

**IN THE MATTER OF THE WATER RESOURCES ACT 1991
(AS AMENDED BY THE WATER ACT 2003) AND THE
WATER ABSTRACTION (TRANSITIONAL PROVISIONS)
REGULATIONS 2017**

APPEAL BY: CANAL & RIVER TRUST

SITE AT: River Dee at Horseshoe Falls

**Planning And Environment Decisions Wales (PEDW)
REFERENCE: CAS-02487-Q9Z8H3**

**STATEMENT OF CASE OF
NATURAL RESOURCES WALES**

Glossary of terms

Abstraction	Removal of water from a source of supply (surface or groundwater).
Abstraction Licence	The authorisation granted by Natural Resources Wales in Wales and the Environment Agency in England to allow the removal of water from a source of supply.
Ammocoetes	The larval stage of lamprey fish.
Appropriate nature conservation body (ANCB)	Advisor to the competent authority (see “competent authority” defined below). Natural Resources Wales is the appropriate nature conservation body for all National Site Network sites (previously Natura 2000 sites) in Wales. (See definition of “National Site Network” below).
Catchment	The area specific to a river network from which precipitation (e.g. rainfall) and groundwater will collect and contribute to the flow of that network.
Competent Authority	The body determining whether a consent, permission or other authorisation should be given in the context of the Habitats Regulations. Natural Resources Wales exercises the competent authority role in Wales.
Entrapment	The condition where entrained fish lack the means to escape a water intake structure.
Entrainment	The unwanted passage of fish through a water intake, which is generally caused by an absent or inadequate screen surrounding the water intake.
Fry	Fish in their first year.
Habitats Directive Review of Consents (HDRoC)	A review of all existing permissions within a particular catchment to determine no adverse effect, or risk of adverse effect, on the integrity of sites designated under the Habitats Directive and Birds Directive, to ascertain if the existing permissions could be allowed to continue unmodified.
Habitats Regulations Assessment (HRA)	An assessment of the potential impacts of ‘projects’ on National Site Network sites (see below).
Impingement	The physical contact of a fish with a barrier structure (screen) due to intake velocities which are too high to allow the fish to escape.
Kelt	Adult salmon, that has recently spawned, often in poor condition.
National Site Network	Special Areas of Conservation (SACs) and Special Protection Areas (SPAs) in the UK no longer form part of the EU’s Natura 2000 ecological network. Amendments made in 2019 to the Habitats Regulations 2017 have created a National Site Network on land and at sea, including both the inshore and offshore marine areas in the UK.
Parr	Juvenile salmonid in its 2 nd or 3 rd year in freshwater (pre-smolt).
Site Integrity	The coherence of the ecological structure and function of a site, across its whole area, or of the habitats that enable it to

	sustain the habitats and/or populations of species for which the site was designated.
Site of Special Scientific Interest (SSSI)	Protected site designated under the Wildlife and Countryside Act 1981.
Smolt	Juvenile salmonid at the stage when it migrates from fresh water to the sea.
Special Area of Conservation (SAC)	Protected site designated under the Conservation of Habitats and Species Regulations 2017.
Transfer Licence	The authorisation granted by Natural Resources Wales in Wales to allow the transfer of water from one source of supply to a different source of supply / another point in the same source of supply, without intervening use.
'UNCLE' test	The principle that licence conditions must be <u>U</u> nambiguous, <u>N</u> ecessary, <u>C</u> lear, <u>L</u> egal and <u>E</u> nforceable ('UNCLE').

Glossary of Acronyms

ANCB	Appropriate nature conservation body
AA	Appropriate assessment
EA	Environment Agency
EAW	Environment Agency Wales
HDRoC	Habitats Directive Review of Consents
HRA	Habitats Regulation Assessment
LSE	Likely Significant Effect
NGR	National Grid Reference
NSN	National Site Network
SAC	Special Areas of Conservation
SSSI	Site of Special Scientific Interest
'UNCLE'	<u>U</u> nambiguous, <u>N</u> ecessary, <u>C</u> lear, <u>L</u> egal and <u>E</u> nforceable

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1. Introduction

- 1.1. This appeal relates to the decision of Natural Resources Wales (“NRW”) on 21 December 2022 to grant a Transfer Licence to the Canal & River Trust (“the Appellant”). The licence authorises the Appellant to abstract surface water for the purpose of “operations in the course of carrying out functions as a navigation authority” at Horseshoe Falls, near Llantysilio, Llangollen (“the Transfer Licence”) (Licence serial number: WA/067/0005/0030).
- 1.2. NRW granted the Transfer Licence (see Annex 1.1) subject to a series of conditions that included, amongst other matters, screening conditions to prevent the entrapment, entrainment and impingement of lamprey and salmon at the point of abstraction. Appended to the Transfer Licence was a section of text under the heading ‘Additional Information’ in which NRW summarised its reasons for including certain conditions.
- 1.3. On 18 January 2023, the Appellant submitted an appeal to Planning and Environment Decisions Wales (“PEDW”) challenging the fish screening conditions included in the Transfer Licence. PEDW accepted the appeal as valid and identified 23 May 2023 as the “start date” for the appeal process.

2. Site and Activity

- 2.1 The Llangollen canal runs between Llantysilio in North Wales to Hurleston in England where it meets the Shropshire Union canal, as shown in Figure 1 below. The canal is supplied with water by an abstraction point from the River Dee at Horseshoe Falls, near Llantysilio. The Appellant submitted an application for a Transfer Licence for this abstraction point, the abstraction having been historically exempt from the licensing regime until the law was changed (explained further in section 3 below).

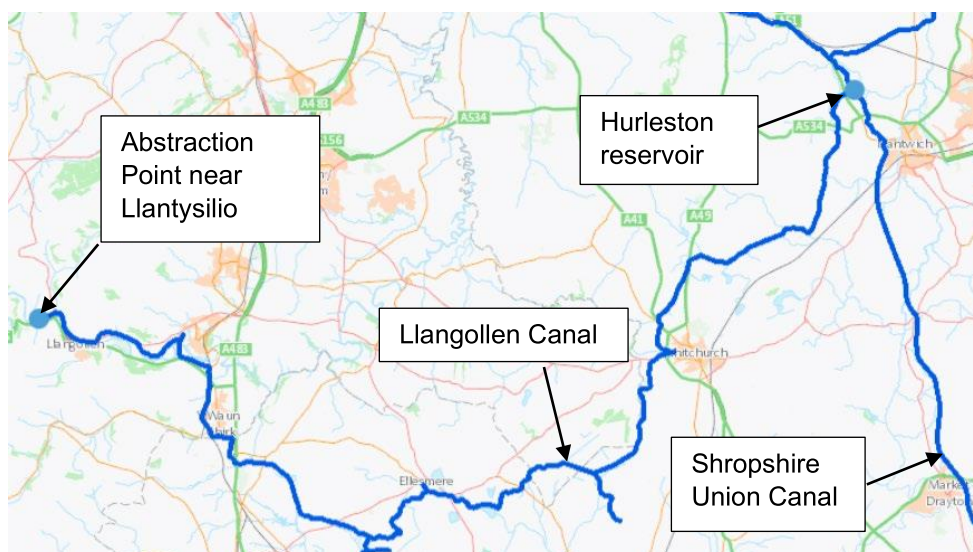


Figure 1. Map showing the Llangollen and Shropshire Union Canals (bold blue line) and the abstraction which provides the water supply to the canal.

- 2.2 The construction of the Llangollen canal and the weir on the River Dee at Horseshoe Falls was authorised by an Act of Parliament. The canal was taken over by the London Midland and Scottish Railway (LMSR), under the LMSR Act 1944. Section 4 of the LMSR Act 1944 authorises the Appellant to abstract from the River Dee at Horseshoe Falls.
- 2.3 According to the information supplied by the Appellant with its application, the abstraction is from the main River Dee at Horseshoe Falls, near Llantysilio, Llangollen at National Grid Reference (NGR) SJ 19588 43283. At the abstraction point, water is diverted via a U-shaped weir into a feeder channel, and then discharged to the Llangollen canal, as shown in Figures 2 and 3 below.
- 2.4 The canal intake is immediately above the crest of the weir. A grill extending across the full width of the intake prevents debris from entering the canal feeder, as shown in Figure 4 below. During certain months of the year fish screens are also in place preventing the entrapment, entrainment or impingement of fish. NRW understand that when these fish screens are in place, regular cleaning is required to prevent the accumulation of debris and to allow the amount of water required for operational purposes to flow through the screens.

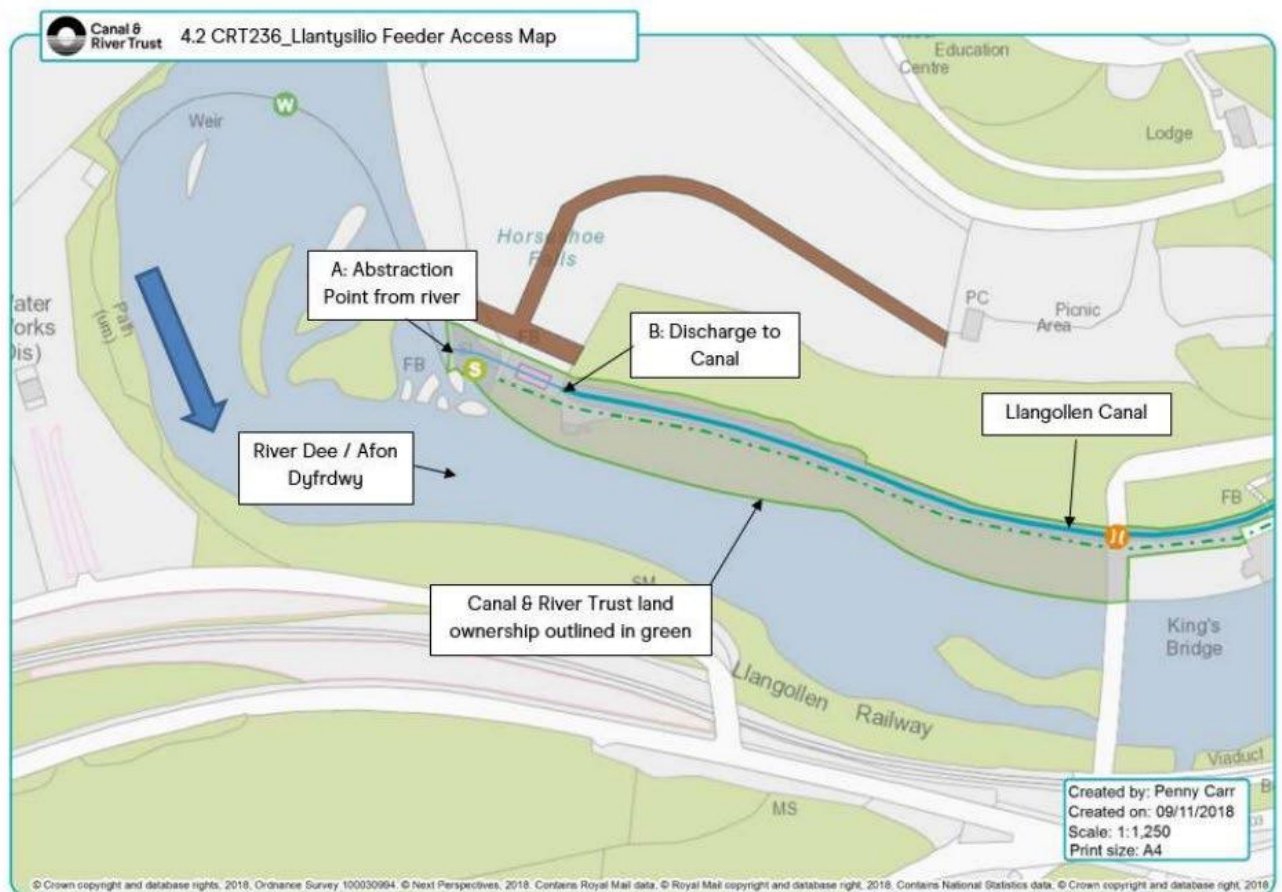


Figure 2. Map included by Appellant within its licence application, showing location of the Horseshoe Falls abstraction from the River Dee and discharge to Llangollen Canal.



Figure 3. Aerial photograph showing location of the Horseshoe Falls abstraction intake from the River Dee and direction of river flow.



Figure 4. Photograph showing the Horseshoe Falls abstraction intake from the River Dee.

- 2.5 The fish screening conditions included on the Appellant's licence (that are the subject of this appeal) do not require the installation of any new infrastructure or changes to the existing infrastructure. They simply require the fish screens already used to be in place for longer periods each year. However NRW acknowledge that changes to the existing maintenance regime will be required

to prevent the accumulation of debris and to allow the amount of water required for operational purposes to flow through the screens.

- 2.6 In addition to the abstraction by the Appellant, United Utilities are also authorised to abstract water from the same point on the River Dee. This abstraction is authorised separately under Abstraction Licence 24/67/05/0057 (see Annex 2.1). The abstraction by both parties is effectively one single abstraction at NGR SJ 19588 43283. Due to the conjunctive nature of the abstraction, the Appellant operates and manages the United Utilities abstraction, including the installation and maintenance of the screens referred to in paragraph 2.4 above. NRW understand this arrangement is subject to an existing commercial agreement between the two parties.
- 2.7 The Appellant transfers water for themselves and United Utilities via the feeder channel to the Llangollen canal. Water abstracted by the Appellant is used to maintain the water levels and navigable depth in the Llangollen canal. The water abstracted for United Utilities is transferred via the Llangollen canal to Hurleston reservoir (shown in Figure 1 above), where it is used for the purpose of public water supply.
- 2.8 The River Dee, from which water is abstracted, is designated as a Special Area of Conservation (SAC) and Site of Special Scientific Interest (SSSI). Further detail is given in section 6.1 below.
- 2.9 The Llangollen canal and the weir at Horseshoe Falls are the subject of various landscape and heritage designations. As a result there is interest from Cadw and the local Archaeological Trust (CPAT) in any proposed works to the site. Most notably, the Pontcysyllte Aqueduct and Llangollen Canal were designated a United Nations Educational, Scientific and Cultural Organization (UNESCO) World Heritage Site (WHS) in 2009. The WHS boundary includes the abstraction intake at Horseshoe Falls and specific mention is given to the weir and the building housing the flow gauge. In addition, the weir, canal entry pounds and sluices are all Grade II listed (reference 19684 and 1237) and are therefore afforded protection under the Planning (Listed Buildings and Conservation Areas) Act 1990. Moreover, the site is a Scheduled Monument under the Ancient Monuments and Archaeological Areas Act 1979. Therefore, any works to the site are also controlled under Scheduled Monument Consent.
- 2.10 There is also interest in the site from local fishing and angling interests, who have raised concerns regarding the current screening arrangements on the structures that facilitate the abstraction and the potential impact this is having on fish species in the catchment.
- 2.11 Under the Eel Regulations 2009 (explained further in section 3.11 below) work is on-going regarding screening improvements to limit the entrainment of migrating eels at the abstraction point. Through this work, consideration is currently being given to an all-year round 3mm screening proposal at the abstraction intake. In recognition of the funding and heritage constraints at the site (see paragraph 2.9 above), an Eel Regulations exemption was issued under regulation 17(5)(a) of

the Eel Regulations 2009. The expiry date for this exemption was 30 June 2023, and the exemption is currently being reviewed by NRW (see Annex 12.1).

3. Legal Framework

3.1 Natural Resources Wales ('NRW') has taken account of all relevant legislation when it made the decision to grant the Transfer Licence, with particular reference to the following (listed in the order discussed below):

- Water Resources Act 1991
- Water Framework Directive (2000/60/EC)
- Water Act 2003
- Water Abstraction (Transitional Provisions) Regulations 2017
- Environment Act 1995
- The Conservation of Habitats and Species Regulations 2017
- Natural Resources Body for Wales (Establishment) Order 2012
- Environment (Wales) Act 2016
- The Well-being of Future Generations (Wales) Act 2015
- The Eels (England and Wales) Regulations 2009

3.2 Water Resources Act 1991 ("the WRA 1991")

3.2.1 Section 24 of the WRA 1991 sets out restrictions on abstracting without a licence. Any person who wishes to abstract water from any "source of supply" must do so in accordance with an abstraction licence granted under Part II of the WRA 1991. Breach of this requirement is a criminal offence.

3.2.2 The WRA 1991, as originally enacted, included a number of exemptions where an abstraction licence was not required. One such exemption applied to operations carried out by a navigation authority in the carrying out of its functions.

3.2.3 Chapter II of Part II of the WRA 1991 makes provision for applications for abstraction licences. Within Chapter II, section 38(3) states that NRW "shall have regard to all the relevant circumstances" when dealing with an application for an abstraction licence including, in particular, any representations received in response to advertising and consultation, and "the requirements of the applicant, in so far as they appear to [NRW] to be reasonable requirements".

3.2.4 Section 40(2) of the WRA 1991 requires NRW to have regard to the minimum acceptable flow in the river or watercourse from which the water is to be abstracted, taking account of the following factors set out in section 21(4) and (5) of the WRA 1991 if (as in the present case) no minimum acceptable flow has been formally determined under Chapter I of Part II of the WRA 1991:

- i. the flow of the waters from time to time;
- ii. the character of the waters and their surroundings
- iii. any relevant water quality objectives established under section 83;
- iv. the requirements amongst other things of navigation and fisheries.

3.2.5 Section 38(2)(a) of the WRA 1991 then empowers NRW to “grant a licence containing such provisions as [it] considers appropriate”.

3.2.6 Sections 51 and 52 of the 1991 Act relate to changes made to existing abstraction licences. Section 51 relates to voluntary changes and section 52 relates to changes imposed by the regulator.

3.3 Water Framework Directive (2000/60/EC) (“the WFD”)

3.3.1 The WFD has established a framework to protect surface waters, groundwater and coastal waters and prevent their deterioration, with the aim of achieving ‘good status’. Following the UK’s departure from the European Union, the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 continue to provide a framework for managing the water environment in England and Wales based on the framework of the WFD, even though the WFD itself no longer applies in the United Kingdom.

3.3.2 The WRA 1991 provides a licensing system for water abstractions, but as noted in paragraph 3.2.2 above, the WRA 1991 as originally enacted also granted exemptions from the need to obtain a licence in some circumstances. These exemptions meant that unlimited amounts of water could be abstracted, irrespective of its availability or the impact of the abstraction on the environment. Therefore, these exempt abstractions had the potential to prevent meeting the WFD’s aim of achieving ‘good status’.

3.4 Water Act 2003

3.4.1 To comply with WFD requirements, the Water Act 2003 included provisions to remove exemptions granted by the WRA 1991 and make the abstractions subject to the licensing system.

3.5 Water Abstraction (Transitional Provisions) Regulations 2017 (“the 2017 Transitional Regulations”)

3.5.1 Many of the exemptions from abstraction licensing granted by the WRA 1991 were removed by the Water Act 2003 with effect from 1 January 2018, pursuant to the 2017 Transitional Regulations.

3.5.2 The 2017 Transitional Regulations required previously exempt abstractors to apply for abstraction licences under the WRA 1991. The combined effect of regulations 3 and 4 was that where a person had abstracted water from a source of supply in the seven years prior to 1 January 2018 without the need for an abstraction licence, they needed to make an application for a licence before 31 December 2019.

3.5.3 The Schedule to the 2017 Transitional Regulations contained requirements for (amongst other things) making the application valid and publicising the application. In particular, paragraph 2 of the Schedule required the application to include details of the abstraction that had been undertaken in the seven years prior to 1 January 2018 (which NRW describes as “the qualifying period”); and

such other information, including maps, as NRW reasonably required. The applicant was also required to sign a declaration to state that the information in the application was true to the best of their knowledge. The information that the applicant provided on the prescribed forms, including the nature and the pattern of the abstraction, then provided the basis for drafting any licence.

3.5.4 Paragraph 10 of the Schedule required NRW to determine the applications within its jurisdiction by 31 December 2022, and if NRW granted a licence on terms that were different in any material respect from those of the application, the notification had to include a statement of NRW's reasons and notify the applicant of their right to appeal (under section 43 of the WRA 1991). Finally, regulation 6 provides that the person may continue to carry out the abstraction as undertaken in the 7 years prior to 1 January 2018 until the application, or any appeal, is determined.

3.5.5 The 2017 Transitional Regulations do not themselves specify any substantive considerations that NRW needs to take into account when determining an application. These substantive considerations are set out in the WRA 1991.

3.6 Environment Act 1995

3.6.1 When determining applications NRW must comply with other legislative duties aimed at protecting the environment, including a duty contained in section 6 of the Environment Act 1995, which contains overarching provisions with respect to water. In particular, sections 6 (1) provides:

"It shall be the duty of an appropriate agency, to such extent as it considers desirable, generally to promote (a) the conservation and enhancement of the natural beauty and amenity of the inland and coastal waters and of the land associated with such waters; (b) the conservation of the flora and fauna which are dependent on aquatic environment; ..."

3.6.2 Section 56 defines "appropriate agency" to include NRW.

3.7 The Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations")

3.7.1 The Habitats Regulations transposed the requirements of the EU Habitats and Wild Birds Directives into UK law and they continue to apply as retained law¹ following EU exit. Their provisions apply independently of any of the other domestic legal provisions mentioned above.

3.7.2 Natura 2000 is a network of nature protection areas in the territory of the European Union made up of Special Areas of Conservation ("SAC") and Special Protection Areas ("SPA"), designated respectively under the Habitats Directive and Birds Directive. Following amendments to the Habitats Regulations in 2019, SACs and SPAs within the UK no longer form part of the EU's Natura 2000 ecological network. These amendments have created a National Site Network

¹ Anything which, on or after exit day, continues to be, or forms part, of domestic law by virtue of the European Union (Withdrawal) Act 2018.

(“NSN”) on land and at sea, including both the inshore and offshore marine areas in the UK.

3.7.3 Under regulation 63 of the Habitats Regulations, NRW, as a competent authority, must, before granting any abstraction licence, assess whether it would be likely to have a significant effect on a NSN site (SAC or SPA), either alone or in combination with other plans or projects. If the licence would be likely to have a significant effect on a NSN site, NRW must undertake an appropriate assessment (“AA”) of the implications of the abstraction upon the site in light of its conservation objectives. In light of that assessment, NRW can then only lawfully grant a licence if it is satisfied that it would not adversely affect the integrity of the NSN site².

3.7.4 Regulation 102(1) of the Habitats Regulations expressly applies the AA process to the grant of authorisations for water abstraction licences under the WRA 1991. Accordingly, before determining this application, NRW considered whether the application would have a likely significant effect (“LSE”) on a NSN site. Where LSE cannot be ruled out, then it is necessary to carry out an AA of the effects of the application on the site. Following completion of the AA, a licence can only be granted where the competent authority, which in this case is NRW, is satisfied that no reasonable scientific doubt remains as to the absence of adverse effects on site integrity. If it is not satisfied of this, it must refuse to grant the consent. As regulation 63(5) of the Habitats Regulations states, in accordance with the precautionary principle that underpins the Habitats Regulations regime:

“In the light of the conclusions of the assessment...the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marina...”

3.7.5 The case law of the Court of Justice of the European Union, which continues to be relevant to the interpretation of the Habitats Regulations in the UK, has confirmed that the precautionary principle is integrated into the assessment provisions of Article 6(3) of the Habitats Directive (transposed as Regulation 63 of the Habitats Regulations) and that when undertaking assessments, a precautionary approach is required.

3.7.6 Regulation 63 of the Habitats Regulations is clear that NRW must be satisfied as to the effects of continued abstractions on a designated site before granting a licence. Accordingly, NRW may not lawfully grant a licence on the basis that continued abstractions would adversely affect the integrity of a NSN site for a period of time before measures might be effective in preventing that adverse effect. Therefore, it was not lawfully open to NRW to grant a licence subject to a ‘transitional period’ when adverse effects on integrity could not be ruled out.

3.7.7 Regulations 64 and 68 of the Habitats Regulations provide a limited derogation from the prohibition on granting consent for plans or projects which will adversely affect the integrity of a NSN site where the following conditions are satisfied,

² This is subject to the provisions of Reg 64, which sets out when considerations of imperative reasons of overriding public interest (IROPI) may apply. This is discussed further in paragraph 3.7.7 below.

namely that: there are no alternative solutions to the plan or project in question; it must be carried out for imperative reasons of overriding public interest (IROPI); and all necessary compensatory measures have been secured to ensure the overall coherence of the NSN of sites is protected. Together, these conditions are known as the IROPI derogation.

3.7.8 Whilst it is NRW (as competent authority) which must satisfy itself that the conditions of the IROPI derogation are met before a consent under that derogation may be given, in practice the derogation process is led by the applicant, who would be expected to produce the information and evidence necessary to support a conclusion by NRW that the relevant conditions for the derogation are met.

3.7.9 Under regulation 65 of the Habitats Regulations, the competent authority is required to review decisions made regarding existing consents, permissions or other authorisations for all relevant plans or projects which are likely to have a significant effect on a European site either alone or in combination with other plans or projects, which are not directly connected with or necessary to the management of that site. Where a competent authority reviews a decision, consent, permission or other authorisation under these Regulations, in the form of AA it must affirm, modify or revoke it.

3.8 The Natural Resources Body for Wales (Establishment) Order 2012

3.8.1 The Order contains the following relevant provisions:

Article 4 - Purpose of the Body

4 General purpose

(1) The Body must—

- (a) pursue sustainable management of natural resources in relation to Wales, and
- (b) apply the principles of sustainable management of natural resources, in the exercise of its functions, so far as consistent with their proper exercise.

(2) In this article—

“principles of sustainable management of natural resources” (“egwyddorion rheoli cynaliadwy ar adnoddau naturiol”) has the meaning given by section 4 of the Environment (Wales) Act 2016;

“sustainable management of natural resources” (“rheoli cynaliadwy ar adnoddau naturiol”) has the meaning given by section 3 of the Environment (Wales) Act 2016.”

Article 5A – Nature Conservation Duties

- 1) The Body must exercise its functions so as to further nature conservation and the conservation and enhancement of natural beauty and amenity.
- 2) The duty in paragraph (1) does not apply to the Body's pollution control functions or its functions under the Forestry Act 1967.
- 3) In exercising its pollution control functions, the Body must have regard to the desirability of nature conservation and of conserving and enhancing natural beauty and amenity.
- 4) Section 1(3A) of the Forestry Act 1967 makes provision about the balance between nature conservation and other matters which the Body must endeavour to achieve in exercising its functions under that Act.

Article 5B

In exercising any function relating to nature conservation, the Body must have regard to actual or possible ecological changes.

Article 5E

In exercising its functions, the Body must have regard to—

- (a) the health and social well-being of individuals and communities;
- (b) the economic well-being of individuals, businesses and communities.

Article 8 - General duty of the Body to have regard to costs and benefits in exercising powers

- 1) In considering whether or not to exercise any power conferred upon it by or under any enactment, the Body must take into account the likely costs and benefits of the exercise or non-exercise of that power.
- 2) In deciding the manner in which to exercise any such power, the Body must take into account the likely costs and benefits of its exercise in the manner in question.
- 3) The duties in paragraphs (1) and (2) [do not apply if], or to the extent that, it is unreasonable for the Body to be subject to them in view of the nature or purpose of the power or in the circumstances of the particular case.
- 4) But those duties do not affect the Body's obligation to discharge any duties, comply with any requirements, or pursue any objectives, imposed upon or given to it by any enactment other than this article.
- 5) For the purposes of this article, costs include costs—
 - (a) to any person; and
 - (b) to the environment

3.9 Environment (Wales) Act 2016

3.9.1 Section 6 of the Environment Wales Act 2016 requires that NRW seeks to maintain and enhance biodiversity in the exercise of its functions, and in so doing promote the resilience of ecosystems, in a manner that is consistent with the proper exercise of its functions.

3.9.2 In response to this duty, NRW has produced a document entitled “Our regulatory approach to deliver sustainable management of natural resources – Our Regulatory Principles” dated April 2016. See Annex 3.1.

3.9.3 These principles are embodied in the determination of all licence applications, namely:

- Deliver outcomes
- Be intelligent
- Prepared to challenge
- Use the full range of tools available
- Be flexible
- Bring the right skills / expertise together
- Be efficient and effective
- Be clear on what we do and why

3.10 The Well-Being of Future Generations (Wales) Act 2015 (“the WBFG Act 2015”)

3.10.1 The WBFG Act 2015 contains the following relevant provisions:

Section 2 - Sustainable development

In this Act, “sustainable development” means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4).

Section 3 - Well-being duty on public bodies

(1) Each public body must carry out sustainable development.

(2) The action a public body takes in carrying out sustainable development must include—

(a) setting and publishing objectives (“well-being objectives”) that are designed to maximise its contribution to achieving each of the well-being goals, and

(b) taking all reasonable steps (in exercising its functions) to meet those objectives.

(3) A public body that exercises functions in relation to the whole of Wales may set objectives relating to Wales or any part of Wales.

(4) A public body that exercises functions in relation only to a part of Wales may set objectives relating to that part or any part of it.

Section 4 - The well-being goals

The well-being goals are listed and described in Table 1—

Goal	Description of the goal
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A prosperous Wales.	An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.
A resilient Wales.	A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).
A healthier Wales.	A society in which people's physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood.
A more equal Wales.	A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio economic background and circumstances).
A Wales of cohesive communities.	Attractive, viable, safe and well-connected communities.
A Wales of vibrant culture and thriving Welsh language.	A society that promotes and protects culture, heritage and the Welsh language, and which encourages people to participate in the arts, and sports and recreation.
A globally responsible Wales.	A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.

5 The sustainable development principle

(1) In this Act, any reference to a public body doing something “in accordance with the sustainable development principle” means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

(2) In order to act in that manner, a public body must take account of the following things—

- (a) the importance of balancing short term needs with the need to safeguard the ability to meet long term needs, especially where things done to meet short term needs may have detrimental long term effect;
- (b) the need to take an integrated approach, by considering how—
 - (i) the body's well-being objectives may impact upon each of the well-being goals;
 - (ii) the body's well-being objectives impact upon each other or upon other public bodies' objectives, in particular where steps taken by the body may contribute to meeting one objective but may be detrimental to meeting another;

(c) the importance of involving other persons with an interest in achieving the well-being goals and of ensuring those persons reflect the diversity of the population of—

(i) Wales (where the body exercises functions in relation to the whole of Wales), or

(ii) the part of Wales in relation to which the body exercises functions;

(d) how acting in collaboration with any other person (or how different parts of the body acting together) could assist the body to meet its well-being objectives, or assist another body to meet its objectives;

(e) how deploying resources to prevent problems occurring or getting worse may contribute to meeting the body's well-being objectives, or another body's objectives.

3.11 The Eels (England and Wales) Regulations 2009 (the “Eels Regulations”)

3.11.1 These Regulations establish measures for the recovery of the stock of European eel.

3.11.2 Part 4 of the Eels Regulations makes provision for the placement of screens that will protect eels over some abstraction intakes.

3.11.3 Regulation 17 applies to any diversion structure capable of abstracting at least 20 cubic metres of water through any one point in any 24-hour period³. Regulation 17(4) requires that a responsible person⁴ must ensure an eel screen is placed in a diversion structure. However, Regulation 17(5) allows the regulator to exempt the responsible person from this requirement by service of a notice.

4. Relevant policy and guidance

4.1 Previously exempt abstractions: ‘New Authorisations’

4.1.1 As outlined in section 3 above, there has been a long history to the process of dealing with previously exempt abstractions, from the introduction of the WFD in 2000 to the commencement of the Transitional Regulations in 2018.

4.1.2 Prior to the implementation of the 2017 Transitional Regulations, two public consultations were undertaken in 2009 and 2016. In October 2017, the UK and Welsh Governments published their response to the latest consultation on bringing previously exempt abstractions into the licensing system: ‘Government response to consultation on changes to water abstraction licensing exemptions in England and Wales: New Authorisations’ (“the 2017 Governmental Response”) (see Annex 4.1). In this document, abstractions that were coming into the system of licence control were referred to as ‘New Authorisations’.

³ The Appellant is authorised to abstract 32,959 cubic metres per day.

⁴ A “responsible person” in relation to a dam, diversion structure or obstruction means the owner, occupier or person in charge of the land on which the dam, structure or obstruction lies.

4.1.3 The 2017 Governmental Response (section 3.2) states that:

“The UK and Welsh Governments expect the Regulator to take a light-touch, risk based approach to licensing these abstractions”

4.1.4 Section 3.2 of the document goes on to state:

“The Welsh Government considers recent Welsh legislation sufficient for supporting a light touch, risk-based approach to licensing abstractions that qualify for the transitional arrangements, without making a direction to Natural Resources Wales”.

4.1.5 Section 3.2 (at footnote 24) refers to the Welsh Government’s view that the Environment (Wales) Act 2016 (see section 3.9 above) placed the sustainable management of natural resources at the core of how NRW should carry out its activities in a manner consistent with its obligations under the WBFG Act (section 3.10 above).

4.1.6 Section 3.2 of the 2017 Governmental Response also states:

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

4.1.7 Section 3.6 (footnote 35) adds that:

“In relation to sites designated under the Habitats Regulations, serious damage includes instances where the precautionary principle is applied because the Regulator has insufficient evidence to conclude no adverse effects to protected sites would be caused”.

4.1.8 NRW considers serious damage to apply where an abstraction is having an adverse effect, or has the potential to have an adverse effect, on the integrity of sites designated under the Habitats Regulations. Accordingly, in the present case, the assessment of whether there would be “serious damage” took the form of the HRA given the potential for adverse effects from the abstraction on the River Dee SAC.

4.2 Operational Guidance Note (OGN) 176: Determining Transitional Water Resources Licence Applications

4.2.1 NRW’s guidance document sets out the process for determining transitional water resources licence applications for previously exempt activities (also known as ‘New Authorisations’ or NAs). The purpose of this guidance is to ensure that transitional licence applications are considered in a consistent manner, and that NRW’s decisions are in line with the 2017 Transitional Regulations and government policy, as well as NRW’s other statutory duties: see Annex 5.1.

4.3 Operational Guidance Note (OGN) 200: Habitats Regulations Assessments of Projects

- 4.3.1 This document is about the procedures that NRW should follow when assessing the potential impacts of ‘projects’ on National Site Network sites: see Annex 6.1.

5. Application History

Please note: For ease of reading this section does not seek to set out all the pre and post-application discussions between the Appellant and NRW, but focuses on the decision-making process as it related to the issues which are relevant to the subject of this appeal.

5.1 Pre-application

- 5.1.1 Prior to the application being submitted, NRW actively engaged with the Appellant as detailed below.

- 5.1.2 In light of the licensing exemption for navigation operations being removed, the Appellant and NRW met on 10 July 2018. The meeting was a high-level discussion about the requirements for the Appellant’s applications and NRW’s approach to licensing previously exempt abstractions.

- 5.1.3 On 29 January 2019, a site meeting took place to discuss the licensing options for the abstraction from Horseshoe Falls. The meeting was attended by the Appellant, NRW, the Environment Agency and United Utilities. A summary of the discussion was circulated by the Appellant on 5 February 2019, which included an action for NRW to: *“provide clarification of any requirements or specific process in relation to the River Dee SAC”*.

- 5.1.4 In an email dated 9 April 2019, NRW provided a response to the Appellant’s email of 5 February, which advised the following:

*“Any new NA application will need to be assessed for the potential to cause Serious Damage (SD) to the environment. If we consider the abstraction may cause SD then we must consider whether the application should be refused or granted but with restrictions. We acknowledge that the abstraction at Llantysilio has already been subject to the HDRoC process and measures are already in place to address the potential adverse impacts identified at the time of the HD assessment (2007). This will certainly be taken into consideration when determining any NA licence application. However, to fully comply with our legal duties it is anticipated that we will need to complete an assessment to demonstrate that the abstraction continues to comply with the requirements of the HD and that SD is not occurring. ... Consideration would also need to be given to other issues such as ... **the suitability of the screening arrangements** at the abstraction location as reflected on the existing UU licence”.*

For further details of the correspondence following the January 2019 site meeting, please refer to Annex 7.1.

5.2 Post-application

5.2.1 On 19 September 2019, the Appellant submitted an application for a new transitional water resources Transfer Licence for the previously exempt abstraction from the River Dee at Horseshoe Falls for the purpose of ‘operations in the course of carrying out functions as a navigation authority’. Copies of the submitted forms and additional information, submitted prior to the application being validated, are provided in Annex 8.1 to 8.5, as detailed below:

- Application Form WRH
- Supporting information document
- Letter of Authorisation
- Abstraction location map
- Raw Abstraction Data

5.2.2 On 8 October 2019, NRW sent an acknowledgement letter to the Appellant, confirming receipt of the application and to advise that further checks would be undertaken to ensure that the relevant application form, supporting documents and fee had been provided.

5.2.3 Following correspondence between NRW and the Appellant, NRW wrote to the Appellant on 20 December 2019, confirming that the application was valid.

5.2.4 Between August 2020 and February 2021, NRW carried out an initial screening and internal consultation exercise for all applications submitted for previously exempt abstractions. Following this the application for the Horseshoe Falls abstraction was assigned a high risk and complexity score, meaning there was risk of potential or actual serious damage to water-dependent features within a designated site.

5.2.5 On 18 March 2021, NRW wrote to the Appellant to advise that its application needed to be advertised in a local newspaper and on NRW’s website. The Appellant acknowledged the update letter in an email dated 25 March 2021.

5.2.6 On 27 April 2021, NRW notified the following interested parties of the application and provided details regarding how to make a representation:

- Cadw
- Clwyd-Powys Archaeological Trust (CPAT)
- Local Fisheries and Angling Group (LFAG)
- United Utilities Water Limited (UU)
- Welsh Dee Trust (WDT)

Cadw and CPAT responded on 10 May 2021 and 26 May 2021 respectively advising they had no concerns regarding the application as no new structures were proposed. LFAG, UU and WDT did not respond.

5.2.7 Internal consultation with relevant NRW teams began on 5 May 2021. The internal consultation responses highlighted concerns regarding the current fish screening arrangements at the site (further details provided in section 6 below).

- 5.2.8 On 18 August 2021, NRW consulted officers working for NRW's appropriate nature conservation body ("ANCB") function via a Habitats Regulations Assessment (HRA) Form, with a focus on potential impacts on the River Dee SAC. Following detailed discussion and revisions the HRA was substantially completed on 15 February 2022.
- 5.2.9 On 27 June 2022, NRW provided the Appellant with a written update regarding their application. The update advised that the HRA undertaken in respect of their application had indicated that the current fish screening arrangements at the site are not sufficient, and that the periods the screens are currently in place may need to be extended. NRW acknowledged the practical and operational implications that extending the screening requirement could present for the Appellant and suggested consideration could be given to alternative screening arrangements. Accordingly NRW requested an update from the Appellant regarding the ongoing screening discussions being held under the Eel Regulations, including expected timescales for implementation. A copy of the email correspondence is provided in Annex 10.1.
- 5.2.10 On 13 July 2022, representatives of NRW and the Appellant met virtually to discuss licence determination progress on all applications that the Appellant had made for transfer licences, including the site that is the subject of this appeal. It was acknowledged that a further site-specific meeting may be required to discuss the Horseshoe Falls site once the Appellant had considered and responded to the points raised in NRW's 27 June email (see paragraph 5.2.9). NRW indicated that fish screening conditions were being considered for all applications where Habitats Regulations apply and that the current position was for these conditions to be effective from date of issue. Potential compliance issues with this approach were acknowledged. A copy of NRW's notes from the meeting is provided in Annex 10.2⁵.
- 5.2.11 On 22 July 2022, NRW wrote to the Appellant about intake screening, advising that due to the uncertainty about whether the screening option proposed under the Eel Regulations would be progressed, NRW were minded to apply screening requirements in line with the conclusions of the HRA. Again the practical and operational implications with this requirement were acknowledged and the Appellant was provided with an opportunity to discuss further. A copy of the email correspondence is provided in Annex 10.1.
- 5.2.12 On 15 September 2022, NRW received a response from the Appellant to their 27 June email (see paragraph 5.2.9). On the issue of intake screening, the Appellant acknowledged the proposal to extend the period of time the current screens are in place, in line with the conclusions of the HRA, and confirmed the practical and operational implications this may present. The Appellant also provided an update regarding the ongoing discussions relating to screening requirements under the Eel Regulations. NRW acknowledged the email on 16 September 2022. A copy of the email correspondence is provided in Annex 10.3.

⁵ Meeting notes are NRW permitting officer's own and were not shared or agreed with the Appellant.

- 5.2.13 On 18 October 2022, the Appellant provided a further update to NRW on the ongoing discussions about eel screening, which confirmed the timescales regarding implementation were uncertain. A copy of the email correspondence is provided in Annex 10.4.
- 5.2.14 On 21 October 2022, NRW responded to the Appellant's emails dated 15 September and 18 October 2022. NRW confirmed that as the screening option being considered under the Eel Regulations would not be in place ahead of the 31st December 2022 deadline for determining transitional licence applications, NRW was minded to apply screening requirements in line with the conclusions of the HRA assessment. Again, NRW acknowledged the practical and operational implications the HRA screening requirements would present for the Appellant, but advised that they were considered necessary to meet the requirements of the Habitats Regulations. NRW also advised the Appellant that once the design and planning processes for the revised screens were complete, they could apply to NRW to vary the screening conditions on any licence issued. Again, the opportunity for further discussion was offered. A copy of the email correspondence is provided in Annex 10.3.
- 5.2.15 On 7 November 2022, NRW attended a virtual meeting with the Appellant to discuss the progress made with the determination process and also to discuss recent correspondence regarding the Horseshoe Falls application, including intake screening requirements. Both parties acknowledged that the HRA screening requirements would mean screens would need to be in place for a longer period than currently required under the conditions of the existing United Utilities Licence 24/67/05/0057 (Annex 2.1). The Appellant indicated they would be likely to appeal this decision as a result of this inconsistency. The Appellant also queried whether NRW was seeking to vary the existing United Utilities Licence 24/67/05/0057 to ensure the screening conditions were aligned. The Appellant also requested sight of the HRA to ensure that the funding for screening could be fully justified. NRW advised that copies of the final HRA documents would be made available once determination was complete. In the meantime, NRW agreed to provide a summary of the relevant information from the HRA to the Appellant. A copy of NRW's notes from the meeting is provided in Annex 10.5⁶.
- 5.2.16 On 17 November 2022 the Appellant contacted NRW requesting a copy of the HRA undertaken in respect of their application and again raised concerns regarding the *"imposition of screening conditions that are inconsistent with the existing UU licence at the same location"*. A copy of the email correspondence is provided in Annex 10.3.
- 5.2.17 On 23 November 2022, NRW responded to the Appellant's email dated 17 November 2022. In response to the request for a copy of the HRA, NRW advised that it was not considered appropriate to provide a copy of the HRA whilst the determination was ongoing and suggested instead that a copy could be formally requested following the determination of the application. NRW did however provide the further justification regarding the proposed screening

⁶ Meeting notes are NRW permitting officer's own and were not shared or agreed with the Appellant.

requirements, as per the outcomes of the HRA. In addition, NRW advised that the concerns regarding the existing United Utilities Licence had been acknowledged during the determination process and that internal discussions were ongoing regarding the potential to review / amend the existing United Utilities Licence 24/67/05/0057 (Annex 2.1) to reflect the proposed conditions on the Appellant's draft licence. A copy of the email correspondence is provided in Annex 10.3.

5.2.18 On 29 November 2022, following further consultation with technical staff and revisions to the HRA, NRW's ANCB officers provided a consultation response agreeing with the final conclusions of the HRA. A copy of the HRA and the response from ANCB officers (Form 2) is available at Annex 9.1.

5.2.19 On 30 November 2022, the Appellant responded to NRW's email dated 23 November 2022 and raised specific queries regarding the justification for fish screening conditions that had been provided by NRW. NRW advised that a response would be provided following further discussion with fisheries colleagues. A copy of the email correspondence is provided in Annex 10.3.

5.2.20 On 2 December 2022, NRW emailed the Appellant with further detailed clarification regarding the justification for the proposed fish screening conditions the Appellant had requested in their email dated 30 November 2022. A copy of the email correspondence is provided in Annex 10.3.

5.2.21 On 12 December 2022, the Appellant again requested a copy of NRW's HRA and supporting evidence. The Appellant also advised that: *"the screens require clearing 4 times per day; therefore requiring the screens to be in place all year adds considerable cost and practical issues"*. Finally, the Appellant requested that NRW delay issuing the licence *"until the end of the determination period"* to allow more time *"to seek legal advice on the merits of an appeal"*. A copy of the email correspondence is provided in Annex 10.3.

5.2.22 On 15 December 2022, NRW replied to the Appellant's email dated 12 December 2022 advising that the issue date would be delayed until week commencing 19 December 2022, but it could not be extended beyond this date. In addition, NRW advised that the HRA would be provided upon completion of the determination i.e. when the licence is issued. A copy of the email correspondence is provided in Annex 10.3.

5.2.23 On 20 December 2022, the Appellant's Transfer Licence and associated decision document were finalised and sent to the NRW permitting team leader for sign-off. A copy of the Decision Document is provided in Annex 11.1.

5.2.24 On 21 December 2022 the Appellant's Transfer Licence WA/067/0005/0030 (Annex 1.1) was issued. Appended to the Licence was a section of text under the heading 'Additional Information' in which NRW summarised its reasons for including certain conditions. The Transfer Licence was accompanied by a supporting issue letter (see Annex 10.6) and a copy of the HRA (Annex 9.1) previously requested by the Appellant. The issue letter provided information regarding the fish screening conditions and explained that these conditions

were considered necessary in accordance with the Habitats Regulations 2017 so as to protect against serious damage.

5.3 Post-licence issue

5.3.1 On 21 December 2022, NRW issued an Eel Screen Exemption Notice (see Annex 12.1) to the Appellant. The notice exempts the Appellant from the requirement to place an eel screen at the canal intake at Horseshoe Falls. The conditions of the Exemption Notice require the Appellant to comply with the screening conditions specified on their Transfer Licence (Annex 1.1). Note, the expiry date for the Eel Screen Exemption Notice was 30 June 2023, and the exemption is currently being reviewed by NRW.

5.3.2 On 21 December 2022, NRW notified the following interested parties that a Transfer Licence WA/067/0005/0030 had been granted:

- Cadw
- Clwyd-Powys Archaeological Trust (CPAT)
- Local Fisheries and Angling Group (LFAG)
- United Utilities Water Limited (UU)
- Welsh Dee Trust (WDT)

No responses were received by NRW.

5.3.3 On 6 January 2023 the Appellant sent a request to NRW for disclosure of the supporting documents referred to in the HRA provided to the Appellant on 21 December 2022. On 17 January 2023 NRW provided the Appellant with the documents requested. Copies of the HRA supporting documents sent to the Appellant are provided in Annexes 9.2 – 9.9.

5.3.4 On 9 January 2023 the Appellant contacted NRW advising that they were currently considering its position in relation to the submission of any appeals, including the Transfer Licence WA/067/0005/0030 (Annex 1.1) issued in respect of Llantysilio feeder to the Llangollen Canal. On 13 January a meeting took place between the Appellant and representatives from NRW Permitting. During the meeting the Appellant confirmed that they were considering an appeal against the conditions included on their Transfer Licence WA/067/0005/0030 (Annex 1.1) and summarised the appeal grounds (see section 7 below). In response, NRW confirmed that the licensing decision reflects NRW's current position but also acknowledged the Appellant's right to appeal.

5.3.5 On 18 January 2023 NRW was notified by the Appellant's solicitors that the Appellant wishes to appeal the conditions of their Transfer Licence WA/067/0005/0030. On 19 January 2023 NRW emailed the Appellant's solicitor acknowledging receipt of the email and associated documents sent on 18 January 2023 and confirmation of access to documents provided on the solicitor's shared access database.

6. Why the conditions were included

6.1 River Dee SAC

6.1.1 The Appellant's abstraction is directly from the River Dee, which is designated as a Special Area of Conservation (SAC).

6.1.2 The River Dee supports a number of fish populations including resident species such as brook lamprey, and migratory species such as Atlantic salmon, which are listed as features of the River Dee SAC.

6.1.3 Further information is available in the River Dee and Bala Lake SAC Core Management Plan (2008)⁷ (Annex 13.1).

6.2 Protected fish species - Lamprey

6.2.1 All three species of lamprey - sea lamprey, river lamprey and brook lamprey - are listed features of the River Dee SAC. However, only brook lamprey are known to be present above the intake at Horseshoe Falls, and therefore are the main species of concern for this site.

6.2.2 There are long standing concerns regarding the potential for a significant proportion of the adult brook lamprey population to be lost from the River Dee SAC, due to their entrainment into the canal intake at Horseshoe Falls.

6.2.3 Brook lamprey are non-migratory, which means they complete their lifecycle within freshwater and do not migrate to sea. However they are understood to move within the river, depending on their lifecycle. Warmer temperatures in the spring stimulate fish movement, and when temperatures reach around 10°C, the adults excavate shallow nests or redds and deposit their eggs. After spawning, adults die. On hatching, the larvae (or ammocoetes - see glossary) drift downstream until they arrive at a suitable nursery site, into which they burrow. They are understood to remain at these nursery sites for approximately six and half years. Metamorphosis generally takes place between July and September. After this, the lamprey swim upstream to suitable spawning sites, where the process begins again.

6.2.4 There is a population of brook lamprey within the canal feeder. It is unclear whether this population are able to reside and spawn within the canal environment. However, as the canal is not considered part of the SAC designation, individuals entrained into the canal are considered lost to the SAC population. Therefore it is necessary to prevent the downstream loss of brook lamprey from the River Dee to the canal in order to improve conservation status of brook lamprey within the River Dee SAC.

⁷ Note, the Core Management Plan published on [NRW's Protected Sites webpage](#) is dated 2022, however the revisions do not relate to the listed fish species.

6.3 Protected fish species - Atlantic salmon

- 6.3.1 Atlantic salmon are designated as a feature of the River Dee SAC and are known to be present above the intake at Horseshoe Falls. There are concerns regarding the potential for Atlantic Salmon to be negatively impacted by the canal intake at Horseshoe Falls, due to entrainment, entrapment or impingement.
- 6.3.2 Atlantic salmon are migratory, meaning juvenile populations (known as salmon smolts – see glossary) migrate downstream from freshwater to the sea, and return to freshwater as adults to spawn.
- 6.3.3 The majority of salmon smolts migrate downstream during the spring, when the sea temperatures and food availability are best for survival and growth. However, this can be delayed by a wide-range of factors, including changes in temperature and barriers to migration. In addition to the downstream migration in the spring, there is now evidence that salmon parr also migrate downstream in the autumn (covered further in paragraph 6.5.4 below).
- 6.3.4 Adult salmon return to rivers to spawn, usually towards the end of the year when water temperatures are cooler. However, as with smolt migration, a wide range of environmental and man-made factors may delay or inhibit the upstream movement of adult salmon. After spawning salmon often die, but a small proportion survive and move back down river and out to sea. A small percentage may return to spawn again in subsequent years.
- 6.3.5 Salmon are classed as an unfavourable feature of the SAC, which is due in part to the low number of adults returning to the catchment to breed. A reduction in breeding adults and juvenile salmon across the Dee means that fewer juvenile salmon will become smolts, meaning a decrease in migrating fish, ultimately resulting in fewer adults returning to their river of birth. At each life stage any loss impacts future recruitment. To bring salmon stocks back to a healthy and sustainable level it is imperative that all life stages of salmon within the Dee catchment are protected by adequate screening at abstraction intakes.

6.4 River Dee Habitats Directive Review of Consents (HDRoC) (2002 – 2016)

- 6.4.1 Given the location of the site within the River Dee SAC, both the Appellant's and United Utilities' abstractions were assessed through the HDRoC process, which is explained in paragraph 3.7.9 above⁸.
- 6.4.2 The HDRoC process was carried out in a number of stages. The screening stage began in 2002 and was completed in January 2003. Sites identified in this stage were then carried through to the Appropriate Assessment stage, which was completed in June 2007. This was followed by the final options appraisal stage, which was completed in 2009. Following this, and further consultation with licence-holders, the necessary licence changes were implemented in 2016.

⁸ The HDRoC process applies to existing consents, permissions or other authorisations. Although unlicensed, the Appellant's abstraction was authorised under the LMS Act 1994 and therefore included in the HDRoC process.

- 6.4.3 During the HDRoC process, NRW's predecessor, Environment Agency Wales (EAW), identified a number of abstractions on the River Dee that may pose a risk to the integrity of the River Dee SAC through the entrainment of fish.
- 6.4.4 To inform the HDRoC process, an environmental consultancy firm (APEM) were contracted by three different water companies abstracting from the Dee, including United Utilities. Fish entrainment studies were carried out at 7 potable water intakes to assess the significance of fish entrainment in terms of populations in the river Dee SAC. A copy of the final River Dee Fish Entrainment Study, dated October 2007, is provided in Annex 14.1.
- 6.4.5 The entrainment surveys commenced at 5 of the intakes on 26 April 2006. Minutes from a meeting held in November 2006 (see Annex 14.2) specifically refer to the need to include the Horseshoe Falls intake in the study, and suggest that the Appellant's predecessor, British Waterways, declined to participate in the study. However, following a request from EAW, the Horseshoe Falls intake was incorporated into the survey programme and sampling commenced at the end of January 2007. Sampling was undertaken at the Horseshoe Falls site, as well as the other five sites on the River Dee, until June 2007.
- 6.4.6 Due to the late addition of the Horseshoe Falls site to the programme, the sampling period for this site (6 months) was limited when compared to the entrainment studies undertaken at other sites in the Dee catchment, which typically ran for 15 months between April 2006 and June 2007.
- 6.4.7 In 2009, British Waterways commissioned a survey considering the effectiveness of fish screening at the intake from the River Dee into the Llangollen Canal. The survey had a particular emphasis on brook lamprey, although also included data on Atlantic salmon. A copy of the 2009 Fish Survey Report is provided in Annex 15.1.
- 6.4.8 The 2009 Fish Survey Report (Annex 15.1), concluded that sandbagged 4mm screens, fitted from early March to mid-April, were effective in preventing entrainment of lamprey in the canal. The 2009 report also concluded that 10mm screens were effective in preventing entrainment of salmon smolts in the canal feeder.
- 6.4.9 The 2009 Fish Survey Report (Annex 15.1) acknowledged that the screens trialled as part of the survey work generally become blocked during periods of heavy rain and high flows and that regular cleaning of screens would be required to allow the amount of water needed for operational purposes. The report therefore recommended that consideration should be given to a more permanent screen, and an improved method of screen installation, to make working conditions safer. In a letter dated 19 November 2009 from British Waterways to EAW (provided in Annex 15.2) there is a commitment to develop a system of screening to make cleaning and placement of screens more operationally efficient.

- 6.4.10 In response to the 2009 Fish Survey Report (Annex 15.1), EAW wrote to British Waterways on 12 February 2010. The letter (provided in Annex 15.3) advised that the proposal to install 4mm mesh screens at the Horseshoe Falls intake would meet the requirements of the HDRoC. It also advised that this proposal would form the basis of a condition that would be applied to the United Utilities licence 24/67/5/0057 to reduce the impact of the abstraction on the brook lamprey population in the SAC to an acceptable level. The letter advised that, to avoid the need for temperature monitoring, the screening should commence on 1st March and be in place for a period of 6 weeks (i.e. to 12 April).
- 6.4.11 The 2010 letter also advised that, to protect salmon, 10mm screens should be in place between 1 March and 31 August each year, excepting the period when 4mm screens are in place to protect brook lamprey.
- 6.4.12 To reflect the conclusions of the HDRoC, the United Utilities Licence 24/67/5/0057 (Annex 2.1) was amended in June 2016 to include the following fish screening conditions:

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 the 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.*

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 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.*

- 6.4.13 It should be noted that, under these conditions, no fish screens are required for the period 1 September through to 28/29 February. Best practice guidance on fish screening (see Annex 16.1) suggests that abstraction intakes should have 10mm screens installed all-year round. However, due to the high level of leaf litter that inundates the intake at Horseshoe Falls during the autumn / winter period, and the lack of technology available at the time to deal with this issue, only trash screens were required to be in place at the intake between 1 September to 28/29 February.

6.5 Habitats Regulations Assessment (HRA) (2021 – 2022) / Serious Damage

- 6.5.1 To comply with NRW's legal duties in respect of the determination of the Appellant's licence application, it was necessary to undertake a HRA (explained in section 3.7 above). The HRA considered the suitability of the screening arrangements at the abstraction location as reflected on the existing United Utilities Licence 24/67/5/0057 (Annex 2.1). A copy of the HRA is provided in Annex 9.1.

6.5.2 The HRA involved a review of the evidence used in the 2007 HDRoC process (see section 6.4 above), as well as consideration of more recent evidence regarding fish migration and behaviours, and other factors such as changing weather patterns.

6.5.3 With regards to **brook lamprey**, the following was noted:

- The entrainment studies carried out for the HDRoC recorded relatively high numbers of brook lamprey entrained outside the current screening window for the site (between 1 March and 12 April). As can be seen from the 2007 raw data (Annex 14.3), both ammocoete and adult brook lamprey were recorded in January and February, as well the second half of April and May. The highest number of adult brook lamprey (87) was recorded on 16 April.
- NRW consider the data obtained for the Horseshoe Falls site in 2007 is of limited value, due to the limited sampling period as explained in paragraphs 6.4.5 and 6.4.6 above. Six months is considered a short sampling period when compared to the entrainment studies undertaken at other sites in the Dee catchment, which typically ran for 15 months. In addition, these studies were carried out in 2007, whereas more recent studies have used much longer sampling periods, often extending over a number of years. Given the limited sampling period, NRW consider a more precautionary decision with regards to screening periods is justified.
- The 2009 Fish Survey Report (Annex 15.1) indicated that temperatures of 9°C stimulated movement and 10°C triggered spawning. Current weather patterns are now far more mixed due to climate change, and warmer temperatures have recently been recorded earlier in the year (for example, in February 2019 a temperature of 20°C was recorded). Higher temperatures earlier in the year could stimulate fish movement / spawning outside the 1 March – 12 April screening period, meaning adult lamprey are at risk of entrainment.
- To protect adult lamprey populations in the River Dee SAC, and to conclude no adverse impacts on the integrity of the SAC, 4mm screening is considered necessary between the period 1 February to 31 May.

6.5.4 With regards to **Atlantic salmon**, the following was noted:

- Current work on salmon migration on the Dee has highlighted that it is likely that downstream autumn migration of salmon parr takes place in late September/October. Evidence of this is provided in Annexes 17.1⁹ - 17.3.
- NRW also has evidence of adult salmon kelts (see glossary) being entrained within the canal during the winter (see Annex 18.1). Rather than continue down river, these entrained fish will almost certainly not survive.
- Under the screening arrangements specified on the United Utilities Licence (Annex 2.1), only trash screens would be in place between 1 September to 28/29 February. Therefore salmon are at risk of entrainment during the autumn and winter period.
- As per paragraph 6.4.5 above, the HDRoC sampling period was between January and June 2007, and therefore did not take into account salmon movement during the autumn or winter period. Therefore there is no evidence to demonstrate that the Horseshoe Falls intake would not entrain salmon with only the current trash screens in place.

⁹ Note the APEM report and data referred to in the Annex 17.1 is provided in Annexes 14.1 and 14.3

- The shorter sampling period is also significant when compared to the entrainment studies undertaken at the other sites in the Dee catchment, which ran from April 2006 to June 2007, and are now subject to all-year round screening requirements.
- Since the HDRoC process, there has been a notable change in salmon productivity within the Dee (see Dee Stock Assessment Programme Angler Report 2022 provided in Annex 19.1). Previously highly productive tributaries of the lower river have seen notable declines in juvenile salmon numbers, whereas some tributaries in the upper catchment have remained consistently good. This means that a higher percentage of smolts moving out of the Dee system are coming from the upper tributaries and migrating past the Horseshoe Falls. This means the intake at the Horseshoe Falls could now have a potentially greater impact on the depleted salmon stocks in the Dee catchment than when the original HDRoC assessment was carried out
- To protect all migratory stages of the salmon lifecycle, and to conclude no adverse impacts on the SAC species, NRW consider 10mm screening is necessary at the Horseshoe Falls abstraction throughout the year (excepting the period when 4mm screens are in place to protect brook lamprey).

6.5.5 In light of the points noted in paragraphs 6.5.3 and 6.5.4 above, the HRA completed for the Appellant's application concluded that the period in which the current fish screens are required to be in place do not provide sufficient protection for brook lamprey and salmon. Therefore, in line with the precautionary principle referred to in section 3.7 above, the existing structures that facilitate the abstraction are considered to have the potential to cause adverse impacts as a result of entrapment, entrainment or impingement.

6.5.6 In order to mitigate adverse effects on the Dee SAC, the HRA concluded that the periods that the screens are in place would need to be extended (as per the table below) to provide better protection and to prevent adverse impacts on brook lamprey and salmon populations.

Fish species and screen size	HDRoC screening requirement	HRA Screening requirement
Lamprey (4mm)	1st March to 12th April	1st February to 31 st May
Salmon (10mm)	13th April to 31st August	1st June to 31 st January

6.5.7 NRW consider the screening conditions included on the Appellant's Transfer Licence necessary to prevent the entrapment, entrainment and impingement of lamprey and salmon at the point of abstraction, to ensure no adverse impact on the River Dee SAC in accordance with the Habitats Regulations.

6.5.8 As NRW considers serious damage to apply where an abstraction is having an adverse effect, or has the potential to have an adverse effect, on sites designated under the Habitats Regulations, the conditions are also considered

necessary to protect against serious damage. In this case therefore, the “serious damage assessment” took the form of the HRA.

6.5.9 Further information is included in the HRA (enclosed within Annex 9.1) and the Decision Document (Annex 11.1).

6.6 Alternative licensing options

6.6.1 As a result of the concerns raised by the Appellant regarding the operational implications the HRA screening requirements were likely to present (see section 5.2 above), consideration was given to alternative licensing options with regards to screening.

6.6.2 As outlined in section 3.7 above, NRW must be satisfied as to the effects of continued abstractions on a designated site *before* granting a licence. Therefore the application of ‘future effective’ dates to the screening conditions was not considered appropriate, as it would allow continued potential adverse impacts on the features of the River Dee SAC.

6.6.3 Consideration was also given to the all-year round 3mm screening requirement being considered to comply with the Eel Regulations (see paragraph 2.11 above). However, as noted in the Appellant’s Grounds of Appeal document (paragraph 35), the feasibility of the 3mm screens has not yet been established and there is currently no timetable for their installation. In addition, funding to carry out the work under the Eel Regulations is not expected to become available until 2025 – 2030. Although NRW consider the all-year round 3mm screening proposal sufficient to prevent adverse impacts to the SAC fish species (salmon and lamprey), in this case it was not considered appropriate to rely on it in the licence as there was no confirmed date for implementation. Relying on the possibility of this uncertain solution being available at a later date would not have enabled NRW to rule out potential adverse impacts on the features of the River Dee SAC in the interim (and potentially beyond then).

6.6.4 Although NRW acknowledge that complying with the HRA screening requirements will have operational implications for the Appellant, it should be stressed that the screening conditions do not require the Appellant to incur costs of installing any new infrastructure or any changes to the existing infrastructure. The main cost implication will be the likely need to have the maintenance regime for the fish screens in place for a greater part of the year.

6.6.5 Once the revised screening arrangements being considered under the Eel Regulations have been sufficiently progressed, the Appellant will be able to apply to NRW to vary the relevant licence conditions.

7. Response to the Appellant's grounds of appeal

7.1. Screening - inconsistency with the United Utilities Licence

7.1.1 NRW understand that the Appellant's first ground of appeal is related to inconsistency with conditions 9.5 and 9.6 specified on United Utilities Licence 24/67/05/0057 (Annex 2.1).

7.1.2 The Appellant has highlighted that the different screening requirements that exist at the abstraction point are not practically possible to achieve as the screens share the same infrastructure. NRW consider that if the screens specified on the Appellant's Transfer Licence WA/067/0005/0030 (Annex 1.1) are not in place, they will be unable to continue legally abstracting their proportion of the water, however United Utilities will be able to continue to abstract their proportion under the conditions of their existing Licence 24/67/05/0057 (Annex 2.1).

7.1.3 The Appellant considers that the inconsistency with conditions 9.5 and 9.6 specified on United Utilities Licence 24/67/05/0057 (Annex 2.1) mean the conditions on their Transfer Licence WA/067/0005/0030 (Annex 1.1) do not meet the 'clear' or 'enforceable' elements of the 'UNCLE' test (see glossary). As the screening conditions on the Appellant's Transfer Licence are more stringent than those on the United Utilities Licence, NRW considers compliance with the conditions on the Appellant's Transfer Licence would also necessarily ensure compliance with the conditions on the United Utilities Licence. NRW is satisfied that these conditions meet the 'UNCLE' test, especially as the Appellant operates the abstraction on behalf of United Utilities.

7.1.4 During determination, it was recognised that the screening requirements concluded through the 2021 – 2022 HRA are more stringent than those currently included on the existing United Utilities Licence 24/67/05/0057 (Annex 2.1). This issue was discussed with the Appellant, as detailed in section 5.2 above and email correspondence dated 30 November and 2 December 2022 (Annex 10.3). Subject to the screening conditions being upheld under this appeal, NRW will review, and if necessary, amend the conditions on the United Utilities Licence (24/67/5/0057). It is not yet known whether United Utilities will make this change voluntarily under the provisions of section 51 of the 1991 Act, or if NRW will seek to impose the change under section 52 of the 1991 Act (explained in paragraph 3.2.6 above).

7.1.5 Although consistency with the United Utilities Licence conditions is a factor NRW considered as part of the overall decision process, it is not in itself a reason or ground upon which NRW can allow an abstraction licence to be granted without screening conditions considered necessary to ensure no adverse impact on the River Dee SAC in accordance with the Habitats Regulations, and to protect against serious damage.

7.2 Screening – Habitats Regulations Assessment (HRA)

- 7.2.1 NRW understand that the Appellant's second ground of appeal relates to the HRA undertaken in respect of the determination of the Appellant's licence application.
- 7.2.2 With respect to paragraph 48 of the Appellant's Grounds of Appeal document, the Appellant suggests that having sight of the HRA and supporting information before the licence was granted was necessary for them to "*verify the HRA justifications*". NRW do not consider that applicants have a role in "verifying" the regulator's justification for licence conditions before they are imposed, although any potential impacts of a decision are taken into account during the determination process.
- 7.2.3 With respect to paragraph 53 of the Appellant's Grounds of Appeal document, NRW wish to clarify that as per section 5.2 above, justification for the fish screening conditions was provided to the Appellant on 23 November 2022 with further clarification provided on 2 December (see also Annex 10.3). In addition, a copy of the HRA (Annex 9.1) was provided to the Appellant on 21 December 2022, with further supporting information provided on 17 January 2023 (Annexes 9.2 – 9.9).
- 7.2.4 With respect to paragraph 54 of the Appellant's Grounds of Appeal document, NRW is satisfied that there is sufficient justification for the 10mm screens for salmon to be in place for the period between 1st June and 31st January each year, as detailed in section 6 above.
- 7.2.5 With respect to paragraph 55 of the Appellant's Grounds of Appeal document, NRW is satisfied that there is sufficient justification for the 4mm screens for lamprey to be in place for the period between 1st February and 31st May each year, as detailed in section 6 above.
- 7.2.6 The Appellant acknowledges the evidence that justifies the need for screening earlier in the year due to potential increases in water temperature. However, the Appellant has suggested this could mean spawning may also finish earlier in the year such that extending the period to 31 May is not justified. NRW considers that spawning periods are likely to vary each year and so the screening period specified in licence condition 9.4 covers the whole period spawning is likely to occur, in line with the precautionary principle described in section 3.7 above.
- 7.2.7 With respect to paragraph 56 of the Appellant's Grounds of Appeal document, NRW note that specific details regarding the maintenance requirements for the current fish screens was only provided by the Appellant on 12 December 2022, despite the proposed licence conditions first being communicated to the Appellant on 27 June 2022, as per section 5.2 above (see also Annexes 10.1 and 10.3). Therefore, it was not possible for NRW to consider this specifically within the HRA, which was initially completed in February 2022, with final sign-off provided by NRW's ANCB function in November 2022.

- 7.2.8 Furthermore, although the maintenance requirements were a factor NRW considered as part of the overall decision process, it is not in itself a reason or ground upon which NRW can allow an abstraction licence to be granted with screening conditions that are no longer considered adequate in order to protect against adverse impacts on the features of the River Dee SAC in accordance with the Habitats Regulations, and to protect against serious damage.
- 7.2.9 Although NRW acknowledge that complying with the HRA screening requirements will have operational implications for the Appellant, it should be stressed that the screening conditions do not require the Appellant to incur costs of installing any new infrastructure or any changes to the existing infrastructure. The main cost implication will be the likely need to have the maintenance regime for the fish screens in place for a greater part of the year.
- 7.2.10 With respect to paragraph 57 of the Appellant's Grounds of Appeal document, NRW consider there is sufficient justification to extend the screening requirements for lamprey and salmon, as outlined in section 6 above. Specifically this includes the data collected for the HDRoC process, current technical understanding of fish migration patterns and behaviour, as well as information regarding changing weather patterns. As per section 5.2 above, this justification was communicated to the Appellant in email correspondence dated 23 November and 2 December 2022 (see also Annex 10.3).

8. Conclusion

- 8.1 NRW consider the screening conditions included on the Appellant's Transfer Licence WA/067/0005/0030 necessary to prevent the entrapment, entrainment and impingement of lamprey and salmon at the point of abstraction, to ensure no adverse impact on the River Dee SAC in accordance with the Habitats Regulations. As NRW considers serious damage to apply where an abstraction is having an adverse effect, or has the potential to have an adverse effect, on sites designated under the Habitats Regulations, the conditions are also considered necessary to protect against serious damage.
- 8.2 To comply with the screening conditions, the Appellant will not be required to install new infrastructure or change the existing infrastructure, although NRW acknowledge that complying with the HRA screening requirements will have operational implications for the Appellant.
- 8.3 NRW respectfully invites the Inspector to dismiss the appeal and uphold the decision to grant the licence to abstract subject to the fish screening conditions, which are necessary to protect against adverse effects on the features of the River Dee SAC in accordance with the Habitats Regulations, and to protect against serious damage.
- 8.4 For the reasons set out above, NRW is satisfied that it has determined the application in accordance with relevant and applicable legislation and guidance.