

Board Paper

Date

21 August 2024

Title

Final reports on implementation of the Bathing Water Regulations in England and Northern Ireland

Report Authors

Neil Emmott, Head of Monitoring Environmental Law and Frances Dixon, Senior Monitoring Environmental Law and Advice Officer

Responsible Executive Director

Helen Venn, Chief Regulatory Officer, Regulatory Directorate

Paper for decision

Open paper

Issue

1. We seek approval of the reports on implementation of the Bathing Water Regulations in England and Northern Ireland.

Recommendation

2. We recommend that the Board:
 - (a) approve the reports in substantially the form at Annex A and Annex B (with only minor, non-material amendments to be made – see paragraph 12).
 - (b) delegate to the Chief Executive, in consultation with the Chair, approving that the final reports have satisfactorily incorporated any such further non-material amendments as the Board may direct during its meeting.
 - (c) note the date to lay the reports before Parliament and Northern Ireland Assembly, planned for 10 and 23 October 2024, respectively.
 - (d) note the proposal to discuss the main findings and recommendations with Defra, EA and DAERA and to send them the final respective reports shortly before publication, to ensure a ‘no surprises’ approach.

- (e) note the intended communications and engagement approach to accompany the report laying and dissemination of the key messages.

Background

3. As a follow-up to our recent reports on implementation of the Water Framework Directive (WFD) Regulations, we have undertaken a study of the implementation of the Bathing Water Regulations in England and Northern Ireland. The project has been conducted under our functions in Section 29 and Paragraph 2 of Schedule 3 to the Environment Act 2021. These provide for the OEP to monitor and report on the implementation of environmental law in England and Northern Ireland, respectively.
4. The strategic intent for these reports is to:
 - (a) support the effective implementation of water law by public bodies and others
 - (b) influence the coherence and substance of any proposals for new policy and law
 - (c) enable legislatures and others' ability to scrutinise how current law is being applied and to hold government to account for them, and
 - (d) build our reputation and authority by producing high-quality reports, strengthening our ability to exercise influence in future matters.
5. The regulations are aimed at improving bathing water quality to protect human health and facilitate the recreational use of natural waters. The project has focused on assessing the guiding principles shaping the regulations, their technical implementation and their coherence with relevant water policy and law.
6. With significant recreational use of waters and an apparent stagnation and some deterioration of water quality, it is pertinent to review the implementation of the regulations at this time. We have undertaken the project to build on recommendations in our report on the WFD Regulations for both England and Northern Ireland, as well as our EIP progress reports for England. We have also taken account of the most recent bathing water results and statements of government intent to review the regulations or how they are applied. We therefore see an opportunity to influence both how the current regulations are implemented as well as their possible future reform.
7. The research underpinning the reports has been undertaken by OEP staff, and the consultancy firms Stantec and the Centre for Research on Environment and Health. We will be publishing the contractors' report alongside our own, which will include their own assessments. We have also had significant engagement with a wide range of stakeholders during the project.
8. We are producing separate OEP reports for England and Northern Ireland, though with a significant degree of commonality in relevant areas. The legislation is very similar since it derives from the same underpinning EU Directive.
9. However, there are also some significant differences. Notably:
 - (a) England allocates the main implementation functions to the Secretary of State (i.e. Defra) and the Environment Agency, as separate legal entities, while in Northern Ireland the equivalent functions all rest with DAERA.

- (b) Northern Ireland has fewer bathing waters (26) than England (451), only one of which is inland (compared to 29 in England).
 - (c) DAERA has already sought to apply a broader application of the regime beyond 'bathers' and has consulted on extending the 'bathing season', while England applies a narrower approach to these issues.
 - (d) Northern Ireland has higher monitoring rates than England per site, and more flexibility in the regulations over the choice of monitoring locations.
10. We have received and considered feedback from Paul Leinster and Malcolm Beatty, our Board member critical friends. We have also received comments from our external review experts, drawn from the College of Experts and other bodies including staff of Environmental Standards Scotland and the Interim Environmental Protection Assessor for Wales. The England report has been fact checked by Defra and EA, and we are awaiting the NI report to be fact checked by DAERA.
 11. Pre-election, Defra committed to consult on the bathing water season and a possible extension beyond 'bathing' but has not yet done so. *This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs.*
 12. There are some outstanding non-material amendments, such as:
 - (a) inserting the final graphics once these have been reproduced by HH Global or inserted by us at higher resolution.
 - (b) performing a final sweep to check our references, cross-references, footnotes and acronyms, and remove any typographical errors and the like.

Analysis

13. The number and quality of bathing waters have greatly increased since the 1990s. However, in significant respects both England and Northern Ireland remain considerably behind other European countries.
14. England has 451 bathing waters. Of these, 422 are coastal, while 29 are inland at rivers, lakes and ponds. Northern Ireland has 26 official bathing waters and seven 'candidate' sites which have been identified but not yet added to the relevant statutory list. These are relatively small numbers of bathing waters compared to other European countries, particularly for inland sites. For instance, Germany has over two thousand sites on lakes and rivers and France has over a thousand.
15. Bathing waters are classified as excellent, good, sufficient or poor, using data collected over a 4-year rolling program. Among other requirements, Defra and the EA must exercise their functions so that all bathing waters are classified as, at least, 'sufficient'.¹ They must

¹ Reg 5(1)(a), Bathing Water Regulations.

also take such realistic and proportionate measures as they consider appropriate to increase the number of bathing waters classified as ‘good’ or ‘excellent’.² The Bathing Water Regulations provide that a bathing water that is ‘poor’ for five consecutive years is automatically ‘declassified’. The result is that such a site is ‘no longer a bathing water’ and ‘permanent advice against bathing’ must be issued.

16. The most recent results, from 2023, show that 66.4% of bathing waters (281 sites) in England achieved ‘excellent’ status. Although the figures have been broadly stable, this is the lowest percentage since 2017. Meanwhile, in 2023, 4.3% of bathing waters (18 sites) were rated as ‘poor’. This marks the biggest proportion (and number) of bathing waters failing to meet the minimum legal standards since the four-tier classification system was introduced in 2015.
17. The figures for Northern Ireland are similar, though the small sample size limits the value of percentage comparisons (see Table 1). Both England and Northern Ireland have more than the EU average proportion of bathing waters failing to achieve ‘sufficient’ quality (the minimum legal standard). In terms of achieving ‘excellent’ quality, England only exceeds three EU Member States (Poland, Hungary and Estonia) and Northern Ireland only does better than one (Poland).

	Northern Ireland		England
	Excluding candidate sites	Including candidate sites	
Number of bathing waters assessed in 2023	26	33	423
Excellent	18	19	281
	69.2%	57.6%	66.4%
Good	6	8	99
	23.1%	24.2%	23.4%
Sufficient	1	1	25
	3.9%	3.0%	5.9%
Poor	1	5	18
	3.9%	15.2%	4.3%

² Reg 5(1)(b), Bathing Water Regulations.

Table 1 Bathing Water quality in Northern Ireland and England in 2023

18. These results should be viewed in the context. Only a small number of locations where people actually bathe and use water for recreational purposes are designated bathing sites. Further the results relate to a designated bathing season of May to September. This means many places throughout the year where people could be exposed to harmful pathogens are not protected by the regulations.
19. The project has examined the implementation, effectiveness and coherence of the current legislation and associated institutional and operational arrangements to identify and manage bathing waters. Through this work, we have identified a number of implementation issues. *This section has been redacted as it relates to information recorded for the purposes of OEP's functions relating to investigations and enforcement.*
20. We have, however, identified a particular weakness in how objectives for bathing waters are given effect under the WFD Regulations.
21. More fundamentally, we consider that the design of the current regulations is not comprehensive when assessed against current societal trends. In particular, we highlight that their focuses on 'bathing' and a fixed 'bathing season' limit the ability of the regime to protect people's health when they use waters for recreational purposes. Public expectations and uses of water for leisure purposes have moved on significantly since the legislation was developed. The regulations have not kept up with those changes.
22. While some of the more specific points that we highlight in this report can be dealt with as matters of implementation under the current regulations, changes in law would likely be necessary to deal with such broader issues. We do not make specific recommendations on changes in legislation, or the means through which any such changes could be made, as these are matters for government. Rather, we highlight the possibility of areas where change could be beneficial, for further consideration by Government.
23. The approach in these bathing waters reports to setting out the OEP's view on matters of the adequacy of law and policy is similar to that in our previous reports on the WFD Regulations. Those reports equally set out our view and make recommendations on a number of areas where we suggest that the law or policy could be improved.
24. Following the Board discussion and once we have addressed any comments, we aim to lay the reports before Parliament and the Northern Ireland Assembly on 10 and 23 October respectively. Defra and DAERA will then each have three months to respond. In contrast with our WFD Regulations' reports, since we are not identifying significant compliance issues, we do not see a need to prepare an investigation strategy in this case.

Finance and Resource

25. Resource has been allocated for the project in the business plan. Work by contractors has been completed.

Impact Assessments

26. *This section has been redacted as its publication would be prejudicial to the effective conduct of public affairs.*

Risk Assessment

27. There is a risk around the possibility of producing a report that is inaccurate or legally flawed and damages the OEP's credibility. We have therefore obtained specialist external advice from acknowledged experts, third party reviewers and have fact checked key points with the relevant public authorities.
28. There is a risk that the media interprets our reports to mean bathing waters are generally in a good state, since only 4% of bathing waters are rated poor. However, as noted above the results relate to only a small number of locations over a 5-month period each year where people actually bathe and use water for recreational purposes. This means many places where people could be exposed to harmful pathogens throughout the year are not protected by the regulations. To address this, risk the context in which the results sit will be made explicit in the reports and their media handling.
29. There is a risk we will be seen to address just one aspect of water, when we know that a wider strategic solution is needed. To address this, the reports will reflect the wider context in the Foreword.
30. There is a risk of delay in the project completing in a timely manner or expending more resource than intended. We have been asked to work at pace and to produce relatively short reports. We think we have succeeded in producing quality reports quickly. They are not as brief as originally intended. However, shortening them further would take additional resource, and would lose nuance in some quite complex technical areas which are of concern to stakeholders. This is an area of significant stakeholder interest, and we think it would be counter-productive to spend more time producing more abbreviated reports with which stakeholders might be less content.
31. There is no specific statutory deadline to complete the project and no immediate risk of missing an opportunity to influence the review of legislation. However, we think it is desirable to put our views on the table to inform early thinking.

Equality Analysis

32. No material equalities impacts have been identified.

Environmental Analysis

33. Through making the recommendation for the Board to approve the reports, and the recommendations in them, we aim to further the OEP's principal objective to contribute to environmental protection and improvement of the natural environment. We consider the recommendations in this paper and the draft reports consistent with our duties to act objectively and impartially, and to have regard to the need to act proportionately and transparently. We have undertaken a thorough review of the Bathing Water Regulations, using our own independent expertise as well as analysis from expert consultants to ensure

robust analysis. Publication of the reports will also support our strategic objective of 'better environmental law, better implemented' in line with our strategy.

34. In addition to our specific duties under the Environment Act 2021, we also have a number of relevant duties under environmental law. We consider that publication of these reports will be consistent with those wider duties, for example in relation to protected sites, water quality, and biodiversity conservation. In particular, we have considered our own duty under the WFD Regulations to have regard to the RBMPs. We refer to and build upon our findings from our earlier WFD reports in the context of bathing waters.

Implementation Timescale

35. We plan to publish the reports on or around 10 October and 23 October in England and Northern Ireland respectively. This will give us time to address any comments from the Board, deal with the logistics of typesetting and laying, and send 'no surprises' advance copies to Defra and DAERA. These dates have been discussed with the Comms team to fit well within the broader programme of OEP reports and stakeholder engagement.
36. These dates are also being briefed into HH Global. As there is a busy schedule over the next coming months due to the election, there is very little scope for things to slip or be rearranged without causing problems elsewhere. We are therefore working at pace to meet this schedule.
37. Following publication, we would expect a limited period and level of effort in which we would seek to engage with others to disseminate the report and influence the uptake of its findings and recommendations. We would largely seek to do this as part of our wider, ongoing work in relation to implementation of the WFD Regulations.

Communications

38. From initial discussions with the Comms team, we anticipate three main actions upon publishing the reports or soon thereafter:
- (1) dissemination via national media, the OEP website and social media, as well as email distribution to stakeholders;
 - (2) direct engagement with selected key stakeholders; and
 - (3) online events shortly after publication with stakeholders who joined our meetings during the project.
39. In England, while the findings of the report may not be as hard-hitting as the report on the WFD Regulations, the subject of bathing water quality remains of significant interest to the public, and of more obvious personal and family relevance to people who spend time at bathing waters. Our findings will be positioned as part of that wider narrative. There is potential for significant media pick up.
40. In Northern Ireland, this report will follow shortly after high profile OEP reports on the WFD Regulations and Drivers of environmental condition. The findings here will need to be

positioned as part of a wider narrative about the need for a step change of environmental governance if future generations are to inherit an environment in a positive condition.

41. We will work with the Comms team to ensure the findings of these reports feed into our plans for longer-term engagement and influencing on this issue and our work in influencing the government to move towards a wider strategic solution for water. We will factor in how Defra and DAERA’s plans develop in respect of possible changes to respective bathing water regimes, as ministers confirm their intentions.

External Stakeholders

42. A variety of external stakeholders have been engaged in the project. These have included government departments, industry representation groups and umbrella environmental NGOs. We have referred to this engagement and referenced stakeholder views where appropriate in the reports. The list of those engaged can be found in Annex 1 of the reports.
43. Our comms plan will also include our ‘no surprises’ approach with government departments and could include some pre-publication briefings with a select number of key stakeholders.
44. Many stakeholders will be interested in our findings. There will be associated stakeholder engagement requirements which will be planned further as we finalise our key communications messages. We have also been invited to speak at the Surfers Against Sewage annual UK bathing waters forum in Manchester on 16 November. This is a good opportunity to present our findings to a wider audience, as Surfers Against Sewage has an important practical role in supporting other organisations and community groups to understand the Bathing Water Regulations and apply for bathing water designations.
45. We also have an upcoming engagement with the Chief Medical Officer of the Department of Health and Social Care and the UK Health Security Agency (UKHSA), in light of the England report noting that reconsideration of the appropriate standards for the protection of human health in relation to bathing water quality ought to involve the relevant health authorities.

Paper to be published	Yes in part
Publication date (if relevant)	To be determined
If it is proposed not to publish the paper or to not publish in full please outline the reasons why with reference to the exemptions available under the Freedom of Information Act (FOIA) or Environmental Information Regulations	<p>We propose to publish the reports in full, subject to comments from the Board and other aspects of finalisation as noted in this paper. However, we are not proposing to publish this paper in full for the following reasons:</p> <ul style="list-style-type: none"> • material intended for future publication • publication would harm the effective conduct of public affairs, including the Board's ability to receive candid advice and engage in free and frank

(EIR). Please include references to specific paragraphs in your paper	discussion and these represent internal discussions (s.36 FOIA / reg. 12(4)(e) EIR).
---	--

ANNEXES LIST

This section has been redacted as it contains information available elsewhere.