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Attn: Paul Haggin, Development Control Case Officer

By email only: paul.haggin@cumbria.gov.uk
Your ref: 4/17/9007

Our ref: SLACC/MM
Email: mmcfeeley@richardbuxton.co.uk

29 January 2021

URGENT LEGAL LETTER

Re: Decision to grant planning permission for development of a new underground metallurgical coal mine & associated development at Whitehaven; Council Ref: 4/17/9007

Dear Sirs

Proposed Whitehaven Coal Mine: Council Ref: 4/17/9007

We write further to our letter of 7 January 2021 in relation to the above. In particular, we write to ensure that the Council is aware that the new information we sent has specific ramifications in relation to the County Council's consideration of the section 106 agreement in this matter, and of the Climate Change Committee's recent letter to Secretary Jenrick, which demonstrates that the Government's own experts disagree with assumptions upon which the County Council has relied in resolving to issue the permission.

Section 106 Agreement

As you know, a draft s 106 agreement with the applicant was provided to the Development Control and Regulation Committee ("**the Committee**") in advance of the October 2020 Committee meeting and discussed in some detail in the accompanying Officer's Report ("**OR**").

Our clients set out in detail in their letter of 21 June 2020 their concerns with the draft section 106 agreement (the "**S 106**"). We do not seek to repeat those points here, and this letter is without prejudice to the many other points made therein concerning the inadequacy of the section 106. However, with specific reference to the new information in relation to the Sixth Carbon Budget that we have provided, this information directly calls into question whether the S 106 is fit for purpose.

As you will be aware, our clients raised significant concerns with the AECOM Report's significance criterion in their 21.6.20 letter (see pages 22-26). The applicant argues that the S 106 will ensure that the proposed mine would not "compromise the ability of the UK Government to meet its carbon emissions reduction obligations." The Council indicates in its latest OR that the S 106 will allow it to require additional mitigation of GHG emissions if necessary to meet UK GHG emissions targets. (OR para 7.275)

However, the 1% significance criterion that is incorporated into the AECOM Report and the S 106 provides that the methodology of the "Proposed GHG Report" shall be in accordance with that used in the AECOM Report.¹

The new information provided to the Council illustrates the scenario the Government's expert Climate Change Committee ("**CCC**") considers is the most cost-effective path to meet the legislated GHG emissions limits for the period from 2033-2037. As we have noted, the data provides the first information available about the emissions reductions necessary on a subsector-by-subsector basis to comply with the UK carbon budgets. Where any subsector exceeds the subsectoral budget, this imposes costs on other sectors, which will be forced to take action to reduce emissions beyond the cost-effective pathway. It is therefore clear that where a single project will exceed the subsectoral budget, this jeopardises the UK's ability to meet the carbon budgets, and/or imposes costs on other sectors of the economy that must be considered. It is submitted that any single project which exceeds the subsectoral budget must therefore be considered to give rise to significant carbon emissions.

We are fortified in this by a letter from the CCC itself to Robert Jenrick, sent on 29 January 2021, which makes these very points: there will be an appreciable impact on the UK's legally binding carbon budgets because the mine is projected to increase emissions to a level greater than the annual emissions projected from all open UK coal mines to 2050. Please note that it is highly unusual for the CCC to raise with the government matters relating to a specific planning application. This demonstrates just how important the matter is considered to be by the CCC.

We submit that all of the above requires revising the S 106 to incorporate a new significance criterion which reflects the CCC's subsectoral budget for operational emissions from open and closed coal mines. However, at minimum, the Committee must now be provided with this new information and asked to consider whether the S 106 should be revised.

Other Points Made by the CCC

In addition to points made in relation to the significance of the mine's emissions we note that the CCC specifically concludes that:

- "The opening of a new deep coking coalmine in Cumbria will increase global emissions", and
- "Coking coal use in steelmaking could be displaced completely by 2035, using a combination of hydrogen direct reduction and electric arc furnace technology to meet our recommendation that UK ore-based steelmaking be near-zero emissions by 2035."

¹ Unless changes in legislation, national policy, or accepted national guidance provide otherwise. This would seem to require legislation, national policy, or "accepted" national guidance to set specific criteria for significance of greenhouse gas emissions in order to displace the AECOM methodology. It is submitted that this is unlikely, as the general approach to EIA in the UK has been to allow significance to be determined on a case-by-case basis depending on the type of development proposed and the surrounding circumstances. For instance, whilst EIA is required for all Schedule 1 development, even the relatively clear-cut thresholds in Schedule 1 simply require that EIA is done, but do not mandate which environmental impacts must be considered within the EIA as potentially significant in any particular case. And of course, for all other projects, the question whether EIA is even required is left to the decisionmaker's judgment.

Both of these points directly contradict key conclusions on which the OR relied. See e.g. OR at paras 7.29, 7.67, 7.84, 7.162, 7.299-7.300, 7.302, 7.304. Where the Government's expert advisory committee has expressed a clear opinion which contradicts the findings of the Council's planning officer, we submit that reference back to Committee is clearly required to consider whether the conclusions on which the resolution to grant permission relied are valid.

Yours faithfully

Richard Buxton Solicitors

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