO is identified for improvement under the SOAF and the BTKNEEC assessment process set out therein is passed, the Environment Agency will apply stipulated design standards to the permit for that CSO. Compliance with those design standards will only be possible if the BTKNEEC solution identified is implemented by the sewerage undertaker.

64. As set out above at paragraphs 13 - 35, on a proper reading of the judgment in Case C-301/10, the *only* basis on which spills are acceptable is due to "exceptional circumstances" or if, "by way of exception only", they spill in non-exceptional circumstances but there is no BTKNEEC solution available.

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

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

65. The SOAF methodology does not set out an approach which deems that non-exceptional spills mean that a CSO is non-compliant. It instead requires, as a first step, identifying for investigation only those CSOs which spill *very frequently*:

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

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

66. The result is that some CSOs which spill commonly are thus not investigated. The trigger levels above require a spill every six days on average with only one year of event duration monitoring ('EDM') data and up to a spill every nine days on average when there is three or more years of EDM data. These are not, by any stretch of the imagination, uncommon, far less "exceptional", events. As set out further below in the section of this Decision Notice dealing with the steps which the Environment Agency should take to remedy, mitigate or prevent reoccurrence of the failure, whilst an annual spill limit may, in principle, be capable of identifying CSOs which discharge in non-exceptional circumstances, in practice, such generous annual spill limits as above will not suffice.

67. In addition, the next stage of the SOAF process, which is to exclude all spills from an entire year where there has been exceptional rainfall, is also irrational when coupled with such high investigation thresholds:

> **Stage 1a – Exceptional rainfall**
>
> Catchment rainfall should be reviewed to determine whether rainfall was exceptional during any of the EDM reporting years. If rainfall was exceptional, the relevant calendar year of EDM data should be marked accordingly and not used. The remaining years of data is assessed against the triggers (Table 1). This is intended to avoid carrying out investigations when frequent spills have been driven by exceptional wet weather, in order to prioritise investigations to assets which spill frequently in more typical years.

68. Excluding all CSOs from investigation when the area they are situated in has had a particularly wet year may be a way of excluding from further investigation those CSOs which are only spilling because there has been a particularly wet year. However, this approach does not differentiate between, on the one hand, a CSO that is spilling only because it is a wet year and, on the other hand, a CSO that is spilling regularly because it is a wet year *and* because the drainage system in that area is hydraulically inadequate (or because the CSO has not been adequately maintained etc.). Given that the Environment Agency's approach to excluding all spills on wet years on this block basis does not and cannot differentiate between these two types of discharges from CSOs, that approach is irrational. In addition, and a further element of the irrationality, the Environment Agency's block exclusion of all spills from wet years will, by design, exclude high-spilling CSOs from consideration under the SOAF.

69. For the same reason, this block exclusion of all CSOs from consideration when there has been a particularly wet year does not constitute a reasonable or rational approach to "exceptional circumstances". While the OEP accepts that the Environment Agency's designation of a wet year (described as "effectively the annual rainfall that would occur in 1 in 20 years on average (i.e. a 5% probability)") may amount to a reasonable designation of an 'exceptionally' wet year, excluding all spills which occur in such a year from consideration will, as set out above, also have the inevitable effect of excluding high-spilling CSOs which are spilling for reasons other than the exceptionally wet weather.

70. A further indication of the irrationality of the SOAF methodology is that if "exceptional circumstances" are to be defined by reference to an annual resolution (i.e. that the year under consideration was an exceptionally wet year), rather than considering on an event-by-event basis whether the discharge was due to exceptional circumstances, then it would follow that in the years which are not to be so excluded, *all* spills should be regarded as occurring in the absence of the same "exceptional circumstances". Yet the SOAF treats up to 60 such spills per year, and even in its strictest application 40 such spills per year, as meriting no further examination, which is manifestly too lax a test to determine UWWTD and 1994 Regulations compliance. The Environment Agency seeks to "have it both ways". If, as the Environment Agency contends, exceptionality is defined by reference to exceptionally wet years and all discharges in wet years are exceptional then it must follow that discharges in drier years are not exceptional. However, the Environment Agency seeks to suggest that *all* discharges in wet years are exceptional but does not accept as a corollary that all discharges in drier years are unexceptional as it seeks to suggest that up to 60 / 50 / 40 discharges in such drier years are not exceptional too.

71. In summary, the effect of the SOAF is therefore (1) to exclude spills from counting altogether on a block annual basis in years of heavy rainfall (regardless of their individual frequency or their temporal relationship with rainfall) and (2) in remaining years (i.e. those in which, on the SOAF's own approach, rainfall has not been "exceptional" at all), to treat 40 spills per year as an acceptable threshold for triggering investigation. This approach is (a) irrational; and (b) inconsistent with a proper understanding and application of the UWWTD as explained in Case C-301/10.

72. It is right that, at section 7 of the SOAF, the framework suggests that investigations into CSOs can be triggered in circumstances other than where spill frequency exceeds the applicable threshold. However, the only three additional gateways into an investigation under SOAF are:

    (a) "*Where it is suspected or probable that storm overflows are a **significant reason for failure of the WFD element**, investigations **may** be triggered to confirm the impact (or otherwise) of intermittent contributions*
    (b) *Where minimum environmental quality standards (EQSs) are not achieved, the performance of storm overflows **may** be investigated by*

*the EA if they are suspected of making a **significant contribution to the failures***

(c) *Storm overflows **may** also be investigated and identified as unsatisfactory through pollution incidents, complaints or other environmental monitoring."*

[emphasis added]

73. All three of these additional gateways merely empower the investigator rather than require them to investigate CSOs further and are therefore inconsistent with the obligation on the Environment Agency under the UWWTD and the 1994 Regulations. They also impose upon the Environment Agency rather than the discharger the burden of establishing impact on receiving waters, even though such a consideration can only be relevant to the second part of the two-stage test i.e. whether a BTKNEEC solution exists, which it is for the discharger to disprove.

*(v) The relationship between the 1997 Guidance, the SOAF and the September 2018 Guidance*

74. The SOAF at p.1 states that "*In accordance with longstanding guidance (DETR, 1997) where such overflows have an adverse environmental impact, measures are required to address these problems.*" The SOAF does not purport to supersede the 1997 Guidance. The Environment Agency says that "*The SOAF was derived to focus on spill reduction of storm overflows that had been identified to spill frequently and provide enhanced performance enabled through WINEP investigation and scheme (if cost beneficial).*"[4]

75. The September 2018 Guidance is described by the Environment Agency as "Guidance on implementing [the 1997 Guidance]".[5] It provides a system of classification of CSOs as "unsatisfactory", "substandard" and "satisfactory". The method of classification as "unsatisfactory" is a slightly modified form of the list of criteria in the 1997 Guidance (and has the same shortcomings). It makes no reference to the SOAF.

76. It thus appears that the SOAF constitutes an additional, discrete driver for the improvement of CSOs. Nevertheless, given the shortcomings of each of them, the combination of the SOAF and the September 2018 Guidance does not constitute a comprehensive and coherent method of identification and improvement of CSOs capable of achieving compliance with the requirements of the UWWTD and the 1994 Regulations. Yet they appear to be relied upon by the Environment Agency as achieving that purpose.

[4] "Environment Agency Response to the Office for Environmental Protection (OEP) letter of the 9th December 2022 regarding - Investigation of potential failures to comply with environmental law by the Environment Agency - untreated sewage discharge by sewerage undertakers", 31 January 2023, answer to question 6.

[5] "Environment Agency Response to the Office for Environmental Protection (OEP) letter of the 9th December 2022 regarding - Investigation of potential failures to comply with environmental law by the Environment Agency - untreated sewage discharge by sewerage undertakers", 31 January 2023, answer to question 5.

77. In conclusion as to Ground One, the 1997 Guidance was inadequate either to identify non-compliance or to drive compliance with the UWWTD and the 1994 Regulations. The Environment Agency's subsequent guidance is based on much the same erroneous approach as the 1997 Guidance and therefore remains flawed. This should have been apparent following the judgment in Case C-301/10, but no significant changes to methodology were made following that judgment meaning that the Environment Agency's approach to setting permit conditions for network CSOs is based on a misinterpretation of the 1994 Regulations, in particular Schedule 2, and thus inevitably contributed to the failure of the Environment Agency to discharge its duty under regulation 6(2)(c) of those Regulations. The SOAF appears to be a tacit acknowledgment of the effect of the judgment, but its substantive content is inadequate to implement the requirements of the UWWTD and the 1994 Regulations, whether on its own or as a supplement to the September 2018 Guidance.

78. The OEP notes that the Environment Agency is now consulting on reducing the trigger investigation threshold from 60/50/40 discharges to 30/20/10 discharges based on data over 3, 2 and 1 years. If this is implemented then the OEP accepts that this will be sufficient to bring the Environment Agency into compliance with Ground One in the future because deeming a CSO to be unsatisfactory if it discharges more than 10 times in a year (after 3 years of data) will, on any estimation, allow for spills to occur only in exceptional circumstances as that equates to a spill occurring at least 37 days apart on average over the course of a year. The same cannot be said for a CSO that spills 40 times in a year (after 3 years of data) as that equates to a spill every 9 days. Accordingly, while the OEP alleges that the breach of environmental law particularised at Ground One continues to date, the non-compliance is likely to come to an end if the Environment Agency reduces trigger investigation thresholds as proposed.

**GROUND TWO**

79. ***As a result of Ground One, unlawfully exercising or failing to exercise the Environment Agency's function of setting permit conditions for discharges from network CSOs pursuant to the 2016 Regulations and their predecessors, by setting or allowing to persist conditions which were in fact insufficient to achieve compliance:***
    - ***(i) with the requirements of the 1994 Regulations, in particular regulation 6(2)(c) and/or Schedule 2, and***
    - ***(ii) (as a result of the above), with the requirements of regulations 3(1) and/or 3(2) of the 2017 Regulations.***

80. As set out above, Ground One is about the Environment Agency's failure to devise ***guidance about the setting of permit conditions*** for CSOs which is consistent with the UWWTD and the 1994 Regulations. Ground Two is about the ***setting of permit conditions***.

81. The first limb of Ground Two is that the Environment Agency has failed to set permit conditions in accordance with the UWWTD and the 1994 Regulations.

82. The second limb of Ground Two is that the Environment Agency has failed to set permit conditions in accordance with the requirements of regulations 3(1) and/or 3(2) of the 2017 Regulations.

***Ground Two(i) Failing to set permit conditions in accordance with the UWWTD and the 1994 Regulations***

83. If a CSO is spilling too frequently, the regulatory tools available to the Environment Agency include to impose a new condition in the CSO's environmental permit which requires that the CSO is only permitted to spill in compliant circumstances (typically, current permit conditions will require that a spill only occurs when a higher volume of sewage is passing through the network of sewage pipes or stipulated storage of wastewater has been provided and exhausted). Discharging in breach of the conditions imposed in the permit is an offence under Regulation 38 read with Regulation 12 of the 2016 Regulations (see paragraph 10 above). Requiring additional capacity in the sewage network will inevitably involve some expenditure by the sewerage undertaker.

84. Given the Environment Agency's failure to devise guidance on setting conditions for CSOs in terms consistent with the UWWTD and the 1994 Regulations, it is inevitable that the Environment Agency has accordingly failed to set permit conditions which were in accordance with the UWWTD and the 1994 Regulations and that this failure extends from 1994 until the present date and so covers permits the improvement of which was the intention of and was driven by the SOAF and/or the September 2018 Guidance and preceding guidance (such as the Environment Agency's AMP2 Guidelines from 1994).

85. In addition, even in the case of those CSOs identified as "unsatisfactory" by the SOAF, and for which a BTKNEEC solution exists, the Environment Agency has not set remedial permit conditions. Paragraph [140] of Holgate J's judgment in *WildFish* confirms, for instance, that of the 598 outfalls for which the Environment Agency has carried out a cost benefit analysis, "*improvement schemes which did pass that [cost benefit] test were identified for 472 overflows of which 53 have already been introduced into the improvement programme*". Notwithstanding that this passage from the *WildFish* judgment is not limited to network CSOs (which are the subject of this investigation by the OEP), this therefore suggests that the vast majority (79%) of the outfalls that have been identified under the SOAF as "unsatisfactory" (which, as set out above is not in itself a lawful way of identifying non-compliant CSOs), have merited improvement works being carried out to them. It appears though that at the time of the *WildFish* judgment none of those CSOs had yet had their permits amended by the Environment Agency and only 53 CSOs had been entered into the improvement programme. With reference to network CSOs in particular, in the Environment Agency's response of 6 November 2023 to the OEP's Information Notice, the Environment Agency stated that 1,606 CSOs had been assessed or were being assessed under the SOAF, for 283 CSOs the SOAF cost benefit analysis had concluded that an improvement scheme was required, 40 CSOs were identified for improvement by 2025 and only one scheme had been delivered and the permit varied. Whatever the exact numbers involved this shows that there are hundreds of CSOs which are non-compliant with the UWWTD and the 1994 Regulations, over

20 years after such compliance should have been achieved and maintained for all CSOs serving agglomerations with a population greater than 15,000. The Environment Agency accepts that '*the permit variations identified via the SOAF have not been implemented at sufficient pace*' (§35(c) Environment Agency response of 1 October 2024 to the Position Statement).

86. In conclusion as to Ground Two(i), the Environment Agency has been and is under a duty under regulation 6(2)(c) of the 1994 Regulations "to secure" the limitation of pollution of receiving waters due to storm water overflows, which it can do through the application of conditions to permits imposed on undertakers through the 2016 Regulations. As CSOs have been spilling excessively (in both volume and frequency), the Environment Agency is thus in breach of its obligations either by a failure to set permit conditions correctly in the first place (i.e. upon consenting a new discharge for the first time), or upon the first attempt at implementation of the UWWTD during AMP3 in 2000-2005 (in the case of pre-existing discharges), or by subsequent failure to correct matters by a combination of monitoring, review, modification, and revocation. The handing down by the CJEU of the decision in 2012 in Case C-301/10 was an obvious time when the Environment Agency should have taken stock, considered whether implementation in practice of the requirements of the UWWTD was being achieved, and concluded that it was not. The Environment Agency's failure to do so was a serious failure to comply with environmental law.

***Ground Two(ii) Failing to set permit conditions in accordance with the requirements of regulations 3(1) and/or 3(2) of the 2017 Regulations***

87. Regulations 3(1) and 3(2) of the 2017 Regulations require that the Environment Agency must exercise relevant functions so as to secure compliance with the requirements of, amongst other legislation, the Water Framework Directive ('the WFD'). They also require that the Environment Agency must decide whether to grant, vary or revoke, or impose conditions (and if so which conditions) on permits so as to prevent deterioration of the surface water status of a waterbody and to otherwise support the achievement of the environmental objectives set for a body of water. They repeal and re-enact in essentially similar terms regulations 3(1) and 3(2) of The Water Environment (Water Framework Directive) (England and Wales) Regulations 2003, which came into force on 2 January 2004.

88. The requirements of the WFD which regulations 3(1) and 3(2) refer to includes that contained at Article 10(2)(a). Article 10(2)(a) of the WFD requires Member States to ensure the establishment and/or implementation of the emission controls based on best available techniques contained in measures which include the UWWTD albeit from 31 December 2020 (IP Implementation Day) this obligation was no longer in place in the UK (see paragraph 6 of Schedule 5 of the 2017 Regulations as amended):

> *Member States shall ensure the establishment and/or implementation of:*
> *(a) the emission controls based on best available techniques,*
> *…*

*set out in:*

*3 Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (2),*

89. Regulation 3(1) of the 2017 Regulations thus imposes a specific duty upon the Environment Agency to exercise its functions in relation to the 1994 Regulations and the 1991 Act so as to secure compliance with the WFD which, in turn, required the establishment and/or implementation of emission controls based on best available techniques in measures including the UWWTD to achieve the requisite degree of limitation of pollution of receiving waters. As set out above, this requires that overflows are permitted to spill only in "exceptional circumstances" unless the absence of a BTKNEEC solution is demonstrated.

90. For the reasons set out at paragraphs 13-35 above the Environment Agency has not secured compliance with this requirement of the WFD because, in the period up until 31 December 2020, network CSOs were not permitted so as to spill only in "exceptional circumstances" unless the absence of a BTKNEEC solution is demonstrated.

91. In conclusion as to Ground Two, permit conditions for CSOs were set by the Environment Agency in a manner which was not compliant with the requirements of the 1994 Regulations and the requirements of the 2017 Regulations.

**GROUND THREE**

92. ***Unlawfully failing to exercise properly or at all, in relation to discharges from network CSOs, its functions of review, inspection and/or modification and/or revocation of permits pursuant to its duty under regulation 6(3) of the 1994 Regulations and regulation 34(1) and (2) of the 2016 Regulations so as to achieve compliance with regulation 6(2)(c) of and Schedule 2 to the 1994 Regulations.***

93. Regulation 6(3) of the 1994 Regulations requires the Environment Agency, at regular intervals, to "*review and if necessary for the purpose of complying with the regulations, modify or revoke consents*".

94. Compliance with regulation 6(2) includes securing "*the limitation of pollution of receiving waters due to storm water overflows*". That means to the extent required by Schedule 2, which implements the UWWTD, whose requirements are explained in Case C-301/10.

95. Regulation 34(1) of the 2016 Regulations requires the Environment Agency to periodically review environmental permits.

96. This Ground arises from the fact that the Environment Agency has not demonstrated any evidence of a system for carrying out the review of permits for network CSOs specifically in order to discharge its duty under regulation 6(3) of the 1994 Regulations, nor for the periodic review and inspection of CSOs as regulated facilities pursuant to regulation 34(1) and (2) of the 2016 Regulations.

97. As a starting point, that process of review, inspection and/or modification and/or revocation of a permit must require some form of investigation and monitoring of the discharges which are taking place from the CSO which the permit controls. This will take place with a view to becoming informed as to whether the CSO's operation by the undertaker, even if in accordance with its permit, is achieving continuing compliance with the UWWTD and the 1994 Regulations and thus compliance by the Environment Agency with its duty under regulation 6(2).

98. The OEP notes that the Environment Agency has suggested (at p11-12 of its response to the OEP's Information Notice) that it has in place a system of permit reviews and that by the end of 2026 all 14,480 storm overflows permits will have been subject to review and variation. However, it remains unclear to the OEP of what, exactly, these 'reviews' consisted and whether they included asking whether the lawful operation of the CSO is achieving compliance with the UWWTD and the 1994 Regulations by the undertaker and thus compliance by the Environment Agency with its duty under regulation 6(2)(c) of the 1994 Regulations. Indeed, the Environment Agency suggests that the 'majority' of such reviews consisted simply of adding EDM monitoring and reporting conditions onto the permits, or general "modernisation". Modifying a permit solely to add conditions relating to EDM into the permit or modernising the terms of the permit is not the same as amending the permit in a substantive way so as to ensure compliance with the 1994 Regulations.

99. At §44 of the Environment Agency's response of 1 October 2024 to the Position Statement the Environment Agency asserts that 4,000 reviews were commenced between 2020 and 2023 in relation to storm overflows (so covering more than just network CSOs) but no detail is provided of the process and content of permit reviews from 2005 (when compliance with the UWWTD should have been achieved) and from 2012 (when the two-stage test to assess compliance was made plain by the CJEU in the 2012 judgment). It is striking that the SOAF assessment programme, although deficient for the reasons set out above, was said in the *WildFish* judgment to have resulted in 472 outfalls (of the 598 outfalls, where a cost benefit analysis had been carried out), being determined to be 'unsatisfactory' and to require improvement. That strongly suggests that had proper review and inspection taken place in the years prior to the SOAF being implemented then there would have been considerably more modification and/or revocation of permits. While, as the Environment Agency admits (see §35(c) response of 1 October 2024 to the Position Statement) the pace of implementation of the permit variations after SOAF assessment has taken place is too slow, this is not just a problem of *implementation* but is a failure of *identification*. The Environment Agency appears to state that its reviews focus '*on operation [of CSOs'] during dry weather*' (§43 Environment Agency response of 1 October 2024 to the Position Statement). While this approach may capture the worst performing CSOs (i.e. the ones which discharge in dry weather), as set out above, this will not amount to a proper review of permits so as to achieve compliance with regulation 6(2)(c) of and Schedule 2 to the 1994 Regulations. How the Environment Agency reviewed, inspected modified and revoked permits so as to achieve compliance in all the years before the advent of EDM is simply not explained by the Environment Agency.

100. The current position is that, more than 20 years after compliance with the UWWTD and the 1994 Regulations was required in law for all agglomerations with a population greater than 15,000, there is a demonstrable widespread lack of compliance as a result of the operation to date of the SOAF and the inevitability of more, as yet unrevealed, lack of compliance.

**WHY THE FAILURES IDENTIFIED ABOVE ARE SERIOUS**

101. The OEP considers that the failures identified above are continuing ones (save in respect of Ground Two(ii)) and serious.

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

103. The OEP considers that the Environment Agency's failures at Grounds One to Three are serious for the following reasons:

(a) **Point of law** – the failures raise points of law of general public importance as they relate to the overall regulation of thousands of network CSOs in England. As set out in the descriptions of breach above, the misunderstanding and/or misinterpretation of environmental law has affected the regulatory approach taken by the Environment Agency. Devising guidance on the setting of permit conditions and then the setting of permit conditions themselves represent a core part of the Environment Agency's function and the legal obligation on the Environment Agency to draft guidance and set permit conditions which accurately reflect the obligations under the UWWTD and the 1994 Regulations was an essential part of the Environment Agency's responsibility. Its failure to do so makes this a serious breach of environmental law as the imposition of permit conditions are the principal way in which the performance of CSOs is controlled. As the SOAF and the September 2018 Guidance do not correctly identify CSOs which require improvement the result is that CSOs were permitted to discharge untreated sewage when such discharges were not appropriate.

(b) **Frequency of conduct** – the OEP considers that the conduct has been frequent because it covers the entire period from the coming into force of the 1994 Regulations on 30 November 1994 and it continues to date for Grounds One, Two(i) and Three and until 31 December 2020 for Ground Two(ii). This long-lasting failure applied across all network CSOs which the Environment Agency permitted through the use of environmental permits.

(c) **Behaviour of public authority** – In response to the OEP's investigation and in correspondence with the OEP the Environment Agency has not accepted that it failed to comply with environmental law. The Environment Agency has stated that it intends to make certain changes which are beneficial such as, for instance, changes to the SOAF as stated above. These changes will be beneficial as, for instance, the trigger above which CSOs will be investigated is intended to be substantially reduced. However,

while the Environment Agency contends that it has made and will continue to make further changes to its approach to permit guidance and to permits, the Environment Agency does not accept that these changes are required to achieve compliance with environmental law and so the OEP is concerned that the basis for the changes the Environment Agency intends to make is not appropriately thought through or consistent with the correct legal position. With specific reference to Ground Three, in addition to the points set out above, the duty to inspect, modify and/or revoke permits was particularly appropriate after the CJEU passed judgment in 2012 on the proper interpretation of the UWWTD. From that point until now, network CSOs have not been the subject of a specific review in order to discharge the Environment Agency's duty under regulation 6(3) of the 1994 Regulations, nor subjected to periodic review and inspection of CSOs as regulated facilities pursuant to regulation 34(1) and (2) of the 2016 Regulations.

(d) **Risk of harm and actual harm** – The discharge of untreated sewage from network CSOs can harm the environment, human health and the amenity value of water bodies. Any failure to adequately permit CSOs and their discharges has the potential to have serious implications for the environment. On the present facts, the OEP is satisfied on a balance of probabilities that the above failures on the part of the Environment Agency (in conjunction with those of the Secretary of State and Ofwat) materially contributed to the current, chronic and unacceptable state of affairs, now clearly demonstrated by the roll-out of EDM data, concerning the frequency of discharges from network CSOs and their effect upon receiving waters and the lack of any effective regulatory activity, individually or collectively, by any of those regulators to prevent such a state of affairs from arising or persisting after the long past deadlines for implementation of the UWWTD. It appears inevitable that the consequences for the environment will not be fully remedied for a long period into the future

## STEPS WHICH THE ENVIRONMENT AGENCY SHOULD TAKE TO REMEDY, MITIGATE OR PREVENT REOCCURRENCE OF THE FAILURE

104. The OEP considers that the Environment Agency should:

(a) forthwith, and whether or not it has adopted or published updated guidance, operate in accordance with the legal position set out at paragraphs 13-78 above, and
(b) by 30 April 2025 revise and update the SOAF and any additional guidance which it uses to identify non-compliant network CSOs and to set permit conditions for network CSOs. The revised guidance should properly and adequately set out the Environment Agency's approach and requirements in a manner which is consistent with the legal position set out at paragraphs 13-78 above.

This is a relevant step to remedy and prevent reoccurrence of Grounds One and Two set out above.

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

    (a) which reflect proper regulation of discharges from network CSOs, in line with the legal position set out in paragraphs 13-78 above and in the Decision Notices given by the OEP to Ofwat and the Secretary of State, and
    (b) which include arrangements for improved cooperation and the exchange of information on the performance of the sewerage undertakers under section 94 of the 1991 Act and regulation 6 of the 1994 Regulations which effectively supports all parties in regulating network CSO discharges in accordance with that legal position.

    This is a relevant step to remedy and to prevent reoccurrence of Grounds One and Two set out above. The OEP notes, and welcomes, the Environment Agency's indication that it will issue updated Memoranda of Understanding.

106. The OEP considers that the Environment Agency should set, vary and modify permit conditions for network CSOs in a manner consistent with lawful guidance as to the setting of such permit conditions. This should be done by the earliest possible date so as to reflect and remedy the failure (which has persisted since 2005 at the latest) to achieve compliance with the UWWTD and the 1994 Regulations. This is a relevant step to remedy and prevent reoccurrence of Ground Two. The OEP notes and welcomes the Environment Agency's indication that it is in the process of updating the relevant permits but for the reasons set out above at paragraphs 96-100 the present extent and rate of progress of setting, variation and modification of permits does not constitute lawful discharge of the Environment Agency's duty under regulation 6(2)(c) 1994 Regulations.

107. As set out in Annex 1 and above at paragraphs 59-78, many CSOs have been subjected to the SOAF process and a BTKNEEC-compliant solution has been identified for them. With regards to these CSOs, the Environment Agency should ensure that the permit conditions are appropriately amended and that the relevant sewerage undertaker implements BTKNEEC-compliant schemes forthwith so as to avoid discharges which are in breach of section 94 1991 Act and/or the 1994 Regulations. This is a relevant step to remedy and prevent reoccurrence of Ground Two.

108. As set out in Annex 1 and above at paragraphs 59-78, the SOAF has identified CSOs for investigation based on exceedance of a certain number of spills per year (ranging from 60 spills per year based on one year's data down to 40 spills per year based on three or more years' data). The Environment Agency should consider, in its updated guidance and when imposing or modifying permit conditions, the imposition of a global single annual spill limit above which a CSO is deemed 'unsatisfactory' for the purpose of further investigation and improvement. The stipulated limit should have regard to and be consistent with,

both the requirement that discharges must occur only in "exceptional circumstances'" and the requirement that it will be "by way of exception only" that there is no BTKNEEC solution. The OEP suggests, in the first instance, that such a figure is based on the reference in Case C-301/10 to 20 spills per year (Judgment at [79], Advocate-General's Opinion at [81] – [84]). This is a relevant step to remedy and prevent reoccurrence of Ground Two. The OEP notes the Environment Agency's proposed change to its SOAF (about which it is consulting with relevant stakeholders) to reduce the trigger investigation threshold to 10 spills per year for those CSOs with more than three years of EDM data. If the SOAF is amended by 30 April 2025 so as to set trigger thresholds of 30/20/10 spills per year this will represent an appropriate remediation so far as this investigation is concerned. Adoption of such an annual spill limit approach is a permissible manner of achieving compliance under the 1994 Regulations, being expressly sanctioned by footnote 1 to Annex 1 of the UWWTD. Once so identified, a CSO will undergo case-by-case analysis to assess whether a particular CSO lacks a BTKNEEC solution. The setting of such a minimum threshold for investigation will also have obvious benefits in terms of providing regulators and the industry with a clear, robust and readily demonstrable threshold above which CSOs will be investigated.

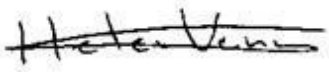
109. The Environment Agency must ensure, whether by means of devising guidance or otherwise, that it keeps under review and inspects CSOs and permits and modifies and/or revokes permits pursuant to its duty under regulation 6(3) of the 1994 Regulations and regulation 34(1) and (2) of the 2016 Regulations. The frequency and nature of such reviews must be consistent with compliance with its duty under regulation 6(2)(c) of the 1994 Regulations as set out in Ground One above. This is a relevant step to remedy and prevent reoccurrence of Ground Three set out above.

## LINKED NOTICES

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

## DATE FOR RESPONSE

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



Helen Venn
For and on behalf of the Office for Environmental Protection

Chief Regulatory Officer
The Office for Environmental Protection
Email: Helen.Venn@theoep.org.uk

Office for Environmental Protection

www.theoep.org.uk

# ANNEX 1

## THE LEGAL FRAMEWORK

### The Water Industry Act 1991

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Section 19 ("Exceptions to duty to enforce")*

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

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

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

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

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

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

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

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

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

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

14. Subsection (3) as enacted provided that:

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

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

**The Water Resources Act 1991**

*Section 85 ("Offences of polluting controlled waters")*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Schedule 2 ("Requirements for Collecting Systems")*

25. Paragraph 2 of Schedule 2 required that:

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

**The Environment Act 1995**

*Section 1 ("The Environment Agency")*

26. Section 1 established the Environment Agency.

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

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

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

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

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

*Regulation 3 ("The general duties")*

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

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

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

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

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

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

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

*The 2007 Regulations*

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

*The 2010 Regulations*

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

(1) repealed and replaced the 2007 Regulations;

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

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

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

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

34. The 2010 Regulations provided at regulation 12:

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

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

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

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

*The 2016 Regulations*

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

    (1) repealed and replaced the 2010 Regulations;

    (2) remain extant;

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

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

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

*Regulation 3(1)*

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

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

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

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

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

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

**The Environment Act 2021**

*Section 80*

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

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

## THE FACTUAL FRAMEWORK

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

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

46. On 21 May 1991 the UWWTD was made.

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

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

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

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

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

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

(iv) operates in dry weather conditions;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

identified bathing waters;

(iv) operates in dry weather conditions;

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

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

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

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

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

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

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

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

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

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

Despite this, Ofwat remained of the view that:

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

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

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

67. By 31 December 2005:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[3] "Unsatisfactory Intermittent Discharges".

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We released two additional KPIs:

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

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

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

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

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

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

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

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

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

(1) at paragraph 2.3.3.1:

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

(2) at paragraph 2.3.3.6:

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

(3) In Annex 1:

> "The Water Companies should also ensure no storm overflow

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

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

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

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

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

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

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

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

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

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

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

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

(2) in section 1.5:

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

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

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

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

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

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

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

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

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

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

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

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

87. In July 2015:

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

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

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

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

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

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

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

The guidance further stated that:

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

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

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

on the number of years of data available:

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

... ... ... ...

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

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

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

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

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

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

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

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

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

93. The SOAF explains its purposes as follows:

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

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

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

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

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

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

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

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

96. The document stipulates that:

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

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

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

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

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

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

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

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

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

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

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

reported in the EPA."

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

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

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

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

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

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

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

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

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

| | |
|---|---|
| 50 - 100 | 15.1% |
| > 100 | 8.1% |

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

companies."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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