

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

**APPEAL BY: CANAL & RIVER TRUST**

**SITE AT: RIVER USK AT BRECON**

**Planning And Environment Decisions Wales (PEDW)  
REFERENCE: CAS-02486-Y2G4M3**

**STATEMENT OF CASE OF  
NATURAL RESOURCES WALES**

## Glossary of terms

Abstraction	Removal of water from a source of supply (surface or groundwater).
Abstraction licence	The authorisation granted by Natural Resources Wales in Wales and the Environment Agency in England to allow the removal of water from a source of supply.
Appropriate nature conservation body	Advisor to the competent authority (see “competent authority” defined below). NRW is the appropriate nature conservation body for all National Site Network sites (previously Natura 2000 sites) in Wales. (See definition of “National Site Network” below).
Assessment point	Point on a watercourse at which the flow from the upstream catchment is assessed.
Catchment	The area specific to a river network from which precipitation (e.g. rainfall) and groundwater will collect and contribute to the flow of that network.
Competent authority	The body determining whether a consent, permission or other authorisation should be given. NRW exercises the competent authority role in Wales.
Habitats Regulations Assessment (“HRA”)	An assessment of the potential impacts of ‘projects’ on National Site Network sites (see below).
Hands-off flow (“HoF”)	The rate of flow in a river below which the abstractor must reduce or stop the abstraction. This flow threshold will usually be defined within a condition of the abstraction licence.
National Site Network	SACs and SPAS in the UK no longer form part of the EU’s Natura 2000 ecological network. Amendments made in 2019 to the Habitats Regulations 2017 have created a National Site Network on land and at sea, including both the inshore and offshore marine areas in the UK.
Site integrity	The coherence of the ecological structure and function of a site, across its whole area, or of the habitats that enable it to sustain the habitats and/or populations of species for which the site was designated.
Special Area of Conservation (“SAC”) and Special Protection Area (“SPA”)	Protected sites designated under the Conservation of Habitats and Species Regulations 2017.
Site of Special Scientific Interest (“SSSI”)	Protected site designated under the Wildlife and Countryside Act 1981.
Surface water	A general term used to describe all water features such as rivers, streams, springs, ponds and lakes.
Transfer licence	The authorisation granted by Natural Resources Wales in Wales and the Environment Agency in England to allow the transfer of water from one source of supply to a different source of supply / another point in the same source of supply, without intervening use.
Water body	A basic unit of surface water management at which assessments are completed for Water Framework Directive Regulations purposes. It is an entire (or part of a) stream, river or canal, lake or

	reservoir, and estuary or stretch of coastal water out to one nautical mile offshore. Water bodies altered by human activity may be classified as heavily modified water bodies or artificial water bodies. A body of groundwater is a distinct volume of underground water within one or more aquifers.
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### Glossary of Acronyms

ANCB	Appropriate nature conservation body
AA	Appropriate assessment
EA	Environment Agency
HRA	Habitats Regulations Assessment
HoF	Hands-off flow
LSE	likely significant effect
NSN	National Site Network
SAC	Special Area of Conservation
SPA	Special Protection Area
SSSI	Site of Special Scientific Interest

## **Table of contents**

### **1. Introduction**

### **2. Site and activity**

### **3. Legal framework**

- 3.1 Natural Resources Wales (NRW)
- 3.2 Water Resources Act 1991
- 3.3 Water Framework Directive (2000/60/EC)
- 3.4 Water Act 2003
- 3.5 The Water Abstraction (Transitional Provisions) Regulations 2017
- 3.6 Environment Act 1995
- 3.7 The Conservation of Habitats and Species Regulations 2017
- 3.8 The Natural Resources Body for Wales (Establishment) Order 2012
- 3.9 Environment (Wales) Act 2016
- 3.10 The Well-being of Future Generations (Wales) Act 2015

### **4. Relevant policy and guidance**

- 4.1 Previously exempt abstractions: 'New Authorisations'
- 4.2 Operational Guidance Note (OGN) 176 Determining Transitional Water Resources Licence Applications
- 4.3 Operational Guidance Note (OGN) 200 Habitats Regulations Assessment of Projects

### **5. Case history**

- 5.1 Pre-application
- 5.2 Post-application

### **6. Why the conditions were included**

- 6.1 River Usk SAC
- 6.2 Severn Estuary SAC, SPA and Ramsar Site
- 6.3 Inclusion of hands-off flow and volumetric conditions

### **7. Response to grounds of appeal**

### **8. Conclusion**

### **9. List of appendices**

## **1. Introduction**

- 1.1 This appeal relates to the decision of Natural Resources Wales (“NRW”) on 19 December 2022 to grant a transfer licence to the Canal & River Trust (“the Appellant”) to abstract water for the purpose of “operations in the course of carrying out functions as a navigation authority” at the River Usk in Brecon (“the Transfer Licence”) (Licence serial number: WA/056/0044/0004).
- 1.2 NRW granted the Transfer Licence (see Annex 1.1) subject to a series of conditions controlling matters that included, amongst other matters, the maximum quantities of water to be abstracted on a daily and annual basis. Further conditions in the Transfer Licence imposed additional restrictions on abstraction in the event of certain flow conditions.
- 1.3 On 16 January 2023, the Appellant submitted an appeal to Planning and Environment Decisions Wales (“PEDW”) challenging some of the conditions included within the Transfer Licence on the ground of an alleged failure by NRW to comply with its obligations under the Well-being of Future Generations (Wales) Act 2015. PEDW accepted the appeal as valid and identified 10 March 2023 as the “start date” for the appeal process.
- 1.4 When the Appellant submitted the present appeal, it submitted, at the same time, another appeal to PEDW relating to a transfer licence it had obtained to abstract water at Trosnant Spring subject to conditions. The Appellant requested that both appeals be dealt with together as they both relate to the Monmouthshire and Brecon Canal and rely on similar grounds of appeal. NRW advised PEDW that it had no objection to this request. PEDW then identified the same “start date” of 10 March 2023 for the appeal relating to the Trosnant Spring licence.

## **2. Site and activity**

- 2.1 The Monmouthshire and Brecon Canal runs between Brecon Basin and Pontymoile Basin in south Wales. The Canal is supplied with water by a main abstraction point from the River Usk at Brecon Weir and six other abstraction points, known as ‘feeders’, within the River Usk catchment and South East Valley catchment. The Appellant submitted seven applications in total for transfer licences for all these abstraction points, these abstractions having been historically exempt from the licensing regime until the law was changed (explained further below). The abstraction points are known as Brecon, Cwm Crawnnon, Llangattock, Castle Turn, Ochram Turn, Mill Turn and Trosnant Spring.

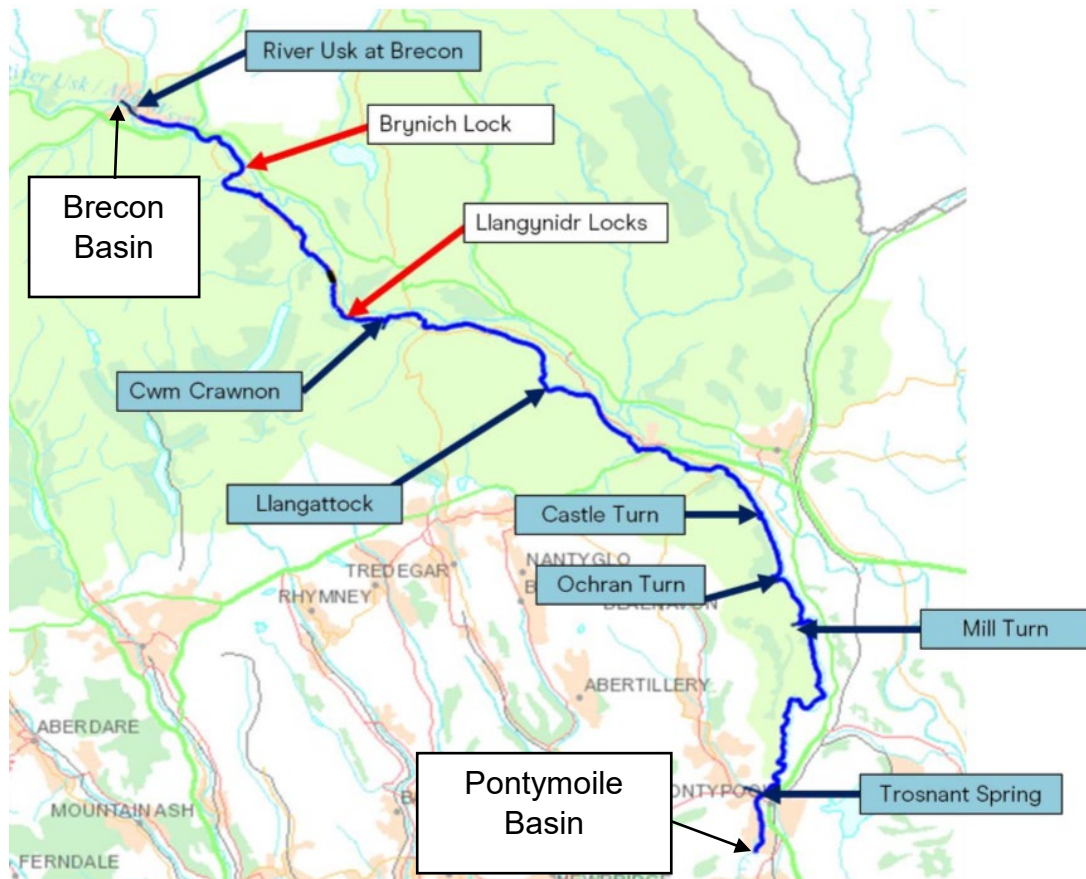


Figure 1. Map showing the Monmouthshire and Brecon Canal (bold blue line) and the abstractions which provide the water supply to the canal.

- 2.2 This appeal relates specifically to the River Usk at Brecon abstraction application and licence.
- 2.3 The surface water abstraction point is located on the River Usk at Brecon Weir, Brecon at National Grid Reference (NGR): SO 03975 28882. The abstraction is directly from the main River Usk. The River Usk flows downstream into the Seven Estuary (over 74.2km downstream).

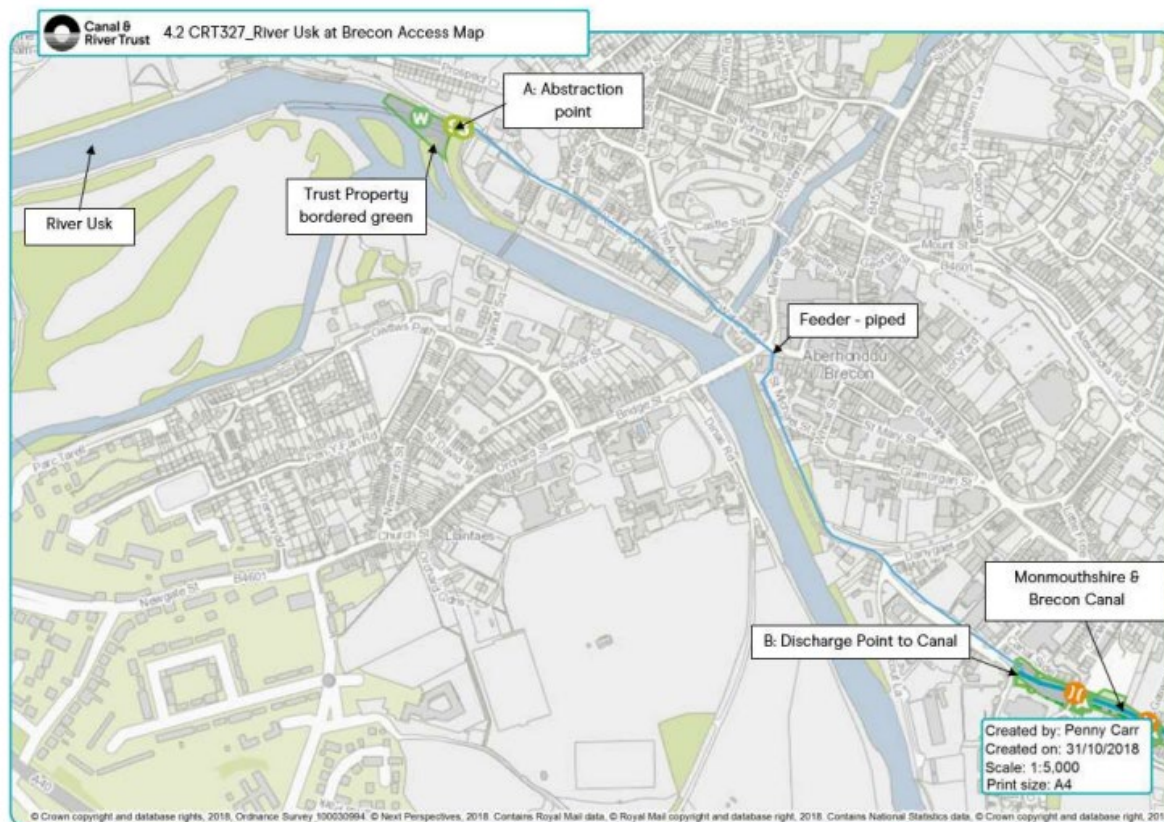


Figure 2. Map included by Appellant within its licence application, showing location of the Brecon abstraction and River Usk.

- 2.4 According to the information supplied by the Appellant with its application, the abstraction is from the main River Usk at Brecon which is diverted into a feeder channel via a 220-metre main river weir. Flow into the feeder is then controlled by a sluice which discharges into a settling pond. A secondary automated sluice then discharges from this pond into a culvert which then discharges to the Monmouthshire and Brecon Canal at Brecon Basin, 1 kilometre downstream at NGR SO 04660 28224, where it is used for the purpose of operations in the course of carrying out functions as a navigation authority.
- 2.5 The abstraction activity has been occurring legally without an abstraction licence for approximately 200 years.

### 3. Legal framework

- 3.1 NRW took account of all relevant legislation when it made the decision to grant the Transfer Licence, with particular reference to the following (listed in the order discussed below):

- Water Resources Act 1991 ("the WRA 1991")
- Water Framework Directive (2000/60/EC) (the "WFD")
- Water Act 2003 ("the 2003 Act")
- Water Abstraction (Transitional Provisions) Regulations 2017 ("the Transitional Regulations")
- Environment Act 1995

- The Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”)
- Natural Resources Body for Wales (Establishment) Order 2012
- Environment (Wales) Act 2016
- The Well-being of Future Generations (Wales) Act 2015

### **3.2 Water Resources Act 1991 (“the WRA 1991”)**

- 3.2.1 Section 24 of the WRA 1991 sets out restrictions on abstracting without a licence. Any person who wishes to abstract water from any “source of supply” must do so in accordance with an abstraction licence granted under Part II of the WRA 1991. Breach of this requirement is a criminal offence.
- 3.2.2 Chapter II of Part II of the WRA 1991 makes provision for applications for abstraction licences. Within Chapter II, section 38(3) states that NRW “shall have regard to all the relevant circumstances” when dealing with an application for an abstraction licence including, in particular, any representations received in response to advertising and consultation, and “the requirements of the [Appellant], in so far as they appear to [NRW] to be reasonable requirements”.
- 3.2.3 Section 40(2) of the WRA 1991 requires NRW to have regard to the minimum acceptable flow in the river or watercourse from which the water is to be abstracted, taking account of the following factors set out in section 21(4) and (5) of the WRA 1991 if (as in the present case) no minimum acceptable flow has been formally determined under Chapter I of Part II of the WRA 1991:
- i. the flow of the waters from time to time;
  - ii. the character of the waters and their surroundings
  - iii. any relevant water quality objectives established under section 83;
  - iv. the requirements amongst other things of navigation and fisheries.
- 3.2.4 Section 38(2)(a) of the WRA 1991 then empowers NRW to “grant a licence containing such provisions as [it] considers appropriate”.

### **3.3 Water Framework Directive (2000/60/EC) (“the WFD”)**

- 3.3.1 The WFD has established a framework to protect surface waters, groundwater and coastal waters and prevent their deterioration, with the aim of achieving ‘good status’. Following the UK’s departure from the European Union, the Water Environment (Water Framework Directive) (England and Wales) Regulations 2017 continue to provide a framework for managing the water environment in England based on the framework of the WFD, even though the WFD itself no longer applies in the United Kingdom.
- 3.3.2 The WRA 1991 provides a licensing system for water abstractions, but originally, the WRA 1991 also granted exemptions from the need to obtain a licence in some circumstances. These exemptions meant that unlimited amounts of water could be abstracted, irrespective of its availability or the impact of the abstraction on the environment. Therefore, these exempt abstractions had the potential to prevent meeting the WFD’s aim of achieving ‘good status’.

### **3.4 Water Act 2003**



- 3.4.1 To comply with WFD requirements, the Water Act 2003 included provisions to remove exemptions granted by the WRA 1991 and make the abstractions subject to the licensing system.

### **3.5 Water Abstraction (Transitional Provisions) Regulations 2017 (“the 2017 Transitional Regulations”)**

- 3.5.1 Many of the exemptions from abstraction licensing granted by the WRA 1991 were removed by the Water Act 2003 with effect from 1 January 2018, pursuant to the 2017 Transitional Regulations.
- 3.5.2 The 2017 Transitional Regulations required previously exempt abstractors to apply for abstraction licences under the WRA 1991. The combined effect of regulations 3 and 4 was that where a person had abstracted water from a source of supply in the seven years prior to 1 January 2018 without the need for an abstraction licence, they needed to make an application for a licence before 31 December 2019.
- 3.5.3 The Schedule to the 2017 Transitional Regulations contained requirements for (amongst other things) making the application valid and publicising the application. In particular, paragraph 2 of the Schedule required the application to include details of the abstraction that had been undertaken in the seven years prior to 1 January 2018 (which NRW describes as “the qualifying period”); and such other information, including maps, as NRW reasonably required. The applicant was also required to sign a declaration to state that the information in the application was true to the best of their knowledge. The information that the applicant provided on the prescribed forms, including the nature and the pattern of the abstraction, then provided the basis for the drafting of any licence.
- 3.5.4 Paragraph 10 of the Schedule required NRW to determine the applications within its jurisdiction by 31 December 2022, and if NRW granted a licence on terms that were different in any material respect from those of the application, the notification had to include a statement of NRW’s reasons, and notify the applicant of his right to appeal (under section 43 of the WRA 1991). Finally, regulation 6 provides that the person may continue to carry out the abstraction as undertaken in the 7 years prior to 1 January 2018 until the application, or any appeal, is determined.
- 3.5.5 The 2017 Transitional Regulations do not themselves specify any substantive considerations that NRW needs to take into account when determining an application. These substantive considerations are set out in the WRA 1991.

### **3.6 Environment Act 1995**

- 3.6.1 When determining applications NRW must comply with other legislative duties aimed at protecting the environment, including a duty contained in section 6 of the Environment Act 1995, which contains overarching provisions with respect to water. In particular, sections 6 (1) provides:

*“It shall be the duty of an appropriate agency, to such extent as it considers desirable, generally to promote*  
*(a) the conservation and enhancement of the natural beauty and amenity of the inland and coastal waters and of the land associated with such waters;*  
*(b) the conservation of the flora and fauna which are dependent on aquatic environment; ...”*

3.6.2 Section 56 defines “appropriate agency” to include NRW.

### **3.7 The Conservation of Habitats and Species Regulations 2017 (“the Habitats Regulations”)**

3.7.1 The Habitats Regulations transpose the requirements of the EU Habitats and Wild Birds Directives into UK law and they continue to apply as retained law<sup>1</sup> following EU exit. Their provisions apply independently of any of the other domestic legal provisions mentioned above.

3.7.2 Natura 2000 is a network of nature protection areas in the territory of the European Union made up of Special Areas of Conservation (“SAC”) and Special Protection Areas (“SPA”), designated respectively under the Habitats Directive and Birds Directive. Following amendments to the Habitats Regulations in 2019, SACs and SPAs within the UK no longer form part of the EU’s Natura 2000 ecological network. These amendments have created a National Site Network (“NSN”) on land and at sea, including both the inshore and offshore marine areas in the UK.

3.7.3 Under regulation 63 of the Habitats Regulations, NRW, as a competent authority, must, before granting any abstraction licence, assess whether it would be likely to have a significant effect on a NSN site (SAC or SPA), either alone or in combination with other plans or projects. If the licence would be likely to have a significant effect on a NSN site, NRW must undertake an appropriate assessment (“AA”) of the implications of the abstraction upon the site in light of its conservation objectives. In light of that assessment, NRW can then only lawfully grant a licence if it is satisfied that it would not adversely affect the integrity of the NSN site<sup>3</sup>.

3.7.4 Regulation 102(1) of the Habitats Regulations expressly applies the AA process to the grant of authorisations for water abstraction licences under the WRA 1991. Accordingly, before determining this application, NRW considered whether the application would have a likely significant effect (“LSE”) on a NSN site. Where an LSE cannot be ruled out, then it is necessary to carry out an AA of the effects of the application on the site. Following completion of the AA, a licence can only be granted where the competent authority, which in this case is NRW, is satisfied that no reasonable scientific doubt remains as to the absence of adverse effects on site integrity. If it is not satisfied of this, it must refuse to grant the consent. As regulation 63(5) of the Habitats Regulations states, in accordance with the precautionary principle that underpins the Habitats Regulations regime:

*“In the light of the conclusions of the assessment...the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marina...”*

3.7.5 The case law of the Court of Justice of the European Union, which continues to be relevant to the interpretation of the Habitats Regulations in the UK, has confirmed that the precautionary principle is integrated into the assessment provisions of Article 6(3) of the Habitats Directive (transposed as Regulation 63 of the Habitats Regulations) and that when undertaking assessments, a precautionary approach is required.

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<sup>1</sup> Anything which, on or after exit day, continues to be, or forms part, of domestic law by virtue of the European Union (Withdrawal) Act 2018.

<sup>3</sup> This is subject to the provisions of Reg 64, which sets out when considerations of imperative reasons of overriding public interest (IROPI) may apply. This is discussed further in paragraph 3.7.7 below.

3.7.6 Regulation 63 of the Habitats Regulations is clear that NRW must be satisfied as to the effects of continued abstractions on a designated site *before* granting a licence. Accordingly, NRW may not lawfully grant a licence on the basis that continued abstractions would adversely affect the integrity of a NSN site for a period of time before measures might be effective in preventing that adverse effect. Therefore, it was not lawfully open to NRW to grant a licence subject to a 'transitory period' when adverse effects on integrity could not be ruled out.

3.7.7 Regulations 64 and 68 of the Habitats Regulations provide a limited derogation from the prohibition on granting consent for plans or projects which will adversely affect the integrity of a NSN site where the following conditions are satisfied, namely that:

- there are no alternative solutions to the plan or project in question;
- it must be carried out for imperative reasons of overriding public interest (IROPI); and
- all necessary compensatory measures have been secured to ensure the overall coherence of the NSN of sites is protected.

Together, these conditions are known as the IROPI derogation.

3.7.8 Whilst it is NRW (as competent authority) which must satisfy itself that the conditions of the IROPI derogation are met before a consent under that derogation may be given, in practice the derogation process is led by the applicant, who would be expected to produce the information and evidence necessary to support a conclusion by NRW that the relevant conditions for the derogation are met.

### **3.8 The Natural Resources Body for Wales (Establishment) Order 2012**

3.8.1 The Order contains the following relevant provisions:

#### **Article 4 - Purpose of the Body**

##### **4 General purpose**

(1) The Body must—

- (a) pursue sustainable management of natural resources in relation to Wales, and
- (b) apply the principles of sustainable management of natural resources, in the exercise of its functions, so far as consistent with their proper exercise.

(2) In this article—

"principles of sustainable management of natural resources" ("egwyddorion rheoli cynaliadwy ar adnoddau naturiol") has the meaning given by section 4 of the Environment (Wales) Act 2016;

"sustainable management of natural resources" ("rheoli cynaliadwy ar adnoddau naturiol") has the meaning given by section 3 of the Environment (Wales) Act 2016."

#### **Article 5A – Nature Conservation Duties**

1) The Body must exercise its functions so as to further nature conservation and the conservation and enhancement of natural beauty and amenity.

2) The duty in paragraph (1) does not apply to the Body's pollution control functions or its functions under the Forestry Act 1967.

3) In exercising its pollution control functions, the Body must have regard to the desirability of nature conservation and of conserving and enhancing natural beauty and amenity.

4) Section 1(3A) of the Forestry Act 1967 makes provision about the balance between nature conservation and other matters which the Body must endeavour to achieve in exercising its functions under that Act.

#### **Article 5B**

In exercising any function relating to nature conservation, the Body must have regard to actual or possible ecological changes.

#### **Article 5E**

In exercising its functions, the Body must have regard to—

- (a) the health and social well-being of individuals and communities;
- (b) the economic well-being of individuals, businesses and communities.

#### **Article 8 - General duty of the Body to have regard to costs and benefits in exercising powers**

1) In considering whether or not to exercise any power conferred upon it by or under any enactment, the Body must take into account the likely costs and benefits of the exercise or non-exercise of that power.

2) In deciding the manner in which to exercise any such power, the Body must take into account the likely costs and benefits of its exercise in the manner in question.

3) The duties in paragraphs (1) and (2) [do not apply if], or to the extent that, it is unreasonable for the Body to be subject to them in view of the nature or purpose of the power or in the circumstances of the particular case.

4) But those duties do not affect the Body's obligation to discharge any duties, comply with any requirements, or pursue any objectives, imposed upon or given to it by any enactment other than this article.

- 5) For the purposes of this article, costs include costs—
- (a) to any person; and
  - (b) to the environment

### **3.9 Environment (Wales) Act 2016**

3.9.1 Section 6 of the Environment Wales Act 2016 requires that NRW seeks to maintain and enhance biodiversity in the exercise of its functions, and in so doing promote the resilience of ecosystems, in a manner that is consistent with the proper exercise of its functions.

3.9.2 In response to this duty, NRW has produced a document entitled “Our regulatory approach to deliver sustainable management of natural resources – Our Regulatory Principles” dated April 2016. See Annex 2.1.

3.9.3 These principles are embodied in the determination of all licence applications, namely:

- Deliver outcomes
- Be intelligent
- Prepared to challenge
- Use the full range of tools available
- Be flexible
- Bring the right skills / expertise together
- Be efficient and effective
- Be clear on what we do and why

### **3.10 The Well-Being of Future Generations (Wales) Act 2015 (“the WBFG Act 2015”)**

3.10.1 The WBFG Act 2015 contains the following relevant provisions:

#### **Section 2 - Sustainable development**

In this Act, “sustainable development” means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4).

#### **Section 3 - Well-being duty on public bodies**

(1) Each public body must carry out sustainable development.

(2) The action a public body takes in carrying out sustainable development must include—

- (a) setting and publishing objectives (“well-being objectives”) that are designed to maximise its contribution to achieving each of the well-being goals, and
- (b) taking all reasonable steps (in exercising its functions) to meet those objectives.

(3) A public body that exercises functions in relation to the whole of Wales may set objectives relating to Wales or any part of Wales.

(4) A public body that exercises functions in relation only to a part of Wales may set objectives relating to that part or any part of it.

#### **Section 4 - The well-being goals**

The well-being goals are listed and described in Table 1—

<b>Goal</b>	<b>Description of the goal</b>
A prosperous Wales.	An innovative, productive and low carbon society which recognises the limits of the global environment and therefore uses resources efficiently and proportionately (including acting on climate change); and which develops a skilled and well-educated population in an economy which generates wealth and provides employment opportunities, allowing people to take advantage of the wealth generated through securing decent work.
A resilient Wales.	A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).
A healthier Wales.	A society in which people's physical and mental well-being is maximised and in which choices and behaviours that benefit future health are understood.

A more equal Wales.	A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio economic background and circumstances).
A Wales of cohesive communities.	Attractive, viable, safe and well-connected communities.
A Wales of vibrant culture and thriving Welsh language.	A society that promotes and protects culture, heritage and the Welsh language, and which encourages people to participate in the arts, and sports and recreation.
A globally responsible Wales.	A nation which, when doing anything to improve the economic, social, environmental and cultural well-being of Wales, takes account of whether doing such a thing may make a positive contribution to global well-being.

## 5 The sustainable development principle

(1) In this Act, any reference to a public body doing something “in accordance with the sustainable development principle” means that the body must act in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs.

(2) In order to act in that manner, a public body must take account of the following things—

(a) the importance of balancing short term needs with the need to safeguard the ability to meet long term needs, especially where things done to meet short term needs may have detrimental long term effect;

(b) the need to take an integrated approach, by considering how—

(i) the body's well-being objectives may impact upon each of the well-being goals;

(ii) the body's well-being objectives impact upon each other or upon other public bodies' objectives, in particular where steps taken by the body may contribute to meeting one objective but may be detrimental to meeting another;

(c) the importance of involving other persons with an interest in achieving the well-being goals and of ensuring those persons reflect the diversity of the population of—

(i) Wales (where the body exercises functions in relation to the whole of Wales), or

(ii) the part of Wales in relation to which the body exercises functions;

(d) how acting in collaboration with any other person (or how different parts of the body acting together) could assist the body to meet its well-being objectives, or assist another body to meet its objectives;

(e) how deploying resources to prevent problems occurring or getting worse may contribute to meeting the body's well-being objectives, or another body's objectives.

## 4. Relevant policy and guidance

### 4.1 Previously exempt abstractions: ‘New Authorisations’

4.1.1 As outlined in section 3 above, there has been a long history to the process of dealing with previously exempt abstractions, from the introduction of the WFD in 2000 to the commencement of the 2017 Transitional Regulations in 2018.

4.1.2 Prior to the implementation of the 2017 Transitional Regulations, two public consultations were undertaken in 2009 and 2016. In October 2017, the UK and Welsh Governments

published their response to the latest consultation on bringing previously exempt abstractions into the licensing system: 'Government response to consultation on changes to water abstraction licensing exemptions in England and Wales: New Authorisations' ("the 2017 Governmental Response") (see Annex 3.1). In this document, abstractions that were coming into the system of licence control were referred to as 'New Authorisations'.

4.1.3 The 2017 Governmental Response (section 3.2) states 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<sup>2</sup> 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".*

4.1.4 Section 3.2 of the document goes on to state:

*"The Welsh Government considers recent Welsh legislation 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".*

4.1.5 Section 3.2 (at footnote 24) refers to the Welsh Government's view that the Environment (Wales) Act 2016 (see section 3.9 above) placed the sustainable management of natural resources at the core of how NRW should carry out its activities in a manner consistent with its obligations under the WBFG Act (section 3.10 above) and that among NRW's seven Well-being Objectives is the objective to promote successful and responsible business that use natural resources without damaging them.

4.1.6 Section 2.4 of the 2017 Governmental Response provides a summary of how the "hands-off flow" ("HoF") conditions are expected to be applied. In some cases these HoFs may be less restrictive than the recommended HoFs detailed in the Abstraction Licensing Strategy ("ALS") for that catchment. NRW's Abstraction Licensing Strategies (ALS)<sup>3</sup> provide a consistent and structured approach to water resource management, giving information on water resource availability based on environmental need, so that all relevant water body and conservation objectives are met. They are produced by NRW and the EA on a catchment basis. They include an assessment of water abstraction pressure on surface water and groundwater sources. The ALS identify where further water abstraction might be possible and what licence conditions might be necessary to protect the environment. However, the 2017 Governmental Response recognises that some abstractions have been happening lawfully for many years.

4.1.7 Accordingly, section 3.2 of the 2017 Governmental Response (section 3.2) states:

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<sup>2</sup> "Hands-off Flow" conditions require the abstraction to be reduced or stopped should a river flow fall below a specified threshold.

<sup>3</sup> These were previously known as 'Catchment Abstraction Management Strategies (CAMS)'.

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

4.1.8 Section 3.6 (footnote 35) adds that:

*“In relation to sites designated under the Habitats Regulations, serious damage includes instances where the precautionary principle is applied because the Regulator has insufficient evidence to conclude no adverse effects to protected sites would be caused”.*

4.1.9 Accordingly, in the present case, the assessment of whether there would be “serious damage” took the form of the HRA given the potential for adverse effects from the abstraction on the River Usk SAC, Severn Estuary SAC, Severn Estuary SPA and Severn Estuary Ramsar Site.

## **4.2 Operational Guidance Note (OGN) 176: Determining Transitional Water Resources Licence Applications**

4.2.1 NRW’s guidance document sets out the process for determining transitional water resources licence applications for previously exempt activities (also known as ‘New Authorisations’ or NAs). The purpose of this guidance is to ensure that transitional licence applications are considered in a consistent manner, and our decisions are in line with the 2017 Transitional Regulations and government policy, as well as our other statutory duties: see Annex 4.1.

## **4.3 Operational Guidance Note (OGN) 200: Habitats Regulations Assessments of Projects**

4.3.1 This document is about the procedures that NRW should follow when assessing the potential impacts of ‘projects’ on National Site Network sites: see Annex 5.1.

# **5. Case history**

## **5.1 Pre-application**

5.1.1 Prior to the application being submitted, NRW actively engaged with the Appellant over a number of years as detailed below.

5.1.2 In 2000, NRW started a process of reviewing consents granted in proximity to the River Usk SAC for their compliance with the Habitats Directive. As part of this process, NRW considered the Appellant’s abstraction from the River Usk at Brecon to support the Monmouthshire and Brecon Canal. Discussions with the Appellant about the impact of their abstraction began in 2004. In 2011, NRW’s review concluded that the main abstraction from the River Usk at Brecon posed a risk to the integrity of the River Usk SAC. The remaining feeder abstractions supporting the canal were not assessed but NRW considered that they too could be impacting the SAC status of the River Usk. Therefore, NRW considered it likely that, when the exemption of navigation activities from the licensing regime was lifted, any abstraction licences issued in relation to the Monmouthshire and Brecon Canal would need to include restrictions to comply with the Habitats Regulations and to protect the River Usk SAC from ‘serious damage’. The Appellant was aware of this prior to submitting its applications.



- 5.1.3 The Appellant is a “competent authority” under the Habitats Regulations and therefore has a duty to ensure that it exercises its functions that are relevant to nature conservation so as to secure compliance with the requirements of the Habitats Directive. Accordingly, as a “competent authority” itself, the Appellant should have a clear understanding of its duties under the Habitats Regulations and the Regulations generally.
- 5.1.4 Prior to the current application being submitted, both the Appellant and NRW acknowledged that any restrictions placed on the seven abstraction points supporting the canal could result in insufficient water being available to meet canal demands, resulting in canal closures at low flows. In or around 2013, a group known as the Usk and Wye Abstraction Group (“UWAG”) began to consider the potential impacts of restricting abstractions to the canal and to look for future water supply solutions. This group included representatives from the Appellant, Dŵr Cymru Welsh Water (“DCWW”), the Wye and Usk Foundation and NRW (which had an advisory role).
- 5.1.5 Since it was established in 2013, UWAG has continued its work of seeking to identify and implement a sustainable solution to the challenge of achieving an improved abstraction regime on the River Usk that meets Habitats Regulations requirements whilst at the same time ensuring the sustainability of operations within the Monmouthshire and Brecon Canal and a reliable public water supply.
- 5.1.6 In light of the licensing exemption for navigation being removed, the Appellant and NRW met on 10 July 2018. The meeting was a high-level discussion about the requirements for the Appellant’s application and NRW’s approach to licensing.
- 5.1.7 On 23 January 2019, NRW attended a site visit with the Appellant and visited numerous locations along the canal.
- 5.1.8 On 19 February 2019, a meeting took place between NRW, the Appellant and DCWW. The purpose of the meeting was to discuss the Appellant’s applications for abstractions for the canal and any other applications for new abstractions that might form part of the long-term sustainable solution. During the meeting, NRW confirmed that, although the feeder abstractions are not within the designated boundary of the River Usk SAC, they would need to comply with Habitats Regulations requirements because of their functional connection to the SAC.

## 5.2 Post-application

*Please note: For ease of reading this section does not seek to set out all the post-application discussions between the Appellant and NRW, but focuses on the decision-making process as it related to the issues which are relevant to the subject of this appeal .*

- 5.2.1 On 13 September 2019, the Appellant submitted to NRW an application for a new transitional water resources transfer licence for the following maximum abstraction quantities at the River Usk at Brecon: 680 litres per second (l/s), 2,295.4 cubic metres per hour (m<sup>3</sup>/hour), 39,660 cubic metres per day (m<sup>3</sup>/day) and 8,623,778 cubic metres per year (m<sup>3</sup>/year), all year, for the purpose of ‘operations in the course of carrying out functions as a navigation authority’. Copies of the submitted forms and additional information, submitted prior to validation, are in Annex 6.1 to 6.4, as detailed below:

- Application Form WRH
- Letter of authorisation

- Supporting Information Document
- CRT327 River Usk at Brecon Raw Data

- 5.2.2 On 19 September 2019, NRW sent an acknowledgement letter to the Appellant, confirming receipt of the application and to advise that further checks would be undertaken to ensure that all relevant application forms, supporting documents and fees had been provided. This process involved checking that the Appellant had met the eligibility criteria for applying under the 2017 Transitional Regulations. This mainly involved providing evidence that abstraction for a previously exempt activity had been carried out during the seven-year qualifying period (2011-2017) defined in the 2017 Transitional Regulations.
- 5.2.3 On 10 October 2019, NRW emailed the Appellant to reconfirm the need to assess all abstractions for the canal against Habitats Regulations requirements: see Annex 7.1.
- 5.2.4 On 23 October 2019 NRW sent a letter to the Appellant. The letter covered all seven of the Appellant's applications for abstractions for the Monmouthshire and Brecon Canal. With regards to the Brecon application, the letter requested clarification of how the quantities in the application form WRH had been derived, including submission of the raw data from the telemetry (i.e. measurement) system and more information about the flow meter and how it works with the telemetry system.
- 5.2.5 A response was received from the Appellant on 21 November 2019 providing the raw abstraction data, clarification of how the quantities were derived and information regarding the flow meter.
- 5.2.6 On 10 December 2019, NRW wrote to the Appellant confirming that the application was valid.
- 5.2.7 After NRW had held further meetings with the Appellant on 6 April and 26 May 2020, NRW wrote to the Appellant on 16 July 2020: see Annex 8.1. The letter explained that, as outlined during the meeting on 6 April 2020, NRW is required to ensure that it does not consent an activity which carries a risk of adverse impact on the integrity of a SAC. NRW again confirmed in the letter that it expects that the Appellant's abstractions for the canal will need to be curtailed in order to prevent the risk of an adverse effect on the SAC and to protect from serious damage.
- 5.2.8 Between August 2020 and February 2021 NRW carried out an initial screening and internal consultation exercise for all applications submitted for previously exempt abstractions. Following this, the Appellant's application for Brecon was assigned a high risk and complexity score meaning there was risk of potential or actual serious damage to water-dependent features within a designated site.
- 5.2.9 Around this time in 2020, in order to progress the work on licensing and finding a long-term sustainable water supply solution for the canal, a project steering group was set up consisting of DCWW, the Appellant and NRW, with NRW acting solely in an advisory capacity. Project delivery was through two sub-groups that fed into the Steering Group. The two sub-groups were the Water Resources Modelling Group and the Environment and Regulatory Group. The purpose of the Modelling Group was to undertake technical modelling work to inform the solution. The purpose of the Environment and Regulatory Group was to ensure that any technical solutions would comply with the regulatory framework and would be environmentally sustainable in the long term. Each group met on a monthly basis from August 2020 until January 2023.

- 5.2.10 In the meantime, on 1 October 2020, NRW formally consulted the Brecon Beacons National Park Authority on the application. NRW sent the Park Authority a subsequent reminder on 26 November 2020. The Park Authority did not respond to the consultation.
- 5.2.11 In a letter to the Appellant dated 20 November 2020, NRW's Head of Operations for South East Wales set out the licensing options that NRW was considering for the abstractions supplying the canal: see Annex 9.1. Option 2 was to allow unconstrained abstraction until a solution was in place. However, NRW explained that it was not minded to pursue this option as it would not be possible to conclude that the continued abstractions would not adversely affect the integrity of the River Usk SAC for a period of time before measures were implemented to address these effects. Option 4 was pursuing IROPI. This was the only option that would allow abstraction to be licenced without restrictions. The letter advised that an IROPI case would need to be led by the Appellant, who would need to provide NRW with the documentation necessary to support a conclusion that the relevant conditions of IROPI were met. No such case has been made by the Appellant.
- 5.2.12 On 17 May 2021, NRW wrote to the Appellant to advise that its application needed to be advertised in a local newspaper and on NRW's website.
- 5.2.13 On 16 June 2021, the application was advertised in the Brecon and Radnor Express newspaper, detailing the abstraction point originally applied for. This followed the statutory notification that was served on DCWW as the relevant statutory water undertaker on 14 June 2021. No representations were received.
- 5.2.14 Between June 2021 and March 2022, NRW was continuing to attend the monthly working group meetings with the Appellant and DCWW and supporting the modelling of technical solutions with a view to identifying a sustainable water supply solution to inform the decision to be made on the Appellant's licence application.
- 5.2.15 Following the meeting of the Environment and Regulatory Group on 31 March 2022, the Appellant submitted to NRW, on 5 May 2022, a report titled "Monmouthshire & Brecon Canal: Screening & Passage Fish Protection" providing detail about potential screening and fish passage requirements at each of the seven abstraction points supplying the Monmouthshire and Brecon Canal (Annex 10.1).
- 5.2.16 By this stage, a long-term sustainable water supply solution was still not agreed and given the determination deadline of 31 December 2022, NRW considered it was necessary to proceed to the next stage of the determination process. The internal consultation for the Brecon application began on 11 May 2022.
- 5.2.17 On 13 July 2022, NRW and the Appellant met virtually to discuss progress on all 11 applications that the Appellant had made for transfer licences, including the transfer licence at Brecon Weir. (In addition to the 7 applications it had made in relation to the Monmouthshire and Brecon Canal, as mentioned in paragraph 2.1 above, the Appellant had made 4 further applications in relation to other sites). It was agreed that NRW would provide copies of draft licences for the Appellant to review ahead of final licences being issued. NRW indicated that, in some licences, there would need to be conditions imposed limiting the volumes of water to be abstracted; in such cases, NRW advised that recording and reporting conditions would also need to be included for compliance purposes.

5.2.18 On 24 October 2022, NRW formally consulted officers working for NRW's appropriate nature conservation body ("ANCB") function. This consultation was conducted using a Habitats Regulations Assessment (HRA) Form, with a focus on potential impacts on the River Usk SAC and the Severn Estuary SAC, SPA and Ramsar Site. The HRA considered all 7 applications for the Monmouthshire and Brecon Canal within one HRA assessment.

5.2.19 Following discussion and updates to the HRA document, NRW's ANCB officers responded to NRW on 24 November 2022 agreeing with the final conclusions. The HRA concluded that:

*'In light of the conclusions of an appropriate assessment, and taking account of the advice received from protected sites advisors, it has been established that the project will not adversely affect the integrity of any Natura 2000/Ramsar site, taking into account any conditions or restrictions as applicable, either alone or in combination with other plans and projects'.*

A copy of the HRA and the response from ANCB officers is at Annex 11.1.

5.2.20 An assessment of the potential impacts on the SSSIs identified (required under section 28I of the Wildlife and Countryside Act 1981) was also undertaken and sent for consultation on 9 November 2022. Its conclusions were agreed with by ANCB officers on 28 November 2022: see Annex 12.1.

5.2.21 During its monthly meetings with the Appellant at this time, and by email to the Appellant on 24 August 2022, NRW conveyed the initial views expressed by its own officers on the Brecon application during NRW's internal consultation. In the email, NRW sought the Appellant's agreement to a reduced daily maximum volume of 35,000 cubic metres as this is what had been considered acceptable by the modelling group. NRW also confirmed that the existing 10-millimetre intake screening was acceptable and that it was minded to include in the licence (amongst other matters) a series of staggered abstraction cut-backs within a table, dependent on the unsupported flow rate in the River Usk. The Appellant confirmed their agreement to a daily maximum volume of 35,000 cubic metres by email later that day: Annex 13.1.

5.2.22 On 30 September 2022, NRW provided the Appellant with written confirmation of the flow restriction condition wording being considered and the hands-off flow and abstraction cut backs figures: Annex 14.1.

5.2.23 On 26 October 2022, NRW provided the Appellant the full set of draft licence conditions via email. This remained subject to agreement via the HRA assessment.

5.2.24 On 17 November 2022, the Appellant responded with minor comments on the draft licence conditions (Annex 15.1). Having considered the comments made, NRW agreed to amend the draft conditions.

5.2.25 On 5 December 2022, NRW had a meeting with the Appellant and informed them of the outcome of the HRA process and confirmed that the conditions on the Brecon licence shared previously had been approved internally within NRW. During the meeting, the Appellant raised concerns about the inclusion of an annual maximum volume condition as that could limit the abstraction of water supplied by DCWW as part of the sustainable solution if that became available. The Appellant had not raised this concern previously. Whilst NRW cannot allow an annual volume greater than evidenced, NRW accepted that its approach could be unduly constraining if a

sustainable water supply solution were found. Having considered this further, NRW added an additional condition in the licence. This condition increases the annual volume to 365 days' worth of abstraction if and when a supply of support water from DCWW starts. A revised licence draft, including this amendment, was shared with the Appellant on 8 December 2022.

5.2.26 On 12 December 2022, the Appellant responded with further comments on the draft licence document. NRW provided a written response to these comments on 13 December 2022 (Annex 16.1).

5.2.27 On 19 December 2022, the licence was granted including the conditions as discussed, and was accompanied by a covering letter (Annex 17.1)

## 6. Why the conditions were included

### 6.1 River Usk SAC

6.1.1 The River Usk SAC rises in the Black Mountain range in the west of the Bannau Brycheiniog National Park (formerly known as the Brecon Beacons National Park and flows east and then south, to enter the Severn Estuary at Newport. The overall form of the River Usk catchment is long and narrow, with short, generally steep tributaries flowing north from the Black Mountain, Fforest Fawr and Bannau Brycheiniog, and south from Mynydd Epynt and the Black Mountains. The Usk catchment is entirely within Wales.

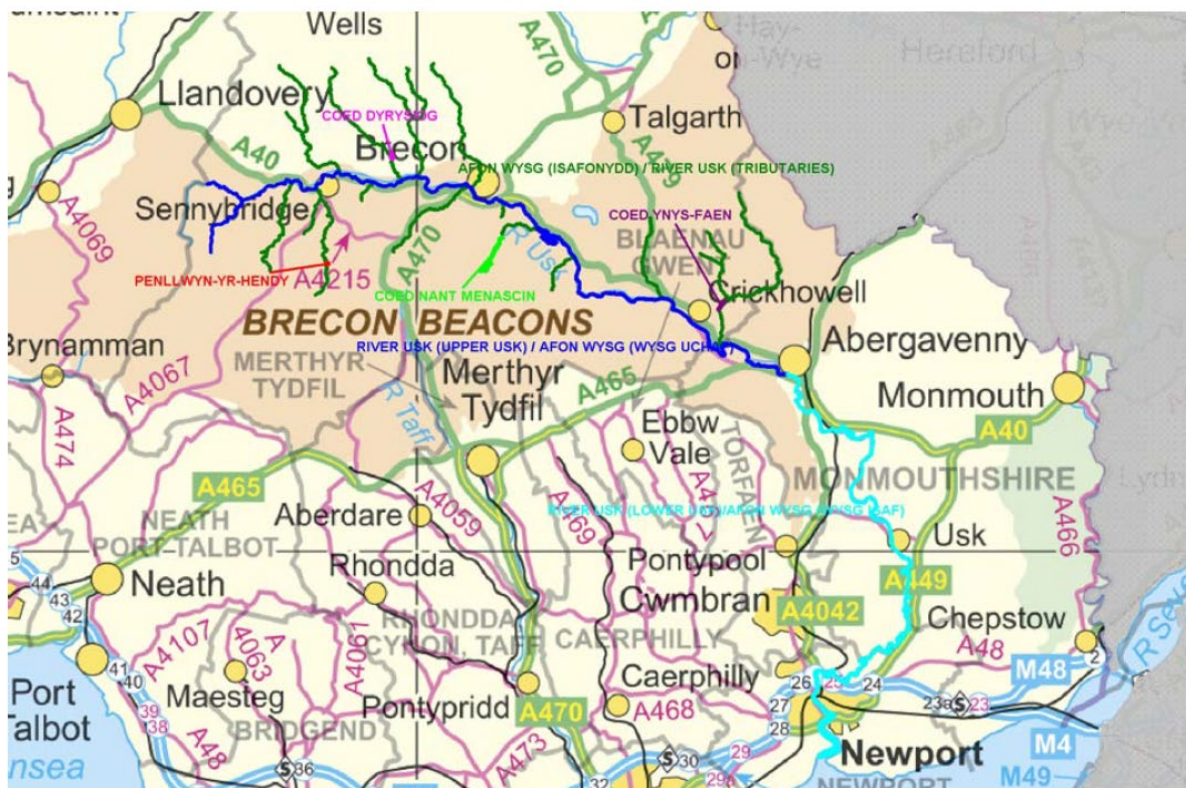


Figure 3. River Usk SAC Map, the dark blue and bright blue lines denote the river reaches that are designated as the River Usk SAC.

6.1.2 By virtue of its identification as a SAC pursuant to the Habitats Regulations, the habitats and species that exist in the River Usk SAC have been identified as being of

a higher ecological value than those of a non-designated river, with a corresponding requirement for more stringent river flow protection. This flow protection is afforded to all the watercourses in the River Usk catchment.

- 6.1.3 The ecological structure and functions of the site are dependent on hydrological and geomorphological processes (often referred to as hydromorphological processes), as well as the quality of riparian habitats and connectivity of habitats. Animals that move around and sometimes leave the site, such as migratory fish and otters, may also be affected by factors operating outside the site.
- 6.1.4 Habitat connectivity is an important property of river ecosystem structure and function. Many of the fish that spawn in the river are migratory, and rely on the conditions of their migration routes being maintained to allow the adults to reach available spawning habitat and juvenile fish to migrate downstream.
- 6.1.5 The River Usk has a wide range of migratory and non-migratory fish species which are designated as part of the SAC. The Annex II species that are a primary reason for selection of the site include;
- Sea lamprey
  - Brook lamprey
  - River lamprey
  - Twaite shad
  - Atlantic salmon
  - Bullhead
  - European otter

A non-primary reason for designation is the presence of Allis Shad.

- 6.1.6 Please refer to Annex 18.1 for the Core Management Plan, including conservation objectives, for the River Usk SAC.

## **6.2 Severn Estuary SAC, SPA and Ramsar Site**

- 6.2.1 The Severn Estuary is the largest example of a coastal plain estuary in the United Kingdom and one of the largest estuaries in Europe. The estuary lies in the broad Severn Vale, with most of the sediments on the margins of the estuary having accumulated since the last ice age. The estuary supports a wide array of habitats and species of international importance for nature conservation. The Severn Estuary SAC covers the extent of the tidal influence from an upstream limit between Frampton and Awre in Gloucestershire out seawards to a line drawn between Penarth Head in Wales and Hinkley Point in Somerset. There are several major rivers, including the Taff/Ely, Usk, Wye, Severn, Avon and Parrett which feed into the estuary. In addition to its SAC, SPA and Ramsar Site status, parts of the Severn Estuary are also notified as Sites of Special Scientific Interest (SSSIs) under the Wildlife and Countryside Act 1981.



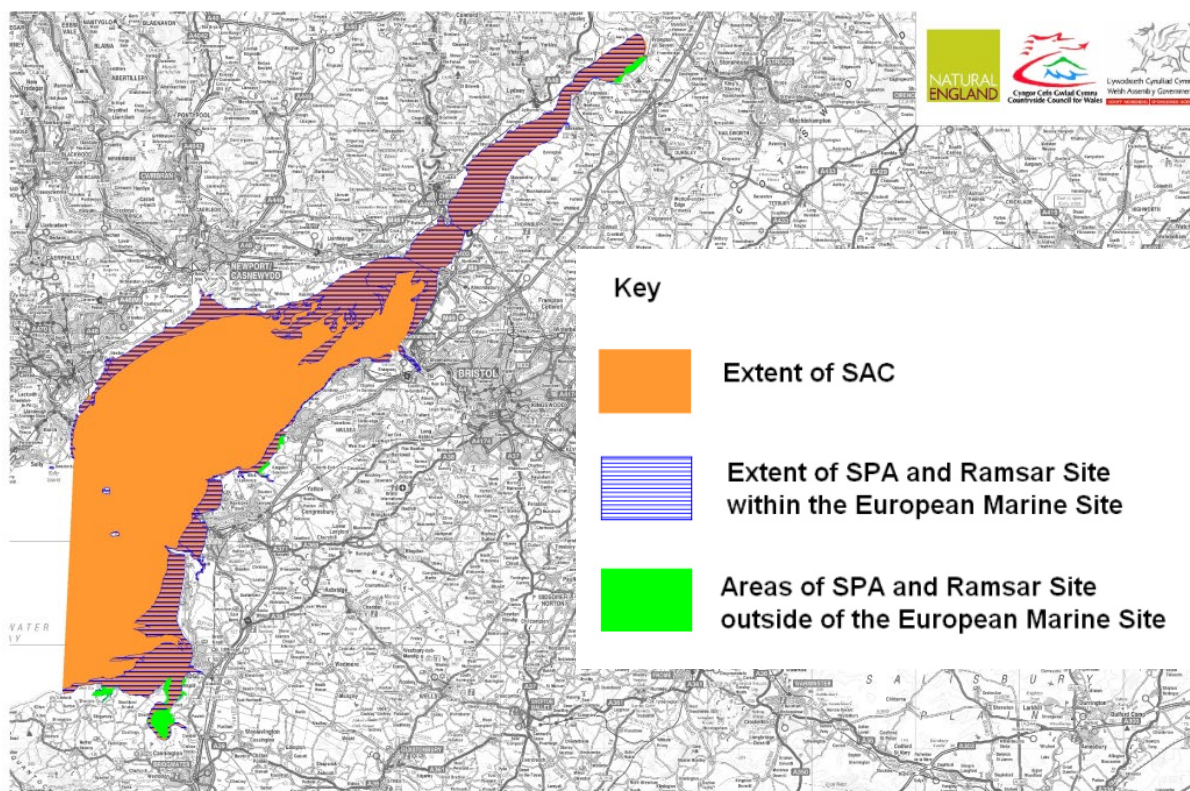


Figure 4. Map showing the extent and relationship of the Severn Estuary SAC, SPA and Ramsar Site

6.2.3 The Severn Estuary has been designated a SAC on the basis that it supports occurrences of habitat types and species listed in Annexes I and II respectively of the Habitats Directive that are considered important in a European context and meet the criteria in Annex III of the Directive. The designation includes an overarching “estuaries” feature within which subtidal sandbanks, intertidal mudflats and sandflats, Atlantic salt meadows and reefs (of *Sabellaria alveolata*) and three species of migratory fish are defined as both features in their own right and as sub-features of the estuary feature. In addition, hard substrate habitats including eel grass beds, the estuary-wide assemblage of fish species and the assemblage of waterfowl species (for which the Ramsar Site and SPA are specifically designated) are identified as notable estuarine assemblages which are an intrinsic part of the estuary ecosystem – these are therefore covered by the “estuaries” feature.

6.2.4 The Severn Estuary SAC is therefore designated for a number of features. The features and species detailed below are those that are relevant to the decision to include a HoF condition in this case:

- Estuaries (Note: A sub-feature of the Estuaries features is ‘Assemblage of fish species (>100 species)’, which includes 7 diadromous species (river lamprey, sea lamprey, twaite shad, allis shad, sea trout, Atlantic salmon and European eel), three of which are separately identified as features in their own right (see below). The other fish species within the estuarine assemblage can be ruled out by virtue of a lack of functional linkage with the impacted reaches).
- River Lamprey
- Sea Lamprey
- Twaite Shad

6.2.5 The diadromous fish assemblage is also highlighted as a protected feature under criterion 4 of the Severn Estuary Ramsar Site designation:

*“Ramsar criterion 4*

*This site is important for the run of migratory fish between sea and river via estuary. Species include Salmon *Salmo salar*, sea trout *S. trutta*, sea lamprey *Petromyzon marinus*, river lamprey *Lampetra fluviatilis*, allis shad *Alosa alosa*, twaite shad *A. fallax*, and eel *Anguilla anguilla*. It is also of particular importance for migratory birds during spring and autumn.”*

- 6.2.6 Please refer to the document in Annex 19.1 titled ‘The Severn Estuary/Môr Hafren European Marine Site’ which includes the ‘Conservation Objectives’ for the Severn Estuary SAC, SPA and Ramsar sites.

### **6.3 Inclusion of hands-off flow and volumetric conditions**

- 6.3.1 The hands-off flow (“HoF”) condition is required to comply with NRW’s obligations under the Habitats Regulations.
- 6.3.2 The 2017 Governmental Response gave policy guidance to regulators on when a new abstraction could reasonably be considered to be at risk of causing “serious damage”. The guidance stated that if an abstraction would have an adverse effect, or would have the potential to have an adverse effect, on the integrity of sites designated under the Habitats Regulations, regulators should apply the precautionary principle when assessing the risk of serious damage. In the present case, the assessment of serious damage took the form of the HRA, and NRW is satisfied that the conditions are necessary to avoid an adverse effect on site integrity.
- 6.3.3 Under the Habitats Regulations, a HRA was undertaken to assess the potential impacts on the River Usk SAC and Severn Estuary SAC. The HRA covered all seven of the Appellant’s applications in relation to the Monmouthshire and Brecon Canal. With regards to the Brecon abstraction, the HRA concluded that the applied HoF and abstraction cut-back conditions were necessary to protect the River Usk SAC from adverse effects on site integrity which would constitute a risk of “serious damage”.
- 6.3.4 The HoF and abstraction cutback restrictions imposed in conditions 9.2 and 9.3 of the licence (Annex 1.1), were set to ensure that the Habitats Directive Ecological River Flow (HDERF) line for the River Usk SAC is met. The high number of cut backs allows the Appellant to abstract as much water as possible without causing flows to drop below the HDERF. By ensuring the abstraction does not adversely affect flows within the River Usk SAC this will, in turn, ensure flows are not adversely effected within the Severn Estuary SAC.
- 6.3.5 The Habitats Directive Ecological River Flow (HDERF) line was developed by the Habitats Directive Water Resources Technical Advisory Group (WR TAG)<sup>4</sup> as a national standard across England and Wales to help indicate where a pressure from abstraction (both spatially and temporally) may cause a risk of adverse effects to the integrity of a site. The WR TAG guidance states that if flows are above the HDERF line then ‘no adverse effect’ on the integrity of the site can be concluded.

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<sup>4</sup> This was a joint Environment Agency, Natural England and Countryside Council for Wales Technical Advisory Group.



- 6.3.6 Although NRW is aware of the impact on water supply to the Monmouthshire and Brecon Canal and the potential solutions to this, the impact and availability of a solution is not in itself a reason or grounds upon which NRW can allow an abstraction licence to be granted without appropriate restrictions. NRW has had regard to the relevant provisions of the Habitats Regulations 2017, as per section 3.7 above.
- 6.3.7 In so far as this application is concerned, NRW note there are alternative solutions which might be considered such as DCWW providing support water from Usk reservoirs and options linked to changes to existing licences on the Afon Lwyd, amongst other considerations. Ultimately, it is for the Appellant to assess business impacts and seek to make alternative arrangements to address water supply concerns accordingly.
- 6.3.8 In order to support a possible future solution and avoid the need for a future variation of the Appellant's abstraction licence if/when a commercial agreement is reached between the Appellant and DCWW, NRW agreed to include additional conditions within the licence to allow abstraction of support water if it becomes available, up to a maximum of 365 days per year. NRW has also granted a variation to DCWW's Usk Reservoir licence, number 20/56/54/0001/V005, to allow DCWW to make support releases should an agreement be reached with the Appellant.
- 6.3.9 In general, water users need to be mindful of water consumption in the current climate and to consider more environmentally sustainable alternatives, such as leakage reduction and water efficiency savings. Using water efficiently is the responsibility of everyone and if there are alternatives, they should be considered.
- 6.3.10 Precise restrictions to be included on the licence were notified to the Appellant at the earliest opportunity. The inclusion of the conditions was necessary to comply with the Habitats Regulations and it was necessary to issue the licence when it was issued to ensure that the statutory deadline under the 2017 Transitional Regulations was met. Therefore, whilst the impact on the operation of the Monmouthshire and Brecon canal was considered, it did not over-ride the duties imposed on NRW through other legislation and in particular to ensure that there was no adverse effect on the integrity of the River Usk SAC when determining and granting new authorisations licence applications. Given the long history of the implementation of the New Authorisations, including all of the supporting and promotional messaging from NRW and other bodies, sufficient information and time has been provided for businesses to be prepared for these changes and to consider alternatives to prevent any significant economic detriment.

## **7. Comments on grounds of appeal**

- 7.1 The Appellant appeals against the decision by NRW to issue the licence on the ground that NRW failed to undertake a proper well-being assessment under the WBFG Act 2015 and if it had done so, the licence conditions may have been different.
- 7.2 Section 3.10 above sets out the relevant provisions of the WBFG Act.
- 7.3 Section 3(1) of the WBFG Act 2015 imposes a duty on each public body to "carry out sustainable development". For this purpose, "sustainable development" means (section 2):

“... the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4).”

- 7.4 In carrying out sustainable development, public bodies are required to take action that includes (section 3(2)):

“(a) setting and publishing objectives (“well-being objectives”) that are designed to maximise its contribution to achieving each of the well-being goals, and  
(b) taking all reasonable steps (in exercising its functions) to meet those objectives.”

- 7.5 Section 4 of the WBFG Act 2015 identifies, and then describes in more detail, 7 well-being goals, namely: “A prosperous Wales”, “A resilient Wales”, “A healthier Wales”, “A more equal Wales”, “A Wales of cohesive communities”, “A Wales of vibrant culture and thriving Welsh language” and “A globally responsible Wales”. By way of example, the first goal in Table 1 of section 4, “A prosperous Wales”, is defined as follows:

Goal	Description of the goal
A resilient Wales	A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).

- 7.6 Section 5 of the WBFG Act is entitled “The sustainable development principle”. Acting in accordance with this principle means acting “in a manner which seeks to ensure that the needs of the present are met without compromising the ability of future generations to meet their own needs” [section 5(1)]. Acting in this manner also requires taking account of various matters set out in s. 5(2), including, by way of example, at s. 5(2)(b):

“(b) the need to take an integrated approach, by considering how –  
(i) the body’s well-being objectives may impact upon each of the well-being goals;  
(ii) the body’s well-being objectives may impact upon each other or upon other public bodies’ objectives, in particular where steps taken by the body may contribute to meeting one objective but may be detrimental to meeting another;”

- 7.7 In summary, therefore, the effect of sections 2-5 of the WBFG Act is as follows:

- (1) A public body has a duty to “carry out sustainable development” [section 3(1)]
- (2) To comply with this duty, the public body must set and publish “well-being objectives” designed to maximize its contribution to achieving the “well-being goals” set out in section 4 [section 3(2)(a)]
- (3) Having published those well-being objectives, the public body must take “all reasonable steps”, in exercising its functions, to meet them [section 3(2)(b)]
- (4) Carrying out sustainable development means carrying out the process of improving the well-being of Wales in a manner which meets present needs without

compromising the ability to meet future needs, with the aim of achieving the 7 well-being goals [section 2].

- 7.8 The Welsh Government published statutory guidance on the WBFG Act 2015 in 2016. the first part of which was entitled “Shared Purpose Shared future” (SPSF 1: Core Guidance), see Annex 20.1. Public bodies must take the guidance into account when fulfilling their legal duties. Paragraph 31 of SPSF 1 : Core Guidance states:

*“It is fundamentally important that the requirements of the Act are not seen as ‘an additional layer’ to existing activity so that sustainable development is embedded into your organisation. For example, the setting of well-being objectives should be the primary way in which you set well-being objectives; it should not take place in addition to an existing process”*

- 7.9 To comply with its legal obligations under the WBFG Act 2015, NRW published a “Well-being Statement” in 2017, identifying its seven well-being objectives and the steps it proposes to achieve them. NRW’s well-being objectives are:

- (1) Champion the Welsh environment and the sustainable management of Wales’ natural resources;
- (2) Ensure land and water in Wales is managed sustainably and in an integrated way;
- (3) Improve the resilience and quality of our ecosystems;
- (4) Reduce the risk to people and communities from environmental hazards such as flooding and pollution;
- (5) Help people live healthier and more fulfilled lives;
- (6) Promote successful and responsible business, using natural resources without damaging them;
- (7) Develop NRW into an excellent organisation, delivering first-class customer service.

- 7.10 NRW’s duty under the WBFG Act 2015 is to carry out sustainable development and it must take “all reasonable steps (in exercising its functions)” to meets its own defined “well-being objectives” that are designed to maximise NRW’s contribution to achieving the well-being goals of Welsh Government. The duty to carry out sustainable development under section 3(1) of the WBFG Act is not an absolute duty; it is a duty to take “reasonable steps” in the context of NRW “exercising its functions”, in this case, its abstraction licensing functions. The duty to carry out sustainable development is a duty that applies in the context of more detailed legal requirements set out in the Water Resources Act 1991, the 2017 Transitional Regulations and the Habitats Regulations.

- 7.11 In this case, NRW has exercised its licensing function in accordance with the relevant statutory provisions set out in section 3 above. When deciding whether or not to grant an abstraction licence under the Water Resources Act 1991 and the 2017 Transitional Regulations, NRW has undertaken an objective, highly technical assessment of whether the licence could be granted in accordance with the exacting requirements of the Habitats Regulations and, if so, how. This assessment relied on specialist, expert advice on the impacts of the proposed activity on the environment and how these impacts could be appropriately mitigated by conditions to enable a licence to be granted in accordance with the Habitats Regulations. There is nothing in the WBFG Act 2015 that mandates or permits an outcome otherwise than in accordance with the Habitats Regulations.

- 7.12 NRW is satisfied that based on all available evidence, the short, medium and long term impacts of granting this licence, subject to conditions specifying the HoF and abstraction cut-back conditions, will protect the resilience of ecosystems and ensure that natural resources are used in a way that does not damage them. Accordingly, it is self-evident that NRW has taken all reasonable steps to fulfil its published well-being objectives.

## **8. Conclusion**

- 8.1 For all these reasons, NRW respectfully invites the Inspector to dismiss the appeal.

## **9. List of appendices**