



Appeal Decision

by Mr A Thickett BA (Hons) BTP Dip RSA MRTPI

an Inspector appointed by the Welsh Ministers

Decision date: 28/11/2024

Appeal References: CAS-02488-V7M8Q2 & CAS-02489-V6P4R9

Site address: Underground strata comprising of sands and gravels at Radnor Hills, Heartsease, Powys.

- The appeals are made under section 43(1)(a) of the Water Resources Act 1991 (as amended) and the Water Abstraction (Transitional Provisions) Regulations 2017.
 - The appeals are made by the Radnor Hills Mineral Water Company Ltd against the decisions of Natural Resources Wales (NRW). The licences, serial numbers: WA/054/0009/0001 and WA/054/0009/0002, were issued on 16 December 2022 following applications dated 23 August 2019.
 - The licences authorise the abstraction of water from underground strata comprising of sands and gravels.
 - The appeals are made against the licences being subject to an expiry date of 31 March 2031.
 - A Hearing was held on 22 October 2024.
 - A site visit took place on 1 November 2024.
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Decision

1. The appeals are allowed and under section 44(6)(c) of the Water Resources Act 1991 (as amended) I direct NRW to vary the licences by extending the expiry date to 31 March 2037.

Application for Costs

2. The application for costs made by Radnor Hills Mineral Water Company Ltd against NRW is the subject of a separate decision.

Main Issue

3. The impact of extending the expiry dates on the licences to 2037 on the integrity of the River Teme SSSI and the River Clun and Severn Estuary Special Areas of Conservation (SAC).

Reasons

Background

4. The water used by the appellant to produce soft drinks, mineral and other bottled water is abstracted from boreholes near the factory. Around 300,000m³ of water is taken per year, mostly from the 12 boreholes located in Wales (235,591m³), the remainder from 3 boreholes just over the border in England (60,833m³) and subject to a separate licence granted by the Environment Agency (EA). The water abstracted is predominantly for commercial use, but also residential and agricultural purposes.
5. No appeal has been made against the EA licence which expires on 31 March 2031. At the Hearing the appellant stated they would seek to vary the English licence should these appeals be allowed. I see nothing incongruous in the appellant deciding to put its resources into appealing the licences which provide over 80% of the water necessary for production. Any application to vary the English licence will be a matter for the EA but I see no reason why licences granted to the same business should not have different expiry dates if demonstrated to be necessary to protect the environment.
6. The boreholes are close to the River Teme SSSI, with the nearest around 200m south of the river. The site is around 6km upstream of the confluence of the River Teme and the River Clun and the River Clun SAC. The Teme is a tributary of the Severn, which supports the Severn Estuary SAC, Special Protection Area (SPA) and Ramsar site.
7. Prior to 1 January 2018 the appellant's abstractions from the boreholes were exempted from licencing. It is common ground that licences should be granted to allow abstraction at pre licencing volumes except where the abstraction may cause serious environmental damage. This approach recognises that granting a licence for an existing abstraction to the same extent has a neutral environmental impact.
8. NRW carried out a HRA prior to issuing the licences and the appellant produced a shadow HRA to support the appeals. Both conclude the appellant's abstractions would not have a likely significant effect on the SSSI or SACs. Expiry dates of 31 March 2031 were imposed due to alleged uncertainty regarding longer term effects and because additional information would be available in 2031 to enable a further assessment to be made. Also due to concerns over long term impacts including the future of the freshwater pearl mussel, the population of which is in decline and is feared may become extinct by 2037.
9. Additional information likely to be available by 2031 includes:
 - abstraction returns, enabling a better understanding of the abstraction profile of the catchment,
 - results from a flow gauge installed by the EA on the River Teme in 2019, and a potential new flow gauge station on the River Clun should enable the accuracy of previously estimated flow data to be assessed,
 - investigations in 2025 to 2030 under the Water Company Water Industry National Environment Program, providing data about the catchment,
 - results of fisheries surveys for both the Clun and Teme, providing further information about the condition of the migratory fish species on which freshwater pearl mussels rely.
10. In addition, NRW advised the appellant to carry out further groundwater monitoring to help understand the impact of abstraction on water levels in the Teme.

The River Teme SSSI and the Severn Estuary and River Clun SACs

11. The River Teme SSSI is home to a number of designated species including Atlantic salmon and freshwater pearl mussel. The Teme is functionally linked to the River Clun and Severn Estuary SACs due to its role as a migratory route for the designated fish species and freshwater pearl mussel, and the provision of supporting habitat for these species. The River Clun SAC is designated because of its population of freshwater pearl mussels, one of the few lowland populations left in the UK. Freshwater pearl mussel larvae attach to the gills of salmon and trout before detaching and settling in riverbed gravels where they grow to adulthood. The future of the freshwater pearl mussel in the SAC depends on there being sufficient water in the rivers to allow migratory fish to reach the areas larvae detach.
12. The Severn Estuary SAC supports habitat types and species listed in Annexes I and II of the Habitats Directive. Three species of migratory fish are defined as features in their own right, River Lamprey, Sea Lamprey and Atlantic Salmon. A sub feature of the Estuaries feature of the SAC is 'Assemblage of fish species' which includes 7 diadromous species also highlighted as a protected feature of the Severn Estuary Ramsar Site designation. River flow is one of the factors of critical importance to the SAC features.

Whether any serious damage to the environment can be attributed to the appellant's abstractions between 2031 and 2037?

13. The life cycle of the freshwater pearl mussel and the migratory fish species designated as features of the SACs depends on there being sufficient water in the rivers to enable them to reach their spawning grounds. Due to natural processes, sections of the River Teme dry out and did so before the appellant began abstraction.
14. The papers submitted indicate internal disagreement within NRW at application stage regarding whether the appellant's abstractions impact on flows in the Teme. However, the agreed statement of common ground states: *'it can be concluded, based on the information currently available, that the abstractions will not adversely impact the relevant SAC, SPA and Ramsar designations. Therefore, a shorter time limit for the Licences is not required in order to mitigate adverse impacts on protected sites and designated features.'* And: *'NRW concluded that the abstractions are not likely to damage features of the River Teme SSSIIt is acknowledged that the Applications are not linked to a WFD waterbody flow failure.'* (WFD – Water Framework Directive).
15. At the Hearing NRW sought to distance itself from the modelling used to assess flows in the Teme and the impact of the applicant's abstractions. However, the officers responsible for producing the HRA were happy to rely on it when producing the HRA, defending their position when challenged by internal consultees. Further, I see no reason to doubt the appellant's expert witness that the methodology is used across Wales and England in ungauged catchments and is accepted by the industry as robust.
16. The additional information referred to above would improve understanding of the catchment, but regarding the licences, is further assessment necessary given the conclusion of NRW's HRA and the shadow HRA that the appellant's abstractions would not have a likely significant effect on the SSSI or SACs? In addition, will this information assist in understanding the effect of the appellant's abstractions on flows in the River Teme?
17. NRW's HRA includes multiple entries accepting it is not possible to link drying out incidents with the abstractions subject to these appeals. Indeed at one point it states it is difficult to justify basing any licensing decisions on such a presumption.

18. The appellant concedes because abstraction will intercept water likely to have drained into the river, it will have an effect in the catchment. However, I accept and it was not meaningfully challenged at the Hearing, that the functioning of the Teme and the interaction between it and the water in the underlying gravels means any effect would only be seen downstream. Further, because the catchment is larger downstream, river flows are higher and impact from the appellant's abstractions reduces. This is accepted in NRW's HRA which states that although the appellant's abstractions intercepts water that is likely to have drained into the river, any impacts on downstream river flows would be minimal.
19. The appellant has been monitoring groundwater levels in the gravel aquifer supplying the abstraction boreholes at 4 locations and groundwater level monitoring at one borehole since June 2023. The water level in the River Teme has been measured electronically since October 2023. The results of this monitoring support the appellant's contention of no direct connection between the effects of abstraction and the River Teme close to the boreholes. I acknowledge as there is only one year's worth of data, one must treat the results with caution but it corroborates the findings of the modelling and the conclusions of the HRA and shadow HRA.
20. Turning to the other additional information NRW say is needed, I agree, for the reasons given by the appellant, that whilst it may improve understanding of the catchment, it would not shed any more light on the impact of the appellant's abstractions on flows in the Teme and thence the SSSI and SACs. I do not doubt climate change will have an impact on flows in the Teme and possibly lead to the ephemeral sections experiencing longer and/or more frequent periods of drying out. Nor that the future of the freshwater mussel population is under threat.
21. Nonetheless, the evidence I have seen and heard demonstrates beyond reasonable scientific doubt, that the appellant's abstractions have a minimal impact on river flows and do not have an adverse effect on the SSSI or SACs. Further, whilst noting the Teme Abstraction Licensing Strategy states licences will be time limited to enable periodic review, I am not persuaded that other than the appellant's monitoring (which so far appears to show no link) the additional information sought by NRW would add anything meaningful to understanding the association between the abstractions and flows in the Teme.
22. In the statement of common ground it is agreed that the 31 March 2031 expiry dates are not required to mitigate adverse impacts on protected sites and designated features. I agree and conclude extending the expiry dates to 31 March 2037 would not have a likely significant effect on the integrity of the River Teme SSSI and the River Clun and Severn Estuary SACs.

Conclusion

23. For the reasons given above and having regard to all matters raised, I conclude that the appeals should be allowed.
24. In reaching my decision, I have taken into account the requirements of sections 3 and 5 of the Well-Being of Future Generations (Wales) Act 2015. This decision accords with the Act's sustainable development principle through its contribution towards the Welsh Ministers' well-being objectives.

A Thickett

Inspector

Appendix A - Habitats Regulations Assessment

Introduction

1. The need for Habitats Regulations Assessment (HRA) is set out within Article 6 of the EC Habitats Directive 1992, which is transposed into British Law by the Conservation of Habitats and Species Regulations 2017 (the Regulations). The Regulations require decision makers, in this case me on behalf of the Welsh Ministers, to undertake an Appropriate Assessment (AA) where significant effects on a European site are likely and only to give consent if there are no adverse effects on the integrity of a European site unless other legal tests have been met.
2. I have considered the HRA carried out by NRW, the shadow HRA produced for the appellant by Ecology Solutions and the evidence submitted to the Hearing. The HRA and shadow HRA were subject to consultation.

The site and proposed abstraction

3. Radnor Hills Mineral Water Company Ltd manufactures soft drinks and produces mineral waters from a factory to the east of Knighton in Heartsease. Water for production, agricultural and domestic use is abstracted from boreholes on land owned and operated by the company. Around 300,000m³ of water is abstracted per year from 15 boreholes, 12 in Wales and 3 in England.

Screening

4. Screening assessments considered the impact on the River Clun and Severn Estuary SACs and the Severn Estuary Ramsar site. The screening identified that the Company's abstractions are close to and hydraulically linked to the River Teme, potentially reducing flows and water levels in the river. Reducing flow and water levels could affect the migratory passage of salmon and trout on which Freshwater Pearl Mussel rely on to carry their larvae.

The special features of the SACs

Severn Estuary SAC

5. Annex I habitats that are a primary reason for designation include, mudflats sandflats and Atlantic salt meadows. Annex II species that are a primary reason for designation are sea and river lamprey and Twite shad. Migratory fish including Atlantic salmon, European eel, sea trout and allis shad are also notable species.
6. The Conservation Objectives for the SAC are to ensure the integrity of the site maintained or restored as appropriate and ensure that the site contributes to achieving the favourable conservation status of its qualifying features by, amongst other things, maintaining or restoring the populations of qualifying species.

Severn Estuary Ramsar site

7. The site is designated, amongst other things, as a result of its importance for the run of migratory fish between sea and river via the estuary. The site is important as a feeding and nursery ground for many fish species and European eel use the estuary as a key migration route to their spawning grounds in the many tributaries that flow into the estuary.
8. The Conservation Objectives for the site are to maintain the site in a favourable condition by, amongst other things, ensuring the migratory passage of fish is not impeded by physical barriers, changes in flows or poor water quality.

River Clun SAC

9. The River Clun SAC holds a population of the Freshwater Pearl Mussel, one of the few lowland populations left in the UK. The Conservation Objectives for the site are to ensure that its integrity is maintained or restored. And to ensure that the site contributes to achieving favourable conservation status of its qualifying features by, amongst other things, maintaining or restoring the populations of qualifying species.

Appropriate Assessment

10. The life cycle of the freshwater pearl mussel and the migratory fish species designated as features of the SACs depends on there being sufficient water in the rivers to enable them to reach their spawning grounds. Sections of the River Teme are ephemeral (they dry out). This is due to natural processes and occurred before Radnor Hills Mineral Water Company began abstracting water but to what extent, if any, is this abstraction linked to the drying out of sections of the Teme?
11. NRW's HRA includes multiple entries accepting it is not possible to link drying out incidents with the abstractions subject to the Company's licences. The technical information supporting the shadow HRA verifies this conclusion. I am satisfied that it has been demonstrated that the functioning of the Teme and the interaction between it and the water in the underlying gravels in the area of the boreholes means any effect would only be seen downstream of the factory. Also, as the catchment is larger downstream, river flows are higher and likely impact from the abstractions reduces. This is accepted in NRW's HRA which states that although the appellant's abstractions intercepts water that is likely to have drained into the river, any impacts on downstream river flows would be minimal.
12. The company has been monitoring groundwater levels in the gravel aquifer supplying the abstraction boreholes at 4 locations and groundwater level monitoring at one borehole since June 2023. The water level in the River Teme has been measured electronically since October 2023. The results of this monitoring support the appellant's contention of no direct connection between the effects of abstraction and the River Teme close to the boreholes. There is only one year's worth of data and it should be treated with caution but it corroborates the findings of the modelling and the conclusions of the HRA and shadow HRA.
13. The shadow HRA, carried out by a qualified and experienced ecologist, concludes that due to distance and ever increasing size of catchment downstream, impact on the Severn Estuary SAC and Ramsar site as result of the abstractions can be ruled out. NRW's HRA concludes that whilst there is an impact pathway, significant effects on migratory fish from the abstractions can be discounted. NRW's HRA comes to the same conclusion when considering in combination effects including the River Clun SAC.

Conclusion

14. A review of the conservation objectives and potential threats to site integrity for the SACs, SPA and Ramsar site was undertaken to identify whether they would be impacted by the proposed development. I have taken into account all the available evidence and have adopted the precautionary principle in carrying out this AA. I have considered the potential impacts on the integrity of the sites that have been identified by the applicant and others.

15. I conclude that it is beyond reasonable scientific doubt that the abstractions authorised by licences WA/054/0009/0001 and WA/054/0009/0002 with expiry dates of 31 March 2037, neither alone nor in combination with other projects, would not have an adverse effect on the integrity of the Severn Estuary SAC, the Severn Estuary Ramsar site or the River Usk SAC.

A Thickett

Inspector