

**APPEAL TO PLANNING AND ENVIRONMENT DECISIONS WALES**

**APPEAL REF: CAS-02487-Q9Z8H3**

**PURSUANT TO SECTION 43 OF THE WATER RESOURCES ACT 1991**

**BETWEEN**

**CANAL & RIVER TRUST**

**Appellant**

**and**

**NATURAL RESOURCES WALES**

**Respondent**

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**RESPONSE TO RESPONDENT'S STATEMENT OF CASE**

**IN RESPECT OF APPEAL AGAINST LICENCE**

**WA/067/0005/0030,**

**SITE CRT236, LLANTYSILIO FEEDER**

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- 1 This Response addresses the Respondent's Statement of Case on the two original Grounds of Appeal which concern conditions 9.4 and 9.5 of the licence relating to screens on the feeder from the River Dee at Horseshoe Falls into the Llantysilio/Llangollen Canal.
- 2 The Appellant also seeks to proceed with its proposed appeal against the annual volumetric condition, and adds a short addendum on that topic.

**Inconsistency**

- 3 The Appellant's first point is that there are inconsistent monthly requirements for the same abstraction point.

- 4 The United Utilities (“UU”) licence (“UU Licence”) (most recently updated in this respect in 2016) requires the 4mm screens for brook lamprey to be in place from 1 March till 12 April in each year, and 10mm screens for Atlantic salmon in place from 13 April to 31 August in each year.
- 5 The Appellant’s new licence requires the 4mm screens to be in place from 1 February until 31 May, and the 10mm screens from 1 June until 31 January.
- 6 The Respondent responds to this point in paragraph 7.1. It essentially does not deny the inconsistency, but says it will “if *necessary*” amend the conditions in the UU Licence. This is unsatisfactory. By this contention, it seeks to uphold an inconsistent condition on appeal on the basis that it *may* amend a condition in another licence at a time of the Respondent’s choosing after the hearing of this appeal, and subject of course to the position taken by the holder of the other licence (UU) in respect of the proposed amendment.
- 7 It also seeks to rely on the fact (a) that the Appellant’s screening condition is more onerous than that in the UU Licence; and (b) the Appellant operates the abstraction on behalf of UU. In effect, it is being said that the Appellant can comply with the more onerous licence when acting as agent for UU. But, on a strict reading of the condition, it cannot have a 4mm screen in place when the other licence tells it that it has to have a 10mm screen in place.
- 8 At paragraph 7.1.5, the Respondent says consistency or inconsistency is not a reason for not including screening conditions to render the feeder Habitats Directive compliant. But the reverse proposition is true; the Habitats Regulations Assessment (“HRA”) cannot justify the imposition of conditions which are bad in law because they are unclear and unenforceable.
- 9 There is an easy solution to this apparent conundrum, namely that proposed in paragraph 8 of the Appellant’s Statement of Case; the Respondent or PEDW decide the terms of both licences in parallel, which will also avoid any inconsistent findings – it cannot be assumed that UU will adduce the same evidence as and when their licence may be reviewed.
- 10 The Respondent has had plenty of time to resolve the problem; the data about brook lamprey was available as long ago as 2007, and the Appellant’s licence application was made as long ago as 19 September 2019.

- 11 A process of change under s.51 WRA or imposed under s.52 WRA in respect of UU could have been managed in such a way that it coincided with the determination of the Appellant's licence. The Respondent has not explained why it has not done that.

### **Need for longer screening periods**

#### *Brook lamprey populations: 4mm screens*

- 12 There is no justification for an increase in the period when the 4mm screens for brook lampreys are required at the feeder.
- 13 At paragraph 6.2.4 of its Statement of Case, the Respondent notes that there is a population of brook lamprey in the canal feeder and later at 6.4.7 it refers to a 2009 Fish Survey Report commissioned by the Appellant's predecessor (Annex 15.1).
- 14 The Respondent does not explain in its Statement of Case what the 2009 Report establishes in terms of wider lamprey populations in the locality, namely that there is a large number of adult brook lampreys (at least 500 individuals) breeding on more than 50 redds in the Canal (p.938). The Report also summarises the results of a habitat survey of the upstream left bank of the River Dee which records that there are no spawning sites there. So, the Canal is a more fertile breeding site than the neighbouring upstream parts of the Dee.
- 15 This applies important context to the assertion that lampreys lost to the Canal are ultimately lost to the SAC. In such circumstances one might have thought that the Respondent would be anxious to record the distribution of the Canal lampreys, and whether they migrate to the SAC. This is not considered by the Respondent.
- 16 There are two important points which are not explored in the Respondent's evidence.
- 17 The first is that brook lampreys are perfectly capable of moving upstream from the Canal back into the River Dee.
- 18 The second is that the Canal supplies water well downstream back to the Dee at River Dee Lock in Chester, with consequent potential brook lamprey movement back into the Dee.

- 19 If either or both of these movements were to be correct, then impairing entrainment at Llangollen in respect of a well-established local population would be having an effect on the river SAC.
- 20 In any event, and irrespective of the above, a bit of perspective needs placing on the limited extent of entrainment at Horseshoe Falls into the Llangollen feeder. The APEM report (Annex 14.1), on limited data, concluded that there was a 0.05% “loss” of ammocoetes (larvae) and 2.5% “loss” of adult brook lampreys at Llangollen into the Canal.
- 21 Given the unresearched movements upstream or downstream from the Canal, and in the light of the well-established breeding community in the Canal, it is surprising that the Respondent is so concerned about entrainment at Llangollen above everything else.
- 22 That all said, the Appellant does not contend that there should be no 4mm (lamprey) screens at the Llangollen feeder. But there is no reason why the Respondent should be as precautionary as it has determined to be in terms of the period for which they need to be in place. The terms of the UU Licence (1 March to 12 April) are sufficient.

*Salmon: 10mm screens*

- 23 The HRA, which does raise concerns about autumnal salmon/trout parr (and therefore a potential extension of the requirement from 31 August as per the UU Licence) does not justify an extension of the requirement to have 10mm screens in place from the autumn until 31 January. There is no reason why the screens need to be in place after 30 September.
- 24 The Respondent’s evidence for extending the screening obligation from the end of autumn to 31 January is very limited. There is a fleeting reference in paragraph 6.5.4 (bullet 2) to adult kelts being entrained during the winter. The supporting documents at annex 18.1 have (unhelpfully) had their dates redacted. There is a third party complaint, but no details are given of what the Respondent says happened.
- 25 It reduces down to whether one kelt died as a result of entrainment. That is far from clear on the evidence, and it does not appear as if the Respondent had carried out any independent investigation of the incident, as it should have

done if it was going to make a significant change to the terms of the Appellant's licence.

- 26 Attached is the Appellant's correspondence about this complaint, in the run-up to Christmas 2020 [Appendix 15]. It is far from clear whether the 10lb kelt arrived in the feeder dead or alive, not least because of the potential for overtopping water events after sustained high rainfall in November 2020. Consequently, there is no evidence that the kelt died as a result of entrainment.
- 27 The two alive kelt (seen outside the trash screen at the entrance to the feeder) were not necessarily affected by it, but even if they were, this is insufficient justification for salmon screens to be in place from November to the end of January.
- 28 As the Appellant pointed out in its Grounds of Appeal, these changes to the timings of the screens are of considerable practical importance. There is no alternative to repeated manual clearance of the screens, with access difficulties particularly in the winter months.

#### **Addendum on proposed amended Grounds of Appeal**

- 29 The Respondent's Statement of Case is revealing as to its policy about releasing its HRA until it reaches its determination (5.2.17). This is entirely counter to the principle of proper and fair administration that applicant and respondent should share information so that the ultimate determination should be made on the best information available. This is particularly important when the determination involves technical evidence.
- 30 Here, there is no excuse at all for not sharing the information as early as possible. The HRA was "*substantially completed on 15 February 2022*": paragraph 5.2.8 of the Respondent's Statement of Case. Then, why was it not sent to the Appellant until December 2022? One inference is that it did not wish to have to respond to the Appellant's comments until it had reached its own determination. That was in part driven by the determination deadline at the end of the year, but the imminence of that deadline was itself as a result of the long delays by the Respondent in the process.
- 31 This is all directly relevant as to why the Appellant did not appeal the volumetric condition in the first place. One critical element of the information which led the

Appellant to the view that there was a viable appeal was the fact (which emerged in disclosure in January 2023), when the Respondent's own hydrologists (May 2021) supported a greater take than the ultimate licence granted by the Respondent, as provided for in existing legislation concerning the Dee (the London Midland and Scottish Railway Act 1944 and the Dee General Directions).

**DAVID HART K.C.**