WildFish.

WildFish response to Ofwat 2024 Price Review consultation

21 August 2024

WildFish is an environmental charity that fights to protect the rivers and streams in the UK from pollution and over-abstraction.

We set out below our brief comments on the PR24 consultation. In summary, we are concerned that Ofwat is still putting the cart before the horse by setting goals which are generally ones of compromise and dictated by what is fair and affordable, rather than starting with what needs to be done to comply with legal obligations.

Since the privatisation of public water and sewage infrastructure, we have campaigned to ensure that water companies are held to account and that problems of illegal discharges and over-abstraction are dealt with at a root and branch level, both in investment and in enforcement from the economic and environmental regulators. Investment plans should not block compliance with legal obligations.

We have taken part and commented on the numerous consultations including Price Reviews, AMPs and Water Resource Management Plans (WRMPs). These are all closely related as they are connected by the mechanisms for funding for which Ofwat effectively holds the key and which have delayed solutions to continuing environmental damage.

In June 2022, following a complaint by WildFish, the Office for Environmental Protection (OEP) launched investigations into whether Ofwat and the Environment Agency (EA) were failing to comply with their statutory duties in relation storm overflows.[1] In 2023, we launched a legal challenge to the Storm Overflows Discharge Reduction Plan under the new section 141A of the WIA 1991 for which the targets were clearly more lenient than the law allows.[2] The challenges came in the context of Ofwat's unwritten rule of compromise and kid-glove regulation in preference to compliance with the law.

[1] OEP identifies possible failures to comply with environmental law in relation to regulatory oversight of untreated sewage discharges | Office for Environmental Protection (theoep.org.uk)

[2] R (oao WildFish et al) v Secretary of State for the Environment, Food and Rural Affairs [2023] EWHC 2285 (Admin)

We are pleased that, as a consequence of the legal challenge and our complaint (where the OEP identified possible 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). PR24 should not limit the scope of enforcement or indeed the companies' obligations to comply with the law.

We obviously welcome the belated emphasis on the environment in the recent round of documents and some recent action by Ofwat in fining Thames, Yorkshire and Northumbrian for failing to manage their wastewater treatment works and networks. But irrespective of 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.

We also believe that throughout the PR24 documents we have seen, there are serious blocks imposed by Ofwat which, despite the hype of improvements, mean that there is no guarantee of positive outcomes. We limit our observations to the issue of water resources and abstraction, given the number of other NGOs and environmental charities that are engaging with the detail of investment and regulation of sewage.

They include, but are not limited to:

i) 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);
ii) 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;

iii) 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.

iv) Most investment figures still lack enough ambition in the sense that they are simply compromises which mean that rivers, streams and aquifers will continue to suffer from over abstraction. For instance, in order to deal with demand, smart metering is a crucial impetus to meet targets for reductions in use. But despite increased investment in installing smart meters, the programmed funding for some companies – particularly in the more drought-stricken Southern and East Anglian areas - has been reduced meaning that their investment will sit out-with the requirements set out in the WRMPs. For instance, South East Water (45% reduction); Wessex Water (50% reduction); Thames water (32% reduction); South West Water (17% reduction); Anglian (30% reduction);

v) There appears to be no requirement for water companies in PR24 to invest in better monitoring of abstraction. We say this at a time when we have uncovered evidence that water companies, who mostly self-report, are breaching permits with no enforcement from the EA.

vi) The amount of investment in fixing leakage is welcome, but again, the ambition should be for the water company to fix the problem without having to balance this against prices. The water company should be forced to make the investment to meet what is required by law to protect the environment.

Our primary concern is that there is 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; yet there are some legal obligations in parallel with this to meet deadlines – for instance, the 2018 s 20 (WRA) agreement between Southern Water and the EA - with obligations for the water company to provide long-term sustainable alternatives to the use of drought measures by 2027. These obligations should have been reflected in the draft WRMP (which they were not) and allowed for in the price review to ensure that the obligations are not stymied or longer compliance dates applied.

Of course, the solution to the inconsistency between plans, agreements and price reviews is as we have observed above: 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 PR24 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.