



RESPONSE BY UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) TO The Government's Strategic Priorities for Ofwat

UKELA (UK Environmental Law Association) comprises over 1,500 academics, barristers, solicitors and consultants, in both the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.

UKELA prepares advice to government with the help of its specialist working parties, covering a range of environmental law topics. This response has been prepared primarily by the Water Working Party but with input from the Nature Conservation Working Party. These submissions do not necessarily and are not intended to represent the views and opinions of all UKELA members but have been drawn together from a range of its members.

1. Has the government identified the most relevant strategic priorities for Ofwat? If not, please provide details of the priorities that should be included.

The statutory framework

S.2A WIA 1991 sets out the structural framework for OFWAT's priorities in the following way:

- (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 1 of Part 2 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) to secure that the activities authorised by the licence of a water supply licensee or sewerage licensee and any statutory functions imposed on it in consequence of the licence are properly carried out and*
- (e) to further the resilience objective.*

The 'consumer objective' referred to at S.2A(a) is explained at S.2B as follows:

(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.

The 'resilience objective' referred to at S.2A(e) is explained at S.2DA as follows:

(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.*

While the WIA sets out no hierarchy of importance between the various objectives set out at 2A(A) – (e), there is an inherent tension between the 'consumer objective' which is primarily focussed on protecting the economic interests of consumers, with the 'resilience objective' which is about ensuring that supplies and treatment systems are adequate. It may, for instance, be necessary to invest in some infrastructure in order to satisfy the resilience

objective which is to be funded by increased charges which may undermine the consumer objective.

It is also immediately noticeable that the Objectives set out at S.2A(a) – (e) do not, explicitly, include an objective to maintain water quality and to conserve sufficient quantities of water in the watercourses in which it is found. This is surprising given that the entire water industry depends on water and so the failure to refer to the quality and conservation of very thing itself is an obvious gap in the legislative framework.

The general environmental duties applicable to OFWAT and to the Secretary of State in S.3 do not fill that gap as they require various environmental measures to be considered when formulating or considering proposals but only so far '*as may be consistent*' with the duties set out under section 2 (summarised above).

In addition, the general environmental duties set out at S.3 again fail to explicitly refer to water quality. The closest the legislation comes to an obligation to consider this issue is in S.3(a) and (c) where water *conservation* is mentioned but water *quality* is not:

(a) *further the conservation and enhancement of natural beauty and the conservation of flora, fauna and geological or physiographical features of special interest and to further water conservation;*

...

(c) *take into account any effect which the proposals would have on the beauty or amenity of any rural or urban area or on any such flora, fauna, features, buildings, sites or objects;*

In sum, given that water quality and water conservation is not a primary duty under S.2 (and the reference to a duty to consider water conservation in S.3(a) is explicitly subject to a requirement to be consistent with the duties under S.2), it is clear that much depends on how the Secretary of State and OFWAT set out their strategic priorities and objectives in a manner which is both consistent with the obligations set out in the WIA and which recognises the central role of water quality and water conservation in the proper consideration of the water industry in this country.

Strategic priorities identified in 2017

UKELA notes that the previous strategic priorities for OFWAT (as identified in their September 2017 priorities notice) read as follows (in the order they appeared):

Securing long term resilience - Priority: Ofwat should challenge the water sector to plan, invest and operate to meet the needs of current and future customers, in a way which offers best value for money over the long term.

- **Water supply - Objective:** Ofwat should further a reduction in the long-term risk to water supply resilience from drought and other factors, including through new supply solutions, demand management and increased water trading.
- **Wastewater - Objective:** Ofwat should challenge water companies to improve planning and investment to meet the wastewater needs of current and future customers.
- **Resilience against flooding and wider risks - Objective:** Ofwat should challenge water companies to make sure that they assess the resilience of their system and infrastructure against the full range of potential hazards and threats and take proportionate steps to improve resilience where required.
- **The environment - Objective:** Ofwat should challenge companies to further the resilience of ecosystems that underpin water and wastewater systems, by encouraging the sustainable use of natural capital and by encouraging water companies to have appropriate regard to the wider costs and benefits to the economy, society and the environment.

Protecting customers - Priority: Ofwat should challenge the water sector to go further to identify and meet the needs of customers who are struggling to afford their charges.

- **Household customers - Objective:** Ofwat should challenge companies to improve the availability, quality, promotion and uptake of support to low income and other vulnerable household customers.
- **Business customers - Objective:** Ofwat should promote an enhanced focus by water companies on the needs of small business customers that may struggle to access the best deals.

Making markets work - Priority: Ofwat should promote markets to drive innovation and achieve efficiencies in a way that takes account of the need to further: (i) the long-term resilience of water and wastewater systems and services; and / or (ii) the protection of vulnerable customers.

There were therefore three priorities and six objectives. It is striking that the term 'conservation' does not appear at all in any of the Priorities or Objectives and only appears three times in the entire 16 page supporting document and the term 'pollution' does not appear in any of the Priorities or Objectives and only appears three times in the supporting document (when reference is made to the discharge of pollution and to a market for pollution reduction where buyers 'buy' the ability to discharge from sellers).

The strategic priorities in place in 2017 do not, in UKELA's opinion, adequately reflect the pressing concerns which OFWAT should place on the risks of pollution and inadequate conservation of water.

The proposed strategic priorities being consulted upon

The proposed priorities as out for consultation (in the order they appear) are as follows:

Protecting and enhancing the environment - Priority: Ofwat should drive water companies to be more ambitious in their environmental planning and delivery to contribute towards the priorities set out in the 25 Year Environment Plan. Ofwat should drive water companies to improve their day to day environmental performance to enhance quality of the water environment.

A resilient water sector - Priority: Ofwat should challenge the water sector to plan, invest and operate its water and wastewater services to secure the needs of current and future customers, in a way which delivers value to customers, the environment and wider society over the long-term.

Serving and protecting customers - Priority: Ofwat should push water companies to provide a better and fairer water service for all, by improving customer services and complaints handling. Ofwat should drive water companies to meet the needs of vulnerable customers, including those who are 'transiently' vulnerable.

Driving markets to deliver for customers - Priority: Where appropriate, Ofwat should consider how the use of markets-based tools, such as competition, can deliver greater benefits for customers and support the delivery of government's wider priorities. Ofwat should encourage markets to drive innovation, efficiencies, and promote longer term sustainable investment across the sector.

UKELA welcome that the proposed strategic priorities refer to protecting and enhancing the environment and that specific reference is made in the supporting document to pollution and that the supporting document sets out as follows:

21. Pollution, particularly from nutrients, is a significant contributing factor to the decline of some of our protected sites, severely impacting rare and significant habitats of national importance. Ofwat should recognise the need for water companies and other stakeholders to support efforts to tackle nutrient pollution, and to consider where it is appropriate to use the regulatory framework to support such efforts.

[OFWAT should] Challenge water companies to prioritise improvements to protected sites and recognise the importance of priority habitats such as chalk streams, including the need to address nutrient pollution.

UKELA have four suggestions:

1. the importance of remedying water pollution and water conservation merits the proposed priorities being numbered sequentially and requiring the decision-maker to consider them sequentially in descending order of importance. The proposed priority related to **'Protecting and enhancing the environment'** should be labelled as a primary priority. There is nothing wrong, in law, with a guidance document picking out one of many statutory factors and requiring that decision-makers accord it a primary consideration¹.

¹ See, for example, Lord Bingham in *R. (on the application of Mehanne) v Westminster Housing Benefit Review Board* [2001] UKHL 11, [2001] 1 W.L.R. 539 at [13], where the duty to have "regard in particular" to a specified factor meant that it carried the most weight.

See also the Court of Appeal in *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137 at [29], on the duty to have "special regard" to the preservation of heritage assets: "Parliament's intention in enacting section 66(1) was that decision-makers should give 'considerable importance and weight' to the desirability of preserving the setting of listed buildings when carrying out the [planning permission] balancing exercise". Sullivan LJ further noted that the "proposition that decision-makers may be required by either statute **or planning policy** to give particular weight to certain material considerations was not disputed" ([26]). [emphasis added]

2. Conservation of water and the need to retain water in the right locations and of the right quality to support the waterborne ecology is an important element of the overall requirement to enhance and protect the environment but it is barely mentioned in the priorities document and supporting text save for a specific reference to protecting and enhancing '*priority habitats such as chalk streams*'. Given that many watercourses in the country have deteriorated in recent years UKELA suggests that this does not go far enough and *all* watercourses should be protected.

3. It is noted that the section where the Secretary of State sets out what OFWAT is expected to do (see p10 of the draft strategic priorities document) is largely concerned with OFWAT 'encouraging' companies to do various things. While this is plainly an important part of OFWAT's role, OFWAT itself makes decisions such as approving proposals for the construction of assets under the Asset Management Plans scheme which water and sewerage undertakers are required to engage with and there is in place an elaborate regulatory code permitting Ofwat to take action in the event of breach (see, for instance, *Marcic* at [70] and the recent judgment of Fancourt J in *Manchester Ship Canal Company Ltd v United Utilities Ltd* [2021] 1571 (Admin) at [25], [83] and [85]. The wording of the current proposed priorities document misses the point that it is not just the companies which have a part to play it is also OFWAT itself which is required to exercise and perform its duties in accordance with the priorities defined in s.2 WIA. As such, the language of the supporting document should be amended to refer to the fact that OFWAT *itself* should be expected to appraise and approve asset management plan proposals and take regulatory action which deliver these environmental objectives.

4. The precautionary principle is a fundamental cornerstone of environmental law and regulation but it is difficult properly to enact in water regulation given that any improvements to the system which costs money have to be balanced against the costs to consumers. UKELA are concerned that unless the precautionary principle is specifically referred to by OFWAT as a priority then OFWAT will be reluctant to approve an infrastructure scheme for instance unless it delivers *tangible* benefits for

Finally, see Lady Hale in *ZH (Tanzania)* [2011] 2 AC 166 where S.55 of the Borders, Citizenship and Immigration Act 2009 was considered which requires that '*The Secretary of State must make arrangements for ensuring that ... the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.*' This was interpreted by Lady Hale at [23] to [26] as requiring that the Secretary of State must make the best interests of the child '*a primary consideration*'.

consumers through, for instance, improved water quality. This may not be an appropriate assessment given that assessing a proposed scheme through the prism of the precautionary principle means that some schemes should be approved which do not deliver *any* obvious current benefits to consumers but which may, in due course, protect water quality or which may preserve the waterborne ecology. Given the significance of the precautionary principle, OFWAT should be instructed to require that water and sewerage companies are obliged to consider the precautionary principle when presenting OFWAT with proposals.

2. Does the strategic policy statement effectively set out government’s expectations of Ofwat in supporting delivery of our priorities? If not, please identify where these expectations could be made clearer.

Please select from the dropdown list

If not, please detail where we can strengthen our expectations of Ofwat.

UKELA welcomes the reference to the 25 year Environment Plan.

This question is addressed in UKELA’s answers to question 1 (above).

3. Do you consider that this statement to Ofwat is clear and easy to understand?

Please select from the dropdown list

If not, please identify any areas that could be clarified.

No comments to make.

UKELA

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