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: TROSNANT SPRING AT PONTYPOOL

Planning And Environment Decisions Wales (PEDW)
REFERENCE: CAS-02485-Q0R8C3

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.
Consumptive abstraction	Abstraction where a significant proportion of the water abstracted is not returned either directly or indirectly to the source of supply after use (for example, water abstracted for spray irrigation).
Diadromous fish species	Commonly referred to as migratory fish species, meaning species which migrate between freshwater and saltwater
Environmental flow indicator	A proportion of the natural flow in a river is set aside for the ecological health of the watercourse. This is called the "environmental flow indicator" and it is used to prevent ecological deterioration of rivers. It is set in line with new UK standards set by a UK Technical Advisory Group ("UKTAG") of experts.
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'.
Ramsar Site	A wetland of international importance under the Ramsar Convention.
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	This is 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.

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

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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 Trosnant Spring, Pontypool ("the Transfer Licence") (Licence serial number: WA/056/0012/0004).

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. 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 Brecon. 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 Brecon 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 Crawnon, Llangattock, Castle Turn, Ochram Turn, Mill Turn and Trosnant Spring.

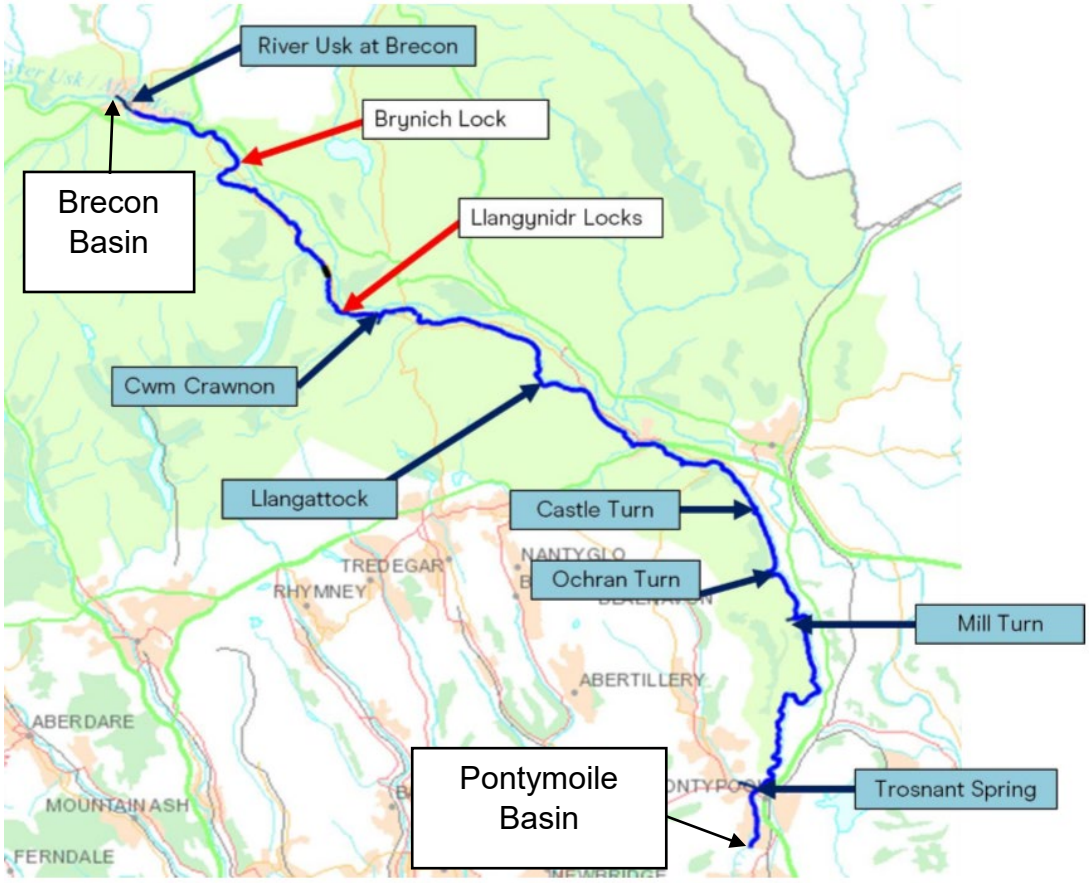

Figure 1. Map showing the Monmouthshire and Brecon Canal (bold blue line) and the abstractions which provide the water supply to the canal.

2.2 This appeal relates specifically to the Trosnant Spring abstraction application and licence.

2.3 For the Trosnant Spring application, the abstraction point originally applied for was located at Trosnant Brook, adjacent to Trosnant Street, Pontypool at National Grid Reference: SO 28609 00570.

2.4 On 30 May 2022, after the application had been submitted, the Appellant submitted a request to NRW to amend the abstraction point applied for at Trosnant (see Annex 2.1). The amended abstraction point was for a surface water abstraction at Trosnant Spring, Pontypool at National Grid Reference: SO 28420 00498. The spring is located adjacent to Trosnant Brook which flows via a culverted section into the Afon Lwyd approximately 219 metres downstream (see Figure 2 overleaf). The Afon Lwyd then flows for approximately 16.9 kilometres before joining the River Usk in Caerleon and subsequently joining the Severn Estuary. NRW was content to determine the application by reference to the amended abstraction point at SO 28420 00498.

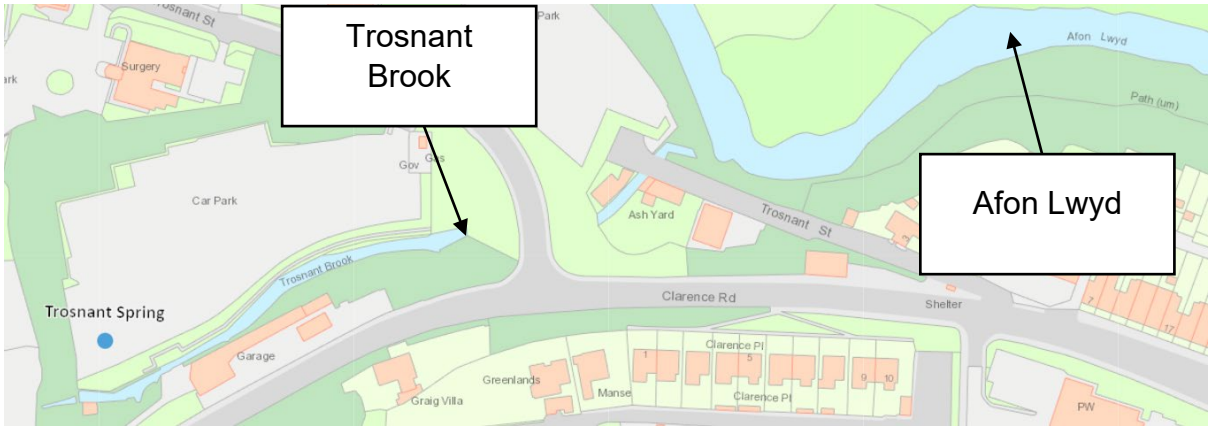

Figure 2. Map showing location of Trosnant Spring in relation to Trosnant Brook and the Afon Lwyd.

2.5 According to information supplied by the Appellant during the application process, the spring is captured underground in a chamber. The chamber is trapezoid in shape and fixed to a retaining wall with an opening into an alcove set in the retaining wall and hillside beyond it. The whole structure is brick until the back wall of the very deepest part which is broken stone. Flow is transferred from the chamber to the canal via a gravity pipe of an internal diameter not exceeding 153 millimetres. The water is discharged from the pipe into the canal at NGR SO 29405 00307 where it is used for the purpose of operations in the course of carrying out functions as a navigation authority.

2.6 The abstraction activity has been occurring legally without an abstraction licence for approximately 20 years as an exempt activity under the Water Resources Act 1991.

2.7 Prior to the Appellant's use of Trosnant Spring, there was an abstraction licence in place for another operator (licence number 20/56/12/76, originally issued in September 1983). This licence lapsed in 2004 and the abstraction was subsequently taken over by the Appellant. This original licence permitted a daily maximum volume of 1,092 cubic metres of water to be abstracted from Trosnant Spring. This was a substantially lower maximum volume than the maximum of 2,000 cubic metres of water per day permitted to be abstracted in the Appellant's Transfer Licence which is the subject of this appeal.

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[1] 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[3].

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.

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.

[1] 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.

[3] 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.

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 'transitionary 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 3.1.

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—

Goal	Description of the goal
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 4.1). 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[2] 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)[3] 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:

> *"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:

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

[3] These were previously known as 'Catchment Abstraction Management Strategies (CAMS)'.

"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 5.1.

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 6.1.

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, see Annex 7.1.

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 instead on their discussions of (i) the hands-off flow condition and (ii) the abstraction volumes condition that are at issue in the 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 Trosnant Spring: 157.3 litres per second (l/s), 566.3 cubic metres per hour (m³/hour), 5,180 cubic metres per day (m³/day) and 87,230 cubic metres per year (m³/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 8.1 to 8.4, as detailed below:

- Application Form WRH
- Letter of authorisation
- Supporting Information Document
- CRT438 Trosnant Spring 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.

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 Trosnant Spring application, the letter requested the following: 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 had been derived and information regarding the flow meter. The raw abstraction data, contained within document 'CRT438 Trosnant Spring Raw Data' in Annex 8.4, was the Appellant's evidence of abstraction volumes within the seven-year qualifying period. The data shows the volumes of abstraction recorded by the Appellant's telemetry system. There were numerous gaps within the data which the Appellant explained was due to the abstraction pipe being blocked or the measurement system being broken.

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 9.1. 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 feeder 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 Trosnant Spring 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 10.1. 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.

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 Monmouthshire Free Press 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 On 1 March 2022, following a discussion at the monthly Environment and Regulatory Group meeting, NRW shared the historical information it held on the previous abstraction licence at Trosnant Spring (which was not held by the Appellant) and raised concerns with the Appellant about the accuracy of the location of the abstraction point as identified in its application.

5.2.16 Following the meeting of the Environment and Regulatory Group meeting 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 11.1).

5.2.17 On 30 May 2022, the Appellant submitted a request to NRW to amend the abstraction point applied for (Annex 2.1). The amended abstraction point was for a surface water abstraction located at Trosnant Spring, adjacent to Trosnant Brook, Pontypool at National Grid Reference (NGR): SO 28420 00498 (the original application point was from the Trosnant Brook itself at NGR SO 28609 00571).

5.2.18 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 Trosnant Spring application began on 24 June 2022

5.2.19 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 Trosnant Spring. (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.

5.2.20 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.

5.2.21 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 12.1.

5.2.22 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 13.1.

5.2.23 During its monthly meetings with the Appellant at this time, and by email to the Appellant on 16 September 2022, NRW conveyed the initial views expressed by its own officers on the Trosnant Spring application during NRW's internal consultation. In the email, NRW sought the Appellant's agreement to a daily maximum volume of 2000 cubic metres, the figure considered at the modelling group. The justification for this maximum volume of 2000 cubic metres a day is addressed in section 5.4 below. The email also confirmed that no fish passage or intake screens were required but that the flow restrictions, for example in relation to the hands-off flow, were to be confirmed following completion of the HRA process and that the intake details and pipe size would be included within the licence conditions. The Appellant confirmed their agreement to a daily maximum volume of 2000 cubic metres by email on 20 September 2022.

5.2.24 On 5 December 2022, NRW had a meeting with the Appellant and informed them of the outcome of the HRA process and discussed the conditions required for the Trosnant Spring licence. The reasons for the licence conditions were explained during the meeting and the draft licence was shared with the Appellant the same day. During the meeting, the Appellant expressed specific concerns about the inclusion of the annual maximum volume within condition 6 of the draft licence (87,230 cubic metres per year), as it would limit abstraction to less than 365 days per year. However, the annual maximum volume specified by NRW was consistent with the annual volumes that the Appellant had abstracted during the qualifying period, as evidenced within the Appellant's application.

5.2.25 On 7 December 2022, NRW emailed the Appellant an explanation of why the annual maximum volume condition was necessary, namely to ensure that the abstraction licence reflected the Appellant's historical abstractions, to comply with Governmental policy on previously exempt abstractions. NRW gave the Appellant an opportunity to submit any additional evidence it had in relation to its historical abstractions: see Annex 14.1.

5.2.26 On 13 December 2022, the Appellant responded with comments on the draft licence document (Annex 15.1). The Appellant expressed concerns that the annual maximum volume had been based on incomplete/partial data from the seven-year qualifying period (due to the gaps within the Appellant's abstraction evidence). The Appellant expressed its view that the annual maximum volume should reflect 365 days of abstraction at the agreed daily rate. The Appellant also commented that its previous work with NRW (referring to discussions at the working groups) had not suggested a need for the HoF condition in the draft document (specifically, no abstraction when the flow in the River Ebbw was 220,000 cubic metres or less per day) to be as protective as was proposed.

5.2.27 On 19 December 2022, the licence was formally granted including (amongst other matters) conditions specifying a maximum annual volume (87,230 cubic metres per year) and a HoF condition that no abstraction should take place when the flow in the River Ebbw (as gauged by NRW at its flow gauging station at Rhiwderin) was 220,000 cubic metres or less per day. The licence was accompanied by a covering letter, a document containing NRW's response to the Appellant's comments on the draft licence and a copy of the HRA document, as requested by the Appellant: see Annex 16.1 and 16.2.

6. Why the conditions were included

6.1 Severn Estuary SAC, SPA and Ramsar Site

6.1.1 Trosnant Spring is located adjacent to the Trosnant Brook which flows via a culverted section into the Afon Lwyd approximately 219 metres downstream. The Afon Lwyd then flows for approximately 16.9 kilometres before joining the River Usk SAC in Caerleon and subsequently joining the Severn Estuary SAC, SPA and Ramsar Site.

6.1.2 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.

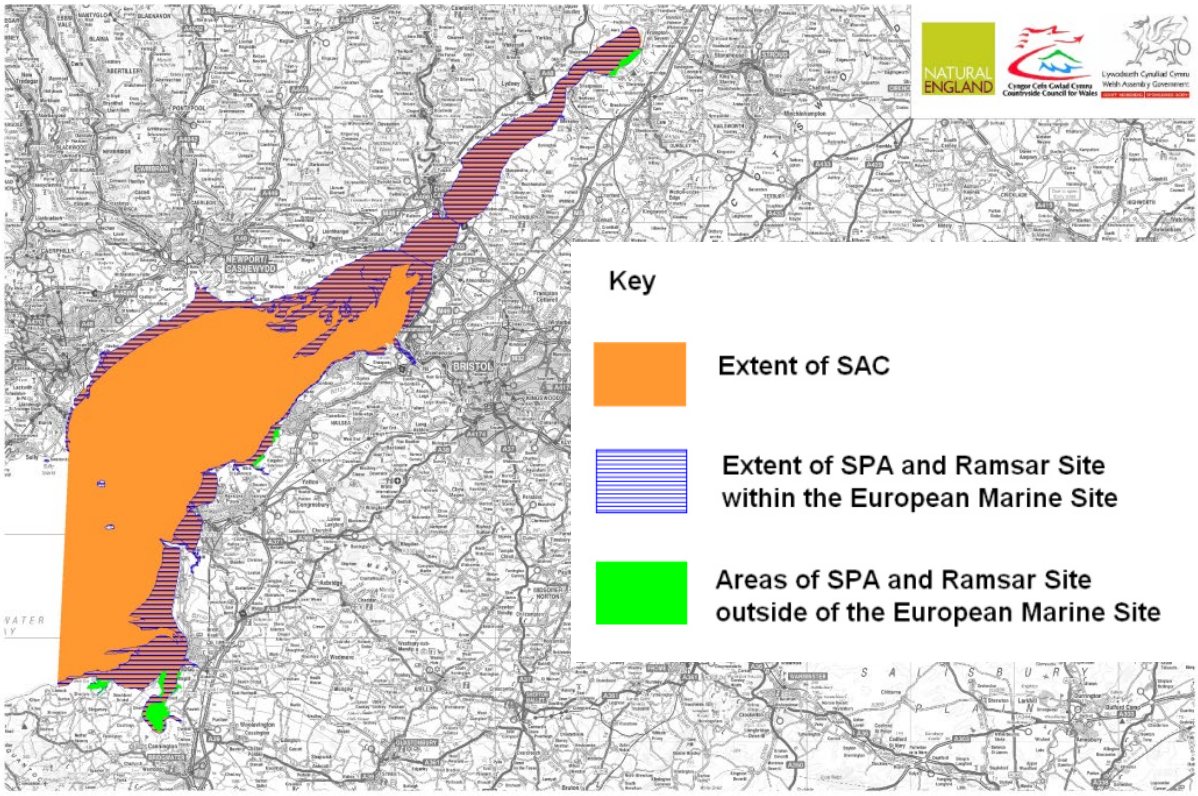

Figure 3. Map showing the extent and relationship of the Severn Estuary SAC, SPA and Ramsar Site

6.1.3 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.

6.1.4 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

6.1.5 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."

6.1.6 Please refer to the document in Annex 17.1 titled 'The Severn Estuary/Môr Hafren European Marine Site' which includes the 'Conservation Objectives' for the Severn Estuary SAC, SPA and Ramsar sites.

6.2 River Usk SAC

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

6.2.2 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.

6.2.3 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.

6.2.4 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.

6.2.5 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.

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

6.3 Current water resources of Afon Lwyd

6.3.1 NRW determines the water resources available to a watercourse by assessing abstraction pressures against consented discharges and environmental needs. The main components of this assessment include taking account of:

- Natural flow – the flow of water without the effects of human influences, i.e. abstractions, discharges and reservoirs;
- Licensed abstraction quantities – water removed from rivers, streams and groundwater (as specified on abstraction licences);
- Consented discharges – water returned to rivers, streams and groundwater (as specified on discharge consents);
- Environmental needs – as reflected in the Environmental Flow Indicator ("EFI"), explained in the next paragraph.

6.3.2 The EFI is the proportion of the natural flow in a river set aside for its ecological health. The EFI is set in line with new UK standards set by a body known as the UK Technical Advisory Group ("UKTAG") and is also used to prevent deterioration of a river. The UKTAG is a working group of experts drawn from environmental and conservation

agencies[4]. It was formed to provide technical advice to the UK Government, the UK's devolved administrations and its own member agencies.

6.3.3 When assessing the water resources available to a river, an assessment is undertaken at set locations on the river, known as "Assessment Points". At each point the net effect of **licensed** abstractions and discharges, assumed to be operating at their maximum licensed rates (subject to any other restrictive conditions), is subtracted from the natural flow.

6.3.4 This cumulative "fully licensed" scenario (excluding any previously exempt abstractions) is then compared against the EFI to understand whether the environmental needs of the river are being met. This relationship between the fully licensed scenario and the EFI therefore determines the availability of water resources within a catchment.

6.3.5 Within the Afon Lwyd catchment, there are many existing licensed abstractions and some consented discharges. The combined volume of abstraction heavily outweighs the discharges. Most of the combined licensed abstraction quantity is held by DCWW and none of these licences have any hands-off flow conditions. Most of these licences were issued to DCWW in the mid 1960's.

6.3.6 The combined effect of the abstractions and discharges in the Lwyd catchment results in the fully licensed flow falling below the EFI during lower flow conditions, meaning under this scenario there is less water remaining in the Lwyd than required by the environment.

6.4 Condition 9: Hands-off Flow

6.4.1 Section 2.4 of the 2017 Governmental Response states that previously exempt abstractions may be restricted in line with basic/universal HoFs. The universal HoF will usually be set at Qn95 (the flow that is exceeded 95% of the time) in catchments where there is over abstraction and flows do not support WFD objectives. Where current flows support the WFD objectives i.e. catchments that are not over abstracted the universal HoF will usually be set at 75% of the Qn99 value (Q99 being the flow that is exceeded 99% of the time) .

6.4.2 The 2017 Governmental Response gave policy guidance to regulators on when a previously exempt 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 and abstractions may be significantly curtailed or refused to protect the environment from serious damage. In the present case, the assessment of serious damage took the form of the HRA, and NRW is satisfied that the licence conditions are necessary to avoid an adverse effect on site integrity.

[4] Natural Resources Wales (NRW), English Nature (EN), Environment Agency, Environment and Heritage Service (Northern Ireland) (EHS), Joint Nature Conservation Council (JNCC), Scottish Environment Protection Agency (SEPA), Scottish Natural Heritage (SNH), Republic of Ireland's Department of Environment Heritage and Local Government (DEHLG)

6.4.3 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 Trosnant Spring abstraction, the HRA concluded that the applied HoF condition was necessary to protect the Severn Estuary SAC and River Usk SAC from adverse effects on site integrity which would constitute a risk of "serious damage".

6.4.4 NRW applied the Habitats Regulation precautionary principle in this instance to rule out any potential adverse impacts.

6.4.5 To explain this further, if no abstraction were taking place, Trosnant Spring would contribute flow to Trosnant Brook and subsequently the Afon Lwyd. The Afon Lwyd is hydrologically linked to the Seven Estuary. Fish species that form the 'Estuaries' feature of the Severn Estuary SAC are known to be present in the Afon Lwyd. The Afon Lwyd is therefore habitat that supports the ecological integrity of the Severn Estuary SAC.

6.4.6 Accordingly, NRW had to consider whether the Trosnant Spring abstraction presented a risk of serious damage to the Severn Estuary SAC. This required consideration of the existing baseline which includes the full extent of all licenced abstractions within the catchment. This is standard practice as any licensed abstractor could take their full consented volume at any time.

6.4.7 NRW undertook further modelling work to assess the impact of the Trosnant Spring abstraction on the Afon Lwyd just downstream of the confluence with the Trosnant Brook, near Pontymoel.

6.4.8 This modelling involved assessing how different abstraction scenarios would affect flows in the Afon Lwyd, in terms of the extent of failure to achieve the EFI. The information was presented to our ecology and fisheries specialists in the form of 'Flow Duration Curve' plots[5] and hydrograph plots[6].

6.4.9 Figure 5 is an example of a Flow Duration Curve at Pontymoel without taking account of the Trosnant abstraction. This represents the current "fully licensed" scenario, where all abstractions and discharges in the catchment are assumed to be operating at their maximum licensed rates, but accounting for any other flow related restrictions e.g. HoFs.

6.4.10 The plot in Figure 5 includes the following:

- Blue line – Natural flow - no human influences by way of abstractions or discharges
- Orange line – EFI flow – environmental need
- Dotted red line – Scenario flow - based on the fully licensed scenario
- Dotted green line (plotted against the second y axis) – percentage deviation below the EFI i.e. how far below the orange line the red line is

[5] A Flow Duration Curve is a frequency curve that shows the percent of time a particular flow is equalled or exceeded. It enables analysts to categorise flows according to a particular percentile, normally referred to as a 'Q' value. For example, a flow which is equalled or exceeded for 99% of the time on average is known as Q99 and represents a very low flow.

[6] A hydrograph is a graph showing the rate of flow against time

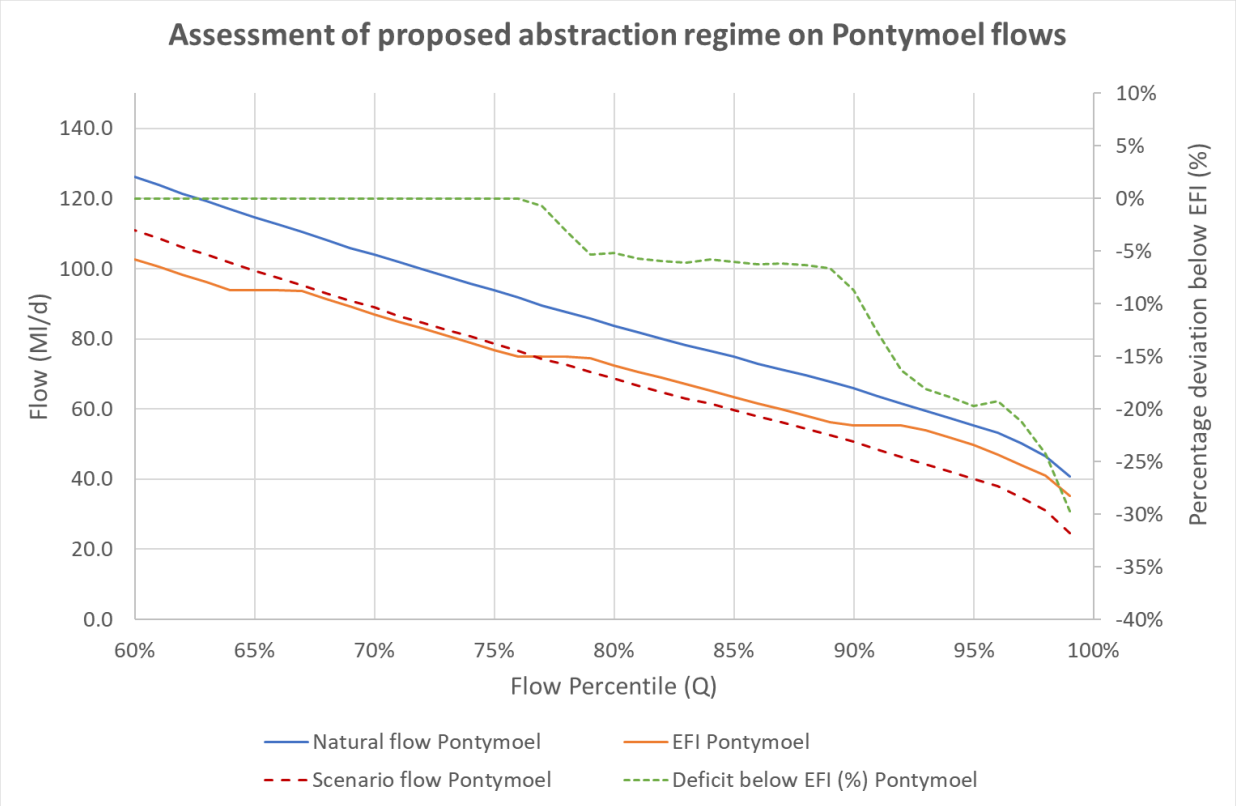

Figure 5. Flow Duration Curve showing the fully licensed flow at Pontymoel excluding any abstraction at Trosnant Spring.

6.4.11 The modelling outputs in Figure 5 showed that the Afon Lwyd is already failing the EFI, even before taking account of the Trosnant abstraction. .

6.4.12 The Flow Duration Curve shows how the fully licensed scenario flow (red line) falls below the EFI when the natural flow reaches Q77 and remains below the line down to the lowest flow shown on the plot, Q99. This means that for 77% of the time flows exceed the EFI, while for 23% of the time flows under this scenario do not meet the EFI. The plot also shows how the extent of deviation below the EFI increases as flows fall from Q77 to Q99.

6.4.13 The abstraction from Trosnant Spring reduces flows into the brook and therefore when a second scenario was run where the abstraction was included in the modelling, alongside the other licensed abstractions, it depletes flows in the Afon Lwyd further, increasing the extent of EFI failure.

6.4.14 The result of this scenario where the Trosnant Spring abstraction is included within the fully licensed scenario and is assumed to be operating at 2,000 cubic metres per day (with no other constraint) is shown in the Flow Duration Curve in Figure 6.

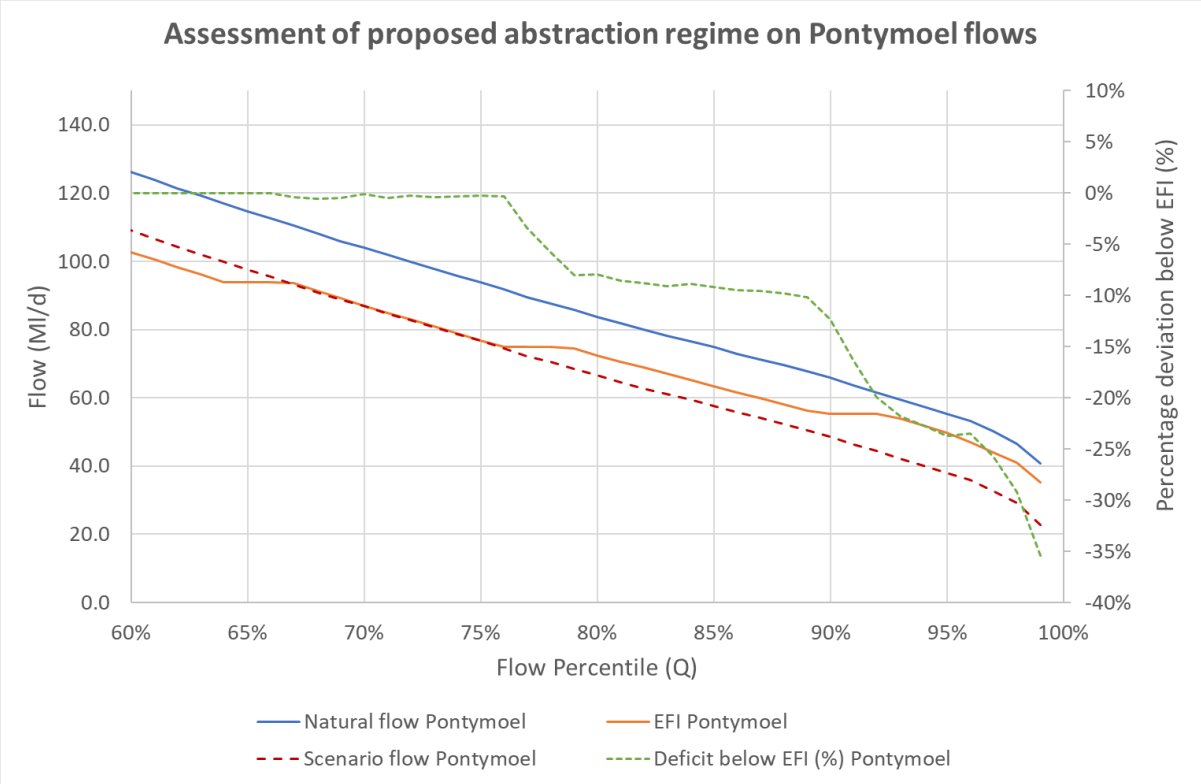

Figure 6. Flow Duration Curve showing the additional impact on the EFI failure as a result of the Trosnant Spring abstraction at 2,000 cubic metres per day, when compared to Figure 5 above.

6.4.15 A comparison between Figures 5 and 6 illustrates how the inclusion of the Trosnant Spring abstraction within the fully licensed scenario leads to the scenario flow falling below the EFI at Q68. This means flows in the Lwyd under the fully licensed scenario would be below the EFI more frequently (32% of the time) than without the Trosnant Spring abstraction.

6.4.16 In addition, the extent of deviation below the EFI is also more significant when the Trosnant Spring is included within the modelling scenario.

6.4.17 Therefore, NRW could not rule out a risk of adverse effect on site integrity to the Severn Estuary SAC features, as the additional failures of EFI prevents NRW from concluding no adverse impact. This meant a risk of serious damage and therefore flow restrictions were required to be able to progress through the HRA process.

6.4.18 To enable NRW to conclude no adverse effect on site integrity in the HRA it was necessary to ensure that the Appellant's abstraction did not make the existing EFI failures under the fully licensed scenario on the Afon Lwyd worse.

6.4.19 Further model scenarios were undertaken to determine an appropriate HoF for the Trosnant abstraction which would prevent the worsening of the EFI failures when it was included in the fully licensed scenario. The outputs from these model runs in the form of Flow Duration Curves and hydrographs were reviewed by our ecology and fisheries specialists to determine which level of restriction was necessary to meet the EFI adequately and thus enable us to conclude no adverse effect on site integrity/serious damage.

6.4.20 As the EFI failures shown in Figure 6 occur at flows of Q68 and below, the basic/universal HoFs suggested for previously exempt licences (described in section

6.4.1 above) would not be sufficient to address the additional EFI failures caused by the inclusion of Trosnant in the fully licensed scenario.

6.4.21 Therefore the HoF required at Pontymoel to prevent additional EFI failures was Q75. As there is no long term flow record from a gauging station on the Afon Lwyd, the HoF was set at the nearest suitable gauging station. This was Rhiwderin gauging station on the River Ebbw. The equivalent Q75 flow at Rhiwderin was used, which equated to 220,000 cubic metres per day.

6.4.22 Figure 7 below shows the Q75 HoF is sufficient to prevent worsening of current EFI failures on the Lwyd and therefore removes the risk of adverse effect on site integrity/serious damage.

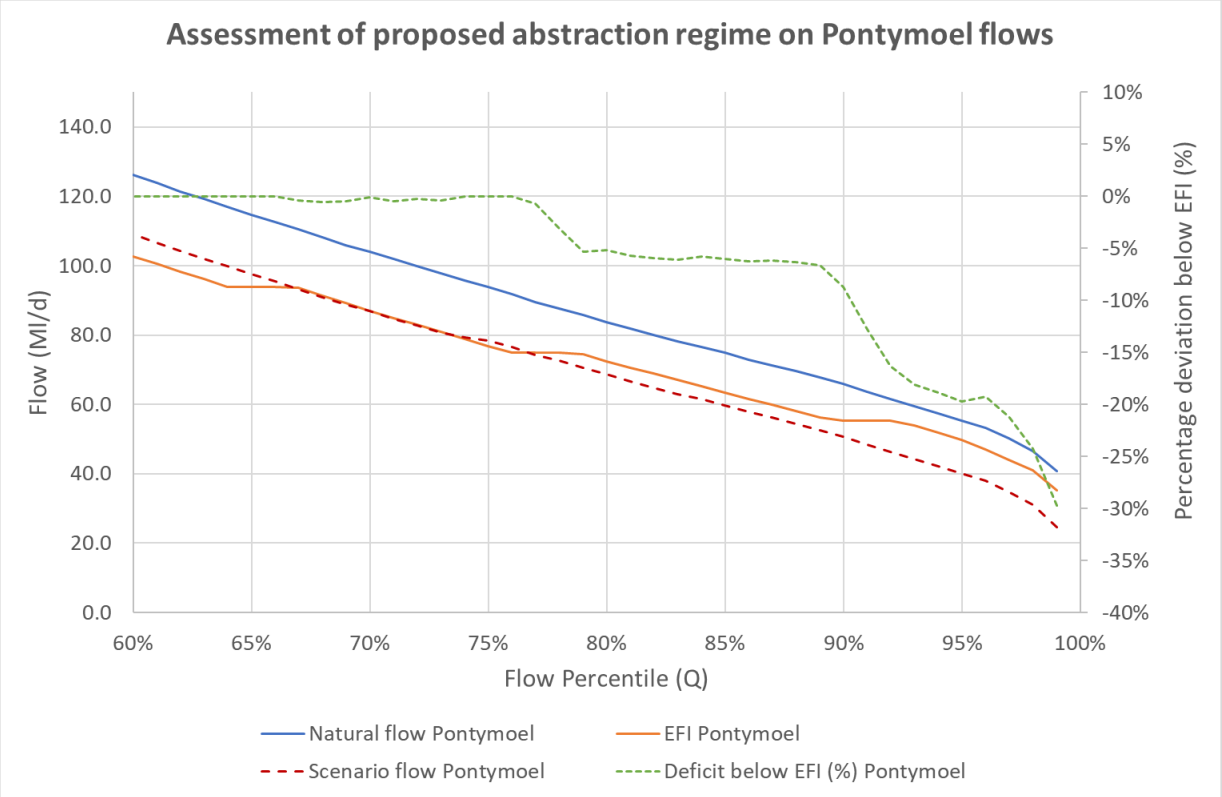

Figure 7. Flow Duration Curve showing impact of the abstractions with the Q75 HoF in place on the Trosnant Spring abstraction.

6.4.23 A comparison of Figures 6 and 7 illustrates how imposing a Q75 HoF on the Trosnant Spring abstraction addresses the additional failures of the EFI comparted with when no HoF is included on this licence.

6.4.24 The EFI failures in Figure 7 are of a comparable magnitude to those shown in Figure 5, which does not include the Trosnant spring abstraction. Although the scenario flow still falls below the EFI at Q68, the extent of deviation below the EFI between this flow at Q75 was deemed to be ecologically acceptable and still enabled a conclusion of no adverse effect on site integrity to be drawn, meaning there would be no risk of serious damage from this abstraction when constrained in this way.

6.4.25 The restrictive HoF is considered necessary in light of the risk of adverse effect on site integrity/serious damage, primarily due to the presence of existing licences within the catchment which alone already cause the EFI failure in the Afon Lwyd.

6.4.26 The risk of adverse effect on site integrity/serious damage and the precautionary principle precludes NRW from applying the basic/universal HoF's in this case and it is for that reason the restrictive HoF has been applied. The Appellant's application has not been assessed as an application for new water.

6.4.27 Although discussions between DCWW and the Appellant at the working groups looking at a long-term sustainable water supply solution have considered options such as changes to existing licences within the Afon Lwyd catchment to make more water available for the Appellant, until an option is progressed and any subsequent licence changes take effect NRW cannot properly take that into account in its decision-making.

6.5 Condition 6: Abstraction quantities

6.5.1 The requirement for the quantities condition is based on the policy guidance in the 2017 Governmental Response which seeks to control abstractions to minimise environmental risk and ensure the licence reflects the historic usage.

6.5.2 It will be recalled that the purpose of the new authorisations was to bring previously exempt lawful abstractions into the licensing system. In pursuit of a light-touch, risk-based policy approach, the expectation of the UK and Welsh Governments was that the majority of licences would be granted based on abstraction requirements within the 2011 to 2017 seven-year qualifying period.

6.5.3 The policy guidance states that regulators have "flexibility on the inclusion of volume conditions on transfer licences to avoid undue abstraction control costs on abstractors while still ensuring environmental protection" (section 3.2). This means that volume conditions do not have to be included if there is another suitable control method (for example, physical control via abstraction structures)

6.5.4 To demonstrate its entitlement to apply for a licence, the Appellant was required to provide evidence that it carried out an abstraction which was previously exempt within the 'qualifying period' between 1 January 2011 and 31 December 2017. To meet this requirement, the Appellant submitted application form WRH and raw abstraction data as part of its application: see Annex 8.1 and 8.4.

6.5.5 As stated in the evidence and application form submitted, the maximum abstraction rates during the qualifying period at Trosnant were as follows:

- 157.3 litres per second (2013)
- 566.3 cubic metres per hour (2013)
- 5,180 cubic metres per day (2013)
- 87,230 cubic metres per year (2016)

6.5.6. The Appellant confirmed, in an email to NRW on 21 November 2019, that the abstractions do take place over 24 hours, but not at the maximum per second and hourly rates for the whole day, every day of the year: see Annex 19.1.

6.5.7 There are numerous gaps in the data provided by the Appellant for Trosnant and prolonged periods of no abstraction data within the qualifying period. Within the supporting information, the Appellant explains these are due to pipe blockages meaning no abstraction was taking place and a broken telemetry system: see 'supporting information document' within Annex 8.3.

6.5.8 During discussions with the modelling group and following subsequent consultation feedback, the Appellant and NRW agreed on a daily maximum abstraction rate of 2,000 cubic metres: see correspondence dated 20 September 2022 within Annex 20.1. Upon reviewing the data further, NRW considers that the daily maximum volume of 2,000 cubic metres that was agreed is generous. This figure was only exceeded twice within the evidence and those two data points are significantly higher than the rest and are potentially errors. If those two outliers are removed, the evidence shows a maximum abstraction of 1,240 cubic metres per day, although there are only four readings above 780 cubic metres in the entire qualifying period.

6.5.9 The annual maximum volume specified in the licence was therefore in line with the maximum figure provided in the application form WRH and the evidence submitted, which was 87,230 cubic metres a year. This figure is from the year 2016 within the qualifying period and the raw data submitted shows there is a complete record of abstraction for this year with no gaps. As the highest annual maximum evidenced during the qualifying period, this is what NRW have applied to the licence.

6.5.10 When considered alongside the annual volume, the high daily volume agreed allows 43.6 days abstraction per year at the maximum daily rate. Whilst this appears very restrictive, the average daily abstraction from the data available for the 7 year period was 302.3 cubic metres a day. At this rate the licence allows 288.5 days abstraction per year.

6.5.11 If the daily volume of 2,000 cubic metres were allowed 365 days per year, this would equate to 730,000 cubic metres of water. This is over 8 times what has been evidenced for 2016, the year with the highest abstraction rates within the qualifying period.

6.5.12 Although the Governmental policy guidance and NRW's own guidance leave it to NRW's discretion whether to include maximum abstraction quantities in transfer licences, or control via alternative means such as conditioning the details of the existing abstraction structure, NRW considered it necessary to include the quantities condition in this case. The evidence suggests that the abstraction pipe could be capable of taking far greater quantities than have been evidenced during the qualifying period and upon which HRA assessments have been based. Therefore, specifying a maximum pipe diameter by condition would not be effective to ensure that the licence issued reflects the historic abstraction. NRW needs to include a mechanism within the licence to ensure the abstraction reflects the historic use to comply with Governmental policy guidance and to ensure no further actual or potential impact on downstream designated sites. For these reasons, it was necessary to specify by condition a maximum annual volume of 87,230 cubic metres in line with the maximum annual abstraction historically as demonstrated in the Appellant's evidence. The inclusion of this condition necessitated, in turn, conditions requiring the volume to be measured and recorded using the existing measurement method on site.

7. Response to the grounds of appeal

7.1 Challenge to condition 9: HoF condition

7.1.1 For the reasons detailed in sections 6.1 – 6.4 above, NRW is satisfied that including condition 9.1 within the Transfer Licence was necessary to comply with the Habitats Regulations and 2017 Transitional Regulations and is consistent with the policy intention of the 2017 Governmental Response.

7.2 Challenge to condition 6: abstraction quantities condition

7.2.1 For the reasons detailed in section 6.5 above, NRW is satisfied that including condition 6.1 within the Transfer Licence is required to comply with the Habitats Regulations and 2017 Transitional Regulations and is consistent with the policy intention of the 2017 Governmental Response.

7.3 The Well-being of Future Generations (Wales) Act 2015 ("the WBFG Act 2015")

7.3.1 The Appellant submits that prior to issuing the Transfer Licence, NRW should have considered how its decision would contribute to the seven well-being goals set out in the WBFG Act 2015 and that NRW has not provided evidence to demonstrate that it carried out this assessment.

7.3.2 Section 3.10 above sets out the relevant provisions of the WBFG Act 2015.

7.3.3 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)."

7.3.4 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."

7.3.5 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).

7.3.6 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;"

7.3.7 In summary, therefore, the effect of sections 2-5 of the WBFG Act 2015 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].

7.3.8 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 21.1. 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"*

7.3.9 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.

7.3.10 NRWs duty under the WBFG Act 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.

7.3.11 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.

7.3.12 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 maximum abstraction quantities, 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. Other considerations

8.1 Period of notice

8.1.1 The Appellant was aware that the broad exemption from licensing requirements for operations carried out by a navigation authority in the carrying out of its functions under section 26 of the Water Resources Act 1991 was removed by the Water Act 2003, with effect from 1 January 2018, following the introduction of the 2017 Transitional Regulations. As a competent authority, the Appellant must have regard to the requirements of the Habitats Regulations when it exercises its functions.

8.1.2 The Appellant was initially notified of the potential for restrictions to be imposed on the Trosnant abstraction a letter from NRW dated 16 July 2020: see Annex 9.1. NRW reiterated this in correspondence to the Appellant dated 20 November 2020: see Annex 10.1.

8.1.3 The Appellant received confirmation of the specific HoF and abstraction quantities conditions that NRW was proposing to include in the Appellant's licence in an email from NRW on 5 December 2022, when NRW sent the Appellant a draft copy of the licence to review: see Annex 22.1 and 22.2.

8.1.4 In view of the above, it would not be tenable for the Appellant to suggest that it could not have reasonably foreseen the likelihood that restrictions would be imposed on its abstraction at Trosnant when its exemption from the need to hold a transfer licence came to an end. In any event, NRW's duty to comply with the Habitats Regulations when making licensing decisions is not contingent on giving any period of notice to those affected by any conditions that must be imposed on a licence to ensure compliance.

9. Conclusion

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