

**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: CRT414, TANAT FEEDER, CARREGHOFA

**Planning And Environment Decisions Wales (PEDW)
REFERENCE: CAS-02484-X8S5F5**

**STATEMENT OF CASE OF
NATURAL RESOURCES WALES**

Glossary of terms

Abstraction	Removal of water from a source of supply (surface or groundwater).
Appropriate nature conservation body (ANCB)	Advisor to the competent authority (see definition below). Natural Resources Wales is the ANCB for all National Site Network sites in Wales.
Assessment point	Point on a watercourse at which the flow from the upstream catchment is assessed.
Consumptive abstraction	Abstraction where a significant proportion of the water is not returned to the source of supply after use.
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.
Common Standards Monitoring Guidance (CSMG) Flow Standards	Hydrology flow standards which aim to protect the natural flow regime of a river to avoid deterioration and environmental damage. They set out maximum acceptable deviations from the natural flow regime for a range of flows and depending on the river size and type.
Competent authority	The body determining whether a consent, permission or other authorisation should be given in the context of the Habitats Regulations (discussed further below). Natural Resources Wales exercises the competent authority role in Wales.
Diadromous fish species	Commonly referred to as migratory fish species, meaning species which migrate between freshwater and saltwater.
Environmental flow indicator	A proportion of the natural flow in a river is set aside for the ecological health of the water course. This is called the environmental flow indicator and we use it to prevent ecological deterioration of rivers. It is set in line with new UK standards set by UKTAG.
Habitats Regulations Assessment (HRA)	An assessment of the potential impacts of 'projects' on National Site Network and Ramsar sites (see below).
Hands-off flow (HoF)	The rate of flow in a river below which the abstractor must reduce or stop the abstraction. This flow threshold will usually be defined within a condition of the abstraction licence.
National Site Network	SACs 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 have created a National Site Network on land and at sea, including both the inshore and offshore marine areas in the UK.
Natura 2000	The Natura 2000 is a network of nature protection areas in the territory of the European Union. It is made up of SACs and SPAs, designated respectively under the Habitats Directive and Birds Directive. Since 2019, any reference to Natura 2000 in documents prepared by Natural Resources Wales should be taken to mean National Site Network.
Ramsar Site	A wetland of international importance under the Ramsar Convention.
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.
Special Areas of Conservation (SAC) and Special Protection Area (SPA)	Protected sites designated under the Conservation of Habitats and Species Regulations 2017.
Surface water	This is a general term used to describe all water features such as rivers, streams, springs, ponds, and lakes.
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.
Water body	A basic unit of surface water management at which assessments are completed for Water Framework Directive purposes. It is an entire (or part of a) stream, river or canal, lake or reservoir, and estuary or stretch of coastal water out to one nautical mile offshore. Water bodies altered by human activity may be classified as heavily modified water bodies (HMWB) or artificial water bodies (AWB). A body of groundwater is a distinct volume of underground water within one or more aquifers.

Glossary of Acronyms

ANCB	Appropriate nature conservation body
AA	Appropriate assessment
CSMG	Common Standards Monitoring Guidance
EA	Environment Agency
FLL	Functionally-linked land
HRA	Habitats Regulations Assessment
HoF	Hands-off flow
LSE	likely significant effect
NSN	National Site Network
SAC	Special Area of Conservation
SPA	Special Protection Area
SSSI	Site of Special Scientific Interest

Table of contents

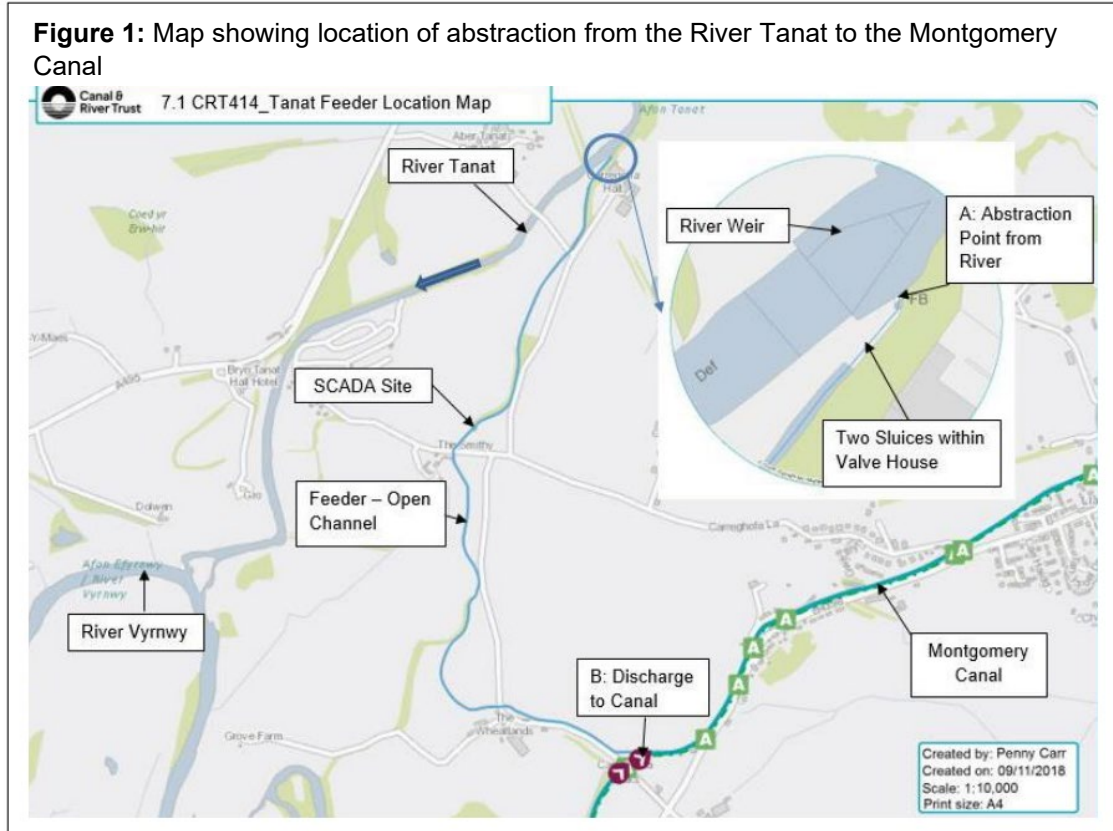
- 1. Introduction**
- 2. Site and activity**
- 3. Legal framework**
 - 3.1 Natural Resources Wales (“NRW”)
 - 3.2 Water Resources Act 1991 (“the WRA 1991”)
 - 3.3 Water Framework Directive (2000/60/EC) (“the WFD”)
 - 3.4 Water Act 2003 (“the 2003 Act”)
 - 3.5 The Water Abstraction (Transitional Provisions) Regulations 2017 (“the 2017 Transitional Regulations”)
 - 3.6 Environment Act 1995
 - 3.7 The Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”)
 - 3.8 The Natural Resources Body for Wales (Establishment) Order 2012
 - 3.9 Environment (Wales) Act 2016 – Biodiversity and resilience of ecosystems duty
 - 3.10 The Well-being of Future Generations (Wales) Act 2015 (“the WBFG Act”)
 - 3.11 The British Waterways Bill: Agreement Respecting the Montgomery Canal dated 19 October 1987 (“the BWB Agreement”)
- 4. Relevant policy and guidance**
 - 4.1 Previously exempt abstractions: ‘New Authorisations’
 - 4.2 Abstraction Licensing Strategies
 - 4.3 Operational Guidance Note (OGN) 176 Determining Transitional Water Resources Licence Applications
 - 4.4 Operational Guidance Note (OGN) 200 Habitats Regulations Assessment of Projects
- 5. Case history**
- 6. Why the conditions were included**
 - 6.1 The Habitats Regulations / Serious Damage
 - 6.2 Existing hydrology within the Severn Catchment
 - 6.3 Maximum rates of abstraction applied for and evidenced
 - 6.4 The BWB Agreement
 - 6.5 Condition 6: Maximum quantities of water to be abstracted
 - 6.6 Conditions 7 and 8: Means of measurement of water abstracted; Records
 - 6.7 Condition 9: Further conditions
 - 6.8 Condition 9.1 Hands off Flow (HoF)
 - 6.9 Condition 9.2 During any ‘river regulation period’
 - 6.10 Condition 9.4 Screening at the point of abstraction
- 7. Response to grounds of appeal**
 - 7.1 Inclusion of a maximum quantities of water to be abstracted (Condition 6.1)
 - 7.2 Condition 6.1 - Definition of an ‘hour’ and ‘day’
 - 7.3 Inclusion of a records condition 8.1 (ii)
 - 7.4 Inclusion of further conditions
 - 7.5 Inclusion of further condition 9.1 – Hands off Flow (HoF)
 - 7.6 Inclusion of further condition 9.2 – During any ‘river regulation period’
 - 7.7 Inclusion of further condition 9.4 – screening of intake
- 8. Other considerations**
 - 8.1 Economic consideration
 - 8.2 Period of notice
 - 8.3 Other concerns
- 9. Conclusion**
- 10. List of Annexes**

1. Introduction

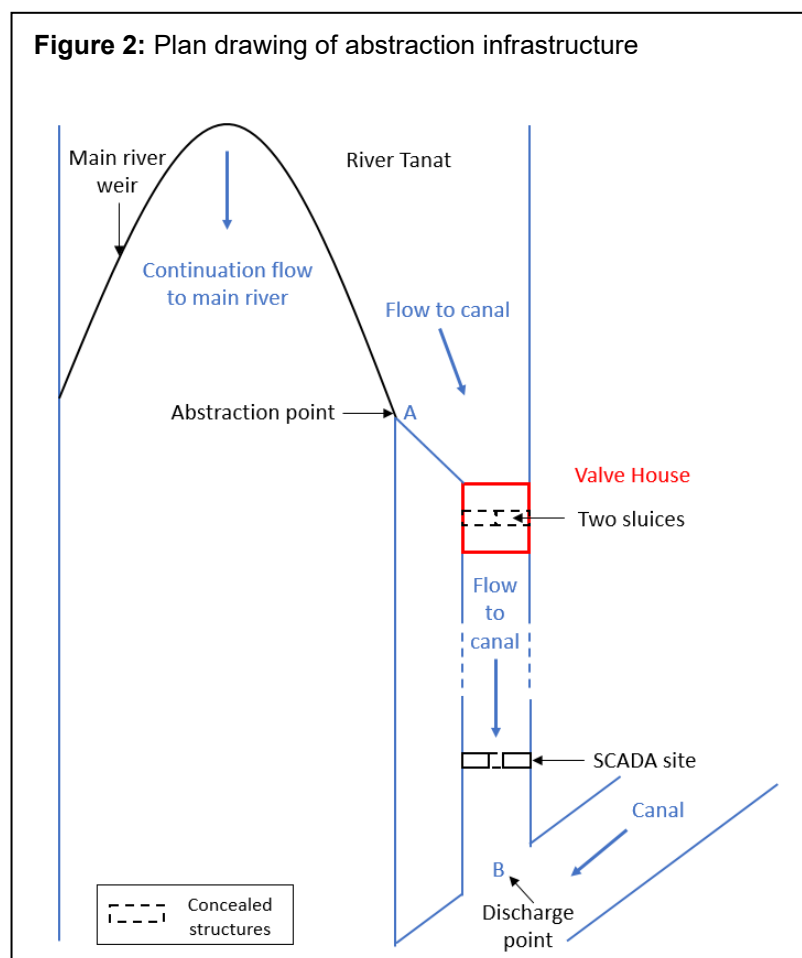
- 1.1** This appeal relates to the decision of Natural Resources Wales (“NRW”) on 21 December 2022 to grant a transfer licence to the Canal & River Trust (‘the Appellant’) to abstract surface water for the purpose of “operations in the course of carrying out functions as a navigation authority” at Tanat Feeder, Carreghofa (‘the Transfer Licence’) (Licence serial number: WA/054/0001/0124).
- 1.2** NRW granted the Transfer Licence (see Annex 18.2) subject to a series of conditions controlling matters that included, amongst others, the maximum quantities of water to be abstracted on an hourly, daily and yearly basis. Further conditions in the Transfer Licence imposed additional restrictions on abstraction in the event of certain flow conditions. 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 some of the conditions included within the Transfer Licence. PEDW accepted the appeal as valid (Reference: CAS-02484-X8S5F5) and identified 3 March 2023 as the “start date” for the appeal process.
- 1.4** When the Appellant submitted the present appeal, it submitted, at the same time, another appeal to PEDW relating to a transfer licence it had obtained to abstract water at Penarth Feeder, Newtown (Reference: CAS-02481-Y4R5Z9). The Appellant requested that both appeals be dealt with together as they both relate to the Montgomery Canal and largely rely on the same grounds of appeal. On 17 February 2023, NRW advised PEDW that it had no objection to this request. PEDW then identified the same “start date” of 3 March 2023 for the appeal relating to the Penarth Feeder licence.

2.0 Site and Activity

- 2.1** This appeal relates to an abstraction undertaken by the Appellant that was previously exempt from licensing under section 26 of the Water Resources Act 1991. This exemption applied to operations carried out by a navigation authority in the carrying out of its functions.
- 2.2** The Appellant’s abstraction point is from the River Tanat at Tanat Feeder, Carreghofa, Llanymynech, Powys, SY22 6LD at National Grid Reference (NGR): SJ 25360 21817. At the abstraction point water is diverted via a weir into a feeder channel, and then discharged to the Montgomery Canal, as shown in Figure 1 below.



- 2.3** As set out in the information provided by the Appellant as part of its application for the Transfer Licence (see Annex 1.1), the abstraction is necessary to maintain the water level within the canal within a 'Normal Operating Zone' so as to avoid damage to infrastructure (caused by overtopping, damage to canal lining and canal bank collapse) and to maintain a navigable depth. The Appellant confirmed in their grounds of appeal that the Montgomery Canal is classed as a "remainder waterway" for which there is no duty to maintain navigation (s. 104, Transport Act 1968). Nevertheless, NRW understands that sections of the Canal are not currently navigable due to roads which sever the canal and very low depths due to silt accumulation.
- 2.4** The Montgomery Canal is designated as: (i) a Special Area of Conservation (SAC) for floating water-plantain (*Luronium natans*); and (ii) a Site of Special Scientific Interest (SSSI) for open water (canal) habitat, floating water-plantain (*Luronium natans*) and otter (*Lutra lutra*) (see citation and core management plans in Annexes 2.1 to 2.3). The abstracted water is necessary to maintain these designations.
- 2.5** To explain the abstraction in more detail, the abstracted water flows under gravity into an open feeder channel controlled by a weir and two sluice gates (which are generally operated alternately). The water then travels through a gauging structure that can measure the volume of water being abstracted, before the water finally discharges into the Montgomery Canal upstream of Carregghofa Locks, as shown in Figure 2 overleaf:



2.6 The Appellant has confirmed that the abstraction was subject to an agreement made on 19 October 1987 between the Appellant's predecessor, the British Waterways Board, and the Severn-Trent Water Authority (a predecessor to the Environment Agency) ("the BWB Agreement"). The BWB Agreement details abstraction restrictions during any 'river regulation period' (meaning any period where water is released from large reservoirs and other sources), to ensure that river levels or flows are adequate to meet abstraction demands further downstream in the river catchment. The Appellant included the BWB Agreement as part of its application for the new transfer licence (see Annex 1.1 to this statement of case)

3.0 Legal framework

3.1 Natural Resources Wales ("NRW") has taken account of all relevant legislation, with particular reference to the following (listed in the order discussed below):

- Water Resources Act 1991 ("the WRA 1991")
- Water Framework Directive (2000/60/EC) ("the WFD")
- Water Act 2003 ("the 2003 Act")
- Water Abstraction (Transitional Provisions) Regulations 2017 ("the 2017 Transitional Regulations")
- Environment Act 1995
- The Conservation of Habitats and Species Regulations 2017 ("the Habitats Regulations")

- Water Environment (Water Framework Directive) (England and Wales) Regulations 2017
- Natural Resources Body for Wales (Establishment) Order 2012
- Wildlife and Countryside Act 1981
- Environment (Wales) Act 2016 – Biodiversity and resilience of ecosystems duty
- The Well-being of Future Generations (Wales) Act 2015 (“the WBFG Act”)

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 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 [Appellant], in so far as they appear to [NRW] to be reasonable requirements”.
- 3.2.3 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 sections 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.
- 3.2.4 Section 38(2)(a) of the WRA 1991 then empowers NRW to “grant a licence containing such provisions as [it] considers appropriate”.

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’.
- 3.3.2 Under the WRA 1991 there was an existing abstraction licensing system in place. However, the exemptions within the WRA 1991 allowed unlimited amounts of water to be taken, irrespective of availability or the impact 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 (“the 2003 Act”)

- 3.4.1 To comply with WFD requirements, the 2003 Act included provisions to remove significant exemptions and make them subject to the water abstraction 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 2003 Act 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, publicising the application, and providing notification of decisions. 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 2018¹; 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 the drafting of 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 his right to appeal (under section 43 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 transpose the requirements of the EU Habitats and Wild Birds Directives into UK law and they continue to apply as retained law² following EU exit. Their provisions apply independently of any of the other domestic legal provisions mentioned above.

¹ Commonly referred to as 'the qualifying period'.

² 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.

- 3.7.2 Natura 2000 is a network of nature protection areas in the territory of the European Union made up of Special Area of Conservation (“SAC”) and Special Protection Area (“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 (“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 site³.
- 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 an 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 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, namely that:-
- there are no alternative solutions to the plan or project in question;

³ This is subject to the provisions of Reg 64, which sets out when considerations of imperative reasons of overriding public interest (IROPI) will apply. If there are imperative reasons, then an authorisation may be agreed notwithstanding a negative assessment.

- 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.

3.8 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 - Biodiversity and resilience of ecosystems duty

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 regulatory 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 Well-Being Future Generations (Wales) Act 2015 (“the WBFG Act”)

3.10.1 The WBFG Act contains the following relevant provisions:

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).

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.

4 The well-being goals

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

Goal	Description of the goal
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 British Waterways Bill: Agreement Respecting the Montgomery Canal dated 19 October 1987 (“the BWB Agreement”)

3.11.1 The Appellant has confirmed that the abstraction was subject to the BWB Agreement (introduced in paragraph 2.6 above), which detailed the following restrictions during any ‘river regulation period’:

- No abstraction when the capacity of Llyn Clywedog is less than 25% of its capacity.
- A maximum abstraction rate of 49MI over 7 days; **OR** a lesser amount in order to maintain a residual flow of 15MI per day downstream of Carreghofa weir
- Efficiency measures.
- Permission to abstract flood water.
- Specifies the requirement to measure and record flows of water in the canal through gauge(s), along with maintenance and inspection.
- Operating rules.
- Review period.
- Defines river regulation period.

3.11.2 It was necessary for NRW to understand the status and relevance of the BWB Agreement in terms of determining a transfer licence with relevant conditions under the 2017 Transitional Regulations. The position is as follows:-

- The BWB Agreement did not itself confer a right to abstract; rather, section 9 of the BWB Agreement deals with the regulation of water flows.
- The right to abstract followed from the exemption in section 26 of the WRA 1991 (see section 3.2 above).
- The Appellant was operating under an exemption, subject to the flow rates set out in the BWB Agreement.
- As detailed in section 3.5 above, the 2017 Transitional Regulations removed this exemption with effect from 1 January 2018.

- Details of the quantities of water abstracted in the seven years prior to 1 January 2018 were required to be provided with the application (see paragraph 3.5.3 above). The relevant consideration was not what flow rates were provided for by the BWB Agreement and the extent to which any licence aligns with those flow rates, but rather what the Appellant had actually been abstracting in the 7 years prior to 1 January 2018 and the extent to which the licence issued aligns with those figures.

4.0 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 2017 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’.
- 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. A light touch, risk based approach means:*
- *The majority of licences will be granted based on existing abstraction requirements. Applicants should be able to demonstrate, to the reasonable satisfaction of the Regulator, their abstraction requirements and entitlements and that abstraction has taken place within the seven year qualifying period.*
 - *Licences will normally have “hands off flow” conditions⁴ to protect rivers during low flows and times of drought where these conditions provide benefits to the environment.*
 - *The Regulator will have flexibility on the inclusion of volume conditions on transfer licences to avoid undue abstraction control costs on abstractors while still ensuring environmental protection.”*
- 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) and that among NRW’s seven Well-being Objectives is the objective to promote successful and responsible business that use natural resources without damaging them.

⁴ “Hands off Flow” conditions require the abstraction to be reduced or stopped should a river flow fall below a specified threshold.

- 4.1.6 Section 2.4 of the 2017 Governmental Response provides a summary of how the “hands off flow” (“HoF”) conditions are expected to be applied. In some cases these HoFs may be less restrictive than the recommended HoFs detailed in the Abstraction Licensing Strategy (“ALS”) for that catchment. ALS are produced by NRW and the Environment Agency on a catchment basis to provide a consistent and structured approach to water resource management, so that all relevant water body and conservation objectives are met. However, the Governments recognise that some abstractions have been happening lawfully for many years.
- 4.1.7 Accordingly, section 3.2 of the 2017 Governmental Response (section 3.2) states:
“It is expected that lawful abstractions will only be significantly curtailed⁵ or refused to protect the environment from serious damage.”.
- 4.1.8 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”.
- 4.1.9 The Governments then accept that (section 3.6):
*“Compensation may be applied for where loss or damage arises from a refused or constrained application for lawful abstraction that is made within the qualifying period, except where refusal or curtailment is necessary to:
 [...]

 - reflect current operating constraints already in place e.g. canal acts, planning conditions, mechanisms to control abstractions during qualifying period in the case of transfer licences with no volumes specified.”*

The requirement to consider curtailment necessary to reflect current operating restraints already in place relates directly to section 3.11 above and NRW's consideration of the BWB Agreement.

4.2 Abstraction Licensing Strategies

- 4.2.1 Abstraction Licensing Strategies (ALS)⁶ provide a consistent and structured approach to water resource management. They are produced by NRW and the EA on a catchment basis. They include an assessment of water abstraction pressure on surface water and groundwater sources. The ALS identify where further water abstraction might be possible and what licence conditions might be necessary in order to protect the environment, so that all relevant water body and conservation objectives are met.
- 4.2.2 In the case of this appeal, the abstraction point is located within Wales and so the application has been determined by NRW. However, it is located within the EA-managed Severn Corridor catchment. The relevant ALS for this application is therefore the Severn Corridor Abstraction Licensing Strategy (“the Severn Corridor ALS”) published by the EA in February 2020 (see Annex 5.1).
- 4.2.3 As detailed in section 3.1 of the Severn Corridor ALS, all new or varied consumptive⁷ surface water abstraction licences within the Severn Corridor catchment will be issued

⁵ significant curtailment can take the form of a HoF condition.

⁶ These were previously known as 'Catchment Abstraction Management Strategies (CAMS)'

⁷ Abstraction where a significant proportion of the water is not returned to the source of supply after use.

with restrictions. For abstractions associated with assessment point⁸ 5⁹, the current standard HoF restriction is equivalent to 224 Megalitres per day (Ml/d). There are also alternative HoF and licensing options under specific conditions set out in the ALS.

- 4.2.4 As more of the 'available' water is allocated to consumptive abstraction, NRW will issue licences with increasingly restrictive HoF conditions to ensure sufficient water continues to be available for the environment and to protect existing abstractions.

- 4.2.5 Section 3.3 of the Severn Corridor ALS states the following:

'3.3. Coasts and estuaries

The Severn Estuary supports a wide array of habitats and species and is designated as a Site of Special Scientific Interest (SSSI), a Habitats Directive Special Protection Area (SPA) and Special Area of Conservation (SAC) and is included on the list of wetlands of international importance under the Ramsar Convention (Ramsar Site). The intertidal mudflats, sand banks, rocky platforms and salt marsh are among the largest and most important in Britain; supporting internationally important populations of waterfowl, invertebrate populations of considerable interest and large populations of migratory fish including Atlantic salmon, sea trout, allis and twaite shad, sea and river lamprey and European eels.

The Estuary receives a significant proportion of its flow from the River Severn catchment, and as we have an obligation to protect all Habitats Directive sites, this means that the River Severn and all of its tributaries must be managed using appropriate flow restrictions to protect the environmental needs of the Estuary. All the HoFs to be applied to new or upwardly varied surface water licences granted on the River Severn and its tributaries are equal to or more restrictive than the flow required by the estuarine ecology.'

The ALS highlights the functional linkage between the Severn Estuary and the River Severn catchment. The ALS confirms that more restrictive licence conditions can be deployed if the abstraction impacts on the protected sites. For instance these restrictions could apply if an abstraction were proposed from a habitat that supported the Severn Estuary protected sites.

- 4.2.6 Section 3.4 of the Severn Corridor ALS details the regulation system of the River Severn whereby water is released from large reservoirs and other sources, to ensure adequate river levels or flows and thereby meet abstraction demands further downstream in the river catchment. The regulation results in heavily modified water bodies, as follows:

'3.4 Heavily modified water bodies

Upstream of Bewdley, the Rivers Severn and Vyrnwy are designated as Heavily Modified Water Bodies (HMWBs), due to the impact from the River Severn regulation system, which influences the flow regime of the rivers. This regulation system is designed to meet the water resource demands of abstractors on the river, while maintaining an acceptable flow for the purposes of fisheries, conservation, recreation, navigation, effluent dilution and other 'in-river' uses. The legislation concerning the regulation system was established in 1963, when it was anticipated that the amount of water that people wanted to abstract from the river, principally for public water supply, could be *greater than the river could provide, particularly during dry years. The resulting Act of Parliament enabled the construction of Clywedog Reservoir to regulate*

⁸ Assessment point: A point on a watercourse at which the flow from the upstream catchment is assessed.

⁹ Closest assessment point for the abstraction subject to this appeal.

the flow of the River Severn to maintain a statutory minimum flow of the River Severn and meet the needs of abstraction in the river. The control point for river regulation is located at Bewdley in the middle reaches of the Severn. Following the exceptional drought in 1976, the Act was varied so that the maintained flow is now 850 MI/d averaged over a 5 day period and a minimum of 650 MI/d on any single day. During very dry summers the flow at Bewdley may fall below these values when river regulation reaches a prescribed maximum value.

The droughts of the 1970s confirmed that the available resources of Clywedog Reservoir would be insufficient to fully meet the increased future demands for water from the River Severn. Investigations were carried out into the possibility of developing a scheme to pump groundwater from the Sherwood Sandstone Aquifer in Shropshire to support the flow of the River Severn. After several years of research and a five week public enquiry, the Secretary of State for the Environment formally approved the Shropshire Groundwater Scheme (SGS) in October 1981. In addition a small proportion of the storage of Lake Vyrnwy (principally used to provide water supplies to Merseyside) is used for river regulation. Rules set out how much water should be released from each regulation source to support flows in the River Severn. They also give detailed guidelines on the day to day operation of Clywedog Reservoir and Lake Vyrnwy in conjunction with the Shropshire Groundwater Scheme.’.

4.2.7 Section 3.5 of the Severn Corridor ALS states the following:

‘3.5. Protected areas

UK law provides a very high level of protection to two types of designated sites, these are also referred to as Habitats Directive sites due to their special environment. These are:

- *Special Areas of Conservation (SAC), which contribute to biodiversity by maintaining and restoring habitats and species;*
- *Special Protection Area (SPA), which provides protection to birds and their nests, eggs and habitats.*

Ramsar sites and Sites of Special Scientific Interest (SSSI) also carry a high level of environmental importance.

All applications for abstraction licences will be assessed in relation to their direct and indirect impacts on protected areas. If an abstraction is deemed to potentially impact a protected area, the licence (if granted) may be conditioned with local, site specific restrictions to ensure the protected area is not impacted. These conditions may be more restrictive than the strategy outlined throughout this document.’.

The ALS stresses again that more restrictive licence conditions can be licensed if the abstraction impacts on the protected sites.

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

4.3.1 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 our decisions are in line with the Transitional Regulations and NA government policy, as well as our other statutory duties. See Annex 6.1.

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

- 4.4.1 This document is about the procedures that NRW should follow when assessing the potential impacts of 'projects' on National Site Network sites. See Annex 7.1.

5.0 Case History

- 5.1 Prior to the application being submitted, NRW actively engaged with the Appellant regarding the removal of the licensing exemption. On 10 July 2018 a meeting took place between NRW and the Appellant regarding the application requirements and licensing approach. In Wales, a total of 11 of the Appellant's operations were identified as needing a licence following the removal of the exemptions¹⁰, including the abstraction from the River Tanat at Carreghofa Weir.

- 5.2 *Please note: for ease of reading this section focuses on the decision-making process as it related to the conditions that are the subject of this appeal.*

- 5.3 On 19 September 2019, the Appellant submitted an application form for a new transitional water resources transfer licence for the following maximum abstraction quantities; 376 litres per second (l/s), 567.5 cubic metres per hour (m³/hour), 9,100 cubic metres per day (m³/day) and 1,911,066 cubic metres per year (m³/year), all year, for the purpose of transfer from one source of supply to another. Copies of the submitted forms, and additional information, submitted prior to validation, are in Annexes 1.1 and 8.1 to 8.5, as detailed below:

- Application Form WRH
- CRT414 Feeder Supporting information document
- Letter of authorisation
- Email dated 17/12/2019 which confirmed the following:
 - how maximum abstraction quantities were calculated,
 - details of means of measurement and structures; and
 - an indication that it was "planning to undertake detailed surveys of all our abstraction structures during the determination stage of the process. We should therefore be able to provide technical drawings of all structures, once this exercise has been completed, *and in time for the determination of each licence.*"

- 5.4 Also attached to the email, was a spreadsheet setting out the total daily abstraction volumes in m³/day.

- 5.5 On 5 May 2022, NRW advised the Appellant during a telephone call that they had now begun to determine the application and some additional clarification would be required around the following points:

- how the maximum abstraction quantities applied for were derived from the data provided; and
- how the Appellant was meeting their obligations under the BWB Agreement, which they had provided as supporting information with the application.

NRW advised that the above points would be detailed in a formal application update letter to follow (Annex 9.2) and arranged a MS Teams meeting with the Appellant (between 14:00 – 15:00) to discuss.

¹⁰ All 11 sites were subsequently licensed by NRW. 4 sites are currently subject to written notices of appeal submitted by the Appellant to PEDW.

- 5.6** The same day (5 May 2022), NRW sent correspondence to the Appellant (Annexes 9.1 to 9.4), which included notification of the following points:
- The application was assigned to the Permitting Officer.
 - Details of next steps, including notification that NRW considered the abstraction to have potential to impact on the Severn Estuary SAC and the Ramsar site. NRW was considering what that meant and would keep the Appellant informed of whether any changes to their operation were likely to be required, as well as the potential requirement to measure and report the quantity of water abstracted.
 - The Appellant could continue to abstract the same volumes of water and operate in the same manner as those applied for, until a decision is made.
 - NRW explained that there is a mechanism to apply for any increase in abstraction rates via the normal application route.
 - How to appeal for non-determination by 31 December 2022.
- 5.7** The Appellant was asked to provide further information on the points discussed during the initial telephone call and at the MS Teams meeting. This information was required to help NRW understand the operation of the abstraction during the qualifying period and to progress internal consultation, including a HRA (see section 3.7.4 above).
- 5.8** On 5 May 2022 the Appellant clarified all of the points required by NRW in an email (see Annexes 9.5 to 9.7).
- 5.9** On 18 May 2022, NRW formally consulted relevant internal consultees. NRW, as the competent authority for the purposes of the Habitats Regulations, consulted officers working for NRW's appropriate nature conservation body (ANCB) function. NRW, as ANCB for the identified sites, comprised a North Powys Environment Team Officer responsible for the Montgomery Canal SAC, and the Marine Area Advice and Management Team responsible for the Severn Estuary SAC and the Ramsar site. NRW ANCB were consulted on a draft Habitats Regulations Assessment (HRA) at the LSE stage, and considered the impact of the abstraction necessary for the management of the Montgomery Canal SAC, and on the Severn Estuary SAC and the Ramsar site. NRW also considered an additional transitional abstraction licence application submitted by the Appellant for the Penarth Feeder abstraction under the HRA, also necessary to facilitate water abstraction to supply the Montgomery canal.
- 5.10** On 13 July 2022, NRW and Canal & River Trust representatives attended a meeting to discuss licence determination progress on all 11 applications then submitted to NRW by the Appellant, including the application that is the subject of this appeal (see Annex 28.1). It was agreed that NRW would provide copies of draft licences to allow the Appellant to review ahead of final licences being issued. NRW advised 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.
- 5.11** On 20 July 2022, NRW requested technical drawings from the Appellant and provided the following HRA update:
'It has been identified that the Penarth and Tanat Feeder points of abstraction are functionally linked to the Severn Estuary SAC and Ramsar. Therefore, we need to further assess the impacts on flows at these locations, on migratory species (including salmon), designated under the SAC and Ramsar, along with any screening requirements.' (see Annex 10.1).

5.12 Final technical drawings were provided on 22 September 2022 (see Annexes 11.1 and 11.2).

5.13 On 18 October 2022, NRW sent correspondence updating the Appellant on the determination progress and HRA, confirming the following:

'From initial consultation and comments from technical specialists we anticipate the inclusion of conditions on the licences in order to mitigate against adverse effect on site integrity of any Natura 2000/Ramsar site, as follows:

- A condition to protect low flows, by restricting the maximum abstraction quantity to 10% of Q95 flows, during a period of low flows at both locations.*
- From initial discussions, we anticipate the inclusion of a condition on both licences requiring a 10mm screen at the point of abstraction.*
- Due to the overflow weir at the intake structure at Penarth, we anticipate the inclusion of a condition requiring a 40mm screen at this location.*

I am also in discussion with our hydrology and legal team to understand whether there is potential for the conditions on the NA abstraction licences to contradict the conditions of the British Waterway Bill.'

5.14 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 since 18 October 2022. A copy of NRW's notes from the meeting is provided in Annex 12.1¹¹.

5.15 On 29 November 2022, NRW hydrology technical specialists completed the final hydrology assessment report of the abstraction and flow restrictions necessary to ensure no serious damage to any NSN / Ramsar sites, and detailed potential impact on abstractable volumes to the Montgomery Canal. A copy of the final hydrology assessment is provided in Annex 13.1.

5.16 On 30 November 2022, NRW officers exercising the competent authority role formally consulted officers working for NRW's ANCB function for the purpose of preparing a Habitats Regulations Assessment (HRA) for the application (for both the Severn Estuary SAC and the Ramsar site, and Montgomery Canal SAC). The HRA concluded that there would be no adverse effect on the SAC site integrity provided that relevant conditions were included in the abstraction licence.

5.17 On 30 November 2022, NRW sent the Appellant a copy of the Hydrology Report (dated 29 November 2022) detailing likely licence flow restrictions considered necessary to ensure the project will not adversely affect the integrity of any NSN / Ramsar sites. The report considered flow restrictions necessary to prevent serious damage to migratory fish species of the Severn Estuary SAC and the Ramsar site, and calculated potential impact on abstractable volumes for the Montgomery Canal (based on maximum abstraction rates applied for). NRW also made a data request to the Appellant to gather additional information on how proposed flow restrictions could impact on abstractable volumes for the canal and how this could translate to changes in water levels. See Annexes 14.1 and 14.2. NRW did not receive the requested information.

5.18 On 1 December 2022, NRW received a data request from the Appellant, relating to the data used to inform the NRW Hydrology Report (dated 29 November 2022). On 2

¹¹ Meeting notes are NRW permitting officer's own and were not shared or agreed with the Appellant

December 2022, NRW notified the Appellant that there would be delays in providing the requested data.

- 5.19** On 7 December 2022 the Leadership Manager of the NRW team exercising the competent authority role agreed with the conclusion of the HRA and signed it off (see Annex 15.1).
- 5.20** On 9 December 2022, NRW received a response from the Appellant containing queries about the Hydrology Report. NRW provided a response to the Appellant's queries on 14 December 2022 (see Annexes 16.1 and 16.2).
- 5.21** On 9 December 2022, NRW shared a draft of the transfer licence with the Appellant as part of the operator review, as previously agreed (Annexes 17.1 and 17.2). On 15 December 2022, NRW received the Appellant's comments (see Annex 17.3).
- 5.22** On 21 December 2022, NRW granted the Appellant's Transfer Licence (WA/054/0001/0124) including conditions relating to the maximum quantities of water to be abstracted. The transfer licence was issued to the Appellant via email and was accompanied by a supporting issue letter, NRW data used to inform the Hydrology Report (dated 29/11/2022), NRW response to operator review comments and the HRA. The associated correspondence and documentation can be found in Annexes 18.1 to 18.6.
- 5.23** On 22 December 2022, the Appellant notified NRW that the issued licence and associated documentation had not been received by them. NRW re-issued the documentation in two separate emails due to receiving inbox size constraints on 22 December 2022. A copy of the email correspondence is provided in Annexes 19.1 and 19.2.
- 5.24** Notice of an appeal was received by NRW on 18 January 2023. On 19 January 2023 NRW emailed the Appellant's solicitor confirming receipt of the email and associated documents sent on 18 January 2023 and confirmation of access to documents on the solicitor's *iManage Share* site. A copy of the email correspondence is provided in Annexes 20.1 and 20.2.

6.0 Why the conditions were included

6.1 The Habitats Regulations / Serious Damage

- 6.1.1** The abstraction is directly from the River Tanat, which is a tributary of the River Vyrnwy (located approximately 2 kilometres (km) downstream). The River Vyrnwy then flows for approximately 24km before joining the River Severn, which flows another 200km ending at the Severn Estuary. The point of abstraction from the River Tanat is approximately 250km upstream of the Severn Estuary, which is designated as a SAC and is also a Ramsar Site.
- 6.1.2** The River Severn catchment supports the populations of diadromous (migratory) fish species for which the Severn Estuary SAC and the Ramsar site were designated (specifically, river lamprey, sea lamprey, allis shad, twaite shad, Atlantic salmon, sea trout and European eel). The River Tanat is therefore considered to be "functionally linked" to the Severn Estuary SAC and the Ramsar site. This is because the River Severn provides supporting habitat for essential life cycle process of the diadromous fish species and contributes a proportion of the whole SAC / Ramsar sites population

of the diadromous fish species. Therefore, effects upon the River Tanat populations of the diadromous fish species could reduce the estuary populations of these species, which may have an adverse effect on site integrity in view of the conservation objectives of the site.

- 6.1.3 Paragraph 27 of the High Court judgment of *RSPB and others v Secretary of State and London Ashford Airport Ltd (2014) EWHC 1523 (Admin)* explains how the concept of functionally linked land (FLL) should be considered in the HRA process:

"There is no authority on the significance of the non-statutory status of the FLL. However, the fact that the FLL was not within a protected site does not mean that the effect which a deterioration in its quality or function could have on a protected site is to be ignored. The indirect effect was still protected. Although the question of its legal status was mooted, I am satisfied, as was the case at the Inquiry, that while no particular legal status attaches to FLL, the fact that land is functionally linked to protected land means that the indirectly adverse effects on a protected site, produced by effects on FLL, are scrutinised in the same legal framework just as are the direct effects of acts carried out on the protected site itself. That is the only sensible and purposive approach where a species or effect is not confined by a line on a map or boundary fence. This is particularly important where the boundaries of designated sites are drawn tightly as may be the UK practice."

- 6.1.4 The point of abstraction from the River Tanat is functionally linked with the Severn Estuary SAC and Ramsar Sites. Through monitoring work, the River Tanat at the point of abstraction is known to be supporting habitat for Atlantic salmon and large European eel, which are migratory fish species protected pursuant to both the Severn Estuary SAC and Ramsar sites designations. For these reasons, at the LSE stage of the HRA, NRW considered likely impacts to be entrainment¹² and flow changes which could impact on movement and habitat availability.
- 6.1.5 Sea trout, Sea and River lamprey are also designated features of the SAC and Ramsar Sites. NRW understand that the Trout identified in routine monitoring upstream of the abstraction are likely to be Brown trout rather than Sea trout¹³. There is no routine monitoring of Sea and River lamprey, however, based on NRW's understanding of how they utilise the catchment, NRW does not anticipate there to be many or any Sea or River lamprey present at the intake location. Accordingly, at the LSE stage of the HRA, NRW considered the likely impacts to be flow changes, which could impact on movement and habitat availability.
- 6.1.6 Twaite and Allis Shad have been recorded further downstream (at Stourport) and significant effects from the proposal when considered alone were ruled out.
- 6.1.7 The abstraction is necessary for the management of the Montgomery Canal SAC, for the conservation of Floating water-plantain (*Luronium natans*).
- 6.1.8 Please refer to Annex 21.1 for the Severn Estuary SAC and the Ramsar sites core management plans including the relevant conservation objectives and Annexes 2.2 to 2.3 for the Montgomery Canal SAC conservation documentation.

¹² Fish being transported along with the flow of water and out of their natural environment.

¹³ Brown trout and sea trout are the same species but they exhibit very different life cycles with sea trout migrating to the marine environment before returning to freshwater to spawn.

- 6.1.9 The Habitats Regulations Assessment (HRA) completed for this application concluded that, in line with the precautionary principle referred to in paragraphs 3.7.4 – 3.7.6 above, the abstraction had the potential to cause adverse impacts to the designated fish species referred to above, as summarised below:
- Removal of migratory fish species (Atlantic salmon and European eel) from the riverine ecosystem, into the Penarth Feeder and Montgomery Canal (entrainment).
 - Potential to impact locally on hydrodynamics of the River Tanat at the point of abstraction, through excessive fluctuations in flow; and as a large proportion of the flows could be abstracted during a period of low flows. This could impact on the movement of migratory fish species present / close to the abstraction locations (Atlantic salmon, European eel, Sea trout, Sea and River lamprey).
 - Potential to impact on the population size / assemblage of migratory fish species within the Severn Estuary (Atlantic salmon, European eel, Sea trout, Sea and River lamprey).
- 6.1.10 In order to mitigate adverse effects on the Severn Estuary SAC and the Ramsar site, the following conditions were considered necessary:
- Intake screen with spacing no greater than 10mm
 - Maximum quantities of water to be abstracted
 - Flow restrictions during a period of low flows (HoF)
- 6.1.11 Imposing a HoF condition on the abstraction had potential to reduce the volumes of water that were available to be abstracted and which were necessary for the management of the Montgomery Canal SAC (see paragraph 6.1.7 above). NRW modelled the potential impacts on the Montgomery Canal SAC of imposing such a low flow restriction, based on the maximum abstraction rates applied for by the Appellant. See Annex 13.1.
- 6.1.12 As the competent authority NRW was required to make a decision on the basis of the best scientific knowledge available. NRW exercised evaluative judgement, considering the potential effects of the project on the protected species and whether those effects presented a real risk to the maintenance of their favourable conservation status. NRW were satisfied that the project, subject to the conditions identified in paragraph 6.1.10 above, would pose no real risk to the integrity of the Montgomery Canal SAC.
- 6.1.13 The HRA is provided as Annex 15.1 and the licence decision document in Annex 22.1.
- 6.1.14 As outlined in paragraph 3.7.6 above, NRW must be satisfied as to the effects of continued abstractions on a designated site *before* granting a licence. The application of 'future effective' dates would not be compliant with Regulation 63 of the Habitats Regulations, as it would allow continued potential adverse impacts on the designated features referred to above. NRW did not consider the inclusion of future effective dates for the above reasons.
- 6.1.15 Sections 3.2 and 3.6 (footnote 35) of the 2017 Governmental Response (see paragraphs 4.1.7 and 4.1.8 above), 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 considered necessary under the HRA, are also considered necessary to protect against serious damage.

6.2 Existing hydrology within the Severn Catchment

- 6.2.1 The River Tanat is a relatively large tributary of the River Vyrnwy. It is essentially a natural river with no significant abstractions or discharges upstream of the Appellant's intake at Carreghafa.
- 6.2.2 The River Severn and River Vyrnwy are subject to river regulation as detailed under paragraph 4.2.6, meaning water is released from Llyn Clywedog, Lake Vyrnwy (and other sources) to offset and support large abstractions from the River Severn further downstream. Regulation results in increased flows in the Rivers Severn and Vyrnwy than would naturally be observed.
- 6.2.3 Flows in the River Tanat are not affected by the regulation scheme. As such, flows in the Tanat can fall to naturally low levels even when the River Severn Regulation scheme is being operated.
- 6.2.4 Common Standards Monitoring Guidance (CSMG) states the natural flow regime of a river should be protected to ensure its ecological integrity. CSMG describes minimum flow standards (targets) that should be met to avoid deterioration and environmental damage. These flow standards set out how much water can be safely removed or added to a river, dependent on its size and the flow range (e.g. at low flows, high flows etc). See Annex 23.1 detailing CSMG Hydrology flow standards considered for this proposal.

6.3 Maximum rates of abstraction applied for and evidenced

- 6.3.1 When assessing abstraction licence applications, it is necessary to consider the scale of the abstraction in the context of river flows and relevant flow standards. It is especially important to consider how much water could be abstracted when river flows are low and the environment is generally considered to be more sensitive. A low flow parameter that is commonly used in abstraction licensing and water quality consenting is the Q95, which is the flow that is equalled or exceeded 95% of the time. Or alternatively, the river flow will only fall below this value for 5% of the time (18 days per year, on average).
- 6.3.2 NRW assessed the Appellant's application based on the maximum abstractions rates applied for and evidenced. When comparing the maximum abstraction rates applied for with the Q95 low flow rates, there was potential for between 17% and 60% of the available low flows to be abstracted, as detailed in the table 1 below (with the percentage significantly higher for the lowest flows). This exceeds the CSMG flow standards, which state that flows below Q95 should not deviate by more than +/-10% from what they would be naturally, or +/-15% for flows between Q95 and Q50 (the flow that is equalled or exceeded 50% of the time).

Table 1: comparison of maximum abstraction rates applied for as a percentage of available flows at Q95 flows.

Units	Maximum abstraction rate applied for	Q95 low flow rate	Maximum abstraction rate as a % of Q95 flows
l/s	376	630	60
m ³ /hour	567.5	2,268	25
m ³ /day	9,100	54,432	17

- 6.3.3 The abstraction rates applied for were not in line with CSMG flow standards as flows reduced within the river. Therefore, there was potential to impact on local hydrodynamics through excessive fluctuations in flow, and abstraction of a large proportion of the river flows during low flow conditions. This could impact on the

movement of migratory fish species, the availability of suitable habitat to support various life stages and subsequently population size / assemblage of migratory fish species protected under the Severn Estuary SAC and the Ramsar site designations.

- 6.3.4 The maximum abstraction rates evidenced during the qualifying period (as detailed in paragraph 3.5.3 above) were not from a period including any droughts.
- 6.3.5 NRW understood the Appellant's means of abstraction to be a fixed gravity feeder, and therefore abstraction rates should reduce at lower flows as the level in the river decreases. However, the Appellant did not provide sufficient evidence for NRW to be satisfied that the means of abstraction would ensure the CSMG flow standards would be met. Therefore, NRW needed to consider how best to ensure the CSMG flow standards would be met.

6.4 The BWB Agreement

- 6.4.1 The relevance of the BWB Agreement when determining an application for a transfer licence with relevant conditions under the 2017 Transitional Regulations is discussed in section 3.11 above.
- 6.4.2 Table 2 below demonstrates that the restrictions in the BWB Agreement were not sufficient to meet the CSMG flow standards during a 'river regulation period'.

Table 2: Reasons why the BWB Agreement did not ensure compliance with CSMG flow standards.

BWB Restriction	Reason restriction does not ensure compliance CSMG flow standards
No abstraction when the capacity of Llyn Clywedog is less than 25% of its capacity.	Llyn Clywedog would only fall below 25% of capacity in an exceptional drought. Therefore, this condition offers no local protection of low flows at all other times.
A maximum abstraction of 49MI over 7 days;	49MI over 7 days equates to an average abstraction of 0.081m ³ /s, which is more than the CSMG flow standards would allow at Q95 flows and below. That condition also assumes a constant rate of abstraction over the 7 day period, whereas in reality it could fluctuate.
OR	OR
a lesser amount in order to maintain a residual flow of 15MI per day	The 15MI/d residual flow equates to less than Q99 flows, therefore, it is so low that it is not sufficiently protective.

- 6.4.3 Low flows on the River Tanat still occur when the river regulation scheme is not operating, at a time when the BWB Agreement restrictions would not have applied to provide any restrictions to the abstraction. The BWB Agreement restrictions are in place to protect the river regulation scheme rather than to protect the ecology of the River Tanat.
- 6.4.4 As the Appellant confirmed that they operated the abstraction in line with the BWB Agreement restrictions during any 'river regulation period' within the qualifying period it was necessary for NRW to consider how these operations should be reflected in the transfer licence conditions.

6.5 Condition 6: Maximum quantities of water to be abstracted

- 6.5.1 In line with the 2017 Governmental response (section 4.1 above), which calls for a light-touch, risk-based policy approach, the expectation was that the majority of licences would be granted based on existing abstraction requirements demonstrated within the 2011 to 2017 qualifying period. The policy expectation was that lawful abstractions would only be significantly curtailed or refused to protect the environment from serious damage. There was also flexibility on the inclusion of volume conditions on transfer licences to avoid subjecting abstractors to undue abstraction control costs whilst ensuring environmental protection.
- 6.5.2 The technical drawings submitted during the determination process on 22 September 2022 (see Annexes 11.1 to 11.2) were not sufficient for NRW to be satisfied that maximum abstraction rates applied for would be secured through the means of abstraction alone. Dimensions of structures and level in metres above datum (mAD) were provided, however, there was no detail as to what the rate of abstraction would be for a corresponding river level or flow. Therefore, there was no way for NRW to confirm whether the intake structure would be sufficient to physically secure the abstraction in order to meet the CSMG hydrology flow standards.
- 6.5.3 Furthermore, the means of abstraction condition (3.1) '*Gravity flow to an open channel controlled by weirs and sluice gates.*', was not sufficient to ensure the rates of abstraction would be secured in line with the CSMG flow standards and also allowed for potential for changes to the intake structure to be made, to increase abstraction rates.
- 6.5.4 As detailed under section 6.1 above, a HRA was undertaken to assess the potential impacts on the Severn Estuary SAC and the Ramsar site, and Montgomery Canal SAC. The HRA concluded that a condition specifying the maximum quantities of water to be abstracted was necessary to protect the Severn Estuary SAC and the Ramsar site from adverse effects on site integrity. This is because NRW considered that outside of low flows, Condition 6 limiting abstraction ensured the CSMG flow standards for the river in this location were adequately met. The inclusion of hourly, daily and annual maximum abstraction rates would prevent the risk of excessive fluctuations in flow. Inclusion of this condition should not impact on volumes of water available to the Montgomery Canal, as the volumes included under condition 6 of the licence reflected the rates applied for and evidenced during the qualifying period by the applicant. See Annex 15.1 for HRA.
- 6.5.5 In summary, therefore, NRW considered condition 6.1 to be legally necessary to remove a real risk of serious damage to the integrity of the Severn Estuary SAC and the Ramsar site.

6.6 Conditions 7 and 8: Means of measurement of water abstracted; Records

- 6.6.1 As it was necessary to include a condition on the licence specifying the maximum quantities of water to be abstracted, it was also necessary to include conditions relating to the means of measurement of water abstracted and record-keeping. The abstraction volumes are required to be measured, and daily records kept, in order to demonstrate compliance with the authorised volumes of the licence deemed necessary to protect the Severn Estuary SAC and the Ramsar site from adverse effects on site integrity which would constitute a risk of "serious damage", as well as providing information on actual water usage for water resource management and planning purposes.
- 6.6.2 As detailed in paragraph 3.11.1 above, the BWB Agreement specified a means of measurement and the daily recording requirements. Conditions 7 and 8 were

necessary and were not more onerous than the Appellant's existing responsibilities under the BWB Agreement.

6.7 Condition 9: Further conditions

6.8 Condition 9.1 Hands off Flow (HoF) condition

6.8.1 As detailed under section 6.1 above, a HRA was undertaken to assess the potential impacts on the Severn Estuary SAC and the Ramsar site, and Montgomery Canal SAC. The HRA concluded that a bespoke HoF condition was necessary to protect the Severn Estuary SAC and the Ramsar site from adverse effects on site integrity. NRW's ANCB for the Severn Estuary SAC and the Ramsar site agreed with the conclusion of the HRA. Condition 9.1 limiting abstraction at low flows ensured the CSMG flow targets for the river in this location were adequately met. NRW was also satisfied that on the basis of the best scientific knowledge available, condition 9.1 would pose no real risk to the integrity of the Montgomery Canal SAC. See Annex 15.1 for HRA.

6.8.2 For the reasons outlined in paragraph 6.1.15, NRW considered there to be a real risk of serious damage to site integrity such that condition 9.1 was necessary in accordance with the Habitats Regulations.

6.9 Condition 9.2 During any 'river regulation period'

6.9.1 The Appellant confirmed that they operated the abstraction in line with the BWB Agreement restrictions during any 'river regulation period', during the qualifying period (section 3.11 above). NRW considered the relevance and status of the BWB Agreement (section 6.4 above) and the 2017 Governmental Response (section 4.1 above). NRW considered it appropriate to reflect the operation of the canal under the BWB Agreement through conditions on the transfer licence, to ensure they were in line with the CSMG flow standards, and to avoid any contradiction with the HoF restrictions condition 9.1 (see section 6.8 above). It was necessary to avoid contradiction in this way, as condition 6.1 and 9.1 were required to ensure the CSMG flow targets for the river in this location were adequately met, as detailed in sections 6.5 and 6.8 above respectively. See Annex 24.1 for further detail.

6.10 Conditions 9.4 Screening at the point of abstraction

6.10.1 As detailed under section 6.1 above, the HRA concluded that the following intake screening requirements were necessary to reduce, to an acceptable level, the risk to relevant diadromous fish features present, and to protect the Severn Estuary SAC and the Ramsar site from adverse effects on site integrity:

- A screen with spacing no greater than 10 millimetres to the point of abstraction is necessary to prevent the entrapment, entrainment or impingement of Atlantic salmon (smolt and adults), and large adult European eel.

NRW's ANCB for the Severn Estuary SAC and the Ramsar site agreed with the conclusion of the HRA. See Annex 15.1 for HRA.

6.10.2 For the reasons outlined in paragraph 6.1.12, NRW considered there to be a real risk of serious damage to site integrity such that conditions 9.4 was legally necessary for HRA purposes.

7.0 Response to grounds of appeal

7.1 Inclusion of a maximum quantities of water to be abstracted (Condition 6.1)

7.1.1 For the reasons detailed in the following sections above:

- 6.1 The Habitats Regulations / Serious Damage
- 6.2 Existing hydrology within the Severn Catchment
- 6.3 Maximum rates of abstraction applied for and evidenced
- 6.5 Condition 6: Maximum quantities of water to be abstracted

NRW is satisfied that including condition 6.1 within the Transfer Licence is required to comply with the Habitats Regulations and 2017 Transitional Regulations and is consistent with the policy intention of the 2017 Governmental Response.

7.1.2 The Appellant stated in their Grounds of Appeal that the abstraction from the River Tanat at Carreghofa is the only source of supply for the Canal. However, this is incorrect as they also abstract from the River Severn at Penarth in order to supply the Montgomery Canal. NRW granted the Appellant another transfer licence on 21 December 2022 (Ref: WA/054/0001/0123) to facilitate the transfer of water from the River Severn at Penarth to the Montgomery Canal, the conditions of which have also been appealed. NRW understand that the Montgomery Canal also receives water from numerous land drains, urban culverts and small streams.

7.1.3 Section 9(k)(ii) of the BWB Agreement specifies giving and exchange of information, including detail of the storage volumes and levels within the canal. On 30 November 2022, NRW provided an update to the Appellant on the determination of their application and made the following data request:

'We are keen to know whether you would have any further information or supplementary data to allow us to better understand how the proposed restrictions could impact on water levels within the canal (SAC). Would this information be available and if so, would you be able to provide it with some urgency please?'

See Annex 14.1.

7.1.4 On 1 December 2022 the Appellant responded to NRW as follows:

'I'm sure you can appreciate, this is a lot for the Trust to review and assess the impacts of, at such short notice prior to the statutory deadline for licences to be issued. We would therefore like to make the following points:

- *For the Trust to properly quantify the impacts of your proposals on abstraction to the canal, we need to review all of the data used to derive/calculate the stepped flow bands in the attached document. Please can you provide the underlying daily time series (in spreadsheet format) of river flows covering the licence application qualifying period i.e., 2011 to 2017, plus 2018 to present day, as used in your calculations, as a matter of urgency?*
- *For the appropriate assessment of the likely significant effects of the abstraction restrictions on the site integrity of the Montgomery Canal SAC, we consider the Habitats Regulations Assessment (HRA) process needs to be followed. It appears from your email that this has not been done yet. Please can you confirm if this is the case or provide the HRA Stage 1 and Stage 2 documentation if it has?'*

See Annex 25.1.

7.1.5 On 2 December 2022, NRW notified the Appellant that there would be a delay in providing the data they had requested on 1 December 2022, due to staff annual leave commitments. NRW also confirmed that they did not anticipate there to be sufficient time to consider the proposed restrictions further in the manner envisioned by the Appellant, ahead of the statutory determination date for the licence. See Annex 26.1.

7.1.6 NRW were unable to provide the data requested by the Appellant on 1 December 2022, until the licence was issued on 21 December 2022.

7.1.7 The data requested by NRW on 30 November 2022 from the Appellant was not provided by the Appellant. The provision of this data would have allowed further assessment of the potential impact of the restrictions proposed on the licence in terms of water levels within the canal. NRW, in its role as the competent authority, was required to make a decision on the basis of the best scientific knowledge available. NRW, in its competent authority role, has exercised evaluative and expert judgement, considering the potential effects of the project on the protected species, and whether those effects presented a real risk to the maintenance of their favourable conservation status. NRW, as competent authority, is satisfied that the project poses no real risk to the integrity of the Montgomery Canal SAC. Having considered the best scientific knowledge available, there was no reasonable scientific doubt as to the absence of adverse effects from the proposed abstraction on the integrity of the Montgomery Canal SAC.

7.1.8 The Appellant also confirmed the following on 9 December 2022:
'Our abstraction is not pumped, it is a gravity feed abstraction, the volume of which is determined by the opening of the abstraction sluices and the driving head which is also a function of the varying river level. As the river flow decreases so does the river level and thus so does our abstraction. As the river flow increases, our abstraction increases. The maximum instantaneous flow will have coincided with a period of HIGH river flow, and not LOW river flow. It will have also only occurred over a short period of the abstraction. It does not reflect our continuous abstraction rate. Therefore, it appears that you have miscalculated our abstraction and consider it to be greater than it is, resulting in unnecessary regulatory constraints.'

7.1.9 This further confirms that the 2021 / 2022 modelling completed by NRW to provide an indication of how abstraction volumes from the Severn could be affected by the proposed restrictions, demonstrates the worst 'potential' scenario. The Appellant confirmed that the maximum abstraction rates used in the modelling would not be possible during a period of low flows. Therefore, NRW's proposed low flow restrictions should have a much lower potential impact on abstractable volumes than its modelling suggested and thus, a lower potential to reduce water levels within the canal.

7.1.10 As detailed above in section 6.4 above, the BWB Agreement restrictions are in place to protect the river regulation scheme rather than to protect the ecology of the River Tanat. Low flows on the River Tanat still occur when the river regulation scheme is not operating, at a time when the BWB restrictions would not have applied to provide any restrictions on the abstraction. Paragraph 6.4.2 above includes Table 2 which demonstrates why the BWB restrictions were not sufficient to meet the CSMG flow standards during a 'river regulation period'.

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

7.2.1 The Appellant challenged these definitions during the operator review of the draft licence, see Annex 17.3 for further detail.

7.2.2 The following definitions of an hour and day are standard definitions used across all modern licences, including other licences issued to the Appellant:

'An hour is any period of 60 consecutive minutes, a day means a period of 24 consecutive hours'

Where necessary, the Records condition (8.1) requires a Licence Holder to take a reading of the measuring device at the same time each day. This device would usually be a meter and show the amount abstracted in a running total, rather than an instantaneous rate at a particular time. The definition therefore allows a Licence Holder to pick what time of day they take this reading. This definition is more flexible than the

definition of an hour as ‘a 1 hour period starting on the hour’ and a day as ‘midnight to midnight’, which would also require condition 8.1 to be changed to require the measurement to be taken at midnight which would reduce flexibility and likely be impractical for many licence-holders. The definition included in the licence still allows flexibility for a licence-holder to take the measuring device reading at midnight, should they wish. These comments follow NRW’s response to Operator Review comments, which were sent to the Appellant with the issued licences on 21 December 2022, see Annex 18.6.

- 7.2.3 NRW wishes to highlight that the above definitions were challenged on a number of other transitional licence applications by the Appellant during the Operator Review. The above justification was accepted for the majority of the issued licences, meaning this condition was not challenged via an appeal.

7.3 Inclusion of a records condition 8.1 (ii)

- 7.3.1 For the reasons detailed in the following sections above:

- 6.1 The Habitats Regulations / Serious Damage
 - 6.2 Existing hydrology within the Severn Catchment
 - 6.3 Maximum rates of abstraction applied for and evidenced
 - 6.5 Condition 6: Maximum quantities of water to be abstracted
 - 6.6 Conditions 7 and 8: Means of measurement of water abstracted and; Records
- NRW is satisfied that including condition 8 within the Transfer Licence is required to comply with the Habitats Regulations and 2017 Transitional Regulations and is consistent with the policy intention of the 2017 Governmental Response.

- 7.3.2 The Appellant challenged the requirement to provide annual returns to NRW under condition 8.1(ii) “*within 28 days after 31 March in each year*” during the Operator Review of the draft licence, see Annex 17.3. This condition is the standard returns condition used across all modern licences that require returns for all year abstractions. NRW send licence-holders a form by email to complete throughout the year. NRW then contact licence-holders when the information is due. These comments follow NRW response to Operator Review comments, which were sent to the Appellant with the issued licences on 21 December 2022, see Annex 18.6.

- 7.3.3 The annual formal return request requires the data to be provided within 28 days of the annual return cycle reporting period. The Appellant confirms they are willing to send the data “within 28 days of being so requested in writing by NRW”. Due to the large number of returns administered we need to treat all licence-holders required to submit returns consistently and use our automated returns system.

- 7.3.4 NRW can request returns on an ad hoc basis, using powers under section 201 of the Water Resources Act 1991, which is additional to the standard returns condition as detailed in paragraph 7.3.2 above.

7.4 Inclusion of further conditions

7.5 Inclusion of further condition 9.1 – Hands off Flow (HoF)

- 7.5.1 For the reasons detailed in the following sections above:

- 6.1 The Habitats Regulations / Serious Damage
- 6.2 Existing hydrology within the Severn Catchment
- 6.3 Maximum rates of abstraction applied for and evidenced
- 6.5 Condition 6: Maximum quantities of water to be abstracted
- 6.8 Condition 9.1 Hands off Flow (HoF) condition

NRW is satisfied that including condition 9.1 within the Transfer Licence is required to comply with the Habitats Regulations and 2017 Transitional Regulations and is consistent with the policy intention of the 2017 Governmental Response.

7.6 Inclusion of further condition 9.2 – During any ‘river regulation period’

7.6.1 For the reasons detailed in the following sections above:

- 6.1 The Habitats Regulations / Serious Damage
- 6.2 Existing hydrology within the Severn Catchment
- 6.3 Maximum rates of abstraction applied for and evidenced
- 6.5 Condition 6: Maximum quantities of water to be abstracted
- 6.8 Condition 9.1 Hands off Flow (HoF) condition
- 6.9 Condition 9.2 During any ‘river regulation period’

NRW is satisfied that including condition 9.2 within the Transfer Licence is required to comply with the Habitats Regulations and 2017 Transitional Regulations and is consistent with the policy intention of the 2017 Governmental Response.

7.7 Inclusion of further condition 9.4 – screening of intake

7.7.1 For the reasons detailed in the following sections above:

- 6.1 The Habitats Regulations / Serious Damage
- 6.10 Conditions 9.4 and 9.5 Screening at the point of abstraction and at the point of discharge to the River Severn from the overflow weir

NRW is satisfied that including condition 9.4 within the Transfer Licence is required to comply with the Habitats Regulations and 2017 Transitional Regulations and is consistent with the policy intention of the 2017 Governmental Response.

7.7.2 The Appellant states in their Grounds of Appeal document that they were first notified by NRW ‘*of the likelihood that the HRA would conclude screening would be a requirement on this Licence in October 2022*’. As detailed in paragraph 5.6 above, on 5 May 2022, NRW notified the Appellant that they considered the abstraction to have potential to impact on the Severn Estuary SAC and the Ramsar site. As detailed in section 5 above, the Appellant was further notified of this consideration via correspondence and virtual meetings on 13 July 2022, 20 July 2022 and 18 October, when the anticipated screen sizing was provided (see Annex 28.1).

7.7.3 NRW should highlight that as a public body the Appellant itself could qualify as a “competent authority” under the Habitats Regulations (regulation 7). It would be reasonable, therefore, to expect the Appellant to have a clear understanding of the main provisions of the Habitats Regulations and what they require.

7.7.4 As outlined in paragraph 6.1.14 above NRW must be satisfied that continued abstractions would not have an adverse effect on the integrity of a designated site before granting a licence. Identifying a target date in the future for compliance with HRA obligations would not comply with regulation 63 of the Habitats Regulations as it would allow continued potential adverse impacts on the designated features of the Severn Estuary SAC and the Ramsar site. This is why NRW did not consider relying on future dates for compliance. On 13 July 2022, NRW advised the Appellant 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 (see Annex 28.1).

7.7.5 As detailed under paragraph 3.7.8 it would have been open to the Appellant to avail themselves of regulation 64 of the Habitats Regulations, which sets out when considerations of imperative reasons of overriding public interest (IROPI) will apply. If there are imperative reasons, then an authorisation may be granted notwithstanding a

negative assessment. This mechanism was highlighted to the Appellant during a meeting on 19 February 2019, relating directly to a different site of operation.

- 7.7.6 A charity is not exempt from having to comply with licence conditions imposed to ensure compliance with HRA obligations.
- 7.7.7 The ability of the Appellant to comply with licence conditions was considered by NRW as part of the overall decision process. However, difficulties with compliance provide no answer to the legal need to impose a screening condition to ensure compliance with HRA obligations.
- 7.7.8 NRW wish to highlight that the Appellant is not currently in breach of screening licence condition 9.4 and will continue to be in compliance for the duration of the appeal. The Appellant emailed NRW on 6 March 2023 (see Annexes 27.1 and 27.2) to provide their anticipated timeline to ensure compliance with conditions 9.4 of the licence, with a completion date in December 2027. It is hoped that the Appellant is using this time to secure funding and draw up a programme of works that will demonstrate compliance at the earliest opportunity, should the Inspector be minded to approve this condition.
- 7.7.9 NRW consider that the screen is required to be in place all year. The Appellant is able to consider this requirement as part of their work in designing the screens. Any proposed changes to the screening condition 9.4 (for example, removing the screen for part of a year) would need to be completed via a variation to the licence conditions. The Appellant would need to provide adequate justification, and any such change would also be subject to a HRA to ensure NRW meets its duties under the Habitats Regulations.

8.0 Other considerations

8.1 Economic consideration

- 8.1.1 The likely costs and benefits do not affect NRW's obligation to discharge any duties, comply with any legal requirements, or pursue any objectives imposed upon it, which includes obligations under the Habitats Regulations. The use of conditions relating to the maximum quantities of water to be abstracted, HoF and screening is necessary to meet NRW's Habitats Regulations obligations.

8.2 Period of notice

- 8.2.1 The Appellant was aware that the broad exemption from licensing requirements for operations carried out by a navigation authority in the carrying out of its functions under section 26 of the 1991 Act, was removed by the 2003 Act, with effect from 1 January 2018, following the introduction of the 2017 Transitional Regulations. As a competent authority and in exercising any of their functions, the Appellant must have regard to the requirements of the Habitats Directives.
- 8.2.2 Initial notification regarding potential restrictions were detailed to the Appellant on 13 July 2022 in a virtual meeting (see Annex 28.1), where the likelihood of conditions in order to protect the environment was referenced. This position was re-iterated in correspondence dated 20 July 2022 (see Annex 10.1).
- 8.2.3 Final confirmation of the specific screening condition to be added to the Appellants licence was given via email on 24 November 2022 (see Annex 29.1) and the specific HoF conditions were provided via a hydrology report on 30 November 2022 (see Annexes 14.1 and 14.2), after determination had been largely completed.

- 8.2.4 NRW sent the Appellant a draft copy of the licence to allow operator review on 9 December 2022 (see Annexes 17.1 and 17.2), with a caveat that the licence was subject to internal review, with some changes possible.

8.3 Other concerns

- 8.3.1 Precise restrictions to be included on the licence were notified to the Appellant at the earliest opportunity following the statutory requirement to consult NRW ANCB and Natural England. The inclusion of the maximum quantities of water to be abstracted, HoF and screening conditions were required in order to ensure NRW's requirements under the Habitats Regulations were met and to ensure the statutory deadline under the 2017 Transitional Regulations could be met. Given the long history of the implementation of the New Authorisations, including all of its supporting and promotional messaging from NRW and other bodies, sufficient information and time has been provided for businesses to be prepared for these changes and to consider alternatives to prevent any significant economic detriment.

9.0 Conclusion

- 9.1 NRW respectfully invites the Inspector to dismiss the appeal and uphold the decision to grant the licence subject to the conditions imposed, which are necessary to protect against adverse effects on the features of the Severn Estuary SAC and the Ramsar site in accordance with the Habitats Regulations and the Transitional Regulations.
- 9.2 For the reasons set out above, NRW determined the application in accordance with relevant and applicable legislation and guidance.