



Appeal Decision

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

an Inspector appointed by the Welsh Ministers

Decision date: 18-11-2024

Appeal A: CAS-02485-Q0R8C3

Site address: Trosnant Spring at Pontypool

Appeal B: CAS-02486-Y2G4M3

Site address: River Usk at Brecon

- 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 Canal & Rivers Trust against the decisions of Natural Resources Wales (NRW). The licences, serial numbers: WA/056/0012/0004 and WA/056/0044/0004, were issued on 19 December 2022 following applications dated 12 & 13 September 2019.
 - The licences authorise the abstraction of water from the Trosnant Spring at Pontypool and the River Usk at Brecon.
 - The appeals are made against conditions 6 and 9 imposed on the licences, set out in Appendix 1 to this decision.
 - A Hearing was held on 15 October 2024.
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Decision

1. The appeals are dismissed.

Main Issue

2. The impact of removing conditions 6 and 9 of licences WA/056/0012/0004 and WA/056/0044/0004 on the integrity of the River Usk and Severn Estuary Special Areas of Conservation (SAC).

Reasons

3. The appeal licences authorise abstraction of water to supply the Montgomeryshire and Brecon Canal. The canal runs for around 40 miles from Brecon to Pontypool. The Canal & Rivers Trust sought 7 licences to abstract water along the length of the canal, only these two licences are challenged.
4. The Trust acknowledges it is necessary to limit the volumes of water abstracted to protect the SACs but argues the limitations imposed are too restrictive and would have an adverse impact on navigation, the structure of the canal and its ecology. At Trosnant Spring, the Trust seeks the removal of both conditions but, in the alternative, maximum

daily and annual limits of 2,000m³ and 247,000m³ (condition 6) and a hands off flow of Q95 or Qn95 (condition 9). Hands off flow (HoF) being a rate of flow in the Afon Lwyd below which abstraction may not occur.

5. For the Usk at Brecon, the Trust seeks the removal of both conditions. No alternative volumes or HoF is suggested. The Trust concedes neither it nor I are in a position to arrive at figures for volumes or HoF which would not harm the integrity of the SACs. Rather the Trust requests I dismiss the appeal and require NRW to review the licence, revoke it and impose new limits.

Severn Estuary and River Usk SACs

6. Trosnant Spring feeds into Trosnant Brook which flows via a culvert into the Afon Lwyd which joins the River Usk and the River Usk SAC around 10 miles downstream. The Usk subsequently joining the Severn, Severn Estuary SAC, Special Protection Area (SPA) and Ramsar Site. Fish species that are a feature of the Severn Estuary SAC are known to be present in the Afon Lwyd. The Afon Lwyd is hydrologically linked to the Severn Estuary and provides habitat that supports the ecological integrity of the Severn Estuary SAC.
7. 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 Lamprey, Sea Lamprey, Atlantic Salmon, other fish species and otter are designated features of the River Usk SAC. The Core Management Plan for the SAC identifies river flow to be of critical importance to the SAC features.
8. Having completed a Habitats Regulation Assessment (HRA), NRW concluded the disputed conditions are necessary to ensuring flows in the Afon Lwyd and Usk are at levels necessary to enable migratory fish to reach spawning sites, this being critical to maintaining the integrity of the Severn Estuary and River Usk SACs.

The Usk at Brecon

9. Should I dismiss this appeal and remove conditions 6 and 9, there would be no limit as to the amount the Trust could extract from the Usk whatever the rate of flow. However, the Trust acknowledges it is necessary to limit the volumes of water abstracted and conceded at the Hearing that I cannot conclude that unrestricted abstraction would not have a likely significant effect on the SACs.
10. Section 44(1)(a) of the Water Resources Act 1991 empowers me to allow or dismiss the appeal or reverse or vary any part of the licence. Section 44(6) states that I may, by direction, grant, vary or revoke a licence. I see nothing in the Act, nor have I been taken anywhere, to indicate that I have the power to require NRW to review and revoke a licence I have varied. Whilst It would be in NRW's interest to do so in order to safeguard the SACs, not least due to the complexity of the issues, there would be an unknown and possibly prolonged period of time during which harm is likely. I agree, therefore, with NRW, that taking such an approach would be in contravention of the Habitats Regulations.
11. Given the Trust acknowledges that I am not able to conclude that removing the limitations imposed by conditions 6 and 9 of the Usk licence would not have an adverse impact on the integrity of the SACs, Appeal B must fail.

Trosnant Spring

12. Removing conditions 6 and 9 from the Trosnant licence, allowing uncontrolled and unlimited abstraction leads to the same conclusion. That leaves me with the question of the impact of the limits suggested by the Trust on the SACs.
13. Prior to 1 January 2018, the appellant's abstractions at Trosnant (and Usk) was exempted from licencing. It is common ground that licences should be granted to allow abstraction at pre licencing volumes except where it 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. The starting point, therefore, is to establish pre licencing levels of abstraction. Historically the Trust was not required to monitor abstractions but NRW issued guidance requiring applicants to provide evidence of abstraction volumes at any time between 1 January 2011 to 31 December 2017 (the qualifying period).
14. The Trust claim an analysis of the abstractions over the qualifying period shows that for the days where data exists, and expressed in annual terms, the mean abstraction rate was around 247,000m³ per annum. However, the Trust acknowledges its data is unreliable due to errors in the Trust's SCADA telemetry records (Supervisory Control and Data Acquisition). There had been several periods where the flow meter had broken down or the pipeline was damaged or blocked. I have no reason to doubt abstraction continued when the meter was broken but there is no SCADA record for 1,479 days of the 2,557 days of the qualifying period.
15. The maximum annual amount abstracted in the qualifying period cited in the Trust's application of 87,320m³ is likely to be equally unreliable. I acknowledge it is not possible to establish the exact amounts extracted but given the acknowledged deficiencies in recording, I cannot say with any confidence that 247,000m³ per annum is representative of the Trust's abstractions over the qualifying period. Consequently, I am not in a position to conclude abstracting 247,000m³ per annum would have a neutral environmental impact.
16. However, it is clear from the application form that 87,320m³ is the maximum annual volume the Trust applied for and that was the basis of the HRA carried out by NRW. The conclusion of the HRA, not disputed by the appellant, is abstracting 87,320m³ per annum would safeguard the integrity of the SACs. There is no robust evidence before me to indicate abstracting above this amount would not harm the SACs or that condition 6 is not necessary to safeguard their integrity.
17. The method for measuring and monitoring healthy flows in rivers not designated as a SAC is the Environmental Flow Indicator (EFI). The EFI indicates the proportion of the natural flow of a river required to support the habitats and species connected with it. Flows are assessed by subtracting licensed abstractions and adding discharges from its natural flow, comparing this with the EFI of the river.
18. The Trust has been abstracting water from Trosnant Spring for around 20 years and argues condition 9 (HoF) has been incorrectly imposed as NRW has treated the abstraction as 'new' and not 'established' water. Further that licences to abstract within the catchment dating back to the 1960s held by Dŵr Cymru but not used should not have been taken into account. At the Hearing, the Trust did not challenge NRW's assertion that the estimation of natural flow on Trosnant Brook and Afon Lwyd did not include the Trosnant Spring abstraction. In addition, that existing water resource models did not account for the Trosnant Spring abstraction or that it was not assessed under the Habitats Directive Review of Consents process for the River Usk SAC. On that basis it

was proper to treat the Trosnant abstraction as 'new' water as it had not previously been taken into account.

19. The appellant argues that as Dŵr Cymru has not used its licences and would need to install new infrastructure to enable abstraction they should be discounted. However, the licences subject to these appeals expire in 2038 giving Dŵr Cymru plenty of time to facilitate the abstraction of the water should it wish to. There is no guarantee currently unused licences would not be used. I agree with NRW that for the purposes of the HRA, it was appropriate to assume abstraction by others could take place in accordance with existing maximum licenced rates (subject to conditions).
20. The Trust produced no empirical evidence to challenge NRW's analysis that in lower flow conditions, taking account of all permitted abstractions, the flow of the Afon Lwyd falls below its EFI and there is not enough water to enable the river to support the habitats and species that rely upon it. I am satisfied, therefore, that the evidence before me demonstrates the HoF set out in condition 9 is necessary to protect the SACs and Appeal A, therefore, fails.

Other matters

21. The appellant accepted at the Hearing that should I determine the conditions are necessary to safeguard the integrity of the SACs, removing them would not be sustainable and would not comply with the Well Being of Future Generations (Wales) Act 2015. The Trust argues the limits imposed by the conditions would have an adverse impact on the canal as a habitat and I acknowledge the Water Framework Directive seeks to avoid environmental deterioration in water bodies such as the canal. However, the canal does not include any designated protected habitat and safeguarding the SACs must be afforded greater weight in accordance with the Habitat Regulations.
22. I do not make light of the impact of closing all or sections of the canal on tourism, local business and local economies or that long periods of drying out can lead to structural damage. However, the canal has not closed in recent years other than for maintenance and I am not persuaded the conditions would lead to closures or the impact of the conditions is likely to be as dire as the Trust makes out. In any event, the importance of maintaining the integrity of the SACs and protecting the species that contribute to their special status must take precedence.

Conclusion

23. For the reasons given above and having regard to all matters raised, I conclude conditions 6 and 9 of licences WA/056/0012/0004 and WA/056/0044/0004 are necessary to safeguard the integrity of the River Usk and Severn Estuary Special Areas of Conservation (SAC)) in compliance with the Water Resources Act 1991 and the HRA Regs 2017 and that the appeals should be dismissed.
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 1

Trosnant Spring at Pontypool

Licence: WA/056/0012/0004.

Condition 6 – Maximum quantities of water to be abstracted

6.1 2,000 cubic metres per day

87,230 cubic metres per year

A day means any period of 24 consecutive hours and a year means the 12 month period beginning on 1 April and ending on 31 March.

Condition 9 - further conditions

9.1 No abstraction shall take place when the flow in the River Ebbw as gauged by NRW at its flow gauging station at Rhiwderin is equal to or less than 220,000 cubic metres per day.

9.2 The Licence Holder shall discharge all of the water abstracted in pursuance of this licence to the Monmouthshire & Brecon Canal at National Grid Reference SO 29405 00307 marked 'Point Q' on the map.

The River Usk at Brecon

Licence: WA/056/0044/0004

Condition 6 – Maximum quantities of water to be abstracted

6.1 35,000 cubic metres per day

8,623,778 cubic metres per year

A day means any period of 24 consecutive hours and a year means the 12 month period beginning on 1 April and ending on 31 March.

6.2 Upon commencement of Canal & River Trust support releases from DCWW, the maximum quantities of water the Licence Holder is authorised to abstract specified in condition 6.1 of this licence shall be replaced with the following quantities, but remain subject to all other licence conditions:

35,000 cubic metres per day

12,775,000 cubic metres per year.

A day means any period of 24 consecutive hours and a year means the 12 month period beginning on 1 April and ending on 31 March.

Condition 9 - further conditions

Definitions

9.1 For the purpose of this licence the terms listed below mean the following;

Term	Meaning
'Canal & River Trust support release'	The additional water which DCWW can discharge to the River Usk from the Usk Reservoir, in excess of the compensation releases and any other releases from the Usk Reservoir, under licence number 20/56/54/0001, to support abstraction by Canal & River Trust at Brecon under this licence.
'Unsupported rate of flow in the River Usk at Brecon'	The flow immediately upstream of Brecon Weir inclusive of compensation releases but excluding any other releases from the Usk Reservoir and the Cray Reservoir by DCWW under licence numbers 20/56/54/0001 and 20/56/53/0002 respectively

9.2 No abstraction of water shall take place unless the unsupported rate of flow in the River Usk at Brecon is equal to or greater than 90,000 cubic metres per day.

9.3 When the unsupported rate of flow in the River Usk at Brecon is equal to or greater than 90,000 cubic metres per day, the restrictions on abstraction as set out in Table 1 below shall apply;

Table 1

When the unsupported rate of flow in the River Usk at Brecon is (cubic metres per day):	The maximum quantity of water to be abstracted shall not exceed (cubic metres per day):
90,000 – 95,000	133
95,000 – 100,000	358
100,000 – 105,000	540
105,000 – 110,000	806
110,000 – 115,000	945
115,000 – 120,000	1,178
120,000 – 125,000	1,233
125,000 – 130,000	1,465
130,000 – 135,000	1,662
135,000 – 140,000	1,812
140,000 – 145,000	3,166
145,000 – 150,000	9,483
150,000 – 155,000	9,940
155,000 – 160,000	10,114
160,000 – 165,000	10,540
165,000 – 170,000	10,957
170,000 – 175,000	11,355

175,000 – 180,000	11,827
180,000 – 185,000	12,097
185,000 – 190,000	12,817
190,000 – 195,000	13,036
195,000 – 200,000	13,538
200,000 – 205,000	13,795
205,000 – 210,000	14,177
210,000 – 215,000	14,456
215,000 – 220,000	15,041
220,000 – 225,000	15,511
225,000 – 230,000	15,899
230,000 – 235,000	16,331
235,000 – 240,000	16,811
240,000 – 245,000	17,146
245,000 – 250,000	17,801
250,000 – 255,000	18,164
255,000 – 260,000	18,743
260,000 – 265,000	19,120
265,000 – 270,000	19,613
270,000 – 275,000	20,266
275,000 – 280,000	20,649
280,000 – 285,000	21,225
285,000 – 290,000	21,596
290,000 – 295,000	22,159
295,000 – 300,000	22,591
300,000 – 305,000	23,152
305,000 – 310,000	23,726
310,000 – 315,000	24,148
315,000 – 320,000	24,646
320,000 – 325,000	25,152
325,000 – 330,000	25,659
330,000 – 335,000	26,209
335,000 – 340,000	26,621
340,000 – 345,000	27,152
345,000 – 350,000	27,656
350,000 – 355,000	28,122
355,000 – 360,000	28,674
360,000 – 365,000	29,151
365,000 – 370,000	29,658
370,000 – 375,000	30,113
375,000 – 380,000	30,735
380,000 – 385,000	31,127
385,000 – 390,000	31,610
390,000 – 395,000	32,165
395,000 – 400,000	32,667
400,000 – 405,000	33,081
405,000 – 410,000	33,639
410,000 – 415,000	34,091
415,000 – 420,000	34,568
>420,000	35,000

9.4 For the purpose of conditions 9.2 and 9.3:

No abstraction shall take place unless the method of calculating the unsupported rate of flow at Brecon has been submitted to and approved in writing by NRW.

9.5 Abstraction of Canal & River Trust Support Releases from the River Usk

If at any such time DCWW makes a Canal & River Trust support release from the Usk Reservoir (under DCWW licence number 20/56/54/0001) then:

- (i) No abstraction of that support release shall take place under this licence unless the release commences at least 12 consecutive hours before abstraction takes place;
- (ii) The abstraction of Canal & River Trust support releases is in addition to the authorised quantity of water permitted to be abstracted under conditions 9.3 but subject to condition 6.

9.6 Pursuant to condition 9.5, abstraction of Canal & River Trust support releases under this licence can continue for up to 12 consecutive hours following cessation of a Canal & River Trust support release from the Usk Reservoir (under DCWW licence number 20/56/54/0001).

9.7 The Licence Holder shall discharge all of the water abstracted in pursuance of this licence to the Monmouthshire & Brecon Canal at National Grid Reference SO 04660 28224 marked 'Point Q' on the map.

9.8 (i) No abstraction shall take place unless the Licence Holder has installed an intake screen with bar spacing no greater than 10 millimetres to prevent the entrapment, entrainment or impingement of fish at the point of abstraction. Licence serial number WA/056/0044/0004 Page 6 of 8

(ii) The Licence Holder shall maintain the fish screen in accordance with the manufacturer's specifications and keep records of such maintenance available for inspection.

9.9 The minimum value for the quantity of water authorised to be abstracted under this licence, as referred to in section 46(2A) Water Resources Act 1991, is 8,623,778 cubic metres per year.

9.10 Upon commencement of Canal & River Trust support releases from DCWW, the minimum value for the quantity of water authorised to be abstracted under this licence as specified in condition 9.9 of this licence shall be replaced with the following;

The minimum value for the quantity of water authorised to be abstracted under this licence, as referred to in section 46(2A) Water Resources Act 1991, is, 12,775,000 cubic metres per year.