

## **WildFish response to Environment Agency consultation on Spill Frequency Threshold Permitting for Storm Overflows**

20<sup>th</sup> January 2025

WildFish notes the interesting ‘choreography’ of this consultation (together with the Environment Agency’s consultation on Storm Overflow Assessment Framework 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.**

Therefore, at page 5 of the consultation, second paragraph, it is disappointing to read the Agency state that “the SODRP is additional and complementary to existing environmental permit conditions”.

While the SODRP is additional and complementary to the requirements of the Urban Wastewater Treatment Regulations 1994, 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 Holdgate 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 spill frequency threshold permitting for storm overflows 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 spill frequency threshold permitting a suitable approach for protecting storm overflow spill performance?**

No.

The questioning implies that storm overflows spill performance is already adequate which is of course a nonsense. Performance does not need 'protecting', it needs

dramatically improving. The Agency would do well to use more robust language that properly reflects the state of English rivers and indeed the OEP's findings on the Agency's own unlawful performance.

Spill frequency does not reflect spill duration, the capacity of the receiving water to accept or 'deal with' spills, nor the quality of effluent being spilt, nor the negative effect on receiving water quality of such spills.

EDM monitoring, which provides the basis of spill frequency permitting, is inadequate unreliable and needs to be replaced with real-time volumetric and qualitative monitoring.

**Question 6 - Should we apply spill frequency conditions to low-spilling overflows (i.e., those that already meet the SODRP standards)?**

Yes. Experience suggests the water companies have over decades been able to exploit loopholes offered up by regulators to the extent that has now been revealed in the OEP Decision Notices. There should be no further offering of loopholes or exemptions for water company discharges that have failed to meet the requirements of 1994 Regulations for many years.

Further, whether or not low spilling overflows are meeting SODRP standards or not does not alter the obligation to meet the existing law.

**Question 7 - Should we use the described approach in the consultation document to protect current performance?**

Whatever approach the Agency feels it needs to adopt here must reflect not only the legal requirement to avoid deterioration (i.e. protect current performance) but the obligation under the now assimilated Water Framework Directive to improve the ecological status of water bodies from the appallingly low level that has persisted for many years.

**Question 8 - What spill frequency should these overflows be permitted to protect?**

Spill frequency permit conditions should be set to ensure compliance with the 1994 Regulations, as well as with SODRP targets (even if these are higher than the current performance – option (C)).

Anything other than spill frequency conditions compliant with the 1994 Regulations would be unlawful, as well as representing a (sadly) typically unambitious response from the Environment Agency to the current sewage crisis and the OEP's findings.

**Question 9 - Should we have a long-term spill frequency (assessed over up to 10 years) average target as part of the spill frequency threshold conditions?**

No. The Environment Agency makes the bare statement that “the spill targets in the SODRP are about a long term average” but there is, of course, no such stipulation in the 1994 Regulations, nor in the SODRP itself. The decision to measure targets over a rolling 10 year period is nothing short of a gift to water companies which will exploit such generous methodology to the full.

**Question 10 - Should we consider excluding data (e.g., exceptionally wet years) or resetting (when improvement schemes or addressing known operational deficiencies are realised) the rolling 10-year period, and in which circumstances?**

There should be no 10-year rolling average for assessment and therefore the question does not arise, but the mere fact that the Agency is considering offering up the exclusion of exceptionally wet years or resetting 10 year averages demonstrates that it has not learned what happens when it offers such loopholes and exceptions to the water companies.

**Question 11 - Do you have an alternative approach that you think we should consider? Please will you describe**

Spill frequency conditions should be set for permits that secure compliance with the Urban Wastewater Treatment Regulations 1994 in the most aggressive way possible given the prolonged unlawful approach to compliance with those Regulations and the backlog of investment required from the water companies that the Agency has allowed to develop.

**Question 12 - We are protecting 10 spills (if that is the governing spill frequency of the design) Where the spill frequency needs to be lower (e.g., to protect ecological harm), is it appropriate for us to permit to protect the lower frequency?**

The Agency appears to be asking whether it should apply permits to protect the environment. There is a strong legal argument to suggest that if spill frequency needs to be lower than 10 spills to protect against ecological harm, it would be unlawful (again) for the Agency not to set permit conditions at the lower spill frequency. It is sad even to see the Environment Agency ask such a question.

**Question 13 - Should we also have a short-term (assessed over less years than the 10-year period to set the average) spill frequency permit condition?**

See earlier answers to questions above concerning the proposed 10 year rolling average permit conditions.

**Question 14 - Do you have a preference for which of these two options we should use for the shorter-term permit condition? Which option would you prefer, and why?**

As for Q13 above.

**Question 15 - Are there any considerations or exceptions we should give to overflows exceeding these shorter-term conditions?**

No. For the reasons given in earlier answers to do with the prolonged unlawful implementation of the 1994 Regulations and the backlog of water company investment in sewerage infrastructure (that is a direct consequence of the Agency's failure to apply the law correctly) no further considerations nor exceptions should be given in respect of storm overflows.

**Question 16 - Do you have an alternative approach that you think we should consider? Please explain it.**

As for Q15 above.

**Question 17 - Should we use the same principles to set spill frequency permit conditions for the bathing season? Why or why not?**

No comment.

**Question 18 - Do you have any suggestions for our approach to utilising spill frequency permitting for storm overflows to designated bathing waters?**

No comment.

**Question 19 - Should we use the same principles to set spill frequency permit conditions for storm overflows discharging to designated Shellfish Waters? Please say why/why not.**

No comment.

**Question 20 - Do you have any suggestions for our approach to utilising spill frequency permitting for storm overflows to designated Shellfish Waters?**

No comment.