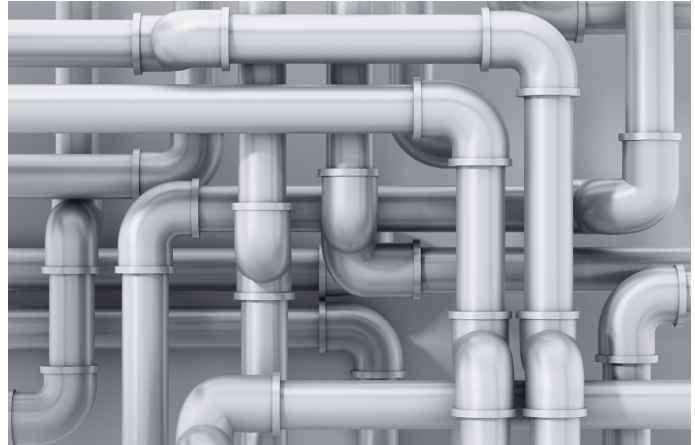


‘There’s Nothing Left to Do but Sing’ – Recent Developments in the Regulation of Combined Sewage Overflows



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The discharge of considerable quantities of untreated sewage into rivers and coastal waters, has, understandably, caused outrage in recent months in England and Wales.

The model of sewerage prevalent in England and Wales combines foul sewerage (from washing machines, toilets etc) with grey sewerage (rainwater running off streets, roads, and roofs). Many sewerage systems are of significant age: in London, for example, until the Thames Tideway Tunnel project, the city has been reliant substantially on a system constructed by the Victorians. Combined sewerage outflows (“CSOs”) are essentially overflow valves, which allow the discharge of sewage directly from sewers to inland or coastal water without treatment. CSOs come into their own at times of peak rainfall, when the quantity of rainwater entering the sewage system exceeds its capacity, raising the risk of treatment plants and sewers overflowing or backing-up into homes and businesses.

Accordingly, DEFRA, the Environment Agency (“EA”), and OfWat, the primary public bodies responsible for the water and sewage industry, are united in their view that CSOs are a necessary part of the sewage system.

There are current 21,562 CSOs in England and Wales. 89% of these discharge into rivers, most of the rest into coastal waters. The Rivers Trust has produced a [useful interactive map](#), showing the location and usage of each CSO, at a high level of granularity.

The operation of CSOs must be governed by an environmental permit under the Environmental Permitting (England and Wales) Regulations 2016: Schedule 21 specifically relates to ‘Water Discharge Activities’. There is a *de minimis* exemption for “the discharge from a sewage treatment plant of 5 cubic metres per day or less of sewage effluent into inland freshwaters, coastal waters or relevant territorial waters”.

Environmental permits may govern the operation of individual CSOs, or CSOs may be covered by the permit for a wider facility, such as a waste water treatment plant. Those permits will set out the circumstances in which CSOs may be operated so as to discharge sewage out of the sewerage system

before treatment. The detailed guidance produced by the EA for applicants for permits for new CSOs can be seen [here](#).

Thus the principal way in which unjustified usage of CSOs can be enforced against is through the EA's powers under the 2016 Regulations. It is an offence under regulation 38 of the 2016 Regulations to breach the terms of an environmental permit. The EA obtained four convictions of water companies in 2019, resulting in total of £1,297,000 being levied in fines. In 2021, that figure increased to seven, with £102m in fines (somewhat skewed by a single fine of £90m), and there have been six convictions so far in 2022.

Since 2016 however, the EA has moved away from bringing prosecutions in favour of non-prosecution enforcement outcomes. These include 'enforcement undertakings' entered into with those in breach of environmental permits under regulation 39(6) and Schedule 26 of the 2016 Regulations, by which malefactors promise to remedy their breaches, thereby forestalling prosecution. It could be said that such undertakings are somewhat toothless – the option of making such an undertaking was always available to those threatened with EA prosecution in any event, given the need for the EA to be satisfied that any prosecution is in the public interest. One factor underlying the EA's change in approach may be significant reductions in their enforcement budget. For more detail on these matters, the National Audit Office has published this helpful report: '[Environmental enforcement and compliance](#)' (May 2022).

There have been five major developments in this space since June this year, which I shall cover in turn.

1. OfWat investigation

In June 2022, OfWat provided an [update](#) on its ongoing investigation into five water companies (Anglian Water, Northumbrian Water, Thames Water, Wessex Water and Yorkshire Water). This update notified the [addition](#) of South West Water to the scope of the investigation, and set out some of OfWat's findings to date, including that all of the water companies investigated had identified that sewage treatment plants which they operate were not meeting flow to full treatment requirements – that is, they were not treating as much wastewater as their environmental permits required them to. The relevance of these failures to the resilience of the system in times of peak rainfall and the operation of CSOs is obvious.

Moreover, in governance terms:

"Their executive team and Boards were not routinely receiving or requesting relevant information on compliance with environmental permits as a whole, or their duty under section 94 of the Water Industry Act 1991, as supplemented by regulations 4 and 5 of the Urban Waste Water Treatment (England and Wales) Regulations 1994, instead focusing on a limited set of performance metrics used for Ofwat's price review and the Environment Agency's annual Environmental Performance Assessment report."

2. Office for Environmental Protection investigation

Also in June 2022, the new Office for Environmental Protection ("OEP") launched its [first statutory investigation](#). Under section 33 Environment Act 2021, the OEP "may carry out an investigation if it receives a complaint made under section 32 that, in its view, indicates that—(a) a public authority may have failed to comply with environmental law, and (b) if it has, the failure would be a serious failure."

The investigation will look at DEFRA, OfWat and the EA and "determine whether these authorities have failed to comply with their respective duties in relation to the regulation, including the monitoring and enforcement, of water companies' own duties to manage sewage. In doing so, we will seek to clarify the respective duties."

At the end of a statutory investigation, the OEP may bring proceedings in the High Court using their new

power of environmental review. Even if the OEP do not take legal proceedings, it must in any event publish a report at the end of its investigations, which is likely to be an important insight into the efficacy of the statutory scheme for the regulation of sewerage operations, particular CSOs and its enforcement. The investigation as a whole will also be an instructive case study for the effectiveness and utility of the OEP's powers.

3. Storm overflows reduction plan

In August 2022, DEFRA published its '[Storm Overflows Reduction Plan](#)'. The development of such a plan is mandated by section 141 Water Industry Act 1991 as inserted by section 80 Environment Act 2021.

DEFRA's summary emphasises that by 2035, the Plan aims to eliminate the environmental impacts of 75% of the CSOs which affect the most important protected sites; by 2035, there would be 70% fewer discharges into areas classified as bathing waters (for the purposes of the Bathing Water Regulations 2013); by 2040, total CSO discharges would be reduced by 40%; and by 2050, total discharges would be reduced by 80%. The Plan also sets out a number of steps that water companies are expected to take, including mapping their sewer networks, reducing surface water connections (rather than providing more storm water storage) and "engaging in long-term collaborative planning".

Interestingly, especially from a development control perspective, the plan also states that DEFRA will examine whether or not to implement Schedule 3 of the Flood and Water Management Act 2010. These provisions would introduce new standards for and require the adoption of SuDS for most new drainage systems, require by law pre-commencement approval of such systems prior to the commencement of any development, and remove the automatic right to connect to the public sewer system (to prevent new developments adding more surface water to the combined sewer network when it rains).

Given the long-term aspirations of the Plan, it has unsurprisingly come under fire from interested groups. WildFish, a charity formerly known as Salmon and Trout Conservation, announced that they have sent judicial review pre-action correspondence to DEFRA with a view to challenging the Plan. WildFish's [press statement](#) on 30 August 2022 stated:

"the plan's central 'headline target' is, in effect, a plan to allow up to 100% of storm overflows that are currently discharging in or close to 'high priority sites' to continue to cause adverse ecological impact to those sites for the next 13 years to 2035, and to allow up to 25% of those same storm overflows to continue to cause adverse ecological impact for a further 10 years to 2045. The plan will also allow up to 100% of storm overflows discharging anywhere else to continue to cause adverse ecological impact for the next 28 years to 2050."

4. Draft drainage and sewerage action plans

Section 94A Water Industry Act 1991, as inserted by the Environment Act 2021, requires sewerage undertakers to develop "drainage and sewerage action plans" – it appears to be these to which DEFRA refers when the Plan mentions "long-term collaborative planning". The action plans are intended to enable strategic planning over a 25-year period, identifying population changes, patterns of use change, consequent infrastructure needs, and the funding and financial apparatus to secure those needs.

The relevant provisions of the 1991 Act have not yet been brought into force, but the water industry, led by OfWat, have nevertheless been developing draft action plans on a non-statutory basis (the commencement of the legislation being, presumably, a sort of stick to incentive the water companies to voluntarily take this action).

OfWat recently (10 October 2022) published its [response to the draft action plans](#) prepared by the water

companies in England and Wales, which is anything but complimentary of progress to date. The most significant criticisms are (i) that none of the targets in relation to CSOs set out in the Plan (see above) have been considered or incorporated in the drafts; and (ii) that OfWat is “concerned that companies have not yet fully or adequately identified the scale or timing of their investment needs and have therefore not fully consulted on these.” Given the primary purpose of these action plans appears to be to identify, fund, and deploy infrastructure investment as the need for it arises, and thereby avoid future capacity or capability deficits, this is particularly concerning.

5. DEFRA Secretary’s conference speech

Finally, the political pressure is still being brought to bear in this area, stimulated no doubt by the public outcry over the summer as bathing spots were closed due to sewage in the waters. The newly-appointed Secretary of State at DEFRA made the issue an important part of his speech at the recent Conservative Party conference, saying:

“I asked [water companies] to write to me with their plans to accelerate investment in infrastructure. They did and now they must deliver. Privatisation has put in £170billion of investment into our water infrastructure already, and the private sector will now put in another £56billion more.

“And, if they don’t deliver, I can confirm to you today that we will take forward plans to lift the Environment Agency’s maximum civil fine for each individual breach of the rules from up to just £250,000, to up to £250 million.”

Conclusion

There is now seemingly a will amongst politicians and regulators to deliver improvements to the current system, in which CSOs appear to be used more frequently than necessary and other elements of sewage infrastructure are underperforming. And it is unlikely that water management is going to go away as an issue, even if over the winter, CSO discharges fall out of the public eye as fewer people are using beaches and rivers for recreation: the prevalent view is that climate change will continue to place pressure on water resources in the UK.

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This blog post arises from a seminar given at the FTB Chambers Quarterly Environmental Law Review on 11 October 2022. The next such seminar is scheduled for the New Year. All are welcome to attend.