



Please quote the reference number below when contacting the office:

Our Ref: 3140

19 November 2021

Sir James Bevan
Chief Executive
Environment Agency
Horizon House
Deanery Road
Bristol
BS1 5AH

BY POST AND EMAIL

Dear Sir James,

Re: Environment Agency and Ofwat major investigation into sewage treatment works

We are writing to you following the announcement on 18 November 2021 that there will be a joint investigation by your Agency and Ofwat into the operation of approximately 2000 sewage treatment works.

We understand that the identities of the water and sewerage companies that are under investigation will not be released to the public.

Fish Legal currently has 24 cases involving water company sewage-related pollution. Some or all of them may involve treatment works that the Environment Agency will now be investigating following indications from the water industry that the planned installation of new flow monitors may show that illegal activity is widespread.

Freedom of Information

We have serious concerns that the Agency will effectively shut-down all information sharing about the operations of these works whilst its investigation is ongoing and will be citing Regulation 12(5)(b) of the Environmental Information Regulations 2004 as a reason for withholding information where such requests fall within the ambit of those regulations. The exemption under Regulation 12(5)(b) applies where the disclosure would adversely affect the course of justice. That cannot apply where there is a merely theoretical chance of enforcement action.

For many years we have endured the Agency's approach to public engagement over 'live' matters and 'ongoing' investigations. That approach has been that there is no engagement. In the context of this investigation that would be totally unacceptable.

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We have, in the past, battled for disclosure of information relating to pollution incidents. The extent of the information that is considered to be *sub judice* by the Agency following a pollution includes details of fish mortalities, post-incident fisheries and biological survey work, water quality monitoring data (collected in response to an incident and subsequently) and reporting. In short, all information used to assess the impact of a pollution incident on an affected waterbody is habitually withheld by the Agency until it has concluded its enforcement response.

Although we understand that the average time from reporting of a suspected water quality offence to the conclusion of a prosecution between 2018-2020 was 2.2 years, we have pollution cases where 4 years have passed since the incident and there is still no indication as to whether enforcement action will be taken by the Agency. We have several pollution cases which are still under investigation where the impact of the Covid pandemic on the Agency's ability to continue working is being cited as a reason for delay. The investigation, prosecution and sentencing of Southern Water in connection with offences at 17 sites that took place between January 2010 to December 2015 concluded in July 2021, which indicates to us how long this major investigation might take.

No access to justice

We therefore consider there to be a very real prospect that the Agency will impose an information 'black-out' relating to storm overflows for years whilst its investigation is ongoing. This would have serious implications, especially at a time when the adverse impacts from these discharges are being actively considered as part of new requirements under the Environment Act. By withholding information about the impact of discharges on the receiving watercourse from 2000 works, it will make it impossible for the public to effectively engage with the process of assessing harm caused by these discharges. Yet it has been information obtained (under EIR) and analysed by the public – while utilisation of the same data by the authorities remained minimal – that has brought to light the systemic abuse of sewage treatment work permit conditions which Defra and the Agency now accept has probably been occurring for many years. A good deal of the relevant information is therefore already in the public domain.

Furthermore, any clamp-down on the information sources would seriously prejudice the ability of our members to take civil actions in respect of these discharges.

Duty to publish

The Environment Agency is under a duty to publish monitoring information. See, for instance, Regulation 46 of the EPR 2016 and Schedule 27, or S190 of the Water Resources Act 1991. There are already shortcomings in the Agency's record keeping relating to permits and permit-related activities. The public has a right to see such information and the mere theoretical chance of a prosecution cannot inform a decision to prevent public access. See also the Aarhus Convention to which the UK is a signatory (such a move to prevent access to information would be entirely at odds with Article 4 of the Convention).

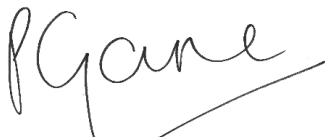
1. Please therefore confirm what period of time the Agency will be investigating in relation to the operations of the 2000 treatment works. Does the Agency intend to investigate back to the point when Operator Self-Monitoring was introduced?

2. Please disclose a list of the 2000 works under investigation and, by extension, the receiving waters.
3. Will the Environment Agency decide on its enforcement response at the conclusion of its investigation, or will it take enforcement action against individual water companies as and when breaches are detected, as they no doubt will be?
4. Where ongoing breaches are detected, what action will the Environment Agency take in order to discontinue those breaches?
5. We understand that the water companies 'revealed that many of their sewage treatment works may not be compliant'. Are you able to confirm whether the evidence that indicates the likely widespread illegal operation of treatment works is data held by the water companies, but not previously shared with the Environment Agency?
6. We believe we have a considerable body of evidence to support any investigation. We also believe we have a constructive role to play in channelling the right evidence to the investigation and we trust you will accept that this event represents a long-overdue opportunity for our members - many of whom have endured years of pent-up frustration at the lack of control of sewage entering our rivers and streams - to be heard. It is quite possible we will receive a glut of information and prospective evidence. Can you give some indication as to whether there will be any call for public evidence in this investigation and how this will be managed?
7. In the course of any enforcement action, aside from obvious and undeniable impact on the environment and public health being taken into account, can you give us assurances that our members, where affected, will be able to submit victim impact assessments as part of any proceedings?
8. Please confirm whether any information about the adverse impacts of storm overflows from the 2000 works identified will be made available to the public before the Agency has concluded its investigation.

Finally, please could you describe how this major investigation will be resourced, in particular, how many Agency staff will be involved? Will this investigation mean that the already delayed Agency responses to pollution incidents will be delayed further?

We look forward to receiving your response.

Yours faithfully

A handwritten signature in black ink, appearing to read 'P Gane', with a long horizontal flourish extending to the right.

Penelope Gane
Head of Practice