

SALMON AND TROUT CONSERVATION

SUBMISSION TO EFRA COMMITTEE

FARMING RULES FOR WATER

The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018

1st December 2021

Introduction

1. Salmon & Trout Conservation (S&TC) is the UK's only independent charity campaigning for wild fish and their environment. Established in 1903, S&TC fights to keep water wild and uses science and the law to drive water policy changes that improve the condition of our rivers to ensure they can support abundant and sustainable populations of wild fish and all other water-dependent wildlife.

2. S&TC thanks the Environment, Food and Rural Affairs Committee for the opportunity to make this submission on The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 ("the 2018 Regulations"), aka the Farming Rules for Water.

The Farming Rules for Water

3. When the 2018 Regulations came into force on 2nd April 2018, S&TC was pleased that, at last, the Environment Agency, having the enforcement role under the 2018 Regulations, had the power to address diffuse agricultural pollution, that has been so intractable to date to address.

4. The Committee should note that the Regulations 2018 were passed under the threat of infraction proceedings from the EU due to the long-standing failure of the UK to pass the necessary measures required by the Water Framework Directive (WFD) to control diffuse agricultural pollution. Post-Brexit, the WFD 'lives on' as The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017.

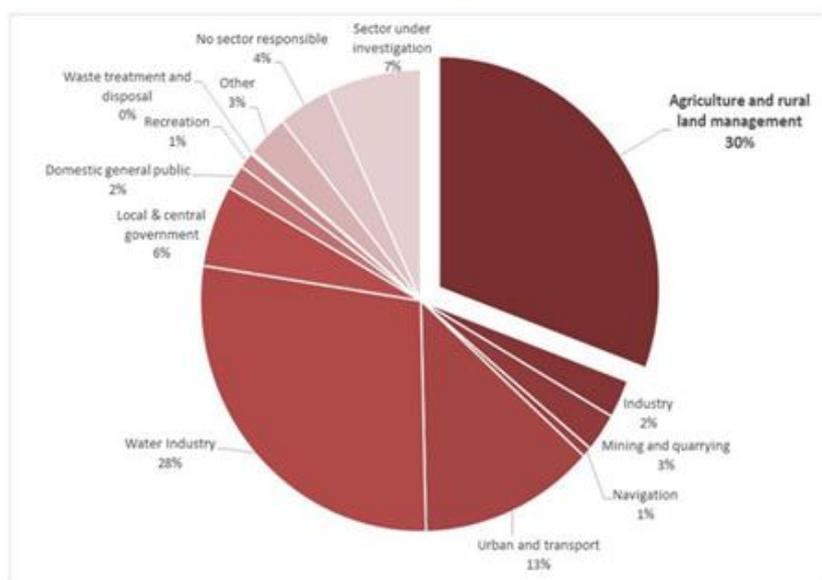
5. In fact, S&TC's view was in 2018 and remains that the 2018 Regulations are the bare minimum required to deal with agricultural diffuse pollution, which the Government recognises arises from multiple, mostly small scale, pollution losses from farms across the country.

6. The 2018 Regulations fall short of being the ambitious and progressive rules that they could have been. S&TC was disappointed that the 2018 Regulations set a very low 'basic' or minimum level for agricultural practices that can have a negative impact on water quality. Many common practices fall well within the 2018 Regulations and have the potential, when spread across whole catchments, to make a marked contribution to diffuse agricultural pollution.

7. The agricultural diffuse pollution problem is still restraining the achievement of good ecological status (as required by WFD and committed to by Government in the 25 Year Environment Plan) in so many water bodies in England.

8. The Government accepts that the agriculture and rural land management sector is responsible for 30% of failures to meet good ecological status, with the water industry responsible for about 28% of failures. The figure below is reproduced from The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 Final Impact Assessment¹.

Figure 1: Sectors preventing waters reaching WFD good status in England
(note that these are counts of reasons for not achieving good status within water bodies not the number of individual waterbodies)



9. S&TC's own Riverfly Census² report indicates that the greatest pressures on the 12 rivers studied were phosphates, fine sediments and chemicals such as pesticides.

10. Cumulatively, diffuse agricultural results in a deterioration in water quality and places costs on all water users including water companies, tourism and the shellfish industry.³

Little enforcement effort from the Environment Agency since 2018

11. Dame Glenys Stacey's interim report from July 2018 *Farm Inspection and Regulation Review*, at page 30, recognised the limitations of the Environment Agency inspection regime noting that only 40 Environment Agency staff were available to inspect farms meaning that any individual farm stood just a 1 in 200 chance of being inspected by the Agency in any one year. She further noted that the Environment

¹ Reproduced from The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 Final Impact Assessment at https://www.legislation.gov.uk/ukia/2018/27/pdfs/ukia_20180027_en.pdf

² https://salmon-trout.org/wp-content/uploads/2019/05/15MB-STC-Riverfly-Census-National-Outcomes_compressed-1.pdf

³ The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 Justice Impact Test – at https://www.legislation.gov.uk/uksi/2018/151/pdfs/uksi0d_20180151_en.pdf

Agency could not say what the rate of dairy farmer non-compliance for slurry storage, a key environmental risk, but that the Environment Agency “*thinks non-compliance is common*”. [It is worth repeating that - the Agency believes non-compliance with slurry rules is common - that is a shocking admission and one that must be addressed].

12. However, there has been very little enforcement activity since the 2018 Regulations came into force.

13. It was not until July 2021, that the Environment Agency announced it was advertising for 50 agriculture regulatory inspection officers, following widespread condemnation of its failure to regularly check environmental compliance and enforce the 2018 Regulations⁴.

14. It is important to note that strict enforcement of the 2018 Regulations was never intended. Inspections of farms as against the 2018 Regulations were to be included within the Agency’s existing risk based, targeted farm inspections, and within catchment investigations and pollution incident investigations⁵.

15. Even as it laid the 2018 Regulations, the Government signalled that enforcement of the 2018 Regulations would be “*in line with the Agency’s Enforcement and Sanctions Guidance, and will be through an advice-led approach...*”.

16. It went on - “***we estimate that cases being taken through to prosecution will be between 0 - 10 per year (likely 2 to 3 years after regulations come into force) and will continue at that very low level. The majority of offences are expected to be dealt with by issuing advice to those in breach and, where appropriate, by imposing civil sanctions and administrative penalties or accepting enforcement undertakings. It would normally be cases of persistent failure or severe pollution and environmental impact which would result in criminal proceedings being brought. The Agency would use the enforcement powers given to them under basic rules to tackle local pollution and encourage changes in farmers’ behaviour to adopt good practice routinely, since the objective of the rules is to prevent diffuse pollution from agricultural sources polluting controlled waters (inland freshwaters and coast waters)***”.⁶

17. S&TC also notes the ‘catch-all’ Regulation 12 defence of due diligence, such that a farmer who takes all reasonable steps and exercises all due diligence to avoid committing an offence is absolved of liability.

18. Since 2018, to S&TC’s knowledge there have been no prosecutions under the 2018 Regulations. None appear, as at 28th November 2021, on the online database of Environment Agency prosecutions⁷.

⁴ ENDS (2021) Environment Agency to hire 50 farm inspectors to tackle water pollution
20th July 2021

⁵ The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 Final Impact Assessment at https://www.legislation.gov.uk/ukia/2018/27/pdfs/ukia_20180027_en.pdf

⁶ The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 Justice Impact Test – at https://www.legislation.gov.uk/uksi/2018/151/pdfs/uksiod_20180151_en.pdf

⁷ Available at <https://data.gov.uk/dataset/6f06910a-8411-4117-9905-6284f1997c33/environment-agency-prosecutions> Inspected 28th November 2021.

19. This 'soft-touch' enforcement approach has been adopted despite the value of the damage caused by agricultural water pollution having been estimated in a DEFRA research project to be between £750m and £1,300m a year. The Government acknowledging that: "*water pollution from agriculture is a significant external cost to other parties such as water companies, recreational users of watercourses and members of the public. This is a market failure; in a free market there are limited incentives for farming businesses to adopt practices which would reduce water pollution. Government intervention is necessary to correct this market failure*"^{8 9}.

The 2018 Regulations merely codified MAFF and DEFRA guidance and codes of practice going back to 1985

20. S&TC believes strongly that all parties to this issue need to recognise that, to a very great extent indeed, what was laid down in the 2018 Regulations merely reflects what had been recommended to farmers as good agricultural practice certainly since 1991, and in many respects since 1985.

21. The Committee is referred to the following earlier codes, covering 1985 to 2011:

The Code of Good Agricultural Practice (MAFF 1985)

The Code of Good Agricultural Practice for the Protection of Water (MAFF 1991)

The Water Code – The Code of Good Agricultural Practice for the Protection of Water (DEFRA 1998); and

The Water, Soil and Air Code: Protecting our Water, Soil and Air. A Code of Good Agricultural Practice for farmers, growers and land managers (DEFRA 2009)

22. A review by S&TC of these predecessor codes of good practice, as against the 2018 Regulations (see Annex 1 to this submission), shows that little has changed since 1985 as to what Government has indicated to farmers is good practice to avoid pollution of watercourses, yet agricultural pollution of watercourses remains a widespread problem. S&TC's analysis shows, in the left-hand column of Annex 1, the requirements of 2018 Regulations, regulation by regulation. The remaining columns show the equivalent provisions in the earlier codes.

23. In respect of the spreading of organic manures etc in the autumn – which is at the heart of the Committee's current examination - the MAFF (1985) The Code of Good Agricultural Practice states

"2.8 The timing of application of manures for optimal use as plant nutrients should be similar to that for inorganic fertilisers (paras 1.5. to 1.7)..."

24. Paras 1.5 to 1.7 then state:

"1.6 Application rates of fertilisers should take account of crop requirements and the nutrients provided by any organic manures and the soil...."

and

⁸ Explanatory Memorandum to The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018

⁹ The Reduction and Prevention of Agricultural Diffuse Pollution (England) Regulations 2018 Final Impact Assessment at https://www.legislation.gov.uk/ukia/2018/27/pdfs/ukia_20180027_en.pdf

“1.7 Nitrogenous fertilisers should only be applied at times when the crops can utilise the nitrogen. In autumn and winter application should be avoided except where there is a specific crop requirement”

25. That is repeated in strikingly similar terms in the 1991, 1998 and 2009 Codes.

26. In other words, Regulation 4(1)(a) of the 2018 Regulations has merely codified into law what the codes of good practice have indicated to farmers is good practice over thirty-five years, repeated on numerous occasions.

27. Dame Stacey’s 2018 review noted that *“good enforcement generally starts with advice and guidance and simple persuasion”*, but it is clear that, in respect of guidance to avoid diffuse pollution of watercourses, a small but not insignificant proportion of farmers have simply not responded, over many years, to the advice and guidance presented in various codes, nor to gentle persuasion.

28. In such cases, the evidence suggests that strict regulation, frequent monitoring and inspection, coupled with robust enforcement, is required to change behaviour.

29. That is a conclusion supported by the Agency’s own research. From 2016 to 2019, the Agency conducted a catchment regulatory project in the River Axe catchment¹⁰. As the Agency acknowledged, the River Axe Special Area of Conservation is in unfavourable condition and is declining, owing to nutrient enrichment and sediment pollution that had led to a number of ecological problems including habitat loss and loss of fish species, resulting from intensification of dairy farming and associated maize growing for fodder as well as for energy production.

30. Over the three years of the project, the Agency carried out 86 farm audits and concluded that “despite over a decade of advisory visits in the period up to 2016, the catchment continued to decline and there were no significant improvement in farming practices. 95% of farms did not comply with storage regulations and 49% of farms were polluting the river Axe.

31. Further, under no circumstances could it be argued that Regulation 4(1)(a) could have come as a shock to the reasonable farmer.

32. Indeed, in S&TC’s view, the reasonable farmer would have planned – and has had ample time to do so – to ensure that his farm business did not generate and accumulate such organic manures that the Codes and now Regulation 4(1)(a) could not be complied with.

The Agency’s Regulatory Position Statement (RPS 252)

33. It would not be correct to characterise the Agency as in any way tough or unreasonable towards farmers.

34. S&TC’s view is that, to the contrary, it is insufficiently robust.

35. This is illustrated well by examining the Agency’s original Regulatory Position Statement (RPS 252).

¹⁰ River Axe N2K Catchment Regulatory Project Report Author: John Cossens EA November 2019

36. S&TC's letter of 9th September 2021 to Helen Wakeham of the Environment Agency (in Annex 2A), S&TC questioned the legal basis of the original RPS 252 - *Spreading organic manure on agricultural land* - issued by the Agency in August 2021.

37. The Agency's original RPS 252 purported to disapply part of Regulation 4(1)(a) until 1st March 2022, stating that "*if you follow the conditions in this RPS you can have a plan to apply organic manure to agricultural land that may exceed the needs of the soil or crop on that land*"

38. As S&TC pointed out, in effect, the Agency's RPS attempted unlawfully to disapply 4(1)(a)(i).

39. While the Agency has considerable discretion - and patently exercises that discretion frequently and liberally - not to prosecute offences under a variety of environmental legislation, it does not have the power to amend or alter statutory instruments laid before Parliament, such that an offence provided for in the 2018 Regulations, is no longer an offence.

40. The Agency responded on 1st October (Annex 2B), committing itself to revising the RPS to ensure that it did not purport to change the law by disapplying Regulation 4(1)(b).

41. However, S&TC is disappointed that the revised RPS 252 still indicates a very soft touch enforcement policy in respect of the 2018 Regulations, as the overwhelming evidence is that pollution of rivers by nutrients can be caused by organic manures spread when crop and soils do not need them, and hence do not take them up.

Conclusions

42. In summary, in answer to the Committee's questions:

Q1) What impact, if any, is the EAs implementation of Farming Rules for Water preventing farmers from spreading organic fertiliser?

43. S&TC would note that farmers have had in excess of thirty-five years to understand and appreciate that the spreading of manures in autumn is not good agricultural practice where soils and crops don't immediately need the nutrients supplied.

44. That was made law in 2018 for a very good reason.

45. Farmers have had over thirty years to adapt and manage their farms to avoid producing excess manures, so as not to need to spread manures in autumn/winter, or to ensure sufficient safe storage of manures until spring, when they can be safely spread when crops and soils need them.

46. In any event, the Agency's soft touch approach to enforcement of the 2018 Regulations presents no practical concern for most farmers.

47. In S&TC's view, nothing in the 2018 Regulations prevents a farmer from managing or spreading manures in accordance with good agricultural practice and the law.

Q2) Are there change that should be made to the rules - or how they are applied?

48. S&TC would argue for a much tougher approach to inspection, monitoring and enforcement of the 2018 Regulations be adopted by the Agency.

49. Enforcement of the 2018 Regulations needs to involve more rigorous and more regular inspection of farmed premises. The 2018 Regulations will not in themselves alter matters on the ground if, in some cases, thirty-five years of guidance in the various codes has not sufficiently altered behaviour.

50. A tougher regime would be no threat at all and would indeed be fairer to those reasonable farmers who have taken heed of the thirty-five years of codes and guidance, now codified into law by way of the 2018 Regulations.

51. Any failure to apply the 2018 Regulations, or to soft-pedal on enforcement, merely enables and encourages those farmers still seeking to spread manures when crops and soils do not require them, who have failed to manage and adapt their farm practice accordingly, thereby seeking an unfair operational and financial advantage over their reasonable-farmer neighbours.

Q3) What are the best ways of preventing agricultural diffuse pollution?

52. As above, S&TC would encourage a far stricter inspection, monitoring and enforcement regime under the 2018 Regulations.

53. Addressing the 2018 Regulations, the 2018 Command Paper *Health and Harmony*¹¹, recognised that "this new set of common-sense rules will apply to all farmers" and, at page 50, that "as soon as is practical we propose to maintain a strong regulatory baseline of standards that reflects the polluter pays principle. This will be the foundation of our future environmental land management system setting out minimum standards that all farmers and land managers must comply with."

54. In its roll-out of the Environmental Land Management Scheme under the Agriculture Act 2020, the Government should ensure that the adoption of agricultural and land management practices that prevent water pollution (including as a result of manure spreading in the autumn and winter) result in a clear and obvious financial benefit to all farmers.

55. However, S&TC would oppose any use of ELMS that appears to reward farmers merely for mere compliance with the 2018 Regulations, the basic rules that have been identified (including in consultation with farmers themselves) to minimise diffuse pollution.

56. Certainly, financial support should not be available for those farmers failing to comply with the 2018 Regulations. That would effectively create a perverse financial reward for those in the industry who have failed to manage and adapt their farming practices over decades. The payment of public money for public goods must be made strictly conditional upon any person seeking to receive such payments, also achieving basic overall compliance with all relevant existing farm rules, including the 2018 Regulations, as well as other measures such as the Water Resources (Control

¹¹ DEFRA (2018) *Health and Harmony: the future for food, farming and the environment in a Green Brexit* - policy statement Updated 14 September 2018

of Pollution) (Silage, Slurry and Agricultural Fuel Oil) (England) Regulations 2010 and the Nitrate Pollution Prevention Regulations 2015.

57. S&TC therefore believes it is essential to design a system that covers all eventualities, both the 'good' farmers who wish to embrace enthusiastically the new system of public money for public goods, which we believe will be the majority, but also the minority of farmers who have ignored thirty-five years of codes of practice, and will probably ignore the 2018 Regulations as well. These farmers have a disproportionately negative impact of water quality and cause reputational damage to all farmers.

58. To deal with the stubborn problems of agricultural diffuse pollution, the new system must combine the 'stick' approach of tough regulation, inspection and enforcement, with the 'carrot' of public money for public goods.