The Planning Inspectorate

Appeal Decision

Hearing held on 28 February 2023
Site visit made on 28 February 2023

by Mike Robins MSc BSc (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 5 September 2023

Appeal Ref: APP/WAT/585R
Pennoxstone Court, Kings Caple, Hereford, HR1 4TX

- The appeal is made under regulation 43(1) of the Water Resources Act 1991 (as amended)
- The appeal is made by Neil J Cockburn against the decision of the Environment Agency to grant a licence with a 'hands off flow' condition
- The licence WA/055/0018/028 was approved by notice on 29 March 2021 following an application dated 28 December 2019.
- The application is for trickle irrigation from the inland water known as the River Wye at Pennoxstone Court, at National Grid Reference SO 55018 28173.
- The licence is for a maximum quantity of 72 m^3/hour, 1,000 m^3/day and 114,000 m^3/year.
- The condition in dispute is 9.1 which states that 'No abstraction shall take place when the flow in the River Wye as gauged at Redbrook gauging station at National Grid Reference SO 52769 11077 is less than 932 Megalitres per day as may be notified by the Agency. The gauged flow as notified by the Agency shall be conclusive'.
- The reason given for the condition is 'to protect the environment and the interests of existing downstream lawful users of water'.
- This decision supersedes that issued on 26 May 2022. That decision on the appeal was quashed by order of the High Court.

Decision

1. The appeal is dismissed, and I direct the Environment Agency to issue the licence.

Procedural Matters

2. This proposal was subject to a previous appeal and decision, subsequently quashed in the High Court. That decision is incapable of having legal effect although it may be capable of being a material consideration.

3. In opening, the appellant's team confirmed that, while they considered there was sufficient headroom within the available water supply from the River Wye such that a Hands-off Flow (HoF) was not required, they were not now specifically challenging the principle of the application of a HoF. Instead, they indicated that they were conscious of the need for consistency across the catchment and the risks of the removal of the condition leading to others challenging such restrictions, referred to at the event as the 'floodgate' effect.

4. Consequently, while promoting their view that this was a long-standing abstraction and that within this part of the river it would have no effect on the integrity of the River Wye, a Special Area of Conservation (SAC), they were seeking a delay to implementation of the condition to be addressed through revised wording. Their request was for that to be for four years, a period that they considered would be sufficient to allow the appellant to make suitable provision for alternative water supply on the site.

Main issues

5. Accordingly, the main issue is whether or not the required application of the HoF condition is necessary and proportionate, having regard to the environmental effects of the abstraction alone or in combination and the economic effects on the business.

Background

6. The operation here involves abstraction for the purpose of trickle irrigation and takes place directly from the SAC and Site of Special Scientific Interest (SSSI). Accordingly, the river forms part of the national site network for which, under retained EU law, the Habitats Directive (92/43/EEC) sets out a duty on States to take measures to protect the distribution and abundance of identified habitats and species. Although now not part of the European Union, that duty is given effect by the Conservation of Habitats and Species Regulations 2017 (the Habitats Regulations).

7. The status of identified qualifying features are assessed by the relevant Statutory Nature Conservation Body (SNCB), and in this case, Natural England (NE) apply an approach under the Common Standards Monitoring Guidance (CSMG) procedures. In their six yearly cycle of assessment, the SSSI component for this part of the River Wye was classified as "Unfavourable – Recovering" and this informed their, and the Environment Agency's (the Agency) consideration of the status of the SAC. However, since the Hearing, NE have carried out an interim assessment and altered their position and declared that the SSSI is "Unfavourable – Declining". This related to the River Wye showing declines in macrophytes, salmon and white-clawed crayfish. Parties were given an opportunity to comment on this change and their views have been taken into account as part of this decision.

8. It is common ground that a project such as this requires assessment under the Habitats Regulations, including screening and subsequent appropriate assessment (AA). This was carried out by the Agency as the competent authority for the licence application, but that responsibility now falls to the Secretary of State.

9. The appellant reports that the soft fruit growing at Pennoxstone Court has been established for many years. It relies on a regime based on raised coir beds, laid under polytunnels with a regular, computer-controlled supply of water and nutrients.

10. The importance of a regular supply of water to the raised beds means the appellant considers that the immediate application of the HoF restrictions would endanger the business without an alternative supply in place. In

effect, the Agency estimated that the application of the HoF would, in a 'normal' year, mean around 18 days when water could not be abstracted; in a dry year this could be many more. The appellant sets out that without water there would be a loss of yield after 4 hours, loss of crop after 24 hours, and the permanent loss of a seasons crop after 48 hours.

11. The supply of water has been met by direct abstraction from the River Wye, with some limited storage on site, for trickle irrigation of the crops. This type of abstraction has previously been exempted from licensing requirements. However, this was removed on 1 January 2018 by the Water Act 2003 resulting in amendments to the Water Resources Act 1991 (WRA).

12. The process of bringing exempted abstractions into the licensing regime has been carried out over a number of years following consultation and the laying of transitional regulations[1]. These required previously exempted abstractions, knows as 'New Authorisations' (NAs), to be applied for by 31 December 2020 and determined initially by 31 December 2022, subsequently extended to June 2023. The licence in this case was issued on 29 March 2021.

Reasons

13. The Agency's assessment of this application that led to issuing of the licence included a Determination Report that confirmed the application was valid under the Transitional Regulations. It concluded on their AA on the potential effects on the River Wye SAC of NAs, and found that, in combination with other abstractions in the catchment, it could not be concluded that there would be no likely significant effect on the SAC.

14. The AA was informed by modelling of flows and abstractions within the catchment, which was used to consider effects on the Habitats Directive Ecological River Flow (HDERF), which I consider in more detail below.

15. This assessment was ratified by the relevant SNCBs of NE and Natural Resources Wales (NRW). The Agency found that requirement for a HoF and installation of a fish screen via conditions on the licence would ensure that there would be no adverse effects.

16. This Report did not consider that the Pennoxstone abstraction could, on its own, lead to serious damage, as set out in the Government response to consultation on changes to water abstraction licensing exemptions in England and Wales: New Authorisations, dated October 2017 (the 2017 Response). However, it did find that the potential to affect the designated site in combination with other abstractions in the catchment could result in serious damage, without the application of the mitigating conditions. This is a point which directly bears on the application of the 2018 Direction.

17. Finally, the Report identified that the Agency had considered the costs and benefits of their decision, including both environmental and financial, and noted their duty to meet the Habitats Regulation requirements.

[1] Water Resources (Transitional Provisions) Regulations 2017 (the 2017 Regulations) and The Water Abstraction (Transitional Provision) (England) Direction 2018 (the 2018 Direction)

18. It is important to note that the 2017 Response anticipated that the Regulator was expected to take a 'light-touch', risk-based approach to licensing NAs, but still considered that HoF conditions would normally be applied. In the case of this particular catchment, the Agency reported that any new, as opposed to previously exempted abstraction licenses that have been issued, have been with increasingly restrictive levels of HoF, significantly exceeding that proposed for this New Authorisation, which here would be linked to the Qn95[2] at Redbrook Gauging Station.

19. The appellant challenged a number of the approaches taken by the Agency in respect of flows. Although most of these were covered in the previous appeal decision, and not considered in the High Court judgement, this re-determination appeal included a submission by the appellant of further evidence to inform the appropriate assessment[3]. For completeness, and where relevant, I have reviewed the case made as well as considered the implications against the Agency's assessment in light of that further information, the Agency's response to that and the evidence presented at the Hearing.

20. The River Wye / Afon Gwy SAC citation in 2004/2005 identified 31 component SSSIs and described the river as a large and geologically mixed catchments with an exceptional range of aquatic flora and a largely unmodified river channel. Two Qualifying Habitats[4] were identified along with nine Qualifying Species, including three lamprey species, two shad species, the Atlantic salmon and white-clawed crayfish.

21. The conservation objectives[5] identified to maintain favourable conservation status included, as well as direct measures for the qualifying habitats and species themselves, maintaining or restoring the supporting processes on which they rely.

22. The Agency carried out a Stage 1, screening assessment, and a Stage 2, AA, under the Habitats Regulation requirements for abstraction licences in the catchment resulting from the Transitional Regulations 2017. These identified the risk of effects as a result of abstraction and set out those relevant as being related to the change in flow or velocity, freshwater flow to the estuary, the salinity regime, surface water inundation, water chemistry, the water table, entrainment/impingement, habitat loss and reduced dilution capacity. Issues around entrainment or impingement of fish are not contested between the parties, nor is the application of a screening condition to address this risk. I have no evidence challenging this matter and accept the Agency's conclusions.

23. Nonetheless, the Stage 1 assessment also concluded that there was a likely significant effect associated with flow conditions when abstractions were considered in combination. The identified effects were on six of the qualifying species and one habitat feature.

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[2] The natural flow exceeded 95% of the time.
[3] Ecology Solutions -January 2023
[4] 'Transitional mires and quaking bogs' and 'water course of plain to montane levels'
[5] Publication Date 27 November 2018 (version 4)

24. The Stage 2 assessment identified that the six species were all considered to have a current Conservation Status of unfavourable, as did the habitat, in this case, water courses of plain to montane levels. To assess the pressure from abstraction on these qualifying features, the Agency updated a model originally developed for their earlier Review of Consents (RoC). The model assessed individual and cumulative impacts based on a precautionary approach of abstraction at maximum daily or annual profiles derived from licences and based on historic use. It is noted by the Agency that, based on more recent data from the NA process, the previously assumed levels of NA abstraction was a significant under-estimate.

25. These revised modelled flows were then considered against the HDERF. This is a flow calculated as a percentage deviation from naturalised flow. If, under a fully licenced scenario, the modelled flow lies above the HDERF, then it can be concluded there is no adverse effect on the integrity of the site. This percentage deviation from the naturalised flow is calculated based on range and the sensitivity of the catchment. Here, the agreement between the SNCBs and the Agency is that the Wye catchment has a high Environmental Weighting and sensitivity and, in lower flow conditions, the maximum reduction from naturalised flows is 10%. This is the agreed flow standard for the River Wye SAC.

26. Consequently, the Agency consider that abstraction resulting in reduced flows represents a risk to qualifying features across the catchment, although they accept there are other factors, notably water quality, which also effect these features. Nonetheless, they consider that, if the HDERF can be achieved, then it could be concluded there would be no adverse effect from abstraction.

27. The modelling indicated that, under the scenarios set out by the Agency as representing a suitable level of precaution, that is some 73,731 m^3/day and 4,241,036 m^3/year, such abstraction could result in a range of increased risks to the species and habitat, with flow levels below the HDERF. It is apparent that ecology and fisheries specialists considered the output of the model, applied professional judgement based on those flows and considered the effects across a range of years and scenarios. The conclusion was that cumulative effects on the integrity of the site could not be ruled out.

28. However, on application of a Qn95 HoF restriction, residual flows for the River Wye were considered to achieve HDERF. Furthermore, despite some variance in the water quality modelling, it was argued that increased flow within the river during low flow conditions would lead to greater dilution capacity and a positive benefit in water quality terms, albeit not sufficient to resolve the water quality effects within the catchment.

29. Thus, the Stage 2 AA concluded that, with suitable conditions, notably HoF conditions, permission for NAs would have no adverse effect on the integrity of the River Wye SAC. This AA was formally consulted on with NE and NRW, who agreed with the findings.

30. As set out above, the appellant disagrees with a number of the approaches used by the Agency in their AA. In their Information for an AA (HRA Information), they have similarly identified the qualifying features and set out the Conservation Objectives. They have then set out the threats to

qualifying features which are considered to adversely affect their populations, reported to be directly informed by the Core Management Plan for the River Wye SAC[6].

31. This identified the qualifying feature, the habitat or supporting requirement, adverse impacts / threats and notes on condition. The appellant accepted that the current status of the interest features is unfavourable, but concluded that '*abstraction hardly features as a concern in relation to qualifying interest features'*.

32. While arguing that the individual abstraction represents only a very small proportion of the river flow, the HRA Information provided by the appellant also found that, in combination with the other NAs, it could not be concluded with sufficient certainty that no likely significant effect would arise, and an AA was therefore necessary.

33. I note the Agency's concern that the simplified flow proportions promoted in the information do not reflect the full abstraction in the catchment. However, having reviewed this and the Agency's evidence, it is accepted that both parties find that there is a need for an AA; I concur.

34. In relation to the AA, the appellant challenges matters relating to the modelling used, the likely effect on qualifying features and the extent of the precautionary approach adopted by the Agency. The HRA Information provided promotes a conclusion that disagrees with the Agency findings, arguing that that was based on a 'zero-risk' policy, and that the threats and pressures are wide-ringing and not linked in this location to abstraction. As such the appellant's submitted HRA Information suggests that a conclusion could be reached that no HoF condition is required. Alternatively, it is suggested that there would be no net effects on the existing baseline, either alone or in combination, and even were there to be, they would be temporary and reversible. On this basis it is proposed that it would be entirely reasonable and justified to allow a delay of four years. I turn then to the points of disagreement.

Modelling and HDERF

35. The appellant argues that the Agency has misrepresented the realistic circumstances for abstraction in the catchment by applying a fully licenced scenario and incorrectly applied peak flow conditions so as to represent maximum risk.

36. The application of a fully licensed scenario is precautionary, the Agency accept that there will be periods through the year when not all licences would be exploited to their full capacity. Nonetheless, in carrying out an AA, it is necessary to adopt a precautionary approach. In this case, the concerns are specific to low-flow conditions, and such conditions are driven by periods of dry weather, typically accompanied in Summer periods by warmer temperatures.

37. While there may be some delay between periods of dry weather and reductions in flow, I do not consider this to be significant. Such conditions

[6] River Wye SAC Core Management Plan (2022) NRW

trigger the requirement for water use within the agricultural sector, which represents a notable level of abstraction, as well as increasing demand on the public water supply network, which represents a significant proportion of the abstraction in this catchment. As such, I do not consider it to be unreasonable for the Agency to have considered a fully licensed scenario.

38. Acknowledging that trickle irrigation presented a seasonal demand, the Agency model incorporated a demand profile based on historic abstraction data. It should be noted that this was based on a relatively small number of NA abstractors submitting data, but was indicative of a peak towards the end of June. The appellant argues that his water demand is relatively static, being based on watering in raised beds within polytunnels, and that peak impacts in June are not reflective of typical low flow conditions.

39. I appreciate that the water use at Pennoxstone is potentially somewhat less weather dependant than agriculture generally, with no direct rainfall or soil moisture contribution to the crops, which instead rely on managed water supplies. However, even in this regime, there will be periods of higher temperatures and transpiration, which will therefore still reflect increased seasonal demand.

40. It is clear that the Agency were aware that selecting a fixed demand profile would not necessarily reflect patterns in other years, and ran additional model runs 6 weeks prior and 6 weeks after the initial demand profile peak. It was all of these scenarios that were reviewed by technical specialists, and I note that resulting hydrographs were reviewed across the full period of recorded flows from the two reference gauging stations, at Redbrook and Lugwardine.

41. The response of flows and weather conditions will vary each year, similarly the demand for water from abstractions is unlikely to be the same, albeit more novel fruit growing techniques, such as at Pennoxstone, may smooth demand somewhat, there will still be a strong demand through warmer, dryer months. However, to properly understand the risk to flows of unconstrained abstraction, a fully licensed scenario must be used, as must some form of demand profile to ensure that seasonable pressures, at a time when weather conditions are likely to be contributing to low-flows, are properly reflected. I am satisfied that the Agency's approach of a modelled peak based on historic data, but with sensitivity assessment for periods either side is a robust and conservative approach and accords with the expected precautionary approach to such assessment.

42. Finally, on the modelling and HDERF matter, the appellant considered that the Agency applied an overly conservative variation figure for the HDERF, contrary to guidance, notably the JNCC CSMG for Rivers. The appellant referred to an expected 15% variation for larger rivers. That this is within the JNCC guidance was accepted by the Agency, who noted that the guidance also reflected the need to use locally agreed targets where already in place.

43. The River Wye is a SAC and a sensitive site, and it is apparent, albeit the appellant did not supply the JNCC document, that in such circumstances locally agreed targets are appropriate and that the flow targets in the guidance are based solely on river size and not necessarily ecological

components. To my mind, lower levels set for smaller rivers are reflective of their greater sensitivity generally, a matter that the Agency, in association with NRW, have considered also applies to the River Wye. I am therefore satisfied that the use of a 10% flow target from the HDERF is appropriate in this case.

Effect on Qualifying Interest Features

44. The relevant interest features, as set out above, are accepted to be in unfavourable status. The appellant argues that the abstraction of water from lower reaches of the River Wye, such as at Pennoxstone, is unlikely to affect the features where threats, they say, are not related to flow in the same way as they are in upper reaches of the catchment. So, while they accept low flows may contribute, within this location the appellant argues they are only a small part and not the key element. While this is referred to as being related, among others, to physical barriers, water quality, sediment dynamics, loss of wetted area and dissolved oxygen, I note the appellant also refers to predation as a significant issue, greater, in his view, than abstraction in the lower reaches.

45. This approach aligns with the appellant's conclusion, quoted above from the HRA Information provided, that abstraction hardly features as a concern, while noting that, at the time of the Hearing, NEs application of the CSM approach to SSSI units to inform the status of the SAC, based on a six yearly cycle of assessment, indicated that the relevant interest features are unfavourable, recovering.

46. The question therefore is whether there is sufficient differential in terms of the influence of abstraction and low flows on the qualifying features between upper and lower reaches so as to accept a different approach to licensing controls, and whether the status of those features is sufficiently robust to allow for a conclusion that abstraction here would not require a HoF restriction or could be tolerant of a delay.

47. While the Agency, in their AA, reviewed some matters associated with abstraction and low flows, such as freshwater flow to the estuary and water chemistry changes, and found no effect, they did find direct effects linked to matters of changes to flow or velocity regime, including associated temperature changes, changes to salinity, water levels, habitat loss and reduced dilution to effects, notably on fish species.

48. The appellant's HRA Information addressed threats by qualifying feature. For lampreys, this identified issues around physical barriers, but also the effect of sediment mobilisation and alteration of flow regimes. For shads, again noting physical barriers to migration as a major impact, but also the potential for damaging flow depletion. For salmon, it noted hydrological change and water pollution as well as the potential for flow depletion. For bullhead, changes to the flow regime are noted, and, while otters are not a species of concern for the Agency, there is a major decline noted for White Clawed crayfish, albeit the threats noted related to competition from the American Signal crayfish and water quality. The transitional mires and quaking bogs habitat is noted to have a principal threat from modification of the hydrological conditions, although its unfavourable status is noted as being due to under-grazing.

49. Despite the appellant's witness's professional conclusion that abstraction hardly features as a concern, it is unquestionably a component of changes to the hydrological regime, reduced dilution affecting water quality, reduction of flow over physical barriers and changes in dissolved oxygen and water temperatures.

50. The Agency's AA also considered qualifying features, noting low flow impacts on lamprey migration, albeit accepting that the Brook lamprey is non-migratory. While it notes Twaite shad have been abundant in the River Wye, the presence of Allis shad is not well-recorded. Twaite shad spawn at or close to the tidal limit, but this would appear to be dependent on temperature and flows. The salmon was identified as a species of particular concern, with the Wye being a highly important river for this species. The Agency consider the population to be close to collapse at around 30% of the Conservation Limit. Critically, the Agency consider that many adult salmon are prevented from migrating from the lower reaches of the river due to water quality, flow and temperature conditions.

51. This accords with the finding in their AA, where changes in flow due to significant levels of abstraction, particularly in low flow conditions, would have a direct affect during the spring migration period, reducing flow velocities, dilution and leading to higher water temperatures. These are all important environmental cues which trigger migration.

52. Having reviewed the evidence, I accept that impacts of the flow regime on spawning gravels, for example, or on wetted width may be more prevalent in the upper catchment. However, effects on flow, temperature, physical barriers, dissolved oxygen and dilution are felt throughout the catchment and may be critical in relation to the environmental cues linked to migration or in exacerbating physical barriers preventing migration. Fish being held back in the lower reaches will clearly affect the spawning success of the anadromous species, the shads and salmon in particular, and may even contribute to increased predation while held in those lower reaches.

53. I cannot therefore conclude that the effect of low flows and the contribution of abstraction is so different between the upper reaches of the catchment and the reach associated with Pennoxstone that an alternative mitigation strategy should be employed.

54. To that end, I note that in excess of 60 NAs were assessed by the Agency. While all of those with direct surface water abstractions have had at least a Qn95 based HoF restriction applied, there are some groundwater or off-line abstractions, which do not have such restriction. Where groundwater abstractions have been shown to have direct hydraulic connection to the river, they too have had restrictions applied. The Agency's approach has therefore been consistent across the catchment.

55. Overall, I do not find the appellant's argument that abstraction does not contribute to particular threats in the lower reaches of the River Wye to be convincing. Low flow conditions, exacerbated as a result of abstraction, have been shown to materially affect the supporting processes on which qualifying habitats and species rely, even within the lower reaches.

56. The appellant argued that NE's SSSI assessment of unfavourable – recovering was indicative of a system with the potential for recovery, even with the historic levels of abstraction associated with NAs. However, this assessment has recently been changed to unfavourable – declining.

57. I note the appellant suggests that to consider this change would be disproportionate or unfair in this case. However, I must consider the latest information and both parties were given an opportunity to comment on the change. While this change was not based on the full 6-yearly assessment and focussed only on certain species, it nonetheless is representative of continuing pressure on those qualifying features. The causes of the acknowledged declines for these species are accepted to be wider than just abstraction. Nonetheless, I am satisfied that low flows, exacerbated by abstractions will be a contributory factor in accordance with my review of threats above.

58. Such further information supports my concerns that this is not a robust system with the ability to withstand continued anthropogenic influences in a 'business and usual' manner. My own assessment therefore concludes that there is a requirement to mitigate the cumulative effects of NA abstractions in low flow conditions. I do not consider that such a requirement represents a zero-risk approach, albeit, as set out, use of a fully licensed scenario is a precautionary approach.

59. There are identified threats to qualifying features associated with low flow conditions, which can only be addressed through the imposition of restrictions. The evidence before me does not support a different risk or threat profile within the lower reaches of the river so as to support a different approach here.

Timing and Potential Exception

60. I have set out the need for imposition of HoF restrictions. However, the appellant argues that there has been delays engendered by the process under the Regulations, including an extension to the determination window for the Agency. They further argue that a period of 4 years to allow for alternative storage provision would not materially affect the integrity of the SAC.

61. Despite accepting that a single abstraction, even one of the scale of that at Pennoxstone, is unlikely to have an impact on integrity alone, to my mind, to step away from the consistent application of necessary restrictions on a cumulative basis, as required by the Habitats Regulations, would represent a risk of others using such a finding as a reason to challenge the restriction on other licences. Even a delay of 4 years would run such a risk; as a result, there must be a clear and definable exception to consider such an approach.

62. The appellant accepted at the Hearing that were the condition to be deleted and other abstractors came forwards and required removal of the HoF condition too, that could lead to serious damage. However, they consider that the position with regard to Pennoxstone is exceptional and identified the short notice of the required conditions, the scale of impact on this particular business and the expectations of a light touch approach for NAs.

63. The previous appeal addressed the matter of the short notice given to the appellant to allow him to make practicable responses to the provision of storage. I have no reason to revisit those findings and consider that there were opportunities for the Agency to have engaged earlier and set out more clearly the implications and likely requirement for restrictions.

64. However, things have moved on and the appellant has been aware for over two years now of the potential restrictions. In addition, for a business so reliant on immediate access to water, and consequently so exposed to pump failures, pipe leakage or other such event, I would have expected there to be plans in place for alternatives. I can fully understand that were the appellant entirely unaware of the risk he may well not have responded prior to the issuing of the license, but nonetheless, I would have expected steps to have been taken by now. In response to questioning on this, it appears that a potential location for reservoir storage had been identified, but no plans were referred to with regard to rainwater collection from the polytunnels, borehole options or other alternatives. Instead, it would appear that the appellant is reliant on waiting for construction of a winter fill reservoir, which, while potentially the long-term solution, will inevitably have planning and construction timescales; in this case, estimated by the appellant at 4 years.

65. I do not underplay the pressure on the appellant and am aware that there will be very real implications from restrictions if there are dry periods triggering low flows before alternative solutions are put in place. However, his position is not unique with there being many other NA trickle irrigation licenses in the catchment, the majority of which were also issued in March 2021. While it was suggested that other businesses that had employed alternative solutions, including winter-fed storage, had done so because of earlier expansion of the business, I was provided with no evidence confirming this.

66. This is a relatively large fruit growing business and as viewed on site, the scale of seasonal workers accommodation is indicative of its importance in employment and economic terms. However, this too does not make it exceptional. There are many other NAs that will represent operations of economic value that are similarly now operating under these restrictions, which have been consistently applied to abstractions from the River Wye.

67. I turn then to the 'light touch' approach that the appellant suggests he expected. While it would appear that this was interpreted as being a 'business as usual' approach, there have been some clear messages on the implications for NAs, not least in the expectation that such an approach would still be likely to include HoF restrictions. It is also necessary to consider the flexibility available to the Agency as regards delaying the imposition of the HoF restriction.

68. The process of regularising the NAs is one of allowing the continuation of previously exempt operations. The government expectations were set out in the initial consultation and response back in 2016/17. The reasons for the change included the need to allow for better and more sustainable water management and to help balance the needs of abstractors and the environment, particularly in areas with known water stress.

69. While a light touch, risk-based approach was expected, this did not mean the exclusion of restrictions, the consultation response was explicit that there may be cases where conditions would be included to protect rivers at low flows and contained a section dealing with HoFs. Clarity on the approach that should be taken by the Agency was then set out in the 2018 Direction. In this, paragraph 4 is clear that where it is necessary to protect from serious damage, the Agency may grant a licence subject to conditions, where such conditions can be expected to protect from that serious damage. A different approach is set out for cases where serious damage will not arise.

70. Serious damage is defined in the 2016 Consultation as an abstraction affecting or having the potential to affect a site designated under the Habitats Regulations and 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. The 2018 Direction had been made after the expectations placed on the Agency under the Regulators Code (2014) and the Environment Act (1995) and must be considered to have taken those into account.

71. To my mind, the NA abstractions in the River Wye catchment have been shown to have the potential to affect the integrity of the SAC through reduction in flows in low flow conditions. This represents serious damage and under the 2018 Direction, the Agency must refuse the application for a license or issue with conditions addressing the risk of serious damage. The same provisions apply in my role under s44 of the WRA.

72. I note the applicant referred to attractions in the Ant Valley, where it was reported that a delay was agreed with the Agency for conditions restricting abstraction. Such abstractions are not within the Wye catchment, and I have limited information on which to base an understanding of the assessment of risks to the integrity of qualifying features, any negotiations with the Agency or any assessment of whether that would represent serious damage.

Conclusions

73. Accordingly, my findings under an AA confirm that in relation to this abstraction, in combination and in low flow conditions, it could not be concluded that there would be no likely significant effect on the SAC. It therefore represents a threat to process, habitats and species, and consequently the integrity of the SAC. Such risks represent serious damage, and in such circumstances, I find the Agency's conclusions to be necessary and proportionate, having regard to the environmental effects of the abstraction alone or in combination and the economic effects on the business.

74. I must therefore dismiss the appeal and direct the Agency to issue the licence without modification.

Mike Robins

INSPECTOR

Appearances:

FOR THE APPELLANT:

Matthew Dale- Harris of Counsel	Instructed by Mr Simon Biggin, Solicitors
Neil Cockburn	Appellant
Paul Bradford	Consultant - Sustainable Water Solutions
Tim Goodwin	Ecology Solutions
Simon Biggin	Solicitor
Hannah Walkden	Trainee Solicitor

FOR THE ENVIRONMENT AGENCY:

Peter Sibley of Counsel	Instructed by Environment Agency Solicitor
Peter Timms	Environment Agency – NPS Officer
Elliot Kenyon-Pain	Environment Agency – NPS Officer
Lesley Worby	Environment Agency – Environment Planning Specialist
Chris Bainger	Environment Agency – Fisheries Technical Specialist
Owain Sheppard	National Resources Wales - Hydrologist