

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

GROUND OFS OF APPEAL

IN RESPECT OF LICENCE WA/054/0001/0123,

SITE CRT286, PENARTH FEEDER, NEWTOWN

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 some of its navigations to various standards depending upon the status of the waterway. Under section 104 of the Transport Act 1968 ("**1968 Act**") [Appendix 11], the Appellant's navigations are divided into Commercial, Cruising and 'remainder' waterways. The Appellant is under a duty to maintain commercial and cruising waterways (which are listed in Schedule 12 the 1968 Act) for navigation by the relevant class of boating traffic. No such duty applies to the remainder waterways (which includes the Montgomery Canal). The Appellant owns and operates a number of these remainder waterways; some are navigable in sections, others are simply maintained as waterways, often with environmental interest including statutory designations under environmental legislation.

5 **LAW AND GUIDANCE**

The Licensing Regime

- 6 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.
- 7 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.
- 8 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.
- 9 These amendments were driven in large part by obligations placed on the UK by the Water Framework Directive (Directive 2000/60/EC).
- 10 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

- 11 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.
- 12 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].
- 13 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.”
- 14 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.”
- 15 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 equivalent direction was issued in Wales as set out in part in paragraph 32 below).

- 16 Paragraph 106 of the 2016 Response notes that, *“to implement this policy the Government proposes that in most cases the Regulator grants a licence with standard licence conditions based on the volume of water that has been abstracted previously”*. Paragraph 118 adds, in the context of transfer licences, that it was the Government’s *“intention that volumes will be included, where possible, on all transfer licences as part of the New Authorisations process. We expect the Regulator to give volumes on transfer licences that reflect the current volumes abstracted”*. The stated intention was however that *“this can be achieved within our “light touch” approach without requiring such rigorous monitoring and reporting standards as when compared to the normal standards for full licences. For example, we expect the Regulator would not normally require daily records of abstraction to be taken and that monthly records could be sufficient. It could also be more appropriate to rely on other methods of assessment rather than detailed measurement through the use of metering which would be difficult in many cases”*.
- 17 Paragraph 109 set out the proposal that Hands off Flow (**“HoF”**) conditions would be attached to all transfer licences *“To be compliant with the overall approach required by the WFD we expect the licences will be subject to the minimum protection standards that would normally be applied to other newly licensed abstractions and be consistent with the minimum acceptable flow identified as part of the Catchment Abstraction Management Strategies (CAMS) process. In over-abstracted catchments where flow does not support WFD objectives, this will normally be set at Qn95 (or a groundwater equivalent). For all other catchments where flow supports WFD objectives, 75% of Qn99 will be applied.*

This is based on the current licensing process but with a less stringent approach to meeting Environmental Flow Indicator (EFI) targets at the initial point of grant. This will improve the sustainability of a catchment by protecting it from environmental damage caused at low flows. Full sustainability, as required by the WFD, will be achieved through future catchment reviews as part of RBMP¹.

- 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 In response to the proposals to include Volumes on transfer licences, the Appellant set out its position that this would not be a fair approach as the majority of transfer licences do not have volumetric limits on them, and that fundamentally it would not be possible to set an appropriate level on the condition as the majority of abstractions do not enable volumes to be recorded. It was not therefore clear how the regulator could grant a licence in line with recent volumes, and that as this would go further than a day- job transfer licence it would therefore put a greater regulatory burden the Appellant, and would not meet the aim of a light regulatory touch. It stated *“If volumes are to be included on transfer licences, the Trust has concluded that it will not be possible to ascertain the “right” volumes in time to include them on the new authorisations at the time of issue because of the late stage at which this proposal has been put forward by Government. The majority of our exempt abstractions have not had measurement in place for the four year qualifying period (or at all).... Most abstractors will be unable to provide reliable evidence of the volumes of their abstraction (even if they can demonstrate that have made some abstraction)”* The Appellant expressed concerns that *“if volumetric conditions are set too low an amount it could compromise the viability of our waterways and/ or expose the Trust to criminal prosecution for breach of limits which were simply “wrong” to begin with”*.

¹ the River basin management plan

- 20 In relation to universal HoF condition, the Appellant expressed its concerns that this did not give proper recognition to the fact that these are existing abstractions *“which should be treated equivalently to existing abstractions which are licensed and not to new applications”*. It also stated that proposing a universal HoF *“does not align with the statements that refer to the exempt abstractions already being an integral feature in the catchment water balance and the need to ensure that the transitional arrangements receive a light touch in terms of regulatory burden... The Trust suggests that HoFs should only be brought in to protect from Serious Damage, rather than universally on every transitional application”*.
- 21 The Appellant also expressed concerns over potential environmental impact of HoF conditions, in that *“our abstractions invariably support the water needs of another WFD waterbody, so the inclusions of any HoF conditions may lead to issues of deterioration and potentially even cause serious damage to the waterways that we manage, which is not permissible under the WFD legislation. It is also possible that these abstractions will make a vital contribution to meeting the needs of other downstream water bodies which receive water discharged from canals along their lengths and at their ends”*.
- 22 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.”

- 23 Paragraph 2.5 of the 2017 Response addressed the question of volume conditions applied to transfer licences. Taking into account responses to the consultation (including those provided by the Appellant) the 2017 Response revised the position proposed in the 2016 Response (see paragraph 16 above) stating that:

“the UK and Welsh Governments have concluded that adding volume limits to water transfers does not always reduce environmental risk and may add unnecessary business costs. We have therefore revised the consultation proposal.

The Regulator will have flexibility on the inclusion of volume conditions on a transfer licence. However, the final decision on whether to do so should be proportionate, reflecting environmental risk, impacts on other abstractors and the burdens it places on the abstractor. We expect, in particular, that in situations where an abstraction is currently unmeasured and / or not readily controlled and where there are satisfactory alternative ways to control the abstraction, for example conditions that describe the use of abstraction structures, that the Regulator uses a licensing approach that minimises regulatory burdens on the abstractor.”

- 24 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.

Application guidance

- 25 In the Government’s consultation response (section 2.3) it stated that *“the Regulator will produce guidance on evidence requirements that will take into account the variability of abstractor working practices, including situations where abstraction volumes are not measured”*. It stated that *“if abstractors have concerns about what evidence can be used, the quality of the evidence available,*

or the potential impacts on current business activities, we strongly recommend speaking to the Regulator to discuss the concerns as early as possible in the two year application window”.

- 26 The Respondent produced guidance on the Transitional Water resources licence application form [Appendix 12], and application form at Appendix 13. In section 8 of that guidance, it states “*To qualify for a transitional water resources licence under the transitional regulations, you need to evidence that an abstraction has taken place at any time in the seven-year qualifying period*”, giving examples such as meter readings, pump ratings and how many hours/days the abstraction had taken place. Section 8.1 describes the information that must be included in the Table.

Appellant’s Abstraction Licence Application

- 27 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.
- 28 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 CRT286 Penarth Feeder (the “**Site**”) [Appendix 1 and 2]. All relevant correspondence between the Appellant and Respondent is contained within [Appendix 4].
- 29 Pursuant to this application the Respondent granted licence WA/054/0001/0123 (the “**Licence**”) on 21 December 2022 [Appendix 3]. The Licence is the subject of this appeal.

The Law

- 30 The applications for abstraction licences made by the Appellant 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.
- 31 The Respondent is required to determine such applications in accordance with the 2017 Regulations and the 1991 Act.

32 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 to, 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”*.

33 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

34 This appeal relates to an abstraction from the River Severn at Penarth into a feeder channel which discharges into the Montgomery Canal (the **“Canal”**).

35 The detail of the abstraction is set out in the supporting information submitted with the application form [Appendix 2] The water is abstracted from the River Severn at Penarth which is diverted into the feeder channel via a main river weir. Flow into the feeder is then controlled by two adjacent sluices. The abstraction discharges into an open channel where it then flows to a secondary sluice used to discharge to the Canal.

36 The Canal is a remainder waterway, running for 35 miles from Frankton Junction near Ellesmere in England, over the border into Wales and on to Newtown in Powys. It was constructed under powers granted to the original company of proprietors in 1794. The Canal was abandoned, due to various breaches and lack of use, under the London Midland and Scottish Railway (Canals) Act 1944, which removed the right of navigation over the Canal. Over the years various sections have been partially restored; the British Waterways Act 1987 [Appendix 14]

authorised the partial restoration of the Canal and the British Waterways Act 1988 [Appendix 15] allowed for the right to navigate on the Canal to be restored.

- 37 The Canal also carries a number of environmental designations. The majority of the Canal is designated as a Site of Special Scientific Interest (“**SSSI**”) and the section of the canal in Wales is designated as a Special Area of Conservation (“**SAC**”) (the “**Canal SAC**”), listed for the presence of floating Water Plantain *Luronium natans*, supporting the largest most extensive population in lowland Britain.

River Severn Regulation

- 38 The Appellant’s abstraction at Penarth is subject to the provisions of the Montgomery Canal Operating Agreement 1987 (which was provided to the Respondent within the Supporting Information) (the “**Operating Agreement**”). This Operating Agreement, made between the Appellant’s predecessor BWB, and the Severn Trent Water Authority (the “**Water Authority**”) (as predecessors to the Environment Agency), was entered into as a result of the Appellant promoting the British Waterways Act 1988, and sought to address the operational concerns of the Water Authority as a result of the proposed restoration of the Canal.
- 39 Clause 9 of the Operating Agreement establishes provisions for the regulation of flows, limiting the amount of water that could be abstracted by the Appellant into the Canal from Penarth (and two other abstractions at Tanat and Maesbury). These restrictions apply during any “*river regulation period*”. This is defined in the Operating Agreement as “*any period of time in respect of which the water authority notify the Board in writing that water is being or is about to be released by the water authority from Llyn Clywedog to support the flow in the river Severn*”.
- 40 The provisions of the Operating Agreement are mirrored in the current “Operating Rules for the River Severn Resource/ Supply System February 2012 (version 6)” (“**River Severn Regulation**”) [Appendix 16]. These set out operating rules “*for the day to day management of the reservoirs and groundwater sources which are used to regulate the River Severn and uphold supplies for water supply intakes*” Further background to the River Severn Regulation is provided at Appendix 17.
- 41 The restrictions on the Appellant’s abstraction under the River Severn Regulation are included at 5.6(a). This refers to the Operating Agreement, and establishes a stepped reduction in the Appellant’s abstraction from Penarth Feeder based upon the amount of support water being released from the Llyn Clywedog

reservoir by specifying the maximum rate of abstraction over a 7 day period, as measured at Byles Lock (on the Canal). The table below is from page 48 of the River Severn Regulation and sets out the flow constraints.

Discharge from Llyn Clywedog	Maximum rate of abstraction as measured at Byles Lock
18 MI/d (Comp Discharge)	No restriction
19 – 300 MI/d	No restriction
301 – 499 MI/d	150 MI per 7 days
500 MI/d – max discharge	115 MI per 7 days
Drought Order in Force	50 MI per 7 days

- 42 In addition to these flow constraints, the Appellant *“shall not cause or permit any water to enter the Canal from (Penarth Feeder) during any river regulation period when storage in Llyn Clywedog is less than 25% of its full capacity”*.
- 43 The Appellant’s application for an abstraction licence at Penarth was validated by the Respondent on 20 December 2019
- 44 On 5 May 2022, the Respondent wrote to the Appellant with a number of questions around the Operating Agreement; how the Appellant secured compliance; and how river regulation periods work in practice. The Appellant replied to these questions on the same date to set out how it complies and what the procedures are in relation to the River Severn Regulation - attaching some examples of the emails received from the Environment Agency (who manage the River Severn Regulation).
- 45 On 18 October 2022, the Respondent set out their intention to include *“conditions on the (licence) in order to mitigate against adverse effect on site integrity of any Natura 2000/Ramsar site”* by the inclusion of a 10% of Q95 HoF condition, and screening requirements of 10mm at the point of abstraction, plus a 40mm screen at the overflow weir. A meeting was held between the parties on 7 November 2022 to discuss the draft conditions further.
- 46 On 24 November 2022, the Respondent wrote to the Appellant, in relation to their proposal that volumetric restrictions would be included on the Licence *“to protect migratory fish species of the Severn Estuary and Ramsar, as well as to ensure sufficient water for the canal SAC during period of low flows”*. The email also confirms that the internal consultees of the Respondent had confirmed that the proposed screening conditions were acceptable – and stating that *“I am sure you are aware that the Penarth Feeder is a listed building and a historic monument...”*

I wanted to flag that you should engage with the Local Authority to discuss the above screening requirements”.

- 47 On 30 November 2022, the Respondent wrote to the Appellant with *“an update on the flow restrictions we consider necessary to protect migratory fish species of the Severn Estuary SAC and Ramsar. The most plausible licensing scenario would be to include 2 flow restrictions on the River Severn at Penarth”*. It attached a word document (*“Respondent’s Analysis”*) which purported to provide *“further detail on these scenarios, as well as impacts on abstractable volumes for the Montgomery Canal”*. The email also stated *“We are keen to know whether you would have any further information or supplementary data to allow us to better understand how the proposed restrictions could impact on water levels within the canal (SAC)”* asking for this information *“with some urgency”*.
- 48 The Respondent’s Analysis of the Appellant’s abstraction contained many inaccuracies and concerning statements. It appeared to have been incorrectly assessed as if the abstraction was a pumped abstraction with standard rates, which resulted in wholly incorrect analysis of hourly and daily flows based on the maximum instantaneous rate (0.228m³/s) that the Appellant had provided as part of its application; it is completely inappropriate to assess the abstraction in this way. In fact, the Appellant’s abstraction is dependent on river flows, and the rate of abstraction fluctuates in reaction to those flows. This incorrect analysis led to erroneous statements in the Respondent’s Analysis such as *“It’s clear that abstraction exceeds 10% of the river flow at the lowest flows, equating to 44% of the flow at Q99”*; in fact, at low flows the abstraction would be proportionately lower as the head of water would not allow for the maximum abstraction rate to be taken- the maximum rate would only be taken at times of high flow in the river providing the head of water to give that high rate of abstraction. This incorrect assumption also means that the analysis of the proposed flow restrictions at Table 1 are completely incorrect.
- 49 In addition to these incorrect calculations, the Appellant did not recognise the figures provided in Table 2 of the Respondent’s Analysis which purported to demonstrate the *“Impact on abstraction volumes associated with proposed restrictions”*; these figures were not provided to the Respondent and are completely different to the SCADA data available for the abstraction. The

Appellant provided its concerns by email to the Respondent on 9 December 2022 (email in the correspondence at Appendix 4).

- 50 The Appellant was also concerned that the Respondent was asking for evidence of what the proposed impacts would be on the Canal SAC of the volumetric and proposed HoF conditions, stating on 1 December 2022 *“for the appropriate assessment of the likely significant effects of the abstraction restrictions on the site integrity of the Montgomery Canal SAC, we consider the Habitats Regulations Assessment (HRA) process needs to be followed. It appears from your email that this has not been done yet. Please can you confirm if this is the case, or provide the HRA stage 1 and stage 2 documentation if it has?”*
- 51 The Respondent replied on 2 December 2022 stating that *“we recognise that any restrictions to flows could have an impact on the Canal SAC, however in balancing the needs of the Severn Estuary and Montgomery Canal Designations, we feel that this is the most appropriate way forward”*.
- 52 As well as providing its serious concerns over the Respondent’s Analysis outlined above, in its email on 9 December 2022 the Appellant also stated *“we wish to query why at this stage the River Severn operating agreement ... appears to have been disregarded in the derivation of the proposed flow restrictions. The provisions of the operating agreement already protect the River Severn by limiting our abstractions when flows in the River Severn are regulated by releases from Llyn Clywedog or when reservoir storage is less than 25%. We do not consider therefore that the additional flow restrictions placed on the licences are necessary”*.
- 53 The Respondent provided its response to the Appellant’s concerns over the Respondent’s Analysis on 14 December 2022; it stated that the River Severn Regulations (as outlined above) were not provided to the Respondent with the Appellant’s application. As these rules are managed by the Environment Agency as the regulator, and are publicly available, the Appellant did not consider it was necessary to provide these to the Respondent. However, in relation to the Appellant’s abstractions for the Canal they reflect the Operating Agreement, which was provided. The Respondent further stated: *“In relation to your licences the restrictions are unlikely to be applicable until the late spring / early summer months, allowing time to gather and review any further evidence to demonstrate whether any changes could be made. We can initiate an NRW led variation to a*

licence where appropriate. We are happy to continue further dialogue with you once the licences are issued to understand your further concerns particularly around the impact to SAC features.”

54 The draft licence was provided to the Appellant on 9 December 2022; the Appellant responded on 15 December 2022, clearly stating that *“these are not comprehensive responses regarding the challenges we have previously made in writing to you”* and that it had not had sufficient time to consider the response to its concerns over the Respondent’s Analysis.

55 The Licence was issued on 21 December 2022. The Habitats Regulations Assessment (“**HRA**”) for the licensing decision was also provided [Appendix 18].

GROUND OFS OF APPEAL

56 The Appellant makes its appeal against the decision by the Respondent to issue the Licence in its current form on the following grounds.

Condition 6.1 - Maximum quantities of water to be abstracted

57 This condition restricts the Appellant’s abstraction to 821.3 cubic metres per hour, 14,574 cubic metres per day and 2,311,216 cubic metres per year.

58 As outlined above, the calculation of these figures has been based on an incorrect assumption that the abstraction is repeatedly varied by the Appellant over the course of a day. During even dry periods the Appellant ordinarily sets the feed and only adjusts the sluice opening every few days. The Hydrological calculations in relation to the Appellant’s abstraction have resulted in volumetric conditions appropriate to a pumped abstraction rather than a gravity fed abstraction which fluctuates with river levels. The restrictions are therefore unnecessary and, on this basis, cannot be justified.

59 Even if volumetric conditions were justified by the Respondent’s Hydrological calculations (which the Appellant submits that they are not), the Appellant further submits that this condition fails to adopt a “light touch, risk based approach” in determining the Licence, in contravention of the Government’s 2017 Response (as per paragraph 22 above). There is no justification for hourly, daily and annual conditions, and no environmental benefit in their imposition; rather, there is more likely to be an environmental impact on the Canal SAC.

- 60 Further, the Appellant submits that the HRA on which the need for these conditions is based fails to properly consider the potential impacts on the Canal SAC. This abstraction is the only source of supply for the Canal SAC and SSSI and any reduction in supply could impact the water quality and designated features – most notably *Luronium natans*. The Canal suffers from low dissolved oxygen, which most recently resulted in fish deaths in the summer of 2022; a reduction in water supply to the Canal is likely to exacerbate these issues. This aspect has not been properly assessed by the Respondent, as evidenced by the fact that in November 2022 it asked the Appellant for its views on the likely effect of the flow constraints. The Respondent has taken a precautionary approach to impacts on the flow in the River Severn SAC (many miles downstream, and affected by many other abstractions) and associated migratory fish species, but it has failed to take a precautionary approach to the impact of its proposed restrictions on the Montgomery SAC, which directly relies upon this abstraction for its water.
- 61 Finally, the Appellant submits that there is, in any event, no need for these restrictions as the abstraction is already adequately controlled under the Operating Agreement and River Severn Regulation, which is in place to protect flows in the River Severn and provides an established process to control the Appellant's abstraction.
- 62 The Appellant therefore submits that the proposed restriction on the quantities of water to be abstracted places an unjustified regulatory burden on the Appellant, has been incorrectly assessed, and has the potential to impact on the Canal SAC. The Appellant therefore submits that condition 6 should be removed in its entirety.

Condition 6.1 - Definition of an 'hour' and 'day'

- 63 Condition 6.1 seeks to define these terms, stating "*an hour is any period of 60 consecutive minutes, a day means a period of 24 consecutive hours*". Whilst the Appellant submits that condition 6 should be removed in its entirety, it also considers that the definition of an hour and day as rolling time periods is unjustified and places an unreasonable and unnecessary regulatory burden on the Appellant. Defining these time periods in this way effectively amounts to requiring instantaneous monitoring at all times to demonstrate compliance within a 24 hour or 1 hour period and is inconsistent with 8.1(i) which only requires records to be taken once "*at the same time each day*". Therefore, although the Appellant's

position remains that condition 6.1 should be deleted in its entirety, the Appellant submits that the definition should be amended to define a 'day' as midnight to midnight, and an 'hour' as a 1 hour period starting on the hour.

Condition 8.1 - Returns

- 64 Whilst the Appellant contends that the maximum quantities of water to be abstracted in condition 6.1 should be deleted in their entirety, it further submits that the requirement to provide annual returns to the Respondent under condition 8.1(ii) "*within 28 days after 31 March in each year*" is an unnecessary regulatory burden on the Appellant and is not appropriate to include on a transfer licence. The Appellant is willing to send the data "*within 28 days of being so requested in writing by NRW*" which it submits should be sufficient to demonstrate compliance without the need for annual returns. It therefore submits that this requirement should be removed from the Licence.

Further Conditions

Condition 9.1 - Hands off Flow (HoF)

- 65 As well as volumetric conditions, the Licence contains HoF provisions at 9.1. For the same reasons as outlined above in relation to the volumetric limits, The Appellant submits that the proposed HoF conditions places an unjustified regulatory burden on the Appellant, have been incorrectly assessed, and have the potential to impact on the Canal SAC as they significantly constrain the water availability to supply the Canal and hence the Canal SAC. The Appellant therefore submits that condition 9.1 should be removed in its entirety.

Condition 9.2 – During any 'river regulation period'

- 66 The Appellant fails to understand why the Respondent did not simply reflect the provisions of the existing and established River Severn Regulation in drafting the conditions on this Licence. Condition 9.2(i) correctly reflects the condition in the River Severn Regulation, but the Respondent has failed to include the stepped conditions outlined in the table above at paragraph 41. Condition 9.2(ii) restricts the Appellant's abstraction to "*50 Ml/d in any period of 7 days*" which reflects the provisions of the River Severn Regulations, but adds an additional stepped reduction in 9.2(iii).

- 67 The Appellant therefore submits that condition 9.2 should be amended to reflect the provisions of the River Severn Regulation, which is an established process for protecting the flows in the river Severn. As outlined above in relation to the HoF and volumetric conditions, any restrictions above those already in place impose an unjustified regulatory burden on the Appellant and cannot be justified by the HRA or the Respondent's Analysis.

Condition 9.4 - Screening Conditions

- 68 The Licence contains a condition at 9.4(i) to require that "*No abstraction shall take place unless the Licence Holder has installed a screen with spacing no greater than 10 millimetres to the point of abstraction to prevent the entrapment, entrainment, or impingement of fish*".
- 69 Further, at 9.5(i) a second screening condition requires that "*No abstraction shall take place unless the Licence Holder has installed a screen with spacing no greater than 40 millimetres to the point of discharge to the River Severn from the overflow weir*".
- 70 The Appellant was first notified by the Respondent of the likelihood that the HRA would conclude screening would be a requirement on this Licence in October 2022. Since that date, the Appellant has commissioned a consultant to consider the feasibility and design of such a screen at this location. Whilst it may be feasible to install such screens, further feasibility studies will be required as well as civil, mechanical and electrical works to install the screens. In addition, there are other regulatory controls which could impact on the Appellant's ability to construct the screens. As the Respondent referred to in its letter issuing the Licence, the Penarth Feeder is a historic Monument and Listed Building and as such consent will be required from CADW, as well as planning permission from the Local Authority, flood defence permit from the Respondent, plus potentially a Habitats Regulations Assessment into the impacts on the abstractions, and of construction, to the Canal SAC. The Appellant is a charity, and the funding to install these screens (which could amount to many hundreds of thousands of pounds) is also not yet in place. It was therefore not practically possible for the Appellant to install such screens from the date of issue of the Licence.
- 71 Screening requirements were also placed on a number of the Appellant's licences in England by the Environment Agency. The Environment Agency recognised that these could not practically be in place from the first day of the licence, and

therefore issued licences to require screens to be installed in accordance with an agreed programme. Such discussions were not progressed by the Respondent, and therefore it is not possible for the Appellant to comply with condition 9.4(i) unless it ceases abstraction - which would have a consequential damaging effect on the Canal SAC and place the Appellant in breach of the Habitats Regulations 2017 and the Wildlife and Countryside Act 1981 in relation to an damage caused to the SSSI.

- 72 No consideration has been given in the HRA process as to whether the screens need to be in place all year round in order to provide the desired protection. In addition, no assessment has yet been undertaken as to whether the screens would impact upon the abstractions and whether this would have a consequential impact on the Montgomery Canal SAC.
- 73 For these reasons, the Appellant submits that further discussions are required with the Respondent to ensure that they are aware of the time needed for these further investigations to be concluded, programme to be developed and regulatory requirements complied with. The Appellant therefore submits that conditions 9.4(i) and 9.5(ii) be amended to require the screens to be installed once these investigations are completed and all regulatory requirements have been met. The Appellant would welcome the opportunity to explore this further with the Respondent to ensure that it can continue to provide the Canal SAC with water.

BURGES SALMON LLP

18 January 2023