

WildFish response to Environment Agency consultation on SOAF

20th January 2024

WildFish notes the interesting ‘choreography’ of this consultation (together with the Environment Agency’s consultation on Spill Frequency and the DEFRA consultation on storm overflow guidance) with the OEP investigation of the WildFish complaint made in 2021 and the Decision Notices now issued to DEFRA, OFWAT and the Environment Agency by the OEP in December 2024.

This consultation must be read in the context that the OEP investigation has concluded that there have been three failures to comply with environmental law by the Environment Agency.

- Failing to take proper account of environmental law in devising guidance relating to permit conditions
- (As a result of the point above) setting permit conditions that were insufficient to comply with environmental laws
- Failing to exercise permit review functions in relation to discharges from CSOs

In common parlance, for decades, the law on controlling sewage pollution of English rivers and coastal waters has been broken by the Environment Agency.

In the face of all the arguments raised by WildFish and many other eNGOs with the Environment Agency, over very many years, it is difficult now to overestimate just how much work the Agency must do to regain stakeholders’ trust and confidence in how it deals with water companies.

Existing environmental permit conditions do not reflect the requirements of the 1994 Regulations, as the OEP has concluded.

It is essential that all water company sewage permits are urgently 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 has 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 sad that this consultation does not recognise that thirty-year failure to apply the law correctly. The Agency needs to recognise its failures honestly and openly. Without such an honest approach, the Agency risks merely repeating past failures.

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.

The Environment Agency must now revise permits not merely to follow investment in sewerage infrastructure (when it finally is delivered by water companies) but to reflect the needs of the receiving waters and to drive investment.

WildFish notes earlier correspondence with the Agency's Senior Managing Lawyer on the chilling effect of the Regulators Code and other legal obligations, that mean imposing permit conditions that cannot immediately be achieved, might be unreasonable or subject to appeal by the water companies. However, WildFish would take the position that the Agency's enforcement and sanctions policy provides considerable (and more than enough) discretion as to whether or not revised permits – that are not immediately capable of being complied with - are subject to robust enforcement action by the Environment Agency while water company investment is being planned and delivered.

It is worth repeating that the section 94(1) duties bite not only on DEFRA and OFWAT but also directly on the Environment Agency itself. As Holgate J made clear in the WildFish judicial review, the Environment Agency must use its powers under the Environmental Permitting Regulations 2016 to ensure that water companies meet their section 94(1) obligations.

Therefore, this consultation on SOAF must be read in the context of the wider legal requirement that permits must urgently be revised to drive water company compliance with the 1994 Regulations.

More generally, the response of the Environment Agency to the sewage crisis is now a clear test of the Environment Agency and its genuine desire or willingness to protect the environment.

Responding to each of these specific questions raised by the consultation (note that Questions 1 to 4 are administrative only):

Question 5 - Is it appropriate for us to revise the trigger thresholds for a SOAF investigation?

Yes. Given the OEP's recent Decision Notice it is clear that a revision of SOAF is long overdue which must lead to compliance with the 1994 Regulations and a far tougher regulatory approach from the Environment Agency to water company discharges.

Question 6 - Are these the right trigger thresholds for us to move to?

No. Investigation triggers need to be far lower than the proposed triggers otherwise storm overflows which require investigation may be missed. There are clear legal obligations on the water companies under the 1994 Regulations (which the Environment Agency must reflect in the permits it issues under the Environmental

Permitting Regulations 2016) to ensure that all storm overflows comply with the 1994 Regulations, and not just those above particular triggers.

Question 7 - Do you think we should make any changes to Stage 1 (cause of high spill frequency)?

The Agency must satisfy itself that stage 1 of SOAF is compliant with water company legal obligations under the 1994 Regulations and in respect of the permits issued by the Agency under the Environmental Permitting Regulations 2016. In the light of the OEP Decision Notice, the Agency must now satisfy itself and indeed others that the entire SOAF process is compliant with the law, in a way that it has not been since the SOAF was first published in 2018.

Question 8 - Should we align our approach for Stage 2 (environmental impact assessment) with the SODRP, and increase the focus on water quality modelling?

WildFish considers that reducing outcomes-based environmental monitoring and focusing on water quality modelling instead could be dangerous.

Of course, the Agency needs to ensure compliance with legal obligations.

WildFish is concerned that the ecological impact caused by raw sewage discharges will be overlooked if ecological/invertebrate monitoring above and below discharges is dropped in favour of modelling. In-river invertebrate sampling remains fundamental in understanding and addressing the issue. Models can only be as good as the data fed into them.

Specifically, we consider that Stage 2 assessments could be done more quickly than the 24 months proposed. 12 months would allow for spring and autumn invertebrate sampling. While more data is always better, extending to 24 months should not stop early action being taken where indicated.

Additionally, WildFish remains concerned that WFD classifications at water body level are simply too coarse, based on infrequent and unrepresentative monitoring, to be used to assess the impact of individual water company assets.

Question 9 - Do you have any comments on the Ecological Impact Investigation Approach?

The Agency must satisfy itself that SOAF is compliance with water company legal obligations under the 1994 Regulations and in respect of the permits issued by the Agency under the Environmental Permitting Regulations 2016. In the light of the OEP Decision Notice, the Agency must now satisfy itself and indeed others that the entire SOAF process is compliant with the law, in a way that it has not been since the SOAF was first published in 2018.

Question 10 - We are reviewing the Benefit-Cost Ratios in the SOAF cost-benefit analysis. Do you have a view on what they should be?

While it is difficult to comment while the Benefits Valuations and Practitioners' Guide is being updated separately, WildFish would not wish to see any BCR ratio used the effect of which is to reduce the number of storm overflows that are improved. This is particularly important given the existing backlog of investment by water companies in sewerage infrastructure.

Given the appalling lack of improvement with respect to ecological status, there must be no use of cost benefit 'trickery' employed to reduce the overall investment required from water companies to the detriment of English rivers.

Question 11 - Do you have any comments on factors we should consider when reviewing and updating the cost benefit analysis, including the associated valuations document and its Practitioners' Guide?

See answer to Question 10 above.

Question 12 - Do you have any additional comments on our proposed changes to the SOAF?

See Introduction to this consultation response.