Neutral Citation Number: [2023] EWHC 2285 (Admin)

Case No: CO/4438/2022 and CO/4445/2022

**IN THE HIGH COURT OF JUSTICE**
**KING'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/09/2023

**Before** :

**THE HON. MR. JUSTICE HOLGATE**

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**Between :**

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| | **CO/4438/2022** |
| **THE KING (on the application of WILDFISH CONSERVATION)** | **Claimant** |
| **- and -** | |
| **SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS** | **Defendant** |
| **- and -** | |
| **(1) THE ENVIRONMENT AGENCY** | **Interested Parties** |
| **(2) THE WATER SERVICES REGULATION AUTHORITY** | |

**and**

**Between :**

| | |
|---|---|
| | **CO/4445/2022** |
| **THE KING (on the application of)** | **Claimant** |
| **(1) MARINE CONSERVATION SOCIETY** | |
| **(2) RICHARD HAWARD'S OYSTERS (MERSEA) LIMITED** | |
| **(3) HUGO TAGHOLM** | |
| **- and -** | |
| **SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS** | **Defendant** |
| **- and -** | |
| **THE ENVIRONMENT AGENCY** | **Interested Party** |

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**David Forsdick KC** and **Charles Bishop** (instructed by **Fieldfisher LLP**) for the **Claimant in CO/4438/2022**

**-and-**

**Marc Willers KC and Peter Lockley** (instructed by **Good Law Practice Ltd**) for the **Claimant in CO/4445/2022**

**Sir James Eadie KC**, **Richard Moules**, **Ned Westaway** and **Charles Streeten** (instructed by the **Government Legal Department**) for the **Defendant**

Hearing dates: **4-6 July 2023**

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# FINAL JUDGMENT

## Mr. Justice Holgate:

## Introduction

1. The claimants in these two applications for judicial review challenge the lawfulness of the Storm Overflows Discharge Reduction Plan ("the Plan") published by the Secretary of State for Environment, Food and Rural Affairs on 26 August 2022 and laid before Parliament pursuant to s.141A of the Water Industry Act 1991 ("WIA 1991").

2. The claimant in CO/4438/2022 is WildFish Conservation ("WildFish"). This is a charitable company established in 1903 as the Salmon and Trout Association. Its aims include the reversal of the decline in wild fish populations and their habitats. They campaign against pollution from agriculture and sewage and to achieve clean and healthy coastal and fresh waters.

3. The first claimant in CO/4445/2022 is the Marine Conservation Society ("MCS"), the UK's largest marine charity. It seeks to promote cleaner, better protected and healthier oceans. It works to protect the marine environment through education, research and engagement with Government and business.

4. The second claimant in CO/4445/2022 is Richard Haward's Oysters (Mersea) Limited ("RHO"). This is a family business which, since the 1700s, has been cultivating oysters in and around the creeks leading into the River Blackwater to the west of Mersea Island, Essex. It operates both on "free ground", which is a common resource, and 14 acres of oyster beds which it owns at Salcott Creek.

5. Mr. Hugo Tagholm is a swimmer, surfer and bodyboarder. He joined Surfers Against Sewage ("SAS") in 1991 and was its Chief Executive from 2008 to 2023. SAS is recognised as one of the UK's marine conservation charities.

6. The Environment Agency ("EA") is an interested party in both proceedings. It is responsible for regulating all discharges from storm overflows by issuing and enforcing compliance with environmental permits under the Environmental Permitting (England and Wales) Regulations 2016 (SI 2016 No. 1154) ("the 2016 Regulations").

7. The Water Services Regulation Authority ("Ofwat") is an interested party in CO/4438/2022. It is responsible for the economic regulation of water and sewerage companies in England and Wales, including the price review mechanism. It is also under a duty to take enforcement action against discharges from storm overflows in breach of s.94 of the WIA 1991 and the Urban Waste Water Treatment (England and Wales) Regulations 1994 (SI 1994 No. 2841) ("the 1994 Regulations").

8. The spillage of large quantities of sewage in various locations throughout the country has become the subject of widespread public concern. So it is important to emphasise at the outset what this case is and is not about. Judicial review is the means of ensuring that public bodies, including ministers, act within the limits of their legal powers and in accordance with any duties, legal principles and procedures governing the exercise of their functions. The court's role is to resolve questions of law. It is not responsible for making political, social or economic choices or decisions about, for

example, the acceptability of environmental impacts. Those choices and decisions have been entrusted by Parliament to ministers and regulatory bodies. Such matters may be the subject of legitimate political and public debate, but they are not for the court to determine. The court is only concerned with legal issues raised by the claimants as to whether the defendant has acted unlawfully. It is not for the court to assess the merits of the policies in the Plan.

## Factual background

9. The parties have helpfully agreed a statement of facts which sets out the background to these claims.

10. The combined sewerage system in England and Wales carries both sewage from homes and businesses as well as water generated by rainfall falling on built-up areas. When combined sewers become overwhelmed in a heavy rainstorm, overflows are designed to act as a "safety valve" by releasing contents from the sewer (including diluted but untreated sewage) into waterways. The overflows also prevent sewage backing up into homes and streets during very heavy rainfall. They may be located either in the combined sewer network or at a wastewater treatment works. There are around 15,000 storm overflows.

11. Where the flow of water exceeds the capacity of a system or treatment works, untreated sewage may be released via a storm overflow into rivers, estuaries or the sea. This may cause harm to humans and to the environment. In addition, for a number of years storm overflows have been used regularly in dry weather conditions, a use for which they are not intended.

12. Around 10-12% of the storm overflows discharge into estuaries and coastal waters. These estuaries and coastal waters include Marine Protected Areas (or "MPAs"), an umbrella term which covers the marine parts of the following: Special Areas of Conservation (SACs), Special Protection Areas (SPAs), Marine Conservation Zones (MCZs), Nature Conservation Marine Protected Areas, Sites of Special Scientific Interest (SSSIs) and Ramsar sites. Estuaries and coastal waters also include shellfish water protected areas of which there are 101 in England.

13. The EA collects "Event Duration Monitoring" data on the frequency and duration of storm overflow spills from the water and sewerage companies ("WaSCs") operating in England. This data was available to the SoS at the time the Plan was finally approved. It shows that in 2022 52% of storm overflows spilled more than 10 times; 39% more than 20 times; 20% more than 40 times and 11% more than 60 times. The average duration of each spill was 5.8 hours but a spill may last a full day.

14. Overall, there were 301,091 spills in 2022. That represented a decrease from the previous year because of drier weather in that year.

15. The EA's data shows that of the 1,355 outflows they have assessed so far, the reason for the spill was lack of hydraulic capacity in 60% of cases, a maintenance issue for 16% and exceptional rainfall for 0%. The reason for the spills in 21% of storm overflows was still being investigated. Inadequate capacity was the overwhelming cause of the spills from the storm overflows with the highest number of spills, that is those with more than 60 spills a year.

16. Section 141A was inserted into the WIA 1991 by s.80 of the Environment Act 2021 ("EA 2021"). Section 141A(6) required the Plan to be published by 1 September 2022. The Storm Overflows Evidence Project ("SOEP"), prepared by Stantec Limited ("Stantec") and published in November 2021, formed part of the evidence base for the Plan. An Addendum was issued in March 2022. The defendant consulted on a draft plan between 31 March 2022 and 12 May 2022. There were nearly 22,000 responses. On 2 September 2022 the Department published an Impact Assessment for the Plan.

17. In section 3.2.2 of the SOEP, Stantec stated that the most common cause of the overflows studied was rainwater entering sewers with insufficient capacity. Hydraulic modelling indicated that inadequate capacity in sewerage systems explained 74% of the spill incidents measured. The view of the Government and regulators is that sewage overflows have been used far too often. The pressure on our combined sewer systems has increased because of (1) increases in population, (2) increases in impermeable surfaces resulting in more rainwater run-off, and (3) more frequent and heavier storms through climate change.

18. In 2013 the Government wrote to the 11 WaSCs in England and Wales requiring them to introduce monitoring of storm overflows. By 2015, 10% of overflows had monitors and by 2022 that proportion had increased to over 90%. It is expected that there will be 100% monitoring by the end of 2023.

19. During 2021 the monitoring by WaSCs revealed significant non-compliance with environmental permits through the discharge of sewage at overflows. By November 2021 estimates indicated that up to 30% of all treatment works would be affected and that this could even be worse, showing that the problem was far more widespread than previously identified.

20. The Environment Minister described the situation as wholly unacceptable and said that water companies had to take urgent and immediate steps to comply with their legal duties. She added that it was necessary to go much further than addressing non-compliance with existing rules and permits, by reducing the harm caused when spills are allowed in "exceptional circumstances", such as severe weather conditions. On 18 November 2021 the EA and Ofwat announced a major investigation of over 2,000 sewage treatment works. That investigation is complex and ongoing.

21. In June 2022, following a complaint by WildFish, the Office for Environmental Protection established under the EA 2021 launched investigations into whether the defendant, Ofwat and the EA were failing to comply with their statutory duties in relation to the regulation of the use of storm overflows by WaSCs.

22. These proceedings do not involve any challenge to decisions taken by the EA or Ofwat. The only decision of the defendant which is challenged concerns the publication of the Plan in its final form.

23. In summary the Plan sets three targets:

    (1) A target for protecting the environment: WaSCs will only be allowed to discharge from a storm overflow where there would be no local adverse ecological effect. The target must be met by 2050, save for overflows

discharging in or close to certain sensitive areas where the target must be met by 2035, or 2045 at the very latest;

(2) A target to protect public health in designated bathing waters: WaSCs must significantly reduce harmful pathogens from overflows either by carrying out disinfection or by reducing the frequency of discharges to meet EA standards by 2035.

(3) A backstop target for 2050, which operates in addition to the first two targets: by 2050 storm overflows will not be permitted to discharge above an average of 10 heavy rainfall events a year.

The Government's objective has been to set policy targets in the Plan which, taken overall, are more restrictive than the existing regulatory regimes.

24. In summary, the central issues in CO/4438/2022 are:

(1) (a) Whether in setting the first and third targets the defendant failed to understand that reg.4 of the 1994 Regulations requires WaSCs to remedy insufficiency of physical capacity in accordance with the decision of the CJEU in *European Commission v UK (Re Storm Water Overflows)* [2013] 1 CMLR 24 ("the *UK* case"). Alternatively, (b) the Plan is unlawful because it has the effect of directing WaSCs to breach reg.4 of the 1994 Regulations, or (c) the Plan will frustrate the purposes of that legislation;

(2) Whether the defendant failed when approving the Plan to take into account obviously material considerations, including the enforcement of reg.4 of the 1994 Regulations and addressing any gap between the requirements of environmental permits and the 1994 Regulations;

(3) Whether the Plan constitutes a "plan" within reg.63 of The Conservation of Habitats and Species Regulations 2017 (SI 2017 No. 1012) ("the 2017 Regulations") so that the defendant approved the Plan in breach of that regulation by failing to carry out an "appropriate assessment" of its effects on "European sites" (including Special Areas of Conservation and Special Protection Areas);

(4) Whether the defendant acted irrationally in approving the Plan.

Issue (1)(a) was put more widely in WildFish's skeleton than had been pleaded in the Statement of Facts and Grounds. I have given leave for the pleading to be amended so as to address the additional point.

25. There are three main issues in CO/4445/2022:

(1) Whether the Plan fails to accord with or undermines the target in s.3 of the EA 2021 to halt the decline in species abundance by 2030;

(2) Whether the Plan breaches the rights of RHO under Article 1 of the First Protocol to the ECHR ("A1P1") and the rights of Mr. Tagholm under Article 8 of the ECHR;

(3) Whether the Plan is contrary to the "public trust doctrine", which is said to impose a duty on the defendant to maintain coastal waters in a fit ecological state for the purposes of the public's right to fish there.

26. Mr. Marc Willers KC said on behalf of MCS that his clients had taken a pragmatic decision to withdraw what had originally been pleaded as ground 2 (irrationality in excluding designated marine ecological sites from "high priority areas in the first target") because the defendant has subsequently decided to consult on *inter alia* extending the scope of the Plan.

27. I am grateful to all counsel for their helpful written and oral submissions.

28. The claim is brought against the Secretary of State. I should record that the present incumbent was appointed on 25 October 2022, after the decision to publish the Plan had been taken.

29. The remainder of this judgment is set out under the following headings:

## Statutory Framework

*The Water Industry Act 1991*

30. The water industry was privatised by the Water Act 1989. The WIA 1991 is a consolidating statute.

31. Part I contains preliminary provisions. Section 1A establishes the Water Services Regulation Authority, or Ofwat.

32. Section 2 imposes general duties on the defendant and on Ofwat as to when and how they should exercise and perform their powers and duties in relation to the water industry under the "relevant provisions" listed in s.2(6) (see s.2(1)). Those provisions include most of Part II of the Act, notably ss.6, 12, 18 and 19. The general duties in s.2 include:

> "(2A) The Secretary of State or, as the case may be, the Authority shall exercise and perform the powers and duties mentioned in subsection (1) above in the manner which he or it considers is best calculated–
>
> (a) to further the consumer objective;
>
> (b) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales;
>
> (c) to secure that companies holding appointments under Chapter I of Part II of this Act as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions;

> (d) …
>
> (e) to further the resilience objective.
>
> (2B) The consumer objective mentioned in subsection (2A)(a) above is to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services.
>
> …
>
> (2DA) The resilience objective mentioned in subsection (2A)(e) is—
>
> (a) to secure the long-term resilience of water undertakers' supply systems and sewerage undertakers' sewerage systems as regards environmental pressures, population growth and changes in consumer behaviour, and
>
> (b) to secure that undertakers take steps for the purpose of enabling them to meet, in the long term, the need for the supply of water and the provision of sewerage services to consumers, including by promoting —
>
> (i) appropriate long-term planning and investment by relevant undertakers, and
>
> (ii) the taking by them of a range of measures to manage water resources in sustainable ways, and to increase efficiency in the use of water and reduce demand for water so as to reduce pressure on water resources."

With regard to s.2(2A)(c), a "sewerage undertaker" is appointed under Chapter I of Part II of the Act.

33. By s.2A the defendant may publish a statement setting out strategic priorities and objectives for Ofwat with which the authority must then comply. A draft of the statement has to be laid before Parliament. It may not be published if Parliament resolves not to approve it. The relevant statement for these proceedings was published in February 2022.

34. Part II of the WIA 1991 deals *inter alia* with the appointment and regulation of WaSCs. Appointments are made by the Secretary of State under s.6. By s.6(2)(a) an appointment of a sewerage undertaker has the effect of requiring the company to perform any duty imposed by an enactment on such a body. Section 11 gives the Secretary of State a broad power to impose conditions on an appointment, including conditions regarding the exercise or performance of any function of a WaSC (s.11(2)).

35. Chapter II of Part II deals with enforcement. Section 18(1) imposes a duty on the Secretary of State and/or Ofwat to make a *final* enforcement order:

> "(1) Subject to subsection (2) and sections 19 and 20 below, where in the case of any company holding an appointment under Chapter I of this Part … the Secretary of State or the Authority is satisfied—
>
> (a) that that company … is contravening—
>
> (i) any condition of the company's appointment … in relation to which he or it is the enforcement authority; or
>
> (ii) any statutory or other requirement which is enforceable under this section and in relation to which he or it is the enforcement authority;
>
> or
>
> (b) that that company … is likely to contravene any such condition or requirement,
>
> he or it shall by a final enforcement order make such provision as is requisite for the purpose of securing compliance with that condition or requirement."

36. Section 18(1) is subject to subsection (2) which provides for the making of a *provisional* enforcement order:

> "(2) Subject to section 19 below, where in the case of any company holding an appointment under Chapter I of this Part …
>
> (a) it appears to the Secretary of State or the Authority as mentioned in paragraph (a) or (b) of subsection (1) or (1A) above; and
>
> (b) it appears to him or it that it is requisite that a provisional enforcement order be made,
>
> he or it may (instead of taking steps towards the making of a final order) by a provisional enforcement order make such provision as appears to him or it requisite for the purpose of securing compliance with the condition or requirement in question."

In determining whether a provisional order is "requisite", the decision-maker must have regard to the extent to which any person is likely to suffer loss or damage before a final order can be made (following the procedure in s.20) from any likely act or omission in breach of a condition or other requirement enforceable under s.18 (see s.18(3)). A provisional order has immediate effect, but a maximum duration of 3 months (s.18(7)) unless confirmed under s.18(4).

37. Section 18(4) requires the Secretary of State or Ofwat to confirm a provisional enforcement order, with or without modifications if satisfied that the company is contravening or likely to contravene any condition or statutory or other requirement, and the order is necessary to secure compliance.

38. Section 18(6) defines the statutory requirements which are enforceable under s.18. They include the general duty imposed upon each sewerage undertaker by s.94 of the WIA 1991.

39. Section 19 contains exceptions to the duty to enforce in s.18. They include breaches of a trivial nature and cases where the Secretary of State or Ofwat accepts an undertaking from a WaSC to take appropriate steps to secure compliance with the relevant condition or requirement and the company is complying with their undertaking. The requirement to comply with an undertaking is also enforceable under s.18 (s.19(2)).

40. Section 20 sets out the procedure for making a final order or confirming a provisional order under s.18. The Secretary of State or Ofwat must give notice to the company of a proposal to make an order and must consider any written representations or objections made within a period of not less than 21 days before deciding whether to make the order. The company has no right of appeal.

41. In addition by s.22A, where a sewerage undertaker breaches a condition of its appointment or of a requirement enforceable under s.18 of the WIA 1991, Ofwat or the Secretary of state may impose a penalty which is reasonable in all the circumstances of the case, up to a maximum of 10% of the company's turnover.

42. Part IV of the WIA 1991 deals with sewerage services. Section 94 provides:

> "**94.— General duty to provide sewerage system.**
>
> (1) It shall be the duty of every sewerage undertaker—
>
> (a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers and any lateral drains which belong to or vest in the undertaker as to ensure that that area is and continues to be effectually drained; and
>
> (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers.
>
> (2) It shall be the duty of a sewerage undertaker in performing its duty under subsection (1) above to have regard—
>
> (a) to its existing and likely future obligations to allow for the discharge of trade effluent into its public sewers; and
>
> (b) to the need to provide for the disposal of trade effluent which is so discharged.
>
> (3) The duty of a sewerage undertaker under subsection (1) above shall be enforceable under section 18 above—

(a) by the Secretary of State; or

(b) with the consent of or in accordance with a general authorisation given by the Secretary of State, by the Authority.

…. "

43. Sections 79 to 83 of the EA 2021 insert into Part IV of the WIA 1991 a suite of new provisions aimed at addressing *inter alia* capacity and overflow issues. Only s.80 has been brought into force so far, but the Government intends to bring the remaining provisions into force during 2024. The upshot is that ss. 141A to 141E of the WIA 1991 are already in force, but ss. 94A and 141DA to 141 DC are expected to become law next year. It is nonetheless helpful to see the overall effect of these provisions.

44. When brought into force s.94A(1) will require each sewerage undertaker to publish a drainage and sewerage management plan. By s.94A(2) this must show how the undertaker will manage and develop its drainage and sewerage system to meet its obligations under Part IV of the Act. By s.94A(3) the plan must in particular address the capacity of the undertaker's system, current and future demands, and the measures to be taken to comply with s.94A(2). The undertaker must review the plan annually and publish a revised plan at least every 5 years (s.94A(5) and (6)). The plans are referred to in practice as Drainage and Wastewater Management Plans ("DWMPs").

45. In the interim the Secretary of State has required WaSCs to produce non-statutory DWMPs in early 2023 as a planning tool for Ofwat's 2024 Price Review for the period 2025 to 2030. The companies have been asked to assess current capacity and actions needed over 5, 10 and 25 year periods.

46. Section 141A of the WIA 1991 is the provision under which the Secretary of State been required to prepare and publish the Plan:

"**141A Storm overflow discharge reduction plan**

(1) The Secretary of State must prepare a plan for the purposes of—

(a) reducing discharges from the storm overflows of sewerage undertakers whose area is wholly or mainly in England, and

(b) reducing the adverse impacts of those discharges.

(2) The reference in subsection (1)(a) to reducing discharges of sewage includes—

(a) reducing the frequency and duration of the discharges, and

(b) reducing the volume of the discharges.

(3) The reference in subsection (1)(b) to reducing adverse impacts includes—

(a) reducing adverse impacts on the environment, and

(b) reducing adverse impacts on public health.

(4) The plan may in particular include proposals for—

(a) reducing the need for anything to be discharged by the storm overflows;

(b) treating sewage that is discharged by the storm overflows;

(c) monitoring the quality of watercourses, bodies of water or water in underground strata into which the storm overflows discharge;

(d) obtaining information about the operation of the storm overflows.

(5) When preparing the plan the Secretary of State must consult—

(a) the Environment Agency,

(b) the Authority,

(c) the Council,

(d) Natural England,

(e) sewerage undertakers whose area is wholly or mainly in England, or persons representing them, and

(f) such other persons as the Secretary of State considers appropriate.

(6) The Secretary of State must publish the plan before 1 September 2022.

(7) The Secretary of State may at any time revise the plan, having consulted the persons referred to in subsection (5), and must publish any revised version.

(8) The plan, and any revised version of it, must be laid before Parliament once it is published."

47. Section 141B requires the Secretary of State to produce progress reports on implementing the Plan, the first covering the 3 year period running from the publication of the first plan (i.e. in 2025). Thereafter progress reports must be produced every 5 years.

48. Section 141C requires sewerage undertakers to produce annual reports on the frequency and duration of discharges from each of their storm overflows. This duty is enforceable under s.18. Section 141D requires the EA to publish annual reports providing the same types of information for each overflow in England.

49. Section141DA will require near instantaneous publication by each undertaker of any discharge from a storm overflow. Section 141DB will set monitoring requirements for each storm overflow and sewage disposal works of an undertaker. By s.141DC each undertaker will be under a duty "to secure a progressive reduction in the adverse impacts of discharges from its storm overflows, including impacts on the environment and on public health." The duties in these three provisions will be enforceable under s.18 of the WIA 1991.

*The Environment Act 2021*

50. Some of the relevant changes introduced by the EA 2021 are contained in that Act, rather than dealt with as insertions into the WIA 1991. Part 1 of the 2021 Act deals with environmental governance. Part 5 deals with water and sewerage.

51. Chapter 1 of Part 1 introduces a series of environmental targets in ss.1 to 7. Section 1 concerns the setting by the Secretary of State of long-term targets looking ahead for at least 15 years in priority areas which include water and biodiversity. The claim brought by MCS involves an additional target which the Secretary of State must set under s.3 in relation to species abundance. Section 5 imposes a duty on the Secretary of State to ensure that each of the targets in ss.1, 2 and 3 is met.

52. So far as is material, s.3 provides:

> "**3 Environmental targets: species abundance**
>
> (1) The Secretary of State must by regulations set a target (the "species abundance target") in respect of a matter relating to the abundance of species.
>
> (2) The specified date for the species abundance target must be 31 December 2030.
>
> (3) Accordingly, the species abundance target is not a long-term target and the duty in subsection (1) is in addition to (and does not discharge) the duty in section 1(2) to set a long-term target in relation to biodiversity.
>
> (4) Before making regulations under subsection (1) which set or amend a target the Secretary of State must be satisfied that meeting the target, or the amended target, would halt a decline in the abundance of species.
>
> …."

53. The species abundance target in s.3 has been set by the Environmental Targets (Biodiversity) (England) Regulations 2023 (SI 2023 No.91) ("the 2023 Regulations"). Regulation 11 requires it to be shown that "the decline in the abundance of species has been halted" by 2030. Regulation 12 provides that that target is met if the overall "relative species abundance index" (as defined) for 2030 is the same as, or higher than, the index figure for 2029.

54. Section 84, which is contained within the part of the EA 2021 dealing with storm overflows, imposes an additional obligation on the Secretary of State:

> "**84 Report on elimination of discharges from storm overflows**
>
> (1) The Secretary of State must prepare a report on—
>
> (a) the actions that would be needed to eliminate discharges from the storm overflows of sewerage undertakers whose areas are wholly or mainly in England, and
>
> (b) the costs and benefits of those actions.
>
> (2) The Secretary of State must publish the report before 1 September 2022.
>
> (3) The report must be laid before Parliament once it is published."

55. The report under s.84 was required to be published by the same deadline as the Plan under s.141A. The defendant included the s.84 report in the Plan as Annex 5. There is no legal challenge in these proceedings to the s.84 report. The report is not a plan such as the s.141A document. The report is simply required to provide information on the steps that would be necessary to *eliminate* discharges from storm overflows and to provide a cost-benefit analysis. By contrast, the document under s.141A is a plan for reducing, not eliminating, discharges from storm overflows and the adverse impacts of those discharges.

*Urban Waste Water Treatment (England and Wales) Regulations 1994*

56. The 1994 Regulations transpose Council Directive 91/271/EEC, the Urban Waste Water Treatment Directive.

57. Regulation 4 imposes a duty on undertakers to comply with requirements for the design and operation of sewers, treatment works and storm overflows:

> "**4.— Duty to provide and maintain collecting systems and treatment plants**
>
> (1) This regulation supplements the duty imposed on every sewerage undertaker by section 94 of the Water Industry Act 1991 (general duty to provide sewerage system) and any *contravention of the requirements of this regulation shall be treated for the purposes of that Act as a breach of that duty*.
>
> (2) Subject to paragraph (3) below, the duty imposed by subsection (1)(a) of the said section 94 shall include a duty to ensure that *collecting systems which satisfy the requirements of Schedule 2 are provided–*

> (a) where the urban waste water discharges into receiving waters which are a sensitive area, by *31st December 1998* for every agglomeration with a population equivalent of more than 10,000; and
>
> (b) without prejudice to sub-paragraph (a) above–
>
> > (i) by *31st December 2000* for every agglomeration with a population equivalent of more than 15,000; and
> >
> > (ii) by *31st December 2005* for every agglomeration with a population equivalent of between 2,000 and 15,000.
>
> (3) …
>
> (4) The duty imposed by subsection (1)(b) of the said section 94 shall include a duty to ensure that urban waste water entering collecting systems is, before discharge, subject to treatment provided in *accordance with regulation 5*, and to ensure that–
>
> > (a) plants built in order to comply with that regulation are designed (account being taken of seasonal variations of the load), constructed, operated and maintained to ensure *sufficient performance under all normal local climatic conditions*;
> >
> > (b) treated waste water and sludge arising from waste water treatment are reused whenever appropriate; and
> >
> > (c) disposal routes for treated waste water and sludge minimise the adverse effects on the environment." (emphasis added)

A "collecting system" refers to a system of sewers for collecting and conducting urban waste water (i.e. domestic waste water or a mixture of domestic waste water with industrial waste water and/or run-off rain water) (reg. 2(1)).

58. For present purposes the relevant part of sched.2 to which the duty in reg.4(2) relates is para.2:

> "2. The design, construction and maintenance of collecting systems shall be undertaken in accordance with the best technical knowledge not entailing excessive costs, notably regarding–
>
> > (a) volume and characteristics of urban waste water;
> >
> > (b) prevention of leaks;
> >
> > (c) limitation of pollution of receiving waters due to storm water overflows."

The cost benefit expression "best technical knowledge not entailing excessive costs" is referred to as "BTKNEEC."

59. Paragraph 2 of sched.2 addresses the capacity of collecting systems by reference to *inter alia* the volume of waste water to be collected and the "limitation" of pollution from the use of storm overflows. The equivalent provision in the Directive is to be found in Annex 1(A). Footnote 1 to that Annex states:

> "Given that it is not possible in practice to construct collecting systems and treatment plants in a way such that all waste water can be treated during situations such as unusually heavy rainfall, Member States shall decide on measures to limit pollution from storm water overflows. Such measures could be based on dilution rates or capacity in relation to dry weather flow, or could specify a certain acceptable number of overflows per year."

60. Regulation 4(4) imposes a duty on undertakers to ensure that urban waste water entering collecting systems is, before discharge, subject to treatment in accordance with reg.5 for the provision of "secondary treatment" or an equivalent at sewage treatment plants. Secondary treatment involves biological treatment with secondary settlement or other process complying with the parameters set by Table 1 in sched.3. Regulation 5(1) provides:

> "**5.— Requirements as to provision of treatment**
>
> (1) Subject to paragraph (5) below, treatment plants which provide secondary treatment or an equivalent treatment shall be provided–
>
> (a) by 31st December 2000 or, in an exceptional case, [a] later date (not being later than 31st December 2005) [...], in respect of all discharges from agglomerations with a population equivalent of more than 15,000;
>
> (b) by 31st December 2005 in respect of all discharges from agglomerations with a population equivalent of between 10,000 and 15,000;
>
> (c) by 31st December 2005 in respect of all discharges to freshwaters and estuaries from agglomerations with a population equivalent of between 2,000 and 10,000."

61. Regulation 5(2) requires more stringent treatment to be provided by 1998 for discharges from agglomerations with a population of 10,000 or more into areas designated as "sensitive".[1] Plainly the obligations in regs.4(2) and (4) and 5 were to be satisfied by deadlines which passed many years ago, but they are continuing obligations.

62. Regulation 6(2)(c) of the 1994 Regulations imposes a duty on the EA, in exercising their functions under the 2016 Regulations (i.e. environmental permitting), to secure in relation to discharges from a collecting system or a treatment plant within regs.4 or 5 "the limitation of pollution of receiving waters due to storm water overflows". That requirement mirrors the language used in para.2(c) of sched.2 in relation to collecting systems (see reg. 4(2)). Accordingly, Footnote 1 to Annex 1 to the Directive is

[1] Regulation 5(5) relaxed the requirement in reg.5(1) for certain discharges into high natural dispersion areas.

equally applicable along with the principles in the *UK* case to the EA's functions (see also Arts. 3(2), 4(3) and 5(3) and Annexes 1(A) and 1(B) of the Directive).

63. In the *UK* case the CJEU interpreted the provisions of the Directive transposed by regs.4 and 5 and sched.2 of the 1994 Regulations. They considered how the relevant parts of the Directive interact.

64. First, in order to meet the objective in Article 1 of the Directive of protecting the environment, all urban waste water must be collected and treated under usual climatic and seasonal conditions. The phrase "sufficient performance" in reg.4(4)(a) of the 1994 Regulations must have that meaning. A failure to treat urban waste water can only be tolerated where the circumstances are "out of the ordinary" ([52] to [54]).

65. Second, the concept of "unusually heavy rainfall" in footnote 1 to both Annexes 1(A) and 1(B) of the Directive applies to both the collecting systems in reg.4(2) and the treatment plants in reg.4(4) read with reg.5. The footnote recognises that it is not possible in practice to construct collecting systems and treatment plants so that all waste water will be capable of being treated. Such situations can be tolerated in "situations such as unusually heavy rainfall" which the Court characterised as "exceptional situations" ([55] to [58]). However, in those situations the state must decide on "measures to limit pollution from storm water overflows".

66. Third, although the concept of BTKNEEC is only referred to expressly in relation to collection systems (see reg.4(2) and para.2 of sched.2), it also controls adverse environmental impacts arising from the discharge of untreated waste from treatment plants. BTKNEEC secures compliance with the Regulations without imposing obligations which cannot be fulfilled or only at a disproportionate cost ([63] to [64]).

67. BTKNEEC involves weighing the best technology and its estimated costs against the benefits (or avoidance of harm) that a more effective water collection/treatment system may provide. This involves taking into account the effects of discharges of untreated waste on the environment to see whether the costs that must be incurred or the works necessary to treat all waste water, would be proportionate to the environmental benefit that would result ([67] to [68]).

68. Fourth, a member state may not rely upon practical or administrative or financial difficulties in order to justify non-compliance with the obligations in the Regulations ([66]).

69. The CJEU decided that the relevant provisions of the Directive (and therefore the 1994 Regulations) involve two tests. First, is the discharge from a collecting system or a treatment plant due to circumstances of an exceptional nature? If the answer is yes, there is no breach of either reg.4(2) read with para.2 of sched.2, or reg.4(4)(a) read with reg.5, of the 1994 Regulations. If the answer is no, the second question is whether discharge can be justified by cost-benefit analysis so as to satisfy the BTKNEEC test. If the answer is yes, then there is no breach of reg.4(2) or reg.4(4), but if the answer is no, then there is a breach (see [73]). Both in submissions and in this judgment these two tests are referred to by way of shorthand as the reg.4 issue and give rise to reg.4 breaches.

70. In his opinion Advocate General Mengozzi stated that the BTKNEEC principle required an assessment of the circumstances of each specific case. It is not possible to apply the concept in the abstract ([AG 61]).

71. Mr. Forsdick KC (who appeared on behalf of WildFish) submitted that the prohibition upon discharging untreated waste water applies to all discharges through storm overflows however caused, subject only to the exclusion of spills caused by exceptional circumstances or the BTKNEEC exception. Thus, breaches of reg.4 may occur because of inadequate physical capacity as well as operational and maintenance failures. This was common ground and I agree with the submission.

72. Mr. Forsdick also pointed out that the requirements laid down in the 1994 Regulations were to be satisfied by the end of December 2005 at the latest, in relation to overflows then in existence. He said that undertakers have operated systems in breach of reg.4 for a long period of time.

73. The effect of reg.4(1) is that a breach of reg.4(2) or of reg.4(4) (and reg.5) is treated as a breach of that company's duty under s.94(1) and is therefore liable to enforcement action under s.94 of the WIA 1991. By s.18 of that Act both Ofwat and the Secretary of State are responsible for taking enforcement action for breaches of regs.4 or 5 of the 1994 Regulations. The court was informed that in practice Ofwat is expected to take the lead in enforcing the 1994 Regulations in individual cases. The Secretary of State exercises a general, strategic role under s.18 of the WIA 1991 to secure compliance with the regulations.

74. Although the EA cannot take enforcement action under the WIA 1991 in relation to breaches of regs.4 or 5 of the 1994 Regulations, reg.6(2)(c) imposes a duty upon the EA to secure through the environmental permitting regime that discharges from a collecting system or a treatment plant meet the requirements of regs.4 and 5 read together with the principles in the *UK* case.

*Environmental Permitting (England and Wales) Regulations 2016*

75. By regulation 12(1) a person must not, save in so far as authorised by an environmental permit, operate a regulated facility, or cause or knowingly permit a "water discharge activity." By reg.2(1) a "water discharge activity" is defined by reference to para.3 of sched.21. The term includes a discharge to inland freshwater or to coastal waters of any polluting matter. That includes the operation of a storm overflow in a combined sewerage system.

76. The regulator may grant an operator an environmental permit authorising the operation of a regulated facility (reg.13(1)). A "regulated facility" includes a "water discharge activity" (reg.8(11)). When granting a permit the regulator may impose such conditions as it sees fit (para.12(2) of sched.5). The EA is the regulator in England for the purposes of the 2016 Regulations. Ofwat has no regulatory role to play in the operation of those Regulations.

77. Regulation 20 gives the EA power to vary the terms of a permit on its own initiative.

78. By reg.38 it is an offence for a person to contravene reg.12(1) or to fail to comply with or contravene a condition of an environmental permit.

79. Part 4 of the 2016 Regulations contains enforcement powers. Under reg.36 the EA may serve an enforcement notice in respect of a contravention of a permit condition, specifying the remedial action required to be taken within a defined time limit. Under reg.37 the EA may serve a notice suspending a permit if, for example, the operation of the facility involves a risk of serious pollution or serious harm to the environment. It is an offence for a person to fail to comply with such notices (s.38(3)).

80. Regulation 31 provides rights of appeal in relation to permitting decisions and the service of enforcement and other notices.

81. It is common ground that the EA's power to impose conditions on environmental permits, whether on the grant of a permit or by variation, enables the Agency to exercise control over *inter alia* the adequacy of the physical capacity of a collecting system or treatment plant, so as to reduce or limit the frequency and duration of discharges of untreated sewage into receiving waters, for example at a storm overflow. Permit conditions are to be set so as to achieve compliance with regs. 4 and 5 of the 1994 Regulations, both when a permit is granted and thereafter, so that the EA complies with reg.6(2)(c). This control is not limited to operational or management or maintenance failures. It also includes the adequacy of the designed capacity of the infrastructure relative to the demand arising over time from the area served by the collecting system. As we will see below ([114]), the Secretary of State envisages that improvements which Ofwat will require to achieve the policy targets in the Plan will be secured by the EA varying the terms of an environmental permit.

82. A typical permit condition allows the discharge of sewage via an overflow only when the flow passed forward for treatment exceeds a setting determined by the EA. This is referred to as the "flow to full treatment" or "FFT". In answer to requests for information from WildFish, the EA relied upon a document it issued in September 2018: "Water companies: environmental permits for storm overflows and emergency overflows." The document makes it plain that a sewerage system must be designed, built and maintained to BTKNEEC, a reference to regs.4 and 5 of the 1994 Regulations.

83. The document explains the design standards applied by the EA when issuing permits for new, improved or altered storm overflows. It requires a treatment works to be designed to treat *peak* dry weather flow (DWF) set for that installation plus additional flows from "light rainfall". In other words, the condition in a permit for a storm overflow allows a discharge to occur when a specified design flow based on DWF is exceeded. Footnote 1 to Annex 1(A) of the Directive allows for "measures to limit pollution from storm overflows" based on "capacity in relation to dry weather flow". The EA's normal minimum setting for an overflow, or FFT, is arrived at using a formula which takes into account the catchment population, a daily *per capita* domestic flow and a daily trade effluent flow. The formula applies a multiple of 3, presumably to arrive at a "peak" figure. The "FFT setting is also known as 3DWF". The document states that where treatment capacity is being designed to deal with future increases in population, an allowance for future levels of infiltration must also be considered. Ultimately it is a matter of judgment for the EA to determine whether the capacity of the collecting system or the treatment works (including any storage) is sufficient for the agglomeration to be served, in accordance with regs.4 and 5 of the 1994 Regulations, both as built and subsequently.

84. As we have seen, the frequency of discharges via storm overflows has increased unacceptably because of population growth (which implies a level of growth not taken into account when a permit decision was made), increases in impermeable surfaces and the effects of climate change. The EA has sought to address these concerns in its Storm Overflows Assessment Framework (June 2018) ("SOAF"). Page 1 clearly states that the Framework is based upon regs.4 and 5 of the 1994 Regulations and the need to design sewage treatment works and overflows to satisfy BTKNEEC (i.e. cases where it is determined that, applying the first test in the *UK* case, discharges would or do take place in non-exceptional circumstances). The assessment framework has been drawn up to enable the EA to make regulatory decisions in accordance with the 1994 Regulations as circumstances change. The document requires regard to be had to such matters as spill frequency, environmental harm and social harm. These factors also affect judgments on prioritisation of assessments.

85. The SOAF addresses cases where "hydraulic capacity" is the cause of excessive discharges (p.2). Hydraulic modelling is carried out "to assess whether the high spill frequency is a genuine reflection of the permitted hydraulic design of the asset and the amount of connected area contributing rainfall runoff", as opposed to being caused by inadequate maintenance (p.6). The SOAF requires a cost-benefit analysis to be carried out so as to comply with the BTKNEEC test for regs.4 and 5 of the 1994 Regulations (p.18).

86. In the EA's guidance to water companies on permitting storm overflows, the Agency addresses the need for improvement of storm overflows, again applying the BTKNEEC test. Where an overflow becomes unsatisfactory, the EA can *inter alia* review the environmental permit conditions to satisfy the relevant standard. A substandard overflow may include a facility which does not have sufficient hydraulic capacity compared to minimum design standards, or which risks becoming unsatisfactory because "discharges have increased beyond the original design due to infiltration, growth and urban creep." The EA states that the undertaker must upgrade a substandard overflow to meet modern standards.

87. Thus, although the EA is not an enforcing authority under the WIA 1991 for breaches of the 1994 Regulations, it must use its powers as the regulator for environmental permits to satisfy its own obligation under reg.6(2)(c) and to achieve compliance with the 1994 Regulations. It is this intersection between the 1994 and 2016 Regulations and the roles of the two regulators which appears to explain why the documentation in this case dealing with non-compliance and enforcement refers so often to the permitting regime. Such references should not be taken to indicate that the requirements of the 1994 Regulations are being left out of account, as the claimants have suggested.

88. Ms. Amira Amzour, a Deputy Director in the Floods and Water Directorate at Defra, responsible for the Water Quality Division, made a witness statement. At para.24 she states that the EA has the *power* to vary permits at any time to secure compliance with relevant legislation including the 1994 Regulations, either in response to an application or on its own initiative. But in my judgment the effect of reg.6(2)(c) is to impose a *duty* on the EA to enforce ongoing compliance with the 1994 Regulations.

*The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 (SI 2017 No. 407)*

89. Regulation 3(1) imposes an obligation on the Secretary of State and the EA to exercise their functions under the Regulations and under the enactments listed in scheds.1 and 2 so as to secure compliance with *inter alia* the Water Framework Directive (Directive 2000/60/EC). Those enactments include Part IV of the WIA 1991, the 1994 Regulations and the 2016 Regulations. Article 4(1)(a) of the Directive sets environmental objectives for river basin management plans. Under the 2017 Regulations the EA is responsible for preparing and reviewing such plans. Under reg.12 the EA must prepare environmental objectives for each river basin in accordance with reg.13 and a programme of measures (reg.20). Under reg.13(2) the objectives for surface water bodies are to prevent further deterioration of their status and to protect, enhance and restore each body with the aim of achieving "good ecological status" and "good surface water chemical status" (as defined) by 22 December 2021. Under reg.16 that deadline may be extended to 22 December 2027 (subject to variations for specific targets).

*The Conservation of Habitats and Species Regulations 2017*

90. In the 2017 Regulations a "European site" refers to a site falling within reg.8, essentially a Special Area of Conservation or a Special Protection Area or such a site falling within UK inshore waters.

91. Regulation 63 imposes an obligation to carry out an "appropriate assessment" in certain cases before authorising the making of a plan:

> "**63.— Assessment of implications for European sites and European offshore marine sites**
>
> (1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which —
>
> (a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and
>
> (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications of the plan or project for that site in view of that site's conservation objectives.
>
> (2) …
>
> (3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

> (4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.
>
> (5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).
>
> …"

92. If a plan under s.141A were to fall within the scope of reg.63(1) and if the Secretary of State was unable to conclude in the light of an appropriate assessment, that the plan would not adversely affect the integrity of each affected European site (or European offshore marine site), reg.63(5) would prohibit the authorisation of that Plan, subject only to reg.64.

93. Regulation 64 provides (so far as it is material):

> "**64. Consideration of overriding public interest**
>
> (1) If the competent authority is satisfied that, there being no alternative solutions, the plan or project must be carried out for imperative reasons of overriding public interest (which, subject to paragraph (2), may be of a social or economic nature), it may agree to the plan or project notwithstanding a negative assessment of the implications for the European site or the European offshore marine site (as the case may be).
>
> (2) Where the site concerned hosts a priority natural habitat or a priority species, the reasons referred to in paragraph (2) must be either—
>
> (a) Reasons relating to human health, public safety or beneficial consequences of primary importance to the environment; or
>
> (b) Any other reasons which the competent authority, having due regard to the opinion of the appropriate authority, considers to be of imperative reasons of overriding public interest."

*European Union (Withdrawal) Act 2018.*

94. It is common ground that the domestic legislation which transposed EU legislation and the case law cited in the parties' submissions is to be treated as European retained law. I agree.

*Human Rights Act 1998*

95. Article 8 provides:

> "**Article 8**

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

96. Article 1 of the First Protocol provides:

"**Article 1**

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

## Chronology leading up to the Plan

97. On 15 July 2020 officials briefed the Minister on increases in discharges from storm overspills. The sewerage network was under pressure because of a growing population, increased run-off from urbanisation and heavier rainfall as a result of climate change. The Department was working with Ofwat and the EA on a waste water infrastructure strategy which would include storm overflows. "The cause of overflow operation is the lack of capacity in the current sewer network and that is what we must tackle" (para.12). Officials considered options for increasing capacity, such as installing bigger pipes and additional storage.

98. As a result, in August 2020 the Minister set up the Storm Overflows Taskforce to develop proposals to reduce significantly the frequency and impact of overflows both in the short and long term, with a range of potential goals including the complete phasing out of overflows. The Taskforce included officials from Defra, Ofwat and the EA and representatives from the water industry, the Consumer Council for Water and Blueprint for Water (an umbrella group of environmental NGOs including WildFish and MCS).

99. In briefing to the Minister on 28 October 2020 officials identified some short-term measures. These included increasing the number of investigations into high-spilling overflows so as to lead to more investment in improvements. The Minister was also

considering two alternative long term goals: to phase out storm overflows completely or to do so where practicable. A cost-benefit analysis was to be developed by the Taskforce to inform the decision on which goal to adopt, the effects on customers' bills and the length of time needed (see also Ms. Amzour's WS at para.62).

100. The Taskforce had recognised that there was a lack of evidence to support a cost-benefit analysis on a national basis of the financial and environmental implications of eliminating or reducing discharges. Research was also needed on technical feasibility and the timescales that would be involved. Accordingly, in December 2020 they invited expressions of interest in a Storm Overflows Evidence Project. Stantec was chosen to lead that project and work began in January 2021 (Ms. Amzour's WS paras.58 and 66 to 68).

101. On 22 January 2021 the Minister and Defra made an announcement in which it was accepted that water infrastructure had not kept pace with developmental growth over decades. The Taskforce had agreed to set a long-term goal of eliminating harm from storm overflows, but recognised the time needed to achieve the changes involved.

102. The Environment Bill reached the report stage in May 2021 and now included an obligation on the Secretary of State to produce a plan by September 2022 for reducing sewage discharges from storm overflows as well as a requirement for each WaSC to produce a DWMP.

103. On 8 July 2021 the Minister was given initial estimates of the cost of imposing a spill limit of 5 discharges a year (£50bn) or complete elimination of overflows (£150bn to £600bn). Because of these costs and limits on the availability of skilled labour, officials recommended spreading investment over five-year cycles, either at a slower rate of £5bn per cycle or a faster rate of £10bn. The Minister chose the faster option.

104. On 5 August 2021 officials briefed both the Secretary of State and the Minister in the context of his obligation under the Bill to produce a plan. Expert analysis had shown that work to reduce sewage discharges at a national level would not be cost beneficial, even with economies of scale and cost-effectiveness measures at a local level. Setting any substantial target for storm overflows would require the EA to update environmental permits for storm overflows over time. The permits would require WaSCs to deliver individual improvements to storm overflows or treatment plants which would not be justified by cost-benefit analysis. Instead the companies would be making the improvements in the most cost-effective way.

105. Ms. Amzour states at para.86 of her witness statement that "previously, many investigations into high-spilling overflows have found improvements were not cost-beneficial to be carried out." "This is a key area where the Plan sets significantly higher ambition on storm overflows." It is therefore plain that officials and ministers were formulating policy targets which would require improvements going beyond those which could satisfy a cost-benefit test and therefore be required under regs.4 and 5 of the 1994 Regulations. Ministers were also advised that in view of the scale of the costs involved it would be necessary to prioritise implementation of the policy targets.

106. Officials provided similar advice to the Secretary of State on 6 October 2021. The new statutory plan that the Secretary of State had to produce was seen as a means to

set specific, time-bound objectives which would drive widespread change on storm overflows across the country. But officials advised that the target should seek to reduce discharges significantly rather than eliminate them altogether, because of the costs involved and the small level of additional benefit generated.

107. The final report of the SOEP was published on 4 November 2021. It set out the costs and benefits of a range of different options for reducing storm overflow discharges down to 40, 20, 10 or 5 a year or no discharges. It estimated that the costs of reducing discharges to zero were between £360bn and £600bn. That option could result in household bills increasing by between £569 to £999 a year and would involve much disruption across the country.

108. The EA 2021 received Royal Assent on 9 November 2021.

109. Officials made a submission to the Minister on 11 November 2021 on the EA's investigation of 3,500 sewage treatment works to assess the extent of non-compliance with permitting requirements. Works would be placed into three categories: compliant, non-compliant and requiring further investigation, resulting in a priority list for investigation of offences. Initial assessments suspected that up to 30% of all treatment works could be affected by the investigation, which was far more widespread than had previously been thought, and the position could be even worse. The Minister was told that more would be known at the conclusion of the first stage of the EA's investigation. Counsel informed the court on instructions that that was expected to be "around late 2024 or early 2025." Officials said reasons for non-compliance may range from "poor management of growth" through to deliberate manipulation of flows (e.g. using overflows below the full treatment setting specified in a permit condition).

110. The briefing referred to the "licence conditions" applicable to the WaSCs. This was one of several examples of infelicitous language in the drafting of documents. During the hearing it was clarified that no "licence" is granted to a WaSC. The briefing (and Ms. Amzour's witness statement) should have referred to "appointment conditions" and the legal effect of the appointment (see [33] to [35] above). The undertaker is required to comply with its statutory obligations (s.6(2)(a)), including environmental obligations. These are described as "regulated activities" for the purposes of the appointment of an undertaker and the conditions of such an appointment. The Minister was told that under the conditions, the board of a company must certify to Ofwat every year that it has sufficient resources to carry out its regulated activities, including the investment programme needed to fulfil its obligations under the appointment. Ofwat's role in the investigation is to assess compliance by a company with its appointment and conditions and to scrutinise its plans "to fix this issue." The full regulatory response would be determined by Ofwat and EA, with input from Defra, once the scale and impact become known.

111. On 18 November 2021 the EA and Ofwat made a public announcement about their investigation. They said that they would be investigating non-compliance with environmental permits and legal duties. The announcement was short on detail, but there is no reason to read it as excluding regs. 4 and 5 of the 1994 Regulations. Read in the context of the overall statutory scheme and published guidance, EA's approach

was to apply those Regulations in decisions on whether to grant a permit and impose conditions and on whether to vary a permit.

112. Ofwat explained its position in a letter to the Chief Executives of the WaSCs dated 18 November 2021. It referred to concerns about non-compliance with "flow to full treatment" conditions in permits. This could be leading to significant numbers of unpermitted spills *and* environmental harm. If so, that was unacceptable and could indicate that companies were not meeting their general duty under s.94 of the WIA 1991. The letter also referred to the funding which companies had been allowed in order to comply with "their legal obligations" and the obligation of each company to certify to Ofwat each year that it has sufficient resources to carry out its regulated activities "which includes compliance with section 94 and related licence conditions" (i.e. its appointment conditions). Ofwat said that it was for the EA to decide how to enforce compliance with individual permits. Ofwat would keep abreast of that process "to inform the next steps we may need to take using our own regulatory tools." The letter specifically relied upon the document "Ofwat's approach to enforcement" (January 2017) which addresses the use of enforcement orders under s.18 and penalties under s.22A of the WIA 1991. Read in context (see also below) the letter did not restrict the regulatory response so as to exclude the need for compliance with the 1994 Regulations.

113. In November 2021 the Minister sent an undated letter to all MPs about the joint investigation. The language used is consistent with the documents from the EA and Ofwat. The letter emphasised the requirement in the terms of appointment for each WaSC that it fulfils "its regulated activities including environmental obligations." The Minister said that the water companies had to take urgent steps to comply with their legal duties. She added that standards needed to be raised further to reduce the harm caused by discharges that are allowed when storm overflows are used "in exceptional circumstances, such as severe weather incidents." On any fair reading the Minister was aware of the requirements of both the 1994 Regulations and 2016 Regulations, but was looking to raise standards further than they require. Contrary to the claimant's submissions, I do not read the responses on the storm overflow issue from the Department, the EA and Ofwat as ignoring or excluding the need for compliance with the 1994 Regulations.

114. On 30 November 2021 officials briefed the Minister on the evolution of the targets to be included in the Plan. It was not intended that those targets would be legally binding, but the outcome of applying the targets to individual facilities would be "turned into permit conditions" which would be binding. In other words, the EA will vary the environmental permit for a system. The targets would be reflected in the Water Industry Strategic Environmental Targets set by the EA, and additional guidance by Defra on DWMPs, and would form the central part of the Government's storm overflow discharge reduction plan.

115. Officials explained that the first two targets dealing with ecological harm and public health would still allow some overflows to discharge sewage "tens of times" a year, whereas the consultation draft for the Secretary of State's Strategic Priorities Statement to Ofwat (July 2021 – s.2A of the WIA 1991) stated that storm overflows should operate "infrequently." They advised that one option was to define what is meant by that term. The Minister was asked to consider adding a third target dealing

with spill frequency. Once a Ministerial steer was given on the targets to be pursued, estimates of the cost implications would be provided.

116. On 13 December 2021 a submission was made to both the Secretary of State and the Minister. Officials presented two options for the third target. The first was to vary permit conditions so that a greater proportion of sewage would have to be treated before an overflow could be operated, for example, discharges would only be allowed where the rainfall is so heavy that the flow of sewage is 10 times the dry weather flow (or "normal" flow). But as population increases, so this standard would become weaker over time. The second option was to impose a limit on the number of spills that could occur in a year.

117. On 9 February 2022 officials advised the Secretary of State against the first of those two options. Analysts had shown that it would still allow some overflows to spill more than 40 times a year, because of regional variations in rainfall and flow. They advised in favour of the second option as a more ambitious target, eliminating the effects of regional variation. "It is also a future-proofed mechanism by design, as upgrades will need to take into account of what is needed to keep spills low without the need for regular updates to flow settings in permits, as weather or demographics change." Officials put forward alternative targets of 10 or 20 spills on average a year, with their respective costs. Officials also pointed out "that current evidence still shows that reducing sewage discharges is generally not cost beneficial, as the environmental benefits do not outweigh the costs and we have limited evidence to have accurate figures on benefits to public health or from greater amenity."

118. At the end of February 2022 Ministers approved a consultation draft of the Plan in which the third target proposed that storm overflows must not discharge above an average of 10 events a year by 2050 so as to ensure that overflows operate only in unusually heavy rainfall events.

119. In February 2022 the Secretary of State issued the Strategic Priorities Statement for Ofwat under s.2A of the WIA 1991:

> "We therefore expect water companies to significantly reduce the frequency and volume of sewage discharges from storm overflows, so they operate infrequently, and only in cases of unusually heavy rainfall. We expect overflows that do the most harm or impact on the most sensitive and highest amenity sites to be prioritised first. The outcomes we expect water companies to meet on storm overflows will be set out in the Storm Overflows Discharge Reduction Plan. Water companies should set out how they will improve the performance of their drainage system, including reducing discharges, through drainage and wastewater management plans. We also expect companies to be open and transparent with the public and provide information relating to discharges to the environment and their environmental impact as soon as reasonably practicable."

120. In April 2022 WildFish provided its consultation response. They criticised the targets for allowing failures to comply with the 1994 Regulations as interpreted in the *UK* case to continue for up to 30 years, whereas compliance should have been achieved

many years ago. In May 2022 the MCS submitted their response in which they said *inter alia* that more immediate action must be taken to reduce harm by 2030.

121. On 6 July 2022 officials briefed the Secretary of State and the Minister on the outcome of the consultation on the draft Plan. They considered the merits of accelerating the targets or making them more ambitious and the associated costs. They advised that the third target should be reviewed in 2027 in the light of data obtained in the interim to assess whether the target could be brought forward from 2050. They also suggested that the issue of whether the targets should apply to all coastal overflows and not simply those discharging into bathing waters be reviewed in 2027. On 13 July 2022 the Secretary of State decided that the three targets should remain as in the consultation draft and be reviewed in 2027.

**The Plan**

122. The Plan sets "clear and specific targets for water companies, regulators and the Government to work towards the long-term ambition of eliminating the harm from storm overflows" (p.8).

123. The EA 2021 will place a duty on WaSCs to progressively reduce the adverse impacts of discharges from storm overflows. This is in addition to their legal duties under the 1994 Regulations and s.94 of the WIA 1991 (p.10).

124. Under the heading "Complying with regulations" p.18 of the Plan states:

> "**1. Water companies must comply with all their existing regulatory obligations and duties, including permits issued by the Environment Agency.**
>
> Water companies need to maintain and upgrade their wastewater systems to ensure they meet their statutory service obligations and keep pace with all the pressures that add surface water to the combined sewer network. Before implementing infrastructure upgrades, water companies must ensure all their wastewater and drainage assets are working as intended, are not limiting capacity of their sewage system, and are compliant with all relevant legislation and permits. This includes (but is not limited to) proactive management and adequate maintenance of assets, with timely replacements, upgrades, or repairs of assets as appropriate. Upgrades as a result of non-compliance do not fall within the scope of this plan."

125. The first target states:

> "**1. Protecting the environment:**
>
> Headline target: Water companies will only be permitted to discharge from a storm overflow where they can demonstrate that there is no local adverse ecological impact.
>
> Sub-targets:

> 1. The headline target must be achieved for most (at least 75%) of storm overflows discharging in or close to high priority sites (as defined in Annex 1) by 2035.
>
> • It must be achieved for all (100%) storm overflows discharging in or close to high priority sites by 2045.
>
> • Water companies must achieve this target for all remaining storm overflows sites by 2050."

"High priority areas" include SACs and Sites of Special Scientific Interest. Annex 1 provides a technical definition of "no local adverse ecological impact." The object is to ensure that no water body should fail to achieve "good ecological status." That term is defined in Annex 1 by reference to The Water Environment (Water Framework Directive) (England and Wales) Regulations 2017. Ms. Amzour explains that currently an ecology test is only applied to overflows suspected of causing "ecological failure", which represents about 13% of the total. The target in the Plan is required to be applied to each inland overflow (WS para 169b).

126. The second target states:

> "**2. Protecting public health in designated bathing waters**
>
> Headline Target: Water companies must significantly reduce harmful pathogens from storm overflows discharging into and near designated bathing waters, by either: applying disinfection; or reducing the frequency of discharges to meet Environment Agency spill standards by 2035."

Ms. Amzour explains that this represents an improvement on existing standards which only apply to overflows impacting on a designated sampling point. The Plan's target affects all overflows discharging in or near a bathing area and would lead to the improvement of around 660 overflows (WS para 169c and briefing to Minister on 30 November 2021).

127. The Plan states that the first two targets are intended to address first overflows which cause the most harm, whether to the environment or to public health. The third target sets an additional requirement for all overflows:

> "**3. Ensuring storm overflows operate only in unusually heavy rainfall events**
>
> Headline Target: Storm overflows will not be permitted to discharge above an average of 10 rainfall events per year by 2050."

The target seeks to ensure that storm overflows will only be used in "the rare case of unusually heavy rainfall…". Annex 1 supplies a technical definition of a "rainfall event." The Plan explains that this operates as the "backstop target" to the first and second targets. If an overflow meets the first two targets it must also meet the third.

128. Section 2.3 deals with the review of the Plan. Section 141B of the WIA 1991 requires the first Progress Report to be issued in 2025 and at five-year intervals thereafter. The Plan states that there is currently no evidence to be able to predict fully whether WaSCs could move more quickly towards achieving the targets set for the 2030s and beyond, taking into account the significant increases required in supply chain capacity, including skills and equipment. In addition, the impact of costs on consumers must be kept under review. Therefore, the Government will review the Plan's targets in 2027 ahead of the price review for the five-year period 2029 to 2034 (pp.13-14).

129. Section 2.4 of the Plan contains a trajectory showing the effect of improvements reducing discharges at five yearly stages from 2030 to 2050. By 2050 it is predicted that the number of annual discharges throughout the country will have reduced by 320,000, or by 80%, from a baseline in 2020.

130. The Plan states that WaSCs will have to set out in their DWMPs how they will meet the Secretary of State's storm overflow targets in a manner integrated with other local plans and local partners (pp.18 to 19).

131. Annex 3 to the Plan summarises legislative action being taken by the Government. It emphasises the lack of adequate monitoring data until recently when WaSCs became subject to new obligations:

> "For too long water companies have been able to discharge raw sewage without appropriate scrutiny due to a lack of monitoring data and an incomplete picture of the full impact of storm overflows on the water environment. These new duties on monitoring will increase transparency and provide the Government, regulators and the public with the information to take action and hold the industry to account."

132. The Impact Assessment for the Plan was published on 2 September 2022. It explains that the Plan does not specify precisely how targets should be achieved as this will be determined through the business planning process scrutinised by the regulator. Solutions could include improvements to capacity (e.g. additional storage tanks) and "sustainable drainage solutions" on new developments to reduce runoff into the sewer network (p.6). The targets will be translated into requirements which WaSCs must meet through the permitting regime operated by the EA and the price review mechanisms operated by Ofwat (p.30).

## The investigation by the EA and Ofwat

133. Ms. Amzour refers to the statement at p.18 of the Plan that upgrades of a sewerage system to comply with existing legislative requirements do not fall within the scope of the Plan (para. 166 of her WS). In other words, the targets in the Plan seek to go beyond those requirements. She then says (para.167):

> "This was an approach taken in the context of an awareness by the Minister and the Secretary of State of the ongoing investigation by the EA and Ofwat into suspected non-compliance with existing permits,

> and their publicly expressed support for taking enforcement action against any existing breaches. In circumstances where the investigation was ongoing and its outcome could not be known, the approach taken in the Plan is to make clear that existing obligations must be adhered to and will be enforced by EA and Ofwat."

134. WildFish has advanced arguments concerned with the relationship between targets in the Plan and the pre-existing statutory obligations of WaSCs and, in that context, the scope of the investigation being carried out by the EA and by Ofwat. I have referred to the letters and statement issued by the regulators on 18 November 2021 ([111] to [112] above).

135. Ofwat issued an update on its investigation on 21 November 2022 in which it said that some "key areas of note" had emerged. They included the lack of information for the executive teams and boards of WaSCs on compliance with environmental permits and regs.4 and 5 of the 1994 Regulations, focusing instead on more limited performance metrics.

136. In an answer dated 21 March 2023 to a FOI request by Mr. Nick Measham, the CEO of WildFish, Ofwat stated that its investigation included the issue of whether the relevant companies are complying with the 1994 Regulations. In a letter dated 1 June 2023 in response to recent requests for information from the solicitors acting for WildFish, Ofwat again stated that its investigation included compliance with reg.4 of the 1994 Regulations.

137. In his submissions at the hearing Mr. Forsdick suggested that because the joint investigation linked non-compliance with reg.4 with breaches of environmental permits, the focus was on *operational* issues making the capacity of a system inadequate and not on any lack of *physical capacity* in the system itself (e.g. that it was undersized) to cope with the demand from its catchment and therefore in need of capital investment. It was then suggested that the Secretary of State had effectively fallen into the same trap when drawing up the Plan. He had wrongly treated "capital infrastructure" needs as falling outside the scope of existing regulatory requirements.

138. Neither the EA nor Ofwat took part in these proceedings although they are interested parties. In order to avoid uncertainty about the scope of their current investigations, I directed each body to file a witness statement addressing the claimant's point.

139. Mr. Owen Bolton is the Senior Investigating Officer dealing with the EA's investigation. In his witness statement he says that the investigation does not "directly" include breaches of reg.4 of the 1994 Regulations. Instead it is concerned with whether permit conditions have been complied with.

140. On the other hand, the letters from the EA dated 23 May 2023 and 6 July 2023 indicate that outside of that investigation, the EA has carried out cost benefit analysis on 598 overflows in 2022 in accordance with the 1994 Regulations. The EA stated:

> "The SOAF is intended to address the problems caused by discharges from storm overflows considered to operate at too high a frequency. The framework will ensure that water companies are proactively monitoring and managing the performance of its overflows in light of

> the pressures of growth, urban creep and changing rainfall patterns. It is also intended to demonstrate that sewerage systems are compliant with relevant legislation such as the Urban Waste Water Treatment Regulations 1994."

The SOAF is based upon regs. 4 and 5 of the 1994 Regulations ([84] to [85] above). The EA found that for 126 overflows (or 21% of the total) there were no solutions to reduce the frequency of discharge which satisfied the cost benefit test. But improvement schemes which did pass that test were identified for 472 overflows, of which 53 have already been introduced into the improvement programme under the Water Industry National Environment Programme ("WINEP") and Asset Management Plan ("AMP") regimes and the remainder (419) remain to be programmed.

141. Ms. Sally Irgin, the Director of Enforcement at Ofwat provided a witness statement. She says that Ofwat does not have a role in enforcing environmental permits, but information about how WaSCs address permit conditions controlling flows provides insight into their compliance with s.94 of the WIA 1991 and the 1994 Regulations. Ofwat sent a list of questions to WaSCs on 18 November 2021 to gather information about compliance with permit conditions as a "starting point." Subsequently Ofwat has issued a series of information requests directed to whether treatment works have been designed and built to "ensure sufficient performance under all normal local climatic conditions." Ofwat is investigating whether systems have adequate capacity, including whether "actual demand is exceeding the demand assumptions against which the plant was built", storm tank capacity and spills performance. This information is being sought to address the issue of whether WaSCs are in breach of reg.4 of the 1994 Regulations. Ofwat accepts that if they find that capacity at a particular site breaches that regulation, their duty under s.18 of the WIA 1991 is to take enforcement action.

142. In his third witness statement Mr. Measham criticises the explanation given by Ofwat as lacking in clarity and supporting evidence. He criticises the summary given of the statutory requests for information. He says that the court should infer that Ofwat's investigation is simply directed at *operational failings* rather than the infrastructure capacity issue.

143. I do not accept these criticisms. They are overly forensic. The correspondence and witness statements are clear enough. Ofwat has stated that it is investigating adequacy of infrastructure capacity.

144. In 2022 a legal challenge was brought by Wild Justice against Ofwat alleging that it was not carrying out its regulatory duties to investigate and take enforcement action in respect of breaches of reg.4 of the 1994 Regulations. The issues included the investigation launched in November 2021. Bourne J refused permission to apply for judicial review deciding that it was not arguable that Ofwat was failing to comply with its obligations in relation to the 1994 Regulations. Permission was then refused by Bean LJ ([2023] EWCA Civ 28) who stated that the data collected by the EA and by the enforcement action commenced by Ofwat in November 2021 were and remain relevant to the obligations of the WaSCs under the 1994 Regulations ([34]).

## Legal principles

145. Mr. Forsdick relied upon the principle confirmed in *O'Reilly v Mackman* [1983] 2 AC 237 at p.278 that a decision reached by a public authority based upon a misinterpretation of the applicable law is liable to be quashed. He referred to the speech of Lord Browne-Wilkinson in *R v Hull University Visitor ex parte Page* [1993] AC 682 at p.702C that the principle applies where the decision-maker has misinterpreted the law at some earlier stage before his decision, provided that that error is relevant: *i.e.* it was "an error in the actual making of the decision which affected the decision itself." Here he submits that in formulating policy targets which seek to go beyond existing legal requirements, the Secretary of State did not appreciate that reg.4 of the 1994 Regulations applies to inadequacy in the physical capacity of a collecting system and treatment works to be addressed, as well as to a lack of capacity resulting from operational issues.

146. However, it is also common ground that the court should start from the position that the Secretary of State, (and indeed Ofwat and the EA), are familiar with the statutory framework and relevant provisions. They are to be taken as having understood them correctly unless there is a sufficient, positive contra-indication within the Plan itself or other relevant documents (*R (Tarian Hafren Severn Shield CYF) v Marine Maritime Organisation* [2022] PTSR 1261 at [158]). Furthermore, the internal records of the decision-making process and the formal decision documents should be read fairly and with an appropriate degree of benevolence when seeking to understand how a decision was reached, or policies formulated. The documents must be read as a whole and in the context of the material and the issues with which the defendant and officials may be presumed to be familiar. They must not be read in an overly forensic or legalistic way (*Tarian Hafren* at [158]; *R (Keir) v Natural England* [2022] Env. L.R.3 at [46] to [48]).

147. It is well established in planning law that development plans should not be interpreted as if they are a statute or legal instrument (Lord Carnwath JSC in *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 at [22] and [25]. I accept the defendant's submission that the same approach is applicable here, *a fortiori* given the high-level, strategic nature of the plan.

148. In part of ground 1 and in ground 2 of WildFish's claim it is said that the Secretary of State failed to take into account various relevant considerations which were "obviously material". The relevant legal principles have been laid down by the Supreme Court in *R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] PTSR 221 and *R (Friends of the Earth Limited)* [2021] PTSR 190. It is insufficient for a claimant simply to say that the decision-maker failed to take into account a material consideration. Such a consideration is only something which is not irrelevant and which a decision-maker is *empowered* to take into account. A decision-maker does not *fail* to take into account a material consideration into account unless he was under an *obligation* to do so.

149. Accordingly, a claimant must show that the decision-maker was expressly or impliedly required by the legislation to take the particular consideration into account, or that, in the circumstances of the case, the matter was so obviously material that it was irrational for the decision-maker not to have taken it into account. A factor is obviously material if a failure to give direct consideration to it would not accord with the intention of the legislation. The test is not to be applied at large but in the context

of the nature, scope and purpose of the legislation in question (*R (Friends of the Earth Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 at [199] and *R (Transport Action Network Limited) v Secretary of State for Transport* [2022] PTSR 31 at [79] and [125].

150. The Supreme Court held in the *Friends of the Earth* case at [120] that if a court should decide that a particular relevant consideration was not required by the legislation to be taken into account and was not "obviously material", it is of no legal significance that the decision-maker did not exercise his discretion as to whether to take it into account.

151. Because part of the claim brought by WildFish depends upon establishing irrationality, it is necessary to have in mind the relatively light intensity of review appropriate for dealing with a plan setting strategic or high level policy on environmental and socio-economic considerations, particularly where the legislation allows the minister a very broad discretion as to the contents of the plan and he is required to lay the document before Parliament to whom he is answerable. This subject has been considered in case law summarised in, for example, *R (Spurrier)* v Secretary of State for Transport [2020] PTSR at [141] *et seq* and *Transport Action Network* at [57] – [58].

152. A minister only takes into account matters of which he has personal knowledge or which are drawn to his attention by officials. He is not deemed to know everything of which his officials are aware. But a minister cannot be expected to read for himself all the material in his department which is relevant to an issue. As a matter of law it is permissible for him to rely upon briefing material. Part of the function of officials is to prepare a precis, analysis and evaluation of material to which the minister is either legally obliged to have regard, or to which he may wish to have regard. But it is only if the briefing omits something which the minister was legally obliged to take into account, and about which he otherwise had no personal knowledge, and which was not insignificant, that he will have *failed* to take into account a relevant consideration so as to render his decision unlawful. The preparation of briefing for a minister involves judgment on the part of officials about the extent of the material to be included (*R (National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154; *Transport Action Network* at [60] to [73]; *R (Save Stonehenge World Heritage Site Limited) v Secretary of State for Transport* [2022] PTSR 74 at [62] to [65]; *Friends of the Earth* [2023] 1 WLR 225 at [198] to [200]).

**WildFish Ground 1**

153. Under ground 1(a) WildFish submits that the defendant proceeded on an erroneous view as to the scope of reg.4 of the 1994 Regulations, namely that it did not require physical incapacity of collecting systems and treatment works to be remedied.

154. In addition, paras.45 to 46 of the skeleton criticise the defendant's Strategic Priorities Statement for Ofwat issued in February 2022 (see [119] above). WildFish says that the expectation that storm overflows should "operate infrequently and only in cases of unusually heavy rainfall" simply articulated the pre-existing legal requirement in reg.4 of the 1994 Regulations. Accordingly, to treat that expectation as the basis for new policy requirements in the forthcoming Plan which are to be met in the future involved "downgrading a long-standing historic statutory requirement in respect of

which compliance is long overdue". The same flawed reasoning is said to infect the Plan itself.

155. Mr. Forsdick criticises statements by the defendant and by officials made in the Plan and elsewhere that WaSCs must comply with their existing regulatory obligations, notably the environmental permits issued by the EA (see e.g. [124] above). He submits that this involved a failure to appreciate that there is a "gap" between the requirements of regs.4 and 5 of the 1994 Regulations and the conditions set by the EA in those permits to control storm overflows. He says that permit conditions are set by reference to the "existing capacity" of a company's infrastructure, resulting in a gap between compliance with those conditions and compliance with the 1994 Regulations. Those conditions do not address present-day physical incapacity of a sewerage system so as to restrict discharges to "exceptional circumstances" (footnote 13 to WildFish's skeleton).

156. The Plan estimates that the cost of achieving its three targets to be £56bn. Mr. Forsdick said that this figure, and the timescales which the Plan allows for achieving those targets, were based upon analysis in the SOEP of the costs of increasing storage capacity at treatment works. SOEP assumed for the purposes of its research that existing storm overflows and sewers are compliant with their environmental permits. Mr. Forsdick submits that the Plan erroneously ignores the extent to which the need to increase physical capacity is attributable to the gap he says exists between the requirements of the 1994 Regulations and environmental permit conditions set by the EA.

157. Mr. Forsdick also criticises a lack of discussion of the 1994 Regulations in the Strategic Priorities Statement, the briefing placed before Ministers, the Plan and in the witness statement of Ms. Amzour. He says that this is consistent with the erroneous assumption on the defendant's part that the 1994 Regulations do not address physical incapacity of storm overflows, whereas the Plan would do so through the setting of policy targets.

158. Under ground 1(b) WildFish contends that the Plan is unlawful because it has the effect of directing WaSCs to remedy inadequate physical capacity through the Plan's targets and not under regs.4 and 5 of the 1994 Regulations. Mr. Forsdick referred to the passage on p.18 of the Plan entitled "Complying with regulations" (see [124] above). He says that on a proper reading of that passage, in the context of the whole document, the upgrades which fall outside the scope of the Plan's policy targets are simply those which involve non-compliance with *operational* obligations to maintain, upgrade, and repair existing assets. Consequently, the upgrades needed to deal with the *physical incapacity* of existing systems do fall within the Plan's targets. Accordingly, the object of the passage on p.18 of the Plan is merely to require WaSCs to comply with their *operational* obligations *before* implementing infrastructure upgrades pursuant to the Plan's targets to deal with *physical incapacity* issues (WildFish's skeleton paras. 102 to 104).

159. Applying the principle in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 as explained in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931, Mr. Forsdick submits that the Plan's targets have the effect of directing WaSCs to address any current physical incapacity of their systems in a

manner which contradicts the law, that is regs.4 and 5 of the 1994 Regulations. The third target, in particular, would allow any such non-compliance to continue potentially until 2050, rather than being required to be rectified in the short term so as to comply with the 1994 Regulations. Furthermore, the setting of the timescale for that policy target has been constrained by the funds which can reasonably be expected to be paid in the future by consumers. In the *UK* case the CJEU decided at [66] that practical, administrative or financial difficulties may not be relied upon in order to justify non-compliance with the Directive and its time limits.

160. If the court should disagree with WildFish on the interpretation of the Plan and decide that upgrades to deal with physical incapacity fall outside the scope of the Plan's targets, Mr. Forsdick appeared to accept that the *Gillick* principle would not be infringed. On that reading, the Plan would not contradict the operation of regs.4 and 5 of the 1994 Regulations. But he introduced a new fallback argument. The £56bn costing and the 2050 timescale allowed by the third target, assumed that *none* of the infrastructure capacity to be provided in order to meet that target, as assessed in the SOEP, would be required in order to comply with existing legal obligations of a WaSC, including the 1994 Regulations. But in so far as such upgrading is required to meet an existing legal obligation, the total cost to consumers will be reduced and therefore the justification for not requiring the third policy target to be met until a year as far off as 2050 is undermined. That target should have been brought forward. Mr. Forsdick says that this ought to have been considered by the defendant but was not.

161. Under ground 1(c), WildFish submits that the Plan frustrates the legislative framework and its objectives (*Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997). That framework is said to comprise the WIA 1991 and the 1994 Regulations (para.106 of the Statement of Facts and Grounds). The Plan unlawfully treats what is currently happening as the baseline, including any existing breach of the 1994 Regulations. Although WildFish does not contend that a lawful Plan under s.141A of the WIA 1991 must rectify immediately any existing breaches of the legislation, the defendant must at least consider that unlawfulness in the Plan. The Plan cannot ignore that unlawfulness "and usurp the requirements of reg.4 through the imposition of the Plan on top of it" (skeleton paras. 115 to 117).

*Discussion*

162. It is important to keep in mind that, according to the principles laid down in the *UK* case, the mere fact that a storm overflow discharges to a waterway in non-exceptional circumstances does not necessarily involve a breach of the 1994 Regulations. If there is no remedy for that occurrence which satisfies the BTKNEEC test, then the discharge is lawful under the 1994 Regulations. Sometimes WildFish's case appeared to ignore that principle and suggested that overflows are *only* permitted in exceptional circumstances (see e.g. para 96 of the Statement of Facts and Grounds and footnote 13 in the claimant's skeleton referred to in [155] above).

163. On the other hand, the 1994 Regulations do require discharges to be remedied if they occur in circumstances which are not exceptional (in the sense explained in the *UK* case) *and* there is a remedial solution satisfying the BTKNEEC test. That obligation upon WaSCs includes the remedying of inadequate physical capacity in sewerage and treatment systems as well as operational issues.

164. There is no merit in ground 1(a).

165. In 2020, even before the Environment Bill was introduced into Parliament, the Minister and Defra understood that lack of physical capacity in the sewerage network was a major cause of discharges from overflows, one solution for which was the provision of additional storage ([97] above). The Taskforce was set up to consider a range of options, including the *complete phasing out* of overflows across the country, subject to carrying out a costs-benefit exercise on a national basis ([98] to [100] above).

166. It is therefore plain that the defendant was considering adopting a strategy for dealing with overflows which went substantially beyond existing legislation, in particular the 1994 Regulations. That is reinforced by the advice given by officials to the Minister that expert analysis had shown that a policy of *reducing* sewage discharges would not be cost-beneficial ([104] to [105] above). The defendant clearly had in mind the point that the 1994 Regulations do not require elimination of discharges and even a requirement to reduce discharges from an overflow is subject to the legal cost benefit test described in the *UK* case.

167. By the time the defendant came to consider including the third target in the Plan in late 2021, the option of complete elimination of all discharges had been rejected as being far too costly. Ultimately, officials put forward two alternative options, namely to reduce spills from all overflows to an average of either 10 or 20 a year. Officials advised that current evidence still shows that reducing sewage discharges is generally not cost beneficial, as the environmental benefits do not outweigh the costs and there is only limited evidence available or figures for valuing benefits to public health and amenity (see [117] above).

168. As Sir James Eadie KC submitted on behalf of the Secretary of State, the Plan contains policy targets which are to be met *regardless* of whether the measures needed for that purpose are BTKNEEC or not. Pages 10 and 34 of the Plan refer to the forthcoming legal duty on WaSCs to reduce progressively the adverse impacts of discharges from storm overflows. The Government states that the companies have not made upgrades to keep in pace with population growth and the effects of climate change. The Plan's targets set out the specific and time-bound reductions which WaSCs must achieve as a minimum. In addition, there are the obligations of the companies to produce DWMPs and carry out annual reviews. All this is "in addition to the legal duties on water companies under the [1994 Regulations] and under the [WIA 1991] to effectively drain their areas." The Plan makes it clear that WaSCs are expected "to ensure their infrastructure keeps pace with increasing external pressures, such as urban growth and climate change, without those pressures leading to greater numbers of discharges" (p.10).

169. There is nothing in the Plan or in the material leading up to the Plan, or in the witness statement of Ms. Amzour to indicate that the Secretary of State or Defra have proceeded on the basis that the 1994 Regulations do not require the physical capacity of a collecting system or treatment work to be remedied. The point is that no such requirement arises unless and until the BTKNEEC test is satisfied. The Plan goes further than the 1994 Regulations. None of the policy targets or statements in the Plan is qualified by any cost benefit test.

170. There is also no merit in WildFish's contention that the third target in the Plan purports to give effect to regs.4 and 5 of the 1994 Regulations and so involves a "downgrading" of the force of those statutory requirements. That involves a misreading of the Plan and the documentation which led up to it. It is impossible to read the third policy target in the Plan as allowing a WaSC until 2050 to comply with regs. 4 and 5 of the 1994 Regulations or to remedy any breach of those regulations. Equally neither of the other two targets allows a breach of the 1994 Regulations to continue until the target years to which they refer.

171. No doubt, as the demands placed upon a particular sewerage system increase over time through population growth, development and climate change, cost benefit analysis may require an upgrade to the physical capacity of that system. But on the information before the defendant, that is not the position for all storm overflows throughout the country. Regulations 4 and 5 of the 1994 Regulations require a site-by-site analysis.

172. Much of WildFish's case, including the allegation that the Plan involves a misunderstanding of the 1994 Regulations, is based upon (a) the estimates that a high proportion of storm overflow discharges is caused by physical incapacity (i.e. 60% or 74% - see [15] and [17] above) and (b) WildFish's view that only a small proportion of those discharges is lawful under the 1994 Regulations applying the BTKNEEC test (see e.g. para 53(b) of skeleton). Indeed, WildFish even goes so far as to assert that, outside the category of exceptional cases, as explained in the *UK* case, discharges are only lawful where it has been demonstrated "exceptionally" that they must be tolerated applying BTKNEEC. That involves a misreading of the *UK* case. CJEU did not indicate that discharges will only satisfy BTKNEEC exceptionally. The Advocate General stated that there must be a comprehensive assessment of the circumstances of each case ([AG 61]).

173. In support of this line of argument WildFish also said that the evidence available from the EA on the discharges they have assessed indicates that only 15% have been found to have "no cost benefit solution" (i.e. irremediable applying BTKNEEC) (see Mr. Measham's second witness statement para. 13). In a letter to the court dated 6 July 2023 the EA stated that the data referred to by WildFish related to those of the high-spilling overflows[2] that had been subjected to a SOAF assessment so far (see [84] to [85] above). There were 598 such overflows of which 21% (not 15%) were said to have no cost-benefit solution. As to the other overflows, 53 had already been included in an improvement programme, while the improvement of the remaining 419 was still to be programmed. The EA added that this analysis should not be treated as representative of other high-spilling overflows, or indeed all other overflows with lower spill frequencies. It should be noted that in 2022 about 1500 overflows spilled more than 60 times (see [10] and [13] above).

174. Mr. Forsdick criticised para.86 of Ms. Amzour's witness statement in which she says that many previous investigations into high-spilling overflows had found that improvements were not cost-beneficial, because she did not supply any supporting evidence (relying upon *R (Gardner) v Secretary of State for Health and Social Care* [2022] PTSR 1338 at [258] to [260]). However, the same information was included in the briefings given by officials to Ministers and there was no criticism of the legal

[2] Overflows that spilled more than 60 times in 2022.

adequacy of that material, applying the legal principles at [152] above. Furthermore, Ms. Amzour's statement is not contradicted by other contemporaneous documents before the court.

175. In any event, the assessment of discharge data and the performance of overflows and the treatment work against the 1994 Regulations is work in progress. It is also the subject of the investigation launched by the EA and Ofwat in November 2021. The court is in no position to assess the overall proportion of overflows discharging in non-exceptional circumstances which fail to satisfy the BTKNEEC test. Nor, in my judgment, does it need to do so. Even if the proportion of overflows not complying with regs.4 and 5 of the 1994 Regulations is relatively high, that provides no indication that the defendant misunderstood the scope of those regulations and wrongly thought that they did not require physical incapacity to be remedied in any circumstances. Page 18 of the Plan (see [124] above) states that WaSCs must *inter alia* upgrade their sewage systems to keep pace with "all the pressures that add surface water to the combined sewer network". They must comply with all relevant legislation and permits, which includes the making of those "upgrades". That would include upgrades which are BTKNEEC for the purposes of the 1994 Regulations. "Upgrades as a result of non-compliance do not fall within the scope of this plan". There is no basis for reading that part of the Plan as excluding from the policy targets only operational issues and not also upgrades to deal with physical incapacity which are BTKNEEC.

176. Mr. Forsdick sought to support his argument under ground 1(a) by relying upon references in the Plan and other departmental documents to the enforcement of environmental permits and their conditions. For reasons set out above (see [62] and [74] to [87]), permits are subject to conditions intended to satisfy regs.4 and 5 of the 1994 Regulations, including requirements on physical capacity. There are enforcement mechanisms to deal with breaches of those conditions.

177. I also reject the contention by WildFish that the defendant failed to appreciate that there is a gap between the conditions set by the EA in the environmental permits and the requirements of the 1994 Regulations because the conditions only deal with operational issues and not with physical capacity.

178. The EA has explained that its methodology for setting FFT conditions is intended to assess the acceptability of the capacity of a system based upon peak dry weather flows. This is a technique which is allowed by Footnote 1 to Annex (1A) of the Directive (see [82] to [83] above).

179. However, an issue which may arise is whether a FFT condition for a particular overflow remains compliant with regs.4 and 5 of the 1994 Regulations years after it was originally set because of development changes, increases in local population and climate change. The EA's method uses a multiple of 3 times the dry weather flow of a system. Officials advised the defendant on the merits of setting a third target in the Plan using a multiple of 10 times the dry weather flow. They said that one problem with a control based on dry weather flow is that that standard becomes weaker over time as a result of increases in demand on the system and climate change. Instead, officials advised the Secretary of State to set the third target by reference to the number of spills permitted in any year. That is a "future-proofed mechanism", as an

original design or an upgrade needs to take account of what is required to keep the number of spills low without the EA having to make fresh assessments of flow settings and to revise permit conditions as weather or demographics change. The onus is placed on the permit holder to continue to comply with the specified limit on the permitted number of spills a year (see [116] to [117] above). This issue may potentially apply to the EA's setting of controls on discharges in permit conditions by reference to dry weather flows.

180. Although this is an important issue, it is not a matter to be determined in these judicial reviews. The parties have not brought any claim against the EA, or indeed Ofwat. The approach of those bodies to regulation is not the subject of the present proceedings. The EA and Ofwat are in the course of investigating issues concerned with lack of physical capacity in existing systems and have taken some steps to require improvements ([84] to [86] and [140] to [141] above). This may be an issue which the Office for Environmental Protection will consider. In addition, there may be other issues meriting consideration, such as whether cost benefit analysis and the values attributed to harm to human health, amenity and ecological interest are sufficiently robust.

181. But the fact that current FFT permit conditions may need to be revised for some overflows from time to time does not mean that there is a legal or conceptual gap between the 1994 Regulations and the environmental permit regime. In any event, the Secretary of State has set policy targets the satisfaction of which is not subject to compliance with BTKNEEC and which deliberately go beyond the scope of existing statutory requirements.

182. In effect, WildFish's argument is that in preparing and publishing the Plan the Secretary of State failed to have regard to whether the standards set by specific FFT permit conditions are failing to comply with the 1994 Regulations. This argument is misconceived. The defendant was under no legal obligation to do this.

183. The purposes for which a plan under s.141A of the WIA 1991 must be prepared are to *reduce* discharges from the storm overflows of sewage undertakers and to *reduce* the adverse impacts of those discharges. Such a plan is directed at storm overflows nationally, but it need not set any targets at all. Parliament has not required the Secretary of State to address in the plan compliance with Part IV of the WIA 1991 (including obligations under s.94 of the Act and under the 1994 Regulations). By contrast, s.94A of the WIA 1991 will require each undertaker to produce a DWMP showing how it will manage and develop its system so as to meet its obligations under Part IV of the Act, including in particular the capacity of the system, current and future demands and the measures to be taken to comply with s.94A(2).

184. Section 141A imposes an obligation on the Secretary of State to produce a storm overflow reduction plan in addition to existing legal obligations. Parliament has not directed the Secretary of State to produce a plan dealing with any issues in relation to regulatory compliance, whether existing issues or ones which may arise during the lifetime of a plan. Section 141A does not require the plan to direct or address how such matters are to be resolved. The statutory machinery for addressing such issues was already in place and Parliament has given no indication in the EA 2021 that s.141A of the WIA 1991 is intended to tackle that subject. Section 141B requires the

Secretary of State to produce a progress report on the implications of the plan in 2025 and every 5 years thereafter. A plan may be revised under s.141A(7). Thus, s.141A envisages a strategic, long-term plan. It is not directed at the enforcement of regulations in respect of individual overflows from time to time.

185. So WildFish's contention depends upon showing that the extent to which there is non-compliance with the 1994 Regulations was an obviously material consideration in formulating the Plan, so that it was irrational for the Secretary of State not to have addressed the subject in the Plan's policies.

186. Similarly, there is no merit in this argument. It cannot be said that this issue had to be addressed in the Plan in order to accord with the intention or purpose of s.141A of the WIA 1991. The legislation gives the Secretary of State a very broad discretion as to the contents of a plan. It has not been enacted to enable the Secretary of State to review the carrying out by the EA of its regulatory functions under the 1994 Regulations. It does not mandate the Secretary of State to adopt policies setting out requirements in the discharge of the EA's regulatory functions.

187. The issue of whether permit conditions do not comply with regs.4 and 5, and if so, the extent of such non-compliance, is a case-specific matter dependent upon the application of BTKNEEC by the EA to the relevant circumstances of each storm overflow and system. That is a subject which is currently being appraised by the EA (and also Ofwat). It is expected to take some time. It is not a subject which, as a matter of law, the Secretary of State was obliged to address in publishing a plan under s.141A by 1 September 2022, the statutory deadline. Instead, in the exercise of his discretion and judgment, the Secretary of State was perfectly entitled to focus on setting policy targets in the Plan which go further than the requirements of existing legislation and, in particular, without requiring each individual upgrade to pass a cost-benefit test.

188. No one suggests that the defendant was not lawfully entitled to set policy targets going further than existing legislation. So to what issue in the preparation of such a plan would failures to make or to require BTKNEEC-compliant upgrades to sewage systems be relevant? The answer proffered by Mr. Forsdick was that upgrades of that nature would not fall to be paid for by consumers, the estimated cost of £56bn for achieving the Plan's targets would be reduced and consequently the target years in the Plan could be advanced. The economic burden on consumers assumed in the setting of the Plan's target years would be lower.

189. Sir James Eadie responded that section 2.3 of the Plan states that a review of the three targets will be carried out in 2027 to see whether they can be advanced (see [128] above). The matters to be considered will include the extent to which upgrades which have otherwise been costed in setting the policy targets are being, or will be, carried out in order to comply with regs. 4 and 5 of the 1994 Regulations. This is a further reason as to why it was not irrational for the issue raised by Mr. Forsdick not to have been addressed in the Plan itself.

190. In the light of the above analysis the issues raised under grounds 1(b) and (c) can be dealt with more briefly. They largely involve the recycling of points which have already been addressed. For the reasons already given, on a fair reading of the Plan, including the passage on p.18 quoted at [124] above and the three targets, the

document does not give guidance or make statements as to what a WaSC should do in order to comply with existing legislation, including the 1994 Regulations. Nor can it be said that that is the effect of the Plan. Accordingly, it does not breach the principles laid down in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 and in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931. The Plan does not authorise, sanction or positively approve unlawful conduct on the part of WaSCs in relation to storm overflows. It contains no statement of the law which would induce an undertaker to breach a legal duty or the law by following or relying upon the Plan's policy targets. The Plan does not contain an inaccurate or misleading statement regarding the legal obligations of WaSCs in relation to storm overflows. It does not contradict those obligations. For the same reasons the Plan does not breach the 1994 Regulations as explained in the *UK* case, by constraining compliance with those regulations by reference to the costs which consumers can be expected to pay.

191. For the reasons already given, I reject WildFish's fallback argument summarised in [160] above.

192. In relation to ground 1(c) I reject the submission that the Plan is unlawful in the *Padfield* sense. This proceeds on a misreading of the Plan as previously explained. Even if it be assumed for the sake of argument that the objectives of s.141A of the WIA 1991 include Part IV of that Act and the 1994 Regulations, the plan does not frustrate those objectives. It seeks to go further. The Plan does not treat any existing breach of the law as a "fait accompli". By imposing more challenging policy targets the Plan does not "usurp" the requirements of *inter alia* reg.4 of the 1994 Regulations (paras. 116 to 117 of WildFish's skeleton).

193. Accordingly, ground 1 must be rejected.

**WildFish Ground 2**

194. Mr. Forsdick submits that on a proper interpretation of s.141A WIA 1991 (and the EA 2021) there is a list of "implied mandatory considerations", or considerations that were so obviously material that it was irrational for the defendant not to have taken them into account. Those considerations relate to non-compliance with regs.4 and 5 of the 1994 Regulations, the gap between permit conditions and the requirements of those regulations, the proportion of non-compliant storm overflows which are identifiable, the timelines and funding for addressing that non-compliance.

195. I will deal with this ground briefly. Essentially it relies upon arguments which the court has already rejected under ground 1.

196. There is nothing in the language of s.141A of the WIA 1991 or in the EA 2021 to support any implication of the claimant's list of considerations as mandatory. Indeed, the claimant did not seek to identify any such language.

197. I have already explained under ground 1 why, as a matter of law, the Secretary of State did not act irrationally by not addressing the extent to which there is currently non-compliance with the 1994 Regulations, including the extent of any gap between the requirements of existing permit conditions and those of the Regulations.

198. On the facts, it is plain that the Secretary of State did take into account non-compliance with legislative requirements and the steps being taken by the EA and Ofwat to investigate non-compliance and to enforce those requirements. It is also plain that the overall extent of non-compliance for all storm overflows across the country has yet to be established. That is the subject of ongoing work by the EA and Ofwat. Given that the issue depends upon the application of a cost-benefit test to individual cases, it is reasonable to infer that in some cases further investigation will be necessary and the outcome may be contentious. The Secretary of State was entitled to publish a plan under s.141A which set policy targets which are to be met irrespective of cost-benefit considerations and thus go further than existing legislation. It was not irrational for the Secretary of State to take that approach without taking into account the current extent of non-compliance with the 1994 Regulations.

199. Accordingly, ground 2 must be rejected.

**WildFish Ground 3**

200. WildFish contends that the plan is "a plan … which is likely to have a significant effect on a European site or a European offshore marine site …" within reg.63(1) of the 2017 Regulations. On that basis it is submitted that the Plan could not be agreed to without carrying out an "appropriate assessment" of its implications for the site(s) in view of the site[s]' conservation objectives. It is common ground that no such assessment was carried out. The defendant maintains that the Plan is not a plan falling within regulation 63(1) of the 2017 Regulations.

201. Neither the Habitats Directive (92/43/EEC as amended) nor the 2017 Regulations contain a definition of a "plan". There is relatively little jurisprudence to assist.

202. In *Landelikje Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw Natuurbeheer en Visserij* (C-127/02) [2005] 2 CMLR 33 the CJEU stated that the definition of project in EIA legislation (i.e. the execution of construction works, other installations or schemes or other interventions in the natural landscape) is relevant to defining the concept of a plan or project in the Habitats Directive. The latter seeks to prevent such activities which are likely to damage the environment from being *authorised* without prior assessment of their impact. The court decided that the concept of mechanical cockle fishing in that case fell within the concept of a "project" for the purposes of the Directive ([25]-[27]). Interpreting the Directive in the light of its broad objective to provide a high level of protection for the environment, and in the light of the precautionary principle, a plan or project falls within its ambit if it cannot be excluded that it will have significant effects on the European site concerned ([41]-[44]).

203. In *European Commission v UK* Case C-6/04 [2006] Env. L.R 29 CJEU stated at [50] that "the plans at issue" had to be subjected to appropriate assessment "if the measures envisaged are capable of having a significant effect on areas of conservation". The relevant plans under consideration in that case were land use plans and the issue was whether the domestic legislation had transposed the requirements of the Directive. No one suggests in the present case that the Plan under s.141A of the WIA 1991 is comparable to a land use plan.

204. The mere fact that a measure is likely to have a significant effect on a European site is insufficient to render it a plan or project within the ambit of the 2017 Regulations. So, for example, in *R (Boggis) v Natural England* [2010] PTSR 725 it was held that the introduction of a *process* which ensures that activities likely to damage the environment are not authorised without prior assessment of their impact on environmental features of interest was not itself an "activity", or a plan or project, falling within the Habitats Directive. The process in that case was the notification of a site of special scientific interest, including any operations likely to damage that interest, which thereby became prohibited unless expressly authorised ([21] to [22] and [27] to [29]).

205. The circumstances in *R (Akester) v Department for Environment, Food and Rural Affairs* [2010] Env. L.R, upon which WildFish relies, were rather different. There, the harbour authority for Lymington Pier proposed to introduce a larger class of ferry on an established ferry route which ran through a Special Area of Conservation. The proposal for that activity was held to be a plan or project within the Habitats Directive requiring appropriate assessment.

206. In the present case the Plan merely sets national targets for storm overflows generally. It does not refer to or authorise specific proposals for upgrades affecting specific European sites. The identification of capacity upgrades for individual sewer systems will depend upon the improvement programmes required by Ofwat, and the linked variations in environmental permits made by the EA. The permitting decisions will be subject to appropriate assessment under the 2017 Regulations where required (see e.g. reg.101).

207. A number of European and domestic authorities rely upon the European Commission's Notice issued on 21 November 2018 "Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC" (or its predecessor). Paragraph 4.4.2 of the 2018 document states:-

> "However, a distinction needs to be made with 'plans' which are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan (C 179/06, paragraph 41). However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is clear and direct, Article 6(3) should be applied."

208. I agree with the defendant's submission that the Plan is a statement of the "general political will" of the Secretary of State. It is a high-level, strategic document which does not identify where upgrades will be required in order to meet the policy targets because, in general, that remains to be assessed over a number of years running up to the target years. Accordingly, there is no link, let alone a clear and direct link, with any specific European site.

209. The passage quoted in [207] above refers to *European Commission v Italian Republic* Case C-179/06 (4 October 2007) at [41] which states that a "plan" should "carry a degree of precision in the planning in question which calls for an environmental assessment of their effects." Where upgrades are identified in order to help meet the Plan's targets an appropriate assessment will be carried out under the 2017 Regulations and the tests in regs.63 and 64 satisfied before the project is authorised.

210. In my judgment the Plan does not fall within the ambit of the appropriate assessment provisions in the 2017 Regulations and ground 3 must be rejected.

211. Although not essential to my reasoning, I would add that WildFish was unable to explain how the tests regarding absence of adverse effects on the integrity of relevant European sites (having regard to the "conservation objectives" of each such site) and "imperative reasons of overriding public interest" could be applied to the Plan (see regs.63(1)(b) and (5) and 64(1) and (2) in the absence of proposals for upgrades on specific sites. This only serves to reinforce the conclusion I have already reached on the outcome of ground 3.

**WildFish Ground 4**

212. WildFish alleges that the Secretary of State's decision to publish the plan was irrational. As its skeleton makes clear (paras. 127 to 128), the argument is based on the contention that Parliament intended s.141A of the WIA 1991 to enforce regs.4 and 5 of the 1994 Regulations, but the Plan's targets fail to address that aim. Put that way the irrationality argument adds nothing to submissions which I have already rejected.

213. Section 141A does not address the enforcement of existing legal obligations. It operates in parallel to existing legislation. It does not require adherence to particular legal standards or tests. Instead, it requires a plan for reducing discharges from storm overflows and their adverse impacts. Reducing discharges includes reducing their frequency, duration and volume. That objective is not qualified by any cost-benefit test. The Plan sets overarching targets which operate in addition to the existing legal obligations of WaSCs with which they must comply both presently and in the future. There is nothing irrational in the approach taken by the Secretary of State to the content of the Plan and its targets.

214. Ground 4 must be rejected.

**Ground 1 in CO/4445/2022**

215. Mr. Marc Willers KC began his oral submissions on behalf of MCS by adopting Mr. Forsdick's submissions on WildFish grounds 1 to 4. I have dealt with those matters.

216. Under MCS ground 1 Mr. Willers submits that the Plan is unlawful because it fails to accord with, or undermines, the target in s.3 of the EA 2021 to halt the decline in species abundance by 2030. Mr. Willers says that s.141A of the WIA 1991, introduced by s.80 in Part 5 of the EA 2021, must be read in the context of the overriding framework created by Part 1 of the 2021 Act, including the target in s.3 and the Secretary of State's duty in s.5 (see e.g. *Ritson-Thomas v Oxfordshire County Council* [2022] AC 129 at [33] to [34].

217. Accordingly, "reducing adverse impacts on the environment" in s.141A(3)(b) in relation to storm overflow discharges must include "eliminating" their contribution to biodiversity decline by 2030, because if discharges "are still causing biodiversity decline in 2030, the species abundance target will not have been achieved."

218. MCS submits that "the Plan does not contribute meaningfully or at all to halting the decline in biodiversity by 2030 because the targets are hopelessly weak." The Plan's first target, which only allows discharges where it is demonstrated that there would be no adverse ecological impact, is to be achieved for at least 75% of overflows discharging in or close to high priority areas by 2035. According to the Plan's indicative trajectory of the improvements that should be achieved (pp.16-17), only 14% of storm overflows and 38% of those in "high priority sites" (which include SACs and SSSIs) will be improved by 2030. MCS criticises the Plan's lack of ambition for 2030. It submits that s. 141A required the defendant to "adopt targets which align with the species abundance target" in s.3.

219. Of course, MCS recognises that the Plan is not the sole delivery mechanism for the species abundance target. There are many other drivers of biodiversity loss which will need to be addressed by other mechanisms. But MCS says that the Plan is unlawful "because its Targets positively undermine the species abundance target, by allowing an important driver of biodiversity loss to persist long after the target date of 2030" (skeleton para.34).

220. I do not accept MCS's submission that the defendant was required by law to adopt targets in the Plan which align with the target in s.3 of the EA 2021. As I have said, s.141A does not require the Secretary of State to put forward any targets. The obligation is to produce a plan for the purposes of reducing discharges from storm overflows and their harmful effects. A plan does not have to contain quantitative targets in order to satisfy that requirement. Neither the language of s.141A of the WIA 1991 nor of Part 1 of the EA 2021 requires the Plan to "align with" the species abundance target. There is no requirement in the legislation that the Plan should contain proposals for contributing to the s.3 target by 2030 or thereafter.

221. Section 3(3) of the EA 2021 declares that the target in s.3(1) in relation to species abundance in 2030 is not a long-term target. However, s.1 of the EA 2021 does require the Secretary of State to set a long-term target in relation to biodiversity. "Long term" is defined as being at least 15 years from the date when the target is set (s.1(6)). Thus, regs. 14 to 16 of the 2023 Regulations set an additional target for the reversal of the decline in species abundance by 2042. This target requires *inter alia* that the overall relative species abundance index be at least 10% higher in 2042 than that for the end of 2030. The target for 2030 is that the overall index should be no worse than that for 2029. Section 141B of the WIA 1991 envisages a plan which will endure until at least 2030 and potentially for substantially longer. Even if it be assumed that the Secretary of State should have regard to relevant targets in Part 1 of the EA 2021, there is no basis for saying that that is limited to a 2030 horizon. The reversal of the decline in biodiversity is to continue beyond 2030 and proceeds as a matter of degree.

222. Furthermore, there is no justification for reading the statutory scheme as requiring the Plan under s.141A to provide for the "elimination" of any contribution from storm

overflow discharges to biodiversity decline by 2030.

223. I reject MCS's submission that the Secretary of State paid no regard to the target in s.3 of the EA 2021 (or the longer term target). The first target of the Plan requires there to be no local adverse ecological impact from a storm overflow discharge. Section 2.2 of the Plan explains that the target "protects biodiversity both at a local and national scale and will result in the complete elimination of ecological harm from storm overflows." The sub-targets are said to provide specific milestones to help the Government and regulators assess progress at each review in relation to the Plan's expectations. The review in 2027 will obtain information to assess whether the WaSCs can be required to go faster in relation to targets in the 2030s and beyond (p.14). On timescales for delivery, p.17 of the Plan states that the Government is "frontloading action in the most urgent areas". The worst polluting and most harmful overflows discharging to "high priority sites" are to be tackled by 2035. Approximately half of that category is to be addressed by 2030. Page 20 of the Plan states that its targets apply in addition to a number of other measures including the commitment in the EA 2021 to halt the decline in species abundance by 2030.[3] The measures are to be approached in "a cohesive way".

224. MCS criticises the targets in the Plan for being weak or lacking in ambition in terms of what is to be achieved for species abundance by 2030. Essentially the criticism is that the Plan should have set a faster pace of change. But the setting of a target requiring a level of change by a specified year is a matter of judgment for the Secretary of State (a) as to whether to set any such target at all and, if so, (b) the content of that target. MCS comes nowhere near showing that the defendant's exercise of judgment on these matters was irrational.

225. The Plan seeks to eliminate ecological harm from storm overflows in respect of a substantial proportion of the most harmful overflows by 2030. MCS has not shown that the Plan would undermine or conflict with the achievement of the target in s.3 of the EIA 2021.

226. Accordingly, ground 1 must be rejected.

## Ground 2 in CO/4445/2022

227. As pleaded Mr. Tagholm sought to advance ground 2 on the basis of Article 2 of the ECHR as well as Article 8. But in his oral submissions Mr. Willers said that he relies solely on Article 8. The claim in relation to RHO is based on A1P1.

228. In relation to Mr Tagholm's claim, Mr. Willers submits that the State has a positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction if it is aware of a "real and immediate risk" to life. This may apply, for example, to industrial activities which by their very nature are dangerous, such as a household waste disposal site generating methane with a risk of explosion (see *Overyildiz v Turkey* (2005) 41 E.H.R.R 20 at [69] to [73] and [89] *et seq*). That was an Article 2 case where the court found that the violation of that provision made it

[3] See also p.14 of the Impact Assessment for the Plan to the same effect.

unnecessary to address Article 8. The Strasbourg court took the same approach in another case relied upon by Mr. Willers (*Budayeva v Russia* (2014) 59 E.H.R.R. 2 at [201]).

229. However, in *Budayeva* the court also said at [133] that in the context of dangerous activities the scope of a State's positive obligations under Article 2 largely overlaps with those under Article 8 and so the principles developed in the jurisprudence on planning and environmental matters affecting private life could also be relied upon for the purposes of Article 2. That statement was also applied in *Kolyadenko v Russia* (2013) 56 E.H.R.R. 2 at [212].

230. Turning to Article 8, that provision imposes a positive obligation on the State to take reasonable and appropriate measures to protect individuals against severe environmental pollution posing a serious and substantial risk to the health and/or well-being of individuals (*Taskin v Turkey* (2006) 42 E.H.R.R. 50 at [113] and *Tatar v Romania* (2009) Case No. 67021/01 at [107]).

231. Mr. Willers submits that the protection offered by Articles 2 and 8 is not limited to specific individuals but extends to society or to the population as a whole (para.41 of the skeleton).

232. In his witness statement Mr. Tagholm describes risks posed to swimmers and surfers by discharges from storm overflows to coastal waters and rivers. He explains the steps he has to take to plan his sporting activities so as to avoid discharges. Through time-consuming vigilance he has been able to avoid ill-health, but unfortunately the same is not true for others who have suffered from gastroenteritis and ear, nose, throat or eye infections. Moreover, the need to take steps to avoid such risks involves a reduction in the opportunities to swim or surf. Moreover, monitoring devices occasionally fail and a discharge may begin when a swimmer is already in the water.

233. In relation to RHO's claim, Mr Willers submits that for the purposes of A1P1 "possessions" include not only physical items of property, but also the marketable goodwill of a business, in the sense of the present-day value of a business derived from its reputation based upon its business endeavours (*Breyer Group plc v Department of Energy and Climate Change* [2015] 1 WLR 4559).

234. A1P1 may also impose obligations on the State to take positive measures to protect the enjoyment of the right conferred by that article, notably where there is a direct link between the measures a person may legitimately expect to be taken by the authorities and his effective enjoyment of his possession (*Oneryildiz* at [134] and *Budayeva* at [172]).

235. Mr. Tom Haward has produced two witness statements describing the problems posed for RHO by discharges from storm overflows in the vicinity of the company's operations to the west of Mersea Island, both on its own oyster beds and on free ground. The measures taken by the company to avoid catching oysters from waters into which discharges have recently taken place are inadequate because of the gaps in the monitoring regimes of the WaSCs and persistently high levels of discharges. There has been a consequential reduction in the size of catches. In addition, RHO has to bear the costs of additional depuration to protect its consumers. Pollution incidents with health risks adversely affect market confidence and demand.

*Discussion*

236. It is necessary to bear in mind that the claimants' challenge is to the lawfulness of the Plan. There is no challenge to the compatibility of s.141A of the WIA 1991 with the ECHR. Nor is there any freestanding human rights claim. Thus, in the Statement of Facts and Grounds the claimants allege that *the Plan* has failed to comply with s.141A. It does so on the basis that there is a right to expect that the defendant will take effective action through the Plan to curb illegal discharges where they affect Convention rights; upholding the law is the core business of the State (skeleton para. 48). As Mr. Willers put it in his oral submissions, the claimants have a legitimate expectation that regulatory requirements will be enforced by the exercise of regulatory powers.

237. The Plan contains measures to improve the performance of storm overflows. It does not prejudice the need for WaSCs to comply with existing statutory requirements, including environmental permit conditions and the 1994 Regulations. That is the subject of an on-going, large scale investigation by the EA and Ofwat. Any issue about that process, such as whether those regulatory bodies are taking sufficient action, or whether the cost-benefit approach is sufficiently robust (e.g. with regard to the valuation of harm to ecology, or to human health and amenity, or to a business use) is not a matter for the Court in these proceedings.

238. Section 141A requires the Secretary of State to produce a plan for reducing discharges from storm overflows and their adverse impacts, including impacts on public health and the environment. It does not require the Plan to be aimed at the elimination of discharges and their adverse impacts. The Plan is not required to address the enforcement regimes for existing statutory requirements governing such discharges. The Plan is to contain policies for reducing discharges and impacts across the country as a whole. It is not required to lay down measures for dealing with dangers or hazards at specific locations. These are matters for the enforcement agencies.

239. Section 141A gives the Secretary of State a broad discretion as to the scope and content of the policies to be adopted. Even where Convention rights are engaged, the Secretary of State is entitled to a wide margin of appreciation. It was common ground that the approach in *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [158] is appropriate. Here, the Secretary of State has decided to adopt targets which go further than the existing statutory requirements and which do not detract from those regimes.

240. RHO has not demonstrated that the proper application of existing statutory requirements, for example in the context of the current investigation, would be insufficient to protect any A1P1 rights which might be engaged. Indeed, RHO's claim that the Plan should address enforcement of existing regimes implies that it would. The company has not justified a requirement that the Secretary of State should take steps in the s.141A Plan to give effect to that legislation or should go further, in some way which RHO has yet to define.

241. In addition to the Plan's three targets, section 3.5 summarises measures outside the Plan which the Government is taking in order to improve the quality of shellfish waters by 2030; "in order to contribute to the high quality of shellfish products suitable for human consumption." For example, the EA will consider the need for

action to be taken in 63% of those designated waters requiring a reduction in sewage discharges and disinfection. The dedicated measures being taken and the reasons for treating shellfish waters separately outside the three targets of the Plan have been explained in Ms. Amzour's witness statement (para. 173 to 189). She says that there are other sources of pollution affecting shellfish waters apart from storm overflows and all these problems need to be tackled comprehensively.

242. RHO has not shown that the Secretary of State was obliged to take additional positive measures through the Plan under s.141A, the absence of which involves an infringement of the company's A1P1 rights.

243. In relation to Mr. Tagholm's reliance on Article 8, the case law cited by Mr. Willers does not establish that environmental protection against pollution afforded by Article 2 and/or Article 8 is owed to society or the population of the country as whole. Those cases refer to protection by the state against dangers arising from terrorism (*Tagayeva v Russia* [2017] ECHR 26562/07), gun crime (*Gorovenky and Bugara v Ukraine* [2012] ECHR 36146/05) or attacks by packs of stray dogs (*Stoicescu v Romania* (2011) 31 BHRC 523). The environmental cases cited by Mr. Willers do not support the proposition for which he contends (*Di Sarno v Italy* (2012) Case No. 30765/08 and *Cordella v Italy* (2019) Case No. 54414/13). In the absence of special circumstances, a domestic court should follow the jurisprudence of the Strasbourg court if it is "clear and constant". The duty of a domestic court is to keep pace with that law, but not to go further (see the case law summarised in *R (Friends of the Earth Limited) v Secretary of State for Business, Energy and Industrial Strategy* [2023] 1 WLR 225 at [271] to [273]).

244. I accept the submission for the Secretary of State that Mr. Tagholm has not demonstrated that his Article 8 rights are engaged let alone violated. He has not shown that the problems he has described involve a hazard of such severity as to impair significantly his ability to enjoy family or private life (*Dubetska v Ukraine* (2015) 61 E.H.R.R. 11 at [105]).

245. The Plan contains the second target and additional matters summarised in section 3.4. It operates in addition to the existing statutory regimes. Mr. Tagholm has not demonstrated any legitimate expectation that the defendant should have taken any additional positive steps.

246. For these reasons, ground 2 must be rejected.

**Ground 3 in CO/4445/2022**

247. The claimants rely upon the public trust doctrine as the basis for contending that the State has a "fiduciary duty to protect vital natural resources for the benefit of both current and future generations."

248. According to "England and the Public Trust Doctrine" (Freedman and Shirley [2014] JPL 839) one of the earliest historical sources is the case of Juliana the Washerwoman. In 1299 Edward I ruled that the mayor of Winchester should not prevent her from using a brook for her work by polluting the water with waste, blood and excrement. But as the article notes, the ruling was put into effect by legislation. It

does not provide any authority that under our common law there is a right to pollution control or an obligation on the part of the State to provide such control.

249. Instead, the common law came to recognise a public right to navigate and fish in tidal waters (*Attorney General of British Columbia v Attorney General of Canada* [1914] AC 153; *Loose v Lynn Shellfish Limited* [2017] AC 599). In addition, the public right of navigation and fishing carries with it ancillary rights (*R (Newhaven Port and Properties Limited) v East Sussex County Council* [2015] AC 1547 at [28]).

250. Mr. Willers asserts that such ancillary rights must include a right for waters not to be polluted to the extent that oysters and other shellfish are unfit for human consumption, otherwise there would be no effective right to gather shellfish at all. There is no authority to support this proposition.

251. Moreover, I cannot agree that the alleged right is a necessary implication of the public right to fish.

252. Given that Parliament has intervened to provide dedicated controls to address the pollution of tidal waters, including the environmental permitting regime, there is no justification for extending the common law in the way Mr. Willers suggests.

253. There is also a public interest in the proper operation of sewerage systems and storm overflows in compliance with all relevant legislative requirements. For example, under the 1994 Regulations overflows may lawfully be used in truly exceptional periods of heavy rainfall, or where, for example, remedial action to improve physical capacity would not be BTKNEEC.

254. Furthermore, Mr. Haward's evidence undermines the company's claim. Its right to fish for oysters is not *negated* by the use of storm overflows in the vicinity. RHO employs techniques to avoid risks to human health, including not fishing in an area where a discharge has recently taken place and depuration.

255. The reasoning in [252] to [253] above also applies to Mr. Tagholm's reliance upon the public trust doctrine. In any event, Mr. Willers accepts that the High Court is bound by existing authority to decide that there is no public right to use the foreshore or coastal waters for recreational purposes (*Blundell v Caterall* (1821) 5 B. & Ald. 268).

256. Accordingly, ground 3 must be rejected.

## Conclusion

257. Both claims for judicial review are dismissed.