

# Matters in practice

## Rethinking Water Regulation in England: a critical examination of the Independent Water Commission's proposal for a unified water regulator (Part 2)

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### At a glance

- The Independent Water Commission criticises the overlapping and duplicative regulatory framework and proposes to do away with Ofwat and incorporate it into a new, singular water regulator.
- The cause of the regulatory quagmire is not explored by the Commission or by the Secretary of State in her recent White Paper but in fact stems from the decision in 1994 to impose *environmental* regulatory functions on the *economic* regulator, Ofwat and Ofwat have been criticised for failing, for many years, even to appreciate that it had such an environmental enforcement function.
- Given that history, a cleaner and less disruptive rethink of water regulation would involve transferring those environmental enforcement functions to the Environment Agency so that it becomes the sole environmental regulator in the water sector.

### Introduction and summary

Public perception is that water companies have operated below their required environmental standards. This has led to a broad consensus that the regulation of the water industry in England and Wales is ineffective.

The Independent Water Commission ('IWC') and the Government's very recent White Paper '*A New Vision for Water*'<sup>1</sup> ('the White Paper'), say that the regulatory framework is duplicative and regulators are said to

have 'overlapping duties [which] also place overlapping requirements on the water industry'. The remedy prescribed for this illness is radical surgery – Ofwat and the water functions of the Environment Agency should be cut out entirely and a new, water-specific, regulator should be formed in its place.

This (second) article considers why such an overlapping regulatory framework exists and whether a more logical response to the criticism of overlapping regulatory functions is, instead of cutting out the regulator entirely, the more straightforward approach of removing the bits of regulation which overlap and consolidating the environmental enforcement of water within the Environment Agency alone. In other words, whether keyhole rather than major surgery would resolve the problems with the regulatory system which have been identified.

Specifically, this article suggests that Ofwat, a body established as the 'economic regulator' for the water industry, was given, for no good reason, environmental enforcement functions which awkwardly cut across the Environment Agency's environmental enforcement functions and have caused a great deal of confusion amongst the regulators and contributed to a sense amongst the public at large that the industry is not being properly regulated.

The previous article considered the IWC's rationale for suggesting that a single sectoral regulator for the water industry was required and contrasted that with

the then government's proposals, only 30 years ago, for an indivisible and integrated environmental regulator. This article builds on the first by suggesting that resolving this awkward regulatory duplication by *combining* the economic regulation of water with the environmental regulation of water, risks undermining transparency and regulatory coherence.

### What has the IWC and White Paper recommended?

The IWC criticises the current division between Ofwat and the Environment Agency on the basis that there is both 'significant duplication in regulatory oversight' as well as there being 'significant gaps in regulatory oversight'. The White Paper uses similar language – 'the water sector has lacked alignment ... we will end this piecemeal approach' and 'a single regulator will mean less burdensome regulatory duplication'.<sup>2</sup>

This diagnosis of regulatory duplication leads the IWC to its centrepiece proposal – that Ofwat and the water regulatory functions of the Environment Agency and Natural England as well as the Drinking Water Inspectorate should be subsumed into a brand-new water specific regulator.

In order to understand *why* such duplication exists, it is necessary to understand the regulatory obligations on Ofwat and the Environment Agency.

## How are the responsibilities between Ofwat and the Environment Agency divided?

As observed in the first article, Ofwat (a non-ministerial government department) was formed through the Water Industry Act 1991 ('WIA 1991'). Ofwat is principally an economic regulator and the division between economic and environmental regulation can be traced to the original White Paper in February 1986 which advocated the creation of privatised water and sewerage undertakers.<sup>3</sup> This envisaged both a Director General of Water Services (now Ofwat) to regulate prices with, separately, the regulation of environmental impacts caused by undertakers to be undertaken by the Environment Agency.<sup>4</sup>

Ofwat has a number of general duties, set out in s.2 WIA 1991. For instance, it must secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out. It executes this duty in respect of sewerage through s.94 WIA 1991, which imposes a duty on sewerage undertakers to deal effectually with all sewage in their sewerage systems. If an undertaker breaches the s.94 duty then Ofwat is obliged, under s.18 WIA 1991, to order that an undertaker achieves compliance.

Ofwat's overwhelming practical focus in ensuring that undertakers adhere to the s.94 duty is through the quinquennial price reviews during which it sets prices for water and sewerage undertakers to charge customers so as to ensure that the undertakers have sufficient operation and capital funding to execute the s.94 duty. The latest Price Review (PR24) published in December 2024 covers prices between 2024 and 2029.<sup>5</sup> As befitting its status as, primarily, an economic regulator, Ofwat is comparatively small with around 300 staff and a budget currently of £56m.<sup>6</sup>

The Environment Agency by contrast is governed by the Environment Act 1995 and, unsurprisingly, has a focus on environmental regulation. Its duties cover

both the regulation of water abstraction through the Water Resources Act 1991, and various duties in relation to water quality which it achieves through imposing permits on discharges operated by undertakers through the Environmental Permitting (England and Wales) Regulations 2016.

The Environment Agency also has very substantial functions relating to flood and water management, waste and emissions. It is much bigger than Ofwat with a budget of over £2 billion and around 12,000 employees. It regulates the environment in all its forms and has purely desk-based officers as well as those who attend sites and undertake investigations 'on the ground'.

## The division between Ofwat and the Environment Agency in practice

This division of responsibilities works in practice through the Environment Agency identifying environmental improvements which must be achieved by the undertakers in order for them to adhere to environmental law. It then includes schemes (such as better treatment at sewage works or more treatment capacity in a particular area) in a programme called the 'Water Industry National Environmental Programme' ('WINEP'). For example, the Environment Agency may state that it intends to update an undertaker's discharge permit at a particular location to restrict the amount of untreated sewage which can be discharged from a combined sewer overflow during times of heavy rain by requiring the construction of more storage for storm sewage. These improvements are identified in the WINEP and all the improvements set out therein are funded by the prices set by Ofwat during its price review processes. Thus PR24 funds the WINEP improvements which have been identified to be implemented between 2024 and 2029.

The WINEP decisions are public<sup>7</sup> as are Ofwat's Price Reviews for each undertaker which are published for

consultation in draft. It is therefore open to the public and stakeholders to seek to amend a Price Review or to challenge a WINEP decision.<sup>8</sup> Undertakers can also challenge Ofwat's Price Review on the basis that they have been given insufficient money to fund the identified improvements.<sup>9</sup>

## What environmental functions does Ofwat have?

So far so (relatively) straightforward. Ofwat is the economic regulator and the Environment Agency is the environmental regulator. Why then does the IWC say that there is significant duplication in respect of reporting, enforcement and the setting of regulatory requirements?<sup>10</sup>

The answer seems to arise from the consequences of a decision made back in 1994 which has caused confusion amongst the regulators and difficulties which are still only now being resolved.

The decision in question was that made by Parliament in 1994 when passing the Urban Waste Water Treatment Regulations 1994 ('UWWTR') which implemented the EU's Urban Wastewater Treatment Directive. Specifically, Regulation 4 and 5 imposed duties on undertakers to provide and maintain sewerage systems which limit pollution to receiving watercourses and which are designed, constructed and maintained in accordance with the best technical knowledge not entailing excessive costs and to ensure that sewerage treatment works treat all sewage to a very high level. These duties, in other words, are *environmental* duties.

For reasons that are not clear, Parliament made these duties enforceable by Ofwat<sup>11</sup> (by supplementing the s.94 WIA 1991 duty referred to above) and not by the Environment Agency.

This means that while the Environment Agency has significant duties in respect of setting permits for

discharges by sewerage undertakers and taking enforcement action against undertakers who breach their permits, really important enforcement obligations against undertakers who allow discharges to occur when appropriate measures have not been undertaken must be enforced by Ofwat. This is not an academic issue – an undertaker may make a discharge from an outfall which is perfectly compliant with its permit (and so will not be enforced by the Environment Agency) but which is nevertheless in breach of the obligations set out in Regulation 4 and 5 of the UWWTR and of s.94 WIA 1991.

Ofwat has, in recent times, been significantly criticised by environmental NGOs for failing to understand that it had such a duty and in failing to understand the extent of its duty under the UWWTR. In the recent case of *Wild Justice v Ofwat* the Claimant alleged that Ofwat had ‘not even considered or addressed its mind to monitoring or enforcing compliance with regulations 4 and 5’.<sup>12</sup> The claim failed because it was put in such a sweeping way (i.e. that Ofwat had done *nothing* to enforce its regulation 4 and 5 duty) whereas Ofwat could point to an internal document from 2021 where the existence of this duty was inferred and from the fact that in 2022 it had commenced enforcement processes against five water companies for breach of the UWWTR.

The Judge is careful in his judgment though to record that he was not pointed to any evidence of such action taken by Ofwat prior to the 2021 document or the 2022 enforcement action and made clear that the court was not able to assess ‘the merits or demerits of the specific action which Ofwat is taking’.<sup>13</sup>

More recently, the Office for Environmental Protection undertook a detailed investigation into Ofwat, Defra and the Environment Agency’s functions in respect of the regulation of pollution from Combined Sewer Overflows. The Investigation Report which it drafted recorded that Ofwat had failed to adhere to its enforcement duties contained in s.94 Water Industry

Act 1991 as supplemented by Regulation 4(2) of the UWTR 1994.<sup>14</sup> As the Office put it:

4.18 Various documents noted in the Decision Notice show that Ofwat had interpreted its section 18 duty as meaning that only ‘systemic’ failures by [water and sewage companies] would constitute a breach of section 94. However, section 94(1)(a) of the 1991 Act as supplemented by regulation 4(2) of the 1994 Regulations, requires [water and sewage companies] to provide systems that comply with Schedule 2 of the 1994 Regulations, including as to the limitation of pollution of receiving waters due to storm overflows. Compliance is a question of fact in each individual case.

The OEP go on to record that:

4.21 ...It was only from 27 June 2022 ... that Ofwat unequivocally acted in accordance with a legally correct understanding of the environmental enforcement obligations on them under section 94 of the WIA 1991 as supplemented by the 1994 obligations.

While Ofwat has embarked on a vigorous enforcement programme since 2022 in relation to Regulation 4 and 5 of the UWWTR, the reason why Ofwat were found to have proceeded on an incorrect understanding of the duties on them as environmental regulators for 28 years from 1994 until 2022 is unclear. This may reflect Ofwat’s focus on economic regulation through the Price Reviews or from the fact that environmental enforcement is evidentially complex and often requires ‘boots on the ground’ to establish what, exactly, occurred at a particular outfall or sewage treatment work and why a discharge was made. Ofwat, as a predominantly desk-based economic regulator, may have been ill-equipped to discharge this duty in contrast to the large number of Environment Agency officers who undertake site visits and gather evidence on the ground as a core part of their role.

## Does the IWC and White Paper’s proposed solution make sense?

Given that the regulator with responsibility for enforcing the UWWTR did not, according to the OEP, interpret its duties correctly for many years, a straightforward solution to this problem, one may think, would be to shift responsibility for enforcing breaches of regulation 4 and 5 UWWTR from Ofwat to the Environment Agency. While this would require legislative amendment it would, at a stroke, eliminate much of the duplication which troubled the IWC and would, essentially, mean that virtually all environmental enforcement in relation to water would fall to the Environment Agency. All involved would know their responsibilities.

While the IWC realistically acknowledges that ‘In a complex policy environment, it is rarely possible to design perfect organisational structures with “clean” boundaries’ and that ‘organisational changes, especially mergers and demergers, should never be undertaken lightly’, it is unclear if the IWC and the Secretary of State in the White Paper appreciate that this much more simple approach to the division of enforcement functions was available to them.

Alternatively, it may be that the IWC’s view that ‘water sector regulation has lost public trust’ drove it, and the Secretary of State in the White Paper, to conclude that major surgery is required to the regulatory framework to re-establish that trust and that the proposal set out above would not satisfy the public outcry. Time will tell if the proposed approach succeeds in re-establishing the public trust which they contend has been missing.

In addition, though, the IWC and White Paper’s proposals set a very different and potentially worrying precedent in blurring the separation between environmental and economic enforcement in the water industry.

The norm in developed countries with privatised water industries<sup>15</sup> is to keep the economic regulation of water separate to its environmental regulation on the basis that putting one organisation in charge of both economic *and* environmental/public health concerns related to water can reduce transparency and create an imbalanced framework that favours economic factors (such as low bills or the undertaker's economic security) over environmental or public health protection or vice versa. By keeping economic objectives separate to environmental / public health objectives in separate organisations, any tensions between the regulators are visible and challengeable.

By contrast, in a unified model, the tensions between the section of the regulator concerned with economic matters, such as keeping prices low for consumers, and the other section of the regulator concerned with upholding environment standards which may apply to a particular asset will become internal and less transparent. Similarly, the decision of a unified regulator to, for instance, prosecute an undertaker for a pollution incident leading to a substantial financial penalty may directly undermine the economic focus on keeping consumers' bills low. These tensions will, at the very least, require very careful handling. Put another way, if the current system is criticised on the basis that it is a '*model lacking transparency and accountability*'<sup>16</sup> then it is difficult to see how a model which keeps all these tensions hidden can realistically be said to be more transparent.

## Conclusion

The most significant structural problem the IWC identifies arises not from the existence of multiple regulators, but from what would appear to be the sub-optimal allocation of environmental enforcement powers to Ofwat.

The IWC's recommendations represent a profound departure from the current regulatory framework in respect of water but the creation of a singular water

regulator may sacrifice transparency, legitimacy, and regulatory coherence while failing to address the root causes of underperformance. A more nuanced rebalancing of responsibilities—particularly the consolidation of environmental enforcement within the Environment Agency—may offer a more effective and proportionate path forward.

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## Endnotes

- 1 Department for Environment, Food & Rural Affairs, 'A new vision for water: white paper' (Policy Paper, 20 January 2026), available at: <https://www.gov.uk/government/publications/a-new-vision-for-water-white-paper>, January 2026, accessed 22 March 2026.
- 2 The White Paper, p24
- 3 Command Paper 9734 – '*Privatisation of the Water Authorities in England & Wales*' (February 1986 White Paper)
- 4 Certain environmental enforcement functions are reserved to Natural England but discussion of their function is outside the scope of this article
- 5 See Ofwat's PR24 Final Determinations webpage <https://www.ofwat.gov.uk/regulated-companies/price-review/2024-price-review/final-determinations/>, accessed 22 March 2026.
- 6 Ofwat, 'Water Services Regulation Authority (Ofwat) Annual Report and Accounts 2024-25: For the period 1 April 2024 to 31 March 2025' (December 2025) HC 1441, available at: <https://www.ofwat.gov.uk/publication/water-services-regulation-authority-ofwat-annual-report-and-accounts-2024-25/>, accessed 22 March 2026. Staff numbers have risen markedly in the last couple of years to 394 in 2025 reflecting the pressures caused by finalising PR24 and, perhaps, by the environmental enforcement issues raised in this article which have resulted in the 'biggest and most complex investigation we have ever undertaken'.
- 7 See, for instance, the website maintained by the regulators setting out the WINEP methodology: 'Water industry national environment programme (WINEP) methodology' (Guidance, 11 May 2022), available at: <https://www.gov.uk/government/publications/developing-the-environmental-resilience-and-flood-risk-actions-for-the-price-review-2024/water-industry-national-environment-programme-winep-methodology>, accessed 22 March 2026. And the WINEP actions: Department for Environment Food & Rural Affairs, 'PR24 Water Industry National Environment Programme' (18 December 2024), available at: <https://environment.data.gov.uk/dataset/39b11ea0-3cfa-4cbb-b3a1-b5950019f169>, accessed 22 March 2026.

- 8 For instance *R(River Action UK) v Water Services Regulation Authority* [2026] EWHC (Admin) 586 available at: <https://caselaw.nationalarchives.gov.uk/ewhc/admin/2026/586/>, accessed 22 March 2026.
- 9 Appeals are made to the Competition and Markets Authority. See 'Water PR24 price redeterminations' (19 March 2025), available at <https://www.gov.uk/cma-cases/water-pr24-price-redeterminations>, accessed 22 March 2026.
- 10 IWC Report at §§314-318
- 11 The obligations on the SoS are, in practice, delegated to Ofwat.
- 12 *Wild Justice v Water Services Regulation Authority* [2022] EWHC 2608 (Admin) at [37] available at: <https://caselaw.nationalarchives.gov.uk/ewhc/admin/2022/2608>, accessed 22 March 2026.
- 13 See *Wild Justice* case at [53].
- 14 See 'Investigation Report addressed to Ofwat in relation to its compliance with the Water Industry Act 1991 regarding the regulation of network combined sewer overflows' (Report, December 2025), available at <https://www.theoep.org.uk/sites/default/files/reports-files/OEP%20CSO%20Investigation%20Report%20-%20Ofwat.pdf>, accessed 22 March 2026.
- 15 See, for instance *OECD Studies on Water: The Governance of Water Regulators* (Paris: OECD Publishing 2015), available at: [https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/04/the-governance-of-water-regulators\\_g1g51d13/9789264231092-en.pdf](https://www.oecd.org/content/dam/oecd/en/publications/reports/2015/04/the-governance-of-water-regulators_g1g51d13/9789264231092-en.pdf), accessed 22 March 2026.
- 16 IWC Report at §330