JUDICIARY OF
ENGLAND AND WALES

Environment Agency
-v-
Southern Water Services Limited

Sentencing Remarks of Mr Justice Johnson
9 July 2021

Introduction

1. Southern Water Services Limited has pleaded guilty to 51 counts of discharging untreated sewage into controlled coastal waters. The offences were committed at 17 separate sites. They were committed over a 6-year period, from January 2010 to December 2015. In that period there were a total of 6,971 discharges of untreated sewage into controlled waters. The average period that each discharge lasted was almost 9 hours. The total period during which untreated sewage was discharged was 61,704 hours, or just over 7 years. The volume being discharged was on average many litres per second – in some instances hundreds of litres per second, over that total period. At one site, it is possible to estimate the volume of untreated sewage that was discharged. The estimate is 850 litres per second or 941.7 million – so almost a billion - litres in total. It has been estimated that the total volume of untreated sewage across all of the sites was in the region of 16-21 billion litres. That is in the equivalent of the volume held by 7,400 Olympic size swimming pools.

2. The sites are each located along the North Kent coast and the Solent. Almost the entire coastline and the adjacent waters are within sites of special scientific interest of one form or another. These include Ramsar sites, Special Protection Areas and Special Areas of Conservation. There are large areas of mud flats or marsh that support huge colonies of wading birds that feed on molluscs. The Whitstable oyster beds, offshore from Whitstable on the North Kent coast, are historically famous for the quality of oysters they produce, bivalve molluscs of the species Ostrea edulis (Native oyster) and Crassostrea gigas (Pacific rock oyster). Modern aquaculture of oysters is one of the most sustainable methods of producing protein in the world. Oysters naturally feed on algae in the water whilst improving water quality and biodiversity. They also act as a carbon store to mitigate climate change. The Solent supports habitats and species of national and international importance which are protected under UK and international law. These are precious and delicate ecosystems.

3. It was into these waters that the quantities of untreated sewage I have outlined were discharged.

4. The evidence paints a vivid and unsurprising picture of the consequences. The Havant Sea Angling Club operates from Bedhampton Creek. In early January 2016, so shortly after the end of the period covered by the indictment, sanitary towels, condoms and tissues could be seen caught in the mooring lines of the club's vessels. There was a strong smell of sewage. Sewage was seen on the slipway. The vessels had to be power-washed. Ropes had to be replaced.

5. Dog walkers have been seen having to walk through the sewage. There are reports of dogs becoming violently ill after swimming.

6. Residents who live near the Swalecliffe site say that discharges from the site were recurring events. They describe incidents where sewage has been seen flowing under the front gates of the site and into Swalecliffe Brook. On one occasion, photographs were taken, showing a footbridge submerged, sewage flooding the road for 24 metres and pooling near a resident's home. The footbridge is used by children going to and from school. The Defendant says that this is due to other deficiencies in the Swalecliffe site rather than those which form the basis of these charges.

7. Oyster landings in the Solent have reduced from 840 tons in 1979/80 to less than 50 tons per year now. This offending only covers a small part of that period, and it is difficult to draw direct links between individual polluting events and specific damage to an identified oyster bed. The reduction in landings is in part due to a need to stabilise stocks, and the introduction of the Pacific oyster has had an impact on the Native oyster. But there is a degree of scientific consensus that a reason for a substantial part of the reduction in the oyster population is water pollution or water quality. The demise of the oyster fishery in the Solent has had a huge impact on the local economy. Conversely, modelling shows that if water quality improves there is likely to be a significant increase in the value of bivalve shellfish harvesting in the Solent.

8. The Defendant is a water utility company. Its duties are simple enough to describe. They are to provide safe drinking water to its customers, and to treat sewage so as to recycle fresh clean water back into the environment. This offending concerns its failures in the discharge of the latter of those two core functions.

9. Each of the 51 offences, seen in isolation, shows a shocking and wholesale disregard for the environment, for the precious and delicate ecosystems along the North Kent and Solent coastlines, for human health and for the fisheries and other legitimate businesses that depend on the vitality of the coastal waters. Each offence does not stand in isolation. It is necessary to sentence the company for the totality of the offences to which it has pleaded guilty. But even that does not reflect this Defendant's criminality. That is because the offences are aggravated by its previous persistent pollution of the environment over very many years. It has 168 convictions and cautions, including numerous offences of discharging untreated sewage, and including offences committed at a number of the sites that are covered by the current indictment.

10. In December 2016 it was fined £2M for discharges of sewage over a 10-day period in 2012. In November 2014 it was fined £500,000 for a discharge of

sewage in July 2013 at Swalecliffe. In August 2013 it was fined £200,000 by HHJ Adele Williams DL, sitting at this court, for discharges of sewage at Margate in 2011. The Defendant appealed against that fine to the Court of Appeal. The appeal was dismissed. Lord Thomas CJ said that the court would not have interfered with a fine "very substantially greater" than that which had been imposed. He expressed the hope that this would be "the last case to come before the court where water companies and other similar utilities have not taken much more seriously the criminality of such offences of the seriousness involved in this case." This case shows just quite how forlorn that hope was. There is no evidence that the Defendant took any notice of the penalty imposed or the court's remarks. Its offending simply continued.

11. When the Environment Agency sought to investigate these offences it met a level of obstruction that it says was unprecedented in its experience of a company of this size. On multiple occasions, employees refused to permit Environment Agency officers to take away documentation that it wished to seize under its statutory powers, refused to allow them to walk around sites unaccompanied, citing "health and safety", and refused to answer questions, despite the Agency's powers to require answers. The employees acknowledged that they were thereby committing criminal offences but said that they were under instructions from managers or the Defendant's solicitor. A letter from an in-house solicitor, on behalf of the Defendant, stated that staff had been told not to communicate or interact with the Environment Agency officers "under any circumstances." Three employees of the Defendant were convicted of offences of obstruction. I am told that that solicitor no longer works for the company. The Defendant itself was acquitted of that offence, but the events I have summarised show that it did not ensure that its staff cooperated with the Environment Agency.

12. The sentence to be imposed for these offences is a fine. The history shows that fines of hundreds of thousands or low millions of pounds have not had any effect on the Defendant's offending behaviour. It is necessary to set a fine which will bring home to the management of this and other companies the need to comply with laws that are designed to protect the environment. Individual shareholders may, I accept, have no direct responsibility for the offending. Their investments may suffer as a result of a substantial fine and its consequences. But if that results in large institutional investors taking a more active role in ensuring that the companies that they invest in comply with the law, then that is not inconsistent with the purposes of sentencing, which include the reduction of crime.

The indictment

13. The sites at which the offences were committed were the Defendant's wastewater treatment works at Eastchurch, Slowhill Copse, Beaulieu, Millbrook, Budds Farm, Swalecliffe, Queenborough, Sittingbourne, Teynham, Herne Bay, Bosham, Thornham, Ashlett Creek, Woolston, Portswood and Chichester, and the Defendant's Diamond Road Combined Sewer Overflow.

14. Counts 1 to 7 concern Eastchurch. Count 1 relates to the period 1 January 2010 to 6 April 2010 and is an offence of polluting controlled waters contrary to

section 85(6) Water Resources Act 1991, in that the company caused or knowingly permitted any poisonous, noxious or polluting matter or waste matter, namely untreated sewage, to enter controlled waters. The 1991 Act was repealed on 6 April 2010 but the same offence was created by regulation 12(1) Environmental Permitting Regulations 2010. Count 2 relates to the period 6 April 2010 to 31 December 2010 and is an offence contrary to regulation 12(1) of the 2010 Regulations. Counts 3-7 relate to offences at Eastchurch for the periods represented by the calendar years 2011, 2012, 2013, 2014 and 2015 respectively and each relate to offences contrary to the same provision.

15. Counts 8-40 follow the same pattern for a further 5 sites, save that in the case of Millbrook there is no charge under the 1991 Act and the counts cover the period January 2011 to December 2015.

16. Counts 41-50 each cover a separate site – so 10 further sites in total, and each relate to discharges of untreated sewage over the period 6 April 2010 until 31 December 2015, save that in 4 cases the period is shorter.

17. Count 51 relates to the discharge of untreated sewage from Diamond Road Combined Sewer Overflow in November 2014.

The offending

18. The detail of the offending is set out in the prosecution's 133-page opening note, the detailed evidence and appendices to which it makes reference, and has been set out orally, together with the mitigation, which I have heard over the last 4 days. The material runs to many thousands of pages. I shall briefly summarise the offending at just two of the sites, Diamond Road and Eastchurch:

    (1) Diamond Road, because it is different in nature from the other 50 counts, the offending is more self-contained, almost to a single incident, and because it is a clear illustration of the harm that is likely to follow from the release of untreated sewage.

    (2) Eastchurch, because it was the subject of the most detailed treatment by the advocates, and it is very broadly representative of the offending that took place at each of the 16 wastewater treatment works.

Diamond Road

19. On 25 November 2014 shellfish flesh samples were taken from Swalecliffe and West Beach in Whitstable for testing. The samples were found to have high E-coli readings: 13,000 colony-forming units per 100g of shellfish. This is an indicator of faecal contamination. The Environment Agency was notified on 1 December 2014. On 11 December 2014 officers from the Agency attended at one of the Defendant's sites to investigate the possibility of a spill from the Diamond Road Combined Sewer Overflow. Inspection of the site diary showed that on 24 November 2014, so the day before the shellfish flesh samples had been taken, the station had not been pumping any flow to treatment as was required by its permit. This was due to a fault with its computer software which had been apparent for some time. This resulted in a discharge of untreated

sewage lasting 20 hours and 6 minutes from 23 November to 24 November. Further discharges occurred on 26 November and 27 November, lasting approximately 9 hours each. The location of the discharges was 1 mile to the east of shellfish beds at Whitstable. These spills had not been reported by the Defendant. A detailed assessment of timings and tides demonstrates that the discharge on 23-24 November was likely to have been taken directly over the shellfish beds. It was assessed that this was very likely the cause of the contamination of the shellfish. The Whitstable Oyster Fishery Company responsibly took the decision to cease harvesting from the Westbeach site in the lead up to Christmas, because of the risk to customers and because of high levels of norovirus in the community. This caused a major disruption in the supply of oysters, a negative impact on its reputation and lost revenue of approximately £25,000. Moreover, in the period between 24 November 2014 and 2 December 2014 an estimated 9,000 - 10,000 oysters had already been harvested, before the company was alerted to the problem, potentially putting at risk anyone who consumed them.

Eastchurch

20. The Eastchurch Wastewater Treatment Works is located on the Isle of Sheppey. It treats wastewater and discharges the product, after treatment, into the Swale. There are storm tanks within the Treatment Works. When, following a storm, the flow into the Treatment Works is too much, the Defendant is entitled to divert the excess flow into its storm tanks. After the storm passes, and the flow decreases, the content of the storm tanks is then added back into the flow through the Treatment Works so that it is treated before discharge. In very exceptional conditions, where the storm tanks themselves are at capacity, further excess may permissibly be discharged without treatment. The pollutant effect is mitigated by the diluting effect of the storm and by other factors too. The permit regulates, amongst many other matters, the flow rate that must be fully treated (the "FFT") before storm tanks can be used, and the capacity of the storm tanks.

21. The required FFT value for Eastchuch is 219 litres per second. That means it must ensure that flows of waste up to that level are treated before the storm tanks are used. However, the flow monitor was set with a range of up to only 200 litres per second. That suggests that the Defendant did not intend to comply with the permit requirement. Much worse than that, a board was secured across the inlet channel to the Treatment Works, thereby reducing the depth of the channel and artificially and significantly limiting the capacity of the channel, and hence the flow rate, so that only a flow rate significantly less than the required FFT, and possibly around 100-130 litres per second, could be achieved. Any excess flow was diverted to the storm tanks. The board was put in place from at least 5 years before the period covered by the indictment. It had been described as "temporary pending being replaced by an actuated control device linked to the FFT monitor". The actuated control device was not installed. As a result, the site did not have sufficient treatment capacity throughout the period covered by the indictment. This was well understood by operatives at the site, one of whom said "[t]he business knows about this issue". The net result is that there were a large number of unpermitted discharges of untreated sewage from

the site. During the period covered by the indictment there were 2,090 discharges into the storm tanks lasting a total of 3,520 hrs. Of the 2,090 discharges into the storm tanks, 257 resulted in discharges to the environment lasting 1,177 hours in total. The 257 discharges to the environment equate to an average of approximately 43 discharges per year, so 3-4 a month. 161 of the discharges lasted for more than one hour.

22. On 16 October 2014 an officer from the Environment Agency visited the site and saw incoming sewage flow being diverted into the full storm tanks, which were then overflowing into a pipe and discharging the untreated sewage into Windmill Creek. The FFT was around 126.5 litres per second, far less than the FFT that was required. There was a similar episode on 8 January 2015.

23. Reports from Eastchurch to the Environment Agency consistently said that there had been no spills. This was incorrect. There was also a degree of underreporting at other sites, but in this respect Eastchurch is not representative because the underreporting there was more stark.

24. Employees at the site were well aware that it was not operating correctly. A Process Scientist said "we were all well aware of the fact the site didn't take the permitted flow. And that it stormed prematurely… it was reported to the business to be investigated".

25. The Field Performance Manager said that the focus had been on ensuring that the treated sewage complied with the regulatory requirements, without attention to the discharge of untreated sewage, thus "end of pipe compliance… has always been king, that's always been the thing that we have really, really concentrated on. Definitely without a shadow of a doubt". He indicated that he was frustrated in trying to manage his sites knowing that they had issues and were non-compliant with the permits. He indicated that he was unsupported by his management. He made it clear that he had made requests to his management on many occasions for the issues to be fixed only to be told "no". He had known of premature spilling at Eastchurch for a number of years: "must have been 2008ish".

26. The position in relation to other sites during the indictment period is comparable, including in respect of a failure to comply with the FFT requirement, the unpermitted discharge of significant quantities, and the accounts given by employees at the sites. The lowest number of discharges is 17 at Ashlett Creek. The highest number is 2,424 at Swalecliff. The shortest duration is 351 hours at Bosham. The longest is 12,631 hours at Queenborough. The average is 3,854 hours, far more than that at Eastchurch which is why there is no unfairness to the Defendant in treating Eastchurch as representative.

27. The Defendant says that the failings at Eastchurch, and other sites, were due to negligence rather than deliberate disregard of the regulatory requirements. It points to the huge scale of its overall operations, of which these 17 sites are just a small part, the complexity of the regulatory regime (the permit for one site ran to 80 pages), the technological challenges of providing monitoring equipment at sewage works which constitute a hostile environment for electronic equipment, and the deficiencies of technology in 2010 compared to now. It is

said that highly professional and competent staff were doing their honest best in very difficult circumstances, but, "with hindsight", it recognises that this was insufficient. In 2008 it had sought approval from the Environment Agency to reduce the permitted FFT from 219 litres per second to 68 litres per second, but this had not been agreed. There have, it is said, now been significant changes to the site to improve its ability to take, and effectively treat, higher flow rates. This has included the installation of an automated penstock to control FFT.

Applicable principles

28. In sentencing the Defendant for these 51 offences I apply the following principles:

(1) It is first necessary to decide whether to make compensation orders and/or a confiscation order.

(2) The appropriate sentence to be imposed is a fine. There is no maximum limit on the amount of the fine that may be imposed for any single offence or for the offending in total.

(3) The level of the fine must reflect the seriousness of the offence and should take account of the circumstances of the case, including the financial circumstances of the offender.

(4) I follow the Sentencing Council's definitive guideline for offences under regulation 12 of the 1990 Act. I reject the Environment Agency's submission that the guidelines do not apply to this type of offending because of its scale and nature, the size of the company and the nature of the omissions. Nothing in the guideline excludes this type of offending and it can be readily accommodated within the guidelines.

(5) The seriousness of an offence is, in the first instance, assessed by reference to the Defendant's culpability and the harm caused.

(6) Having undertaken that assessment, the guidelines are structured by reference to the turnover of the offender, ranging from micro companies with a turnover of not more than £2M, to large companies with a turnover of £50M and over. Where turnover "very greatly exceeds" £50M then it may be necessary to move outside the guideline ranges in order to achieve a proportionate sentence. In doing so, however, it is wrong to apply "extravagant multiples" so as to scale up the guidelines by way of "mechanistic extrapolation" in direct and linear proportion to the turnover.

(7) After identifying the relevant guideline bracket for the assessed harm and culpability, and adjusting that bracket, if necessary, for the company's size, it is necessary to have regard to those factors that increase the seriousness of the offending, and those that reduce its seriousness or reflect mitigation.

(8) If a company has relevant recent convictions then that is likely to result in a substantial upward adjustment.

(9) In some cases, the factors that increase seriousness may make it appropriate to move outside the identified category range.

(10) It is then necessary to ensure that any economic benefit derived from the offending is removed. Normally, the amount of the benefit should be added to the fine. If the figure cannot be calculated then it may be estimated.

(11) The combination of financial orders must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to improve regulatory compliance. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence. The application of these principles may in a case such as the present "result in a fine equal to a substantial percentage, up to 100%, of the company's pre-tax net profit for the year in question (or an average if there is more than one year involved), even if this results in fines in excess of £100 million. Fines of such magnitude are imposed in the financial services market for breach of regulations. In a Category 1 harm case, the imposition of such a fine is a necessary and proper consequence of the importance to be attached to environmental protection."[1]

(12) Other factors that may warrant adjustment of the fine should then be considered.

(13) Some factors could be taken into account at different stages of the process. It is important that the same factor is not taken into account more than once, so as to avoid double counting.

(14) The fine should be reduced on account of the guilty pleas.

(15) A check should be made that the total sentence is just and proportionate to the offending behaviour.

Compensation

29. I do not make any compensation orders. Such orders are not sought. It is, broadly, not practical to identify specific losses attributable to particular offences that have been suffered by identified individuals or companies. Insofar as such losses could be identified that is a tiny proportion of the damage that has been caused by the offending. Insofar as losses have been sustained by bodies such as the Whitstable Oyster Fishery Company it would have been possible to bring civil claims for damages.

Confiscation

30. A confiscation order is not sought. I accept the Environment Agency's argument that it is necessary to ensure that the fines that are imposed remove any benefit that the Defendant has derived from its offending. So long as that objective is achieved it is not necessary separately to make a confiscation order.

[1] *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960 (Lord Thomas CJ, Mitting and Lewis JJ) *per* Mitting J, giving the judgment of the Court, at [40].

Culpability

31. I have assessed the culpability of the company by reference to the culpability of its board of directors at the time of the period covered by the period of the indictment. The board did not have direct operational responsibility for any of the sites. It was several layers of management removed. I am sure that it was not aware of the detailed ways of working at each of the sites and may, for example, not have been aware of the board that had been installed at Eastchurch to limit the flow. Nonetheless, I am satisfied so that I am sure that each of counts 1-50 was committed deliberately, in that there was an intentional breach of, or flagrant disregard for, the law by the Defendant's board of directors, and/or a deliberate failure by the board of directors to put in place and enforce such systems as could reasonably be expected in all the circumstances to avoid the commission of the offences.

32. I reach that conclusion for the following reasons:

(1) The sheer scale of the offending over a 6 year period at 17 separate sites. It is inherently unlikely that this was due to a small number of rogue employees. It is far more likely to be due to deliberate disregard for the law from the top down.

(2) The evidence shows that many different employees, at site level, recognised the inadequacies of the sites and had reported these up the management chain, but to no avail. The number and nature of these reports is such that it is inconceivable that the company, at the highest level, was unaware of the problems.

(3) The board of directors must have been aware of the convictions against the company, particularly those that resulted in six figure fines. Yet, there is no evidence of remedial action being taken.

(4) The current chairman's evidence does not expressly explain the reasons for the offending, but it is entirely consistent with it being due to a culture inculcated by the then board of directors. Thus, he repeatedly emphasises how there has now been a complete culture change in the company. He does not anywhere suggest that the board of directors that was in place in 2010-2015 was unaware of what was going on.

(5) I do not agree that the problems are only clear with hindsight. The Defendant's own case shows that it had the foresight to recognise, in 2008, that Eastchurch could not cope with an FFT of 219 litres per second. That is because it sought approval from the Environment Agency to reduce the FFT to just 68 litres per second. When this was not approved it should have ensured that improvements were made to the site to ensure that it could cope with the higher flow rate that was required. This was just not done. No good explanation has been given. Similarly, when the board which limited the inlet flow was installed around 2005 it was said to be temporary pending an actuated control device. Again, this was just not done. Again, no good explanation has been given. There is no evidence that the improvements which it has been said have now been made could not have been made in

the 2000s. There is no evidence that they depend on technology that has only more recently become available.

(6) I do not accept that the measures that it is said have now been installed were not reasonably expected in the period before 2015. It is said that the approach taken by this Defendant compares with the approach taken by other water utility companies. I do not accept that this means that it took the measures that were reasonably expected to avoid commission of the offences. The evidence shows that the Defendant itself knew well before 2000 that certain measures were required (eg the actuated control device), but it failed to take them.

33. For these reasons, I am sure that the board of directors knew that the systems that were in place were wholly inadequate to prevent unpermitted discharges of sewage into controlled waters, and yet it deliberately failed to put in place and enforce the systems that were reasonably required to avoid the offences. It thereby flagrantly disregarded the law.

34. Count 51 falls into a different category. The problems at Diamond Road arose because of the failure of a computer system installed by an independent contractor. Although the failures had been known about before the November discharge, I accept the submission of Mr Matthews QC that in respect of count 51 the Defendant's culpability could properly be characterised as negligent.

Harm

35. For the purposes of assessing harm, I focus initially on a single representative count, comprising offending over a 1-year period at a single site. This may be taken as count 7, being Eastchurch in the year 2015. Many of the other individual counts likewise represent offending that took place over an entire year, with dozens of individual discharges of sewage.

36. I am sure that this representative count, and the majority of other like counts, considered in isolation, caused harm at level 1 of the guidelines.

37. That is because the offending had a major adverse effect on or damage to water quality or amenity value. It is axiomatic that discharging hundreds of thousands of litres of untreated sewage into a body of water has a major adverse effect on both the water quality and its amenity value: On a hot day, who would not wish to swim in clean water off a beach in Kent? But who would venture into the sea if they knew that the Defendant had discharged a large amount of untreated sewage into the sea from a nearby works the previous day?

38. I reach that conclusion notwithstanding the expert evidence adduced by the Defendant. That proceeded on the explicit recognition and acceptance that sewage discharge is damaging to water quality and amenity. The evidence showed that, over time and depending on tidal flow and other factors, the sewage is dispersed and diluted. Taking the coastal waters around North Kent and the Solent as a whole, there has not been a marked diminution in measurable water quality over the period 2010-2015. Monthly spot checks of water quality by reference to different indicia of pollution have also been largely (and with

some exceptions) benign. There are, however, limitations in the data, including the sporadic intervals at which it has been collected and the macro level at which some of it has been interpreted. It is, as I have said, axiomatic that at the time of the release of untreated sewage, and in the location of that release, there is inevitability a major adverse effect on both water quality and amenity value.

39. Many of the individual offences can also be said to have had the potential to cause major interference with or undermining of other lawful activities. Further, the perception of pollution has an obvious impact on the local economy, from leisure activities to the harvesting of shellfish.

40. There are other dimensions to the harm that was likely caused. Sewage contains human faecal material. Oysters are filter feeders. They become contaminated by faecal material. If that is detected then it may result in a loss of harvest, with consequential economic loss. Count 51 illustrates that. If it is not detected then it may result in human harm from eating contaminated shellfish, for example through norovirus. Again, count 51 is a potential illustration albeit no specific case has been identified. Norovirus can cause extremely unpleasant symptoms, including diarrhoea and vomiting over a period of days. A person infected with norovirus may infect others. In extremely rare cases, and only where the individual is particularly vulnerable, norovirus can theoretically be fatal because of the effects of dehydration and electrolyte imbalance. I accept that the risk of a fatality from any individual discharge of sewage is exceedingly low, but (notwithstanding the expert evidence that was adduced by the Defendant) I do not accept it is entirely non-existent, and here there were several thousand discharges of waste over a long period of time. Even then I do not find that this small and theoretical risk would be sufficient, in itself, to place the case even in harm category 2.

41. Some of the individual counts come within category 2 harm (eg those that cover a shorter time period, for example the early part of 2010 before the change in legislation, or those where there was a relatively small volume of discharge), because it cannot be shown that category 1 harm was in fact caused, but there was nevertheless a risk of category 1 harm.

Guideline bracket for a large company

42. The guidelines for a deliberate category 1 harm offence by a large company provide a starting point of £1,000,000 and a range of £450,000 - £3,000,000.

Size of company

43. The Defendant has an annual turnover of £.88bn. That is higher than the £50M threshold for a large company, by a factor of 17.6. The Defendant has substantial net assets, in excess of £1bn. Its annual profit is in proportion to its turnover, the profit before interest and tax for 2019-20 being £213M.

44. The Defendant has provided a wealth of material about its financial arrangements to seek to argue that its published profit figures should not be used for sentencing purposes. The materials provided analyse, in detail, matters such as “the real/nominal mismatch”, its “derivative portfolio” and “totex

incentives". The Defendant's financial arrangements were described by Mr Matthews QC, without understatement, as labyrinthine. The key underlying point for these purposes is that the Defendant, as a water utility monopoly, derives an income that is regulated by Ofwat. The dividends paid to shareholders are relatively modest. I accept that in these respects it differs from many other commercial entities. I do not accept that this provides a reason to depart from the approach identified in the guidelines. Lord Thomas CJ, dismissing the appeal brought by this Defendant in 2014, said:

> "We have had a statement from the company secretary in which it is said that no dividends have been distributed out of the profits to which we have referred. It is clear that the fact that a privately owned company of this kind does not distribute its profits but ploughs [them] back into the business is irrelevant. It is a profitable company, and in the water industry professional shareholders would be expected to make investments. The court looks at its profitability in the ordinary way, as if it were an ordinary privately held company. It is quite different to Network Rail, where the monies put into the company come from the public purse."[2]

45. Applying the guideline figures for a large company would not achieve the principles that I have outlined. It is necessary to move outside the suggested range in order to achieve a proportionate sentence. I do so by increasing the range by a factor of 2.5. That gives a starting point of £2.5M and a range of up to £7.5M for an individual offence.

Factors increasing seriousness

46. I adopt a starting point of £2.5M. The factors that increase the seriousness of the offending are:

(1) the previous convictions (which include convictions immediately before, during and after the indictment period, and convictions which are closely similar to the current offences).

(2) The underreporting of spills (recognising that this was not as significant at other sites as it was at Eastchurch).

(3) The motivation for the offending which, as I find, was to focus the company's attention on those metrics that increased its income ("end of pipe compliance… has always been king"), disregarding its wider compliance obligations.

(4) The serious obstruction – within the meaning of the sentencing guidelines – of the Environment Agency's investigation (irrespective of the fact that the company was acquitted of a criminal offence of obstruction).

47. I do not treat the location of the offences as a separate aggravating factor because I took that into account for the harm assessment.

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[2] *R v Southern Water Services Limited* [2014] EWCA Crim 120 *per* Lord Thomas CJ at [17].

48. The factors I have identified as aggravating factors (and the Environment Agency relies on others besides) are each sufficiently serious to warrant a substantial upward adjustment, albeit I have stopped short of moving outside (or even to) the top of the adapted guideline range.

49. I adjust the starting point from £2.5M to £7M to reflect these factors.

Factors reducing seriousness

50. I have taken account of all of the detailed written material and oral argument that has been advanced by Mr Matthews QC on behalf of the Defendant. The written material included a sentencing note, appendix 6 of which deals with mitigation.

51. I do not consider that the submissions advanced under the heading "co-operation with investigation, self-reporting and early admission of guilt" reduce the seriousness of the offending. The overall stance of the company was obstructive, not co-operative. Any co-operation was grudging, partial, inadequate and forced. The investigation was not triggered by any self-reporting on the part of the Defendant. The identification of the problem was delayed because of a failure in self-reporting. The pleas fall to be taken into account at a later point in the process.

52. The main thrust of the mitigation that is advanced concerns more recent remedial steps that have been taken. Less than a week before this hearing, the chairman of the company filed a statement. He expresses remorse and his, and his Board's, determination to put matters right. He outlines the steps that have been, are being, and will be, taken to achieve that. The Environment Agency do not challenge the bona fides of the chairman's statement. He was not involved in the company during the period of the indictment. He is relatively new to the company, and has evidently come in with his eyes open. I too have no reason to doubt the chairman's genuineness. The remorse and the determination to put matters right do amount to substantial mitigation. I accept that some significant steps have been taken, and significant financial expenditure has been incurred. That too amounts to substantial mitigation However, the weight that can be attached to the matters set out in the chairman's statement is attenuated by its late arrival, the attitude that was shown by the company during the Environment Agency's investigation, the fact that many of the remedial steps are proposed for the future rather than steps that have already been taken, and the fact that similar statements of remorse have no doubt been given on many previous occasions when the company has been convicted, only to be subsequently shown to be all warm words and no action. I do not accept that market and price sensitivity sufficiently accounts for the lateness of the chairman's statement. That might explain the precise timing within the last month, but the Defendant company has known about the scale of the issues for a very long time, and it could have made public statements to similar effect at a much earlier stage.

53. Having regard to the mitigation, I reduce the fine for the notional representative count to £6M. I consider that a fine of £6M after trial for the offences charged under count 7 would meet the seriousness of the offences, taking account of the aggravating and mitigating factors. That bears comparison for the fine of £2M

after reduction for plea in December 2016 where the offending related to a single site over a 9-day period, where it was negligent rather than deliberate, and where there was no uplift for the size of the company. It also bears comparison with fines upheld or substituted in other cases by the Court of Appeal Criminal Division.

54. A fine at that level would not be remotely sufficient to reflect the totality of the offending here. There are 51 separate offences, the vast majority of which would individually merit a fine of £6M, and each of which would merit a fine of at least £3M. It would be disproportionate, and contrary to the principles that underpin the notion of totality, to impose fines at that level for each of the individual offences. I consider, however, that the totality of the offending could only be met following trial by a fine of £6M for each of the 16 treatment sites over the entire 5-year period, together with a fine of £3M on count 51 (equivalent to the fine imposed (before adjusting for plea) for a similar offence in December 2016). That amounts to £99M in total.

Removal of economic benefit derived from the offending

55. It is not possible precisely to calculate the benefit that the Defendant derived from its offending. It is, however, possible to estimate the benefit in different ways.

56. One approach is to consider the amount that the Defendant was notionally paid to treat the sewage that it did not in fact treat. That can only be assessed in a broad brush manner, but I accept the methodology that the Environment Agency has adopted when, at my invitation, they performed a calculation using the known volume of discharge at one site, scaled up and down according to the size of other sites and the known duration of leaks that occurred at those sites. That produces estimates of between £33.3M and £43.3M in respect of the income that the Defendant achieved for work that it did not do, not including count 51. This approach avoids having to address the Defendant's argument that any claimed saving of expenditure does not amount to a real saving because of the way in which the Defendant is funded. This is because the benefit here is not achieved by way of a saving, but rather by way of income that was in fact received for work that was not in fact done. For the same reasons, I do not accept the Defendant's alternative suggested approach, which is to approach the untreated wastewater by reference to the costs it says it has saved, which produces a figure of around just £1M. Nor do I accept the Defendant's alternative figures for the volume of the discharges. Those alternative figures in fact accept the methodology adopted by the Environment Agency for all sites apart from Swalecliffe, but adopt a different approach for Swalecliffe for reasons that do not seem to me to have been justified.

57. Another approach, by way of a cross-check, is to consider the savings that the Defendant achieved by not carrying out necessary maintenance in the period 2010-2015. An indication of the cost of such maintenance is the costs that the Defendant says that it has now incurred seeking to put matters right. The costs identified in respect of the 17 sites amount to well in excess of £100M. The Defendant achieved a benefit by not having to incur these costs in advance of

the indictment period (and further maintenance costs during the indictment period).

58. Taking all these matters into account I estimate the Defendant's benefit at £36M (towards the bottom of the range indicated by the Environment Agency's estimates). I add that to the £99M to reach a fine of £135M.

Proportionality of fine to the Defendant's means

59. For the reasons I have given, the Defendant is to be treated in the same way as other companies with a corresponding financial profile. A fine of £135M amounts to a very substantial proportion of its annual net profits. It represents approximately 10% of its net assets. It falls within the scope of that contemplated by the Court of Appeal in *Thames* for this type of offending. I am satisfied that it is proportionate to the Defendant's means. I recognise that the Defendant may require substantial time to pay. There is power to allow such time.

60. I also recognise that a fine at this level, coming on top of other regulatory action, may trigger a chain of events that might cause the continued viability of the Defendant, in its current form, to be reviewed. If so, that is an acceptable consequence of the seriousness of this offending against a background of a failure over many years to respond to previous court interventions.

Consideration of other factors

61. The Defendant has been the subject of a major regulatory intervention from Ofwat. This has resulted in a penalty of £37.7M which has been reduced to £3M in the light of undertakings to provide redress of £34.7M to customers in lieu of a penalty. In addition, it is required to make reparations to customers and former customers of around £123M in the coming years. I see no principled reason why this should lead to a reduction in the fine imposed for these offences.

62. Mr Matthews QC suggested that his client found itself in a cycle of poor performance, offending, credit risk and financial challenges. I do not disagree with that assessment. Other types of criminality can lead to cycles of offending too. There is no reason why this Defendant should be treated differently.

Reduction for plea

63. The Defendant entered guilty pleas to all counts at the first hearing in the Crown Court. It had unequivocally indicated to the Environment Agency, in advance, that it would do so. I give full credit for the pleas, and reduce the fine by a third to £90,000,000.

Totality

64. I have ensured that the total sentence is just and proportionate to the offending behaviour by imposing the fines I have indicated on one count for each of the sites, and by imposing no separate penalty for the remaining counts for each of the sites.

65. I therefore apportion the fine as follows:

(1) Counts 7, 14, 21, 26, 33 and 40-50: a fine of £5,500,000 on each count.

(2) Count 51: a fine of £2,000,000.

(3) Counts 1-6, 8-13, 15-20, 22-25, 27-32 and 34-39: no separate penalty.

66. The total fine is therefore £90,000,000.

67. I impose the statutory surcharge in the sum of £120. There is a claim for costs in the sum of £2,542,428.51. I will adjourn the hearing of the application for costs.