

OEP LAUNCHES FIRST INVESTIGATION OVER REGULATION OF SEWAGE RELEASES

30 June 2022 | London

Legal Briefings - By **Julie Vaughan**

The Office for Environmental Protection is primed to investigate the role of Ofwat, the Environment Agency and DEFRA over their regulation of sewage overflows.

The Office for Environmental Protection (OEP) has launched an investigation against the Environment Agency (EA), Ofwat and George Eustace as Secretary of State for DEFRA concerning whether they have seriously breached environmental law in not adequately enforcing regulation of combined sewer overflows (CSOs). This is the first investigation by the OEP which may result in the EA and Ofwat more actively pursuing sewerage companies in relation to discharges from CSOs in their network.

For more information on the OEP, its role and powers visit our [Environment Act 2021 Hub](#).

THE INVESTIGATION

The investigation follows a complaint made to the Interim OEP by Salmon & Trout Conservation UK. The issue under the spotlight is whether the EA, Ofwat and DEFRA have seriously breached environmental law in not adequately performing their regulatory duties with regard to the operation of CSOs by sewerage network operators. (CSOs are the river and coastal outfalls designed to release excess volume when sewerage networks become overloaded, for example due to run-off from heavy rain fall entering the sewer.)

Announcement of the investigation was welcomed in a statement by the Chair of the House of Commons Environmental Audit Committee (EAC), Conservative MP Philip Dunne. Dunne commented that the EAC had invited the OEP to reflect on the conclusions and recommendations in the EAC's January 2022 inquiry report into water quality and to use its statutory powers to drive improvement of the regulation and enforcement regimes.

POTENTIAL IMPLICATIONS

The OEP's objectives in bringing the investigation are currently open ended. If the conclusion is there has been a breach, it could result in the OEP serving a decision notice with recommendations for actions to be taken, bringing a new 'environmental review' before the High Court or statutory review, or making an application for judicial review. However the OEP's first port of call is likely to be to seek the voluntary co-operation of the parties to resolve the issues it has identified. Should that not be forthcoming, this will be the first test of the OEP's mettle.

The investigation is not directly targeting sewerage companies' own compliance with environmental obligations, which is primarily the responsibility of the EA and Ofwat respectively. However, the pressure brought to bear by the OEP against the EA and Ofwat may result in them more actively pursuing sewerage companies for breaches of their obligations not to pollute and to provide adequate capacity in their sewerage systems.

The OEP also announced last week in its first Corporate Plan that it will be producing a report in the coming year to Government on the implementation of law and regulatory governance supporting inland water quality in England and Northern Ireland. The findings of its CSO investigation are likely to feed into that report as information obtained in an investigation can be used for other aspects of the OEP's functions.

CONTEXT

The OEP investigation follows on from the recommendations on CSOs made by the House of Commons Environmental Audit committee in its January 2022 report on water quality in rivers. It is in addition to the new duties to be imposed on licence holders with regards to CSOs in sections 80-84 of the Environment Act 2021 (the Act) which insert a new Chapter 4 into the Water Industry Act 1991. Those provisions require:

- a) sewerage licence holders in England to publish annual storm overflow reports;
- b) DEFRA to draw up a plan to reduce CSO discharges and reduce the associated adverse impacts;
- c) the EA to report annually on the operation of CSOs; and
- d) sewerage undertakers to:

- secure a progressive reduction in the adverse impacts of discharges from their CSOs;
- issue a public notice following each CSO discharge event; and
- continuously monitor for impacts to water quality upstream and downstream of it.

However, the obligations in (d) have not yet been brought into force.

WHAT TO WATCH OUT FOR

How much information about the investigation the OEP chooses to make publicly available is yet to be seen. It is allowed to make the report of its investigation public and the OEP Strategy includes commitments to transparency wherever possible. However, if the OEP decides at the conclusion of the investigation to bring enforcement action, producing an investigation report is optional.

OUR THOUGHTS AND RECOMMENDATIONS

We suspect the OEP may contact sewerage companies to provide information to assist its investigation using the duty on public authorities (which in this context will include the sewerage companies) to co-operate, which is found in section 27(1) of the Act.

The OEP investigation could also potentially have knock on impacts for Ofwat/EA investigations that are already open against certain sewerage undertakers in relation to CSOs.

Ultimately, sewerage companies' ability to pass the cost of necessary upgrades to fund increased capacity in their sewerage networks in order to address the CSO issue is subject to the Ofwat Periodic Review process, with limited ability for them to request additional allowances from Ofwat once its determination has been made. If the outcome of the OEP investigation is that the regulators must drive additional capex investment, this will need to be factored into the methodology for the upcoming PR24 review, which will set wholesale price controls for water and sewerage companies for the period 2025 to 2030.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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