

Editorial

Reflections on a new chapter in English sewage regulation

Pollution of rivers by sewage is among the most complex topics environmental lawyers encounter. Much of this complexity is exemplified by the debate around combined sewer overflows (CSOs) which dominated the latter stages of the enactment of the Environment Act 2021. The UK Government had not planned to address CSOs in this Act, when the Bill was presented in 2019. Rather, it considered the greater priority to lie in reform of the abstraction licensing regime, to empower the Environment Agency to modify licences that are harmful to the environment without compensating the undertaker. This is the upshot of section 88 of the Act, which addresses conditions in roughly one-fifth of water bodies currently subject to overly 'generous' (harmful) abstraction licences.¹ All things being equal, this important provision will not only encourage greater efficiency in the use of mains water but also contribute to the restoration of the quality of thousands of miles of England's rivers, currently affected by pollutants – from sewage and other sources – in a form that is concentrated by low river flow.

Another way of explaining the late introduction of CSO-specific provisions into the Act is that it is, or rather was, unclear that regulatory law regarding sewage suffers from significant formal gaps. The impact of sewers on the environment has been regulated legally from the very moment the Victorian-era infrastructure came into existence and it has evolved steadily ever since. Section 17 of the Public Health Act 1875 imposed on undertakers a duty to purify sewage prior to discharge into water bodies, whilst the Public Health Act 1936 (section 14) added a catch-all duty to 'deal effectually with sewers' – a duty which is currently provided for in section 94 of the Water Industry Act 1991 ('the WIA 1991'). In the post-war era of large public investment in the water industry, responding to pressure from powerful angling and amenity lobbies, this duty was interpreted as mandating a fivefold increase in expenditure on sewage treatment,² with observable benefits. Thus the percentage of 'unpolluted' rivers rose from 72.9 per cent in 1958 to 77.4 per cent in 1972 (an increase of 2674 miles, to 17,279).³ In 1977, the National Water Council advised against further investment, because a quarter of rivers being polluted represented 'best environmental value' given broader environmental priorities.⁴

Against this backdrop, the government has accepted the case for reform of an incremental character in keeping with the domestic tradition of proportionate, flexible, qualitative regulatory standards. A highlight is the new chapter (chapter 4) inserted into Part 4 of the WIA 1991, tailored to CSOs. It contains a provision⁵ imposing on undertakers a duty to 'secure a progressive reduction in the adverse impacts of discharges' from CSOs. Like the duty to 'deal effectually', this is enforceable by both the Secretary of State and Ofwat. It is the government's response to the Duke of Wellington's amendment, which called for an explicit statutory recognition that sewers are not being effectually operated if they tolerate harmful CSO discharges. Though the duty is expressed in rather open-ended language ('*progressive reduction in adverse impacts*'), a firm timescale is provided by new section 94A, requiring undertakers to prepare and publish drainage and sewerage management plans which they are to review every five years.⁶

Flexibility in this setting is desirable because of the complexity of the environmental impact of CSOs. A typical CSO discharge is 97.1 per cent rainwater,⁷ meaning that it is often at least as 'pure' as the water into which it is discharged. Consider in this respect the evidence of the CEO of Southern Water before the Environmental Audit Committee on water quality in October:

I should perhaps say that I am a civil engineer, an environmental engineer and a fellow of ICE [Institute of Civil Engineering], so it is an area I have looked at over many years. To try to eliminate all CSO sources by building bigger storage has several consequences for customers. It is expensive. It increases carbon footprint enormously, and ultimately we finish ... up taking that very diluted water into treatment works and treating it, which is an enormous carbon footprint and, effectively, we add more chemicals and more power to dilute water.⁸

A good example of a scheme to eliminate CSO discharges having adverse environmental consequences is Thames Water's £5 billion Thames Tideway Tunnel, which the government approved in the face of objections from the green campaign group Thamesbank led by Lady Dido Berkeley.⁹

1 HM Government, *Our Green Future: 25 Year Plan for Improving the Environment* (2018) 68.

2 David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Cornell University Press 1986) at 98.

3 Martin Holdgate, *A Perspective of Environmental Pollution* (Cambridge University Press 1979) at 91.

4 Vogel, n 2.

5 WIA 1991 s 141DC.

6 *ibid* s 94A(6)(c).

7 Environmental Audit Committee, *Water Quality* HC74, Oral Evidence, 13 October 2021: <https://committees.parliament.uk/oralevidence/2936/pdf/Q423> (Ian McAulay).

8 *ibid*.

9 Jennifer Rankin, "'Super-sewer' in London and south-east could add £80 to water bills", 12 September 2014. Lady Berkeley asserted that the water undertaker was guilty of greatly exaggerating an environmental problem to justify a lucrative heavy industrial fix: 'Super-sewer' in London and south-east could add £80 to water bills | Water bills | The Guardian.

One of the most delicate aspects of the reforms under consideration, therefore, is the statutory duty on the government to report on the costs and benefits of eliminating CSO discharges by September 2022.¹⁰ The government is not starting from scratch in this respect, as the Storm Water Task Force it set up in August 2020 has already estimated the costs eliminating CSOs for consumers to be in the region of £350–£600 billion (or £560–£999 extra on each annual bill).¹¹ Opposition MPs cast doubt on this, yet whatever the exact sum, it is obvious that the cost of any shift from a position in which (according to the Task Force) 13,350 CSOs operated 342,346 times in England in 2020 to one in which 'operations' are zero is going to be substantial. Much, then, depends on the nature of the alternatives to CSOs. Should these take the form of nature based drainage arrangements – green infrastructure of one kind and another of the kind advocated by Lady Berkeley as a better environmental option than the Thames 'super sewer' – then this can be justified by environmental and amenity benefits that include but are independent of any improvement in water quality.

Moving forward on the regulatory issue of CSOs is thus highly challenging. To the extent that the reforms touched on above promote a rounded sense of 'best environmental value' they are to be welcomed. But there are real dangers of unintended consequences in any rush to eradicate CSOs, in the name of dealing with a 'crisis' and a 'scandal' (terms that pervade some of the parliamentary calls for reform in this area).

¹⁰ Environment Act s 84.

¹¹ Storm Overflow Evidence Project (November 2021) ii: Storm overflows evidence project (publishing.service.gov.uk).

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