

APPEAL TO PLANNING AND ENVIRONMENT DECISIONS WALES

APPEAL REF:

PURSUANT TO SECTION 43 OF THE WATER RESOURCES ACT 1991

BETWEEN

CANAL & RIVER TRUST

Appellant

and

NATURAL RESOURCES WALES

Respondent

GROUND OFS OF APPEAL

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

NB References to [Appendix [x]] are references to the location of the documents in the appeal bundle

- 1 These Grounds of Appeal are split into three sections: Background, the Law and Guidance and the Grounds of Appeal.

BACKGROUND

About the Appellant

- 2 The Appellant is a navigation authority within the meaning of section 221 of the Water Resources Act 1991 (the “**1991 Act**”) [Appendix 9]. It is a non-governmental organisation and registered charity formed in 2012 as the successor body to the British Waterways Board (“**BWB**”), assuming various functions and liabilities of BWB, and taking title to property and assets, under the terms of the British Waterways Board Transfer Scheme 2012.

- 3 The Appellant's functions include responsibility for over 2,000 miles of waterways in England and Wales including large parts of the canal network, some of which dates back more than 200 years.
- 4 As a navigation authority, the Appellant is under a statutory duty to maintain its navigations to various standards depending upon the status of the waterway. Under schedule 12 Part II of the Transport Act 1968 the Appellant's navigations are divided into Commercial or Cruising waterways [Appendix 14]. Pursuant to section 11(2) of the British Waterways Act 1983 [Appendix 15], the main navigable channel of the scheduled waterways (which includes Monmouthshire and Brecon Canal) shall be deemed to be included in Part II of Schedule 12 to the Transport Act 1968. Under section 105 of the 1968 Act the Appellant has a duty to "*secure the general availability of the commercial and cruising waterways for public use*" and in order to do so it is required to "*maintain the commercial waterways in a suitable condition for use by commercial freight-carrying vessels*"; and "*to maintain the cruising waterways in a suitable condition for use by cruising craft, that is to say, vessels constructed or adapted for the carriage of passengers and driven by mechanical power*".
- 5 This duty includes a requirement to maintain the navigations to allow passage by boats that "*correspond to, or are less than, those of a vessel of that kind which customarily used that waterway or part during the period of nine months ending with 8th December 1967*".
- 6 In performing its functions the Appellant must ensure that the Canal is kept supplied with water, and so it is required to abstract water to transfer to its system. This abstraction has formed part of maintenance of the canal network for as long as that network has existed.

LAW AND GUIDANCE

The Licensing Regime

- 7 Abstraction operations are licensed under the regime implemented by the 1991 Act, as amended. In order for an entity to carry out abstraction activities which fall within the scope of this regime it is required to apply to the relevant authority for a licence: in Wales the relevant authority is the Respondent.
- 8 Until recently the Appellant was not required to hold any licences in respect of its abstraction operations as section 26 the 1991 Act provided a broad exemption

from licensing requirements for operations carried out by a navigation authority in the carrying out of its functions.

- 9 The scope of this exemption was narrowed considerably by amendments made under section 5 of the Water Act 2003, which came into force on 1 January 2018. Following these amendments this exemption applies only to transfers, without intervening use, from water systems and supply reservoirs of a navigation authority to certain specified types of waters.
- 10 These amendments were driven in large part by obligations placed on the UK by the Water Framework Directive (Directive 2000/60/EC).
- 11 Changes to the regime were contemplated at the time the Appellant came into being and assumed the role of BWB. On 6 June 2012 the Appellant entered into a Memorandum of Understanding with the Secretary of State for Environment, Food and Rural Affairs (“**Defra**”). A similar Memorandum was negotiated with the Welsh Government (the “draft Memorandum”) [Appendix 5]. Although not signed, the draft Memorandum committed the Welsh government to work with the Respondent and the Appellant *“to understand the impacts of the canal abstractions and practicable mitigation and improvement measures; protect the water environment; safeguard and enhance environmental, social and economic benefits; and to minimise any impacts on the canals as a result of abstraction licensing charges”*.

Consultations on Changes to Abstraction Licensing

- 12 The process by which this exemption (along with other exemptions) 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.
- 13 An initial consultation was carried out in 2009, and a formal response and further consultation was published in January 2016 (the “**2016 Response**”) [Appendix 6].
- 14 At paragraph 51 of the 2016 Response, the Government made clear that it:

“expects the Regulator [i.e. the Respondent] to take a light-touch, risk-based approach to licensing these abstractions, but in doing so will tackle environmental damage caused by unlicensed abstractions. Our preferred approach is to end exemptions for most of the few remaining exempt abstraction activities, granting

a licence in line with recent volumes abstracted where appropriate, and curtailing or refusing licences where there is a risk of serious damage to the environment.”

- 15 Paragraph 53 of the 2016 Response adds that:

“The policy approach recognises that these abstractions have taken place lawfully and that all abstractors should be treated in a fair and consistent manner, both when these abstraction exemptions are ended and when the abstraction is moved into the reformed abstraction system.”

- 16 Paragraph 103 of the 2016 Response indicated the Government’s intention to use its statutory power to direct the Respondent:

“on the general approach to licensing decisions. The Government expects that the effect of this Direction will be that the Regulator will be able to grant licences in the majority of cases where there are existing lawful entitlements, except where the abstraction may cause serious environmental damage. We consider this will stop the most significant environmental impacts, whilst balancing the needs of existing (currently exempt and licensed) and ongoing abstraction. We propose that the Direction will reinforce the position that existing volumes of ongoing abstraction for New Authorisations are environmentally neutral. This approach recognises that to grant a licence for an existing abstraction to the same extent does not in itself change the environmental impact or increase any damage.”

(No equivalent direction was ultimately issued in Wales as set out in part in paragraph 39 below).

- 17 Paragraph 106 of the 2016 Response notes that, *“to implement this policy the Government proposes that in most cases the Regulator grants a licence with standard licence conditions based on the volume of water that has been abstracted previously”*. Paragraph 118 adds, in the context of transfer licences, that it was the Government’s *“intention that volumes will be included, where possible, on all transfer licences as part of the New Authorisations process. We expect the Regulator to give volumes on transfer licences that reflect the current volumes abstracted”*. The stated intention was however that *“this can be achieved within our “light touch” approach without requiring such rigorous monitoring and reporting standards as when compared to the normal standards for full licences. For example, we expect the Regulator would not normally require daily records of abstraction to be taken and that monthly records could be sufficient. It could also*

be more appropriate to rely on other methods of assessment rather than detailed measurement through the use of metering which would be difficult in many cases”

- 18 Paragraph 109 set out the proposal that Hands off Flow (HoF) conditions would be attached to all transfer licences *“To be compliant with the overall approach required by the WFD we expect the licences will be subject to the minimum protection standards that would normally be applied to other newly licensed abstractions and be consistent with the minimum acceptable flow identified as part of the Catchment Abstraction Management Strategies (CAMS) process. In over-abstracted catchments where flow does not support WFD objectives, this will normally be set at Qn95 (or a groundwater equivalent). For all other catchments where flow supports WFD objectives, 75% of Qn99 will be applied. This is based on the current licensing process but with a less stringent approach to meeting Environmental Flow Indicator (EFI) targets at the initial point of grant. This will improve the sustainability of a catchment by protecting it from environmental damage caused at low flows. Full sustainability, as required by the WFD, will be achieved through future catchment reviews as part of RBMP¹.”*
- 19 The Appellant actively participated in the consultation process, and provided a response to the 2016 Consultation [Appendix 7]. In its response the Appellant emphasised that *“many of the Trusts abstractions have been taking place lawfully over two hundred years and will pre-date other licensed abstractions by many years and the Trust welcomes Defra’s recognition that these abstractions should not be treated as “new” abstractions and nor should they be used as balancing items within a catchment or prejudiced against because they have not previously been required to the licensed.”*
- 20 In response to the proposals to include Volumes on transfer licences, the Appellant set out its position that this would not be a fair approach as the majority of transfer licences do not have volumetric limits on them, and that fundamentally it would not be possible to set an appropriate level on the condition as the majority of abstractions do not enable volumes to be recorded. It was not therefore clear how the regulator could grant a licence in line with recent volumes, and that as this would go further than a day- job transfer licence it would therefore put a greater regulatory burden the Appellant, and would not meet the aim of a light regulatory touch. It stated *“If volumes are to be included on transfer licences, the*

¹ the River basin management plan

Trust has concluded that it will not be possible to ascertain the “right” volumes in time to include them on the new authorisations at the time of issue because of the late stage at which this proposal has been put forward by Government. The majority of our exempt abstractions have not had measurement in place for the four year qualifying period (or at all).... Most abstractors will be unable to provide reliable evidence of the volumes of their abstraction (even if they can demonstrate that have made some abstraction)” The Trust expressed concerns that “*if volumetric conditions are set too low an amount it could compromise the viability of our waterways and/ or expose the Trust to criminal prosecution for breach of limits which were simply “wrong” to begin with*”.

- 21 In relation to universal HoF condition, the Appellant expressed its concerns that this did not give proper recognition to the fact that these are existing abstractions “*which should be treated equivalently to existing abstractions which are licensed and not to new applications*”. It also stated that proposing a universal HoF “*does not align with the statements that refer to the exempt abstractions already being an integral feature in the catchment water balance and the need to ensure that the transitional arrangements receive a light touch in terms of regulatory burden... The Trust suggests that HoFs should only be brought in to protect from Serious Damage, rather than universally on every transitional application*”.
- 22 The Appellant also expressed concerns over potential environmental impact of HoF conditions, in that “*our abstractions invariably support the water needs of another WFD waterbody, so the inclusions of any HoF conditions may lead to issues of deterioration and potentially even cause serious damage to the waterways that we manage, which is not permissible under the WFD legislation. It is also possible that these abstractions will make a vital contribution to meeting the needs of other downstream water bodies which receive water discharged from canals along their lengths and at their ends*”.
- 23 A further Government response was published in October 2017 (the “**2017 Response**”) [Appendix 8]. This set out the Government’s final policy approach, confirming (at paragraph 3.2) 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” conditions 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.*

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

- 24 Paragraph 2.5 of the 2017 Response addressed the question of volume conditions applied to transfer licences. Taking into account responses to the consultation (including those provided by the Appellant) the 2017 Response revised the position proposed in the 2016 Response (see paragraph 17 above) stating that:

“the UK and Welsh Governments have concluded that adding volume limits to water transfers does not always reduce environmental risk and may add unnecessary business costs. We have therefore revised the consultation proposal.

The Regulator will have flexibility on the inclusion of volume conditions on a transfer licence. However, the final decision on whether to do so should be proportionate, reflecting environmental risk, impacts on other abstractors and the burdens it places on the abstractor. We expect, in particular, that in situations where an abstraction is currently unmeasured and / or not readily controlled and where there are satisfactory alternative ways to control the abstraction, for example conditions that describe the use of abstraction structures, that the Regulator uses a licensing approach that minimises regulatory burdens on the abstractor.”

- 25 The Appellant actively participated in all consultations on this matter and expected that implementation of changes to the abstraction licensing regime, in particular

the Respondent's approach to determining related licence applications, would reflect the policy position set out in the Government's responses.

Respondent's obligations under the Well-being for Future Generations (Wales) Act 2015 (the "2015 Act")

26 In accordance with the 2015 Act [Appendix 11], the Respondent 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. It must also seek to achieve seven well-being goals, which carry equal weight and should each be considered separately by the Respondent and any other public body to whom the 2015 Act applies (Emphasis added). The well-being goals are as follows:

- (a) A prosperous Wales;
- (b) A resilient Wales;
- (c) A healthier Wales;
- (d) A more equal Wales;
- (e) A Wales of cohesive communities;
- (f) A Wales of vibrant culture and thriving Welsh language; and
- (g) A globally responsible Wales.

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

28 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.

29 Guidance published by the Welsh Government [Appendix 12] 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.”

30 The Respondent has also published its own Well-being Statement as it is obliged to under the 2015 Act [Appendix 13]. In its Well-being Statement, the Respondent lists its Well-being Objectives which are intended to contribute to the well-being goals as follows:

- (a) Champion the Welsh environment and the sustainable management of Wales’ natural resources;
- (b) Ensure land and water in Wales is managed sustainably and in an integrated way;
- (c) Improve the resilience and quality of our ecosystems;
- (d) Reduce the risk to people and communities from environmental hazards like flooding and pollution;
- (e) Help people live healthier and more fulfilled lives;
- (f) Promote successful and responsible business, using natural resources without damaging them; and
- (g) Develop NRW into an excellent organisation, delivering first class customer service.

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

Application guidance

32 In the Government’s consultation response (section 2.3) it stated that “*the Regulator will produce guidance on evidence requirements that will take into account the variability of abstractor working practices, including situations where abstraction volumes are not measured*”. It stated that “*if abstractors have*

concerns about what evidence can be used, the quality of the evidence available, or the potential impacts on current business activities, we strongly recommend speaking to the Regulator to discuss the concerns as early as possible in the two year application window”.

- 33 The Respondent produced guidance on the Transitional Water resources licence application form [Appendix 16], and application form at [Appendix 17]. In section 8 of that guidance, it states “*To qualify for a transitional water resources licence under the transitional regulations, you need to evidence that an abstraction has taken place at any time in the seven-year qualifying period*”, giving examples such as meter readings, pump ratings and how many hours/days the abstraction had taken place. Section 8.1 describes the information that must be included in the Table.

Appellant’s Abstraction Licence Application

- 34 The Appellant has actively engaged with the Respondent (and the Environment Agency in England) with regard to these changes to the licensing regime and has identified the need for 150 new licences in respect of those of the Appellant’s abstraction operations which no longer fall within the amended exemption, 11 of these new licences were determined by the Respondent.
- 35 On 13 September 2019, the Appellant submitted the application in question to the Respondent in respect of the site known by the Appellant as CRT438 Trostant Spring at Pontypool (the “**Site**”) [Appendix 1 and 2]. All relevant correspondence between the Appellant and Respondent is contained within [Appendix 4].
- 36 Pursuant to this application the Respondent granted licence WA/056/0012/0004 (the “**Licence**”) on 19 December 2022 [Appendix 3]. The Licence is the subject of this appeal.

The Law

- 37 The applications for abstraction licences made by the Respondent in relation to the above changes to the abstraction licensing regime, including the application for the licence that is the subject of the current appeal, were made in accordance with the Water Abstraction (Transitional Provisions) Regulations 2017 (the “**2017 Regulations**”) [Appendix 10] and Chapter 2 of Part 2 of the 1991 Act.
- 38 The Respondent is required to determine such applications in accordance with the 2017 Regulations and the 1991 Act.

39 Whilst the Government issued a direction to the Environment Agency in respect to the determination of licences, requiring them to consider that existing volumes of ongoing abstraction for New Authorisations are environmentally neutral and requiring a light touch approach to, the Welsh Government considered that recent Welsh legislation was 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; referring to the Environment (Wales) Act 2016, and the Well-being of Future Generations (Wales) Act 2015 - further stating *“and among Natural Resources Wales’ seven Well-being Objectives is the objective to promote successful and responsible business that use natural resources without damaging them”*.

40 Section 43(1)(a), Chapter 2, Part 2, of the 1991 Act [Appendix 9] provides that:

“Where an application has been made to the appropriate agency for a licence under this Chapter, the applicant may by notice appeal to the Secretary of State if the applicant is dissatisfied with the decision of the appropriate agency on the application”.

Application for the Licence

41 This appeal relates to an abstraction from Trosnant Brook into a feeder pipe which discharges into the Monmouthshire & Brecon Canal (“the Canal”).

42 The detail of the abstraction is set out in the supporting information submitted with the application form [Appendix 2] The water is abstracted from the Trosnant Brook, a tributary of the Afon Lwyd. Flow is diverted into the feeder via an intake chamber and is then piped to the Canal. Discharge into the Canal is controlled by a valve adjacent to the Canal, with a flow meter installed in the pipeline to measure the abstraction.

43 The Canal is designated as a cruising waterway under schedule 12 Part II of the Transport Act 1968 [Appendix 14] as amended by the British Waterways Act 1983 [Appendix 15]. It was constructed under powers granted to the original commissioners of the navigation in the 1700s, who were granted general powers to supply the Canal with water from any source within 2000 yards, including powers to construct new cuts and feeders to supply the Canal.

44 The Abstraction at Trosnant Spring is one of 7 licensable abstractions supplying the Canal. Due to the potential impacts of the other abstractions (most notably

the abstraction from the River Usk at Brecon) on the River Usk SAC, the Respondent has been working with the Appellant for over 10 years to consider the sustainability of these abstractions. However, the Trosnant Springs abstraction has not previously been identified as impacting on the River Usk SAC, as the Afon Lwyd flows into the main River Usk towards the downstream extent of the SAC; a daily abstraction of 2 MI/D had been identified as sustainable.

- 45 In its application form, the Appellant completed the table at 8.2 as directed to do so by the guidance, and provided the figures that it was able to from its SCADA telemetry records. It further stated that this abstraction was carried out for 24 hours per day. However, as stated in the supporting information, *“the data recorded via the Trust’s telemetry/SCADA system is of variable quality over the qualifying period 2011-2017. There have been several periods in the record where the flow meter has broken down.”* There were also periods where the pipeline may have been damaged or blocked. Where no abstraction was shown, this does not mean that no abstraction was taking place on those days, given the unreliability of the SCADA data. There was no requirement on the Appellant to record its abstractions whilst exempt, and so its records were unreliable.
- 46 As explained in the supporting information, the Appellant did not provide estimates of the abstracted quantities for period where there was no evidence, due to uncertainty over the precise means of abstraction- the majority of the structure is underground, and until 2004 the structure was operated by a third party. The precise means/ dimensions of the abstraction structure was unknown and the Appellant was therefore cautious to not provide incorrect information. **However the dimensions of the abstraction structures already limit the amount that can be abstracted - it is not an uncontrolled abstraction.**
- 47 On 23 October 2019, the Appellant received a letter from the Respondent stating that the application for Trosnant Springs (plus other applications relating to the Canal) was invalid on a number of grounds [contained within Appendix 2]. Of relevance to this appeal is the statements in relation to Abstraction Quantities. The letters states that *“the applied for instantaneous rates and annual quantities for each year do not correlate if abstraction is taking place for 24 hours. Further clarification is required as how the quantities in section 8.1 of WRH are derived”* it then requests that the Appellant provide the raw data for this application.
- 48 The Appellant responded to this letter by email on 21 November 2019 [contained within Appendix 2]. It stated *“The abstractions do take place over 24 hours, but*

not at the maximum instantaneous flow rates for the whole day, every day of the year. For sites with SCADA, we have calculated the maximum peak instantaneous flow rate from the maximum daily abstraction on the day when the maximum hourly abstraction rate was recorded in each year i.e. $PI = MD/0.0864$, where the PI is the peak instantaneous flow in l/s and MD is the maximum daily abstraction in Ml/d. For those sites without SCADA, the maximum instantaneous flow rate has been estimated from the maximum daily abstraction in each year using the same formula above.” It also provided the raw data from the SCADA [contained within Appendix 2].

- 49 The application was validated by letter on 10 December 2019 [contained within Appendix 2]. There were some further discussions around the means of abstraction and source of supply, included in the correspondence at [Appendix 4].
- 50 On 16 September 2022 the Respondent wrote to the Appellant requesting confirmation that it would accept a daily maximum of 2,000 cubic metres per day, as their internal consultation had suggested that the maximum evidenced abstraction of 5,180 cubic metres was an anomaly, and not in line with the modelling work (on the protections for the Usk) which was based on 2,000 cubic metres per day. The Appellant confirmed on 20 September 2022 that it would accept a daily volume limit of 2,000 cubic metres. The Respondent further confirmed by email on 26 October 2022 that this application would be conditioned to allow a maximum abstraction of 2,000 cubic metres per day.
- 51 On 5 December 2022, the Appellant received the draft licence for the abstraction, which conditioned the abstraction to 2000 cubic metres per day (2 Ml/d), whilst also setting a limit of 87,230 cubic metres per year. This would only allow the Appellant to abstract for 43.6 days at the full licensed daily amount, when the abstraction during the qualifying period was undertaken 365 per year (although not evidenced by the poor SCADA data) The Appellant raised concerns in subsequent meetings that this did not reflect the actual abstraction, as the annual total was based on poor SCADA data. The Respondent replied via email on 7 December 2022, stating that this was based on the evidenced annual quantities. The Appellant responded to the draft licence via email on 13 December 2022, stating again that the condition was based on incomplete data and did not reflect the actual quantities abstracted during the qualifying period, and that "a more appropriate annual maximum should be based on the daily maximum multiplied

by 365 days”, re-emphasising that the collaborative working group “did not highlight any environmental issues with a 2MI/d abstraction all year round”.

GROUNDINGS OF APPEAL

- 52 The Appellant makes its appeal against the decision by the Respondent to issue the Licence in its current form on the following grounds.

Maximum quantities of water to be abstracted (condition 6)

- 53 The annual volumetric conditions contained in condition 6 do not reflect the abstraction during the qualifying period, as outlined above. The Appellant was under no duty to record its abstracted volumes at this location during the qualifying period, and so was only able to provide the information that it held.
- 54 The Respondent has on a number of occasions referred to the quantities evidenced by the Appellant as the quantities ‘applied for’ (including the annual limit). This is incorrect. The Appellant was applying for a Transfer Licence, and the evidence that it provided to the Respondent was as requested to show that an abstraction had occurred during the 7 year qualifying period. The Appellant explained in detail that the evidence was unreliable due to errors with the SCADA. It was not anticipated that an annual volumetric condition of this nature would be placed on a transfer licence, especially given all the modelling work undertaken as part of the wider Usk and Wye Abstraction Group (“UWAG”) assessment of abstraction pressures on the Usk was always based on daily abstractions and no reference to annual volumes was ever made in over a decade of collaborative working; this had not been indicated to the Appellant until the final month of the determination window. Prior to that point, the Respondent had only indicated that a daily limit of 2MI/d would be included, which was in line with the modelling undertaken by the UWAG.
- 55 The Appellant does not accept that the annual limit is required for environmental protection, as it does not reflect the abstraction undertaken in the qualifying period, and is likely to be considerably lower than the actual quantities abstracted.
- 56 The Appellant therefore submits that the Licence as granted does not reflect the quantities of water abstracted during the qualifying period. To more accurately reflect the actual abstraction, a limit of 2MI/d is sufficient to provide protection. Condition 6 should therefore be amended to remove the annual volumetric condition limiting the abstraction to 87,230 cubic metres per year.

Further Conditions (condition 9)

- 57 Condition 9 prohibits any abstraction “when the flow of the River Ebbw as gauged by NRW at its flow gauging station at Rhiwderin is equal to or less than 220,000 cubic metres per day.” This represents a restrictive Q75 HoF, and will significantly restrict the Appellants abstraction; the Appellant’s initial calculations show that the HoF threshold would have been met for 586 days of the qualifying period, meaning abstraction would not be permitted on those days.
- 58 The additional information section on the Licence states that the HoF is required *“to ensure no adverse impact on the River Usk and Severn Estuary Special Areas of Conservation in accordance with the Habitat Regulations 2017”* The Respondent’s issue letter [contained within Appendix 3] states that the HoF *“is included to protect against adverse impacts to the Severn Estuary SAC. As NRW considers serious damage to apply where an abstraction is affecting or has the potential to affect sites designated under the Habitats Regulations, the condition is also considered necessary to protect against serious damage”*.
- 59 The Habitat Regulations Assessment (“**HRA**”) undertaken by the Respondent which they state shows the requirement for HoF condition was not provided to the Appellant until the Licence was issued [HRA contained within Appendix 3], and it was therefore unable to assess the justification for the HoF when commenting on the draft licence. However **having now considered the HRA, the Appellant considers that the HoF is not justified and the Appellant’s abstraction has been incorrectly assessed as an application for ‘new’ water.**
- 60 The HRA (at page 34) states that *“When assessing the application, due to the potential impact on supporting habitat of the River Usk and Severn Estuary designated sites, NRW have to consider whether the Trosnant Spring abstraction presents a risk of serious damage when considered alone. The ‘alone’ assessment has to consider the existing baseline which includes all licenced abstractions within the catchment (including the unused DCWW licences).*

The modelling provided (see email on DMS here dated 11/11/22) shows that the Afon Lwyd is already failing CAMS EFI due to the presence of the DCWW licences (based on fully licensed scenario). The abstraction from Trosnant Spring is reducing flows into the brook and therefore reducing flows in the Afon Lwyd, increasing the extent of the CAMS EFI failure on the Afon Lwyd.”

- 61 In justifying the Q75 HoF, the HRA (at page 45) states that *“the modelling has shown that this abstraction would cause a worsening of the CAMS² EFI³ failure on the Afon Lwyd, which provides supporting habitat to the Severn SAC fish features and also flows into the River Usk SAC. Therefore, to conclude no adverse impact on the SAC features, the abstraction must be curtailed to ensure it does not worsen the existing CAMS EFI failure on the Afon Lwyd.”*
- 62 By way of context, at ‘high ecological status’ (HES) the water body must show almost undisturbed conditions with no significant artificial influences or pollution pressures and have high biological quality. They must be maintained at HES and not be allowed to deteriorate. Targets of ‘good ecological status’ (GES) are set for water bodies unless an alternative objective can be justified through the RBMP process. The flow must be sufficient to support the river biology. The Respondent therefore uses the Environmental Flow Indicator (EFI) to make sure a water body meets GES.
- 63 Some water bodies have been designated ‘artificial’ or ‘heavily modified’ because they have been physically altered for a specific purpose, such as to supply water or generate power. They cannot be restored to GES without compromising that purpose. In this case the objective is GEP. If the water body has been designated ‘artificial’ or ‘heavily modified’ for water resource purposes, the Respondent assesses the status on the presence or absence of measures that reduce the effects. Heavily modified water bodies (HMWB) that have been designated for non-water resources purposes must comply with the EFI.
- 64 The Appellant considers that the statements set out at paragraph 61 demonstrate that the Respondent has incorrectly treated the Trosnant Springs 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 have been taken into account in the CAMS EFI**. This is further evidenced by the assessment of the HoF required, for which the HRA states *“This can be achieved via the inclusion of a Hands-off flow condition on the licence. Following review of the modelling undertaken to establish the hands-off flow required, NRW are satisfied that a Q75 HOF will be sufficient to prevent worsening of current EFI failures on the Lwyd, as shown in the graphs below, and is sufficient to conclude*

² Catchment Abstraction Management Strategy

³ Environmental Flow Indicator

no adverse impact on Severn Estuary SAC features, see email dated 16/11/22 on DMS”.

- 65 The Appellant therefore asserts that the Respondent has incorrectly assessed its application under ‘day job’ rules by adding the impact of the abstraction as if it was an application for ‘new’ water. It therefore asserts that the HoF imposed is too restrictive and does not reflect that this is an existing abstraction. The 2017 Response indicated that for new authorisation licences in over abstracted catchments a HoF of QN95 or 75% Qn99 should be imposed.

Well-being of Future Generations (Wales) Act 2015

- 66 The Canal is an important part of the natural environment of Wales, and is an integral part of Welsh heritage. It provides economic, social and environmental benefits, and any loss or reduction of navigation on the Canal resulting from a decrease in available water could be significant. The Appellant compiled a report into the Impact of restrictions on its abstraction from the river Usk which sets out these impacts in more detail [Appendix 18].
- 67 The restrictions imposed on this licence will lead to decreased water supply to the Canal, and combined with the effects of restrictions imposed on the other abstractions feeding the Canal, particularly the abstraction from the River Usk at Brecon, this will lead to increases in closure of the Canal unless alternative economically and environmentally viable supplies can be accessed. No evidence has been provided by the Respondent to demonstrate how they have considered the impacts of their decision against the seven well-being goals established by the 2015 Act.
- 68 The Canal, and the amenity it provides, contributes to each of the well-being goals established by the Act:
- 69 **A prosperous Wales:** The Canal is currently the most popular attraction in the Brecon Beacons National Park and contributes around £17million a year, in spend, and supports 390 full time jobs in the area. Economic activity on the Canal is sensitive to any loss of water during the spring / summer / autumn boating season and many boating businesses could be made unviable by the uncertainty over security of supply.

- 70 **A resilient Wales:** loss of available water will negatively impact the historic fabric of the Canal, leading to increased leakage and hastening failures of old embankments.
- 71 **A healthier Wales:** the Canal attracts over 3 million visits a year- including 1000,000 cycle visits. Whilst towpath usage is not directly dependent on water levels, a decline in the condition of the Canal and a reduction in boat usage and associated businesses will negatively impact the attraction of the Canal for leisure visits.
- 72 **A more equal Wales:** with 60km of towpath for walking, with nearly 20km also accessible for cyclists, and linking to other walking and cycling routes, the Canal provides a free green space for local communities and visitors, outdoors and close to water.
- 73 **A Wales of cohesive communities:** the Canal has historically linked the local communities from Brecon to Pontypool, and is still an important landmark linking these communities with a green/blue corridor. Boaters navigate the length of the canal over 2-3 days, visiting the local communities on their route, and as such it is an attractive location for a week's holiday.
- 74 **A Wales of vibrant culture and thriving Welsh language:** The Canal played a significant part in Wales's industrial heritage, connecting the hillside tram roads and transporting coal, limestone and iron ore to the iron works in Blaenavon and the forges at Garnddyrys. Today the Canal features over 120 designated structures, which are at risk if water supplies cannot be guaranteed.
- 75 **A globally responsible Wales:** as well as local importance, the canal is internationally recognised, with the World Heritage site in the Blaenavon including the Canal. The Cefyn Flight of 14 locks has also been recognised as being of international significance and is on Cadw's list as a Scheduled Ancient Monument. The Canal itself is a waterbody under the Water framework Directive, and reduced water supply would have a negative impact on the status of the water body.
- 76 Therefore it is clear that the Canal and its associated environment provides economic, social and environmental benefits of national and international importance, and it provides a significant contribution to the 7 well-being goals of the 2015 Act. The Appellant therefore submits that prior to issuing the Licence,

the Respondent should have considered how its decision would contribute to the seven well-being goals; the Respondent has not provided evidence to demonstrate that it carried out this assessment.

- 77 The Appellant submits that, had the Respondent discharged its duties properly, it would have considered the impacts of those restrictions (i.e. the conditions within the Licence subject to this appeal) on the other well-being goals under the 2015 Act and therefore would not have applied these conditions.

BURGES SALMON LLP

16 January 2023