

Action on Sewage? DEFRA's Sewage Overflows Plan and the *Wild Justice* and *WildFish* challenges



Christopher Jacobs

What are storm overflows?

- Storm overflows are safety valves built into the combined sewer system and waste water treatment plants. They discharge excess sewage to rivers, lakes, or the sea when rainfall exceeds capacity.
- Their purpose is to protect properties from flooding and prevent sewage backing up into streets and homes during heavy storm events.
- Storm overflows were introduced in the Victorian era and intended to be used occasionally following heavy rainfall events. Their use is regulated through permits which are issued by the Environment Agency to the water and sewage companies.
- However, over recent years it has become the system has been used frequently rather than exceptionally.
- Causes for this include – Growing population, Urban creep (fewer permeable surfaces), heavier storms and climate change.

The extent of storm overflow discharges

- There are around 15,000 storm overflows in England.
- In 2020 there were over 400,000 sewage discharges, totaling over 3 million hours when sewage was discharging.
- 2021 – Over 370,00 discharges and 2.7 million hours of discharges.
- In the introduction to the Plan DEFRA states: *In 2021, 90% of storm overflows discharged at least once, with 5% discharging more than 100 times, including in high priority nature sites such as Sites of Special Scientific Interest. Bathers and other water users are impacted by the 8% of storm overflows that discharge near a designated bathing water.*
- The Storm Overflow Evidence Project ('SOEP') dated 1 November 2021 stated: *The Environment Agency estimates that approximately 402 inland river water bodies fail to achieve Good Ecological Status because of intermittent discharges through storm overflows*

Effects of sewage discharge

Public health

- Harm to public health (i) Swimmers, kayakers, anglers, surfers. Prone to gastric infections from faecal bacteria, E. coli and other harmful pathogens.
- Risk to public health (ii) Those eating oysters and shellfish which are affected by sewage contamination.

Marine life

- Excess nitrogen and phosphorous and heavy metals can starve marine ecosystems of oxygen – creation of 'dead zones'
- Accumulation of microplastics in watercourses

The statutory and regulatory scheme – Water Industry Act 1991

Water Industry Act 1991

Section 2 of the Water Industry Act 1991 provides:

"(1) This section shall have effect for imposing duties on the Secretary of State and on the Authority [ie OFWAT] as to when and how they should exercise and perform the powers and duties conferred or imposed on the Secretary of State or the Authority by virtue of any of the relevant provisions.

...

(2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated–

...

(b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;

... ."

Section 94(1) Imposes a duty

"(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."

Enforcement and information collection powers.

Enforcement Powers

Section 18 of the 1991 Act empowers the Secretary of State and Ofwat to make enforcement orders to secure compliance by water companies with ‘ any statutory or other requirement’ i.e the section 94(1) duty.

Power to obtain information

Section 27(2) imposes upon OFWAT a duty *insofar as it appears practicable from time to time*’ to collect information with respect to the carrying on by companies of the functions of water and sewerage undertakers and of the carrying on by licensees of the activities authorised by their licences. Section 27ZA provides a power to serve notices on a sewerage undertaker or water supply licensee for this purpose.

Statutory and regulatory scheme – 1994 Regulations

Urban Waste Water Treatment (England and Wales) Regulations 1994/2841

- **Regulation 4(2)** of the 1994 Regulations requires sewerage undertakers to ensure the provision of collecting systems, i.e. sewers, which satisfy the requirements of schedule 2.
Paragraph 2 of schedule 2 provides:
The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge 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.*
- **Reg 4(4)** imposes a duty to ensure that urban waste water entering collecting systems is, before discharge, treated in accordance with regulation 5, which imposes certain requirements on the treatment of urban waste water, and 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;*
 - (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.*

Statutory and regulatory scheme – Water Framework Directive

- Water Environment (Water Framework Directive) Regulations 2017/407

(Implementing Water Framework Directive 2000/60/EC)

Article 4.1(a) of the Water Framework Directive :

In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water

...

(ii) Member States shall protect, enhance and restore all bodies of surface water ... with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive

S80(1) Environment Act 2021, S141A WIA 1991. Storm Overflows Discharge Reduction Plan requirement

Section 141A of Water Industry Act 1991 was amended by s80(1) of the Environment Act 2021 from 9 January 2022 and required DEFRA to prepare a storm overflow discharge plan by 1 September 2022. The provision reads as follows:

141A Storm overflow discharge reduction plan

(1) The Secretary of State must prepare a plan for the purposes of—

(a) reducing discharges from the storm overflows of sewerage undertakers whose area is wholly or mainly in England, and

(b) reducing the adverse impacts of those discharges.

(2) The reference in subsection (1)(a) to reducing discharges of sewage includes—

(a) reducing the frequency and duration of the discharges, and

(b) reducing the volume of the discharges.

(3) The reference in subsection (1)(b) to reducing adverse impacts includes—

(a) reducing adverse impacts on the environment, and

(b) reducing adverse impacts on public health.

S80(1) Environment Act 2021

Storm Overflows Discharge Reduction Plan requirement .. Cont'd

(4) The plan may in particular include proposals for—

(a) reducing the need for anything to be discharged by the storm overflows;

(b) treating sewage that is discharged by the storm overflows;

(c) monitoring the quality of watercourses, bodies of water or water in underground strata into which the storm overflows discharge;

(d) obtaining information about the operation of the storm overflows.

(5) When preparing the plan the Secretary of State must consult—

(a) the Environment Agency, (b) the Authority, (c) the Council, (d) Natural England,

(e) sewerage undertakers whose area is wholly or mainly in England, or persons representing them, and

(f) such other persons as the Secretary of State considers appropriate.

(6) The Secretary of State must publish the plan before 1 September 2022.

(7) The Secretary of State may at any time revise the plan, having consulted the persons referred to in subsection (5), and must publish any revised version.

(8) The plan, and any revised version of it, must be laid before Parliament once it is published.

Annex 3 - New duties, powers & requirements imposed by EA 2021

- The Plan states that new duties in the Environment Act 2021 will provides DEFRA and regulators “*the tools we need to hold water companies to account and take enforcement action where water companies are not meeting their legal obligations*”
- Those duties are set out in Annex 3 to the Plan:
 1. A duty on water companies to **secure a progressive reduction in adverse impacts of discharges from storm overflows**. (s83 - Not yet in force)
 2. A duty directly on water companies and **EA to publish data on storm overflow operation on an annual basis**. . (s80 – in force from 6 January 2022)
 3. A duty directly on water companies to **publish near real time information** on the operation of storm overflows. (s81 – not yet in force)
 4. A duty directly on water companies to **monitor the water quality upstream and downstream of storm overflows** and sewage disposal works. (s82. Not yet in force)
 5. A duty on water companies to **produce comprehensive statutory Drainage and Sewerage/Wastewater Management Plans** setting out how they will manage and develop their drainage and sewer systems over a minimum 25-year planning horizon, including how storm overflows will be addressed through these plans. (s79 introduces new sections 94A-94E to WIA 1991. Not yet in force)
 6. A power of direction for the **Government to direct water companies** in relation to the actions in these Drainage and Sewerage Management Plans. (s78. Not yet in force)
 7. A requirement for the **Government to produce a report setting out the actions that would be needed to eliminate discharges** from storm overflows in England, and the costs and benefits of those actions. (s84 – in force from 6 January 2022)
 8. A duty on the Government to produce a **statutory plan to reduce discharges from storm overflows and their adverse impact**, and report to Parliament on progress. (s80 – in force from 6 January 2022)

Storm Overflows Discharge Reduction Plan

- On 26 August 2022, following a Consultation, the Government published the Storm Overflows Discharge Reduction Plan and an accompanying impact assessment.
- The scheme is described as the largest infrastructure project to restore the environment in water company history.
- Annex 4 sets out commitments from 9 water companies (after engagement with Ofwat) to reduce overflow discharges from 2020 levels by around 25%
- The plan sets out ‘specific and time-bound targets that water companies will deliver as a minimum’.
 - By 2035, water companies will have: improved **all** overflows discharging into or near every designated bathing water; and improved **75%** of overflows discharging to high priority sites.
 - By 2050, no storm overflows will be permitted to operate outside of unusually heavy rainfall or to cause any adverse ecological harm.
- The plan envisages the following indicative spill reductions: 2030 – 44,000; 2035 – 84,000; 2040 – 240,000; 2050 - 320,000.
- Mandatory £56bn investment programme
- Mandatory review in 2027

Storm Overflows Discharge Reduction Plan cont'd

- Wider expectations for the water industry - Water companies will be expected to ensure their infrastructure keeps pace with increasing external pressures, such as urban growth and climate change, without these pressures leading to greater numbers of discharges
- There is an emphasis on water companies preventing additional rainwater from entering the combined sewer network.
- The plan states that Ofwat are required to challenge water companies to improve day-to-day environmental performance demonstrate actions they will take to meet the targets set out in the plan.

The Three Targets for water companies

Target One – Protecting the environment

1. Protecting the environment:

Headline target: Water companies will only be permitted to discharge from a storm overflow where they can demonstrate that there is no local adverse ecological impact.

Sub-targets (specific milestones for companies):

The headline target must be achieved for most (at least 75%) of storm overflows discharging in or close to high priority sites (as defined in Annex 1) by 2035.

- It must be achieved for all (100%) storm overflows discharging in or close to high priority sites by 2045.
- Water companies must achieve this target for all remaining storm overflows sites by 2050.

NB - High priority sites include Sites of Special Scientific Interest (SSSIs), Special Areas of Conservation (SAC), Urban Wastewater Treatment Regulations sensitive areas, chalk streams and waters currently failing ecological standards due to storm overflows. There are approximately 5,500 overflows that discharge to high priority sites across England.

The Three Targets

Target Two – Public health around bathing waters

2. Protecting public health in designated bathing waters

Headline Target: Water companies must significantly reduce harmful pathogens from storm overflows discharging into and near designated bathing waters, by either: applying disinfection; or reducing the frequency of discharges to meet Environment Agency spill standards by 2035.

- 8% of overflows are close to designated bathing waters
- This target applies to both inland and coastal areas
- Limit of 3 or fewer discharges per bathing area per season
- Reduction of discharges by over 70% during bathing season (plus reductions out of season)
- Commitment to review Bathing Water Regulations by 2024
- ‘Near’ bathing waters 5km upstream of upper limit in inland waters & 1km upstream of coastal bathing water.

The Three Targets

Target 3 – Heavy rainfall events target

3. Ensuring storm overflows operate only in unusually heavy rainfall events

Headline Target: Storm overflows will not be permitted to discharge above an average of 10 rainfall events per year by 2050.

- A maximum of 12 hours rainfall will be classed as a rainfall event. Longer periods count as multiple events.
- This target acts as the backstop target to the other targets outlined in the Plan (i.e applies in addition to Targets 1 &2) .
- This target applies to all storm overflows discharging to inland waters, and to designated bathing waters (inland and coastal). NB: Does not apply to non-designated coastal waters.

Screening requirements for storm overflows

- Water companies must ensure that all inland and coastal storm overflows have screening controls (screens that limit discharge of persistent inorganic material a faecal and organic solids)

The role of Government, EA & OFWAT

Government review

EA 21 s.80 - First review to be completed by 31 January 2023. Subsequent 5 yearly reviews. Targets to be reviewed in 2027.

Role of Environment Agency

EA will review 5 yearly business plans put forward by water companies to assess compliance with environmental and public health requirements. EA is responsible for issuing permits and the Plan anticipates that EA will focus on regulatory and enforcement action, including powers to prosecute.

Ofwat

Ofwat will assess companies' plans for efficiency – challenging companies to keep bill increases manageable for consumers. Ofwat has a range of enforcement powers, including powers to impose financial penalties to a maximum of 10% of their turnover. The Plan anticipates that Ofwat will robust action against water companies to fine and prosecute those to fail to comply with their statutory and regulatory obligations and will be guided by the new monitoring and reporting framework.

Annex 5 – Report on feasibility of elimination of discharges from storm overflows

Option One : Complete Separation

- **The Plan considers how to achieve complete elimination in England. The objectives are twofold: (1) Reduce the volume of rainwater entering the sewage network; (2) Increase the capacity of the sewage network. Four options are put forward:**
- **Option 1 - Complete separation of the combined sewer network**
- Separating the combined sewer network, so that wastewater (sewage from homes and amenities), is treated, and rainwater is redirected back into the natural environment
- Would reduce the total volume of water entering sewage treatment works.
- Would remove the need to spill, even during times of heavy rainfall.
- Would require a redesign of the system and construction of new sewers which would be used exclusively for wastewater (and which would run parallel to the current system used only for rainwater).
- Estimated costs – c £338 to £560 billion (Storm Overflows Evidence project)

Option Two - Construction of additional storage

Option 2 - Construction of additional storage

- The water industry already relies heavily on the use of storage tanks to store rainwater and wastewater.
- In order to achieve zero discharges in an average year, water companies would need to significantly expand network storage to accommodate all rainwater, through the expansion of sewage treatment works, increasing the size of pipes or constructing storage tanks.
- According to the Storm Overflows Evidence Project, water companies would need access to an additional 118.43 million m³ of storage to achieve this. This is equivalent 40,000 Olympic sized swimming pools.
- Thames Tideway Tunnel – will capture and store rainwater and sewage underground.
- Achieving complete elimination using the storage only option would cost an estimated £120 -£190 billion.

Option Three – Sustainable Drainage Systems

Option 3 - Use of sustainable drainage systems (SuDS)

- Sustainable Drainage Systems (SuDS) can improve rainwater management by slowly filtering rainwater back into the natural environment through groundwater or into watercourses. This diverts rainwater from the sewer network and can be used to reduce the total volume of water entering the sewage system, alleviating pressure on the network.
- Storm Overflows Evidence Project concluded that SuDS alone would not be able to redirect enough rainwater to achieve zero discharges in an average year. Therefore, SuDS must be combined with storage tanks to achieve elimination.
- The Plan anticipates a review of Sched 3 to the Flood and Water Management Act 2010 to introduce standards for SuDS and remove the automatic right to connect to the public sewer system.
- Possible incentivisation of soakaways in gardens (costing £750)

Option Four – Local measures

Option 4 - Alternative measures to sewage discharges and their harm, and remove inefficiencies in the network

Local measures - alone would not achieve complete elimination but could be used alongside options outlined above:

- 1. Reduce groundwater infiltration** - Lining pipes or cracks in pipes and sealing manholes to prevent groundwater infiltration to reduce the volume of water entering the sewage system.
- 2. Good asset maintenance** – Blockages in pipes can cause storm overflows to spill. Ensuring that water companies are proactive in anticipating issues would reduce blockages.
- 3. Reduce misconnections** - New developments have separate wastewater and surface water drainage systems, so that surface water can be returned into the natural water environment. However, some surface water pipes are reconnected back to the combined system. Preventing misconnections and will reduce pressure on the network.
- 4. Changing consumer habits** – e.g Pouring fats and oils down sinks and flushing wet wipes and other sanitary products down lavatories can cause blockages within the sewer network.

R (WildFish) v Secretary of State for Environment, Food and Rural Affairs.

(Environment Agency and Ofwat have been joined as interested parties)

- WildFish is a charity concerned with the conservation of freshwater fish species and their habitats.
- The Claimant says that the Plan fails to deal with the overflows that are causing the problem and that the targets set by the Plan would allow continued discharges of unacceptable amounts of raw sewage to continue – in some cases up to 2050. James Maurici KC and Charles Bishop acting for Claimant

4 grounds of challenge

1 The Plan tacitly approves unlawful conduct and frustrates the existing legal framework:

- Water companies are not complying with the existing statutory and regulatory requirements which require *inter alia* that there be no overflows in all normal climatic conditions.
- The Plan sets out targets for water companies to improve overflows by 2035 (for priority sites) and 2050 (for other sites). In doing so, the Plan appears to accept that sewage overflows before those dates will continue to breach current duties and regulations.
- See R (BF (Eritrea) v SSHD [2021]1 WLR 3967 – Obligation in policy guidance not to direct recipient to act contrary to their legal duties.

R (WildFish) v Secretary of State for Environment, Food and Rural Affairs.

2. The Plan fails take into account material considerations :

- The Plan did not take current legal requirements into account when setting targets. The plan does not provide any response to current breaches / overflows, assess the extent of those overflows, or assess the extent to which those overflows could and should be reduced by enforcement.

3. The Plan is in breach of the Habitats Regulations:

- The Plan purports to set targets for overflows which are having unacceptable and harmful discharges into European sites, yet there has been no “appropriate assessment” under the Habitats Regulations.

4. The Plan is Irrational:

- The Plan purports to deal with all overflows, yet omits to deal with the current nonconforming overflows. It is argued that the Plan is irrational, and not fit for purpose .

R (Marine Conservation Society & others) v Secretary of State for the Environment, Food and Rural Affairs

Action brought by (1) Marine Conservation Society - A large charity committed to preserving marine environment;

(2) Richard Haward's Oysters - An established oyster company which sources oysters from Mersea Island and the River Blackwater

(3) Hugo Tagholm- A recreational swimmer and surfer and former CEO of Surfers Against Sewage.

Four Grounds: 1 **The plan fails to discharge the Defendant's duty under s141A of the WIA 1991** –Under S141A the Plan is required to meet the purposes of reducing the frequency, duration and volume of discharges and reduces adverse impacts on the environment and public health. The long targets fail to meet this objective as the 'species abundance target' in s.3 EA 2021 is 2030.

2. **The Plan is irrational** in that it (i) adopted a definition of 'high priority sites' that excluded the majority of coastal areas that have been designated for their ecological sensitivity and (ii) adopted a definition of 'no adverse ecological impact' that can only be applied to freshwater sites.

3. **Breaches of ECHR** – Art 2 Right to Life; Art 8 Right to respect for private and family life; Article 1, First protocol; Protection of Property. Art 2 :Positive obligation on MS to take steps to safeguard life. Art 8: positive obligations to protect people against environmental damage. Art 1 protocol 1-possession extends to marketable goodwill in a business.

4. **Breach of the Public Trust Doctrine-** A principle of English Common Law.

- Loose v Lynn Shellfish Ltd [2017] AC 599 - 'Public common of piscary' Public right to fish in tidal waters
- R (Newhaven Port and Properties) v East Sussex County Council [2015] UKSC 7. Lord Carnwath reviewed US authorities which accepted that the English Common law provided right to recreational access to the foreshore.

R (Wild Justice) v Water Services Regulation Authority [2023] EWCA Civ 28

- The Claimant, a wildlife and conservation campaigning organisation, brought a challenge against OFWAT on the basis that it is not properly carrying out its environmental duties in relation to the planned and unplanned discharge of untreated sewage into rivers and other water bodies by water and sewerage undertakers
- Ground 1 asserted that Ofwat has been unlawfully taking a passive stance in relation to enforcement of the 1994 Regulations including taking no steps to obtain information relating to compliance with them from undertakers with specific obligations in relation to their sewage treatment works
- Ground 2 asserted that Ofwat acted in breach of section 27(2) of the 1991 Act by failing to collect information in relation to its performance under the 1994 Regulations
- Ground 3 alleged that Ofwat failed to discharge its functions under section 2 (2A) of the 1991 Act so as best to ensure that the obligations under the 1994 Regulations are properly carried out.
- Ground 4 sought to argue that Ofwat erred in its consideration of data passed on by EA, which had been obtained under a different Regulation in the 1994 Regs.
- The matter came before Bourne J, who refused permission. On the main ground he stated that Ofwat had not generally failed to obtain information because on 18 November 2021 (prior to the PAP letter) Ofwat had written to a number of water companies and had asked them to state the causes of non-compliance with 'Flow to Full Treatment' ('FTT') conditions in their environmental permits for their waste water treatment works in England.

R (Wild Justice) v Water Services Regulation Authority [2023] EWCA Civ 28 cont'd

- Bourne J noted that there was evidence before the court that Ofwat had taken enforcement action against 5 water companies before the pre- action process had started. He concluded that it was not arguable that the Defendant had not turned its mind to compliance with its statutory duties or that it was guilty of an entire failure to perform those duties. He noted that:

53. None of this means that OFWAT has necessarily discharged its investigation and enforcement duties in a sufficient or satisfactory way. This claim does not allege any specific, individual failure to do so (despite some more specific criticism in the supporting witness statements) but is expressed in general terms.....

54. Moreover, there is no proper basis on which this Court should go behind OFWAT's assertion that, rather than being purely passive, it gathers information in several ways and uses that information for enforcement purposes, as is demonstrated by the current enforcement action.

- The Claimant sought permission to appeal and the matter came before Bean LJ at an oral hearing. Bean LJ refused permission to appeal in a judgment dated 17 January 2023, agreeing with the reasoning of Bourne J. The Judge held that it was artificial to draw a distinction between duties under section 94 of the 1991 Act and those under regulations 4 and 5 of the 1994 Regulations. Section 94 of the parent Act is the section imposing obligations which OFWAT can enforce under its statutory powers as set out in s94(3).
- There was no arguable case that Ofwat was not performing its monitoring and enforcement duties under section 94. It is likely that the court will require details of specific failings if future challenges of this nature are to proceed.

Manchester Ship Canal Company Ltd v United Utilities Water Ltd

Whether discharges may form the basis of an action in private law.

- On 6 March 2023, the Supreme Court will hear an appeal by Manchester Ship Canal Company against a judgment from the Court of Appeal ([2022] EWCA Civ 852) to the effect that MSCC was not entitled to bring a private law claim against United Utilities in nuisance and/or trespass in respect of unauthorised discharges of untreated foul water into the canal.
- The Court of Appeal held that the Judge at first instance had been right to find that, absent any finding of negligent or deliberate wrongdoing on the part of the statutory undertaker, a private law claim was inconsistent with the statutory scheme under the Water Industry Act 1991 and so could not be brought.
- Therefore, the proposed private law claims were impliedly ousted by the Water Industry Act 1991, which provides a separate mechanism for breaches of duty by sewerage undertakers.

Conclusions

- The current challenges are primarily based on (i) the failure of the Plan to address the immediate and ongoing section 94(1) and Reg 4 breaches and (ii) the lack of protection in the Plan for coastal areas.
- The Plan addresses the current issues with reference to the enforcement regime and the new powers under Part V EA 2021 (set out at Annex 3) .
- The Plan acknowledges the difficulties that are inherent in the proposed options for elimination.
- Option One - Sewerage companies are funded by investment from shareholders, borrowing and through customer bills. Anticipated bill increases of upwards of £200 per year for each option are unlikely to be acceptable to the public. According to Water UK, the average household water bill was £413.33 in 2020
- The embedded carbon involved in Options 2 and 3 is around 20 million tons of CO₂e.
- Potential Challenges for the Government's carbon emissions commitment and 2025 Net Zero target.
- The Plan concludes that, however, it is feasible to apply one, or a combination of, options 2, 3 and 4 at a local or catchment basis to reduce discharges and eliminate ecological harm

Thank you for listening

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