

Information Notice



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

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

CMS-256

7 September 2023

Dear Mr Black,

Investigation of complaint against Ofwat – untreated sewage discharge by sewerage undertakers via network Combined Sewer Overflows – Information Notice

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

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

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

I look forward to hearing from you.

Yours sincerely,



Natalie Prosser

Chief Executive

For and on behalf of the Office for Environmental Protection



www.theoep.org.uk

Information Notice
Section 35, Environment Act 2021

Public Authority: Ofwat

Date of this Notice: 7 September 2023

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

Case reference: CMS-256

1. Background

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

2. Description of alleged failures

2.1 This Information Notice relates to the following alleged failures of Ofwat to comply with environmental law:

2.1.1 unlawful failure to take proper account of environmental law when exercising its functions, by misunderstanding:

2.1.1.1 the true legal extent of the duties upon sewerage undertakers under section 94 of the Water Industry Act 1991 ('the 1991 Act') (as extended by the Urban Waste Water Treatment (England and Wales) Regulations 1994 ('the 1994 Regulations'));

2.1.1.2 the true legal extent of its duty under section 18 of the 1991 Act (as qualified by section 19) to make enforcement orders in the case of contraventions by sewerage undertakers of section 94 of the 1991 Act

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

- 2.1.2 (whether as a result of 2.1.1 or otherwise) unlawfully failing to exercise its functions under section 18 of the 1991 Act by the making of enforcement orders in respect of known contraventions of section 94, when it was under a legal duty to do so.

Errors of Law

- 2.2 The alleged failure at 2.1.1 appears to have arisen from an unduly restrictive approach to the interpretation of the duty on sewerage undertakers under section 94 of the 1991 Act and a misinterpretation of the extent of Ofwat's duty under section 18 of that Act. The effect of these interpretations on the implementation of Ofwat's duties is set out below.

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

- (a) *to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and*
- (b) *to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.*

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

- (2) *Subject to paragraph (3) below, the duty imposed by subsection (1)(a) of the said section 94 shall include a duty to ensure that collecting systems which satisfy the requirements of Schedule 2 are provided—*
 - (a) *where the urban waste water discharges into receiving waters which are a sensitive area, by 31st December 1998 for every agglomeration with a population equivalent of more than 10,000; and*
 - (b) *without prejudice to sub-paragraph (a) above-*
 - (i) *by 31st December 2000 for every agglomeration with a population equivalent of more than 15,000; and*
 - (ii) *by 31st December 2005 for every agglomeration with a population equivalent of between 2,000 and 15,000*

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

- 2.5 Schedule 2 in turn sets out requirements for collecting systems as follows:

1. *Collecting systems shall take into account waste water treatment requirements.*
2. *The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding—*
 - (a) *volume and characteristics of urban waste water;*
 - (b) *prevention of leaks;*
 - (c) *limitation of pollution of receiving waters due to storm water overflows.*

2.6 Section 18 of the 1991 Act provides, so far as relevant:

- (1). *... where ...the Secretary of State or the Authority is satisfied-*
 - (a) *that that company ... is contravening—*
 - (i) *...*
 - (ii) *any statutory or other requirement which is enforceable under this section and in relation to which he or it is the enforcement authority;*
 - or*
 - (b) *that that company... is likely to contravene any such condition or requirement, he or it shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement.*

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

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

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

4.22 In considering whether a company may have breached its obligations under section 94(1) of the WIA91, we will look at whether:

- *there has been a systemic failure by the company to comply with its obligations; and*
- *the actions of the company were the actions to be expected of a reasonable company*

4.24 All breaches of permit conditions are subject to the Environment Agency's enforcement policy. Our focus is different. We are unlikely to consider individual breaches as being indicative of a breach of a sewerage company's general duty under section 94 of the WIA91.

4.25 However, where breaches or risks of breaches are numerous, widespread or persist over an extended period, we are likely to view this as being indicative of a systemic failure to make appropriate provision for effectually dealing with the contents of sewers, constituting a breach of section 94 of the WIA91.

2.10 The duty on sewerage undertakers under section 94 of the 1991 Act (as supplemented by regulation 4 of the 1994 Regulations) to ensure provision of collecting systems compliant with Schedule 2, is a specific duty, accompanied by a very specific enforcement mechanism in section 18 of the 1991 Act.

2.11 Ofwat's approach as set out at 2.9 above, amounts to the following errors of law:

2.11.1 Error as to the essential character of the duty under section 94 of the 1991 Act. Ofwat's approach confuses the question of what constitutes a breach of the duty under section 94 with the question of whether circumstances exist which qualify Ofwat's duty to make an enforcement order in respect of that breach. In particular, Ofwat interprets its duty as meaning that only 'systemic' failures are breaches at all. This is an erroneous approach; the question of whether a sewerage undertaker has breached its duty to 'effectually deal' with sewage under section 94 of the 1991 Act is a question of fact and if untreated sewage has been discharged outside of the 'exceptional circumstances' permitted under the 1994 Regulations (as confirmed by the Court of Justice of the European Union ('the CJEU') in *Commission v United Kingdom* Case C-301/10 ('Case C-301/10')), then there is a *prima facie* breach of that duty. This is separate from the question of whether Ofwat must then enforce, which must be considered by properly complying with the duty to enforce under section 18 of the 1991 Act by consideration of the exceptions under section 19 of that Act. The correct approach to the interpretation of the duty under section 18 of the 1991 Act is set out further below.

2.11.2 Error as to what is required to discharge the extension to the duty under section 94 of the 1991 Act duty imposed by regulation 4 of the 1994 Regulations. Regulation 4(2) of the 1994 Regulations places a duty on

sewerage undertakers to ensure the provision of urban collecting systems that are compliant with Schedule 2 of the 1994 Regulations, including the requirements of paragraph 2(c) of that Schedule concerning limitation of pollution of receiving waters due to storm overflows in the manner explained in Case C-301/10. Ofwat appears to have misunderstood the findings of the CJEU in that case by considering that discharges from network CSOs that are in accordance with permits issued by the Environment Agency are necessarily also compliant with the duty under section 94 of the 1991 Act. This is a misinterpretation of the section 94 duty, as supplemented by regulation 4 of the 1994 Regulations.

- 2.12 In relation to the alleged failure at 2.1.2, Ofwat appears to take the approach that the duty to take action under section 18 of the 1991 Act in the event of a breach of the section 94 duty of effectual drainage is a duty which only arises if the breach of section 94 is 'systemic'. Ofwat then appears to consider it has a discretion whether to act under section 18. However, any discretion enjoyed by Ofwat is created by, and consists solely of, the exceptions found in section 19 of the 1991 Act. Section 18 of the 1991 Act is engaged whenever Ofwat is presented with evidence of a failure effectually to drain a particular sewer, Ofwat must then consider whether any of the exceptions in section 19 of the 1991 Act are engaged in order to determine whether it must take enforcement action under section 18.

Failure to enforce

- 2.13 The result of the error identified at 2.9 above appears to explain the failure that is alleged at 2.1.2, namely that Ofwat has unlawfully failed properly to exercise its functions under section 18 of the 1991 Act as it has proceeded on the basis that the duty under section 18 is only engaged as a last resort in the most serious cases. For the reasons set out above, this is an incorrect interpretation of the duty under section 18. The correct position is that any identified breach of the section 94 1991 Act duty by the sewerage undertaker engages the section 18 enforcement duty, subject only to the exceptions in section 19 of the 1991 Act.
- 2.14 Save for Ofwat's current investigation concerning South West Water, during the preceding period of over 30 years since the duty under section 18 (and its predecessor, section 20 of the Water Act 1989) has been imposed upon Ofwat and its predecessor (the Director General of Water Services), neither Ofwat nor its predecessor has, so far as the OEP is aware, ever exercised its related powers of enforcement in relation to the operation of network CSOs, notwithstanding the decision in Case C-301/10, and not even in the case of the discharges at Whitburn with which that decision was directly concerned. The explanation provided by Ofwat for its non-activity in relation to Whitburn (see Ofwat's answer 23 in its letter dated 14 February 2023 to the OEP) is in terms consistent with its apparent misunderstanding of its duties and those upon the undertakers.

- 2.15 In arriving at the above view, the OEP has had particular regard to (1) the contents of the letter dated 3 February 2023 from the Directorate-General Environment of the European Commission to Mr. Robert Latimer concerning spills of untreated waste water at Whitburn (attached as Appendix 1 hereto) and (2) the data concerning spills at Whitburn found within that letter and in the judgement in Case C-301/10 (attached as Appendix 2 hereto).

3. Seriousness

- 3.1 Our Enforcement Policy explains how we will assess the seriousness of an alleged failure to comply with environmental law and can be found in Annex A of our Strategy: [Here](#).
- 3.2 We consider that the alleged failure at 2.1.1, if it occurred, would be serious for the following reasons:
- 3.2.1 Point of law – the alleged failure raises points of law of general public importance as it relates to the overall regulation of network CSOs in England. As set out at section 2 above, the misunderstanding and/or misinterpretation of environmental law has affected the regulatory approach of Ofwat. The coherent enforcement of the duty under section 94(1) of the 1991 Act, as supplemented by regulation 4 of the 1994 Regulations, is of increased importance since only the Secretary of State and Ofwat can take enforcement action against sewerage undertakers for breaches of that duty by virtue of section 18(8) of the 1991 Act. Any errors in the application of section 18 have the potential to remove the possibility of securing compliance through enforcement on a national scale.
- 3.2.2 Frequency of conduct – We consider that the conduct has been frequent and is ongoing to the extent that Ofwat's approach to enforcement in connection with network CSOs is affected by the alleged failure.
- 3.2.3 Behaviour of public authority – In response to the OEP's investigation and in correspondence to date there has been no acceptance of any failure to comply with environmental law by Ofwat or an attempt to remedy such failures.
- 3.2.4 Risk of harm – The discharge of untreated sewage can harm the environment, human health and the amenity value of water bodies. Any failure to adequately enforce an effective sewerage system and to ensure compliance with the requirements of section 94(1) of the 1991 Act (as supplemented by the 1994 Regulations) has the potential to have serious implications for the environment. Ofwat's self-limiting approach to considering 'systemic' breaches means that any singular or localised, and yet far from trivial, failure is removed from consideration. A failure to act increases the likelihood of recurrence of unlawful spills to the environment.

3.3 We consider that the alleged failure at 2.1.2, if it occurred, would be serious for the same reasons as outlined at 3.2 above.

4. Our request for information

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

4.1.1 Ofwat's response to each of the alleged failures to comply with environmental law set out at 2.1.1 and 2.1.2 above.

4.1.2 Any steps Ofwat intends to take in relation to each of the alleged failures to comply with environmental law set out at 2.1.1 and 2.1.2 above.

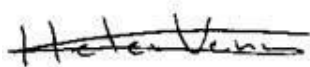
4.2 We draw your attention to your obligations under section 27 of the Environment Act 2021 regarding cooperation and the candid disclosure of information. You should also note section 43 of the Environment Act 2021, concerning the confidential handling of any information you provide to us.

5. Linked Notices

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

6. Date for response

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



Helen Venn

For and on behalf of the Office for Environmental Protection

Chief Regulatory Officer | Office for Environmental protection

The Office for Environmental Protection

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