Wildfish Response to Call for Evidence by the Independent Water Commission

Wildfish is responding to the Cunliffe Review's "Call for Evidence". We ask the commission to note, however, that WildFish was not one of the "90" invited to provide evidence in the initial phase and therefore we have arrived late to the table, despite having written to Sir Jon Cunliffe to ask to be involved.

Nevertheless, we provide below our responses to the consultation using the general headings and not the specific leading questions which we believe are far too narrow. We have answered the official questionnaire, but we wish to expand on a number of issues alongside that constrained response.

WildFish

WildFish is an environmental charity dedicated to protecting wild fish and their habitat across the UK.

We have a long, successful campaigning history (formerly known as the Salmon & Trout Association). We take an approach based firmly on science and the law to address the myriad problems faced by the aquatic environment in the UK. We employ scientists, policy experts and have two in-house solicitors, both with over twenty years of direct experience in water law, across the whole UK. We are strongly independent and do not take any Government or corporate funding.

In relation to the water industry, we have been involved in matters relating to the performance of the water companies in England and Wales (both water and sewerage undertakers and water 'supply-only' companies), addressing the harm caused by the discharge of under-treated and untreated sewage into rivers and lakes as well as the very significant (and often overlooked) impact caused by over-abstraction of water resources from groundwater and rivers for public water supply purposes.

Our work on sewage

In relation to sewage, WildFish has been heavily involved in inquiries, legal cases and statutory complaints to the Office for Environmental Protection (OEP) in recent years. In 2020, WildFish lawyers assisted in the drafting of Philip Dunne MP's Private Member's Bill, the Sewage (Inland Waters) (England) Bill,[1] which led to the various concessions, by way of sewage provisions in in the Environment Act 2021.

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1 https://bills.parliament.uk/bills/2625#:~:text=A%20Bill%20to%20place%20a%20duty%20on%20water,and%20other%20inland%20waters%3B%20and%20for%20connected%20purposes.

Following the changes brought in by the Environment Act 2021, WildFish launched a judicial review challenge against the Storm Overflow Discharge Reduction Plan, which we considered risked ignoring and undermining the existing law on sewage treatment.[2]
In parallel to the judicial review challenge, in 2022, WildFish made a formal and successful complaint to the Office for Environmental Protection (the OEP).[3]

Our work on water resources

WildFish has, for decades, been involved in campaigning to end the unsustainable and damaging over-abstraction of rivers in England – particularly on the chalk streams which stretch from the south west up to Yorkshire.

Rivers and streams that were once teaming with life are now labelled as "water stressed". WildFish sees these impacts at first hand. Our SmartRivers river monitoring project fills the evidence gap in regulatory assessments of rivers by investigating the actual diversity of invertebrate life as against what a healthy rivers should contain. SmartRivers monitoring is an excellent way to tell us just how healthy our rivers are.

In addition to our work in ensuring water companies make proper plans for long-term supply to avoid over-abstraction, we have been involved in important appeals, such as the Test & Itchen abstraction licences inquiry in 2018, which ended in a "section 20" Water Resources Act 1991 agreement for which WildFish contributed a key condition to ensure that the water company would use "all best endeavours" to develop long term measures to avoid the need for drought permits and orders.[4]

We have also responded to a number of consultations, including the Water Resource Management Plan final draft for Southern Water - which received over 800 letters of support of our criticisms directed at Southern Water.

<u>The consultation</u>

As indicated above, we do not intend to rely on our answers to the 73 leading questions posed in the consultation as the questions are far too narrow, miss some of the main issues and involve areas that we believe are way beyond the remit of a water industry review. For instance, we do not agree that this is the right forum to discuss changes to the WFD or for views to be taken on undermining its system of status-designation. WFD is broad as it covers water quality and measures at a high level. It is the litmus test of good regulation and governance of industries which pollute. It is not itself something that should be interfered

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[2] https://www.judiciary.uk/wp-content/uploads/2023/09/Judgment-Wildfish-Conservation-and-Marine-Conservation-Society-and-others-v-Secretary-of-State-for-Environment.pdf
[3] Office for Environmental Protection upholds WildFish complaint | Wildfish
[4] EA faces legal challenge if it fails to curb Southern Water's chalk stream abstraction | Wildfish

with other than to ensure it remains unattenuated and that the regulators do their jobs in implementing its provisions and attaining its goals.

We also object to the implied normalisation of "growth" as a right and obligation at the expense of the aquatic environment. The perspective of the review appears to be broadly utilitarian but ultimately imprecise and without a real understanding of the necessity of protecting the environment. For instance, the suggestion that WFD should somehow be balanced against growth and watered down to allow economic prosperity is perverse (and also misunderstands the way WFD works). WFD actually allows for situations where, for instance, there are no alternatives to activities which are causing damage to waterbodies but where there is an overriding public interest. There is no need to simply re-align the measure of waterbody health to meet growth requirements. The question of whether the RBMPs are not in alignment geographically with particular authority boundaries seems to be a non-question (par 162). The EA/ NRW are the relevant regulators, and they operate on a national basis. We fail to see this as an issue. The regulators make the decisions on the measures required to attain GES which then applies to other actors within catchment.

The key problem with the "Call for Evidence" document is that it is far too broad. It deals with countless aspects of the water industry often with random and generalised references and very little close scrutiny. The document is therefore a victim of its own ambition. The sections are oddly organised and the labelling is sometimes confusing (e.g. "water framework").

Nevertheless, we have tried to respond to the issues raised – and to include others that are relevant – in our response below, using the overarching sections provided in the consultation.

Overall, we do not agree that the system is "broken" or that the time is right to call for renationalisation. We do not have perspective on this. But what we do say is, the regulators, under the existing legislation, need to do their jobs properly. The goals of protecting the environment and ensuring sufficient supply of water and treatment of sewage can be attained by using existing law with some strengthening and minor alteration.

<u>The key areas proposed by the Commission</u>

1. ***The strategic management of water. This seeks views on how to manage the many competing pressures and demands on the water system, and how strategic direction and management can be set at both national and regional levels.***

a) ***Water Resource Planning***

We deal with the issue of the Strategic Policy Statement below on p 10 of our response. However, the absence of strategic, joined-up thinking is apparent in the plans for water resources and infrastructure development for both water and sewage treatment.

For example, the water companies are under a general duty to provide and maintain water supply systems (s 37 WIA), enforceable under section 18. But water supply should go hand in hand with good planning to ensure that supply meets demand without causing damage to the environment. But that really does not happen at present.

A provision was inserted into the WIA by the Water Act 2003 to ensure that the water companies planned how they were going to meet those duties. Water companies are obliged to "*prepare, publish and maintain*" (37A (1)) Water Resource Management Plan (WRMP) which needs to be revised every 5 years and which should set out how the water company will secure water supply to meet demand. Such plans crucially include long term measures such as the use of new infrastructure and reservoirs with provisions for repairs to leaking infrastructure but also ways of reducing demand such as metering – looking forward 25 years. But as with much of the processes overseen by Ofwat and the EA, they are subject to a "best value" metric which to some degree skews results away from the goal of protecting the environment. [5]

Southern Water's WRMP, for instance, illustrates what is wrong with the system of planning for water. In our response to the consultation on their final draft of the SW WRMP, we set out how there are unreasonable delays in the predicted timeframe for the creation of alternative long-term supply sources with ceaselessly shifting targets; there are no alternative long-term supply options proposed in case the primary plans are delayed or abandoned (as they were with the last version of the WRMP) with failures in clarity, deliverability, environmental assessment and environmental protection.

Both Thames and Southern have long term plans in their WRMPs (including reservoir and water transfer and recycling projects). But time is not on the water companies' (nor the aquatic environment's) side and the necessity of so many sign-offs delays matters considerably.

The WRMPs continue to also put forward measures for meeting obligations which are controversial – including plans to rely on drought orders and permits where there is a shortage or the over-use of existing and sometimes new abstraction without examining the effects on sensitive rivers.

Water companies are expected to revise the plans every 5 years and before the end of that anniversary period to review, report and revise the plan (section 37A(5)).

However, there is no strict time limit for the measures detailed in the Water Resources Management Plans to be brought into operation.

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[5] Water Resources Planning Tables – Instructions - https://www.ofwat.gov.uk/wp-content/uploads/2022/03/WRMP24-Table-instructions_2022_Final.pdf

That means, for instance, that some measures (such as large reservoirs, water recycling or desalinisation processes) to meet demand may not have reliable 'delivery dates' and could be dragged out over many years, from one Water Resources Management Plan to the next.

Section 837D - Water resources management plans: supplementary - hints that directions may be given for the process by which Water Resources Management Plans are drawn up, but nowhere with the 1991 Act (sections 37A-37D) is there any requirement that the water company abide by the commitments made in these Plans.

We believe that the way to get around delays is to make the steps towards completion of long term supply projects more transparent and or to make the steps and timetables enforceable by Ofwat.

WildFish has therefore proposed in its suggested amendments to the Water (Special Measures) Bill the addition of a new section in the Water Industry Act 1991, to mirror the general enforceable requirements of section 37 for the provision of water, but applied to the duty to develop new properly sustainable sources of water to meet demand (such as new reservoirs, water re-use schemes, desalination etc), thereby better protecting rivers and groundwaters from over-abstraction.

That would be achieved through amendments to the WIA with a new section at 37CA to create a "general duty" to "carry out the long-term measures for water resources provision included in any of its water resources management plans; to publish interim reports every 6 months and for the duty to be enforceable under s 18.

That would mean that the water company would not then be able to chop and change, kicking the can further down the road to avoid investment.

b) Water, sewage and housing development disconnect

We note scattered references in the 27 February "Call for Evidence" report to the disjunctive relationship of planning/ development and the water industry (see for instance para 38; Box 3; Box 17). We have recently published a "Call to Action" for linking planning/ development and water resources as well as sewage.

The government has expressed the will to pursue growth. But more houses means more demand on sewage infrastructure and water resources.

At one end of the process, abstraction and sewage are subject to licensing and permitting. At the other, the economic regulator deals (in theory at least) with the long-term plans and investment for supply. But the permits seldom reflect what it is necessary for the water company to do to meet capacity requirements.

We say that there are problems with how demand is predicted. Water companies consider "Growth scenarios" in their planning for water resources and wastewater. That should include future housing demand. But it is difficult to predict demand and the plans are often out of date by the time they are approved by Defra – yet they remain often unamended for a five year period.

Water and sewage companies are consulted by local planning authorities in the drafting of their Local Development Plans (LDPs). But the clear lack of capacity demonstrates that this system does not work in accurately predicting demand and required supply.
Water Resource Management Plans (WRMPs) are high level and do not deal with the detail of individual developments and will be out of step with planning applications.[6]

In practice, the water company's role is highly reactive: it will respond to planning applications, when it is consulted (which is never guaranteed), indicating whether it has capacity.

Meanwhile, the planning guidance and the National Planning Policy Framework are really too strategic and insufficiently prescriptive. A local authority can include conditions in a planning permission that require that the question of capacity to be resolved. But with poor data from water companies which fatalistically accept that they have no choice to but to connect where there is a lack of capacity.

The biggest problem is the obligation for water companies to comply with water mains and sewer requisition under ss 106 and 41 of the Water Industry Act 1991. But this is not the case north of the border in Scotland where the public authority (Scottish Water) can refuse permission for connection or required that the developer, pays to upgrade sewers.

Wildfish has recommended that the law be changed by amending the Water Industry Act 1991 to allow for water companies to refuse to connect when there is no capacity for sewage treatment and water resource demands. This takes the responsibility away from non-specialist councils and puts the onus on the developer to only make applications where capacity is present.

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[6] See, for instance, the Draft Water Resources Plan for Southern Water, para 8.2*, "The HRA of the draft WRMP24 provides a strategic, plan-level assessment to support the WRMP. It is not an application-specific ("project" level) assessment. A more detailed, project-level HRA (with Stage 2 Appropriate Assessment where required) will be needed to support any actual planning application and environmental permit or consent. https://www.southernwater.co.uk/media .pdf.*

Despite the unreliability of WRMPs, the EA has recently lifted its objections for a massive development project in Cambridgeshire, assuming that the WRMP will have the right provisions for supply to make the development sustainable. But the WRMP will always be one step behind what is really required. Council approves Waterbeach new town homes after water concerns - BBC News

[6] See, for instance, reference to an appeal by the Post Office to a refusal by Yorkshire Water to connect – discussed at paragraph 46 of *Barratt Homes v Dwr Cymru* [2009] UKSC 13

We also think planning guidance and the NPPF should be amended to clarify that planning permission should be refused where there is no capacity.

Water companies should always be consulted on new housing development and, lastly, the law should be changed to make the developer pay for upgrades to sewage treatment or invest in water resources – or be refused permission.

2. ***The overarching regulatory system. This covers the volume and complexity of legislation in the water sector, and the overall functions and responsibilities of the four regulators (Ofwat, Environment Agency, Drinking Water Inspectorate, Natural Resources Wales)****.*

We believe that the fundamental problem with the water industry is not necessarily with the existing law and statutory framework, but with the failures in implementation under that framework, and in enforcement by regulators of that existing law. As such we believe that the diagnosis is really far more mundane and 'dull' than others describe it to be. See, for instance, our report, "Doing its Job"[7] on the failures of the Environment Agency.

The Agency has been poorly resourced and its existing resources have not been properly directed to robust enforcement. As a consequence, the Agency has not been able properly to investigate and enforce against water companies that are regularly in breach of environmental law. Specifically, the Agency has failed in its duty to review and to impose enforceable conditions in environmental permits, issued under the Environmental Permitting Regulations 2016. All too often, water company permits follow, but do not drive, the investment our rivers require.

WildFish launched a judicial review challenge against the Storm Overflow Discharge Reduction Plan, which we considered risked ignoring and undermining the existing (1994) law on sewage treatment.[8]

Although the case was lost, the judgment of Mr Justice Holgate has clarified how we should comply with the Urban Waste Water Treatment Regulations 1994, which restrict the circumstances in which untreated sewage can be released into rivers via storm overflows.

That 1994 law requires water companies to use best techniques, not involving excessive cost, to prevent untreated sewage being released, unless there is exceptional weather. Exceptional weather does not include normal or usual rainfall. It certainly does not include dry weather

[7] https://wildfish.org/wp-content/uploads/2022/07/Doing-its-job.pdf
[8] https://www.judiciary.uk/wp-content/uploads/2023/09/Judgment-Wildfish-Conservation-and-Marine-Conservation-Society-and-others-v-Secretary-of-State-for-Environment.pdf

conditions, although we have seen many water company sewage pipes discharging untreated sewage into rivers in dry conditions over recent years. The case confirmed that it is for the Environment Agency to set permits under the Environmental Permitting Regulations 2016 to ensure that water companies comply with the 1994 law.

In parallel to the judicial review challenge, in 2022, WildFish made a formal complaint to the Office for Environmental Protection (the OEP) which led to the OEP's announcement of its first-ever investigation into the regulation of combined sewer overflows.

As part of that investigation, the OEP identified failures to comply with environmental law by Defra, the Environment Agency and Ofwat, stating that "we believe that there may have been failures to comply with environmental law by all three of the public authorities".[9]

The OEP's findings resonate with Mr Justice Holgate's judgement in the WildFish case.

The upshot of both is that WildFish believes it is now clear that Ofwat has a duty directly to enforce the 1994 law against water companies, which it has failed to do over decades and that it must now do that urgently. The Environment Agency also has a duty to secure compliance with the 1994 law by tightening the terms of the permits it issues to water companies under the Environmental Permitting Regulations 2016. The Agency must do that at once, as most permits issued by the Agency do not currently restrict raw sewage overflow discharges to exceptional weather.

We note at Box 17 of the Call for Evidence document that there may be too many "statutory requirements" for water and sewage companies to "navigate" for the upgrading of sewage works to meet demand. We find this surprising. Treating effluent to the correct standard is a requirement that cannot be avoided. The method for achieving compliance is for the water companies to pay for upgrades.

If either of Ofwat or the Agency decide not to act on the recommendations of OEP, WildFish has made it clear that it will actively consider further legal proceedings to force compliance with the existing legal duties to enforce the law on sewage against the water companies.

The Agency's Sanctions and Enforcement Policy has also been too weak. The Agency is hamstrung by the Regulators Code and the statutory growth duty. Even when it does take formal enforcement action, it prioritises the use of civil sanctions instead of prosecutions for serious offences. It has been far too willing to accept cosy enforcement undertakings for repeat offences and repeat offending by water companies, a matter that WildFish has reported upon recently and has referred to the OEP.[10]

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[9] https://www.theoep.org.uk/news/oep-identifies-possible-failures-comply-environmental-law-relation-regulatory-oversight

[10] https://wildfish.org/wp-content/uploads/2024/09/WildFish-Report-into-Enforcement-Undertakings_200324.pdf

Members of the Blueprint group of Wildlife and Countryside Link have also called for the removal of Enforcement Undertakings as a way of dealing with water company offences arising out of the recent investigations into widespread water company failures to treat sewage as required by law and relevant permits.[11]

This matter of inappropriate use of enforcement undertakings has also been raised recently by Professor Richard Macrory, who is the recognised architect of many civil sanctions including enforcement undertakings, at the UK Environmental Law Association's annual Garner Lecture in November 2024.[12]

Overall, under recent governments, there has been a serious lack of political support for the Agency taking a tough approach with the water companies and this has undoubtedly contributed to the awful sewage pollution which we now see in our rivers.

Solutions

We note that the EA has only recently put out its "Guidance – Reporting, recording and managing incidents involving water company assets which implies a preservation of the OSM status quo. But it is not too late to publish better guidance to put an end to this failed policy. We note also the light discussion of OSM in the Call for Evidence document, in particular paragraphs 445-447. We disagree that more audits will fix the problem (Call for Evidence, para 462) as the water companies have been shown to "cook the books" – but we do believe that real-time monitoring would assist the regulator and cut the cost of regulation. Your question 55 does not provide the option to do away with OSM. We feel that it is extremely disappointing.

We believe that the Agency (per section 40 Environment Act 1995) should be directed to end operator self-monitoring (OSM) of all effluent discharges to take monitoring back from the water companies and increase permit charges to pay for independent continuous volumetric monitoring of all discharges, with publication of real-time data (all achievable by revising permits issued under the Environmental Permitting Regulations 2016).

Likewise, all licences for the water companies to abstract water for public water supply should be reviewed, if that has not already been done in the last 2 years, to require abstractions from rivers and groundwater for water supply to be monitored continuously, requiring that water companies publish that data in real time.

Although Ofwat is the economic regulator, it has environmental regulatory functions too. But its performance has been woefully poor over many years. Underlying this is the unambitious

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[11] https://www.wcl.org.uk/docs/WCL_Statement_on_Voluntary_Enforcement_Undertakings_and_the_Sewage_Investigation_31_05_2022.pdf

[12] Garner lecture

and internally inconsistent Strategic Policy Statement (SPS) issued to the financial regulator by previous Secretaries of State (which is raised as a question at q 20 in the Call for Evidence). When the most recent SPS was being drawn up, WildFish wrote and published a shadow SPS ("Time to fix the broken water sector")[13] to show how Ofwat could be given the direction it needs to put the water industry back on track.

We consider that the Government could correct the SPS, right now, by using the powers it already has under section 2A of the Water Industry Act 1991.

Above all, we believe that the Secretary of State needs to provide sufficient funding and a strong steer to both regulators to address water company offending as aggressively as they are able. If the new Government really means what it says - that it will not tolerate poor performance across the water sector - then it can start now.

The alternative ways of dealing with many of the above issues are found in our proposals for legislative amendment to the Water (Special Measures) Bill included below.

3. ***Economic regulation. This seeks views on the five-yearly Price Review process and the weight placed upon industry-wide benchmarking. It also covers customer protections, financial resilience and investor returns. This includes how to attract the necessary finance for future investment, with a fair balance between risk and reward***.

Behind all water resource planning is the Price Review process and the Asset Management Planning. It is far too complicated and closes the door to improvements to the systems and allows the water companies to simply use the "locked in" approach to avoid further investment or even meeting compliance targets.

In order to make its decision on what a water company can spend, the water companies are required to produce Business Plans and the regulators draft a Water Industry National Environment Programme (WINEP) report which then helps OFWAT to perform the Price Review (and hence set the percentage by which water bills can rise over the next 5 year period)

But it is an increasingly complex jigsaw of reports and plans. Into the mix go requirements and drivers including the Water Resource Management Plans, the 25 Year Plan and (through WINEP), the Environmental Improvement Plan - CAMS process outcomes, WFD drivers and so on.

[13] https://wildfish.org/wp-content/uploads/2022/06/STC-AT-%E2%80%93-OFWAT-Report-final-draft.pdf

But what is really needed is a simplification and alignment of Ofwat's price review process with other plans and programmes for water.

As for the economic regulator's role in environmental regulation, we were encouraged that, as a consequence of our legal challenge and our complaint (where the OEP identified failures to comply with environmental law), Ofwat seems finally to have decided to take its enforcement role for breaches of duty by the water companies more seriously. But these challenges highlight that the proper role of the regulator is to regulate and enforce in order to protect the environment, and not to soft pedal on its statutory duties (which has meant years of illegal activity by water companies).

Price Reviews should not be restricted to economic matters alone and should not conflict with the scope of enforcement or indeed the companies' obligations by simply putting a price on compliance with environmental law.

Despite a recent but reluctant awakening of concerns and some reaction to amendments to the Water industry Act, we continue to be alarmed at the *insouciance* of Ofwat to pursue its duty-bound regulation of the water industry and to use its powers under, for instance, s 18 of the Water Industry Act 1991.

On the face of it, WildFish believes that we have the necessary legislation to ensure that the environment is protected from sewage pollution and over abstraction and that Ofwat must press the water companies to achieve total compliance with environmental obligations. Non-compliance is caused by a lack of capacity and a gap between regulatory compliance and economic investment, not helped by past and current failure of the regulators to ensure that sewage treatment and water supply are managed properly. But the business model has prevailed instead, allowing the environment to absorb the consequences of poor management and under-investment. There is an enormous amount of catching up to do.

But in PR24, there were serious blocks imposed by Ofwat which, despite the hype of improvements, meant that there has been no guarantee of positive outcomes. That includes:

- Far too much emphasis on caps to investment in water supply. There is also confusion over how this interrelates with more detailed and complex plans – for instance WRMPs – which set out the intentions of the water companies to ensure that supply meets demand without compromising rivers, streams and groundwaters and the habitats they support. Such uncertainty and confusion over the mismatch between plans means that long term measures to meet demand are further obscured and left to an uncertain fate.

- a real failure to ensure that there is clarity over thresholds for enforcement (at recent presentations by Ofwat - "Your Water; Your say" - there was a lack of understanding of how far a water company needs to be in breach of its licence and statutory obligations before Ofwat would intervene);

- the adopted philosophy that there are restrictions on how a water company that failed to invest in a previous period can be forced to commit to capital investment for fear of duplication. This effectively means that that a positive outcome for the environment will be forever delayed; the cycle can only be broken by clear directive from Ofwat to order investment where necessary and not to compromise;

- Ofwat is clearly conflicted as it is required to pay attention to its "growth" duty under s 108 of the Deregulation Act which has nothing to do with the consumer or the environment and in fact means that the light touch in agreeing investment and enforcement is further undermined by worries over the impact on water companies. That should never be a material consideration in the price review.

Of course, the solution to the inconsistency between plans and price reviews is that the water companies should be told to do what they need to do to comply with the law; the source of funding is secondary. All plans would therefore be united by the common aim to protect the environment and for the water companies to comply with their legal obligations.

In any event, a basic but important resolution to the Price Review defects would be for: 1. Ofwat to insist on goals being met (i.e. with the required investment to meet total compliance) and then to apply the metric, rather than deciding what is fair for the company and the consumer and setting a compromise. The liability should then be applied between the water company and the consumer to reach the environmental aims 2. Ofwat should provide better clarity on what it understands its regulatory and enforcement role to be, with key criteria for when it will act to prevent breaches of obligations by the water companies.

4. ***Environmental and drinking water regulation. This covers how regulation can better protect the environment, public health and the country's finite water resources. It seeks views on how water companies are held to account for non-compliance.***

Typically, water resource use is subject to an abstraction licensing under the Water Resources Act 1991, which will include conditions relating to the amount of water that can be taken from a source per day or per hour..

But having a licence does not mean that there is compliance. This is complicated by the fact that water companies and other businesses are rarely required to produce evidence or measurements of the amount of water they have actually taken.

The system relies on self-reporting, with rare inspections by the EA. And when breaches are identified (i.e. when too much water is abstracted) the regulator will only be given very basic

details of an exceedance, probably just a snapshot reading that does not tell the regulator for how long the exceedance has continued (i.e. the volume of illegally abstracted water).

WildFish has uncovered data that shows that where there have been exceedances, these are rarely followed up by the EA and no sanctions applied, which means that water companies (the main offenders) go scot-free. There is almost never any assessment of the harm caused to the rivers from which the water has been taken unlawfully, in our experience.

Where there are breaches of condition, the EA's guidance explains that they should be investigated for their impact on the environment. But it is common knowledge that the law on abstraction is rarely enforced.[14]

WildFish has seen evidence that there have been multiple breaches of licence in England over the past 5 years. For example, within the sensitive catchments of the Test, Itchen and Avon, which are vulnerable chalk streams, there were 46 breaches of licence between 2019 and 2023 by water companies with no prosecutions. It is uncertain how long these breaches lasted for, so the question arises, what was the quantity that was removed and how has it impacted the rivers? Neither the EA nor the water companies are able to say.[15]

It is unclear whether the lack of enforcement is down to an absence of information on the extent of breaches (e.g. the duration and the impact) or just the lack of capacity for EA to inspect, monitor and enforce as against the licences it issues.

Nowhere is abstraction more controversial than when water is scarce. And questions of scarcity are becoming more and more common with increasingly persistent droughts, especially in the south of England.

The water companies are under a duty to maintain a water supply and to connect a domestic supply to consumers (see for instance sections 37 and 41 WIA 1991), but whether through poor regulation or poor investment or both, the sources of water are limited, so attention turns to rivers including those already over-abstracted.

Drought orders and permits provide for supply-side measures, in common language, taking more water from rivers, when river flow is already much reduced. In effect, this may allow the taking of water where there is little left and could be the final straw in terms of environmental impact. This can be particularly bad for the ecology of chalk streams.

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[14] See ENDS report: "Just 17 water abstraction licence breaches punished by regulator in past decade
EXCLUSIVE: In the past ten years just 17 abstraction licence breaches have resulted in a financial penalty despite hundreds of infractions recorded, according to Environment Agency (EA) data obtained by ENDS Report." [dated?]

[15] Letter to EA from WildFish dated 5 September 2024; EA to WildFish 20 December 2024

At a higher administrative level, the previous government published its Water Resources Planning Guideline (WRPG), which effectively "guides" the water companies in how to make provision for such extreme conditions for inclusion in their Water Resource Management Plans (WRMP), which require water companies to maintain supplies in a drought without having to rely on damaging drought permits and orders – but the target for achieving this is 2039 – a long way in the future[16].

Section 39B Water Industry Act 1991 also requires water companies to prepare, maintain and publish drought plans. Drought plans cover the range of actions necessary to deal with various drought situations and should include detail on possible drought permits and drought orders options with assessments of likely environmental impacts and proposals for environmental monitoring and mitigation. It is expected that when drought strikes, the water company should follow its drought plan.

In 2018, WildFish took part in an inquiry sparked by the EA's intended "variation" of abstraction licences on the Test SSSI and Itchen SAC – iconic chalk streams.
Under pressure from WildFish, the EA had said it needed to vary the licences as they could not be certain that the existing abstraction limits weren't having a significant adverse effect on these protected rivers. Southern Water's position was, conversely, that it was under a statutory duty to provide water to consumers and without taking that water there would be a risk to supply under section 37 Water Industry Act 1991.

WildFish and some other NGOs put forward an amendment to the agreement to prevent the avoidance or delay of "*urgent and necessary investment*" and for the water company "*to use all best endeavours to implement the long-term scheme for alternative water resources"* with an objective to stop using drought permits and orders by 2027.

However, with the gulf between WRMP level planning and abstraction licensing, the targets set in the agreement keep moving and now the new long-term measures (which replace others suggested in 2018 at the time of the inquiry) have been kicked further down the regulatory road with dates of 2030 and 2035 being suggested for when new water sources come on line. That means further and unsustainable use of drought permits to make up for the lack of long term investment.

WildFish believes that the current web of law covering abstraction can be made to work – maybe with a few tweaks. The last government proposed moving the regulation of abstraction into the Environmental Permitting Regime so that the system could be standardised. Although streamlining regulation so that, for instance water companies can have discharge permits for sewage and abstraction under the same regulatory process, it is not certain whether that would make a difference to the environment other than assisting the water companies in having their applications expedited.

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[16] See the Water Resource Planning Guideline, section 4 Water resources planning guideline - GOV.UK (www.gov.uk) "Planning to be resilient to a 1 in 500 drought".

What is certain is that without regular inspection of existing permits and continuous, publicly available, volumetric monitoring of actual abstractions, there will be a real gap in regulation and over-abstraction will continue to be the norm.

Surprisingly, whereas the Environmental Permitting Regulations (which govern water company discharges of treated and untreated sewage into rivers) require that permits be reviewed from time to time, there is no such equivalent requirement in the Water Resources Act 1991; the drivers are rather found in the WFD and under the Habitats Directive where the abstraction licences effect protected streams and rivers.

The drivers for review in WFD etc are less absolute and more procedural – which means that there is too much leeway to simply continue as normal.

WildFish has proposed several changes to the way regulators such as the EA regulate abstraction:

- The EA should properly regulate existing licences which should include regular and frequent inspection and, preferably, continuous monitoring;

- There should be a review of licences at least every five years for non-sensitive river abstractions and at least every other year for protected rivers.

- The EA should properly investigate the impact of breaches (usually volume exceedances) to establish the seriousness and take enforcement action rather than doing nothing in some misguided effort to protect its working relationship with the water companies;

- Alternative sources of water need to be planned, established and built now and in line with ambitious, enforceable targets;

- All applications for drought permits or orders should be heard by way of an inquiry and the application must come prepared with all impact and appropriate assessments;

- As they are the most valuable of our aquatic habitats, and are important on a global basis, WildFish believes that water companies should end abstraction from chalkstreams and take steps to find other sources.

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5. Water company ownership models. This includes the impact of public listing versus private ownership and how to ensure financial resilience.

We note and welcome that the Commission's work will be aimed at making the existing 'privatised' model work. The paper states, for example, "the Commission will focus on reforms that improve the privatised regulated model". Though we note that the questions raised in the consultation appear to suggest broader options.

We believe that it is not for WildFish to suggest which corporate structure is best for water companies. We are not expert in that area. While we do note that some eNGOs are arguing that we need complete and fundamental 'root-and-branch' reform of the water industry and that the Water (Special Measures) Bill (and some future Bill) should be used as a vehicle to bring about that change, when it comes to the water companies, WildFish lawyers strongly believe the existing legal structures – with a few 'tweaks', and if implemented correctly, and with strong political support from the highest levels of government – are largely sufficient already to put the water industry back on track.

We do find ourselves slightly 'out on a limb' in that thinking.

Of course, it is undeniably true that, with the connivance of the central government, Ofwat and the Environment Agency have presided over a decade or more of the water companies' performance getting markedly worse and rivers, lakes and coastal waters getting more polluted by sewage - and all the while, money has been siphoned out of the companies with some now drowning in their own debt - that is largely 'water under the bridge'. That cannot easily be undone.

The poor financial regulation of the industry by Ofwat, and the knock-on effect of that on the ability of the Environment Agency to require the necessary changes to water company operations in relation to both sewage treatment and water resources management, is at the heart of the issue.

In that context, WildFish would strongly recommend the Commission to examine the speech made by Michael Gove, then Secretary of State in 2018,[17] particularly with respect to the financial engineering that the water companies have used. That has been a clear failure of

[17] https://www.gov.uk/government/speeches/a-water-industry-that-works-for-everyone

Ofwat to prevent the ‘siphoning off’ of money to investors and away from necessary investment.

However, in relation to the insufficiency of investment over the last decade or more, we cannot go back in time. Unlike some other eNGOs, WildFish recognises that, given where we find ourselves today, it will the water bill-payer, one way or another, that has to pay for the failings to date to protect the environment. That will take time, but if we can lock in the principle that there must be higher-than-once-expected levels of annual investment, over at least the next decade, then considerable progress will be made to rectify the problems we now see.

Therefore, we particularly welcome the fact that the Commission's recommendations will be “practical and deliverable”. WildFish does not believe the Commission should be attracted by ‘blue-sky’ thinking – nor ripping up the current statutory framework and ‘starting again’ - but should focus its attention on making the current system work.

6. ***Asset health and supply chains. This seeks views on improving the resilience of water company infrastructure – its pipes, water treatment plants, reservoirs and pumping stations. It also covers the capacity and robustness of water industry supply chains.***

As above in the first section, we believe that water companies should be forced to comply with deadlines for providing upgraded and new infrastructure under, for instance, the WRMP and DWMP. Simply revising timeframes based on investment on a 5 year basis cannot work unless the timeframes are locked in and punitive measures levelled at water and sewage companies if deadlines are not met.

With the “sword of Damocles” hanging above the heads of the water industry and proper enforceable and enforced targets (overseen by regulators charged with doing their jobs properly), we believe that the aquatic environment would be in a far better state.

Annex 1

We set out below the WildFish proposals for amendments to the Water (Special Measures) Bill which relate to small changes to current water legislation that could have significant effects in improving the regulation of the water and sewage industry and protecting the environment.

Index to amendments proposed by WildFish

1) Right to connect to public sewers: ensuring sufficient sewage treatment capacity when granting planning permission for new builds

2) Requiring the Environment Agency to review environmental permits applying to water companies

3) Requiring the Environment Agency and not water companies to monitor in-river impact, and to require publication of data generated

4) Requiring continuous real time independent monitoring of water company treated effluent storm sewage discharges and emergency sewage discharges

5) Removal of Regulators' Code and statutory growth duty in respect of regulation of water and sewerage undertakers

6) Giving the Authority a primary duty to protect the environment

7) Ensuring water companies remain as public authorities for the purposes of the Environmental Information Regulations 2004 and requiring proactive publication by water companies of operational sewage and effluent monitoring data

8) Duty to comply with water main requisition: ensuring sufficient water resource capacity when granting planning permission for new builds

9) Form and content of abstraction licences: requiring improved monitoring and publication of volumes abstracted for water resources

10) General duty to deliver measures set out in Water Resources Management Plans

11) Ending the use of Enforcement Undertakings to deal with water company pollution offences

1) **Planning and capacity considerations: ensuring sufficient sewage treatment for new builds**

Some developers argue that because of the legal obligations on sewerage undertakers to treat wastewater, the question of sewer and sewage treatment capacity is not a material planning consideration. There is therefore a reluctance among planning authorities to impose conditions to protect the environment from sewage pollution partly because of the case of *Barratt Homes v Dwr Cymru* [2009] UKSC 13 where the Supreme Court confirmed that section 106 of the Water Industry Act 1991 provides a right for householders to connect to the sewer network and that, only in narrow circumstances, can the water company refuse such a connection.

Section 106(4) allows for the sewage undertaker to serve a counter notice on the developer or owner of land intended to drain to the public sewer to refuse the permit communication in narrow circumstances including standard of the connecting drain and where it is prejudicial to the undertaker's sewerage system.

But it does not include **capacity** as a ground for refusal.

The Court of Appeal commented, as summarised but not contradicted by the Supreme Court, that, "*If the developer indicates that he intends to deal with the problem of sewerage by connecting to a public sewer, the planning authority can make planning permission conditional upon the sewerage authority first taking any steps necessary to ensure that the public sewer will be able to cope with the increased load (*para 43)*".*

This puts the onus on the local planning authority to treat the issue of capacity as a material consideration and to resolve it by way of conditions. However, in our experience, it is rare for local planning authorities to deal with the issue of capacity by way of conditions or indeed to always give capacity the attention it requires in the planning process. This is not surprising, given the level of technical understanding that is required by the local planning authorities to deal with sewage infrastructure issues.

WildFish believes that capacity to deal with sewage – including to treat it to render it harmless - is, in fact, always an important material consideration and it is vital that there is sufficient capacity for new builds before they are approved.

WildFish proposes an amendment to the Water Industry Act 1991 to allow the sewage undertaker to refuse to connect to the public sewer where there is insufficient capacity. This amendment (54) was tabled at the Lords' Committee stages in the name of Baroness Browning but was not moved.

After Clause 3, insert the following new Clause—

"*Right to communicate with public sewers*
In section 106(4) of the Water Industry Act 1991 (right to communicate with public sewers), after paragraph (b) insert—
"(c) the predicted or actual volume of sewerage to be discharged into the public sewer would exceed the capacity of sewerage infrastructure.""

2) **Requiring the Environment Agency to review environmental permits applying to water companies**
Currently, Regulation 34 of the Environmental Permitting Regulations 2016 only requires the Environment Agency (EA) to periodically review environmental permits, including those attached to water company sewage works.

However, the truth is that many permits remain unfit for purpose and do not properly protect the receiving waters (rivers, lakes and coastal waters) from harm.

They have not been reviewed as they need to be and are outdated. Most importantly, they do not reflect the needs of the receiving water (rivers, lakes or coastal waters) but merely reflect the infrastructure that the water company has in place, even if that infrastructure is not adequate.

The discretion afforded by Regulation 34, combined with lack of resources within the EA, and the pernicious effect of the Regulators' Code (see below for specific amendment on the Code etc), has led the failure to review water company permits to ensure they comply with existing environmental obligations, for example, those laid out in the Urban Wastewater Treatment Regulations 1994.

This was a matter raised during the recent WildFish judicial review Wildfish Conservation, R (On the Application Of) v Secretary of State for Environment, Food and Rural Affairs [2023] EWHC 2285 (Admin) (15 September 2023) (bailii.org) of the previous government's Storm Overflow Discharge Reduction Plan. At para 87 of his judgment, Mr Justice Holgate stated that *"although the EA is not an enforcing authority under the WIA 1991 for breaches of the 1994 Regulations, it must use its powers as the regulator for environmental permits to satisfy its own obligation under reg.6(2)(c) and to achieve compliance with the 1994 Regulations*".

However, generally the EA has not done that, with permits merely following, but not driving, water industry investment in sewage infrastructure.

WildFish therefore proposes that the EA should be placed under a duty to review those permits applying to water companies every five years (we suggest in advance of each periodic review cycle) to ensure they reflect other legal obligations on sewage pollution and water quality and therefore drive investment.

This amendment (56) was tabled at the Lords' Committee stages in the name of Baroness Bakewell of Hardington Mandeville and Earl Russell but was not moved.

After Clause 3, insert the following new Clause—

*"**Review of environmental permits***

The Environmental Permitting (England and Wales) Regulations 2016 are amended as follows.

In Regulation 34, remove (1) and insert—

"(1A) The regulator must review environmental permits held by a person appointed under the Water Industry Act 1991 as water undertaker or sewerage undertaker for any area of England and Wales at least once every five years in order to ensure those permits—
contain conditions to incorporate all relevant legal obligations on such persons with respect to sewage treatment and disposal including but not limited to those specified in the Water Industry Act 1991, and
contribute to achieving all relevant targets set out under the Environment Act 2021.""

Member's explanatory statement
This amendment would require the Environment Agency to review environment permits applying to water and sewage companies every five years, rather than "periodically" as regulations currently dictate.

3) Requiring the Environment Agency and not water companies to monitor in-river impact, and to require publication of data generated

As is now widely acknowledged, there were considerable problems caused by the introduction some fifteen years ago, of OSM into water company activities insofar as that applies to the monitoring of discharges from sewerage infrastructure. At the time many NGOs, including WildFish, warned that OSM would prove to be a big mistake, but were ignored.

The naked truth is that water companies have exploited OSM and have cheated the system, deliberately and systematically. The evidence is very clear and is not disputed by the Environment Agency (EA).

Both this and the previous government have now committed to rowing-back on OSM. Effluent and sewage discharge monitoring needs to be truly independent of water companies. That can be delivered without changes to the law.

However, the principle of OSM was extended unwisely by the last Government, by section 82 of the Environment Act 2021, which amended Part IV of the Water Industry Act 1991 (s141DB).

Section 82 required water companies to monitor the quality of water potentially affected by its discharges.

Put another way, section 82 extended OSM into the rivers themselves, giving water companies the responsibility of monitoring their own impact, beyond the sewage treatment works.

This is 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 Environment Agency and not with the water companies.

To rectify the position created by section 82 of the 2021 Act and ensure that the regulator, the EA, is the body charged with monitoring in river water quality upstream and downstream of sewerage infrastructure - and also to ensure that the data produced by such monitoring is published - WildFish proposes the following amendment.
This amendment (58) was tabled at the Lords' Committee stages in the name of Baroness Young of Old Scone (an ex-CEO of the Environment Agency) but was not moved.

After Clause 3, insert the following new Clause—
"Monitoring quality of water potentially affected by discharges
Section 141DB of the Water Industry Act 1991 (monitoring quality of water potentially affected by discharges from storm overflows and sewage disposal works) is amended as follows.
In subsection (1) for "A sewerage undertaker whose area is wholly or mainly in England" substitute "The Environment Agency".
For subsection (2) substitute—

"(2) The assets referred to in subsection (1) are—
(a) any storm overflow operated by a sewerage undertaker, and
(b) any sewage disposal works comprised in the sewerage system of a sewerage undertaker, where the storm overflow or works discharge into a watercourse."
(4) For subsections (4) to (7) substitute—
"(4) The Environment Agency must publish online the data obtained as a result of the monitoring under subsection (1) in as close to real time as is practicable.""

4) Requiring continuous real time independent monitoring of water company treated effluent storm sewage discharges and emergency sewage discharges

Under existing environmental permits, discharges of treated sewage are subject to what is known as 'spot sampling', with often only twenty samples taken over a year at times selected by the water companies themselves.

This method of using spot samples to assess whether or not a discharge complies with the applicable conditions dates back almost half a century.

Further, the twenty or so samples are then subject to what is known as the 'look up table' which allows for a small number of the samples to fail the conditions within the permit, with the operator still achieving overall compliance with the permit.

This approach dates back to the time before technology existed to enable real time continuous monitoring of the key determinands in effluent and is woefully out of date.
Simply put, permits do not reflect modern practices.

It is clear that 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 look up table 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.

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 waters.

This would be a straightforward and common-sense approach to modernising permitting of all sewerage undertaker discharges.

Importantly, the continuous monitoring equipment should 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.

As part of the changes proposed here, storm sewage Event Duration Monitors should also be replaced. They are unreliable and should be replaced by flow metres which have proven reliable over decades and provide spill volumes, not just the start and stop times of spills, as EDMs do. That, of course, is far more relevant data to the receiving water and whether or not the assimilative capacity of receiving waters is being exceeded.

Allied to this amendment has to be an end to operator self-monitoring, brought in about 14 years ago, under which the water companies have monitored their own effluent and have been trusted to report the results to the regulator. As has been comprehensively proven, the water companies have cheated the system in order to allow them to discharge undertreated and raw sewage to receiving waters in breach of existing permits and the requirements of the Urban Wastewater Treatment Regulations 1994.

This amendment (59) was tabled at the Lords' Committee stages in the name of Lord Cameron of Dillington but was not moved.

After Clause 3, insert the following new Clause—
"Environmental permits: monitoring requirements: sewerage undertakers
The Environmental Permitting Regulations 2016 are amended as follows.
In regulation 34 (Review of environmental permits and inspection of regulated facilities), after subsection (1) insert—
"(1A) By 31 December 2027 the regulator must amend or modify any existing environmental permit that relates to the discharge of treated effluent, storm sewage or emergency sewage by a sewerage undertaker to include conditions that—
ensure the independent, continuous volumetric and qualitative monitoring of all discharges, such qualitative monitoring to be as against such determinants as the regulator shall deem necessary;
require the real time online publication of all data generated by the monitoring under paragraph (a); and
detail the method of assessment of compliance with the permit as against the monitoring under paragraph (a).""

5) Removal of Regulators' Code and statutory growth duty in respect of regulation of water and sewerage undertakers

The Regulators' Code came into effect in 2014. This followed Lord Heseltine's independent report from 2012, 'No stone unturned: in pursuit of growth', which recommended that the then government should impose an obligation on regulators to take proper account of the economic consequences of their actions.

The Regulators' Code was intended to deliver "a flexible, principles-based framework for regulatory delivery that supports and enables regulators to design their service and enforcement policies in a manner that best suits the needs of businesses and other regulated entities".

Similarly, the statutory growth duty, established by section 108 of the Deregulation Act 2015, requires regulators, when exercising their regulatory functions, to have regard to the desirability of promoting economic growth. Both the EA and Ofwat are forced to consider the importance of the promotion of economic growth and ensure any regulatory action they take is necessary and proportionate.

These two measures have undoubtedly had a chilling effect on how the EA in particular, but also Ofwat have been able to operate with respect to the water companies.
However, the statutory and regulatory system controlling the operation of water and sewerage undertakers is necessarily detailed as set out in the Water Industry Act 1991.

For all the fairly obvious reasons, water companies are not normal private companies and are - at least on paper - strictly controlled by the state because their functions are essential to public well-being.

In relation to pollution control, the water companies have specific and long-standing duties that they must meet but have hereto failed to meet. They also enjoy a privileged position in respect of the setting of customer bills as effective regional monopolies.

It is therefore inappropriate to allow those water companies to 'enjoy' the benefit of the obligations placed on the EA and Ofwat by the Regulators' Code and the statutory growth duty, both of which act to constrain proper regulation of the water industry by those regulators.

To remove the EA and Ofwat from the scope of the Regulators' Code and the statutory growth duty, only when dealing with water companies, WildFish proposes the following amendment.

This amendment (84) was tabled at the Lords' Committee stages in the name of Baroness Jones of Moulsecoomb but was not moved.

After Clause 9, insert the following new Clause—

"Removal of Regulators' Code and statutory growth duty in respect of regulation of water and sewerage undertakers

The Schedule to the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 (S.I. 2007/3544) is amended as follows—

in Part 1, after "Environment Agency" insert "except in so far as those functions relate to a water or sewerage undertaker appointed under the Water Industry Act 1991";

in Part 2, omit "Water Industry Act 1991".

Part 1 of the Schedule to the Economic Growth (Regulatory Functions) Order 2017 (S.I. 2017/267) is amended as follows—

after "Environment Agency" insert "except in so far as those functions relate to a water or sewerage undertaker appointed under the Water Industry Act 1991";

omit from "Water Services Regulation Authority" to the end of Part 1."

Member's explanatory statement

This amendment aims to remove the Environment Agency and Ofwat from the scope of the Regulators' Code and the statutory growth duty, only when dealing with water companies.

6) Giving Ofwat a primary duty to protect the environment

Currently, the general duties of Ofwat are set out in section 2(2A) of the Water Industry Act 1991, but do not include an express duty to protect the aquatic environment, as shown:

General duties with respect to water industry
(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--
(a) to further the consumer objective;
(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;
(c) to secure that companies holding appointments under Chapter 1 of Part 2 of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions; . . .
(d) to secure that the activities authorised by the licence [of a water supply licensee or sewerage licensee] and any statutory functions imposed on it in consequence of the licence are properly carried out; and
(e) to further the resilience objective
…
[(2DA) The resilience objective mentioned in subsection (2A)(e) is--
(a) to secure the long-term resilience of water undertakers' supply systems and sewerage under-takers' 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,
including by promoting--
(i) appropriate long-term planning and investment by relevant undertakers, and
(ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources.

Additionally, there is a highly qualified duty in Section 2(3)(e) :
(*3) Subject to subsection (2A) above, 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—*
….(e) to contribute to the achievement of sustainable development.

It is important to appreciate that the references to ‘environment’ as part of the resilience duty on Ofwat are references to pressures on water company systems etc caused by the environment – i.e. drought, climate change etc – and do not address those pressures on the environment caused by water company activities by over-abstraction of water resources or by the discharge of raw or under-treated sewage pollution.

At the time of the debate on the 2013 Water Bill - that led to the Water Act 2014 - there was considerable disquiet among eNGOs about the failure to give Ofwat an express and direct environmental duty. The consequences of not having given Ofwat such an express and direct duty, to protect the environment in exercising its functions, are clear for all to see ten years later. They do not need rehearsing here.

In order to address this, once and for all, to enable Ofwat to become part of the solution in 'turning round the ship', Ofwat needs to be given a clear and unambiguous environmental duty, by amending section 2 of the Water Industry Act 1991.

This amendment (85) was tabled at the Lords' Committee stages in the name of Baroness Jones of Moulsecoomb but was not moved. It was tabled again (49) at Report stage by Baroness Jones of Moulsecoomb and Lord Sikka but again not moved.

After Clause 9, insert the following new Clause—
*"**Giving the Authority a primary duty to protect the environment***
Section 2 of the Water Industry Act 1991 (general duties with respect to water industry) is amended as follows.

30 Water (Special Measures) Bill [HL]
After subsection (2A)(a), insert—
"(aa) to further the environmental objective;"
After subsection (2D), insert—
"(2DZA) The environmental objective mentioned in subsection (2A)(aa) above is—

to protect the environment;
to ensure compliance by persons engaged in commercial activities concerned with the provision of water and sewerage services with all relevant legal obligations on—
sewage collection, treatment and disposal,
the abstraction of water resources, and
the conservation of biodiversity, and
(c) to contribute to meeting all relevant targets set out under the Environment Act 2021.""

7) **Ensuring water companies remain as public authorities for the purposes of the Environmental Information Regulations 2004 and requiring proactive publication by water companies of operational sewage and effluent monitoring data**

Water companies continue to attempt to thwart the public right of access to environmental information held as part of their role as sewerage undertakers. For example, United Utilities is currently appealing against the Information Commissioner's decision to order it to publish operational data relating to sewage works in Cumbria. If it succeeds, then all such

‘operational’ data from discharges from all sewage works into streams, rivers, lakes and coastal waters will be kept hidden.

In the leading case of Fish *Legal v Information Commissioner United Utilities plc Yorkshire Water Services Ltd and the Secretary of State for the Environment, Food and Rural Affairs* [2015] UKUT 52 (AAC) the Upper Tribunal ruled that water companies in England & Wales are ‘public authorities’ for the purposes of the Environmental Information Regulations 2004 and so are under a legal duty to disclose environmental information they hold to the public.

However, it is not impossible that the decision of the Upper Tribunal might be overturned. Water companies continue to seek appropriate Decisions from the Information Commissioner to appeal in relation to the disclosure of environmental information they hold, to find an appropriate mechanism to avoid their obligations the 2004 Regulations.

It is therefore an appropriate time both to send a ‘Parliamentary reminder’ to the water companies and to give the *Fish Legal* case statutory under-pinning, to put on the statute book that water and sewerage undertakers licenced under the Water Industry Act 1991 are also public authorities for the purposes of the Environmental Information Regulations 2004. Further, the water companies should be reminded of their duties pursuant to Regulation 4 of the Environmental Information Regulations 2004 proactively to publish online by electronic means environmental information they hold. Although this should apply both their regulatory and operational monitoring data held in relation to the performance of their sewerage infrastructure, this data is not often published and requests are routinely denied and contested. WildFish’s proposed amendment would remove many of the difficulties and obstacles that the public experience in getting access to real-time and operational data held by the water companies pursuant to their roles as sewerage undertakers under the Water Industry Act 1991, which the companies, for fairly obvious reasons, might prefer not to disclose.

This would also build on the existing requirement on all public authorities proactively to publish environmental data they hold, adding the specific proactive publication of sewage treatment works and effluent quality data held by water companies.

Additionally, in order to ensure that such changes can be enforced against a reluctant water industry, the amendment at subsection (3) below would enable any failure to proactively publish such data to be referred to the Information Commissioner for investigation (note that currently failures under Regulation 4 cannot be referred for ICO Decision).

This amendment (87) was tabled at the Lords’ Committee stages in the names of Baroness Boycott, Baroness Parminter, Baroness Browning and Lord Whitty but was not moved. It was tabled again (44) at Report stage by Baroness Boycott but again not moved.

After Clause 12 insert the following new Clause—

"Water and sewerage undertakers: the Environmental Information Regulations 2004

(1) A water or sewerage undertaker appointed under the Water Industry Act 1991 is a public authority for the purposes of the Environmental Information Regulations 2004.

(2) After regulation 4 (dissemination of environmental information), paragraph (4)(b) of the Environmental Information Regulations 2004 insert—

"(c) all effluent or wastewater treatment works monitoring data held by water and sewerage undertakers appointed under the Water Industry Act 1991 31 Water (Special Measures) Bill [HL] including operational monitoring data in addition to any data required under permits issued under the Environmental Permitting (England and Wales) Regulations 2016."

(3) Section 50 of the Freedom of Information Act 2000 as read with regulation 18 of the Environmental Information Regulations 2004 is to be read as if a request for information made by the complainant to a public authority includes a complaint concerning any failure proactively to publish information under regulation 4 of the Environmental Information Regulations 2004."

***Member's explanatory statement**:*

This amendment would remove some of the difficulties that the public experience in getting access to real-time and operational data held by the water companies pursuant to their roles as sewerage undertakers under the Water Industry Act 1991 and would enable any failure to proactively publish such data to be referred to the Information Commissioner.

8) Duty to comply with water mains requisition: ensuring sufficient water resource capacity when granting planning permission for new builds

Where new infrastructure is required to provide water supplies for domestic use, the availability of water resources is not always considered by planning authorities as a material consideration, despite the real strain increased abstraction may have on riverine ecology, including waterbodies protected for nature conservation purposes.

Section 41 of the Water Industry Act 1990 requires the water undertaker to provide a water supply to new development (see section 41 (1) (b) (ii)). WildFish suggests that this is amended to allow for the developer to refuse where there is insufficient water resource capacity and there is the possibility of environmental damage being caused by further abstraction.

WildFish sees the impact of over-abstraction on rivers, particularly chalk streams and protected rivers caused by a failure to match demand with supply, partly due to increased development and the escalating demand for water.

WildFish therefore proposes an amendment to the Water Industry Act 1991 (to allow the sewage undertaker to refuse to connect to the public water supply for proposed new development where there is insufficient capacity).

This amendment (88) was tabled at the Lords' Committee stages in the names of Baroness Browning and Baroness McIntosh of Pickering but was not moved.

After Clause 12, insert the following new Clause—
"Duty to comply with water main requisition
In section 41 of the Water Industry Act 1991 (duty to comply with water main requisition), after subsection (4) insert—
"(4A) The duty to provide water under this section shall not apply to provision for a proposed new development where the water undertaker has notified the developer and the planning authority that—
it does not have sufficient water resources available, or
it believes that the provision of water to the new proposed development would be likely to lead to unacceptable damage being caused to a protected site.""

9) Requiring improved monitoring and publication of volumes abstracted for water resources

In WildFish's experience, the Environment Agency (EA) rarely inspects water company abstraction monitoring records. There is also no requirement for continuous volumetric monitoring and publication of real-time or up-to-date data. It is not surprising that there has been effectively no enforcement where there have been breaches of abstraction licences. Spot-check results indicate neither the duration of the breach nor the seriousness of such breaches, either as against the licence conditions, or for the rivers or groundwaters from which abstraction has occurred unlawfully.

WildFish therefore proposes that the Water Resources Act 1991 be amended so that all licences for abstraction held by water undertakers should include a condition that real-time abstraction volumetric data is recorded and made publicly available in as close to real time as is practicable.

This amendment (89) was tabled by Baroness Browning at Lords' Committee stage but was not moved.

After Clause 12, insert the following new Clause—
"Form and contents of licences
The Water Resources Act 1991 is amended as follows.
In section 46 (form and contents of licences), after subsection (7) insert—

"(8) All licences granted to water undertakers for the abstraction of water from surface or groundwater sources must include a condition requiring the continuous measurement or monitoring of volumes abstracted.

(9) The information required under subsection (8) must be made publicly available at all times and should be published online in real time.

(10) For those licences which precede the coming into force of subsections (8) and (9), the measures in those subsections will be required when the licence comes under review or by 31 December 2027, whichever is the earlier."

In section 197 (provision of information about water flow etc.), after subsection (2) insert—

"(2A) It shall be the duty of every water undertaker to publish in real time the flow and abstraction volume data for every abstraction licence that relates to abstractions from rivers.""

10) General duty to deliver measures set out in Water Resources Management Plans

Section 37 of the Water Industry Act 1991 sets a duty for water undertakers to "develop and maintain an efficient and economical system of water supply within its area and to ensure that all such arrangements have been made". It is enforceable under section 18 (see section 37 (2)). The planning of such systems is carried out by way of the Water Resource Management Plans, sections 37A-37D of the Water Industry Act 1991, amended and added by the Water Act 2003, Water Act 2014.

Section 37A of the Water Industry Act 1991, inserted by the Water Act 2003 and amended by the Water Act 2014, makes it an added duty of the water undertakers to "prepare, publish and maintain" a Water Resource Management Plan, defined by subsection (2) as "a plan for how the water undertaker will manage and develop water resources so as to be able, and continue to be able, to meet its obligations under this Part."
Subsection (3)(c) requires that the water company address, "the likely sequence and timing for implementing those measures" referring to the measures the water company intends to "take or continue" to meet demand.

The water company is expected to revise the plans every 5 years and before the end of that anniversary period to review, report and revise the plan (section 37A(5)).
However, there is no strict time limit for the measures detailed in the Water Resources Management Plans to be brought into operation. Nor is there any provision for reporting on progress.

That means, for instance, that some measures (such as large reservoirs, water recycling or desalinisation processes) to meet demand may not have reliable 'delivery dates' and could be dragged out over many years, from one Water Resources Management Plan to the next.
Section 837D - Water resources management plans: supplementary - hints that directions may be given for the process by which Water Resources Management Plans are drawn up, but nowhere with the 1991 Act (sections 37A-37D) is there any requirement that the water company abide by the commitments made in these Plans.

WildFish proposes, therefore, the addition of a new section 37E in the Water Industry Act 1991, to mirror the general enforceable requirements of section 37 for the provision of water, but applied to the duty to develop new properly sustainable sources of water to meet demand (such as new reservoirs, water re-use schemes, desalination etc), thereby better protecting rivers and groundwaters from over-abstraction.

This amendment (90) was tabled by Baroness Browning at Lords' Committee stage but was not moved.

After Clause 12, insert the following new Clause—
"Water resources management plans: general duty.
After section 37C of the Water Industry Act 1991 (water resources management plans: provision of information), insert the following new section—
"37CA Water resources management plans: general duty

It shall be the duty of every water undertaker to carry out the long-term measures for water resources provision included in any of its water resources management plans.
A water undertaker shall publish interim reports every six months on all projects and schemes listed in any of its water resources management plans.
The duties of a water undertaker under this section shall be enforceable under section 18 (orders for securing compliance with certain provisions)—
(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 Director.""

11) Ending the use of Enforcement Undertakings to deal with water company pollution offences

Enforcement Undertakings are one of a number of civil sanctions available to the Environment Agency (EA) in England and are used as an alternative to full-blown prosecution when taking enforcement action, for example, in relation to water company pollution offences under the Environmental Permitting Regulations 2016.

They are being used increasingly to settle matters relating to water pollution offences committed by water companies. The offending water company makes an offer to the EA – usually involving some low value payment to a local eNGO. If the EA accepts, which it usually does, the offence is dealt with, and that is the end of the matter. The EA is then expressly prevented by law from prosecuting that offence in court. This is clearly a very popular mechanism for water companies to deal with their offending.

However, WildFish is clear that Enforcement Undertakings do not provide a strong enough deterrent for serious or persistent offences as they allow the offenders to avoid criminal sanctions and the useful stigma of prosecution.

Despite formal policy to the contrary, Enforcement Undertakings have been and continue to be used by the EA to settle offences committed under water pollution legislation that appear to have caused serious harm (category 1 or 2 incidents). Also contrary to the EA's own stated

policy, water companies have benefitted from having their offers of Enforcement Undertakings accepted for repeat offences, and where they are repeat offenders. WildFish has conducted detailed research into the mis-use of Enforcement Undertakings particularly for water company offences - WildFish-Report-into-Enforcement-Undertakings_200324.pdf - and has supplied that report to the OEP.

Further, members of the Blueprint group of Wildlife and Countryside Link has also called for the removal of Enforcement Undertakings as a way of dealing with water company offences arising out of the recent investigations into widespread water company failures to treat sewage as required by law and relevant permits. See WCL_Statement_on_Voluntary_Enforcement_Undertakings_and_the_Sewage_Investigation_31_05_2022.pdf

This matter of inappropriate use of enforcement undertakings has been raised recently by Professor Richard Macrory, who is the recognised architect of many civil sanctions including enforcement undertakings – see his 2006 Report Regulatory Justice: Making Sanctions Effective - at the UK Environmental Law Association's annual Garner Lecture - see Garner lecture.

To end the use of Enforcement Undertakings, only for water company offences, WildFish proposes the following amendment. This amendment (75A) was tabled at the Lords' Committee stages in the name of Baroness Jones of Moulsecoomb but was not moved.

After Clause 6, insert a new clause:
Water companies: removal of enforcement undertakings
"(1) The Regulatory Enforcement and Sanctions Act 2008 is amended as follows:
(2) In section 50 insert-
"(6) a regulator may not accept an enforcement undertaking from a person appointed under the Water Industry Act 1991as water undertaker or sewerage undertaker for any area of England and Wales""

END

JN
WildFish, March 2025