

**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:

RADNOR HILLS MINERAL WATER COMPANY LTD

SITE AT:

RADNOR HILLS, HEARTSEASE

Planning And Environment Decisions Wales (PEDW)

References:

CAS-02488-V7M8Q2 & CAS-02489-V6P4R9

**NATURAL RESOURCES WALES'
RESPONSE TO APPELLANT'S
STATEMENT OF CASE**

INTRODUCTION

1. This is a response by Natural Resources Wales (“NRW”) to the Statement of Case (“SoC”) submitted by the Appellant, dated 17 July 2023, in support of the appeals identified on the previous page.
2. For ease of reference, this document follows the order and structure of the Appellant’s SoC, providing comments in response as NRW considers necessary. NRW has not considered it necessary to respond to every section in the SoC. NRW shall focus here on responding to any new information or argument in the Appellant’s SoC.
3. References to paragraph numbers below are to those in the Appellant’s SoC, unless otherwise stated. References to annexes are to the annexes to NRW’s SoC, unless otherwise stated.

NRW’S RESPONSE TO THE SOC

4. Para 3: The Appellant has stated that they abstract from 15 boreholes at the Radnor Hills site. To clarify, and as stated in para 2.2 of NRW’s SoC, only 12 of these boreholes are located in Wales. The remaining 3 boreholes are located in England.
5. Paras 3, 5 and 6: The Appellant has stated that they abstract approximately 300,000 cubic metres of water per year. Although clarified in para 42 of the Appellant’s SoC, NRW wish to reiterate here that the Appellant is authorised to abstract 235,591 cubic metres of water per year from the boreholes located in Wales and 60,833 cubic metres of water per year from the boreholes located in England.
6. Para 6: The licences granted by NRW (WA/054/0009/0001 and WA/054/0009/0002, provided in Annexes 1.1 and 1.2 to NRW’s SoC), authorise abstraction from the boreholes located in Wales. The licence granted by the Environment Agency (MD/054/0009/052, provided in Annex 17.1 to NRW’s SoC) authorises abstraction from the boreholes located in England. All 3 licences specify the same expiry date of 31 March 2031.
7. As detailed in paras 2.2 and 5.3.1 of NRW’s SoC, only the licences granted by NRW (WA/054/0009/0001 and WA/054/0009/0002) are the subject of these appeals. The Appellant has not submitted any appeal regarding the licence granted by the Environment Agency (MD/054/0009/052).

Summary of the issues

8. Para 8: The Appellant refers to the decision by NRW to “*curtail the duration of the licence*”. NRW do not consider the licence expiry date a “curtailment”. This language suggests that the Appellant has a legal entitlement to a licence of a particular duration when there is no such entitlement. Moreover, the decision to

apply an expiry date of 31 March 2031 places no immediate constraint on the Appellant's ability to abstract water as they have done historically.

9. The Appellant asserts that NRW's decision is "*unnecessary and unjustified*" because the Appellant's applications did not meet the serious damage criteria outlined in the 2017 government response (provided in Annex 4.1 to NRW's SoC) and that NRW had sufficient evidence to conclude no adverse effects would be caused if the later expiry date of 31 March 2037 had been applied. As explained in para 7.19 of NRW's SoC, NRW did not identify the earlier expiry date of 31 March 2031 as mitigation to prevent adverse impacts on the nearby designated sites. The earlier expiry date was not, therefore, applied to protect against serious damage. Rather, NRW consider the earlier expiry date to be necessary in light of the longer-term uncertainty regarding the River Teme catchment and the need for further data to better understand any future potential impacts. Further detailed justification for NRW's decision to include the earlier expiry date of 31 March 2031 is provided in section 6 of NRW's SoC.

Abstraction scheme and locality

10. Para 12: The Appellant acknowledges the proximity of the abstraction boreholes to the River Teme but highlights that the capture zones (i.e. the area where groundwater is abstracted by the boreholes) do not reach the River Teme, and therefore do not take water directly from the river. NRW agree with this. However, NRW's conceptual understanding is that groundwater flow is in the direction of the River Teme and therefore supports water levels and flow in the river and underlying sands and gravels. As a result, there is the potential for the Radnor Hills abstraction boreholes to intercept some of the groundwater that may have otherwise found its way to the river. It was this potential impact that NRW assessed through the HRA and SSSI assessments, provided in Annexes 13.1 and 14.1 to NRW's SoC.
11. Paras 15 and 16: The Appellant suggests that "*the abstraction volumes that were justified and applied for*" were "*subsequently licensed*". It should be noted that, during the determination of the licence applications, NRW identified an error with the daily quantity originally applied for (1,183 cubic metres). As a result, a lower daily quantity of water (896 cubic metres per day) was subsequently licensed. Further detail is provided in section 8 of NRW's Decision Document provided in Annex 16.1 to NRW's SoC.

Legal and policy framework

12. Para 26: The Appellant refers to para 3.2 of the 2017 Government Response (provided in Annex 4.1 to NRW's SoC), as follows:

"The UK and Welsh Governments' expectations are that the Regulator *will normally grant licences with a time limit to the relevant common end date in keeping with its published licensing position*". (emphasis added by Appellant)

Sections 4.2 and 4.3 of NRW's SoC set out the "published licensing position". In summary, the regulator will aim to time-limit licences to a common end date (CED)

for that catchment, however there is discretion to apply shorter or longer time limits in certain circumstances.

13. Paras 26 and 27: The Appellant has summarised the policy position with respect to serious damage, as set out in the 2017 Government Response (provided in Annex 4.1 to NRW's SoC). As stated in para. 9 above, NRW does not consider the earlier expiry date of 31 March 2031 to be mitigation to prevent adverse impacts on the nearby designated sites. The earlier expiry date was not, therefore, applied to protect against serious damage. Rather, the earlier date is considered necessary in light of the longer-term uncertainty regarding the River Teme catchment and the need for further data to better understand any future potential impacts.
14. Para 28: The Appellant highlights that the 2013 Teme Abstraction Licensing Strategy (provided in Annex 5.3 to NRW's SoC) was published by the Environment Agency rather than NRW. As per paras 2.4 and 4.3.2 of NRW's SoC, the Teme catchment is a cross-border catchment, managed by the Environment Agency. Therefore NRW can confirm that the Teme Abstraction Licensing Strategy is the relevant strategy for the applications that are the subject of these appeals.
15. Paras 29 and 30: Section 4.3 of NRW's SoC details the time-limiting policy set out in the 2013 Teme Abstraction Licensing Strategy. In summary, where an application is made within six years of the CED (as is the case with the applications that are the subject of these appeals), the regulator will generally apply the subsequent CED to any licence granted. However, where the long-term impacts of an abstraction are uncertain and further monitoring is required, the regulator has discretion to apply shorter time limits to a licence.
16. Paras 31 – 38: Section 3.11 of NRW's SoC set out the relevant provisions of the WBFG Act 2015. In para 7.6 – 7.10 of their SoC, NRW summarise the relevant provisions and explain how they have complied with the legal obligations arising from them. NRW is satisfied that granting these licences subject to the time limit of 31 March 2031 is consistent with achieving sustainable development as it will protect the resilience of ecosystems and ensure that natural resources are used in a way that does not damage them, in accordance with the requirements of the WBFG.
17. Paras 39 - 41: The Appellant suggests that NRW should have had regard to section 108(1) of the Deregulation Act 2015 and the related statutory guidance issued by the former UK Government Department for Business, Energy and Industrial Strategy ("BEIS"). The regulatory functions to which the section 108(1) duty applies are those specified by a Minister of the Crown in an order made under section 109: see s. 109(1). Section 109(3) states:

"An order under this section may not specify—

...

(c) a regulatory function so far as exercisable in Wales, if or to the extent that the function could be conferred by provision falling within the legislative competence of the National Assembly for Wales."

18. The order made pursuant to s. 109 is the Economic Growth (Regulatory Functions) Order 2017. None of NRW's regulatory functions are specified in the order. The Appellant's submission that the s. 108 duty is engaged in these appeals is therefore incorrect.

Appellant's licence applications and NRW's determination

19. Para 43: As detailed in para 5.2.3 of NRW's SoC, the licence duration section on the NRW WRH forms (Annexes 8.1 and 8.2 to NRW's SoC) was left blank. The Appellant, in their SoC, states that this is because "*the expectation was that NRW would select the next CED at the time of determination*". However, the Appellant's application to the Environment Agency (Annex 9.1 to NRW's SoC) indicated the Appellant was willing to accept a time limit of 31 March 2025, as it was noted that this is the common end date for the Teme catchment. On this basis NRW could not reasonably have anticipated any concern on the Appellant's part with the decision to apply a time limit of 31 March 2031.
20. Para 45: The Appellant has correctly stated that their licences were issued on 16 December 2022, which was three years after the Appellant's applications were first submitted and 15 days before the statutory deadline by which NRW were required to determine the licence applications. NRW wish to highlight that they were required to determine over 115 licence applications within the three-year statutory determination period. To achieve this NRW followed a programme of work to ensure the determinations were completed within the statutory timescales, which resulted in some licences being issued towards the end of the determination period. In addition, as the Appellant had submitted applications to both NRW and the Environment Agency, both organisations had aligned their work programmes to ensure the applications were determined concurrently. The Environment Agency licence (MD/054/0009/052) was subsequently issued on 3 January 2023.
21. Para 46: NRW wish to clarify that it was the Environment Agency that first communicated the "*prospect of shorter duration licences*" to the Appellant in their email dated 25 October 2022. It was also the Environment Agency that advised that this was on the basis that the "*catchment is considered to be very dynamic, and there are a number of other factors that would justify a shorter time limit in this situation*". NRW then confirmed its position in relation to the duration of the licence on 3 November 2022, by which time consultation with the relevant appropriate nature conservation bodies (ANCBs) had been concluded. NRW did not provide further justification for the proposed time limit at this time but did acknowledge the concerns raised by the Appellant's agent in their email dated 31 October 2022, and subsequently arranged a meeting with the Appellant, their agent and the Environment Agency on 6 December 2022. The meeting allowed the Appellant further opportunity to discuss their concerns and provided NRW and the Environment Agency with the opportunity to explain their justification for the proposed time limit. Following the meeting, NRW sent an email (dated 8 December 2022) providing more detailed justification for the proposed 2031 licence time limit. The email correspondence and subsequent meeting notes are provided in Annexes 10.4, 10.5 and 10.6 to NRW's SoC.

22. Para 50: NRW is not aware of “*repeated requests*” for the Decision Document and other evidence relating to the licence expiry date. As detailed in section 5.3 of NRW’s SoC, the Appellant’s agent contacted NRW in January 2023 advising that the Appellant was considering submitting an appeal against the earlier expiry date, and NRW subsequently received notice of the appeal from the Appellant’s solicitors on 13 January 2023. It was not until 12 June 2023 that NRW received a request for information from the Appellant’s solicitors relating to the determination of the Appellant’s licences. NRW acknowledged the request on 14 June 2023, and subsequently provided the information requested on 5 July 2023 i.e. within 20 working days as required under regulation 5(2) of the Environmental Information Regulations 2004 (“EIR”). A further request was submitted to NRW by the Appellant’s solicitors on 20 July 2023 requesting a copy of NRW’s draft Operational Guidance Note (OGN) entitled ‘*Applying time limits to abstraction licences*’. NRW subsequently provided a copy of the draft OGN on 21 July 2023.
23. Para 51: As explained in paras 9 and 13 above, NRW does not consider the earlier expiry date of 31 March 2031 to be mitigation to prevent adverse impacts on nearby designated sites. The conclusions of the HRA completed by NRW to determine the potential impacts on designated sites did not have a direct bearing on the identification of the expiry date. However, the expiry date was an issue that was highlighted as part of the consultation process of the HRA, due to the uncertainty around the long-term impacts and the need for further monitoring. As per para 22 above, NRW first received a request for information, including a copy of the HRA, on 14 June 2023. NRW subsequently provided the information requested on 5 July 2023, in line with the timescales specified under the EIR.
24. Para 52: As explained in para 22 above, it was not until 12 June 2023 that NRW received a request for information from the Appellant’s solicitors relating to the determination of the Appellant’s licence applications. This was approximately 5 months after the Appellant had submitted their notices of appeal and one week into the 9-week appeal timetable set out by PEDW. NRW note that, had the Appellant requested the information from NRW sooner, then they would have had sufficient time to consider and respond to the information provided, without the need to alter the appeals timetable or procedure.
25. Para 53(a): As per para. 8 above, NRW do not consider the licence expiry date a “curtailment”. The decision to apply a time limit of 31 March 2031 places no immediate constraint on the Appellant’s ability to abstract water as they have done historically. In addition, the time limit of 31 March 2031 provides regulatory certainty to the Appellant for the next 8 years in relation to its licensing position. Historically, the Appellant has not benefitted from this certainty, especially since the Water Act 2003 first confirmed removal of the exemptions.
26. Para 53(c): NRW acknowledge that the relevant ANCB functions did not agree with NRW’s (or the Environment Agency’s) conclusion that adverse effect on site integrity could be ruled out. As a result, the HRA decision was escalated to NRW’s Leadership team, in line with internal guidance and policy. As explained above, the shorter time limit of 31 March 2031 is not considered mitigation to prevent adverse impacts on nearby designated sites. Therefore the conclusions of the HRA did not have a direct bearing on the expiry date identified for the licences.

27. Para 53(d): NRW do not agree that the Habitats Regulations Escalation Options Paper (provided as Annex 8 to the Appellant's SoC) "*makes clear that the short duration of the licence was advised due to the need to make a decision prior to statutory time limit (31 December 2022)*". Although the Options Paper acknowledged the need to make a decision prior to the statutory deadline, the only reference to the 2031 time limit within the paper explains that it would allow the licences to be reviewed, and if necessary amended, earlier than would be the case if the end date were set to the common end date for the catchment (2037). This is a reasonable position in light of the longer-term uncertainty regarding the River Teme catchment and the need for further data to better understand any future potential impacts. It is worth noting that this concern was known to NRW, the Environment Agency and the Appellant for some time, even before the licence determination process commenced.
28. Para 53(e): As detailed in section 5.2 of NRW's SoC and para 21 above, NRW provided the Appellant with justification for the 2031 time limit during the meeting held on 6 December 2022, subsequent email correspondence dated 8 December 2022 and the issue letter dated 16 December. NRW acknowledge that the justification provided to the Appellant was a summary only and more detailed justification was provided in NRW's Decision Document (which as per para. 22 above, was disclosed to the Appellant on 5 July 2023, following a request for information on 14 June 2023).

Summary of Appellant's case

29. Paras 54 and 68: As per para 24 above, NRW consider the Appellant would have had sufficient time to consider and respond to the information provided by NRW, without the need to alter the appeals timetable or procedure, had the request for information been submitted earlier on in the year, and not 5 months after the submission of its appeals.
30. Paras 55 – 56: As per para 15 above, NRW considers the time limit applied to the Appellant's licences is in line with the published licensing position, namely that where the long-term impacts of an abstraction are uncertain and further monitoring is required, the regulator has discretion to apply shorter time limits to a licence.
31. Paras 55 and 57: For the reasons given in paras 8 and 25 above, NRW do not consider the licence expiry date a "curtailment".
32. Paras 59 - 64: NRW is satisfied that sufficient regard was given to the requirements of the applicant. The decision to apply a time limit of 31 March 2031 places no immediate constraint on the Appellant's ability to abstract water as they have done historically. As per para 7.16 of NRW's SoC, shorter time limits have been applied to other water bottling operations without these licence-holders expressing the concerns expressed by the Appellant in these appeals. In addition, the 2031 expiry date was applied to a total of 5 EA-issued licences in the Teme catchment. Again, NRW are not aware of any concerns raised by the licence-holders about the licence duration.

33. Para 65: As per para 16 above, NRW is satisfied that granting these licences subject to the time limit of 31 March 2031 will protect the resilience of ecosystems and ensure that natural resources are used in a way that does not damage them, in accordance with the requirements of the WBFG.
34. Para 66: As explained in para. 18 above, the Appellant's contention that the s. 108(1) duty is engaged in these appeals is incorrect.
35. Para 68: The earlier expiry date of 31 March 2031 is not considered mitigation to prevent adverse impacts on:
- the Water Framework Directive (WFD) status of relevant groundwater and surface water bodies
 - fisheries
 - SSSI features
 - National Site Network sites (formerly Natura 200 sites)
- Rather, the earlier expiry date is considered necessary in light of the longer-term uncertainty regarding the River Teme catchment and the need for further data to better understand any future potential impacts.
36. Para 68 (f): NRW wish to clarify that both NRW and the Environment Agency consulted Natural England (NE) as the relevant ANCB for the River Clun SAC. Although this SAC is located in England, NRW had a statutory duty to consult Natural England given the potential for impacts from the Welsh abstractions on the River Clun.
37. Para 69: As per para 27 above, NRW do not agree that the shorter time limit was applied "*as a way to resolve an internal disagreement in the face of the approaching statutory deadline*". The 2031 time limit was applied in light of the longer-term uncertainty regarding the River Teme catchment and the need for further data to better understand any future potential impacts. It would allow the licences to be reviewed, and if necessary amended, earlier than would be the case if the end date were set to the common end date for the catchment (2037). NRW consider this a reasonable position in light of the longer-term uncertainty regarding the River Teme catchment and the need for further data to better understand any future potential impacts. These concerns are long standing and have been known by the Appellant for a considerable time, well ahead of the submission of the transitional licence applications.
38. NRW is satisfied the time limit applied is in line with all relevant policy and legislation.
39. NRW does not consider the time limit applied will "*have devastating consequences for the Appellant's business and the wider economy*". The time limit places no immediate constraint on the Appellant's ability to abstract water as they have done historically. In addition, it provides regulatory certainty to the Appellant for the next 8 years in relation to their licences. Historically, the Appellant has not benefitted from this certainty, especially since the Water Act 2003 first confirmed removal of the exemptions.

NRW'S CONCLUSIONS

40. This concludes NRW's comments on the Appellant's SoC in these appeals.

41. NRW respectfully renews its invitation to the inspector to dismiss the appeals and uphold the decisions to grant the licences subject to the expiry date of 31 March 2031.