

INVESTIGATION REPORT

**addressed to Ofwat in relation to its compliance with the Water
Industry Act 1991 regarding the regulation of network combined
sewer overflows**

December 2025

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Executive summary

Executive summary

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

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

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

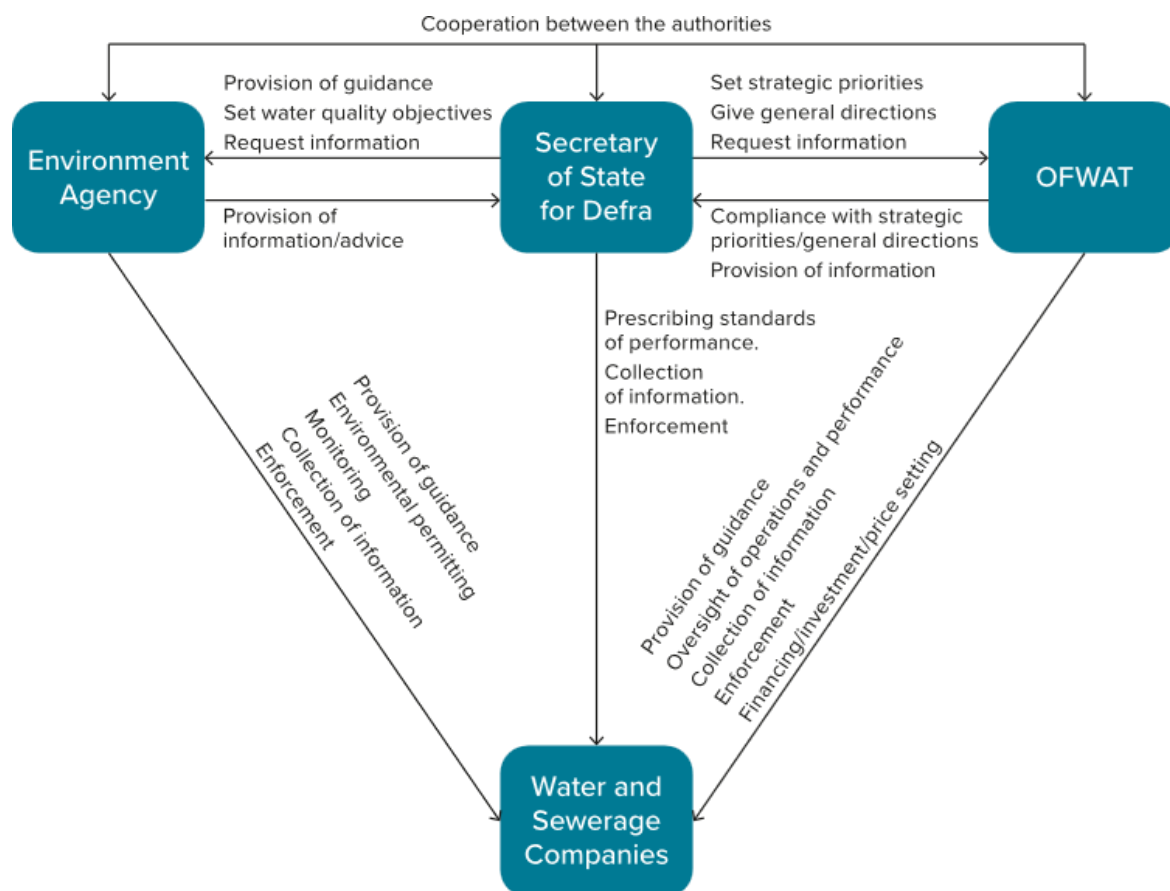


Figure 1: Overview of the interactions between the authorities and the WaSCs

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

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

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

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

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

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

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

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

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

Our Investigation

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

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

Findings

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

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

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

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

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

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

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

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

Actions

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

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

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

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

Next Steps

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

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

Defra should:

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

The Environment Agency should:

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

Ofwat (or any subsequent authority) should:

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

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

report. We will also remain engaged with sector reforms arising from the government's response to the Independent Water Commission's recommendations and consider how these developments influence our own recommendations.



Introduction

1. Introduction

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

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

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

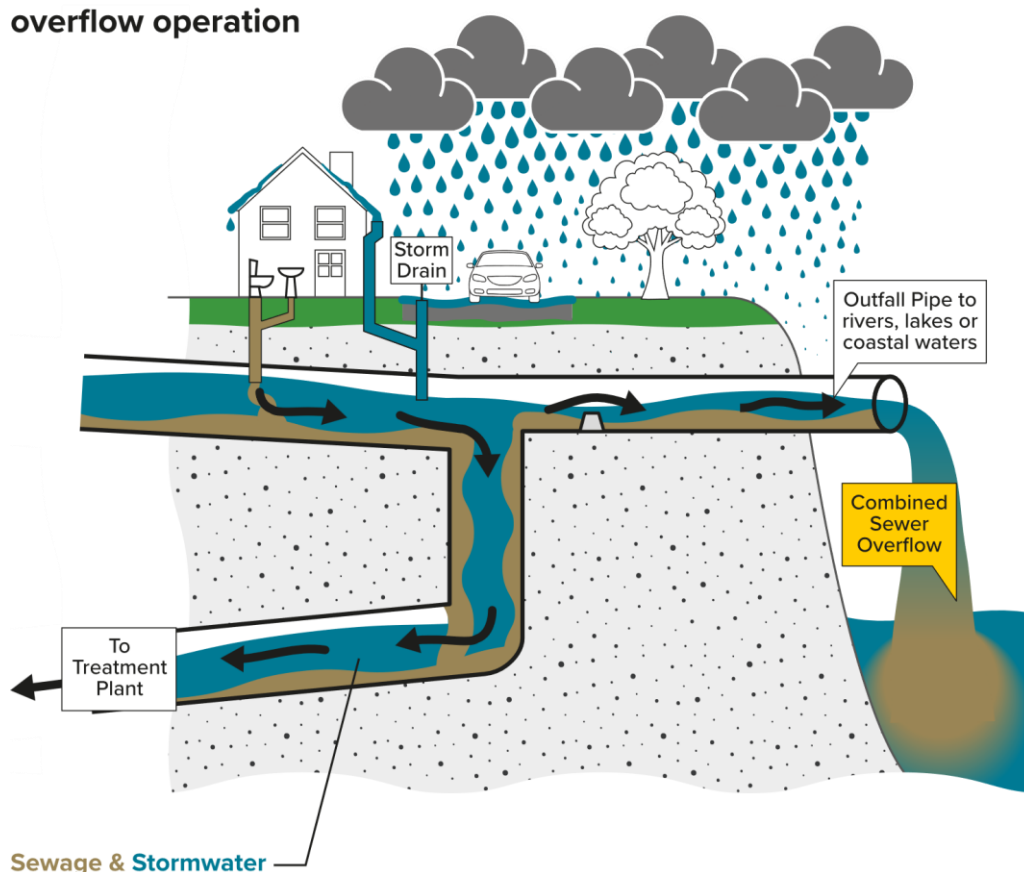
⁶ The complaint and information reviewed related to various issues regarding the regulation of wastewater by WaSCs. In November 2021, Ofwat and the Environment Agency launched investigations into the management of sewage treatment works by all WaSCs - Ofwat, 'Water companies could face legal action after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

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

Overflows from the sewerage system⁷

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

Combined sewer overflow operation



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

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

The regulatory framework

Secretary of State for Environment, Food and Rural Affairs

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

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

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

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

Environment Agency

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

Ofwat

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

¹⁰ Section 38 of the Environment Act 1995.

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

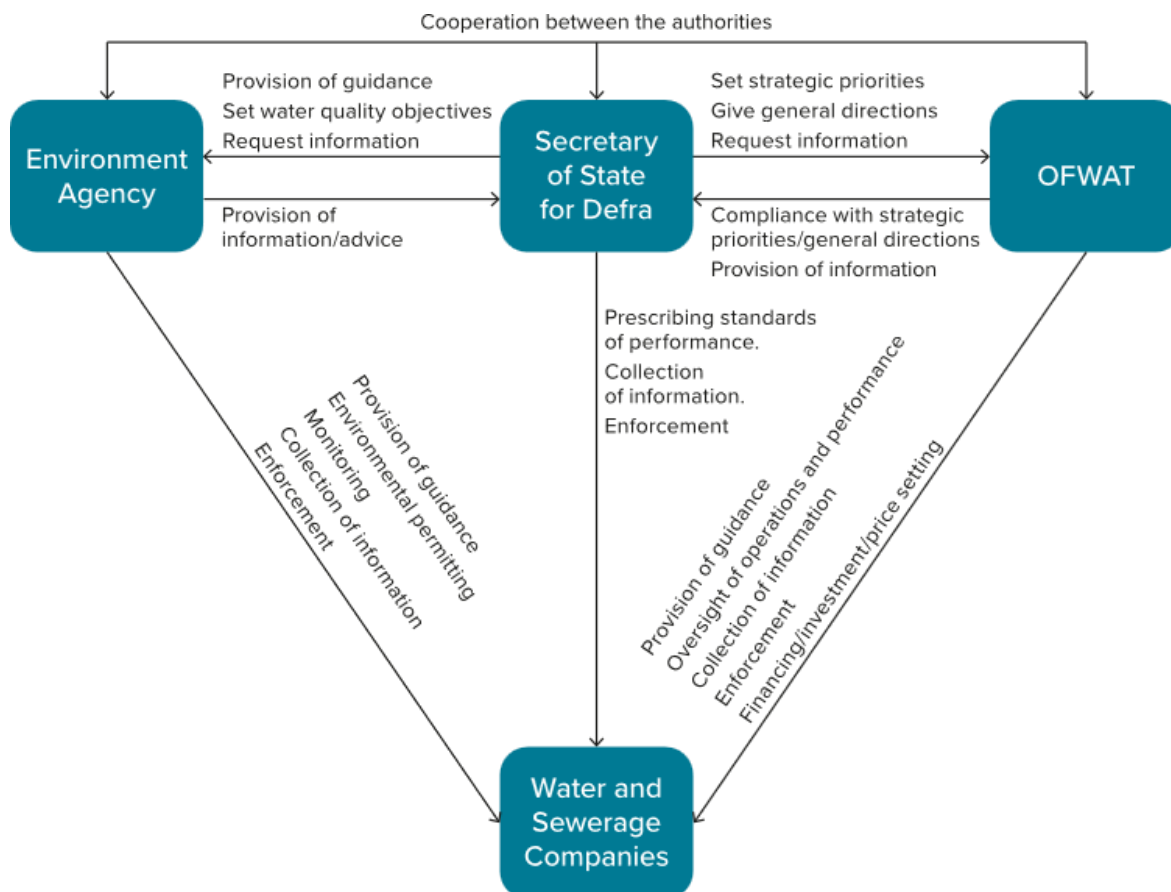


Figure 1: Overview of the interactions between the authorities and the WaSCs



Legal framework

2. Legal framework

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

The Water Industry Act 1991

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

(1) It shall be the duty of every sewerage undertaker -

(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers... as to ensure that that area is and continues to be effectually drained; and

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

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

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

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

(b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.

2.5 Section 94(3) provides that:

(3) The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above -

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Authority.

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

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

(1) ...where in the case of any company holding an appointment under Chapter I of this Part ...the Secretary of State or the Authority is satisfied-

(a) that that company... is contravening—

(i) ...

(ii) any statutory or other requirement which is enforceable under this section and in relation to which he or it is the enforcement authority;

or

(b) that that company... is likely to contravene any such ... requirement, he or it shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that ... requirement.

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

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

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

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

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

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

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

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

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

¹⁷ See art.1 of the UWWTD.

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

2.12 Schedule 2 provides that:

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

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

2.13 By 31 December 2005:

- (1) the UK was required by the terms of the UWWTD to have achieved full compliance with the requirements of the UWWTD;
- (2) sewerage undertakers were required pursuant to their duties:
 - (a) under regulation 4(2) of the 1994 Regulations (as part of their general duty of effectual drainage under section 94(1)(a) of the 1991 Act), to have ensured that collecting systems which satisfied the requirements of Schedule 2 to the 1994 Regulations were provided in urban areas;
 - (b) under regulation 4(4) of the 1994 Regulations (as part of their general duty of effectual treatment under section 94(1)(b) of the 1991 Act), to have ensured that waste water entering those collecting systems was, before discharge, subject to treatment at a treatment works in accordance with regulation 5.

Relevant case law

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

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

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

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

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

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

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

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

¹⁹ *ibid* [52].

²⁰ *ibid* [54].

²¹ *ibid* [56].

²² *ibid* [58].

²³ *ibid* [64].

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

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

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

<https://assets.publishing.service.gov.uk/media/631063778fa8f5448a3836e4/Storm_Overflows_Discharge_Reduction_Plan.pdf> accessed 03/12/2025. See 3.27 of this report for a summary of the SODRP.

²⁶ *R (on the application of WildFish Conservation) v Secretary of State for Environment, Food and Rural Affairs*; *R (on the application of Marine Conservation Society and others) v Secretary of State for Environment, Food and Rural Affairs* [2023] EWHC 2285 (Admin), at [187].

The background of the slide is a solid blue color with a repeating pattern of stylized, light blue leaves or feathers. The pattern is symmetrical and covers the entire area.

Factual background

3. Factual background

Background to the investigation

- 3.1 In Chapter 1 we note that a complaint was received by the Interim OEP on 13 September 2021 from the Salmon and Trout Conservation Trust (now known as WildFish).
- 3.2 Between April 2021 and November 2021, we also received complaints alleging failures by the Environment Agency to enforce permit conditions at two specific CSO sites.²⁷ We assessed the issues raised by these complaints together with those in the complaint from WildFish. We noted the commencement of a joint investigation by the Environment Agency and Ofwat into sewage treatment works in November 2021.²⁸ Also, in March 2022, Defra launched a consultation on the SODRP.²⁹ Tackling storm overflows in England was noted as a government priority and producing such a plan was a legal requirement introduced under section 80 of the 2021 Act.
- 3.3 The OEP published its first strategy and enforcement policy on 23 June 2022.³⁰
- 3.4 We considered the complaints noted above and other publicly available information and determined that there were indications of potential failures to comply with environmental law by the Secretary of State, Ofwat and the Environment Agency in relation to monitoring and enforcement of the management of sewage by WaSCs. We also determined that, if they had occurred, those failures would be serious given that the issues were of public importance, had been on-going for many years, and the pollution of watercourses by untreated sewage causes serious harm to the environment.
- 3.5 On 28 June 2022, the OEP launched an investigation under section 33 of the 2021 Act into potential failures to comply with environmental law by Ofwat, the Environment Agency and the Secretary of State in the regulation of CSOs in England. For Ofwat, there was an indication of a failure to comply with the enforcement duty under section 18 of the 1991 Act.

²⁷ Hendon Wastewater Treatment Works and Whitburn CSO

²⁸ Ofwat, 'Water companies could face legal action after investigation launched into sewage treatment works' (18 Nov 21) <<https://www.ofwat.gov.uk/joint-ofwat-environment-agency-and-defra-announcement-november-2021/>> accessed 03/12/2025; and [Department for Environment, Food & Rural Affairs](#), 'Water companies could face legal action after investigation launched into sewage treatment works' (18 November 2022) <<https://www.gov.uk/government/news/water-companies-could-face-legal-action-after-investigation-launched-into-sewage-treatment-works>> accessed 03/12/2025.

²⁹ Defra, 'Consultation on the Government's Storm Overflow Discharge Reduction Plan' (2022) <<https://consult.defra.gov.uk/water-industry/storm-overflows-discharge-reduction-plan/>> accessed 03/12/2025.

³⁰ OEP, 'Our Strategy and Enforcement Policy' (23 June 2022) <<https://www.theoep.org.uk/report/our-strategy-and-enforcement-policy>> accessed 03/12/2025.

- 3.6 From June 2022 to September 2023 we engaged with the public authorities, via meetings and correspondence, to gather information and further assess the issues. We received and reviewed a significant amount of detailed information from multiple information requests.
- 3.7 We can give an information notice where we have reasonable grounds for suspecting a serious failure to comply with environmental law by a public authority.³¹ Public authorities must respond in writing to such notices and must provide the information requested so far as it is reasonably practicable to do so.
- 3.8 Having considered the evidence available, we determined that we had reasonable grounds for suspecting failures to comply with environmental laws by all three of the public authorities.
- 3.9 We gave information notices to each of the public authorities on 7 September 2023 ('the Information Notices') setting out the details of those alleged failures.
- 3.10 A copy of the Information Notice sent to Ofwat is published alongside this report. In summary, the notice set out the following grounds:
- i) Misunderstanding of sections 94 and 18 of the 1991 Act with regards to duties on sewerage undertakers and Ofwat's duty to make enforcement orders
 - ii) Failure to exercise Ofwat's duty under section 18 of the 1991 Act to make enforcement orders.
- 3.11 The recipients of an information notice are required to respond within two months. Ofwat responded to the Information Notice on 7 November 2023 and denied that there had been any failure to comply with environmental law as set out in the notice, with reasons.
- 3.12 As set out in our Enforcement Policy, we take a proportionate approach and aim to resolve any non-compliance through cooperation, dialogue and agreement at every stage of the investigatory and enforcement processes. We held several meetings with the public authorities between March and September 2024 to understand in greater detail the respective positions of the parties in relation to the legal issues identified in the Information Notices.
- 3.13 The OEP may give a decision notice to a public authority if the OEP is satisfied, on the balance of probabilities, that the public authority has failed to comply with environmental law, and it considers that the failure is serious.³² A decision notice may only be given after an information notice.³³ It must contain a description of the failure to comply, an explanation as to why the OEP

³¹ Section 35 of the Environment Act 2021.

³² Section 36(1) of the Environment Act 2021.

³³ Section 36(5) of the Environment Act 2021.

considers it to be serious and steps the OEP considers the authority should take in relation to the failure identified.³⁴

- 3.14 Having considered the evidence available and the responses from the public authorities, we determined that on the balance of probabilities, all three public authorities had failed to comply with environmental law and that these failures were serious and mostly ongoing. The OEP gave decision notices accordingly to each of the public authorities on 12 December 2024 ('the Decision Notices').
- 3.15 A copy of the Decision Notice given to Ofwat is published alongside this report. The notice made findings of failure to comply with environmental law in relation to each of the grounds set out in the Information Notice and summarised at 3.10 above.³⁵ The Decision Notice also explained why we considered these failures to be serious. This related to points of law of general public importance, the risk of harm to the natural environment, the frequency of conduct over time, and the behaviour of the public authority:
- i) We considered that the misunderstanding or misapplication of environmental law had affected how Ofwat exercised its enforcement duty. This is an important issue because only Ofwat and the Secretary of State have the authority to take enforcement action against WaSCs for certain legal breaches. If the law is applied incorrectly, it can prevent enforcement from occurring and undermine compliance across the sector. These failures raise points of law of general public importance, as they affect the regulation of thousands of network CSOs in England.
 - ii) We considered the conduct to be frequent and long-standing because it spanned the entire period referenced in the notice. This failure affected all network CSOs whenever they discharged in such a way that compliance with the 1991 Act and 1994 Regulations was not achieved.
 - iii) In response to our investigation, Ofwat acknowledged that it could have approached a previous investigation decision differently and indicated it would take steps to address the failures identified in the Information Notice. These include updating its enforcement guidance, continuing investigations and enforcement where appropriate, and improving coordination with other regulators. We considered Ofwat's actions to be neutral when assessing seriousness, as they neither worsened nor minimised the identified failures.
 - iv) We considered that the discharge of untreated sewage from CSOs posed risks to the environment, human health, and the amenity value of water bodies. Any failure to adequately enforce the duty to provide an effective

³⁴ Section 36(2) of the Environment Act 2021.

³⁵ The Decision Notice was founded upon the duty under section 94(1)(a) of the 1991 Act as supplemented by regulation 4(2) of the 1994 Regulations. It is also a breach of section 94(1)(b) of the 1991 Act for a sewerage undertaker to fail to make provision for effectually dealing with sewer contents but for the purposes of this investigation we did not come to any conclusion about the scope of the section 94(1)(b) general duty in respect of network CSOs.

sewerage system or to ensure compliance with the law has the potential to cause serious environmental harm. The consequences for the environment are likely to persist for a significant period.

- 3.16 The recipients of a decision notice are required to respond within two months. Ofwat responded to the Decision Notice on 12 February 2025 and denied that it had failed to comply with environmental law as described in the notice. Ofwat did accept that in its enforcement case into Southern Water Services Limited in 2019, it had not enforced section 94 of the 1991 Act to its full extent.
- 3.17 Chapter 4 of this report sets out more detailed analysis of our findings in the Decision Notice together with key points from the response of Ofwat.

Key Documents and Evidence

- 3.18 In this section, we identify and summarise key documents and evidence and explain their relevance to this investigation.
- 3.19 On 27 November 1990 the Secretary of State for the Environment authorised Ofwat to act as an enforcement authority under the relevant sections of the Water Act 1989.³⁶ This authorisation was updated and continued following the consolidation of these provisions within the 1991 Act (sections 94 and 18).
- 3.20 In Chapter 2 we set out the importance of the 2012 Case in respect of interpreting the UWWTD. On the facts of the case, the CJEU found that the UK had failed to fulfil its obligations under that Directive. However, following this case, no subsequent enforcement action was taken domestically against the relevant WaSCs. In 2023, the EU Commission remained of the opinion that the UK was not in compliance with the 2012 Case at one of the original sites.³⁷
- 3.21 EDM was rolled-out to all network CSOs beginning in 2015 and 100% coverage of all known network CSOs was achieved by the end of 2023. Prior to this, EDM had only been required for storm overflows associated with designated bathing waters and shellfish waters. EDM is intended to record the frequency (i.e. the number of times a discharge occurs) and duration (i.e. the length of time for which the discharge continues) of spills. This allows WaSCs to collect and report data to the regulators about the operation of CSOs.
- 3.22 By 2020, the Environment Agency began to publish EDM data on an annual basis. According to data provided by the Environment Agency in response to our Information Notice, the number of monitored network CSOs that

³⁶ Section 67 and 20.

³⁷ Letter from the Directorate-General Environment of the European Commission to the original complainant (3 February 2023).

discharged more than 60 times per year (i.e. the upper investigation trigger threshold under the SOAF³⁸) between 2020 – 2022 was as follows:

Year	No of CSOs
2020	955
2021	787
2022	526

- 3.23 Further information and data in relation to discharges from network CSOs can be found in the Annex to our Decision Notice.
- 3.24 In 2019, Ofwat completed an investigation into Southern Water Services Limited ('Southern Water') in relation to the management of its wastewater treatment works by accepting undertakings from the company under section 19 of the 1991 Act.³⁹ In its final decision dated 10 October 2019, Ofwat found that Southern Water had contravened section 94(1)(b) of the 1991 Act by failing to make provision for effectually dealing with and treating wastewater.
- 3.25 On 18 November 2021 Ofwat and the Environment Agency announced investigations into all WaSCs in England and (in relation to Ofwat only) Wales.⁴⁰ Initially the investigations were to look at how WaSCs managed their sewage treatment works. By July 2022 the scope of the investigations had widened to include consideration of the performance of network CSOs.⁴¹
- 3.26 As part of these investigations, Ofwat published notices of its proposals to issue enforcement orders against three water companies in August 2024.⁴² Public consultations on the proposed decisions and enforcement orders closed in September 2024. As at the date of our Decision Notice, 12 December 2024, Ofwat had not issued final decisions or enforcement orders in relation to any WaSCs under investigation.⁴³

³⁸ The 'Storm Overflow Assessment Framework v.1.6' (the SOAF) was published in June 2018 by the Environment Agency and addressed the identification and classification of CSOs in need of improvement.

³⁹ Although this case concerned failings in respect of wastewater treatment works, the same legislative provisions apply to network CSOs. This case was the earliest evidence we reviewed of enforcement of these provisions by Ofwat.

⁴⁰ Ofwat, 'Water companies could face legal action after investigation launched into sewage treatment works' (18 Nov 21) <<https://www.ofwat.gov.uk/joint-ofwat-environment-agency-and-defra-announcement-november-2021/>> accessed 04/12/2025; and Department for Environment, Food & Rural Affairs, 'Water companies could face legal action after investigation launched into sewage treatment works' (18 November 2022) <<https://www.gov.uk/government/news/water-companies-could-face-legal-action-after-investigation-launched-into-sewage-treatment-works>> accessed 04/12/2025.

⁴¹ Letter from Ofwat to South West Water Limited (27 June 2022). Letter from Ofwat to all WaSCs (12 July 2022).

⁴² See for example Ofwat, 'Notice of Ofwat's proposal to issue an enforcement order and impose a financial penalty on Thames Water' (6 August 2024) <https://www.ofwat.gov.uk/consultation/notice-of-ofwats-proposal-to-issue-an-enforcement-order-and-impose-a-financial-penalty-on-thames-water/> accessed 04/12/2025.

⁴³ See para 4.41 for information on Ofwat investigations as at the date of this report.

The Storm Overflow Discharge Reduction Plan

- 3.27 The Secretary of State published the SODRP, as required under section 141A of the 1991 Act, on 26 August 2022 (updated 25 September 2023). It primarily set new targets for WaSCs to reduce sewage discharges from storm overflows. According to the plan, by 2050, no storm overflows will be permitted to operate outside of unusually heavy rainfall or to cause any adverse ecological harm.⁴⁴ To achieve this, storm overflows will not be permitted to discharge above an average of 10 rainfall events per year by 2050.⁴⁵

⁴⁴ Defra, *Storm Overflows Discharge Reduction Plan* (25 September 2023) <https://assets.publishing.service.gov.uk/media/631063778fa8f5448a3836e4/Storm_Overflows_Discharge_Reduction_Plan.pdf> accessed 04/12/2025, p11.

⁴⁵ *ibid* p14.



Analysis and findings

4. Analysis and Findings

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

The 1994 Regulations and the 2012 Case

- 4.2 In Chapter 2 we set out the two-stage test, as articulated in the 2012 Case, which provides a methodology to follow when considering whether discharges are compliant with the 1994 Regulations.⁴⁶

First stage – exceptional circumstances

- 4.3 The first stage of the test is to consider whether the discharge is occurring only in exceptional circumstances.
- 4.4 The UWWTD does not define, or even use, the term “exceptional circumstances”. The judgment in the 2012 Case used the term to interpret a footnote in the UWWTD that accepts it will not be possible to collect and treat all waste water during situations “such as unusually heavy rainfall”.⁴⁷ The judgment did not provide a definition of ‘exceptional’, and the Commission did not propose a strict 20 spills per year rule, but pointed out that the more an overflow spills, particularly during periods when there is only moderate rainfall, the more likely it is that the overflow’s operation is not in compliance with the Directive.⁴⁸

Second stage – BTKNEEC (exceptionality)

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

⁴⁶ See 2.18 – 2.19 above.

⁴⁷ Footnote 1 to Annex 1 Sections A & B UWWTD.

⁴⁸ The 2012 Case, at [28]. The idea of a 20 spill rule was raised by the EU Commission in pre-litigation and before the CJEU. However, the Commission did not propose a strict 20 spill rule but instead indicated that discharges over this number would be a cause for concern and indicate a possible failure to fulfil obligations.

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

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

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

4.9 Advocate General Mengozzi in his Opinion in the 2012 Case described the BTKNEEC clause as a “safety valve” that “operates by way of exception”.⁴⁹ He also stated at [61] that:

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

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

“It is important to keep in mind that, according to the principles laid down in the UK case, the mere fact that a storm overflow discharges to a waterway in non-exceptional circumstances does not necessarily involve a breach of the 1994 Regulations. If there is no remedy for that occurrence which satisfies the BTKNEEC test, then the discharge is lawful under the 1994 Regulations”.⁵⁰

and

“CJEU did not indicate that discharges will only satisfy BTKNEEC exceptionally. The Advocate General stated that there must be a comprehensive assessment of the circumstances of each case...”⁵¹

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

4.12 The 2012 Case established that, at a European level, it is for an EU Member State to demonstrate why CSO improvements do not satisfy the BTKNEEC

⁴⁹ Paras [59]-[60].

⁵⁰ The WildFish Judgement at [162].

⁵¹ *ibid* at [172].

requirement. The 1994 Regulations implement the UWWTD by placing this requirement on the operators of relevant networks such that if a CSO is discharging outside of exceptional circumstances, it is evidently not compliant with the 1994 Regulations and it is up to the discharger to satisfy the regulator that there is no BTKNEEC solution.

- 4.13 The Decision Notice summarised the application of the two-stage test at paragraph 23 as follows:

“...if untreated sewage has been discharged outside of ‘exceptional circumstances’ permitted under the 1994 Regulations (as confirmed by the CJEU in Case C-301/10) then there is a prima facie breach of the section 94(1) duty. An undertaker may seek to invoke 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) and the absence of any BTKNEEC solution as a defence to an allegation of breach. However, the CJEU in Case C-301/10 at [65] noted that such a defence is to be invoked “by way of exception only”. These two tests (that of “exceptional circumstances” and the BTKNEEC assessment) create a methodology prescribed by the CJEU for determining compliance with the UWWTD and 1994 Regulations in respect of discharges from network CSOs.”

- 4.14 In response to the Decision Notice, Ofwat stated that if a storm overflow is, or is likely to be, discharging outside exceptional circumstances (for instance, where they are discharging 20 times or more in a year) then the relevant WaSC has a duty to investigate by undertaking a BTKNEEC assessment in a timely way. Further, Ofwat added that a BTKNEEC assessment in relation to frequently spilling sites is a core feature of WaSCs’ obligations under the 1994 Regulations.
- 4.15 We conclude that CSOs spilling outside of exceptional circumstances and for which there is no BTKNEEC solution must be the exception rather than the rule i.e. that this must be the outcome in only a minority of cases. If otherwise, it is suggestive of too conservative an approach to the exercise of cost-benefit assessment. We nevertheless consider any difference of legal opinion in relation to the description of the BTKNEEC concept, between the Decision Notice and Ofwat’s response, to be theoretical. In practical terms, we conclude that if a network CSO is discharging outside exceptional circumstances then it is for the relevant WaSC to investigate by undertaking a BTKNEEC assessment in a timely manner.

Misunderstanding of law

- 4.16 In Chapter 2 we set out the relevant legal provisions and case law in relation to network CSOs. This includes the duty of effectual drainage on WaSCs under section 94(1)(a) of the 1991 Act, as supplemented by regulation 4(2) of

the 1994 Regulations. We also set out the enforcement duty on Ofwat under section 18 of the 1991 Act and the exceptions to this duty under section 19.

- 4.17 We reviewed various documents and correspondence with Ofwat and found that Ofwat had adopted an unduly restrictive approach to the interpretation of the duties on WaSCs under section 94 of the 1991 Act and a misinterpretation of the extent of Ofwat's enforcement duty under section 18 of the 1991 Act.⁵² For example, Ofwat responded to the original complaint from WildFish on 3 February 2022 and explained its approach to section 94 of the 1991 Act by reference to its 2019 decision against Southern Water.⁵³ In this decision, dated 10 October 2019, it stated:

“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.”

- 4.18 In the Decision Notice, we found that Ofwat's approach confused the question of what constitutes a breach of the duties 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.⁵⁴ Various documents noted in the Decision Notice show that Ofwat had interpreted its section 18 duty as meaning that only 'systemic' failures by WaSCs would constitute a breach of section 94.⁵⁵ However, section 94(1)(a) of the 1991 Act as supplemented by regulation 4(2) of the 1994 Regulations, requires WaSCs to provide systems that comply with Schedule 2 of the 1994 Regulations, including as to the limitation of pollution of receiving waters due to storm overflows. Compliance is a question of fact in each individual case.

⁵² Decision Notice, para 14.

⁵³ Ofwat, 'Ofwat's final decision to impose a financial penalty on Southern Water Services Limited' (10 October 2019) < <https://www.ofwat.gov.uk/wp-content/uploads/2019/10/Ofwat%E2%80%99s-final-decision-to-impose-a-financial-penalty-on-Southern-Water-S....pdf> > accessed 04/12/2025.

⁵⁴ Decision Notice, para 20(a).

⁵⁵ Decision Notice, para 27.

4.19 The above extract from Ofwat’s 2019 decision against Southern Water also indicated that it had regarded compliance with permits issued by the Environment Agency as necessarily also achieving compliance with the duty under section 94 of the 1991 Act. This revealed a misinterpretation of the section 94(1)(a) duty as supplemented by regulation 4(2) of the 1994 Regulations.

4.20 As the Decision Notice states at paragraph 22:

“...Ofwat’s jurisdiction under section 18 of the 1991 Act is prima facie engaged whenever a discharge from a network CSO occurs in non-exceptional circumstances. This will amount to a breach of the UWWTD and the 1994 Regulations, which, in turn, will amount to a breach of section 94(1)(a) of the 1991 Act unless the undertaker can demonstrate the absence of a solution applying best technical knowledge not entailing excessive costs (‘BTKNEEC’). Such breaches will engage section 18 of the 1991 Act and Ofwat’s jurisdiction.”

4.21 The Decision Notice acknowledges that Ofwat agreed with the above characterisation of its section 18 enforcement duty in its response to our Information Notice.⁵⁶ It also noted that Ofwat’s more recent investigations, referred to at 3.25 above, provided evidence of a correct understanding of section 94 of the 1991 Act.⁵⁷ However, we found in the Decision Notice that it was only from 27 June 2022, when Ofwat sought EDM data from WaSCs in respect of all network CSOs, that Ofwat unequivocally acted in accordance with a legally correct understanding of section 94 of the 1991 Act as supplemented by the 1994 Regulations.

4.22 Paragraph 3(a) of the Decision Notice concluded that Ofwat had unlawfully failed to take proper account of environmental law when exercising its functions, by misunderstanding:

- “i. the true legal extent of the duties upon sewerage undertakers under section 94 of 1991 Act (as supplemented by the 1994 Regulations)*
- ii. the true legal extent of its duty under section 18 of the 1991 Act (as qualified by section 19) to investigate and make enforcement orders in the case of contraventions or likely contraventions by sewerage undertakers of section 94 of the 1991 Act,”*

⁵⁶ Decision Notice, para 24.

⁵⁷ Decision Notice, para 31.

- 4.23 It was noted that the period of failure for the above had ended on 27 June 2022.⁵⁸
- 4.24 At paragraph 49(a) of the Decision Notice, we recommended that Ofwat adopt and publish an updated version of its guidance document 'Approach to Enforcement'. We stated that this was a relevant step to remedy and prevent reoccurrence of the identified failure to comply with environmental law.
- 4.25 In the Decision Notice we also recommended that Ofwat agree and publish new MoUs with the Secretary of State and the Environment Agency which reflected proper regulation of discharges from network CSOs and included arrangements for improved cooperation.⁵⁹ This step was included to prevent reoccurrence of relevant failures set out in the Decision Notice and to clarify the roles and responsibilities of the public authorities more generally in relation to the regulation of discharges from network CSOs.
- 4.26 Ofwat responded to the Decision Notice and accepted that it had failed to comply with environmental law in relation to its 2019 enforcement decision against Southern Water, by not making findings in relation to breaches of the 1994 Regulations. However, Ofwat did not accept that this constituted a serious failure to comply with environmental law. It also stated that the response letter to WildFish in 2022 was never intended to provide a definitive statement of how Ofwat understood the extent of its duties in relation to storm overflows at that time.
- 4.27 With respect to the duties under sections 18 and 94 of the 1991 Act, Ofwat broadly agreed with the analysis set out in the Decision Notice and summarised at 4.2 – 4.14 above. As noted at 4.21 above, by the date of our Decision Notice, Ofwat had already provided evidence of a correct understanding of these provisions in its response to our Information Notice and its more recent investigations.
- 4.28 In April 2025 Ofwat published an updated version of its guidance document 'Approach to Enforcement'.⁶⁰ We have reviewed the updated guidance and consider that it reflects the recommended step set out in the Decision Notice, to prevent reoccurrence of the failure.
- 4.29 On or around 10 September 2025, Defra, the Environment Agency and Ofwat signed an MoU with respect to the regulation of storm overflows in England. We acknowledge that the MoU reflects proper regulation of discharges from CSOs so as to fulfil our recommendation and should help to avoid reoccurrence of the failures identified in the Decision Notice.

⁵⁸ Decision Notice, para 5(a).

⁵⁹ Decision Notice, para 49(d).

⁶⁰ Ofwat, 'Ofwats Enforcement Guidance' (April 2025) < <https://www.ofwat.gov.uk/wp-content/uploads/2025/04/Ofwats-Enforcement-guidance-1.pdf> > accessed 04/12/2025.

- 4.30 We conclude that Ofwat failed to comply with environmental law by misunderstanding the duties under sections 18 and 94 of the 1991 Act in relation to network CSOs. This failure ended on 27 June 2022 which was the date of the earliest evidence of Ofwat's correct interpretation of the law. This failure was included in the Decision Notice due to its seriousness and duration.

Enforcement – failure to exercise the section 18 enforcement duty

- 4.31 In addition to misunderstanding the extent of its enforcement duty under section 18 of the 1991 Act, we found that Ofwat had failed to exercise this duty in relation to the unlawful operation of network CSOs.⁶¹
- 4.32 We note in Chapter 3 Ofwat's investigation into Southern Water in 2019 and its investigations into all WaSCs launched in 2021. However, we have found no evidence that, prior to these cases, either Ofwat or the Secretary of State had ever sought to exercise their enforcement functions in relation to unlawful discharges from CSOs.⁶² This includes failing to do so after the decision in the 2012 Case.⁶³
- 4.33 Following the introduction and rollout of EDM to CSOs in 2015, there has been ample data to demonstrate that a significant number of network CSOs are spilling frequently and therefore it is more likely than not that a significant number of network CSOs are not compliant with the law.⁶⁴
- 4.34 Although Ofwat launched its investigation into all WaSCs in November 2021, it had still not made any final enforcement orders (or accepted undertakings) when the Decision Notice was given in December 2024. Therefore, we found that Ofwat had also failed to exercise its enforcement duty as at the date of the Decision Notice.
- 4.35 At paragraph 3(b) of the Decision Notice we concluded that Ofwat had committed a serious failure to comply with environmental law by:
- “(b) ... unlawfully failing to exercise its functions under section 18 of the 1991 Act by the making of enforcement orders in respect of known actual or likely contraventions of section 94, when it was under a legal duty to do so.”*
- 4.36 We made several recommendations at paragraph 49 of the Decision Notice in relation to this failure to comply with environmental law, including that Ofwat should operate in accordance with the law as set out in the Decision Notice in

⁶¹ Decision Notice, para 3(b)

⁶² Decision Notice, para 37.

⁶³ See para 3.20 above.

⁶⁴ Decision Notice, para 38.

undertaking its enforcement. We also advised that if Ofwat chose to delegate to the Environment Agency the investigation of relevant breaches of section 94 of the 1991 Act (which the Environment Agency has no direct power to enforce) then it must take such steps as may be necessary to ensure that the Environment Agency properly fulfils that function. Lastly, we recommended that Ofwat take appropriate enforcement action under section 18 of the 1991 Act if a WaSC declines or fails to carry out necessary works in relation to those CSOs which have been subjected to the Environment Agency's SOAF process and for which a BTKNEEC solution has been found.

- 4.37 Ofwat responded to the Decision Notice and denied that they had failed or were failing to comply with environmental law regarding the exercise of the section 18 1991 Act enforcement duty. Ofwat agreed that its section 18 duty is engaged whenever it is satisfied of the existence of an ongoing or likely future breach of a provision that it enforces. It also accepted that in theory, Ofwat could have opened enforcement investigations after the 2012 Case but stated that this would have been duplicative of the work by Defra and the Environment Agency under the scrutiny of the European Commission.
- 4.38 However, Ofwat did not accept that it had failed to exercise its enforcement duty and cited action taken against Southern Water in 2019 and its ongoing investigation into all WaSCs opened in 2021. It advised that these investigations are intensive and necessarily take time. Ultimately, Ofwat stated that given it was actively investigating and following required legal and procedural requirements, it could not be in breach of section 18 because it had not finalised its decisions.
- 4.39 In response to our recommendations, noted at 4.36 above, Ofwat confirmed that it was progressing ongoing enforcement consistently with its duties under sections 18 and 19 of the 1991 Act. Ofwat also indicated that it did not intend to delegate the investigation of relevant breaches of section 94 of the 1991 Act to the Environment Agency but would work closely with it in accordance with the MoU described above. As an example of this, Ofwat stated that it was working with the Environment Agency in the development of a revised SOAF and supporting its review of BTKNEEC cost benefit analysis guidance. Additionally, it confirmed that any enforcement orders (and any undertakings in lieu of an enforcement order) accepted in its current investigations would require WaSCs to comply with the new SOAF.
- 4.40 Between March and September 2025, Ofwat made final decisions in its investigations into Yorkshire Water Services Limited, Thames Water Services Limited ('Thames Water'), Northumbrian Water Limited, Anglian Water Services Limited and South West Water Limited. Ofwat made findings that each of these companies had, amongst other things, breached its duties under section 94 of the 1991 Act and under regulation 4(2) and Schedule 2 of the 1994 Regulations. It has accepted undertakings from each of these

companies except Thames Water, against which it has issued an enforcement order under section 18 of the 1991 Act.⁶⁵ The undertakings, and enforcement order, set out details of the steps the companies will take to address the non-compliance identified and secure future compliance.

- 4.41 Investigations relating to all other WaSCs in England remain ongoing as at the date of this report.
- 4.42 We conclude that Ofwat failed to comply with environmental law as set out in the Decision Notice by failing to exercise its enforcement duty. We consider that Ofwat's enforcement action noted at 4.40 above demonstrates that it is no longer failing to comply as set out in the Decision Notice.

⁶⁵ Ofwat, 'Investigation into sewage treatment works and sewerage networks' (last updates 9 September 2025) <<https://www.ofwat.gov.uk/investigation-into-sewage-treatment-works/>> accessed 04/12/2025.



Conclusion and recommendations

5. Conclusion and recommendations

- 5.1. For the reasons set out in Chapter 4, we conclude that Ofwat failed to comply with environmental law as set out in the Decision Notice. As a result of actions taken, we no longer consider that these failures remain ongoing.
- 5.2. Ofwat has made meaningful progress in addressing the issues raised during the investigation. Prior to the Decision Notice in December 2024, Ofwat had not made any final enforcement orders (or accepted undertakings) in its investigations against WaSCs. As summarised at 4.40 above, it has now made enforcement decisions in its investigations against several WaSCs, including a final enforcement order against Thames Water under section 18 of the 1991 Act. In April 2025, it published updated enforcement guidance which improved upon existing guidance in relation to its understanding of sections 18 and 19 of the 1991 Act. We consider these actions to provide clear evidence that Ofwat both understands the duties under sections 18 and 94 of the 1991 Act and that it is properly exercising its enforcement duty in respect of network CSOs.
- 5.3. In March 2025, the Secretary of State published new guidance that sets out their regulatory functions, together with those of Ofwat and the Environment Agency, in relation to storm overflows.⁶⁶ The new MoU noted at 4.29 above further supports this by clarifying responsibilities and promoting coordinated action between the relevant regulators.
- 5.4. Concluding our investigation by publishing this report offers a proportionate and effective means of securing accountability and maintaining transparency. We will continue to monitor compliance with the relevant legal and regulatory obligations by Ofwat. This monitoring will include engagement with Ofwat, review of performance data, and assessment of progress against statutory requirements and commitments made in response to this investigation. The initial monitoring stage will take place six months after the publication of this report. We will also maintain appropriate oversight as sector reforms are implemented, including those arising from the government's response to the Independent Water Commission recommendations.⁶⁷

Recommendations

- 5.5. In addition to setting out the specific steps we consider a public authority should take in relation to any failure identified in an investigation report, we

⁶⁶ Defra 'Storm Overflows: policy and guidance' (24 March 2025) <<https://www.gov.uk/government/publications/storm-overflows-policy-and-guidance/storm-overflows-policy-and-guidance>> accessed 04/12/2025.

⁶⁷ Independent Water Commission: review of the water sector' (Published 3 June 2025, last updated 29 July 2025) <[Independent Water Commission: review of the water sector - GOV.UK](https://www.gov.uk/government/publications/independent-water-commission-review-of-the-water-sector/independent-water-commission-review-of-the-water-sector)> accessed 04/12/2025.

may also make broader, general recommendations arising from our investigation or its conclusions.

- 5.6. We make the following recommendations to Ofwat in relation to our findings in the Decision Notice and subsequent actions taken.

Recommendation 1 - following the publication of the MoU, Ofwat (working with the Secretary of State and the Environment Agency) should ensure that the MoU is reviewed 12 months after the date of signature, or earlier if required. Such reviews could be coordinated with and included in the Secretary of State's statutory review of the SODRP. If regulatory responsibilities change following the Independent Water Commission's recommendations the MoU should also be reviewed and revised as part of that transition process.

- 5.7. Throughout the investigation it has become increasingly evident that the correct application of the BTKNEEC test is crucial for ensuring effective outcomes.

Recommendation 2 - Ofwat,⁶⁸ in partnership with the Environment Agency should establish a robust and transparent methodology for consistent data collection and reporting. This framework should enable clear tracking of progress for each CSO and provide structured summaries at each stage of the SOAF process. It must also support accurate reporting of BTKNEEC assessment outcomes, ensuring that data is both reliable and comparable across submissions.

⁶⁸ Or any subsequent authority.

Annex

Annex: Glossary

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

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

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