Consultation: Guidance – Reporting, recording and managing incidents involving water company assets.

WildFish response

Wildfish is responding to the Environment Agency (EA) consultation on the "Internal guidance for the assessment of self-reporting and recording of pollution incidents from water company assets".

The inference from such a consultation must be that Defra and the EA are satisfied that the current *status-quo* of operator self-monitoring (OSM) should remain in place. That is extremely concerning given the controversy since OSM was introduced 15 years ago and the overwhelming evidence that water companies have been fiddling the books. The EA is effectively consulting on the moving of the furniture on an already sinking vessel.

Your consultation papers say that the intention is to seek views from invitees because *"we want to ensure that the revised guidance is understandable and fit for purpose"*. It is understandable. But it simply allows the continuation of a system which is not "fit" for the intended regulatory purpose.

The proposed changes are, according to your explanation, *"incorporating new storm overflow Event Duration Monitoring (EDM) technology";* "*Clarification of 'no impact' claims"* increased reporting to cover "*all water pollution incidents to us no matter how small"* and amendments to reflect recently updated regulatory approaches.

The problem with these light-touch changes is that they do a fraction more than would be expected of the regulator and its regulated industry whilst not dealing with the more fundamental problem.

More generally, the EA has for far too long relied on stay-at home regulation and investigation allowing the polluters to *self-under-report* on pollution. The reporting of all incidents should have been policy from the word go. As for the regulatory approach to amendments, the EA did not need to wait for the guidance to get on with doing its job properly under the existing law or to require water companies to comply.

1. **Operator Self-Monitoring**

The whole document pre-supposes that the bulk of the analysis and reporting will be done by the water company itself. But it is widely acknowledged that OSM has been completely ineffective and has encouraged dishonest practice insofar as that applies to the monitoring of discharges from sewerage infrastructure. Water companies have exploited OSM and have cheated the system, deliberately and systematically.

The evidence is clear. Effluent and sewage discharge monitoring needs to be truly independent of water companies.

This present government had indicated that it would be committed to rowing-back on OSM. But that appears not to be the case.

The last government extended OSM into the monitoring of receiving watercourses by amending s 141DB of the WIA 1991, giving water companies the responsibility of monitoring their own impact, beyond the sewage treatment works.

This was clearly unwise. Water companies have demonstrated that they cannot be trusted accurately to reflect the impact of their own activities. Further, monitoring of in-river water quality falls firmly within the statutory function of the EA and not with the water companies. Yet the proposed amendments to the guidance simply encourage the reliance on the water companies to police themselves. The legislation, however, does not exclude or obviate EA duties to monitor and investigate impacts on the receiving watercourses.

Self-reporting is problematic not just for EDM and in-river monitoring but all other output data including the day-to-day compliance with permits for treated sewage. It all boils down to this: water companies are required to do spot checking and monitoring and then to self-report in the context of poor regulation.

2. **Third Party-reporting**

As the draft guidance explains, "*The EA can be informed of incidents involving water company assets by either the appropriate water company, which we refer to as 'self-reports', or by an alternative source, which we refer to as 'non-self-reports'*. [p 4]

But nowhere in the document is there an explanation of the status of third party "non-self-reports" as opposed to self-reporting data or the rare sampling undertaken by the EA. What is the evidential status of third-party data?

We believe that many, if not most, pollutions are discovered not by the EA or the polluter but by the general public, calling-in an event to the national phoneline. Presuming that they get beyond the "is it serious?" EA triage-filter, the report may or may not be dealt with by a full investigation and attendance by an EA officer. If there are delays or there is no site investigation and sampling, then it is likely that the third party's evidence will be crucial, but time and time again we find that incidents are "triaged-out", and the water company defends its systems, and the EA fail to act.

Above all, the report of pollutions by third parties and investigated by the EA (in rare moments) relating to exceedances of permits will often *not* count for the purposes of the Look up Tables (LUTs - see below), meaning that the status of reports from the

public remains ambiguous and favours the polluter, whatever the impact of the pollution.

3. Spot sampling

The draft guidance relies, in the main, on the good-faith of the water company to mark its own homework, often on a "*randomised*" basis. Under existing environmental permits, discharges of treated sewage are subject "*spot sampling*" with twenty samples or less being taken over a year at times selected by the water companies themselves.

The EA's Guidance entitled, "*Site-specific quality numeric permit limits: discharges to surface water and groundwater*" (Updated 17 January 2019) explains under the section "*When to take samples"* that "*the 'sampling body', which is either the operator or the Environment Agency, will take the samples. Your permit will provide details of any sampling you must carry out.*"

It continues, *"the sampling body should sample discharges evenly over a 12-month period in a regular but randomised programme. Regular and randomised means approximately equal intervals during the year and includes samples from different days of the week.*

This method of using spot samples taken as part of an oxymoronic "*regular but randomised programme", to* assess whether or not a discharge complies with the applicable conditions, is far from transparent. And it begs the question, what about those *reactive* samples taken by the EA that are not part of the regular and random regime?

The answer is that the samples often do not count for the purposes of the LUT parameters which allow for a small number of the samples to fail or exceed the thresholds per year (such as those for phosphorous, ammonia, dissolved oxygen or suspended solids). So, a permit holder could exceed the LUT parameter limits every day except where the spot samples are "random and routine".

This approach dates back almost half a century to a time when equipment was not available to give continuous results. But real-time continuous monitoring of the key determinands in effluent is clearly possible.

But for the vast majority of the year when samples are not being taken, discharges can breach the conditions within a permit undetected and therefore unenforced. Even if an exceedance of the LUT parameter occurs, as long as it is not discovered during

one of the official routine spot-checks, then it cannot be included in the number of failures allowed under the permit. That means that there could be any number of exceedances and, so long as they are below absolute limits and are not one of the several allowed every year for routine sampling, they will not count and do not constitute breaches of permit.

It is notable that the draft guidance refers to “Assessing Compliance” (p 12), and advises that a record must be made of whether there has been a non-compliance with a permit. Of course, if a spot sample is non-random, and non-regular, it may often be compliant with the permit conditions and will not need to be recorded or assessed: an absurdity which is not dealt with in the draft guidance document or elsewhere. As above, the majority of “incidents” are ones not reported by the water company but by the public. Little do they know that their efforts at reporting may well come to naught.

4. Continuous monitoring

As the draft guidance says for assets with telemetry, “*. . .the water companies should have real-time, remote operational oversight of such assets. If water companies rely upon alarm and telemetry systems at unmanned sites, then it is paramount that such systems are effective, accurate and fully operational.”.* It does not take much in the way of guidance-amendments to require that *all* such data should be published in real time. Then there is less risk of the EA having to rely on the unreliable polluter for its data. But these assets are only the ones with telemetry. There are many others that need to have up-to-date monitoring equipment fitted.

Compliance-checking for both treated effluent and for spills of storm sewage and emergency overflows needs reliable detection and recording devices, independently controlled and calibrated, providing real-time data to the regulator which should then assess compliance as against modernised permits, with such permits designed to ensure that the treated effluent or other discharge does not harm the receiving watercourse. This would be a straightforward and common-sense approach to reporting, recording and managing incidents.

The problems of self-monitoring would disappear if the data were made available, in real time, to the public and not simply left to the water companies to select, subject to very occasional inspections by the EA.

Importantly, the continuous monitoring equipment could be paid for by sewerage undertakers but operated independently of the water companies who have shown over the last few years that they are not trustworthy, seeking to manipulate effluent data under the spot sampling process and also under operator self-monitoring.

With such continuous monitoring and publicly available data, EDM, as an example *par excellence* of how small checks mean limited transparency, would be unnecessary and redundant. The EDM data requirements, for instance, do little to provide real insight into the water company compliance. All the EDM data shows is when the "event" begins and ends. The system is simply unreliable and open to abuse. It should be replaced by flow metres which have proven reliable over decades to provide spill-volumes, not just the start and stop times of spills. Such data would be far more relevant to the assessment of performance and the question of whether or not there has been an exceedance of the assimilative capacity of receiving watercourses.

5. Incident response from water company

The section entitled "*Gathering information about the incident*" (Page 23) discusses the information that needs to be gathered by the water company. The intention is that such information should cover both cause and impact with the requirement that the company should submit this information to the EA as soon as reasonably practicable.

We are told that "*the provision of incident information by water companies does not preclude the EA from conducting its own investigation and evidence gathering, or from taking any form of enforcement action in line with its enforcement and sanctions policy."*

The EA "*may also use third party information to assist in the assessment and categorization of environmental incidents*." We say that this option for the EA to investigate should be a fundamental obligation as it is an obvious necessity for the EA to engage proactively because, from our own experience, water companies do not investigate properly and seldom report the full impact on ecology.

Where the EA does not attend or turns up late, that means that cursory investigations may well underestimate the real impact of pollution (for instance, evidence from a fish kill investigated days after a report will have disappeared by the time the dilatory EA officer appears on site; likewise, a visible pollution plume may clear following a single incident after the damage has been caused). Relying on cursory visits by the EA or muted water company investigations is simply not good enough.

With regard to the "*analytical information*" gathering by the water company, the regulator is effectively handing over responsibility to the water company. If there has been an incident reported, or if the EA have on rare occasions discovered it for themselves, they should certainly be undertaking the investigation in full from start to finish.

Of course, getting rid of operator self-monitoring and introducing continuous monitoring with published real-time data would introduce a level of transparency that would make life much easier for the regulator, making non-compliance visible and encouraging better conduct from water companies. There is scope for requiring this in the guidance without changing the law.

Overall, we believe that:

1. OSM needs to be scrapped – it has clearly failed. This can be done by simply drafting guidance which requires the EA to monitor and investigate incidents, and

2. Water companies must be required to install continuous monitoring apparatus;

3. Permits could then be upgraded to reflect continuous monitoring – with monitor failure an automatic permit breach.

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