

# Consultation Responses

Please record your answers here and return via email to [stormoverflows.consultation@defra.gov.uk](mailto:stormoverflows.consultation@defra.gov.uk)

## About you section

**Q1. Would you like your response to be confidential?**

☐ Yes

☒ No

If you answered 'Yes' above, what information would you like to be kept confidential and why? (Read section 'After the consultation' in the 'consultation document' for more information)

**Q2. Provide your full name. If you are representing an organisation or group, you will be asked its name later.**

Guy Linley-Adams

**Q3. Provide your email address.**

guy@wildfish.org

**Q4. In what capacity are you completing this consultation?**

☐ As a representative of a water company

☒ As an e-NGO or other non-profit public interest group

☐ Other (detail below)

**Q5. If you're not responding as an individual, what is the name of the organisation or interested group that you're responding on behalf of?**

WildFish

## Draft sections

We have set out specific questions below. Each question relates to a particular section of the draft information and guidance, which we have provided in a separate document.

### Draft section 3.1: Legal requirements

Refer to section 3.1 of the draft document when answering these questions.

**Q6. Do you agree that the 'legal requirements' section provides helpful information on storm overflows legal requirements?**

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree
- ☒ Strongly disagree
- ☐ I don't know

If you disagree, explain why, providing evidence where possible:

WildFish notes the interesting ‘choreography’ of this consultation (and the two Environment Agency consultations on Storm Overflow Assessment Framework and Spill Frequency), in the light of the OEP investigation of the WildFish complaint made in 2021 to the then interim OEP. Decision Notices have now been issued to DEFRA, OFWAT and the Environment Agency by the OEP in December 2024.

The OEP investigation has concluded that there have been three failures to comply with environmental law by DEFRA:

- Failing to take proper account of environmental law by:
  - Drafting guidance for water companies and regulators which did not reflect the true legal extent of sewerage undertaker duties
  - Failing to amend or replace the guidance after a relevant Court of Justice of the European Union (CJEU) decision in 2012
  - Misunderstanding its legal duty under environmental law to make enforcement orders
- Failing to exercise its duty under environmental law to make enforcement orders

In common parlance, for decades, the law on controlling sewage pollution of English rivers and coastal waters has been broken by Government. It is therefore essential that the information and guidance on storm overflows is revised to reflect the fact that since 1994 (and post-ECJ in 2012), there has been an appalling failure properly to regulate storm discharges from water company infrastructure into English rivers and coastal waters, presided over by DEFRA, the Environment Agency and OFWAT jointly. That led to the lower-than-required levels of investment from water companies over a prolonged period. That is reflected in the appalling levels of sewage pollution of in English rivers that we currently see.

It is therefore incredible that the draft information and guidance on storm overflows does not recognise that thirty-year failure of DEFRA and its regulators to apply the law correctly.

At section 1.1 - Objectives - it is both extraordinary and completely unacceptable that DEFRA should seek to couch what has happened, in the light of what the OEP has concluded, as an “evolution in the understanding of storm overflows legislation”.

DEFRA needs to recognise its failures honestly and openly. Without such an honest approach, DEFRA and its regulators risk merely repeating past failures.

Nor is it acceptable that the draft guidance fails to recognise that, as a consequence of those failings, an immediate and considerable uplift in investment by water companies is required to start to deal with the backlog of under-investment created by DEFRA and its regulators.

It is worth repeating that the section 94(1) duties bite not only on DEFRA and its regulators but also directly on the water companies themselves and have done so since 1994. The companies have enjoyed an unlawfully low level of regulatory demand for investment in sewerage infrastructure for decades.

## **Draft section 3.2: Policy – storm overflows discharge reduction plan**

Refer to section 3.2 of the draft document when answering these questions. For questions in this section, we particularly encourage responses from water companies.

**Q7. Do you agree that the ‘policy – storm overflows discharge reduction plan’ section delivers the objectives of this document (refer to section 1.1 ‘objectives’)?**

- ☐ Strongly agree
- ☐ Agree
- ☒ Neither agree nor disagree
- ☐ Disagree
- ☒ Strongly disagree
- ☐ I don’t know

If you disagree, explain why, providing evidence where possible:

WildFish remains deeply sceptical as to the practical effect that the Storm Overflow Discharge Reduction Plan (SODRP) will have.

In our case of R (oao WildFish et al) v SEFRA [2023] EWHC 2285 (Admin), the court was clear that whilst the SODRP did not offend the law by setting different deadlines to those in statute, the law had primacy over the SODRP.

In effect, if the 1994 Regulations were complied with in full – and without the supporting guidance and decision-making being designed with loopholes and ‘get-outs’ - the SODRP would have limited - if any - purpose or effect.

“...the document [the SODRP] does not give guidance or make statements as to what a WaSC should do in order to comply with existing legislation, including the 1994 Regulation” (as per Holgate J).

It is of course clear that the section 141A requirement for such a plan was an attempt to provide political cover for the government of the day in response to the furore over storm sewage discharges. It was ‘bad law’. At that stage, had the 1994 Regulations been complied with by all concerned, it is doubtful that the SODRP would have been required.

WildFish nevertheless notes that the SODRP was published in August 2022 and under the provisions of the 2021 Act, a first report on implementation of the SODRP must be published at the latest by November 2025.

**Q8. Is the approach for coastal and estuarine waters adequately explained?**

☐ Yes

☐ No

☐ I don't know

If not, explain why, providing evidence where possible:

No comment

**Q9. Are the approaches in the ‘policy - storm overflows discharge reduction plan’ section likely to have an adverse impact on water companies’ ability to deliver their programme of storm overflow works?**

☐ Yes

☐ No

☒ I don’t know

Explain in detail, providing evidence where possible:

WildFish is concerned at the tone of this consultation question. The water companies neither require nor deserve such consideration.

As noted above, the 1994 Regulations and the section 94(1) duties applied to water companies for thirty years and therefore the ability of water companies to comply with that legislation should not now be a consideration.

Had the 1994 Regulations been complied with by all concerned for the last thirty years, it is doubtful that much of the SODRP would have been necessary.

If water companies are now unable to make good the thirty-year backlog of investment, they should face enforcement under relevant law (the Environmental Permitting Regulations 2016).

This requires the Environment Agency to make good on its failure, as identified by the OEP investigation, “to take proper account of environmental law in devising guidance relating to permit conditions” and “as a result...setting permit conditions that were insufficient to comply with environmental laws”, by urgently reviewing and tightening all relevant permits.

The Environment Agency’s Sanctions and Enforcement Policy will no doubt provide more than sufficient discretion as to whether or not robust enforcement action should be taken in the context of any *genuine* difficulties being faced by water companies in delivering the required investment in infrastructure.

**Q10. Are the approaches outlined in the ‘policy - storm overflows discharge reduction plan’ section likely to have any positive or negative impacts (other than those described in Q9)?**

☐ Positive impact

☐ Negative impact

☐ I don't know

Explain, providing evidence where possible:

No comment

## **Draft section 4.1: Investigation triggers**

Refer to section 4.1 of the draft document when answering these questions.

**Q11. Overall, do you anticipate that the impacts of the approach outlined in the 'investigation triggers' section will be positive or negative?**

☐ Positive impact

☐ Negative impact

☐ I don't know

Explain, providing evidence where possible:

Section 4 of the consultation - Assessing storm overflows - is based on a continued failure to recognise that the 1994 Regulations have required a standard of treatment to be applied to sewage including in relation to storm overflows. The fact that we are still assessing storm overflows and that such assessment is still being described as “a key step in water and sewerage companies and regulators being able to identify which storm overflows should be investigated and subsequently where improvements are required” is a sad indictment of the result of the thirty-year failure to comply with the law as identified by the OEP.

The relevance therefore of investigation triggers needs to be examined in that context.

While it may be considered by some to be pragmatic, given where we are today, to prioritise the highest spilling storm overflows, that does not alter the fact that even lower spilling overflows are currently spilling unlawfully, whether or not they have yet been assessed.

The legal duty to assess whether or not its operations are unlawful as against the 1994 Regulations lies firmly with the water companies and WildFish would expect the Environment Agency to apply appropriate permit conditions to all such discharges to protect receiving waters and to take robust enforcement action where water companies fail to meet those conditions. How or whether the water companies investigate their own discharges should be a matter for the companies, but they need to know that should they fail to assess or improve their discharges they will face robust enforcement action from the Agency as against their permits and indeed from OFWAT as against section 94.

## **Draft section 4.2: Investigation process**

Refer to section 4.2 of the draft document when answering these questions. For questions in this section, we particularly encourage responses from water companies.

**Q12. Do you agree that section 4.2 explains the full context around the ‘investigation process’, in line with the objectives of the document (refer to section 1.1 ‘objectives’)?**

- ☐ Strongly agree
- ☐ Agree
- ☐ Neither agree nor disagree
- ☐ Disagree



☒ Strongly disagree

☐ I don't know

If you disagree, do you have an alternative suggestion? Explain, providing evidence where possible:

Section 4 of the consultation - Assessing storm overflows - is based on a continued failure to recognise that the 1994 Regulations have required a standard of treatment to be applied to sewage including in relation to storm overflows. The fact that we are still assessing storm overflows and that such assessment is still being described as “a key step in water and sewerage companies and regulators being able to identify which storm overflows should be investigated and subsequently where improvements are required” is a sad indictment of the result of the thirty-year failure to comply with the law as identified by the OEP.

The relevance therefore of continued ‘investigation’ also needs to be examined in that context.

The legal duty to assess whether or not its operations are unlawful as against the 1994 Regulations lies firmly with the water companies and WildFish would expect the Environment Agency to apply appropriate permit conditions to all such discharges to protect receiving waters and to take robust enforcement action where water companies fail to meet those conditions. How or whether the water companies investigate their own discharges should be a matter for the companies, but they need to know that should they fail to assess or improve their discharges they will face robust enforcement action from the Agency as against their permits and indeed from OFWAT as against section 94.

**Q13. Is the ‘investigation process’ section workable for water companies?**

☐ Yes

☐ No

☐ I don't know

If not, explain why, providing evidence where possible:

See answer to Q12.

The legal duty to assess whether or not its operations are unlawful as against the 1994 Regulations lies firmly with the water companies and WildFish would expect the Environment Agency to apply appropriate permit conditions to all such discharges to protect receiving waters and to take robust enforcement action where water companies fail to meet those conditions. How or whether the water companies investigate their own discharges should be a matter for the companies but they need to know that should they fail to assess or improve their discharges they will face robust enforcement action from the Agency as against their permits and indeed from OFWAT as against section 94.

### **Draft section 4.3: Identifying improvements**

Refer to section 4.3 draft document when answering these questions.

**Q14. Do you agree that the approach to identifying improvements in section 4.3 delivers the objectives of the document (refer to section 1.1 'objectives')?**

- ☐ Strongly agree
- ☐ Agree
- ☒ Neither agree nor disagree
- ☐ Disagree
- ☒ Strongly disagree
- ☐ I don't know

If you disagree, do you have an alternative suggestion? Explain, providing evidence where possible:

The legal duty to assess whether or not its operations are unlawful as against the 1994 Regulations lies firmly with the water companies and WildFish would expect the Environment Agency to apply appropriate permit conditions to all such discharges and to take robust enforcement action where water companies fail to meet those conditions. How or whether the water companies investigate their own discharges should be a matter for the companies, but they need to know that should they fail to assess or improve their discharges they will face robust enforcement action from the Agency as against their permits and indeed from OFWAT as against section 94.

## **Draft section 5: Delivering storm overflow improvements**

Refer to section 5 of the draft document when answering these questions. For questions in this section, we particularly encourage responses from water companies.

**Q15. Is the ‘delivering storm overflow improvements’ section clear on the relationship between the drivers for improving storm overflows (for example, UWWTR 1994 and the SODRP)?**

- ☐ Yes
- ☐ No
- ☐ I don't know

WildFish remains deeply sceptical as to the practical effect that the Storm Overflow Discharge Reduction Plan will have.

It is of course clear that the section 141A requirement for such a plan was an attempt to provide political cover for the government of the day in response to the furore over storm sewage discharges. It was ‘bad law’.

Had the 1994 Regulations been complied with by all concerned, it is doubtful that the SODRP would have been required.

Given the non-statutory basis of the targets within the SODRP there needs to be a clear hierarchy expressed that the earliest possible compliance with the 1994 Regulations is non-negotiable.

It is of course common sense that should new sewerage infrastructure be required to deliver compliance with the 1994 Regulations at any particular location, that should also be future-proofed as against SODRP targets.

If not, explain why, providing evidence where possible:

**Q16. Is it clear what factors water companies need to take into consideration when determining the timing of improvement works?**

For example, the prioritisation of statutory requirements or what water companies should do when additional improvements are identified that are not in existing business plans.

☐ Yes

☒ No

☐ I don't know

If not, explain why, providing evidence where possible:

The question is based upon a premise that the water companies in some way need help to decide the timing of improvement works to their sewerage infrastructure.

However, as noted already, the legal duties imposed by the 1994 Regulations lie firmly with the water companies and have done for decades.

As above, WildFish would expect the Environment Agency to apply appropriate permit conditions to all sewage discharges to protect receiving waters and to take robust enforcement action where water companies fail to meet those conditions.

How or whether the water companies investigate their own discharges or make improvements should be a matter for the companies, but they need to know that should they fail to assess or improve their discharges they will face robust enforcement action from the Agency as against their permits and indeed from OFWAT as against section 94.

**Q17. Do you agree that the approach for determining how and when to deliver storm overflow improvements delivers the objectives of the document (refer to section 1.1 'objectives')?**

☐ Strongly agree

☐ Agree

☐ Neither agree nor disagree

☐ Disagree

☒ Strongly disagree

☐ I don't know

If you disagree, do you have an alternative suggestion? Explain, providing evidence where possible:

For the reasons already given, the implication in the document that storm overflow improvements required under 1994 Regulations should be subject to yet further delay or some prioritisation process fails to recognise that the current position is unlawful as against those 1994 Regulations and that the failures of DEFRA, OFWAT and the Environment Agency has contributed to the extremely difficult practical situation now faced in English rivers.

However WildFish considers that all relevant permits should be revised to include conditions to protect receiving waters. It would then be clear to water companies where improvements are required and it then becomes the question of what would be a reasonable period of time during which to apply the discretion allowed for under the Sanctions and Enforcement Policy operated by the Environment Agency before robust enforcement action - including prosecution and significant fines - are applied to water companies for failures to meet the 1994 Regulations. The same goes for enforcement by OFWAT under section 18 of the section 94(1) duties.

**Q18. Does the framework set out in the ‘delivering storm overflow improvements’ section enable water companies to capitalise on innovative solutions and technological advancements?**

For example, smart sewers or alternative treatment approaches, such as nature-based solutions.

- ☐ Strongly agree
- ☐ Agree
- ☒ Neither agree nor disagree
- ☐ Disagree
- ☐ Strongly disagree
- ☐ I don't know

If you disagree, do you have an alternative suggestion? Explain, providing evidence where possible:

WildFish would note that new research suggests that one type of nature-based solution, the Integrated Constructed Wetland (ICWs), designed to treat wastewater and reduce nutrient pollution in freshwaters, is likely to be ineffective in providing an appropriate solution for pollution control. WildFish recommends that organisations responsible for nutrient mitigation reconsider the use of constructed wetlands only if strong scientific evidence is available to support each proposed use.

**Q19. Is the ‘delivering storm overflow improvements’ section workable for water companies?**

- ☐ Yes
- ☐ No
- ☐ I don’t know

If not, explain why, providing evidence where possible:

See previous comments.

**Q20. Overall, do you anticipate that the impacts of the approach outlined in the ‘delivering storm overflow improvements’ section will be positive or negative?**

- ☐ Positive impact
- ☐ Negative impact
- ☐ I don’t know

Explain in detail, providing evidence where possible:

See previous comments

## **Draft section 6: Enforcement**

Refer to section 6 of the draft document when answering these questions.

**Q21. Is the 'enforcement' section clear on the regulators' enforcement roles?**

☐ Yes

☒ No

☐ I don't know

If not, explain why, providing evidence where possible:

For the reason already given, the implication in the document that storm overflow improvements required under 1994 Regulations should be subject to yet further delay or some prioritisation process fails to recognise that the current position is unlawful as against those 1994 Regulations and that the failures of DEFRA, OFWAT and the Environment Agency has contributed to the extremely difficult practical situation now faced in English rivers.

However, WildFish considers that all relevant permits should be revised to include conditions to protect receiving waters. It would then be clear to water companies where improvements are required and it then becomes the question of what would be a reasonable period of time during which to apply the discretion allowed for under the Sanctions and Enforcement Policy operated by the Environment Agency before robust enforcement action - including prosecution and significant fines - are applied to water companies for failures to meet the 1994 Regulations. The same goes for enforcement by OFWAT under section 18 of the section 94(1) duties.

**Q22. Is the 'enforcement' section clear on instances where the regulators might take enforcement action and the type of action they might take?**

☐ Yes

☐ No

☐ I don't know

If not, explain why, providing evidence where possible:

See answer to Q21

**Draft section 7: Replacing sections of the 1997 guidance**

Refer to section 7 of the draft document when answering these questions.

**Q23. Are you aware of any additional technical documents or guidance being used by the industry to implement the UWWTR 1994 requirements, that are not mentioned in this ‘replacing sections of the 1997 guidance’ section?**

☐ Yes

☒ No

☐ I don't know

If yes, explain, providing evidence where possible:

## Overall comments

Provide any further comments on the draft document below.

**Q24. Do you have any other comments on the draft document that you would like us to consider?**

If so, explain, providing evidence where possible:

## Summary

Thank you for taking the time to respond to this consultation. If you have any questions or concerns, reach out to us by emailing [stormoverflows.consultation@defra.gov.uk](mailto:stormoverflows.consultation@defra.gov.uk)