

APPEAL TO PLANNING AND ENVIRONMENT DECISIONS WALES

APPEAL REF: CAS-02487-Q9Z8H3

PURSUANT TO SECTION 43 OF THE WATER RESOURCES ACT 1991

BETWEEN

CANAL & RIVER TRUST

Appellant

and

NATURAL RESOURCES WALES

Respondent

STATEMENT OF CASE

IN RESPECT OF APPEAL AGAINST LICENCE

WA/067/0005/0030,

SITE CRT236, LLANTYSILIO FEEDER

1 This Statement of Case addresses:

- (i) the two original Grounds of Appeal which concern the conditions of the licence relating to screens on the feeder from the River Dee at Horseshoe Falls into the Llantysilio Canal (also known as the Llangollen Canal); and
- (ii) the draft amended Grounds of Appeal which concern the annual volumetric limit of 5,779,590 cubic metres per year.

Screens

2 The points about screens are fully set out in the Grounds of Appeal.

- 3 In brief, the feeder supplies water not only for the Llantysilio Canal but also for an existing full licence granted to United Utilities (“UU”) to feed its Hurleston Reservoir. The existing screens are at the entrance to the feeder. The 4mm screens are for the protection of brook lamprey which otherwise could be entrained into the Canal. 10mm screens are for the protection of salmon parr. Screens have been in place since a Habitats Regulations Assessment was carried out in 2007, and are part of the UU abstraction licence.
- 4 The first point is that there are inconsistent monthly requirements for the same abstraction point. The UU licence (most recently updated in 2016) requires the 4mm screens to be in place from 1 March till 12 April in each year, and 10mm screens in place from 13 April to 31 August in each year. The Appellant’s new licence requires the 4mm screens to be in place from 1 February until 31 May, and the 10mm screens from 1 June until 31 January.
- 5 As the Grounds of Appeal point out, this means that there are different screening requirements in place for the same feeder from 13 April until 31 May (10mm for the UU licence and 4mm for the Appellant’s licence.)
- 6 There can be no possible justification for these differential burdens. The Respondent has not sought to vary the UU licence though it says it was aware of data about brook lamprey as long ago as 2007. The data was available at the time of the Habitats Directive Review of Consents in 2007, and at the time that the UU licence was renewed in 2016, with no change to the screening requirements imposed on renewal.
- 7 That said, a report from the Respondent published in 2016 (River Dee & Bala Lake SAC population attribute condition assessment for brook, river and sea lamprey 2014) concluded that brook lamprey passed all the Common Standards Monitoring guidance attributes for the condition of a SAC feature; given that the Horseshoe Falls weir and the feeder have been in place for 200 years, the brook lamprey population does not appear to be in decline. The Appellant is unaware of further research subsequent to that report.
- 8 The appropriate course (only if changes are justified) would be not to impose different screening requirements on the Appellant’s licence in that respect until a review by the Respondent into the nature of the screen provisions in the UU licence has been completed. That would ensure consistency between the licences.

- 9 The second point concerns the Habitats Regulations Assessment which the Respondent says justifies the changes in screen timing.
- 10 As is pointed out (and this is of considerable relevance to the new proposed Grounds), the HRA was only sent to the Appellant with the determination on 22 December, and despite requests for its production on 17 November 2022 and 30 November 2022. This gave the Appellant little opportunity to consider its contents before it appealed on 18 January 2023, and gave the Appellant no opportunity to provide input before the determination.
- 11 The HRA, which does raise concerns about autumnal salmon/trout parr (and therefore a potential extension of the requirement from 31 August as per the UU licence) does not justify an extension of the requirement to have 10mm screens in place from the autumn until 31 January.
- 12 These changes to the timings of the screens are of considerable practical importance to the Appellant. Screens need a considerable degree of maintenance, requiring attendance by two operatives twice a day, particularly during the late autumn and winter months when leaf fall and hence potential blockage is at its greatest. Access to the site in this remote area is difficult, particularly in winter months.

THE PROPOSED AMENDED APPEAL GROUNDS

- 13 The Appellant addresses these under the following topics:
- (1) the nature of the proposed grounds; and
 - (2) the reasons why these grounds were not contained in the original grounds of appeal.

(1)(a) Annual Volumetric Condition

- 14 The Appellant's licence contains volumetric conditions to limit the hourly, daily, 90 day and annual abstracted volumes.
- 15 The Appellant has no objection to the hourly, daily and 90 day abstraction volumes.
- 16 Though the Appellant was exempt from requiring an abstraction licence for this abstraction prior to 2018, the abstraction was in fact already regulated by the provisions of the London Midland and Scottish Railway Act 1944 ("**LMSR Act**")

and the Dee General Directions (“DGD”), under which the Appellant has operated the abstraction for decades.

17 The LMSR Act places daily and 90 day restrictions on the licence under section 4. In metric terms, these equate to a daily limit of 32,959 m³ and a limit of 2,554,830m³ in a 90 day period, which have been reflected in the Licence.

18 The Respondent set out its proposal to include volumetric conditions on the Licence via email on 27 June 2022; this included proposals to add an instantaneous condition as well as hourly, daily, 90 day and annual limits. The Appellant responded to the Respondent’s proposals for volumetric conditions via email on 15 September 2022, stating that:

“We appreciate that there are existing legal limits on our abstraction relating to daily and 90-day limits, which we would expect to be reflected in the licence condition. However, we are concerned that you are looking to impose peak instantaneous and hourly rates on this licence. These are not required by the Dee General Directions or the London, Midland and Scottish Railway Act 1944, and we do not have the means to measure these rates. Given the controls already provided by the daily and 90-day abstractions, we do not consider that these additional requirements can be justified and pose an additional and unnecessary regulatory burden on the Trust.”

19 The Respondent replied to the Appellant’s concerns on 21 October 2022; they agreed to drop the imposition of an instantaneous rate due to the acknowledged operational difficulties this would present to the Appellant, and explained in more detail why they considered the hourly limit to be necessary; on this basis the Appellant accepted the justification for the hourly limit.

In the same email, in relation to the annual limit, the Respondent stated that *“NRW consider an annual limit is necessary to ensure the licence reflects the quantities abstracted during the qualifying period in order to comply with the transitional regulations and policy approach. In addition, NRW consider inclusion of an annual limit is consistent with the existing UU licence, which also specifies an annual limit.”*

20 In light of the policy context and the above regulatory scheme, the Appellant submits that the annual volumetric condition provided for in the Licence is not warranted or proportionate in this particular case for the following reasons.

- 21 The Appellant does not accept the existence of an annual limit on the UU licence justifies the Respondent imposing one on the Appellant's licence; the UU licence is a full 'day job' licence where volumetric conditions are usually imposed. Whilst the regulator had the flexibility to impose volumetric conditions on transitional licences, they must be proportionate and necessary.
- 22 No evidence has been provided by the Respondent to justify the imposition of an annual limit; in the Respondent's Internal Consultation document of [Appendix 15], the Respondent's Hydrologists, in their replies of 27 May 2021, recommended that the licence should be conditioned in accordance with the LMSR Act and DGD; in relation to an annual volume, the Respondent's Hydrology team did not seem concerned with a limit, suggesting that 366 x the daily rate would be appropriate. This material was only disclosed to the Appellant on 17 January, 2023 after the Respondent's determination and just before the Appellant's appeal was due.
- 23 The questions posed in this internal consultation state that the annual figure that the Appellant 'applied for' was 5,779,590m³; this is incorrect. The abstraction evidence required and provided by the Appellant as part of its application was only for the purpose of showing that an abstraction had occurred during the 7-year qualifying period (in accordance with the 2017 Regulations [Appendix 10] and Section 8 of the application form WRH [Appendix 1]).
- 24 The Respondent was not, as a result, required to limit the Licence by setting volume conditions at all, or to set volume conditions that corresponded to those historical abstractions. This approach was recently confirmed in Appeal: APP/WAT/583 (CRT218, Knipton Reservoir Outflow, Knipton, Leicestershire) [Appendix 16]. Whilst the Inspector in that case considered that the seven year period provides a reasonable timeframe for establishing existing needs, he accepted that evidence of historical patterns of abstraction did not *"preclude the decision maker from considering any other relevant matters to put to them in addition to the pattern of usage within the seven years..."*.
- 25 In their internal consultation response of 27 May 2021, the Respondent's hydrologists made the point that the maximum annual volumes set out in the application form were probably underestimates of the need of the abstraction for the Canal (due to support from the UU abstraction); hence, their recommendation that it be licenced in accordance with the LMSR Act.

- 26 Unaffected by this hydrological advice, the Respondent simply licenced by reference to the 5,779,590m³ which had been abstracted in the calendar year 2017. The “maximum taken in the 7-year qualifying period” may have some justification as a *starting point* for a new licence (as per the Inspector’s remarks in the Knipton Appeal), but it cannot and should not override the advice from hydrologists – backed up by existing and long-standing legislation regulating the river.
- 27 Hence the Appellant submits that the annual volumetric limit on this licence is unnecessary because the abstraction is already controlled by the provisions of the LMSR Act and the DGD which impose daily and 90 day volumetric limits (and which themselves are adopted in this licence).
- 28 Taking a proportionate approach (as is required here) the Respondent should have considered whether the condition containing an annual limit is necessary and if there were alternative means available to achieve a particular policy or legislative aim. In relation to transfer licences, the Respondent is expected to use a licensing approach that minimises regulatory burdens on the abstractor (see the 2017 Response [Appendix 8]).

1(b) Fall-back cases

Wrong year start and end

- 29 Whilst it does not accept that an annual limit is required at all, the Appellant considers that the Respondent has erroneously used the Annual abstraction figures requested to be provided on the application form (which are all stated to run from 1 January to 31 December) to impose an annual limit running from 1 April – 31 March.
- 30 Had the application form asked for the figures for this period, the figures provided by the Appellant in the form for the annual abstraction would have increased to 5,851,237m³.
- 31 On any view, any annual limit ought to be increased to 5,851,237m³.

Under-estimate of maximum volumes by the Appellant

- 32 However, the annual figure provided on the application form (and the estimated figure above which would have been provided had the application form asked for the licenced annual period) contained gaps in the data, and so only

represented an estimate based on the information readily available to the Appellant at the time the application was made. Whilst it was aware of some gaps in the data, the Appellant did not expect annual volumetric conditions to be imposed on this licence outside of the existing protections found in LMSR Act and the DGD.

- 33 Having now analysed the abstraction data in closer detail, the Appellant has been able to fill in some of the gaps in the data recorded for the qualifying period. It is now able to evidence a maximum abstraction from 1 April – 31 March 2011/2012 of 6,248,605m³.
- 34 It will be recalled that the Respondent itself considered that the Appellant had under-estimated the amount of water abstracted for purposes of the Canal: see paragraph 25 above.
- 35 Therefore, whilst it is not accepted that an annual limit is justified or necessary, the Appellant submits that this annual volumetric limit should be increased to 6,248,605m³ to reflect the maximum actual abstracted amount during the qualifying period.

(2) Reasons why not originally in the Grounds

- 36 By email of 27 June 2023, the Appellant summarised its additional case to the Respondent, and sent draft amended grounds on 28 June. By email of 29 June, the Respondent objected to the inclusion of these proposed amended grounds. The Appellant proposed a sequential filing of statements of case, with the Respondent responding within 21 days (i.e. at the 9 week deadline stage), both generally and in order to respond to the draft amended grounds.
- 37 On 30 June, the Appellant wrote to PEDW setting out in some detail why it was inviting PEDW to consent to the these amended grounds. By email of 3 July, PEDW indicated that it was unwilling to consent to this amendment.
- 38 Planning guidance focusses on preventing new grounds at the 9-week deadline response stage. Section 9.7 of the guidance states, “*The Planning Inspectorate expects both the appellant and NRW to have given all their evidence in the grounds of appeal and statements of case, so the opportunity to comment at 9 weeks must not be used as a means of introducing new material or putting forward arguments that should have been included in the 6-week statement” (Emphasis added). Notably, the guidance only expressly*

states “*The Planning Inspectorate will reject and return representations received at this stage [9-week deadline] if they raise new issues.*” No such caveat is provided in relation to the 6-week deadline stage.

- 39 More fundamentally, in this case, there is good reason as to why these grounds were not contained in the original appeal, and PEDW should exercise its discretion in favour of the Appellant. There is no prejudice to the Respondent or indeed to the planning process and much of the information underpinning the annual volumetric appeal and referred to in the HRA was only disclosed to the Appellant on 17 January. The underlying problem arose because the Respondent did not disclose the HRA until serving the determination and even then did not serve the supporting material at the same time. It is that material which revealed that the Respondent did not have a substantive hydrological reason for upholding the 5,779,590 m3 annual limit.
- 40 This is in the context of an application made by the Appellant as long ago as 19 September 2019 but only determined by the Respondent on 22 December 2022.

Conclusions

- 41 For these reasons, the Appellant:
- (i) challenges the screening provisions in 9.4 and 9.5 of the licence;
 - (ii) seeks to amend its grounds of appeal in accordance with the draft sent to the Respondent on 28 June 2023, and further explained in this Statement of Case; and
 - (iii) invites the Inspector to delete the annual volumetric limit of 5,779,590m3.

DAVID HART K.C.

4 July 2023