



The Growth Duty on Ofwat: Impacts on freshwater pollution

Wildlife and Countryside Link Briefing: February 2024

Wildlife and Countryside Link ([Link](#)) is the largest environmental coalition in England, bringing together 83 organisations to use their joint voice for the protection of the natural world.

Executive summary

- Ofwat’s economic regulatory focus is already out of kilter with the need for more robust environmental regulation to respond to freshwater pollution caused by water companies.
- The Government is exacerbating this imbalance by imposing a new Growth Duty on Ofwat, requiring the regulator to have regard to desirability of promoting economic growth.
- Draft guidance to implement the Growth Duty suggests that it will make it harder for Ofwat to take enforcement action against polluting water companies, as this could be construed as hindering the growth of those companies.
- We recommend that parliamentarians press for the forthcoming Statutory Instrument to be withdrawn and, failing that, for the draft guidance on the Duty to be significantly amended.
- We also make the case for a Green Duty to replace the Growth Duty, to empower regulators to do more to sanction polluters and to ensure that regulatory decisions contribute to the achievement of targets set under the Climate Change Act 2008 and the Environment Act 2021.

Background

Sections 108 and 109 of the Deregulation Act 2015 give the Secretary of State power to impose a Growth Duty on regulators, requiring them “*have regard to the desirability of promoting economic growth*” when exercising their regulatory functions.¹

Following two consultations in 2023, in February the Government confirmed that the Growth Duty will be extended to Ofcom, Ofgem and Ofwat, with effect from April 2024, subject to Parliamentary approval of

¹ <https://www.legislation.gov.uk/ukpga/2015/20/section/108/enacted>



the necessary secondary legislation.² The Government has also published draft refreshed statutory guidance on how the Growth Duty should be applied³, and has confirmed that it is working with stakeholders to develop a separate ‘Regulatory Performance Framework’, which will specify an approach to reporting.

A Statutory Instrument is expected to be laid before April 2024 to impose the Growth Duty on Ofcom, Ofgem and Ofwat and the draft refreshed statutory guidance should be presented to Parliament around the same time. This briefing explores the impact that the imposition of the Duty on Ofwat will have on freshwater pollution, as well as the regulator’s ability to contribute to environmental enhancement.

How will the Growth Duty affect freshwater pollution?

The draft refreshed statutory guidance for the Growth Duty, published in February 2024, states that the Duty will mean that Ofwat:

“Should give appropriate consideration to the potential impact of their activities and their decisions on economic growth, for the wider UK economy, alongside or as part of their consideration of their other statutory duties.” (p37)

The guidance is explicit that this consideration should apply when enforcement action is contemplated, highlighting that:

“Certain enforcement actions, and other activities of the regulator, can be particularly damaging to growth. These include, for example, enforcement actions that limit or prevent a business from operating; financial sanctions; and publicity, in relation to a compliance failure, that harms public confidence.” (p61)

As such, before taking enforcement action, regulators are guided to consider the:

“Likely impact of the proposed intervention on the business, and the wider business community both in terms of remedying and deterring the noncompliance and in terms of economic costs and benefits to businesses.” (p62)

² <https://assets.publishing.service.gov.uk/media/65d611f2188d77001603883b/government-response-to-smarter-regulation-regulating-for-growth-consultation.pdf>

³ <https://assets.publishing.service.gov.uk/media/65d611f2188d77001603883b/government-response-to-smarter-regulation-regulating-for-growth-consultation.pdf> p34-70



In the context of the sewage scandal⁴, this is extraordinary guidance for the regulator that oversees water companies. It could have a chilling effect on Ofwat enforcement action, as it would allow water companies to challenge enforcement as the imposition of undue economic costs, or even point to the harm action would cause to public confidence in their business. Water companies have not been shy about using every available route to challenge Ofwat in the past (see for example the Competition Markets Authority complaint four water companies submitted against Ofwat in 2019⁵). The Growth Duty and the guidance to apply it provides water companies with a new tool to push back against robust regulatory action.

Indeed, it is conceivable that the Growth Duty, as applied by the draft new guidance, could be used to frustrate efforts to give Ofwat new powers to prevent polluting water companies from paying bonuses to executives. This policy reform, proposed over recent years by Labour⁶, the Liberal Democrats⁷ and the Greens⁸, was green-lit by the Government in February, with an Ofwat consultation on the detail of banning bonuses payments in polluting companies due to start soon.⁹ A ban on bonuses is a financial sanction, which the guidance states can be “*particularly damaging*” to growth. A case could be made that Ofwat would breach its Growth Duty if it implemented such a potentially growth damaging policy. Yet more robust action, such as a ban on polluting companies paying dividends to shareholders, could also be subject to challenge or delay in the light of the new duty.

The guidance contains other concerning elements. It encourages “*consideration of reviews to streamline, relax, revoke or remove rules*” (p61) and urges “*speed of decision making*” (p52), including proposed targets for processing regulatory approvals at speed (p63), as ways to comply with the Growth Duty. The last thing struggling freshwater habitats¹⁰ need is the relaxation or revocation of rules designed to prevent pollution. Similarly, without first addressing the significant resource and funding gap regulators still face¹¹, targets to increase speed risk undermining the rigour of regulatory processes and their efficacy against freshwater pollution.

⁴ <https://www.sas.org.uk/water-quality/water-companies-shocking-stats/>

⁵ <https://www.ofwat.gov.uk/regulated-companies/price-review/2019-price-review/regulated-companies-price-review-2019-price-review-competition-and-markets-authority-referrals/>

⁶ <https://labour.org.uk/updates/press-releases/labour-will-empower-water-regulator-to-ban-bosses-bonuses-until-they-clean-up-their-filth/>

⁷ <https://www.libdems.org.uk/press/release/ofwat-on-exec-pay-toothless-regulator-needs-to-ban-bonuses>

⁸ <https://www.greenparty.org.uk/news/2022/08/09/greens-call-for-action-on-water-companies-as-england-faces-heat-health-alert-and-drought/>

⁹ <https://www.gov.uk/government/news/government-cracks-down-on-bonuses-for-water-company-bosses>

¹⁰ For more on the poor state of England’s freshwaters, see the recent ‘State of our Rivers’ report from The Rivers Trust: <https://theriverstrust.org/key-issues/state-of-our-rivers>

¹¹ https://www.wcl.org.uk/docs/assets/uploads/The_state_of_pollution_in_rivers_Briefing_note_Feb_2024_1.pdf (p4-5)



A section on environmental sustainability as a driver of economic growth (p54) has been included in the draft guidance. This is a welcome response to strong representations made from environmental organisations at consultation stage.¹² However, this section fails to set a clear requirement for regulators to directly contribute to economically essential¹³ net zero and nature recovery goals. Instead, the section proposes a series of marginal, barely environmental measures such as setting “*efficiency targets to reduce business costs*”. This is a muddled and incomplete articulation of environmental sustainability as a driver of economic growth, which fails to offset the environmentally harmful steers elsewhere in the guidance.

In sum, the imposition of a Growth Duty on Ofwat, and the new draft guidance that will apply it, will make sanctions harder to impose on water companies that pollute, open the door to freshwater deregulation and prioritise speed over rigour in regulatory decision making.

All of these changes are likely to make freshwater pollution, already at stubbornly high levels¹⁴, worse rather than better.

This shifting of the dial of water regulation away from environmental objectives is:

- **Unnecessary:** As an economic regulator, Ofwat already gives considerable attention to financial costs and economic growth. Paragraph 1 of the Regulators’ Code¹⁵ already requires Ofwat to consider how it can support or enable economic growth, making the Growth Duty an unnecessary duplication.
- **Contrary to the advice of key Parliamentary committees:** Both the Environmental Audit Committee in the Commons¹⁶ and the Industry and Regulators Committee in the Lords¹⁷ have recommended in recent reports that Ofwat be given clearer guidance to regulate for environmental objectives. The imposition of the Growth Duty and the closer alignment of water regulation to economic concerns runs directly contrary to these recommendations.
- **Contrary to public opinion:** Public support for stronger action to address freshwater pollution is well documented;¹⁸ polls show 80% support for banning the payment of dividends to the

¹² See https://www.wcl.org.uk/docs/WCL_Response_Growth_Duty_Extension_Consultation_17_08_2023.pdf & https://www.wcl.org.uk/docs/WCL_Response_Growth_Duty_Draft_Statutory_Guidance_Consultation_Jan_2024.pdf

¹³ <https://www.wcl.org.uk/docs/EAC%20Inquiry%20on%20natural%20capital%20-%20Link%20response%20-%202022.09.23.pdf> (p2)

¹⁴ https://www.wcl.org.uk/docs/assets/uploads/The_state_of_pollution_in_rivers_Briefing_note_Feb_2024_1.pdf (p1&2)

¹⁵ <https://www.gov.uk/government/publications/regulators-code>

¹⁶ <https://committees.parliament.uk/work/891/water-quality-in-rivers/publications/>

¹⁷ <https://publications.parliament.uk/pa/ld5803/ldselect/ldindreg/166/16602.htm>

¹⁸ <https://riveractionuk.com/healthy-rivers-are-an-influential-voting-issue-for-almost-half-of-british-public/>



shareholders of polluting water companies.¹⁹ The Growth Duty is likely to make the more moderate option of banning bonuses difficult, it will almost certainly mean that action on dividends on environmental grounds is more heavily contested.

These concerns were raised when the Government first introduced the Growth Duty powers as part of the Deregulation Act. Speaking at Commons 2nd reading of the Deregulation Bill in 2014, then Chair of the Environmental Audit Committee Joan Walley MP said:

“My biggest objection to the Bill is the duty to achieve economic growth as set out in clauses 61 to 64....Insufficient regard seems to have been given to environmental appraisal throughout the clauses, and I wonder how the Government can square clause 61 with guidance from their own Natural Capital Committee.”²⁰

Nearly a decade on, the Government has chosen to apply this ratchet away from environmental objectives to the water regulator, at the very moment when the public is demanding stronger environmental regulation in the water sector.

In line with the public demand for water regulation to become more environmentally focused, plans to apply the Growth Duty to Ofwat should be scrapped. This would preserve Ofwat’s current capability to take enforcement action against polluting water companies, a key (but not the sole²¹) contributor to the pollution harming England’s freshwaters. As such, **Link asks parliamentarians:**

- **To oppose the Statutory Instrument that will impose the Growth Duty on Ofwat.** If this opposition fails to persuade the Government to withdraw the SI, then:
- **To demand the redrafting of the guidance intended to apply the Growth Duty to Ofwat,** including the removal of the most environmentally damaging elements on sanctions, the revocation of regulations and speed of processing. Redrafted guidance should also make clear that environmentally sustainable economic growth means growth that is compatible with meeting the objectives of the Environment Act 2021 and the Climate Change Act 2008 and that regulators’ actions and decisions should support economic activity where it is compatible with those objectives.

¹⁹ <https://www.thetimes.co.uk/article/clean-it-up-ban-polluting-water-companies-from-handing-out-dividends-public-say-3vx6x8998>

²⁰ <https://hansard.parliament.uk/Commons/2014-02-03/debates/14020325000001/DeregulationBill> (See also concerns raised by Caroline Lucas MP at that debate)

²¹ https://www.wcl.org.uk/docs/assets/uploads/The_state_of_pollution_in_rivers_Briefing_note_Feb_2024_1.pdf

Going further: Replacing the Growth Duty with a Green Duty

We also ask Parliamentarians to consider going further and supporting a strong Green Duty for regulators.

Such a Green Duty would require regulators to contribute, wherever possible, to the delivery of environmental targets under the Environment Act 2021 and the Climate Change Act 2008, explicitly linking work of regulators to the delivery of legally-binding, measurable Government targets. This would be a cost-free governance change that would bring key public bodies (such as Ofwat, the Forestry Commission and the Marine Management Organisation) up to date, and align them in support of the Government's environmental objectives.

By contributing towards the delivery of these targets, and thereby the restoration of the natural capital our economy relies on, public bodies and regulators would promote sustainable growth and enhance economic resilience. This would also help ensure that cost-effective and efficient opportunities for green growth, such as investment in nature-based solutions, are not missed. There is a funding gap of more than £19 billion in the UK for nature recovery when comparing existing funds and Government objectives, which increases to £44 billion for all nature-related objectives.²² Private sector finance will be vital to addressing this investment gap for nature, and the contribution that regulated industries could make to this target is substantial.

A Green Duty applied to Ofwat would clarify its role as an environmental regulator, and the weight that environmental costs and benefits should have in its decision-making. This would empower Ofwat to regulate the water industry with more rigour than it can currently apply. Regulators should have to have the powers effectively punish companies who damage the environment. Given the scale of pollution in the freshwater environment, Ofwat's environmental powers should be increased through a Green Duty, not curtailed through the proposed Growth Duty.

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28.02.24

²² <https://www.greenfinanceinstitute.com/wp-content/uploads/2021/10/The-Finance-Gap-for-UK-Nature-13102021.pdf>