

**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'
FURTHER COMMENTS ON THE
APPELLANT'S RESPONSE TO NRW'S
STATEMENT OF CASE**

INTRODUCTION

1. This document provides Natural Resources Wales' ("NRW") further comments on the Appellant's Response to NRW's Statement of Case ("SoC") submitted on 5 September 2023 in support of the appeals identified on the previous page ("the Appellant's Response").
2. PEDW has given NRW this further opportunity to comment on the Appellant's Response. This is following written correspondence sent from both the Appellant and NRW to PEDW between 20 September and 26 September 2023.
3. For ease of reference, this document follows the order and structure of the Appellant's Response, providing comments in response as NRW considers necessary. NRW has not considered it necessary to respond to every section in the Appellant's Response. NRW shall focus here on responding to any new information or argument.
4. References to paragraph (para.) numbers below are to those in the Appellant's Response, unless otherwise stated. References to annexes are to the annexes to NRW's SoC, unless otherwise stated.

NRW'S COMMENTS ON THE APPELLANT'S RESPONSE

5. Para 3: Please refer to section 5.3 of NRW's SoC and para. 22 of NRW's Response to the Appellant's SoC for clarification regarding the disclosure of relevant documentation to the Appellant.
6. Para 4: NRW acknowledge that PEDW agreed that it would accept evidence and / or arguments from the Appellant at the "final comments" stage to address issues raised in NRW's SoC. However, NRW maintains that the submission of a Response document that was a third longer than the Appellant's original SoC, plus an additional bundle of documents of 1202 pages, was contrary to the intent of PEDW's guidelines and agreement to accept further evidence at the "final comments" stage.

Issues

7. Para 6(a): NRW is satisfied that the "*light-touch, risk-based approach*" was applied to the determination of the Appellant's licence applications for the following reasons:
 - The Appellant's operation has been licensed in accordance with existing abstraction requirements.
 - The Appellant's operation is not subject to any restrictions related to river flow or groundwater levels.
 - The abstraction has not been "curtailed" because the decision to apply a time limit of 31 March 2031 places no immediate constraint on the Appellant's ability to abstract water in the same way as they have done historically.
 - The earlier expiry date of 31 March 2031 was not applied as mitigation to prevent adverse impacts on the nearby designated sites or 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.

8. Para 6 (b-d): NRW is satisfied that the Appellant's licence applications were determined with due regard to the following:
- NRW Guidance document on '*Determining Transitional Water Resources Licence Applications*' (Annex 6.1);
 - Section 38(3)(b) of the Water Resources Act 1991 ("the WRA 1991");
 - The legal obligations arising from the relevant provisions of the Well-being of Future Generations (Wales) Act 2015 ("the WBFG Act 2015"); and
 - The "economic consequences" of the decision to apply a time limit of 31 March 2031.
- Further detail is provided in the sections below.
9. Para 6 (d): As clarified in para. 17 of NRW's Response to the Appellant's SoC, the section 108 duty of the Deregulation Act of 2015 is not engaged in these appeals.

Ecology Solutions Report

10. Paras 7 – 9: The Appellant's Response introduces a new piece of evidence in the form of a "*shadow Habitats Regulations Assessment and Annexes*" carried out by Ecology Solutions. This "*expert report*" is included as document number 14 of the Appellant's Response bundle and is 420 pages in total, plus an additional 554 pages of "ancillary" documents. NRW contend that this cannot reasonably be considered as "final comments" and constitutes new evidence of the kind which PEDW, in their email dated 3 August 2023, advised they would not accept.
11. NRW does not propose to provide any detailed or technical comments in respect of this report as they do not consider it appropriate to consider such information outside the context of a properly made licence application. This is firstly because NRW does not have sufficient time or resource to undertake this work as part of the appeals process, especially given the requirement to consult officers exercising "appropriate nature conservation body" ("ANCB") functions on behalf of NRW and Natural England for the purposes of the Habitats Regulations 2017, and also the Environment Agency. Secondly, the 2017 Transitional Regulations specified a "Transitional Period" (2018 – 2022) within which applicants were required to submit any information they wished to be relied upon for the determination of their applications. If NRW were to review the Appellant's further information outside of this "Transitional Period" it would be unfair to other applicants who did not have any further opportunity to submit additional information after their applications had been submitted / determined.
12. It is of course open to the Appellant to submit this document, together with the modelling analysis referred to in para. 23 below, as part of an application to vary the existing licences, so that it can be reviewed, and consulted on, as part of a properly made licence application. Plainly, no guarantee can be given that an application to extend the time limit would be successful, but if the Appellant has substantial additional evidence that it would like NRW to consider, this would be the proper

way to obtain that consideration. (For completeness, NRW should note that the “light-touch, risk-based” policy approach would not apply to the determination of any such application as it is not possible to make an application under the 2017 Transitional Regulations outside of the 2018 – 2022 “Transitional Period”. It follows that any application to vary the existing licence could result in more stringent conditions being applied, although the application would, of course, have to be determined on its merits and in accordance with all relevant law and policy at the time.)

13. NRW note that the report is described by the Appellant as a “shadow HRA” (Habitats Regulations Assessment) and that the overall conclusion is the same as the conclusion reached by NRW in their own HRA (Annex 13.1), i.e. no ‘adverse effect on site integrity’ (“AEOSI”). However, the Appellant’s “shadow HRA” specifically makes the case that the conclusion of no AEOSI can be considered valid until 2037, therefore a shorter duration for the licences issued is not necessary or justified. NRW consider this to be an entirely new argument that formed no part of the Appellant’s Grounds of Appeal or SoC.
14. Para 9: As outlined in section 6 of NRW’s SoC and NRW’s Response to the Appellant’s SoC, the HRA completed by NRW to determine the potential impacts of the abstraction 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 HRA consultation process, 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. Therefore, the submission of a “shadow HRA”, especially one that supports the conclusions reached by NRW’s own HRA, does not have any direct bearing on NRW’s decision to apply an expiry date of 31 March 2031.

Justifications for implementing an expiry date of 31 March 2031

Concerns relating to Freshwater Pearl Mussel populations within the River Clun SAC

15. Paras 17 - 18: As noted previously, the Appellant has not submitted any appeal regarding the licence granted by the Environment Agency (MD/054/0009/052). Rather the appeals relate to the licences granted by NRW (WA/054/0009/0001 and WA/054/0009/0002). Therefore, the Appellant’s reference to the Environment Agency’s HRA is not appropriate in the context of these appeals, especially as NRW carried out its own HRA which is not referenced here.

Concerns relating to lack of confidence in assessments long-term

16. Para 19: The Appellant’s suggestion that NRW’s HRA was carried out on the basis of applying an expiry date of 2037 to any licences issued is not correct. The HRA carried out by NRW gave no specific consideration to the duration of the abstraction activity; it was simply assessing the potential impacts using the best data available at the time. It specifically acknowledged the absence of actual flow monitoring data and the need therefore to rely on flow estimates instead. In addition, NRW recognised that the groundwater monitoring data provided in

support of the application covered a relatively short time period from 2017 – 2021. When consulted, NRW's ANCB officers raised concerns about the confidence that could be placed in the data used to inform the HRA. Although NRW were satisfied the data was the best available and therefore sufficient for the purposes of the HRA, the consultation responses highlighted that more confidence was needed as to whether data collected over a longer time period would reflect the same results, and to better understand any future potential impacts. It is these concerns that led to the identification of the need to apply a shorter time limit to the licences issued. This shorter expiry date allows a reasonable period to gather further data to reliably inform a review of the licences whilst allowing the Appellant to continue abstracting for their business needs.

17. Para 21: The Appellant advises that the conclusions of NRW's HRA were "*reached by experts in each of the relevant fields*". This is correct in that NRW's technical Geoscience and Hydrology teams were supportive of the conclusions reached. However, the relevant ANCB officers are also experts in their relevant fields and are statutory consultees in the HRA process. Therefore, NRW are obliged to have regard to the concerns they raised through the HRA consultation process.
18. Para 24 - 25: As noted previously, the Appellant has not submitted any appeal regarding the licence granted by the Environment Agency (MD/054/0009/052). Rather the appeals relate to the licences granted by NRW (WA/054/0009/0001 and WA/054/0009/0002). NRW acknowledge the point made in the footnote to para. 24 of the Appellant's Response that the Environment Agency and NRW pursued a joined approach to the determination of all 3 licences, however NRW do not accept that internal Environment Agency correspondence, which was not referred to or relied upon in NRW's SoC, is relevant to these appeals.
19. Para 28: The Appellant has suggested that NRW "*have not clarified what timeframe it considers to constitute 'short term'*". NRW refer to section 6.5 of its SoC for a detailed reasoning as to why the 2031 date was selected. In summary, it is considered a suitable date by which point further data will be available to support further assessments to be carried out and will inform whether the licences can be renewed upon their expiry in 2031 or should be amended.
20. Para 29: As clarified previously, NRW did not identify the earlier expiry date of 31 March 2031 as mitigation to prevent adverse impacts on designated sites. 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. Therefore, the submission of a "*shadow HRA*", especially one that supports the conclusions reached by NRW's own HRA and will have relied on the same limited data sources (i.e. flow estimates and limited groundwater monitoring data), does not have any direct bearing on NRW's decision to apply an expiry date of 31 March 2031.

Concerns relating to increase in frequency and duration of low flow and drying events

21. Para 31 - 32: The Appellant suggests that NRW has "*failed to distinguish external causes of drying events from the impact of the Appellant's abstractions*". This is

not the case. Rather, NRW recognised that the potential impact of the abstraction on surface water flows was less certain in the context of changing weather patterns **and** the specific hydromorphological nature of the catchment (e.g., low flow and drying events).

22. Para 33: As clarified previously, the determination of the expiry date did not relate specifically to the HRA. However, the HRA consultation process highlighted valid concerns regarding changing weather patterns, the specific hydromorphological nature of the catchment and the need therefore to gather more data to better understand any future potential impacts. As a result, a shorter time limit was applied to allow a review of the licences to determine whether the licences can be renewed upon their expiry in 2031 or should be amended.
23. Para 34: The Appellant introduces a new piece of evidence in the form of an analysis which models the effects of the Appellant's abstractions on the River Teme against the effects of climate change. This is included as document numbers 12 and 13 of the Appellant's Response bundle and is 23 pages in total. NRW contend the submission of this information cannot be considered as "final comments" and is instead a completely new piece of evidence of the kind which PEDW, in their email dated 3 August 2023, advised it would not accept.
24. For the reasons outlined in para. 11 above, NRW do not consider it appropriate to consider this information outside the context of a properly made licence application. Therefore, NRW do not propose to provide any detailed or technical comments in respect of it. As per para. 12 above, it is open to the Appellant to submit this document, together with the "shadow HRA", as part of an application to vary the existing licences, so that it can reviewed, and consulted on, as part of a properly made licence application.

Justification of a time limit of 2031 to 'gather and assess further data'

25. Para 35: As explained in para. 16 above, NRW agree that the best available data used in the HRA assessment was sufficient for the purposes of concluding no AEOSI. However, through the HRA consultation process, NRW recognised the need to gather further data to better understand any future potential impacts in the context of changing weather patterns and the specific hydromorphological nature of the catchment. As a result, a shorter time limit is both necessary and justified to allow the licences to be reviewed once sufficient further information becomes available.
26. Para 36: NRW welcome the submission of the Scheme of Monitoring report (provided as document number 11 of the Appellant's Response bundle). NRW acknowledge that the ongoing monitoring is not required by any licence conditions but was instead a recommendation included in the issue letter accompanying the licences (Annex 10.7). As explained in NRW's letter, the monitoring outputs are required to support any application to renew or vary the licences going forward. Therefore it is neither necessary nor appropriate to consider them for the purposes of these appeals.

27. Para 37: As outlined in para. 16 above, NRW's HRA specifically acknowledged the absence of actual flow monitoring data and the need to rely on flow estimates instead. It is therefore reasonable for NRW to wish to compare the flow estimates used in the determination of the Appellant's licence applications against actual flow data should it become available. It is also reasonable for NRW to apply a shorter time limit to allow the licences to be reviewed once this information becomes available.
28. Para 38: As per para. 16 above, a shorter time limit is both necessary and justified to allow the licences to be reviewed once sufficient further information becomes available, including fish survey data.
29. Para 39: As per para. 11 above, NRW has not reviewed the Appellant's "shadow HRA" in any technical detail.

Expiry date on the EA application form

30. Para 40: NRW acknowledge that it was the Appellant's application to the Environment Agency (Annex 9.1) that indicated a time limit of 31 March 2025 would be accepted. However, as pointed out in the footnote to para. 24 of the Appellant's Response, the Environment Agency and NRW pursued a joined approach to the determination of all 3 licences. Therefore, it is fair to consider the information included on the EA's application form when considering these appeals. In addition, as the Appellant had not completed the corresponding section on the NRW application forms (Annexes 8.1 and 8.2), NRW could not have initially anticipated any concern on the Appellant's part with the decision to apply a time limit of 31 March 2031. NRW acknowledges significant concerns were raised about this issue later in the determination process. As detailed in section 5.2 of NRW's SoC, due consideration was given to the concerns raised, both through dialogue with the Appellant and internal discussions.

Application of the 2013 Strategy

31. Para 42: The Appellant states that none of the reasons which would allow a licence to be granted for less than 12 years, given in para. 4.2.1 of the 2013 Teme Abstraction Licensing Strategy (Annex 5.3), would apply in the Appellant's circumstances. This is not the case. The final point included in para. 4.2.1 states that licences can be granted for less than 12 years where "*a fixed period of monitoring is agreed to enable determination of any longer-term licence*". Although in this case, the impact of the abstractions was satisfactorily assessed through the HRA and SSSI Assessments, it was recognised that this was on the basis of best available information at the time and that further monitoring was required going forward to inform whether the licences can be renewed upon their expiry in 2031 or should be amended. As per para. 26 above, the issue letter accompanying the licences (Annex 10.7) clearly communicated that should the Appellant wish to renew their licences beyond 2031, further monitoring would be required.
32. Paras 43 – 52: As per para. 8 above, NRW is satisfied that the Appellant's licence applications were determined in line with its own Guidance document on

'Determining Transitional Water Resources Licence Applications' (Annex 6.1). NRW acknowledges that the 2013 Teme Abstraction Licensing Strategy was published prior to The Water Abstraction (Transitional Provisions) Regulations 2017 coming into force. However, both NRW's Guidance document and the 2017 Governmental response both specifically state that time limits will be applied in line with the "*published licensing position for the catchment*", which in this case is the 2013 Teme Abstraction Licensing Strategy. This document states that the normal duration period for a licence is between 6-18 years. Therefore, the 31 March 2031 expiry date is in line with the "*published licensing position for the catchment*" and NRW's own Guidance document.

33. NRW wish to clarify that the passages of the NRW's Guidance document relied upon by the Appellant in paras 44 - 47 were not written to give guidance on licence duration. Rather this text was intended to reflect the "*light-touch, risk-based*" approach as defined in section 3.2 of the 2017 Governmental Response. As outlined in para. 7 above, NRW is satisfied the "*light-touch, risk-based*" approach was applied.
34. NRW do not consider the licence expiry date a "curtailment" as the Appellant had no legal entitlement to a licence of a particular duration and 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.
35. Para 49: NRW acknowledges that its Guidance on determining Transitional licences advised that "*shorter time limits should not generally be applied*". However, section 7.3.2 of the Guidance document outlines the process to be followed when considering whether a shorter time limit should be applied. Therefore, the guidance did recognise that there may be cases where shorter time limits may be justified. NRW is satisfied that this process was followed and that the shorter time limit is justified.
36. The Appellant suggests that NRW did not make any representation in its Decision Letter (Annex 10.7) in respect of sustainability. Whilst NRW acknowledge that the word "*sustainability*" was not specifically included in the letter, it is clear that the reason given for the shorter time limit (namely "*the potential for increased or prolonged low flow / drying events, as well as the conservation status of certain designated features*") was firmly based on concerns about sustainability.

Constraints on the Appellant's ability to abstract water

37. Paras 53 - 54: As per para. 8 above, NRW is satisfied it has had sufficient regard to the "*reasonable requirements*" of the Appellant as required by section 38(3)(b) of the WRA. As outlined in para. 7 above, the Appellant's operation has been licensed in accordance with existing abstraction requirements and is not subject to any restrictions related to river flow or groundwater levels. This reflects the "*light-touch, risk-based*" policy position outlined in the 2017 Governmental Response, which recognised that "*exempt abstractors have operated lawfully and rely upon their access to water*".

38. NRW consider the decision to apply a time limit of 31 March 2031 places no immediate constraint on the Appellant's ability to abstract water. Moreover, as the licences authorise abstraction to continue for next 8 + years, the Appellant is now able to operate with more certainty than when abstracting under the exemption. Therefore there is no immediate business impact. Furthermore, NRW has made the Appellant aware of the need to carry out further monitoring work to support any application to amend or renew their licence in the future, which clearly acknowledges the Appellant's continued reliance on water as "*the primary resource which underpins its entire business.*"
39. Para 54: The Appellant states that they have "*historically abstracted free from constraints on ... any time limitation*". This language suggests that the Appellant has an entitlement to continue abstracting in perpetuity, when there is no such entitlement, especially since the Water Act 2003 first confirmed removal of the exemptions. However, the time limit of 31 March 2031 now provides regulatory certainty to the Appellant for the next 8 years.
40. As outlined in the 2017 Governmental Response, one of the drivers for bringing previously exempt abstractors into the licensing system was to address the "*unfair playing field*" created by the licensing exemptions, which allowed some abstractors to abstract without any controls whilst other operators were subject to stricter controls. One such control is the time-limiting of abstraction licences which allows for the review of abstraction activities in the light of changing pressures. The removal of the exemption the Appellant was previously operating under means the Appellant no longer has the ability to abstract without "*any time limitation,*" as is the case for all other licensed abstractors.
41. Para 55: As documented in section 11 of NRW's Decision document, as well as section 5.2 and para. 7.16 of NRW's SoC, NRW is satisfied it had proper regard to the concerns raised by the Appellant relating to the decision to apply a time limit of 31 March 2031.
42. Para 56: Section 3.6 of the 2017 Governmental Response simply outlines the circumstances where compensation may *not* be applied for, including the application of time limits. Therefore, it is saying that the application of a time limit is *not* considered a "curtailment" that would qualify for compensation. This supports NRW's position that the licence expiry date is not considered a "curtailment".
43. Para 57: For the reasons set out in paras 37 – 42 above, NRW does not consider the decision to apply a licence expiry date of 31 March 2031 a "curtailment".

Regard to the seven well-being goals set out in the WBFG Act 2015

44. Paras 58 – 61: Section 3.11 of NRW's SoC sets out the relevant provisions of the WBFG Act 2015. In paras 7.6 – 7.10 of their SoC, NRW summarises the relevant provisions and explains how it has complied with the legal obligations arising from them.

45. NRW is satisfied that granting these licences subject to the time limit of 31 March 2031 is consistent with the '*sustainable development principle*' under section 5(1) of the WFBG Act. NRW's decision will ensure that natural resources are used in a way that does not damage them therefore ensuring "*that the needs of the present are met without compromising the ability of future generations to meet their own needs.*"
46. Para 60: As previously stated, NRW did not identify the earlier expiry date of 31 March 2031 as mitigation to prevent adverse impacts on the nearby designated sites.
47. Para 61: The Appellant is correct that there is a mandatory duty on public bodies to carry out sustainable development. However, this is further defined by section 3(2)(a) of the WFBG Act 2015 as including the need to take all reasonable steps, in the exercise of our functions, to meet the well-being objectives. The section 3(1) duty is not to be read in isolation but is clearly subject to the requirements of section 3(2). NRW has previously explained how they have complied with the legal obligations arising from the WFBG Act 2015 in paras 7.6 – 7.0 of their SoC.

Comments on NRW's Statement of Case

48. Para 62: The Appellant's assertion that they were not aware of any long-standing concerns regarding the potential impact of groundwater abstraction at the Radnor Hills site on flow in the River Teme cannot be correct. As detailed in para. 5.1.2 of NRW's SoC, NRW staff attended a site meeting with the Appellant, their agents, and the Environment Agency in April 2019. Correspondence from the Appellant's agent in respect of the site meeting, dated 11 February 2019, refers to "*possible environmental impacts*" as well as "*concerns of both Natural Resources Wales and the Environment Agency*". Therefore, it is clear that the Appellant and their agents were aware of the concerns regarding potential environmental impacts of the abstraction. For further information please refer to Annex 19.1.
49. Para 63: Please refer to sections 4.2 and 4.3 of NRW's SoC, which clearly outlines why 6 – 18 years is considered to be the normal duration period for abstraction licences.
50. Paras 65 – 67: As stated previously, the appeals relate to the decision by NRW to apply a time limit of 31 March 2031 to the licences issued in respect of the Appellant's abstractions in Wales. However, the Appellant has included multiple references to Environment Agency correspondence and guidance (internal and with Natural England), which NRW was not involved in and did not refer to or rely upon in its SoC. Therefore, the introduction of this material is not appropriate as it does not necessarily reflect NRW's position.
51. Para 66: The Appellant states that the Environment Agency has "*erred in its decision*" to apply the 31 March 2031 time limit. However, as previously noted, the Appellant has not submitted any appeal regarding the licence granted by the Environment Agency (MD/054/0009/052).

52. Para 70: The Appellant’s assertion that NRW “*had not disclosed the Decision Letter*” at the time the Grounds of Appeal were lodged is incorrect. NRW’s “Decision Letter” was sent to the Appellant on the same date that the licence was issued (i.e., 16 December 2022).
53. NRW are satisfied that they did consider the technical report prepared by the Appellant’s agent (Annex 11.2), as evidenced by the fact that it was referred to in both NRW’s HRA (Annex 13.1) and Decision Document (Annex 16.1). Furthermore, NRW agree with the conclusion of no adverse impacts to the River Teme. However, NRW recognise that this conclusion is based on best available information, and therefore there is a need to review the conclusion once sufficient further information becomes available.
54. Para 75: NRW acknowledges that factors such as climate change are external to the Appellant’s abstraction. However, it recognises that the potential impact of the abstraction on surface water flows is less certain in the context of changing weather patterns **and** the specific hydromorphological nature of the catchment (e.g. low flow and drying events). Therefore, NRW identified the earlier expiry date as a means of further assessing the potential impacts once sufficient further detail becomes available.
55. Para 76: Please refer to paras 44 - 47 above.
56. Para 77: As clarified in para. 17 of NRW’s Response to the Appellant’s SoC and para. 9 above, the section 108 duty of the Deregulation Act of 2015 is not engaged in these appeals.
57. Paras 78 - 79: NRW do not consider the “*examples of the Appellant’s commitment to sustainability*” as relevant to the Appellant’s recent breaches of its environmental permits (as detailed in para 7.24 of NRW’s Response to the Appellant’s SoC), nor are they considered relevant to these appeals.

NRW’S CONCLUSIONS

58. This concludes NRW’s further comments on the Appellant’s Response.
59. NRW respectfully renews its invitation to the inspector to dismiss the appeals and uphold the decisions to grant the Appellant’s licences subject to the expiry date of 31 March 2031.

ANNEXES

Reference	File Name
Annex 19.1	Correspondence from Agent re. Site Meeting 11.02.2019