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21 Bloomsbury Street
London WC1B 3HF

Attn: [REDACTED]
General Counsel

Direct Dial: [REDACTED]

Email: [REDACTED]
[REDACTED]

Your Ref:

Our Ref: CDY/RGA/191552/22

Date: 19 April 2022

By email only: PressOfficeTeam@ofwat.gov.uk
foi@ofwat.gov.uk

Dear Ofwat,

IN THE MATTER OF A PROPOSED APPLICATION FOR JUDICIAL REVIEW

We are instructed on behalf of Wild Justice. This is a letter sent pursuant to the Judicial Review Pre-Action Protocol under the Civil Procedure Rules.

We write in accordance with the judicial review pre-action protocol in contemplation of a legal challenge arising from Ofwat's letter to us (responding to requests under the Environmental Information Regulations) of 3 March 2022 (copy attached for ease of reference).

We waited before progressing this matter until we had received a related response from DEFRA (on 4 April 2022), copy also attached.

This letter sets out the factual and legal basis on which any claim would be pursued. Please be clear in your response in identifying any areas of factual and/or legal dispute and the basis for them so that the issues in dispute can be identified and if possible narrowed.

We require a response within the standard period of 14 days, i.e. **by 4pm on 3 May 2022.**

1. PROPOSED CLAIMANT

1.1. The proposed claimant is Wild Justice:

Wild Justice
9 Lawson Street
Raunds
Wellingborough
Northants NN9 6NG

2. PROPOSED DEFENDANTS

2.1. The proposed Defendant is OFWAT:

OFWAT
Centre City Tower
7 Hill Street
Birmingham B5 4UA

4th floor
21 Bloomsbury Street
London WC1B 3HF

3. DETAILS OF CLAIMANT'S LEGAL ADVISORS

3.1. Please see details above.

4. DETAILS OF MATTER BEING CHALLENGED

4.1. The proposed Claimant is concerned that lack of action (including monitoring and enforcement action) in relation to the planned and unplanned discharge of untreated sewage into rivers and other water bodies is creating and maintaining excessive nutrient levels which, in turn, is highly detrimental to the health and biodiversity of those watercourses.

4.2. The Claimant reserves the right to add to, or substitute, the proposed grounds of claim following receipt of the pre-action protocol response.

5. DETAILS OF ANY INTERESTED PARTIES

5.1 We consider Defra, Nobel House, Area 1E, 17 Smith Square, London SW1P 3JR (defra.helpline@defra.gov.uk) and the Environment Agency, Legal Services, Horizon House, Deanery Road, Bristol BS1 5AH (LegalSupport@environment-agency.gov.uk) to be potential interested parties. Please identify any additional individuals and/or bodies you consider to be interested parties to the proposed claim.

6. LEGAL FRAMEWORK AND GROUNDS

The Urban Waste Water Treatment Obligations

6.1 In this context, Wild Justice has sought to understand what action (if any) is taken, and by whom, to monitor (and enforce in relation to) compliance in England with the requirements of the EU Urban Waste Water Treatment Directive ('UWWT') as now operating through the Urban Waste Water Treatment (England and Wales) Regulations 1994.

6.2 As below, those UWWT obligations are the cornerstone of ensuring that sewage plants are designed and operated so as to avoid sewage overflow and discharge into watercourses. They are supplemented by, but – critically - not duplicated by, obligations such as those which are imposed by environmental permits.

6.3 Regulation 4 of those Regulations supplement the obligations falling on sewerage undertakers by virtue of section 94 of the Water Industry Act 1991 (so as to place on them the UWWT obligations).

6.4 The obligations in question include an obligation to ensure treatment in accordance with Regulation 5 and an obligation

“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.”

6.5 Plants are also required to comply with schedule 2 of the Regulations which requires that:

“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.”

6.6 Importantly, those obligations relate to the design and operation of particular (and to each and every) sewage treatment plant operated by each sewage undertaker.

6.7 By section 94(3) of the 1991 Act those obligations on sewage undertakers are potentially enforceable under section 18 of the Act by the Secretary of State and (with the Secretary of State’s consent) Ofwat.

The Secretary of State’s position

6.8 The Secretary of State’s letter of 4 April 2022 provided us with a copy of the consent given by the Secretary of State to (what is now) Ofwat for that purpose, and confirmation that the Secretary of State considers himself to have no further role in these matters.

Ofwat's position

6.9 It follows that enforcement of those UWWT obligations (and the related monitoring etc.) is a matter in England and Wales for Ofwat alone.

6.10 With that in mind, we note Ofwat's response of 3 March 2022 (as above) to our request for information on how Ofwat discharges its obligations in this regard.

6.11 We first note that Ofwat provided no reference to any existing documentation or policy specifically or directly explaining its approach to the Regulations as they apply under Section 94. You have provided no documentation referencing Ofwat's actions or role in relation to the UWWT obligations.

6.12 Insofar as the letter touched on the point, it noted that Ofwat has powers of enforcement in relation to the UWWT obligations but said merely that:

"Where we obtain evidence that a company could potentially be in breach of its section 94 duty we will consider the most appropriate course of action, in line with our published approach to enforcement."

6.13 The document dealing with Ofwat's "approach to enforcement" is entirely generic and says nothing specific about the UWWT obligations, let alone about any monitoring or other duties in relation to those obligations.

6.14 While the 3 March 2022 letter mentioned monitoring of undertakers by Ofwat, the monitoring in question relates entirely to other things, with nothing that was identified of any direct relevance to the compliance by particular plants with the Regulations and thus the plant-specific UWWT requirements.

6.15 The 3 March 2022 response also explained that:

"Evidence of potential breaches of section 94 may come to light from a number of different sources. Individual customer complaints are typically raised via our routine complaints and casework function¹. Information may also come to light from other

¹ Our approach to dealing with those incidents and whether or not these might result in enforcement action has been set out on our website so customers understand the approach that we will adopt. We also set out our approach to complaints in relation to section 94 in 2006 in RD 03/06: Sewer flooding and Ofwat's approach to enforcement - Ofwat.

sources, including our regular company performance monitoring activities, which might indicate that a company is performing poorly against agreed performance commitments on metrics covering areas of performance related to its section 94 duties.”

6.16 The essence of the Ofwat response was therefore that Ofwat is entirely reactive in its approach to enforcement of the UWWT obligations in relation to individual treatment plants. If something happens to come to its attention then it will consider what if any action to undertake; but no positive monitoring or assessment is undertaken.

6.17 Anyway, the letter continued:

“As a general duty, section 94 is concerned with a company's provision and custodianship of its sewerage system (including cleansing of the system and the lateral drains it owns), and whether these secure effectual drainage of its appointed area and effectually deal with the contents of its sewerage system. In considering compliance, we therefore focus on the adequacy of a company's overall planning, resources, and systems for managing its sewerage system and wastewater treatment works and whether there are factors which point to a material failure in any of these.” [underlining added]

6.18 While Ofwat’s focus on those wider ‘planning’ matters is not unwelcome, it plainly does not amount to, or substitute for, consideration of compliance with the plant-specific obligations arising under the Regulations (and thus section 94) including as set out above.

6.19 Finally, in terms of the interaction with the Environment Agency (and Ofwat’s monitoring of environmental performance), the letter explained that:

“In relation to environmental performance, the metrics that Ofwat uses to track company performance have evolved over the years but typically reflect the measures used by the EA as part of its Environmental Performance Assessment (EPA). This includes metrics such as number and type (category) of pollution incidents reported by a company or compliance with wastewater treatment work environmental permits and is based on the EA's data or company reporting to the EA – it is not data that Ofwat gathers separately.”

6.20 In other words, insofar as Ofwat considers environmental performance of undertakers (which would thus potentially include their compliance with the UWWT obligations) at all, it relies entirely on data gathered for that purpose by the Environment Agency.

6.21 However, when we asked the Environment Agency about its role in relation to the UWWT obligations it explained that it has no direct function in monitoring or enforcing the obligations, enforcement of which is a matter for Ofwat. Consistent with that, as far as we have been able to establish, the Environment Agency does not gather information about compliance with the UWWT obligations such as those which we have quoted from the Regulations as above.

6.22 Ofwat's passivity in this matter is illustrated by the fact that, when we asked water companies about which agency monitors their compliance with the UWWT obligations none of them identified Ofwat as having that role or as taking any steps in that regard. Southern Water (for example) said that the EA and DEFRA monitor their compliance (but, as above, neither of them actually do); Anglian Water referred only the Environment Agency (ditto); and likewise Southern Water (ditto). If Ofwat does anything in regard to the UWWT obligations, the undertakers in question are not even aware of it.

Illegality by Ofwat

6.23 Unsurprisingly, Ofwat's section 18 enforcement powers do not exist in a vacuum.

6.24 We note, for example, section 27(2) of the 1991 Act which provides that:

"It shall also be the duty of the Authority, so far as it appears to it practicable from time to time to do so, to collect information with respect to—

(a) the carrying out by companies appointed under Chapter I of this Part of the functions of relevant undertakers; or

...

with a view to its becoming aware of, and ascertaining the circumstances relating to, matters with respect to which any power or duty is conferred or imposed on it by or under any enactment."

6.25 That places a positive obligation on Ofwat to collect information with respect to (among other things) compliance with the UWWT obligations arising under section 94 from the Regulations, as above.

6.26 As above, Ofwat's approach here is entirely passive, reactive. We have seen nothing to suggest that Ofwat collects any information in this regard. Indeed, the only information provided suggests that it specifically does not do so.

6.27 To be clear, the only limitation on the section 27(2) obligation is provided by the words "so far as it appears to it practicable". In other words, information collection which is practicable must be undertaken; and Ofwat could only excuse its inactivity if it had specifically addressed its mind to the point and decided that collecting more was (for some proper reason) not practicable.

6.28 We also note section 2(2A) of the 1991 Act which provides that:

"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—

...

(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;

..."

6.29 That too plainly requires positive action by Ofwat in securing compliance with the UWWT obligations falling on the undertakes by virtue of section 94 and the Regulations.

6.30 It thus appears to us that Ofwat is unlawfully failing to discharge the obligations falling on it in relation to the UWWT obligations as arising under section 94 by virtue of the Regulations including that:

(1) Ofwat is unlawfully taking an entirely passive stance in relation in enforcement including taking no steps to obtain information relating to compliance with undertakers with those specific obligations in relation to their treatment plants.

- (2) In breach of section 27(2) of the 1991 Act, Ofwat is unlawfully failing to collect information in relation to the performance of those specific obligations.
- (3) In breach of section 2(2A) of the 1991 Act, Ofwat is unlawfully failing to discharge its functions so as best to secure that the UWWT functions of undertakers are properly carried out.

7. DETAILS OF THE ACTION THE DEFENDANT IS EXPECTED TO TAKE

- 7.1. Please reply to this letter within the standard 14 days, i.e. **by 4pm on 3 May 2022**.
- 7.2. If you disagree with our characterisation of the factual or legal position then please make that clear and explain the disagreement in your letter.
- 7.3. In particular, if you consider that, contrary to our assessment, Ofwat has in fact and law discharged its obligations in relation to ensuring compliance with the UWWT obligations (including by gathering the information which would enable it to do so), then please make that clear and explain exactly how Ofwat does that.
- 7.4. If and insofar as you consider that your obligations, as above, are dealt with by regulatory or other action by others, then please make that clear and explain exactly how (in fact and law) their action is said to obviate the need for action by Ofwat or discharge the duties falling on Ofwat.
- 7.5. Please in response to this letter set out clearly what action Ofwat is now taking and will now take arising from and in relation to the UWWT obligations on undertakers and its obligations in relation to those obligations. We would expect that to include a commitment to specific consideration by the Ofwat board of what action Ofwat should now undertake alongside a specific acknowledgement of the deficiencies in what has happened so far (without which the necessary change of approach will not be credible).
- 7.6. With your letter please provide:

(a) Any and all specific documentation (other than that recently set out in response to our EIR request) relating to (or even mentioning) Ofwat's oversight of compliance with the UWWT obligations.

(b) Any and all specific information and documentation (if any exists) relating to any collection by Ofwat of information relating to the performance of sewerage undertakers in relation to their particular treatment plants of the UWWT obligations as set out above. Please provide that information by reference to a period which will fairly represent Ofwat's activities in this regard. Please illustrate Ofwat's performance by giving representative examples of information gathering in relation to particular undertakers and their particular treatment plants.

7.7 If and insofar as Ofwat has at any time addressed its mind to the practicability of the collection of such information (including so as to reach a view that collecting more is not practicable) then please provide us with full documentation relating to that evaluation and its outcome.

7.8 If and insofar as Ofwat has at any time addressed its mind (other than in responding to our EIR request) to how to exercise and perform its functions in the manner which it considers is best calculated to secure that the UWWT functions (as above) of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales then please provide us with full documentation relating to that evaluation and its outcome.

7.9 If we do not receive a satisfactory response to our letter then Wild Justice will, without further notice, commence a judicial review challenge in which it will seek a declaration that Ofwat is unlawfully failing to discharge the obligations falling on it as set out above.

8. AARHUS CONVENTION

8.1. This proposed claim falls within the scope of Article 9(2) and Article 9(3) of the Aarhus Convention and CPR Rule 45.41 therefore applies. Wild Justice will therefore apply for a costs cap of £10,000 (CPR 45.43(2)(b)).