

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

APPEAL BY: CANAL & RIVER TRUST

SITE AT: River Dee at Horseshoe Falls

**Planning And Environment Decisions Wales (PEDW)
Reference:**

CAS-02487-Q9Z8H3

**NATURAL RESOURCES WALES'
RESPONSE TO APPELLANT'S
STATEMENT OF CASE**

INTRODUCTION

1. This is a response by Natural Resources Wales (“NRW”) to the Statement of Case (“SoC”) submitted by the Appellant, dated 4 July 2023, in support of the appeal identified on the previous page.
2. For ease of reference, this document follows the order and structure of the Appellant’s SoC, providing comments in response as NRW considers necessary. NRW has not considered it necessary to respond to every section in the SoC.
3. Whilst paragraphs 1 – 12 of the Appellant’s SoC deal with matters which were included with the Appellant’s original grounds of appeal submitted to PEDW on 18 January 2023, paragraphs 13 – 39 seek to introduce new grounds of appeal. For the reasons given in paragraphs 6 – 9 below, NRW does not propose to respond to the Appellant’s new grounds of appeal. NRW shall only consider and respond to the matters set out in paragraphs 1-12 of the Appellant’s SoC.
4. NRW notes that paragraphs 1 – 12 of the Appellant’s SoC follow very closely the Appellant’s grounds of appeal document. As NRW has already responded to the Appellant’s grounds of appeal in its own SoC, NRW shall focus here on responding to any new information or argument in paragraphs 1 – 12 of the Appellant’s SoC.
5. References to paragraph numbers below are to those in the Appellant’s SoC, unless otherwise stated. References to annexes are to the annexes to NRW’s SoC.

NRW’S RESPONSE TO THE SOC

6. Paras 1(ii), 13 - 39: As stated above, paragraphs 13 – 39 of the Appellant’s SoC seek to introduce new grounds of appeal. The Appellant’s solicitors had contacted NRW via email on 27 and 28 June seeking NRW’s agreement to allow new grounds of appeal. NRW responded to the Appellant’s solicitors on 29 June explicitly stating that NRW would not be prepared to consent to amending the grounds of appeal. No response was received from the Appellant’s solicitors. Upon reviewing the Appellant’s SoC (para 37), NRW note that PEDW were also asked to consent to the amended grounds of appeal, and that PEDW did not agree, which was confirmed by email of 3 July. Despite this, the Appellant has submitted a SoC inappropriately seeking to introduce new grounds of appeal.
7. The Water Abstraction (Transitional Provisions) Regulations 2017 set out the process to be followed for this appeal. In particular, paragraph 12 of the Schedule to the 2017 Regulations concerns appeals against decisions on licence applications. This states that the period for serving the notice of appeal is 28 days from the determination of the application (para. 12(1)) and further states that “A notice of appeal under section 43 **must state the grounds of appeal** ...” (para. 12(2)). NRW determined this application on 21 December 2022 and the Appellant complied with para. 12(1)-(2) on 18 January 2023 by submitting detailed grounds of appeal. The Appellant cannot now introduce new grounds of appeal. Indeed, there is no provision in the statutory framework that allows grounds of appeal to be amended after the notice of appeal has been filed.

8. Accordingly, NRW does not propose to respond to the new grounds of appeal raised by the Appellant in paragraphs 13 – 39 of its SoC.
9. NRW advises the Appellant to submit an application to vary the licence to allow NRW to consider the proposed change to the annual volume condition and the newly available data.

Screens

10. Para 3: The Appellant suggests that 4mm and 10mm screens have been in place at the abstraction point since the Habitats Regulations Assessment carried out in 2007. Although the Appropriate Assessment stage of the Habitats Directive Review of Consents (HDRoC) was completed in 2007, the 4mm screens were not installed permanently until 2010 at the earliest. This is based on a letter dated 19 November 2009 from British Waterways (the Appellant's predecessor) to Environment Agency Wales (NRW's predecessor) which suggests that British Waterways were intending to install the 4mm screens in time for the 2010 spring movement of lamprey. A copy of the letter is provided in Annex 15.2 of NRW's SoC.
11. Paras 4 and 5: As detailed in para 7.1.3 of NRW's SoC, the screening conditions on the Appellant's Transfer Licence are more stringent than those on the United Utilities Licence. As a result, NRW considers compliance with the conditions on the Appellant's Transfer Licence would also necessarily ensure compliance with the conditions on the United Utilities Licence.
12. Para 6: As detailed in sections 6 and 7 of NRW's SoC, NRW has provided justification for the differential screening requirements applied to the Appellant's Transfer Licence. Specifically for lamprey, para 6.5.3 of NRW's SoC refers to the shorter sampling period of the 2007 data and changing weather patterns which justify a more precautionary approach and longer screening period.
13. Para 7: The Appellant refers to a report published by NRW in 2016 ("River Dee & Bala lake SAC population attribute condition assessment for brook, river and sea lamprey 2014"). The Appellant did not include a copy of this report with its SoC. For ease of reference, NRW provide a copy in Annex 1.1 to this response.
14. The Appellant suggests that as the report concludes that brook lamprey have *"passed all the Common Standards Monitoring guidance attributes for the condition of a SAC feature ... the brook lamprey population does not appear to be in decline"*. As highlighted in section 7 of the report, the assessment of the 2014 results in the report is *"a contribution to the overall assessment of the population that will be completed when the programme of annual surveys is completed in 2017/18"*. The report did not, therefore, purport to be a comprehensive assessment of the health of the brook lamprey population at the time of its publication in 2016. In addition, the report highlights that the 2014 data is based on a small number of survey sites (11 "primary" sites). Table 4 of the report also highlights that *Lampetra* (river and brook lamprey) were classed as unfavourable in the previous reporting cycles (2001 – 2006 and 2007 - 2012), which included a higher number of survey sites (approximately 33 optimal sites). As detailed in para 6.2.4 of NRW's SoC, NRW consider the 4mm screening condition necessary to prevent the downstream loss

of brook lamprey from the River Dee to the canal in order to maintain the status of brook lamprey within the River Dee SAC.

15. Para 8: As detailed in para 7.1.4 of NRW's SoC, NRW will review and, if necessary, amend the conditions on the United Utilities Licence (24/67/5/0057) if the screening conditions are upheld following this appeal.
16. Para 10: As detailed in para 7.2.3 and Annex 10.3 of NRW's SoC, justification for the fish screening conditions was provided to the Appellant on 23 November 2022 with further clarification provided on 2 December 2022. A copy of the HRA (see Annex 9.1 of NRW's SoC) was provided to the Appellant on 21 December 2022, with further supporting information provided on 17 January 2023 (see annexes 9.2 – 9.9 of NRW's SoC).
17. Para 11: As detailed in para 6.5.4 of NRW's SoC, NRW consider that 10mm screening is necessary throughout the year (excepting the period when 4mm screens are in place to protect brook lamprey) to protect *all* migratory stages of the salmon lifecycle, and to enable a conclusion of no adverse impacts on the integrity of the SAC species to be reached. It is also consistent with the screening arrangements at other abstraction intakes on the River Dee.
18. Para 12: NRW acknowledge that changing the periods that the 4mm and 10mm screens are required to be in place will have operational implications for the Appellant. However, as noted in NRW's SoC, the screening conditions do not require the Appellant to incur costs installing any new infrastructure or making any changes to the existing infrastructure. The preference of a licensee to avoid additional maintenance costs would not be a sound reason to grant an abstraction licence with screening conditions that are no longer adequate to protect against adverse impacts on the features of the River Dee SAC. The Appellant asserts that obtaining access for maintenance is more "difficult" in winter months, but there is no suggestion (still less any evidence) that this presents insurmountable challenges. It would not be credible to suggest this when the Appellant has a long history of maintaining waterways and their associated infrastructure across Wales and England at all times of the year.

NRW'S CONCLUSIONS

19. This concludes NRW's comments on the Appellant's SoC in this appeal.
20. In summary, NRW reiterates that to comply with the screening conditions, the Appellant will not be required to install new infrastructure or change the existing infrastructure.
21. NRW respectfully renews its invitation to the inspector to dismiss the appeal. The conditions imposed on the licence are necessary to protect against adverse effects on the integrity of the Dee SAC site in accordance with the 2017 Transitional Regulations, the Habitats Regulations and to protect against serious damage.

ANNEXES

Reference	File Name
Annex 1.1	NRW Report: <i>“River Dee & Bala lake SAC population attribute condition assessment for brook, river and sea lamprey 2014”</i> 03.2016