

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/056/0044/0004,
SITE CRT327, RIVER USK AT BRECON**

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 date 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 ("**The 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**”) in relation to its operations in England. 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 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.”

(Ultimately, no direction was issued in Wales as set out in part in paragraph 42 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

¹ The River Basin management plan

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 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 the 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 the ‘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*”.

32 Usk and Wye Abstraction Group (“UWAG”)

33 The Rivers Wye and Usk were designated as Special Areas of Conservation (SAC) under the Habitats Directive (92/43/EEC) and were therefore subject to a Habitat Directive Review of Consents (“HDRoC”). The results of the HDRoC were incorporated into the River Usk Abstraction Licensing Strategy [Appendix 17].

34 The Appellant acknowledges the impacts of abstractions on the River Usk, including its own abstractions to supply the Canal. The Appellant has therefore been an active member of the UWAG, which was established over 10 years ago and brings together the statutory water undertakers that abstract from the Wye (Severn Trent Water) and the Usk (Dwr Cymru Welsh Water (“DCWW”)) and the Wye and Usk Foundation. The aim of UWAG is to find a solution utilising the available resources, including reservoirs, to balance the available resources in the area.

35 A solution has been developed which will see DCWW provide support water released from the Usk reservoir to mitigate the impact of the Appellant’s abstraction from the River Usk at Brecon. This solution is not yet in place; the Appellant and DCWW are negotiating the terms of an agreement to provide this support water, which will be under commercial arrangements, the costs of which are yet to be agreed.

36 The Appellant wrote to the Welsh Ministers expressing concern that the Respondent would be issuing licences for the Appellant’s abstractions to feed the canal under the 2017 Regulations. The Appellant also requested support, particularly with funding for the increased costs of delivering the solution developed by UWAG, to supply support water to the River Usk from the Usk Reservoir. This correspondence, together with supporting documentation, is included in Appendix 4.

Appellant’s Abstraction Licence Application

37 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.

38 On 13 September 2019, the Appellant submitted the application which is the subject of this appeal to the Respondent in respect of the site known by the Appellant as CRT327 River Usk at Brecon (the “**Site**”) [Appendix 1 and 2]. All relevant correspondence between the Appellant and Respondent is contained within [Appendix 4].

39 Pursuant to this application the Respondent granted licence WA/056/0044/0004 (the “**Licence**”) on 19 December 2022 [Appendix 3]. The Licence is the subject of this appeal.

40 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.

41 The Respondent is required to determine such applications in accordance with the 2017 Regulations and the 1991 Act.

42 Whilst the Government issued a formal direction to the Environment Agency in respect of 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, the Welsh Government considered that recent Welsh legislation was sufficient for supporting a light touch, risk-based approach to licensing abstractions that qualified for the transitional arrangements, without making a formal direction to Natural Resources Wales. The references to recent Welsh legislation were to the Environment (Wales) Act 2016, and the Well-being of Future Generations (Wales) Act 2015. The Welsh Government further stated “*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*”.

43 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”

- 44 This appeal relates to an abstraction from the River Usk at Brecon, into a feeder pipe which discharges into the Monmouthshire & Brecon Canal (“the Canal”)
- 45 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 main River Usk at Brecon, by diverting some of the flow into the feeder channel via a weir in the river. Flow into the feeder is then controlled by a sluice which discharges into a settling pond; a secondary sluice then discharges from this pond into a culvert, which conveys the water into the Brecon basin, the head of the Canal.
- 46 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.
- 47 The abstraction at Brecon is one of 7 licensable abstractions supplying the Canal, however this Abstraction is the main feed to the Canal.
- 48 The application was validated by letter on 10 December 2019 [Appendix 18]. The Respondent and Appellant exchanged emails in October and November 2022 regarding the proposed volumetric and HoF conditions, which are included within the correspondence in [Appendix 4].
- 49 On 5 December 2022, the Appellant received the draft licence for the abstraction. The licence includes volumetric conditions (condition 6) and a stepped Hands off Flow condition (condition 9). The Respondent considers these conditions are required in order to meet the conclusions of the Habitat Regulations Assessment undertaken to assess the impacts of the Appellant’s 7 licensable abstractions on the Usk SAC [Appendix 19].
- 50 The volumetric condition allows the Appellant to abstract a maximum of 8,623,778 cubic metres per year, until the support releases by DCWW from the Usk reservoir commences, at which point the Appellant can abstract 12,775,000 cubic metres per year. The Respondent is aware that no agreement or commercial arrangements are as yet in place with DCWW.

GROUNDS OF APPEAL

- 51 The Appellant makes its appeal against the decision by the Respondent to issue the Licence in its current form on the following ground.
- 52 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 16].
- 53 Whilst the HRA requires that the volumetric and HoF conditions are imposed on the licence, the Appellant is concerned that, until the support water is available, the volumetric restrictions imposed on this licence will lead to a significantly decreased water supply to the Canal. The DCWW support water arrangements are not yet in place, and the Appellant is concerned that it does not yet know if the commercial arrangement will be affordable. Without this support water, the restrictions on the licence will lead to increases in closure of the Canal.
- 54 Even with the support water available, the stepped Hands off Flow represents a serious risk to supplies to the canal during low flows in the Usk.
- 55 No evidence has been provided by the Respondent to demonstrate how it has considered the impacts of its decision on the Appellant's licence against the seven well-being goals established by the 2015 Act.
- 56 The Canal, and the amenity it provides, contributes to each of the well-being goals established by the Act as follows:
- 57 **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.
- 58 **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.

- 59 **A healthier Wales:** the Canal attracts over 3 million visits a year including 1,000,000 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.
- 60 **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. This is available to all in Wales.
- 61 **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.
- 62 **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.
- 63 **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.
- 64 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 in 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.

- 65 The Appellant submits that the Respondent, in issuing the Licence, cannot simply assume that the Appellant would be able to agree terms with DCWW for the supply of 'support' water. Therefore, focus must be placed on the Licence without surplus water when conducting an assessment as to whether the well-being goals have been taken into account in determining the Licence. Consequently, the Appellant submits that (i) the Respondent failed to undertake a proper well-being assessment; and (ii) if it had done so, the Licence conditions may have been different.

BURGES SALMON LLP

16 January 2023