



## **Proposed amendments to Water (Special Measures) Bill for Commons Stages**

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## 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***

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

*(2) 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—*

*(a) 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*

*(b) 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 operator self-monitoring (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***

*(1) 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.*

*(2) In subsection (1) for “A sewerage undertaker whose area is wholly or mainly in England” substitute “The Environment Agency”.*

*(3) 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***

*(1) The Environmental Permitting Regulations 2016 are amended as follows.*

*(2) 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—*

*(a) 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;*

*(b) require the real time online publication of all data generated by the monitoring under paragraph (a); and*

*(c) 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***

- (1) *The Schedule to the Legislative and Regulatory Reform (Regulatory Functions) Order 2007 (S.I. 2007/3544) is amended as follows—*
- (a) *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”;*
  - (b) *in Part 2, omit “Water Industry Act 1991”.*
- (2) *Part 1 of the Schedule to the Economic Growth (Regulatory Functions) Order 2017 (S.I. 2017/267) is amended as follows—*
- (a) *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”;*
  - (b) *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 undertakers' 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***

*(1) Section 2 of the Water Industry Act 1991 (general duties with respect to water industry) is amended as follows.*

*(1) 30 Water (Special Measures) Bill [HL]*

*(2) After subsection (2A)(a), insert—*

*“(aa) to further the environmental objective;”*

*(3) After subsection (2D), insert—*

*“(2DZA) The environmental objective mentioned in subsection (2A)(aa) above is—*

*(a) to protect the environment;*

*(b) to ensure compliance by persons engaged in commercial activities concerned with the provision of water and sewerage services with all relevant legal obligations on—*

*(i) sewage collection, treatment and disposal,*

*(ii) the abstraction of water resources, and*

*(iii) 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***

***(1) 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—***

***(a) it does not have sufficient water resources available, or***

***(b) 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***

*(1) The Water Resources Act 1991 is amended as follows.*

*(2) 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.”*

*(3) 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 37D - 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***

- (1) 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.*
- (2) A water undertaker shall publish interim reports every six months on all projects and schemes listed in any of its water resources management plans.*
- (3) 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 1991 as water undertaker or sewerage undertaker for any area of England and Wales””*

**END**