

APPEAL TO PLANNING AND ENVIRONMENT DECISIONS WALES

APPEAL REF: CAS-02485-Q0R8C3

PURSUANT TO SECTION 43 OF THE WATER RESOURCES ACT 1991

BETWEEN

CANAL & RIVER TRUST

Appellant

and

NATURAL RESOURCES WALES

Respondent

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

**IN RESPECT OF LICENCE WA/056/0012/0004,
SITE CRT438, TROSNANT SPRING AT PONTYPOOL**

1 The main issues on this appeal, as emerge from the Statements of Case ("SoC"), are:

- (i) the Respondent's erroneous assumption that during the qualifying period the feeder was only used on an average of 43.6 days p.a. (this goes to condition 6);
- (ii) the Respondent's adoption of the Q75 Hands off Flow ("HoF") (via condition 9) via reasoning which treats the abstraction as "new water"; in so doing, the Respondent failed to consider the effect of the restriction on the water status of Monmouthshire and Brecon Canal (the "Canal"), as it was duty-bound to do under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017;

- (iii) the Respondent's failure to have regard to the 7 well-being goals set out in the Well-being of Future Generations (Wales) Act 2015.

Condition 6

- 2 The Respondent addresses this issue at [6.5] of its SoC. The premise is that policy required the Respondent to cap abstraction at the historic flows which the SCADA evidence proves. This is of course not the Respondent's role (or indeed that of the Inspector). If the Respondent says that a licence's limit is to be rigidly defined by the SCADA evidence over the qualifying period, then this is wrong in law. It has a wider fact-finding role than that, as does the Inspector.
- 3 The Respondent has decided that licences should be determined by flows over the 7-year qualifying period. SCADA evidence is just part of that task. Solely for present purposes, the Appellant accepts the premise that the 7-year take should entitle the terms of the Appellant's licence. But SCADA evidence is not the be-all and end-all of the evidence which the Respondent and Inspector must consider.
- 4 The Respondent itself acknowledges that its annual limit of 87,230 m³/day would appear to be "very restrictive" (its SoC [6.5.10]), in which case it was all the more incumbent upon it to assess what abstractions were in fact made within the defined qualifying period. It is that qualifying period which it had decided would determine the entitlement to the volumes to be abstracted under the new licence.
- 5 The Respondent at [6.5.9] places reliance on the fact that in 2016 there was evidence that there was an abstraction at 87,230 m³ for the year for a period for which there is continuous SCADA evidence. This is not a point which has been put to the Appellant before and is a flawed one.
- 6 There are two reasons for this. First, analysis of the weather data for 2016 shows that, because of its significant rainfall, it does not represent a typical year of abstraction (because limited abstraction would be needed in a rainy year): a table of rainfall in Wales is attached. Secondly, there is evidence that the feeder was becoming less efficient as the years went by.
- 7 Rather more potent evidence of the operation of the feeder derives from Alex Hampton, who has worked for the Appellant for many years. He confirms that the feeder remained in the open position for much of the time in these years, other than when sections of the Canal were shut for maintenance. The feeder is remote

and is rarely visited by the Appellant, and certainly not used for regular flow adjustments.

- 8 Photographs of the feeder in use taken in 2010 (just before the qualifying period started: attached to this response) reveal that it was operating on days when SCADA was indicating no abstraction.
- 9 The raw data supplied by the Appellant to the Respondent shows long section of blank cells showing that no measurement was recorded. Had SCADA been working, and there was no abstraction on given days, the data would have shown 0 in those cells rather than being blank.
- 10 The Inspector is invited to consider all the evidence, not simply that which the Respondent has taken into account, because the probabilities are that this feeder abstracted far more than the surviving SCADA data demonstrates.
- 11 As the Appellant points out at [65] of its SoC, the annualised mean abstraction rate for the periods when data exists over 2011 to 2017 is c.247,000 m³/p.a. rather than the 87,230 m³/year allowed by the licence. If, contrary to the Appellant's primary submission, the Inspector is minded to impose an annual limit on abstraction it should be 247,000 m³/year coupled with the agreed daily limit of 2,000 m³/day.

Condition 9

- 12 As the Appellant's SoC states, the Respondent approached this application on the basis that it is one for "new water" whereas in fact the abstraction is a long-standing one. This is demonstrated by the adoption of the Q75 HoF standard embedded in Condition 9. The Respondent appears to have approached the application on the basis that its grant would add to the abstraction load affecting the relevant SACs, whereas in fact the volumes taken were taken into account in existing studies.
- 13 The Respondent's SoC refers to its Abstraction Licensing Strategy of 2017. 4.2.9 of the Strategy provides guidance concerning the River Lwyd catchment which is applicable to this feeder. It is plain that the HoF (Q75) recommended for Assessment Points 12 and 13 (the Trosnant feeder is between these Assessment Points on the river) is only applicable to "**new** consumptive surface water licences".

- 14 The Respondent's [6.3] refers to Assessment Points on the river. The one selected by the Respondent and used in Figure 6 is downstream of the abstraction in issue. This means that, in effect, the Respondent has double-counted the effect of the Appellant's abstraction. To analyse flows there means that the Respondent is assessing the water potentially available for abstraction on the river at a point when the abstraction in issue has already occurred.
- 15 The Appellant repeats the points made in [69]ff of the SoC which also demonstrate that the Respondent has incorrectly treated the Troisant Spring abstraction as 'new water' in assessing the impacts, incorrectly assessing the abstraction as a new pressure to water resources, when the abstraction should in fact have already been taken into account in the CAMS¹ EFl².
- 16 As the Appellant points out at [77] of its SoC, Dŵr Cymru Welsh Water ("DCWW") has some abstraction licences within the catchment. These licences authorise in the order of 13 Ml/d (13,000 m³/ per day) to be abstracted. They are not in fact used. The Appellant has been abstracting water for many years. But, under this licence, the Appellant's water needs are subordinated to those of a water company which has not found it necessary to use its licensed resources.
- 17 The Appellant accepts that DCWW could choose to exercise these abstraction rights for the first time – though there is no obvious reason why it should have priority over the Appellant's actual usage. But if that were to occur, and the Inspector were to consider that the ability to exercise those rights overrode the Appellant's established usage, the Appellant would be content for a further condition to be incorporated into the licence under which DCWW's actual future abstraction was taken into account in a way which recognised the respective impacts of the abstractions in a proportionate way.
- 18 The Respondent makes fleeting reference to the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017. However, there is no sign in the Respondent's SoC that it has given any actual site-specific consideration under those regulations to the impact of the restrictions in the issued licence on the Canal. As the Appellant points out, that was its statutory duty under reg.3(2) of those regulations when determining an application for an abstraction licence. It has not performed that duty.

¹ Catchment Abstraction Management Strategy

² Environmental Flow Indicator

- 19 Had it done so, it would have appreciated that the Canal needed a good deal more water than the 87,230 m³/day allowed by the licence.

Well-being of Future Generations (Wales) Act 2015

- 20 The rival contentions are set out at [84]ff of the Appellant's SoC and [7.3] of the Respondent's SoC. But nowhere in the Respondent's contemporaneous consideration of the documents is there any sign that the actual decision-maker has considered the 2015 Act, and in particular the considerations concerning the benefits of the water supply to the Canal to be weighed against the downsides of the current abstraction. All its references to the Act in its SoC are at the highest level of generality.
- 21 In this context, the Appellant repeats the point that the Respondent has given no consideration to the effect of the restriction on the water status as assessed under the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017.
- 22 That is procedurally not in accordance with the 2015 Act, which is about the integration of all the well-being goals into public decision-making. Nor does the Respondent establish that its restrictions are substantively justified.

DAVID HART K.C.

12 May 2023