

APPEALS TO PLANNING AND ENVIRONMENT DECISIONS WALES

PURSUANT TO SECTION 43 OF THE WATER RESOURCES ACT 1991

REFERENCES CAS-02488-V7M8Q2 & CAS-02489-V6P4R9

BETWEEN

RADNOR HILLS MINERAL WATER COMPANY LTD

Appellant

and

NATURAL RESOURCES WALES

Respondent

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STATEMENT OF CASE OF APPELLANT

*in respect of licences WA/054/0009/0001 and  
WA/054/0009/0002*

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***NB References to [Appendix x Appeal 1] and [Appendix x Appeal 2] are references to the location of the documents in the appendices of the grounds of appeals CAS-02488-V7M8Q2 and CAS-02489-V6P4R9 respectively. References to [SC x] are references to the location of the documents in the bundle that accompanies this statement of case.***

1. This statement of case concerns two appeals, CAS-02488-V7M8Q2 (“**Appeal 1**”) and CAS-02489-V6P4R9 (“**Appeal 2**”).
2. The Appellant appealed against the terms of two abstraction licences granted by Natural Resources Wales (“**NRW**”), which cover the Appellant’s abstraction from boreholes located in Wales.
3. The Appellant is a manufacturer of soft drinks and a producer of mineral and other bottled waters, which are sourced from water abstracted from land owned and

operated by the Appellant. The Appellant's production facility has been operational since 1985. The Appellant abstracts approximately 300,000 cubic metres of water per year from 15 boreholes for predominantly commercial, but also residential and agricultural purposes. The Appellant's business contributes significantly to the Welsh economy. The business has an annual turnover of approximately £58 million pounds. It is also the largest employer in East Radnorshire, employing more than 240 direct employees and a further estimated 200 sub-contractors in the immediate supply chain (including haulage and electrical contractors). As a major producer of soft drinks in mid Wales, the Appellant was recently identified by 'Insider Wales' (Business magazine) as being in the top ten Food and drink companies in Wales **[Appendix 20 Appeal 1]** and listed as number 145 of all industries in Wales **[Appendix 21 Appeal 1]**.

4. Until 1 January 2018, the Appellant was exempted from the requirements to hold abstraction licences.<sup>1</sup> The Appellant abstracted from its boreholes pursuant to the Severn River Authority (Exceptions from Control) Order 1967, which designated large areas of the River Teme and wider River Severn catchment area as a Groundwater Licence Exempt Area. Water abstraction has formed part of the ongoing operations at and maintenance of the Appellant's land for over thirty years.
5. The Appellant actively engaged with NRW (and the Environment Agency ("EA") in respect of its abstraction activities in England) in order to identify the specific operations which required abstraction licences **[Appendices 4 and 5 Appeal 1]**. On 12 August 2019, the Appellant submitted two applications to NRW in respect of new full abstraction licences for a total of 235,951 cubic meters of water per year (together, "the Applications") **[Appendix 3 Appeal 1]** and one application to the EA.
6. Pursuant to the Applications, NRW granted licence WA/054/0009/0001 **[Appendix 9 Appeal 1]** and licence WA/054/0009/0002 **[Appendix 9 Appeal 2]** on 16 December 2022, permitting the abstraction of a total of 110,456 and 125,135 cubic metres of water per year respectively (together, the "Licences"). Both Licences were granted for approximately 8 years, until 31 March 2031.

### **Summary of the Issues**

7. These appeals concern the decision by NRW to grant the Licences for a shorter period

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<sup>1</sup> Following the coming into force of The Water Resources (Transitional Provisions) Regulations 2017 (the "2017 Regulations") on 1 January 2018 **[Appendix 2 Appeal 1]**, the Appellant was required to apply for abstraction licences.

of time than the Common End Date (“CED”) provided for in the Teme Abstraction Licensing Strategy 2013 [**Appendix 13 Appeal 1**], namely 31 March 2037.

8. It is the Appellant’s case that, in the absence of any evidence of adverse impact from the licensed abstraction, it is unnecessary and unjustified to curtail the duration of the licence from the CED for the following reasons. Neither of the Appellant’s licence Applications met the *serious damage criteria* outlined in the 2017 government response to licensing previously exempt abstractions to justify curtailing the duration of the Licences; NRW had sufficient evidence to conclude that no adverse effects would be caused by the longer CED time period up to 2037. Further, the time limit imposed by NRW is contrary to the applicable legislative and policy framework, having regard to the detrimental impact on the Appellant’s business and ability to make future investment in the business.

#### **Abstraction scheme and locality**

9. The Appellant’s Applications concern the historical abstraction from groundwater from the Appellant’s land at Radnor Hills, Heartsease, Knighton, Powys, which crosses the border between England and Wales. The Appellant abstracts water for the bottling of mineral and spring waters and the blending of syrups and juices to create a range of still and sparkling soft drinks. As the Appellant’s site is not connected to a mains water supply, water for domestic (both residential and commercial) and general agricultural (poultry, sheep and agrochemical spraying) applications are also supplied by the water abstracted.
10. The Appellant abstracts from two different sources of supply: bedrock (underground strata comprising Raglan Mudstone Formation) and superficial deposits (underground strata comprising sands and gravel). The abstraction comes from 15 boreholes: a total of 12 boreholes in Wales and 3 boreholes in England. A site location plan showing where each of the 15 boreholes are situated is provided at **Appendix 1 Appeal 1** and a summary of all 15 abstraction boreholes can be found in **Appendix 3 Appeal 1**.
11. The abstractions are by means of submersible pumps. A diagram showing how the water is piped and distributed to the Appellant’s site is provided at Figure 2 of Appendix I of the Applications [**Appendix 3 Appeal 1**].

12. The Appellant's abstractions are located within the Teme catchment, the abstraction boreholes being close to the River Teme and approximately 6km upstream of the confluence of the River Clun with the River Teme. The Appellant's abstraction capture zones (i.e. the area where groundwater is abstracted by the boreholes) do not, however, reach the River Teme. This means that the boreholes do not take water directly from the river.
13. The River Teme is a Site of Special Scientific Interest ("**SSSI**"), notified under section 28 of the Wildlife and Countryside Act 1981 ("**WCA**").<sup>2</sup> It is of special interest as a representative, near-natural and biologically-rich river type that supports river plant, fish and invertebrate communities and other populations, including species covered by the Conservation of Habitats and Species Regulations 2017 ("**Habitats Regulations**") and the WCA.
14. The River Clun is a downstream tributary of the River Teme and is a Special Area of Conservation ("**SAC**"), designated for freshwater pearl mussel. The River Teme is itself a tributary of the River Severn, which supports the Severn Estuary SAC, Severn Estuary Special Protection Area ("**SPA**") and Ramsar. The Severn Estuary was designated as a SAC due to its natural features (e.g. its sandbanks and mudflats) and the habitat supporting species of migratory fish. The designation as a SPA was due to the Estuary's national and international importance for breeding, feeding, wintering and migration of rare and vulnerable species of birds, and the Estuary's designation as a Ramsar site is owing to its wetlands. Owing to these designations, and pursuant to section 63 of the Habitats Regulations, a Habitats Regulation Assessment ("**HRA**") was undertaken by NRW prior to its determination of the licence Applications.
15. There was no historic requirement to meter exempt abstractions. As a result, individual meters were not installed on each of the 12 boreholes included in the Appellant's Applications. The abstraction volumes that were justified and applied for, included as part of the Appellant's Applications and subsequently licensed, were therefore compiled from a number of different sources, including:
- a. bottling line metered flow rates and volumes;
  - b. total product sales volumes;
  - c. bottling efficiency adjustment;
  - d. British Water Codes of Practice guidance data on domestic water use;

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<sup>2</sup> Designation:

<https://designatedsites.naturalengland.org.uk/SiteDetail.aspx?SiteCode=S2000102&SiteName=teme&countyCode=&responsiblePerson=&SeaArea=&IFCAAarea=>

- e. Poultry and livestock numbers;
- f. Cropping areas; and
- g. the EA's optimum water user criteria.

16. The Licences provide for a maximum aggregate abstraction volume of 235,591 cubic metres of water per year (which equates to 896 cubic metres per day).

## **Legal and policy framework**

### *The Licensing Regime*

17. Chapter II of the Water Resources Act 1991 (“**WRA**”) as amended governs water abstractions [**Appendix 10 Appeal 1**]. Section 24 directs that “...*no person shall (a) abstract water from any sources of supply...except in pursuance of a licence under this chapter granted by the appropriate agency*”. NRW is the principal environmental regulatory in Wales and has regulatory responsibility for water abstraction.

18. The Severn River Authority (Exceptions from Control) Order 1967, which designated large areas of the River Teme and wider River Severn catchment area as a Groundwater Licence Exempt Area, previously exempted the Appellant from the need for such a licence, though the terms of this exemption were varied by section 10 of the Water Act 2003, which was brought into force with effect from 1 January 2018 [**SC 1**], and pursuant to the Water Abstraction (Revocations etc.) (England) Order 2017.

19. There is no issue between the parties that the particular operations in question now need abstraction licences under section 24 WRA.

20. The consideration of applications is governed by section 38 WRA. Section 38(3)(b) of the WRA provides that:

*“...the appropriate agency, in dealing with any application for a licence under this Chapter, shall have regard to all the relevant circumstances, including any duty imposed by or under any enactment on bodies having functions in relation to inland waters (for example, navigation authorities and internal drainage boards), and shall have regard in particular to—*

(a) *any representations in writing relating to the application which are received by the appropriate agency before the end of the period mentioned in subsection (1) above; and*

(b) *the requirements of the applicant, in so far as they appear to the appropriate agency to be reasonable requirements*" (Emphasis added).

21. Conditions may be attached to a licence by virtue of s.38(2) WRA.

22. Section 43 WRA enables the applicant for an abstraction licence to appeal to the Secretary of State if "*dissatisfied with the decision*" of NRW in respect of the application, such appeals to be determined in accordance with section 44.

23. There is a further provision made by the Secretary of State pursuant to powers in the WRA, namely the Water Abstraction (Transitional Provisions) Regulations 2017 (SI 2017/1047) (the "**2017 Regulations**") [**Appendix 2 Appeal 1**]. This provision applies to applications for licences made by those, such as the Appellant, who previously had the benefit of exemptions.

24. The process by which the previous exemption was ended and the way in which licence applications for formerly exempt abstraction activities were to be determined was the subject of consultation by UK and Welsh Governments.

25. An initial consultation was carried out in 2009, and a further consultation was published in January 2016 (the "**2016 Consultation**") [**Appendix 11 Appeal 1**]. The Government's response to the 2016 Consultation was published in October 2017 (the "**2017 Response**") [**Appendix 12 Appeal 1**]. This set out the Government's final policy approach to licensing previously exempt abstractions. In accordance with the 2017 Response and the 2017 Regulations, applications would only be significantly curtailed or refused to protect the environment from 'serious damage'.

26. Paragraph 3.2 of the 2017 Response provided 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.*

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

*The UK and Welsh Governments' expectations are that the Regulator will normally grant licences with a time limit to the relevant common end date in keeping with its published licensing position. Once within the licensing system, these abstractions will be treated like other licensed abstractors. While licences will be issued with time limits, it is the UK and Welsh Governments' intention to phase out time limits as part of abstraction reform."*

27. The principles used to assess serious damage are set out in the 2012 consultation and the government response 'on the principles to be used in determining whether a water abstraction may cause serious damage' (the "**2012 Response**") [SC 2].<sup>3</sup> As clarified in the 2016 consultation, if the abstraction is affecting, or has the potential to affect, a European site designated under the Habitats Regulations, regulators will apply the precautionary principle in their determination decision of serious damage. This means that an abstraction would be restricted to protect from serious damage where the regulator has insufficient evidence to conclude that no adverse effects to protected sites would be caused. The serious damage criteria is set out in the 2012 consultation and Government response "*on the principles to be used in determine whether a water abstraction may cause serious damage*". Under the transitional application process, NRW consider they are met where:

- a. there is a known, tangible impact to any protected site that has been shown to result specifically from a previously exempt abstraction activity; or
- b. the abstraction is located in a WFD waterbody with an overall status of less than 'Good', the abstraction of water has been confirmed as the (contributing) reason for not achieving 'Good Ecological Status' and the abstraction is causing recent actual flows in the waterbody to fall 50% below the Ecological Flow Indicator ("**EFI**"); or
- c. there is insufficient evidence to conclude that 'no adverse effects' to European protected sites would be caused.

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<sup>3</sup><https://www.gov.uk/government/consultations/the-water-act-2003-withdrawal-of-compensation-on-the-grounds-of-serious-damage>.

28. The time limits referred to in the 2017 Response are determined by the Catchment Abstraction Management System (“**CAMS**”) process, which sets out the water resources management licensing strategy for different catchment areas. The relevant licensing strategy for the Teme catchment at the time of determination of the Appellant’s Applications was the Teme Abstraction Licensing Strategy 2013 (“**2013 Strategy**”) [**Appendix 13 Appeal 1**]. A revised strategy was issued in March 2023 - Teme Abstraction Licensing Strategy 2023 (“**2023 Strategy**”) [**SC 3**]. Whilst the Teme Abstraction Licensing Strategy was published by the EA, NRW has not published its own licensing strategy and therefore it is understood that the 2013 Strategy (and now the 2023 Strategy) applies to the Appellant’s abstraction in Wales.
29. In accordance with the 2013 Strategy, all new licences within a CAMS area have a CED. CEDs occur every twelve years. The purpose of CEDs is to ensure that licences issued within a CAMS area can be reviewed concurrently so that, if any action is required, it is done so on a fair basis. When an application is made within six years of the CED, regulators will generally apply the subsequent CED to any licence granted. This is to avoid issuing shorter and shorter duration licences as the CED approaches. This means that the initial CED on a licence may be between six- and 18-years duration. On replacement, the normal duration will then usually be 12 years. Where regulators are uncertain about the long-term impacts of an abstraction they may grant a short-term licence during which time potential impacts are monitored.
30. At the time the Appellant made its Applications, the CED was 31 March 2025 and the subsequent CED was 31 March 2037.
31. Unlike in England, where the UK government issued a direction to the EA that applies to lawful abstractions that qualify for the transitional arrangements<sup>4</sup>, the Welsh government considered recent Welsh legislation sufficient for supporting a light touch, risk-based approach to licensing abstractions under the transitional arrangements, without making a direction to NRW. In particular, the Environment (Wales) Act 2016 placed 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 Well-being of Future Generations (Wales) Act 2015 and among NRW’s seven Well-being Objectives is the objective to promote successful and responsible business that use natural resources without damaging them (the WBFG is addressed further below).

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<sup>4</sup> Water Abstraction (Transitional Provisions) (England) Direction 2018.

*Well-being for Future Generations (Wales) Act 2015*

32. In accordance with the Well-being for Future Generations (Wales) Act 2015 (“**WCFG**”), all public authorities must, when carrying out sustainable development, ensure that its actions seek to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs. A copy of the WCFG can be found at **Appendix 14 Appeal 1**.

33. A public authority must also seek to achieve seven well-being goals, which carry equal weight and should each be considered separately by any public body to whom the 2015 Act applies. The well-being goals are as follows:

1. A prosperous Wales;
2. A resilient Wales;
3. A healthier Wales;
4. A more equal Wales;
5. A Wales of cohesive communities;
6. A Wales of vibrant culture and thriving Welsh language; and
7. A globally responsible Wales.

34. In determining the application for the Licence, the Respondent was carrying out sustainable development for the purposes of the 2015 Act.

35. The 2015 Act provides that ‘sustainable development principle’ includes balancing short-term needs against long term needs, the need for integrated approaches considering all relevant well-being goals and the consideration of how the relevant public body’s well-being objectives impact upon each other or upon other public bodies’ objectives, in particular where steps taken by the public body may contribute to meeting one objective but may be detrimental to meeting another.

36. Guidance published by the Welsh Government [**Appendix 15 Appeal 1**] discourages public bodies from viewing the well-being goals in a hierarchical fashion, stating:

*“Only looking at one or two of the well-being goals, or interpreting a single goal as being of greater significance (...) must be avoided. Public bodies must consider all seven of the well-being goals (...) It is important to understand that this is not about balancing impacts; it is working towards win-win solutions and identifying the multiple benefits where they exist.*”

*Public bodies that (sic) understand that this is not just about the environment, or just the economy or society, and that it is about understanding the often complex, but real world interconnections between our environment, our economy, our society and culture.*" (emphasis added)

37. NRW has also published its own Well-being Statement as it is obliged to under the 2015 Act [**Appendix 16 Appeal 1**]. In its Well-being Statement, NRW lists its Well-being Objectives which are intended to contribute to the well-being goals as follows:

1. Champion the Welsh environment and the sustainable management of Wales' natural resources;
2. Ensure land and water in Wales is managed sustainably and in an integrated way;
3. Improve the resilience and quality of our ecosystems;
4. Reduce the risk to people and communities from environmental hazards like flooding and pollution;
5. Help people live healthier and more fulfilled lives;
6. Promote successful and responsible business, using natural resources without damaging them; and
7. Develop NRW into an excellent organisation, delivering first class customer service.

38. The Well-being Statement explicitly states that each of the Objectives are "*equally important and not listed in any priority order*".

39. Finally, NRW must have regard to the wider economic consequences of its regulatory action. By section 108(1) of the Deregulation Act 2015 [**SC 4**], a person exercising a regulatory function must, in the exercise of that function, have regard to the desirability of promoting economic growth (section 108(1)). In performing this duty, the person must, in particular, consider the importance for the promotion of economic growth of exercising the regulatory function in a way which ensures that regulatory action is taken only when it is needed, and any action taken is appropriate (section 108(2)).

40. The former Department for Business, Energy and Industrial Strategy ("**BEIS**") (now the Department for Business and Trade) has issued statutory guidance on the section 108 growth duty, emphasising the importance of regulators understanding the business

environment. This includes “*knowledge of how a regulator’s approach to delivering regulation, and the individual actions that a regulator takes, impact on businesses generally, and on business growth; including both direct economic impacts and indirect impacts*” (p.8).<sup>5</sup>

41. It follows that NRW was required to determine such applications in accordance with the 2017 Regulations, the WRA, the 2017 Response, the Teme Strategy, the WBFGB and the s.108 growth duty.

### **Appellant’s licence applications and NRW’s determination**

42. On 12 August 2019, the Appellant submitted two applications to NRW and one application to the EA in respect of new full abstraction licences at the Appellant’s land. In total, the Appellant applied to NRW for abstraction licences to abstract 235,591 cubic metres of water per year for predominantly commercial, but also residential and agricultural purposes. The Applications can be found at **Appendix 3 Appeal 1** and **Appendix 3 Appeal 2**, and detail of the abstractions is set out in the supporting information submitted with (to be found in Appendix 3) and following submission of the Applications [**Appendix 5 Appeal 1**].
43. When compiling the application forms it was common not to include duration dates, as the expectation was that NRW would select the next CED at the time of determination. No queries were raised by NRW with respect to the absence of duration dates on the Applications.
44. As explained above, the Appellant actively engaged with NRW regarding the licensing regime to identify the need for licences in respect of its abstraction operations and throughout the applications process. All relevant correspondence between the Appellant and NRW is contained within **Appendix 4 Appeal 1**.
45. NRW issued the Licences on 16 December 2022, some three years after the Appellant’s Applications were first submitted and 15 days before the last date on which such applications had to be determined. Both Licences were time-limited with an expiry date of 31 March 2031, providing a shorter duration than the CED of 31 March 2037.
46. The prospect of shorter duration licences was first communicated to the Appellant on 25 October 2022, despite the parties’ continual engagement throughout the appeals

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<sup>5</sup> BEIS, ‘Growth Duty: Statutory Guidance’ (Statutory Guidance under section 110(6) of The Deregulation Act 2015, March 2017)

process beginning in 2019. In the October correspondence **[Appendix 4 Appeal 1]**, NRW explained that it was considering imposing a short duration period on the basis that the catchment area was considered to be ‘very dynamic’, and that “*a number of other factors would justify a shorter time limit in this situation*”. No explanation of what would constitute ‘very dynamic’ was given and no further details on the ‘other factors’ were provided.

47. The Licences were issued with the following rationale for the shorter duration period, in the ‘Reasons for Conditions’:

*“The licence is time-limited in line with our policy on setting time limits, taking into account the long term uncertainty within this part of the catchment.*

*The abstraction is required to be metered to demonstrate compliance with the terms of the licence and to provide information on actual water usage for water planning purposes.”*

48. In NRW’s accompanying decision/issue letter dated 16 December 2022 (“**Issue Letter**”) the following is said about the imposition of a shorter time period **[Appendix 5 Appeal 1]**:

*“Your abstraction licences will remain in force until 31/03/2031, in line with our policy on setting time limits. As previously advised, the time limit of 2031 is shorter than the current common end date of 2037 for the Teme catchment. However it is within the normal 6-18 year licence duration period and is considered to be in line with the policy position as outlined in the 2017 Government response on licensing previously exempt abstractions.*

*The shorter time limit has been applied due to the dynamic nature of the catchment and concerns raised during the consultation process regarding the potential for increased or prolonged low flow / drying events, as well as the conservation status of certain designated features. It is also considered justified in light of the limited groundwater monitoring data provided to support the application, which covers a relatively short time period from 2017 – 2021.” (emphasis added)*

49. Shortly thereafter, the Appellant’s agent engaged with NRW to ascertain more fully NRW’s reasons for its determination and to explore whether the agency would reconsider its decision. In email correspondence dated 12 January 2023, NRW confirmed it was “*unable to reconsider the decision regarding the licence duration for the above applications as the licences have now been issued. NRW’s justification for*

*this decision was provided in email correspondence dated 8/12/2022 and licence issue letter dated 16/12/2022.*” **[Appendix 4 Appeal 1]**

50. What NRW did not divulge or provide as part of that email exchange or engagement was the full decision document (the “**Decision Document**”) **[SC 5]**, which has only now been disclosed (as of 5 July 2023) and only following repeated requests from the Appellant to be provided with the Decision Document and other evidence.
51. In addition, as explained at paragraph 14 above, NRW carried out a HRA as part of the application process to determine whether the licensed abstractions would adversely affect the integrity of designated sites, namely the River Clun and Severn Estuary SACs and Ramsar. The HRA was not provided to the Appellant at the time of the determination or shortly thereafter. Copies of the Appellant’s correspondence with NRW requesting its Decision Document and HRA can be found at **[SC 10]**. This demonstrates a lack of transparency on NRW’s part as to the HRA and information evidencing NRW’s reasons for its determination. The HRA was only disclosed on 5 July 2023.
52. As a result, the Appellant has not had sufficient time to consider and respond to the Decision Document or HRA that have now been disclosed as part of the preparation of its statement of case. The Appellant wrote to PEDW on 15 June 2023 explaining the prejudicial impact of not being afforded this opportunity and requested alterations to the appeals timetable, principally the accommodation of sequential statements or a delay to the timetable **[SC 11]**. PEDW refused the Appellant’s request for sequential statements and a delay to the deadline for the filing of statements of case but confirmed, by email dated 23 June 2023 **[SC 11]**, that the Appellant can introduce evidence and arguments at the final comments stage to address issues raised by NRW in its statement and that it would consider an extension to the 9-week deadline for the lodging of any response **[SC 11]**.
53. In the short time the Appellant has had to review and consider the Decision Document and HRA, the following points appear pertinent to NRW’s decision to confine the Licences to a shorter time period:
- a. First, NRW acknowledge and recognise that “*applications will only be significantly curtailed or refused to protect the environment from ‘serious damage’*” (section 9.7 Decision Document **[SC 5]**).

- b. Secondly, NRW does not consider the Appellant's Applications to meet the *serious damage criteria* outlined in the 2017 Response. This is confirmed at page 18 of the Decision Document **[SC 5]** where NRW state:

*"Under the 2017 Government response applications will only be significantly curtailed or refused to protect the environment from serious damage. NRW consider serious damage criteria is met where -*

*There is insufficient evidence to conclude that no adverse effects to European protected sites would be caused; or*

*If there is a known, tangible impact to any protected site that has been shown to result specifically from a previously exempt abstraction activity; or*

*The abstraction is located in a WFD waterbody with an overall status of less than Good....*

*...NRW do not consider the application to meet the 'serious damage' criteria as impacts to any designated sites have been ruled out through the HRA an Appendix 4 assessments, neither is the application linked to a WFD waterbody flow failure."*

- c. Thirdly, there was disagreement between NRW and the other HRA consultees (namely, Natural England ("**NE**") and the NRW Marine Advice Team) on the results of the HRA. NE and NRW's Marine Advice Team did not consider the HRA proceeded on a sufficiently precautionary approach due to an absence of data. However, those concerns were addressed prior to NRW's determination. This is clear from the New Authorisations and Habitats Regulations Escalation Options Paper dated 24 October 2022 ("**Options Paper**") at p.4 "*SNCB [NE] advice hasn't identified any evidence of impact. Rather it's highlighted perceived evidence gaps and is therefore reliant on the precautionary principle. We agree impact pathways exist however, based on the best available scientific evidence and expert advice from technical advisors, permitting are satisfied that significant impacts are unlikely and all concerns raised by the SNCB [NE] have been addressed."* **[SC 8]**
- d. Fourthly, the Options Paper makes clear that the short duration of the licence was advised due to the need to make a decision prior to statutory time limit (31 December 2022) **[SC 8]**.

- e. Fifthly, the Decision Document includes supplementary justifications not previously disclosed to the Appellant or addressed in the Licence and/or Issue letter. Section 11 of the Decision Document provides:

*“The time limit of 2031 is considered justified for the following reasons:*

- *As per section 9.2 above, the catchment is very dynamic and already subject to low flow and drying events. During determination, concerns have been raised regarding the potential for an increase in the frequency and duration of drought events;*
- *The groundwater monitoring data provided to support the application covers a relatively short period from 2017 to 2021. More confidence is needed in whether data collected over a longer time period would reflect the same results;*
- *In response to the HRA consultation (see section 9.6 above), Natural England suggested that Freshwater Pearl Mussel (FWPM) may not survive the 15 year duration originally proposed.”*

### **Summary of Appellant’s case**

54. This section summarises the Appellant’s case on the information it currently has and based on a preliminary review of the very recent disclosure from NRW, but the Appellant reserves the right to develop its arguments and grounds more fully and submit further evidence (including expert evidence), if so advised, as part of its reply, having had the opportunity to consider NRW’s evidence properly.

55. The Appellant’s case, in summary, is that, pursuant to s.44(2) of the WRA, the Inspector should vary the decision of NRW so that the duration of both Licences aligns with the CED for the following reasons.

56. First, the published licensing position is that licences will usually be granted to the relevant CED.

57. Secondly, where, as here, the Appellant is applying for a transitional licence, the Inspector is required to take a “*light-touch, risk-based approach*” which means that abstractions will only be “*significantly curtailed to protect the environment from serious damage*”: 2017 Response.

58. From the information which NRW has recently provided to the Appellant, it is clear that NRW did not consider the licenced abstraction met the “*serious damage*” criteria: see page 18 of the Decision Document [SC 5], and the HRA which confirmed “*no likely significant effect*” on the designated sites. In those circumstances, the Appellant’s Applications should have been managed in accordance with the 2013 Strategy (i.e. granted with the CED of 31 March 2037) (see page 22, 2013 Strategy [Appendix 13 Appeal 1]).
59. Thirdly, when determining a licence application, regard must be had to the requirements of the applicant in so far as they appear to be reasonable requirements: s.38(3)(b) WRA.
60. The ability to abstract water encompasses and underpins the Appellant’s entire business. Therefore, the knowledge that it can continue to abstract water for the foreseeable future at the quantities historically abstracted is paramount to the Appellant. As is the case for most businesses, the Appellant works on a minimum ten-year business plan. A licence duration period limited to just over 8 years will have a major impact on all planning relevant to the business, as this window of time is entirely insufficient to enable the Appellant to accommodate changes made to the Licences for the purposes of the Appellant’s operations. In the event that the volume of abstraction under the Licences is in the future reduced, this would represent a serious risk to the Appellant’s business and a disruption to future planning.
61. In contrast, an expiry date of 31 March 2037 would provide the Appellant with sufficient time to prepare for and plan any future investment decisions over the next 14-year period. For example, the Appellant’s investment in machinery is based on a minimum amortisation of approximately 15 years. As filling machines (a core part of the Appellant’s infrastructure) are currently on a two-year lead time, the Appellant would have only a seven-year window to plan for purchase and payback on this investment. This contrasts with the 13-year window that the Appellant would have with the CED. The additional six-year window would be crucial in providing the Appellant comfort and certainty that financial investment and strategy would not be interrupted or affected by a restriction to abstract the one resource vital to its entire business. In the immediate future, the Appellant is considering upgrading a number of second-hand machines as well as upgrades to its warehouse to more fully automate its operations, including investing in laser-guided vehicles/forklifts. However, given the lead times and factoring in amortisation, the Appellant is unable to proceed with these investments considering

the Licences' duration period. The Appellant's grounds of appeal for Appeals 1 and 2 set out in detail the additional areas of investment which will be affected by the uncertainty attached to the Licences' time limits (see paragraph 94, Appeal 1).

62. The continuity of the Appellant's business is plainly intrinsically linked to and dependent upon the comfort provided by a longer-term licence duration period, which is why the Appellant requires a licence until the CED. Limited to an eight-year duration (approximately) within which it can lawfully abstract water, the Appellant will need to cease investment in the business, leading to a decline in business growth and lack of vital jobs within the community in the years leading up to the present expiry date of the Licence, given that it cannot make any future investments without the knowledge that its business can, or will, continue. The shorter duration period therefore poses a material risk to both the Appellant's business and the wider Welsh economy. This latter consequence is not merely the Appellant's supposition. A letter from James Evans MS (Member of the Welsh Parliament) written in support of the Appellant's appeal confirms that "[T]he sums being invested by [the Appellant...] are vast and the local community, local jobs are heavily reliant on its success going forward." [SC 12]

63. These material risks were made clear to NRW as early as October 2022. In a communication from the Appellant's agent on 31 October 2022 (see **Appendix 4, Appeal 1**) the following was explained to NRW:

*"The short licence period that has been proposed presents a significant barrier to investment in the business, due to the risk that licence renewal represents. This puts at risk a successful Welsh business that employs 240 people directly and an estimated 250 people indirectly, and generates a local turnover of approximately £60 Million directly and a further local turnover of £15 Million.*

*This is in an area of Wales and England, that is devoid of high quality technical jobs and long term employment prospects. It is critical that Natural Resources Wales and the Environment Agency consider the seriousness of this situation in their deliberations."*

64. Despite being made aware of the severity of the implications of a shorter-term licence duration period, NRW still proceeded to issue the Licences subject to a restrictive time limit.

65. Fourthly, the Inspector must take account the requirements of the WBFG. Varying the duration of the Licences will enable the Appellant to strategise for the future and invest with certainty that the main resource used in its products will continue to be available for at least the next 14 years. With that certainty and investment, the various benefits that stem from the Appellant's business (as identified in the grounds of appeal – see paragraphs 59 to 89, Appeal 1) will be realised fully and will potentially thrive. It will therefore be in accordance with each of the well-being goals under the WBFG.
66. Fifthly, pursuant to s108(1) of the Deregulation Act 2015, the Inspector must have regard to the economic consequences of a decision not to grant the licence for the duration required by the Appellant. In particular, the Inspector must consider the importance for the promotion of economic growth and the impact of a decision on business growth. As explained above, the shorter duration period poses a material risk to both the Appellant's business on an ongoing basis and to the wider Welsh economy.
67. It follows that it would be contrary to the applicable legislative and policy framework not to vary the Licences so that the duration aligns with the CED.
68. As explained above, the Appellant has only very recently been provided with NRW's Decision Document and HRA. It is seeking expert advice on these documents, and it has not been possible within the very limited time since that information was provided to prepare an expert report in response. In order to assist the Inspector, the Appellant makes some preliminary points below, but the Appellant reserves its position, intending to respond fully to the points raised in these recently disclosed documents, as well as any additional material relied upon by NRW, at the final comments stages.
- a. The application was screened out from further assessment under the Water Framework Directive Regulations 2017 on the basis that the abstraction is unlikely to affect the overall status of the relevant groundwater and surface water bodies: Decision Document at p.12 **[SC 5]**.
  - b. Abstraction pursuant to the Licences is considered to prevent any changes in surface water flows which could impact on fisheries: Decision Document at p.14 **[SC 5]**.
  - c. Abstraction pursuant to the Licences is considered not likely to damage any SSSI features for the purposes of the Wildlife and Countryside Act 1981: Decision Document at p.16-17 **[SC 5]**.

- d. The HRA undertaken by NRW concluded that abstraction pursuant to the Licences is not likely to have a significant effect on any Natura 2000 site for the purposes of the Conservation of Habitats and Protected Species Regulations 2017: see HRA **[SC 6]**.
- e. The HRA conclusions were reached following consultation with relevant technical specialists at NRW. These specialists include those from the NRW Fisheries, Hydrology, Geoscience and Geomorphology teams, all of which should be viewed as the relevant experts for the purpose of HRA consultation given the nature of the project and the possible implications for the designated sites.
- f. The conclusion of *no likely significant effect* could not be agreed by the Marine Advisory Team and the concerns were focussed upon a lack of available flow data and the level of confidence in the flow estimates used in the assessment. It is also noted that NE raised concerns during consultation with the EA (for those aspects of the project which fall under the EA's jurisdiction, in England), principally regarding the robustness of the data used for assessment and implications for Freshwater Pearl Mussel and Atlantic Salmon. It is clear however, that following re-consultation in the light of the concerns raised, both the Hydrology and Geoscience teams at NRW (the relevant NRW specialists best placed to advise on such matters) were satisfied that the data can and does support the HRA conclusions **[SC 9]**. That conclusion was later upheld by NRW's Leadership Group (following escalation) and, notably, the option of restricting the abstraction based on river flow was ruled out **[SC9]**.

69. In summary, the NRW assessment is that the environmental impact of abstraction under the Licences is negligible on every metric applied. It is clear that that the shorter end date has been applied as a way to resolve an internal disagreement in the face of the approaching statutory deadline to determine the Applications. This approach is contrary to the legal and policy framework governing the determination of applications for transitional licences. It will have devastating consequences for the Appellant's business and the wider economy.

70. For all these reasons, the Inspector is asked to vary the Licences and apply the expiry date in line with the CED provided for in the Teme Abstraction Licensing Strategy 2013, namely 31 March 2037.

**Burges Salmon LLP**

**17 July 2023**