

**APPEAL TO PLANNING AND ENVIRONMENT DECISIONS WALES**

**APPEAL REF:**

**PURSUANT TO SECTION 43 OF THE WATER RESOURCES ACT 1991**

**BETWEEN**

**CANAL & RIVER TRUST**

**Appellant**

**and**

**NATURAL RESOURCES WALES**

**Respondent**

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**GROUND OFS OF APPEAL**

**IN RESPECT OF LICENCE WA/067/0005/0030,  
SITE CRT236, LLANTYSILIO FEEDER**

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***NB References to [Appendix [x]] are references to the location of the documents in the appeal bundle***

- 1 These Grounds of Appeal are split into three sections: Background, the Law and Guidance and the Grounds of Appeal.

**BACKGROUND**

**About the Appellant**

- 2 The Appellant is a navigation authority within the meaning of section 221 of the Water Resources Act 1991 (the “**1991 Act**”) [Appendix 9]. It is a non-governmental organisation and registered charity formed in 2012 as the successor body to the British Waterways Board (“**BWB**”), assuming various

functions and liabilities of BWB, and taking title to property and assets, under the terms of the British Waterways Board Transfer Scheme 2012.

- 3 The Appellant's functions include responsibility for over 2,000 miles of waterways in England and Wales including large parts of the canal network, some of which dates back more than 200 years.
- 4 As navigation authority, the Appellant is under a statutory duty to maintain its navigations to various standards depending upon the status of the waterway. Under schedule 12 Part II of the Transport Act 1968 [Appendix 11], the Appellant's navigations are divided into Commercial or Cruising waterways; this schedule includes "*The Shropshire Union Canal from its junction with the Manchester Ship Canal at Ellesmere Port to its junction with the Staffordshire and Worcestershire Canal at Autherley, including the branches to the River Dee at Chester, to Llantisilio and to Middlewich*". The section of the canal at Llantisilio is also known as the Llangollen Canal (the "**Canal**").
- 5 Under section 105 of the Transport Act 1968 the Appellant has a duty to "*secure the general availability of the commercial and cruising waterways for public use*" and in order to do so it is required to "*maintain the commercial waterways in a suitable condition for use by commercial freight-carrying vessels*"; and "*to maintain the cruising waterways in a suitable condition for use by cruising craft, that is to say, vessels constructed or adapted for the carriage of passengers and driven by mechanical power*".
- 6 This duty includes a requirement to maintain the navigations to allow passage by boats that "*correspond to, or are less than, those of a vessel of that kind which customarily used that waterway or part during the period of nine months ending with 8th December 1967*".
- 7 In performing its functions the Appellant must ensure that the Canal is kept supplied with water, and so it is required to abstract water to transfer to its system. This abstraction has formed part of maintenance of the canal network for as long as that network has existed.

## **LAW AND GUIDANCE**

### **The Licensing Regime**

- 8 Abstraction operations are licensed under the regime implemented by the 1991 Act, as amended. In order for an entity to carry out abstraction activities which fall within the scope of this regime it is required to apply to the relevant authority for a licence: in Wales the relevant authority is the Respondent.
- 9 Until recently the Appellant was not required to hold any licences in respect of its abstraction operations as section 26 of the 1991 Act provided a broad exemption from licensing requirements for operations carried out by a navigation authority in the carrying out of its functions.
- 10 The scope of this exemption was narrowed considerably by amendments made under section 5 of the Water Act 2003, which came into force on 1 January 2018. Following these amendments this exemption applies only to transfers, without intervening use, from water systems and supply reservoirs of a navigation authority to certain specified types of waters.
- 11 These amendments were driven in large part by obligations placed on the UK by the Water Framework Directive (Directive 2000/60/EC).
- 12 Changes to the regime were contemplated at the time the Appellant came into being and assumed the role of BWB. On 6 June 2012 the Appellant entered into a Memorandum of Understanding with the Secretary of State for Environment, Food and Rural Affairs (“Defra”) in relation to its operations in England. A similar Memorandum was negotiated with the Welsh Government (the “draft Memorandum”) [Appendix 5]. Although not signed, the draft Memorandum committed the Welsh Government to work with the Respondent and the Appellant *“to understand the impacts of the canal abstractions and practicable mitigation and improvement measures; protect the water environment; safeguard and enhance environmental, social and economic benefits; and to minimise any impacts on the canals as a result of abstraction licensing charges”*.

### **Consultations on Changes to Abstraction Licensing**

- 13 The process by which this exemption (along with other exemptions) was ended and the way in which licence applications for formerly exempt abstraction activities were to be determined was the subject of consultation by UK and Welsh Governments.

- 14 An initial consultation was carried out in 2009, and a formal response and further consultation was published in January 2016 (the “**2016 Response**”) [Appendix 6].
- 15 At paragraph 51 of the 2016 Response, the Government made clear that it:
- “expects the Regulator [i.e. the Respondent] to take a light-touch, risk-based approach to licensing these abstractions, but in doing so will tackle environmental damage caused by unlicensed abstractions. Our preferred approach is to end exemptions for most of the few remaining exempt abstraction activities, granting a licence in line with recent volumes abstracted where appropriate, and curtailing or refusing licences where there is a risk of serious damage to the environment.”*
- 16 Paragraph 53 of the 2016 Response adds that:
- “The policy approach recognises that these abstractions have taken place lawfully and that all abstractors should be treated in a fair and consistent manner, both when these abstraction exemptions are ended and when the abstraction is moved into the reformed abstraction system.”*
- 17 Paragraph 103 of the 2016 Response indicated the Government’s intention to use its statutory power to direct the Respondent:
- “on the general approach to licensing decisions. The Government expects that the effect of this Direction will be that the Regulator will be able to grant licences in the majority of cases where there are existing lawful entitlements, except where the abstraction may cause serious environmental damage. We consider this will stop the most significant environmental impacts, whilst balancing the needs of existing (currently exempt and licensed) and ongoing abstraction. We propose that the Direction will reinforce the position that existing volumes of ongoing abstraction for New Authorisations are environmentally neutral. This approach recognises that to grant a licence for an existing abstraction to the same extent does not in itself change the environmental impact or increase any damage.”*
- (Ultimately, no direction was issued in Wales as set out in part in paragraph 26 below).
- 18 The Appellant actively participated in the consultation process, and provided a response to the 2016 Consultation [Appendix 7]. In its response the Appellant emphasised that *“many of the Trusts abstractions have been taking place lawfully*

*over two hundred years and will pre-date other licensed abstractions by many years and the Trust welcomes Defra's recognition that these abstractions should not be treated as "new" abstractions and nor should they be used as balancing items within a catchment or prejudiced against because they have not previously been required to the licensed."*

- 19 A further Government response was published in October 2017 (the "**2017 Response**") [Appendix 8]. This set out the Government's final policy approach, confirming (at paragraph 3.2) that:

*"The UK and Welsh Governments expect the Regulator to take a light-touch, risk based approach to licensing these abstractions. A light touch, risk based approach means:*

- The majority of licences will be granted based on existing abstraction requirements. Applicants should be able to demonstrate, to the reasonable satisfaction of the Regulator, their abstraction requirements and entitlements and that abstraction has taken place within the seven year qualifying period.*
- Licences will normally have "hands off flow" conditions to protect rivers during low flows and times of drought where these conditions provide benefits to the environment.*
- The Regulator will have flexibility on the inclusion of volume conditions on transfer licences to avoid undue abstraction control costs on abstractors while still ensuring environmental protection.*

*It is expected that lawful abstractions will only be significantly curtailed or refused to protect the environment from serious damage."*

- 20 The Appellant actively participated in all consultations on this matter and expected that implementation of changes to the abstraction licensing regime, in particular the Respondent's approach to determining related licence applications, would reflect the policy position set out in the Government's responses.

### **Appellant's Abstraction Licence Application**

- 21 The Appellant has actively engaged with the Respondent (and the Environment Agency in England) with regard to these changes to the licensing regime and has identified the need for 150 new licences in respect of those of the Appellant's

abstraction operations which no longer fall within the amended exemption. 11 of these new licences were determined by the Respondent.

22 On 19 September 2019, the Appellant submitted the application which is the subject of the appeal to the Respondent in respect of the site known by the Appellant as CRT236 Llantysilio Feeder (the “**Site**”) [Appendix 1 and 2]. All relevant correspondence between the Appellant and Respondent is contained within [Appendix 4].

23 Pursuant to this application the Respondent granted licence WA/067/0005/0030 (the “**Licence**”) on 21 December 2022 [Appendix 3]. The Licence is the subject of this appeal.

### **The Law**

24 The applications for abstraction licences made by the Respondent in relation to the above changes to the abstraction licensing regime, including the application for the licence that is the subject of the current appeal, were made in accordance with the Water Abstraction (Transitional Provisions) Regulations 2017 (the “**2017 Regulations**”) [Appendix 10] and Chapter 2 of Part 2 of the 1991 Act.

25 The Respondent is required to determine such applications in accordance with the 2017 Regulations and the 1991 Act.

26 Whilst the Government issued a formal direction to the Environment Agency in respect of the determination of licences, requiring them to consider that existing volumes of ongoing abstraction for New Authorisations were environmentally neutral and requiring a light touch approach, the Welsh Government considered that recent Welsh legislation was sufficient for supporting a light touch, risk-based approach to licensing abstractions that qualified for the transitional arrangements, without making a formal direction to Natural Resources Wales. The references to recent Welsh legislation were to the Environment (Wales) Act 2016, and the Well-being of Future Generations (Wales) Act 2015. The Welsh Government further stated “*and among Natural Resources Wales’ seven Well-being Objectives is the objective to promote successful and responsible business that use natural resources without damaging them*”.

27 Section 43(1)(a), Chapter 2, Part 2, of the 1991 Act [Appendix 9] provides that:

*“Where an application has been made to the appropriate agency for a licence under this Chapter, the applicant may by notice appeal to the Secretary of State if the applicant is dissatisfied with the decision of the appropriate agency on the application”.*

### **Application for the Licence**

- 28 This appeal relates to an abstraction from the River Dee at Horseshoe Falls, Llantysilio.
- 29 The detail of the abstraction is set out in the supporting information submitted with the application form [Appendix 2].
- 30 The Canal for which the abstraction is required is designated as a cruising waterway under schedule 12 Part II of the Transport Act 1968 [Appendix 11]. It was constructed under powers granted to the original commissioners of the navigation in the 1700s, who were granted general powers to supply the Canal with water, including powers to construct new cuts and feeders to supply the Canal.
- 31 In the Supporting Information, the point of abstraction is shown on drawing 4 and 7.1 and is marked as abstraction point A on the schematic at section 8.4 (the **“Abstraction Point”**). The abstraction is made from the main River Dee at Horseshoe Falls, which is diverted into the feeder channel via a weir; flow into the feeder passes through permanent trash grilles, and removable fish screens at certain times of the year. The flow passes through a meter house with an upstream and downstream sluice either side of a Venturi flume (used to measure the abstracted volumes). The abstraction is managed by raising and lowering the downstream sluice. Horseshoe Falls, together with the nearby aqueduct, forms part of the Pontcysyllte World Heritage Site.
- 32 Although the Appellant’s abstraction for canal supply at this location was exempt from licensing until the legal changes outlined above, the abstraction is conjunctive as United Utilities Water Limited (**“UU”**) also abstract at this location from the Abstraction Point. UU’s abstraction is subject to a separate abstraction licence (24/67/05/0057/V001) [Appendix 12] (the **“UU Licence”**), and is held by UU to authorise abstraction for their water transfer. The abstraction is used by UU to feed Hurleston Reservoir. The UU Licence at Llantysilio has been held by UU and its predecessors since 1978; the Appellant operates the abstraction on behalf

of UU and there is a commercial agreement between UU and the Appellant in relation to the abstraction and the conveyance of water along the Canal.

- 33 Due to the amount of debris entrained in the trash grilles and fish screens, and the risk that this poses to the abstraction, the current regime of maintenance and inspection when either screens are in place involves two operatives from the Appellant inspecting and clearing the screens twice per day.

### **Eels (England and Wales) Regulations 2009 - screening**

- 34 The Abstraction Point has been identified by the Respondent as a priority site for eel screening under the Eels (England and Wales) Regulations 2009, and discussions are ongoing with the Respondent as to how to screen the site for eels effectively. Eels are not listed as being present in the Dee SAC (referred to below), and so these are separate to the requirements for screening to protect Salmon and Lamprey under the Licence.
- 35 Eel screens will require considerable work to the intake, which will require consent from Cadw, as the regulator to protect the historic environment, given that the Horseshoe Falls are designated as a World Heritage Site. Planning permission and other regulatory consents will also be required, and the feasibility of the 3mm screens has not yet been established. The Appellant (and UU) currently holds an exemption from the need for an eel screen, and there is currently no timetable for installation of the 3mm eel screens. However, the eel screen requirements may supersede any screening conditions placed on the Licence under the Habitats Directive (below) in due course.

### **Habitats Directive - Screening**

- 36 The River Dee and Bala Lake SAC lists the presence of Atlantic Salmon as one of the primary reasons for designation, with Sea, Brook and River Lamprey also present. As part of the Habitats Directive review of consents process, the abstraction was the subject of a Habitats Regulations Assessment (“HRA”) in 2007. The conclusion of this assessment required, amongst other measures, the provision of screens at the Abstraction Point.
- 37 These screening requirements are set out in the UU Licence at condition 9. This requires that at the Abstraction Point (marked as Point A in the UU Licence):

**“9.5 For the period 1 March to 12 April in each year:**



*No abstraction shall take place unless six flat panel screens with 4 millimetre mesh are installed to prevent entrapment, entrainment or impingement of lamprey at the point of abstraction in accordance with the plans and specifications to be submitted and approved in writing by NRW."*

and

***"9.6 For the period 13 April to 31 August in each year***

*No abstraction shall take place unless six flat panels with 10 millimetre mesh are installed to prevent entrapment, entrainment or impingement of salmon at the point of abstraction in accordance with the plans and specifications to be submitted and approved in writing by NRW"*

No screens are required for the period 1 September through to 28/29 February, inclusive.

- 38 Following the removal of the Appellant's exemption from the need for abstraction licensing, it was required to apply for a licence for its abstraction from the Abstraction Point and, as stated above, it submitted its application on 19 September 2019. This was validated by the Respondent on 20 December 2019.
- 39 In an email to the Appellant on 27 June 2022, the Respondent stated that the HRA that it had undertaken into the Appellant's application had indicated that *"the current fish screening arrangements at the site are not sufficient"*, and that the period of screening would need to be extended, to require *"4mm screens between 1st February and 31st May each year"* and *"10mm screens between 1st June and 31st January"*. This would therefore require screening to be in place all year.
- 40 The email states that *"we understand that this could present practical and operational difficulties for CRT and United Utilities. Therefore consideration is being given to alternative screening arrangements. We understand that under the Eel Regulations plans are currently being progressed for all- year round 3mm screening"*. The email requested an update on these discussions.
- 41 In response, the Appellant replied on 15 September 2022 stating that *"We are also in discussions with UU about screening requirements under the Eel Regulations. UU are anticipating having a design proposal and costing by around the middle of September, which will be subject to a heritage impact assessment and further finalisation of the design. It is not possible to commit to a detailed*

*programme of works and timescales until design is finalised*". The email also confirmed that the proposed year round screening "*could present practical and operational difficulties*" for the Appellant.

- 42 The Respondent replied on 21 October 2022, stating "*It is now clear that the all year 3mm screening option will not be in place ahead of 31<sup>st</sup> December 2022 deadline for determining transitional licence applications. Therefore we are minded to apply screening requirements in line with the conclusions of the HRA assessment, i.e. 4mm screens between 1<sup>st</sup> February and 31<sup>st</sup> May each year and 10mm screens between 1<sup>st</sup> June and 31<sup>st</sup> January each year. We acknowledge the practical difficulties the proposed conditions present for CRT. However, these conditions are considered necessary to meet the requirements of the Habitat Regulations.*"
- 43 The Respondent and Appellant met on 7 November 2022 to discuss the proposed conditions (including screening and various other conditions). On 17 November 2022, the Appellant requested a copy of the HRA, stating "*we consider that having visibility of this now is imperative to avoid the Trust considering an appeal against the imposition of screening conditions that are inconsistent with the existing UU licence at the same location*".
- 44 The draft licence was provided to the Appellant by email from the Respondent on 23 November 2022. The draft contained the proposed year round screening conditions outlined above. In response to the Appellant's request for a copy of the HRA on which these were based, the Respondent stated "*As the determination process is still on going, we do not consider it appropriate to share a copy of the HRA with you at this time.*" It did however provide commentary to seek to provide justification to the screening requirement; this email can be found in the correspondence bundle at Appendix 4. The justification stated that for lamprey the Respondent's "*current understanding is that there are relatively high numbers of species entrained outside the current window*"; no evidence was provided to demonstrate this fact. For salmon, it stated "*current evidence suggests there is likely to be Autumn salmon/trout parr movement in all catchments. As there is currently no screening in place at this time, there is a potential for adverse impacts on their ability to migrate downstream during September/ October*". No evidence was provided to demonstrate this assertion.
- 45 The Appellant replied by email on 30 November 2022, stating "*We are disappointed that you are unable to share the Habitats Regulations Assessment*

*(HRA) in advance of determination of our licence; it is important that the Trust can properly understand the justification for the proposed conditions. We do not feel the justification provided in your email... gives enough detail/supporting evidence on what has changed between the Habitats Directive Review of Consents in 2007 and the HRA undertaken in 2022. We would therefore like to request urgently more specific fisheries information that the changes in screening requirements have been based on".* Specifically, it requested evidence to demonstrate the statements made in the email of 23 November 2022 were justified. It also further referred to the inconsistency with the UU Licence.

46 On 30 November 2022, the Respondent stated that it would endeavour to provide the Respondent with the additional information requested. Additional information was provided by email on 2 December 2022, which can be found in the correspondence bundle [Appendix 4].

47 The Licence was issued by the Respondent on 21 December 2022 [Appendix 3], and the HRA was also provided at the same time [Appendix 13]. The Licence contains the following conditions:

***"9.4 For the period 1 February to 31 May in each year:***

*(i) No abstraction shall take place unless screens with 4 millimetre mesh are installed to prevent the entrapment, entrainment or impingement of lamprey at the point of abstraction in accordance with plans and specifications to be submitted and approved in writing by NRW"*

***"9.5 For the period 1 June to 31 January in each year:***

*(i) No abstraction shall take place unless screens with 10 millimetre mesh are installed to prevent the entrapment, entrainment or impingement of salmon at the point of abstraction in accordance with the plans and specifications to be submitted and approved in writing by NRW"*

48 The Appellant has reviewed the HRA provided on 21 December 2022; the HRA refers to a number of documents and internal emails which contain the evidence on which the HRA was made. The Appellant requested copies of a number of documents which it considers it is necessary to view to understand the justification for year round screening; these were only provided by the Respondent on 17 January 2023. The Appellant therefore submits that it was not afforded sufficient

time to evaluate the supporting documents properly in order to verify the HRA justifications for imposing conditions on the Licence.

## **GROUND OF APPEAL**

- 49 The Appellant makes its appeal against the decision by the Respondent to issue the Licence in its current form on the following grounds:

### **Screening - inconsistency with the UU Licence**

- 50 Conditions 9.4(i) and 9.5(i) of the Licence together require screening year round (4mm from 1 February - 31 May and 10mm from 1 June – 31 January). This is inconsistent with the UU Licence for the same abstraction point, which requires 4mm screens from 1 March – 12 April and 10 mm from 13 April – 31 August. The result of this inconsistency means that there is a period from 13 April to 31 May each year where different screening requirements exist at the Abstraction Point- 10mm for UU and 4mm for the Appellant. This is not practically possible as the screens share the same infrastructure. Indeed, it is effectively one single abstraction albeit now regulated by two licences.
- 51 The Respondent has previously indicated that it was proposing to seek to vary the UU Licence to bring it in line with the Appellant's Licence. It is not currently clear how it is proposing to make this change under the 1991 Act, whether it is proposing to seek to persuade UU to make this change voluntarily under the provisions of section 51, or to seek to impose the change under section 52. Changes sought under section 52 by the regulator can be the subject of an appeal. Therefore there is no guarantee that the UU Licence will be varied.
- 52 The Appellant considers that the inconsistency in the Licence conditions, in particular the period between 13 April and 31 May, makes conditions 9.4(i) and 9.5(i) unenforceable. The Appellant therefore submits that the Licence conditions should be varied to ensure consistency with the UU Licence conditions, namely requiring 4mm screens from 1 March – 12 April, and 10mm screens from 13 April – 31 August. It is trite law that conditions in planning permissions, environmental permits, abstraction licences and the like must pass 'the UNCLE test': they must be Unambiguous, Necessary, Clear, Legal and Enforceable<sup>1</sup>. In light of the

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<sup>1</sup> See for example in decision of the Planning Inspector in APP/WQ/09/270R [Appendix 14]; the position taken there being confirmed in the Use of planning conditions - GOV.UK at paragraph 0003 under the sub-heading '*Why and how are conditions imposed*'

inconsistency between the conditions, the Appellant submits that the wording of the Licence is not Clear or Enforceable in its current state.

### **Screening – Habitats Regulations Assessment**

- 53 The Appellant has not been able to consider the conclusions of the HRA fully as it was only provided with the supporting evidence requested from NRW on 17 January 2023. However, having summarily reviewed the HRA in the short time available, the Appellant does not consider it provides justification for year round screening.
- 54 The Licence increases the current screening periods for salmon (10mm) from 18 weeks to 28 weeks each year. The HRA describes new evidence (not provided to the Appellant) *“that suggests there is likely to be Autumn salmon/trout parr movement in all catchments”*. The Appellant submits that, even if the evidence provided on 17 January 2023 demonstrates this (on which the Appellant reserves its position until it has received and reviewed all the relevant information from the Respondent), this does not justify the 10mm screens being required through to 1 January.
- 55 The Licence increases the period for lamprey screens (4mm) from 6 weeks to 12 weeks each year. The HRA considers that there is evidence that spawning is brought forward by an increase in water temperature and so may start before 1 March; however, if this is the case, the Appellant submits that the spawning period may therefore finish earlier, and extending the period to 31 May may not therefore be justified. The HRA also states that *“the studies carried out for the review of consents in 2007 recorded relatively high numbers of brook lamprey (were) entrained outside of the current screening window”* but it was not considered necessary at that time to increase the screening window. As such, this should not be used as justification for increasing the window in the Licence.
- 56 The Appellant is concerned that the increased maintenance and clearing of the screens has not been evidenced as justified in the HRA. As outlined above, the screens require two operatives attending the Site twice per day to keep the screens clear of debris. It is anticipated that, particularly during the winter months, leaf fall is likely to increase the frequency of clearing required. Consequently, the Appellant submits that the Respondent has failed to adopt a “light touch, risk based approach” in determining the Licence in contravention with the Government’s 2017 Response (as per paragraph 19 above).

- 57 Due to the lack of any legitimate justification to require screening throughout the winter, the Appellant therefore submits that conditions 9.5(i) and 9.6(i) should be amended to reflect conditions 9.5 and 9.6(i) of the UU Licence.

**BURGES SALMON LLP**

**18 January 2023**