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Our ref: SOU1/1 (MRM/)

23 December 2022

Secretary of State for Levelling Up, Housing & Communities  
c/o Government Legal Department  
Litigation Group  
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## PRE-ACTION LETTER THIS LETTER REQUIRES YOUR URGENT ATTENTION

Dear Secretary of State,

**Former Marchon Site, Pow Beck Valley and Area from the Former Marchon Site to the St. Bees Coast, Whitehaven, Cumbria – Grant of planning permission for application 4/17/9007**

1. This is the proposed Claimant's pre-action letter, which we are sending in accordance with the Practice Direction – Pre-Action Conduct and Protocols.

### **Claimant**

2. We are instructed by South Lakes Action on Climate Change *Towards Transition* (“**SLACC**”), a Rule 6 Party during the Planning Inquiry which led to the decision under challenge.

### **Defendant**

3. The proposed Defendant is the Secretary of State for Levelling Up, Housing and Communities (“**the Defendant**” or “**the Secretary of State**”).

### **Decision to be Challenged**

4. The Claimant challenges the decision of the Defendant to grant West Cumbria Mining Ltd (“**WCM**”) planning permission for a new underground metallurgical coal mine and associated development (“**the Decision**”) (as described more fully in the Secretary of State's decision letter (“**DL**”) and in the Inspector's Report (“**IR**”) by Stephen Normington (“**the Inspector**”) to the Defendant).

### **Date of Decision**

5. 7 December 2022 (published at 18h00).

### **Factual Background**

6. The factual background in respect of this application and the Inquiry which took place in September-October 2021 (“**the Inquiry**”) will be well-known to the Defendant and his legal representatives and is not recited here.

### **Proposed Grounds of Challenge**

7. At present, without prejudice to the Claimant’s right to rely on further or alternative grounds of challenge, and subject to the requests for information below, the Claimant considers that the following eight grounds of challenge arise.
8. Unfortunately, the IR, and thus the DL, are shot through with errors and with examples of the Inspector (and hence the Secretary of State) either ignoring or cherry-picking evidence. Mindful of the criticism, often levelled at proposed Claimants who put forward a number of grounds of challenge, what follows is not a ‘scattergun’ approach. The proposed Claimant has not included every error made by the Inspector and the Secretary of State; rather, the proposed Claimant has only included as grounds of challenge the main errors, which had a significant impact on the Decision.

### **Proposed Ground 1 Error in discounting the international impact of granting permission; alternatively failure to give intelligible reasons**

9. The international impact of the UK granting permission for a new coal mine, and its negative effects on the UK’s status and role as a global climate leader, were principal controversial issues in the inquiry. One of the reasons the Secretary of State called in the application was due to the potential for “*substantial cross-boundary or national controversy*” or that the case “*may involve the interests of national security or of foreign governments*”. Issues of national reputation and global leadership fall squarely within these categories and were plainly part of the reason for call-in in this case.
10. WCM’s planning witness accepted in cross-examination that the fact that G7 countries, including the UK, have committed themselves to taking a credible lead in meeting the temperature targets set by the Paris Agreement was a material planning consideration.
11. SLACC led detailed evidence on this issue from Sir Robert Watson, former chair of the Intergovernmental Panel on Climate Change and of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services and of the World Meteorological Organisation; former chief scientific advisor in the White House; chief scientific advisor at the World Bank and a senior scientific advisor in DEFRA. He was the only expert witness with experience in the field of international climate change diplomacy. His evidence was:
  - a. Were the UK to permit a large coal mine such as the proposed Woodhouse Colliery, this would have a negative effect on the UK’s climate diplomacy image and efforts. A signal would be sent that the UK is not serious about its climate ambition or its promises of world

leadership on this issue. This would have material consequences in the form of reduced ambition from other countries, and therefore increased GHG emissions;

- b. If the mine was permitted on the basis that it was “*carbon neutral*”, “*carbon negative*” or a “*net zero mine*”, this would have an equally negative impact. If the rationale for permitting the mine was supposedly that to do so would not increase (or would decrease) global greenhouse gas emissions, many other countries would be likely to follow suit in arguing that they too needed to allow new fossil fuel extraction projects within their borders for similar reasons. The decision could thus have serious knock on effects, leading many countries to justify new coal mines, or oil extraction projects, etc, on the basis that this was actually good for the global climate. This would not be positive climate leadership, but would set a harmful precedent which would undermine both the UK’s climate leadership and international efforts to meet keep global temperature rise below dangerous levels.
  - c. Even if the mine were ‘truly’ net zero – i.e. all emissions were captured – it would still have an overall negative effect on climate change because it would encourage, or provide an excuse for, other new additional mines to be opened, claiming to be net zero.
12. SLACC and FoE also relied on a letter sent to the Secretary of State by Lord Deben, the Chair of the Climate Change Committee (“**the CCC**”), the independent expert statutory body established to advise the Secretary of State on compliance with the carbon budgets (CD 8.13). It is highly unusual for the CCC to write such a letter in relation to a specific proposed development. The letter expressed the CCC’s concern on a number of matters, including the international implications of granting permission for the mine and the fact that it “*gives a negative impression of the UK’s climate priorities in the year of COP26.*”
  13. The issue was a key part of both SLACC and FoE’s Closing Statements. SLACC set out and relied on Sir Robert’s evidence which was largely unchallenged and addressed the narrow ways in which it had purportedly been challenged – predominantly, the dismissal by WCM of the issue and why that was incorrect. FoE set out and relied on the relevant passage in the CCC’s letter.
  14. The Secretary of State and the Inspector were required to grapple with the case put forward on this principal controversial issue and to give an adequate explanation for accepting or rejecting the key evidence: *South Bucks DC v Porter (No.2)* [2004] 1 WLR 1953 at §36; *R (CPRE Kent) v Dover DC* [2018] 1 WLR 108 at §§35-42. It is not sufficient for them merely to refer in general terms, or through shorthand, to the issue. It is unlawful for the decision-maker to fail to engage with or grapple with the case that has been put forward in a significant respect: see, for example, *R (MacKenzie) v SSJ* [2009] EWCA Civ 669 at §§32-33.
  15. The IR completely failed to deal in its Conclusions or in the Planning Balance with Sir Robert’s evidence or with the CCC’s letter and failed to grapple with the principal controversial issue to which it went. The Report did not even mention them.
  16. The closest the Inspector came is IR 22.16, where he referred, in a single sentence, to there being “*considerable discussion*” regarding “*the ‘virtue*

*signalling' of granting permission for a new coal mine against the background of climate change and the UK's position as a world leader in that regard". The Inspector did not grapple with any of the evidence or, indeed, with the actual issue, on which he did not appear to come to a conclusion.*

17. Instead, he stated: "*However, planning policy does not provide any restrictive approach to coal extraction. It provides a rigorous test for the consideration of coal mining proposals as prescribed by paragraph 217 of the Framework.*". (emphasis added). That is plainly incorrect, given paragraph 217 of the Framework does provide a restrictive approach to coal extraction.<sup>1</sup> It also does not address the principal controversial issue, particularly as it was the Rule 6 parties' position, and accepted by WCM's planning witness, that the effect of the grant of permission on the UK's international climate leadership was part of the reason the decision was called in and was a material planning consideration.
18. The Inspector thus failed to grapple with the issue; failed to engage with the evidence and failed to give any reasons for rejecting Sir Robert's evidence (if that is what he did); failed to give any reasons for rejecting the CCC's advice (if in fact that is what he did); and/or failed to provide any cogent and intelligible reasons for his approach to the issue.
19. The Secretary of State failed to address the issue at all in the DL.
20. This amounts to an error of law which undermines the cogency of the entire approach of the Secretary of State to the negative climate impacts of the mine. As the Rule 6 parties made clear (but which was not addressed by the Inspector or the Secretary of State), the effects of granting permission on the UK's climate leadership and the resulting use of the mine as a precedent for new coal mines around the world would be devastating for climate change. Far from being "*neutral*" or "*slightly beneficial*", had the Inspector and the Secretary of State properly grappled with this issue, it could have resulted in the climate impact being strongly negative.

**Ground 2: Errors of law in misunderstanding or misinterpreting National Planning Policy: paragraphs 152 and 217 of the NPPF.**

21. The proposed Claimant is mindful of the decision in *Hopkins Homes Ltd v Secretary of State* [2017] 1 WLR 1865 per Lord Carnwath at §25 that Inspectors are assumed to know and understand planning policy, particularly when it has been addressed before them. Nevertheless, the way in which an Inspector sets out and applies national planning policy can positively disclose an error of understanding. In *Barker-Mills Estate Trust v Secretary of State* [2016] EWHC 3028 (Admin), at §§83-84 Holgate J set out that a claimant must identify (i) the policy wording said to have been misinterpreted, (ii) the interpretation of that language adopted by the decision-maker and (iii) how that interpretation departs from the correct interpretation of the policy wording in question. This is the proposed Claimant's approach in the proposed grounds below.

**Paragraph 152**

22. The first policy wording the Inspector misinterpreted is the requirement in

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<sup>1</sup> This error is addressed further in Ground 2.

paragraph 152 of the NPPF that the planning system “*support the transition to a low carbon future in a changing climate*” and “*should seek to shape places in ways that contribute to radical reductions in greenhouse gas emissions*”. Paragraph 152 requires both aspects: support for a low carbon economy and radical reductions in GHG emissions. This is plain from the language of the paragraph.

23. It is also consistent with other climate change obligations, and the contribution to radical reductions in GHG emissions reflects the Paris Agreement temperature goals, the net zero obligation in the Climate Change Act 2008 and the carbon budgets, including the Sixth Carbon Budget, all of which are based on the need for, and all of which require, radical reductions in GHG emissions. This was put to, and accepted by, WCM’s planning witness.
24. The Inspector, at IR 21.65, referred to paragraph 152, but only to the first sentence, concerning transition to a low carbon economy. He emphasised that this does not expect “*a total removal of all carbon emissions*”. He made a similar point at IR 21.131. He did not mention, set out or address the second sentence of paragraph 152 or the requirement to contribute to radical reductions in GHG emissions. Nor did he do so earlier in the decision at IR 5.7-5.8, when he set out relevant policies of the Framework (in fact he did not mention paragraph 152 at all in that section).
25. At no point in the Inspector’s Conclusions or Planning Balance did he mention or address the policy requirement to contribute to radical reductions in GHG emissions.
26. The Inspector found at IR 21.131 that the proposed development is consistent with paragraph 152 “*on the basis of the comprehensive mitigation that will be adopted and whole life net zero commitment*” and because operating a (purportedly) net zero mine would “*to some extent support the transition to a low carbon future.*”
27. The Inspector failed to address or apply the requirement within paragraph 152 NPPF to “*contribute to radical reductions in greenhouse gas emissions.*” Given the emphasis on the need for “*radical reductions*” within paragraph 152, it is clear that consistency with paragraph 152 does not require simply “*neutrality*” over the life of a development, but an active reduction in emissions. A development which causes considerable GHG emissions, which are either captured or eventually offset, does not comply with the second sentence of paragraph 152. The Inspector wholly overlooked this element.
28. Accordingly, either the Inspector erred in misunderstanding that both aspects of paragraph 152 of the NPPF were relevant and should be applied to determine whether the proposed Development complied with and was supported by the Framework; or the Inspector failed to give adequate and intelligible reasons concerning the requirement to contribute to radical reductions in GHG emissions.

#### Paragraph 217

29. At IR 22.16, the Inspector’s assessment of paragraph 217 of the NPPF (which was not corrected by the Defendant in the DL) was that “*planning policy does not provide any restrictive approach to coal extraction*” (emphasis added). Earlier, in the Inspector’s Conclusions at IR 21.55, he contrasted proposals for

coal extraction with those for peat extraction, emphasising that paragraph 211(d) of the Framework makes “*clear that planning permission for peat extraction should not be granted*” and stating that there is “*currently no planning policy or guidance in England to suggest that proposals for coal extraction should not come forward.*”

30. This discloses a material misunderstanding of national policy. Contrary to the Inspector’s statement at IR 22.16, paragraph 217 of the NPPF is obviously ‘restrictive’ in respect of its approach to coal extraction. It begins “*planning permission should not be granted for the extraction of coal*” before providing for two, limited exceptions which allow the prohibition to be disapplied. Paragraph 217 of the NPPF does, correctly understood, provide a restrictive approach to coal extraction.
31. The Inspector’s approach to the comparator provision within the NPPF (paragraph 211(d)), which is said to “*contrast*” with paragraph 217 (IR 21.55) further underscores this error. The comparison is employed, presumably, to justify the erroneous conclusion that paragraph 217 is not restrictive because it does not limit approval to the extent set out within paragraph 211(d). What this approach overlooks, however, is that paragraph 211(d) is not simply restrictive but wholly prohibitory of peat extraction. It is not the case that planning policy must be completely prohibitory in order to be considered ‘restrictive’, and to the extent that the Inspector took a contrary view, evidenced by IR 21.55, he erred in law.
32. As a result of the above errors, the Inspector adopted an incorrect understanding of the critical NPPF tests which governed this application. Alternatively, the Inspector erred by taking into account an immaterial consideration, namely that “*planning policy does not provide any restrictive approach to coal extraction*”.

**Ground 3: Error of law and/or failure to give reasons concerning substitution**

33. A principle controversial issue between the parties, again central to the extent of the climate impact of the mine, was substitution: WCM asserted that the coal produced would “*displace*”<sup>2</sup> and/or “*replace*”<sup>3</sup> and/or “*substitute*”<sup>4</sup> for coal currently being supplied by existing mines, predominantly located within the USA.
34. As set out in SLACC’s Closing,<sup>5</sup> Professor Grubb addressed substitution and shipping emissions (both on the basis of the AECOM report and the Ecolyse Report) and his evidence demonstrated that, for WCM’s argument to work, there has to be not just “*substitution*” but “*perfect substitution*”: if even 1% of the of the coal from the mine were net additional, this would result in more than a doubling of the existing Ecolyse estimate for “*likely mitigated*” emissions from the mine for every year that the mine is operating at full capacity.<sup>6</sup> So if “*only*” 90% substitution took place, the actual emissions from the mine would be more than 11 times the Ecolyse estimates for every year the mine operated at full capacity.<sup>7</sup>

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<sup>2</sup> WCM/JT/1 § 3.5.

<sup>3</sup> Revised ES Chpt 19 (August 2021) §14

<sup>4</sup> WCM/ST/1 §5.143.

<sup>5</sup> §§54-55.

<sup>6</sup> SLACC/MG/3 §2.19.

<sup>7</sup> SLACC/MG/3 §2.20.

35. WCM's witness confirmed these figures were not disputed. Accordingly, they represent the undisputed evidence before the Inspector.
36. In DL 21, the Secretary of State agrees, for the reasons given at IR 21.50-21.51, "*that the WCM coal would be at a competitive advantage over US coal and therefore it is highly likely that there is the potential for a significant degree of substitution to occur* (IR21.52)." (emphasis added). Neither the Inspector nor the Secretary of State find that there will be 100% substitution. The Inspector refers to "some degree of substitution" in IR 21.51.
37. However, they do not go on to grapple with what this means, in light of Professor Grubb's evidence that "*only*" 90% substitution would result in emissions from the mine being more than 11 times the Ecolyse estimates every year (and that these additional emissions from end use of the coal would not be offset); and even if 1% of the of the coal from the mine were net additional, this would result in more than a doubling of the existing Ecolyse estimate.
38. It is notable that, although the Secretary of State referred in DL 21 to disagreeing with "*SLACC's assertion*" about additional GHG emissions, the reference is in fact to FoE. The Secretary of State fails to address SLACC's actual submissions on substitution, nor does he appear to grasp the implications of accepting that there would only be a "*potential*" for a "*significant degree of*" substitution. In light of that factual finding, either it was not possible, given Professor Grubb's evidence, to find a neutral climate impact; or Prof Grubb's evidence and the undisputed numbers have been rejected, without any reasons being given for by the Secretary of State or the Inspector.
39. This failure to grapple with Professor Grubb's evidence and the ramifications of there only being 90%, or even 99%, substitution, has a significant impact on the conclusions on GHG emissions. The Inspector concluded that "*the potential for the coal from the proposed development to substitute to some extent for other coal, rather than acting as an additional source*" in IR 21.120 (emphasis added), which was key to the conclusion, in IR 21.121, that there is a "*neutral or at worst slightly beneficial*" effect in relation to GHG emissions. The Secretary of State accepts this at DL 36. However, in light of Prof Grubb's evidence, on undisputed numbers, a "*neutral*" or "*slightly beneficial*" climate impact requires 100% substitution, which neither the Inspector nor the Secretary of State found.
40. Accordingly, the Secretary of State either erred in failing to appreciate the implications of the factual findings; or erred in failing to grapple with those implications; or erred in failing to give intelligible and cogent reasons.

#### **Ground 4: Errors of law concerning downstream emissions**

41. IR 21.114-21.115 discloses that, in light of the Court of Appeal's decision in *R (Finch) v SSLUHC* [2022] EWCA Civ 187 ("**Finch**"), the Inspector considered the evidence of the extent of downstream emissions provided by the Rule 6 Parties' experts, as well as a further adequacy check undertaken by the Planning Inspectorate Environmental Services Team. The Inspector concluded that the information "*demonstrates that substantial carbon emissions will arise from the end use of the extracted coal [220 million tonnes of CO<sub>2</sub>e over the life*

of the mine<sup>8</sup>]. Having regard to this information and relevant IEMA guidance (IEMA Assessing Greenhouse Gas Emissions and Evaluating their Significance. 2nd Edition) it is my opinion that the release of these emissions at this scale and intensity are likely to be significant.”. Accordingly, there is an explicit finding that downstream emissions are a likely significant effect of the proposed development.

42. Despite this, the Inspector concluded at IR 21.123 that the downstream emissions “cannot reasonably be regarded as indirect significant effects of the proposed development.” The Secretary of State adopts this at DL 32-35. This conclusion is based on three errors. The first is already set out above: the error concerning substitution.
43. The second is that, at IR 21.117, the Inspector referred to §70 of *Finch* and relied on the applicant not having “*knowledge or control over*” the processes said to intervene between the extraction of the coal and the release of its GHG emissions through burning. However, this misunderstands §70 of *Finch*, in which Lindblom LJ rejected the developer’s contention that EIA is concerned with matters within the control of the developer and, crucially, did not rely on lack of control as a reason for the downstream emissions from the proposed oil extraction in Surrey not amounting to an indirect effect of the development. The Inspector is thus incorrect in contending that there is “*correlation*” between his consideration of, and reliance on, lack of control in IR 21.117 and §70 of *Finch*. The Secretary of State adopts the Inspector’s error.
44. The third is that the Inspector relied on intervening processes between the extraction of the coal and its subsequent use in blast furnaces, specifically emphasising the that the coal “*may be blended with other coke and would then be placed in a blast furnace*” (IR 21.116; see also 21.119; 21.122; 21.123). The only evidence before the Inspector about the blending of the coal concerned whether the high sulphur content of the coal would prevent its use in the UK and Europe, or whether “*blending with lower volatility coals*” would, or could, address that problem: see SLACC’s Closing §§142-146. Nothing in that evidence was relevant to, or touched on, the impact of blending on the emissions from the coal. It was not open to the Inspector, without further evidence, to assume that the blending of the coal would have any impact whatsoever on the extent of downstream GHG emissions caused by the coal or justified a conclusion that there is insufficient causal connection between the extraction of the coal and the emission from its burning in blast furnaces.
45. The Inspector did not refer to any evidence; it is unclear what, if anything, the Planning Inspectorate’s Environmental Services Team, provided to the Inspector and the Secretary of State in relation to the impact of the potential blending of the coal on the GHG emissions resulting from the coal being burned. The Rule 6 parties were not made aware of PINS’ further assessment and were not provided an opportunity to make submissions on the relevance, if any, of the blending of the coal to the downstream emission issue.<sup>9</sup> Taking these matters together, the Inspector and the Secretary of State erred.
46. Alternatively, the Court of Appeal decision in *Finch* was wrongly decided. It is subject to appeal before the Supreme Court, to be heard in June 2023.

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<sup>8</sup> IR 21.111.

<sup>9</sup> The potential Claimant reserves the right to raise a further point of unfair process, depending on what the potential Defendant discloses under his pre-action duty of candour.

Correctly understood, the downstream emissions which would inevitably be caused by the mine are indirect significant effects of the proposed development, and no additional test of “*sufficient causal connection*” or assessment of the “*essential character*” of the proposed development is necessary or should be applied; nor is the “*level of ‘control’ or lack of ‘control’ which the developer would have over future occurrences off-site*” a relevant factor.

**Ground 5: Failure to grapple with or address the Gold Standard letter**

47. Offsetting was another principal controversial issue, going centrally to WCM’s claim that the mine would be net zero, and thus crucial to the nature and extent of the climate impact and whether the environmental impacts of the coal mine could be made acceptable.
48. At IR 21-97 – 21.101, the Inspector referred extensively to the Gold Standard in relation to carbon offsetting, including in relation to its offsets being “*robustly audited*” (emphasis added); relied on the fact that the Gold Standard is “*a globally recognised framework*” and concluded that the use of offsetting “*is neither unusual nor inappropriate in the proposed development*”. The Secretary of State accepted this at DL 31.
49. The Inspector’s conclusions on offsetting were crucial to his overall conclusion that the climate impact of the proposal would be neutral, given that he accepted that there would inevitably be GHG emissions from the proposal [IR 21.126 (erroneously second IR 21.125)]. The Secretary of State accepted this at DL 31 and 37.
50. FoE provided a letter to the inquiry, from the Gold Standard,<sup>10</sup> setting out that the purchase of carbon credits to justify a new mine for fossil fuels is a fundamentally inappropriate use of offsetting. It stated, in very clear terms, that the Gold Standard considered that voluntary offsetting could not properly be used to justify new fossil fuel exploration or extraction and that, in the absence of a commitment to offset Scope 3 emissions (i.e. the emissions from burning the coal), any “*claim to have offset emissions [would be rendered] incredible.*” FoE relied on this in Closing.<sup>11</sup>
51. Given the Gold Standard is the very scheme relied on by the Inspector to conclude that offsetting of the mine’s emissions would be neither inappropriate nor unusual, direct evidence of their views is particularly pertinent. The Inspector failed to refer to the Gold Standard letter in his Conclusions or in the Planning Balance and thus failed to grapple with and address the evidence put forward in the letter. It is unclear whether he turned his mind to that evidence or why he apparently rejected it in order to conclude, contrary to the Gold Standard letter, that offsetting authenticated by the Gold Standard would be neither inappropriate nor unusual. The same is therefore true of the Secretary of State’s DL. The Secretary of State’s reasons thus fail the test for intelligible and adequate reasons. The DL and IR leave room for “*genuine doubt...as to what [the decision-maker] has decided and why*” on a “*principal important controversial issues*” because they do not disclose how a key issue was resolved.

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<sup>10</sup> Appendix 7 to Mr Broekhoff’s Rebuttal Proof [FOE/DB/3]; [ID 7].

<sup>11</sup> ID73 at §§78-84; 135.

**Ground 6: Error of Law in Considering the Amended Scheme (Underground Conveyor and Pipe-Jacking) and/or failure to give reasons**

52. The factual background to the Applicant's amendment of its application from one which uses a "sub-surface conveyor installed by a cut and cover method" as the "chosen method of coal transportation" to one in which the sub-surface conveyor would be installed partly by a cut and cover method and partly via trenchless tunnelling using pipe jacking, is set out in detail in SLACC's submissions on the issue [ID66] at §§5-23. Contrary to the tone of IR 4.17, the Inspector did not ask for the information about an alternative proposal to install and underground conveyor using pipe-jacking and that information emerged in a piecemeal fashion, unheralded and unbidden.
53. As set out in SLACC's legal submissions, the Secretary of State does not have the power to consider a "*substantial*" amendment, which fails to comply with sections 65 and 327A of the Town and Country Planning Act 1990: see *R(Holborn Studios Ltd) v Hackney LBC* [2018] PTSR 997 at §§9-12; 20-21 and 64-68. It is not purely a question of planning judgment whether an amendment is "*substantial*". It is a mixed question of fact and law, in light of what is understood in the case law to comprise a substantial amendment: see *Holborn Studios* at §64 and *Bernard Wheatcroft Ltd v Secretary of State for the Environment* [1990] P & CR at §241.
54. The Inspector approached the question as one wholly of planning judgment: IR 21.10.
55. WCM's case for why the amendment was not "*substantial*" was that it was a very small part of the overall proposal. It appears from IR 21.9 – 21.11 that the Inspector accepted that case, given he emphasises that the amendment is "*relatively small*".
56. SLACC's submissions, however, relied directly on the evidence given by WCM's planning witness, that the conveyor mechanism was a crucial part of how the proposed development worked; was crucial to whether the development could come forward and, importantly, was central to whether the development complied with national policy. Accordingly, even though the parts of the conveyor that go through (via cut and cover) or under (using pipe jacking) ancient woodlands are only around 80m and 50m respectively, they are crucial to whether the development itself comes forward. SLACC submitted that the pipe jacking amendment was therefore patently a "*substantial amendment*" as understood by *Holborn Studios* at §64.
57. The Inspector failed to grapple with these submissions and failed to give any reasons (let alone intelligible reasons) for rejecting them. Asserting that the change is "relatively small" does not address SLACC's key point – that a change which is critical to the development coming forward and to a development complying with national policy is substantial.
58. The Inspector recognised at IR 21.22 that the Secretary of State may wish to take further legal advice on the matter and may come to a different view. DL 17 simply agrees with the Inspector and provides no separate reasoning. It is unclear whether the Secretary of State took further advice as to whether the use of pipe-jacking "*for the construction of a relatively small section of the underground conveyor route*" did not constitute a substantial amendment to the scheme, as he simply adopted IR 21.9-12.11. There is thus no indication the

Secretary of State appreciated that the question of whether the amendment was substantial was a mixed question of fact and law; what he understood in light of the *Holborn Studios* case and what view, if any, he formed in relation to the submission that that a change which is critical to the development coming forward and to a development complying with national policy is substantial.

**Ground 7: Procedural impropriety - Apparent bias of the Inspector**

59. As the House of Lords established in *Porter v Magill* [2002] 2 AC 257 at §§102-103, the correct approach to apparent bias is for the court, first, to ascertain all the circumstances which have a bearing on the suggestion that the decision-maker may have been biased; and, secondly, to ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased.
60. A clear distinction is drawn between judicial or quasi-judicial processes and those decisions that are entrusted to local councillors: in the latter instance, it is expected that members may have strong views on particular policies or projects; the same is not true of planning inspectors: *R (Lewis) v Redcar and Cleveland BC* [2008] EWCA Civ 746.
61. “All the factual circumstances” include:
  - a. The main issues in the inquiry, which included determining the need for the proposed mine (so engaging with evidence on the steel industry); the climate change impact of the proposed mine (meaning familiarity with climate change and the climate science would also have been relevant); and adjudicating the potential benefits and disbenefits of the proposed development;
  - b. The Inspector’s experience and expertise; and
  - c. Recent public comments at any other relevant inquiries made by the Inspector.
62. In August 2022, after the close of the Cumbria Inquiry but prior to the Secretary of State’s Decision, the Inspector conducted an inquiry concerning the refusal of permission for the development of an Energy from Waste Facility at Hownsgill Industrial Park (“**the Hownsgill Appeal**”).<sup>12</sup> The application site in the Hownsgill Appeal comprised land which was formerly part of the Consett Steel Works (which closed in 1980) in County Durham.
63. As was reported in local media in August 2022;<sup>13</sup> by the BBC in August 2022<sup>14</sup> and in national news after the instant decision was announced, the Report published and the Secretary of State’s statement to Parliament, emphasising his reliance on the Report of the “independent planning Inspector”<sup>15</sup>, immediately prior to closing the Inquiry in respect of the Hownsgill Appeal, the Inspector made the following remarks:

*“I’m from a mining background. I’m from a pit village. I still live in a pit village. I worked 10 years down the pit. I’m the only inspector ever to work down the pit”*

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<sup>12</sup> LPA Ref: DM/20/03267/WAS.

<sup>13</sup> <https://www.thenorthernecho.co.uk/news/20684842.ex-miner-inspector-realls-residents-waste-plan-inquiry-i-get-it/>

<sup>14</sup> <https://www.bbc.co.uk/news/uk-england-tyne-62671461>

<sup>15</sup> <https://www.thetimes.co.uk/article/former-miner-approved-cumbrian-coalmine-5c73q788t>

*“The anguish you felt when the steel works closed, I’ve been part of it so I know what you went through because I went through it.”*

64. SLACC is concerned that the Inspector’s comments would cause a fair-minded and informed observer who has considered the facts to consider that there was a real possibility that he was biased in favour of the applicant’s case. His comments arguably go beyond demonstrating that he had appropriate mining experience relevant to the inquiry and raised questions whether and to what extent the Inspector’s experience and views were taken into account when he was appointed.
65. The Secretary of State should have been made aware of those comments before he issued his Decision in the Cumbria application, given the Hownsgill Appeal was a called-in appeal; the comments were made in August 2022 (before the Decision in this appeal was finalised and published) and were relevant to the Secretary of State’s consideration of both appeals.
66. The Claimant highlights the requests for further information in respect of this ground as set out at paragraph 88 below and reserves the right to update and amend this ground after the Defendant complies with the duty of candour.

**Ground 8: The Defendant imposed an unlawfully high threshold in analysing the evidence before him; applied different thresholds to the arguments of WCM and SLACC, and reversed the burden of proof in respect of the application for planning permission contrary to paragraph 217 of the NPPF.**

67. The Inspector and Secretary of State repeatedly required SLACC to provide ‘certainty’ in respect of its case, particularly concerning their submissions on the advance of green-steelmaking technologies (see IR 21.37, IR 21.38, IR 21.40, and IR 21.43 (accepted at DL 18-21)).
68. Applying a certainty standard (akin to the criminal standard of proof) to issues in planning inquiries has been held to be inappropriate because planning judgments *“whether evaluative or forecasts or estimates about a particular future, are by their nature probably incapable of proof to that standard”* (per Sir Duncan Ouseley in *Satnam Millenium Ltd v SSHCLG* [2019] EWHC 2631 (Admin) at [107]). The Inspector required SLACC to prove its case to an unlawfully high standard.
69. Like the analysis of the forthcoming commercial availability of green steelmaking, there were other complex issues on which the Inquiry heard direct, detailed expert evidence. Among these was the extent to which the proposed mine’s coal could ‘substitute’ for existing supply, and whether there would be transport emissions savings achieved by providing metallurgical coal domestically.
70. There is a concerning contrast in the way in which SLACC’s submissions on the advance of green steelmaking technologies were dismissed (i.e. because they were not certain), and the way in which WCM’s arguments in respect of these further complicated topics were accepted. The Inspector applied a different threshold or a differential standard to the parties.
71. A key element of SLACC’s case was a criticism of the fundamental unlikelihood of the coal from the proposed mine substituting perfectly for the coal currently

supplied by existing mines. On the topic, the Inspector stated: *“it is reasonable to assume that WCM only needs to be marginally cheaper to encourage some degree of substitution”* (IR 21.51) [...] *“therefore it is highly likely that there is potential for a significant degree of substitution to occur.”* (emphasis added).

72. Similarly, the Inspector found at IR 21.121 that absent the proposed development there would be *“equivalent emissions”* which would *“likely occur from other origins”* meaning that opening the mine or not would not significantly impact global emissions levels. The Inspector then went on to directly confirm, however, that *“uncertainty will remain as to the likely origin of any replacement products.”*
73. The Inspector therefore expressly acknowledged as uncertain, but nevertheless accepted, WCM’s case on alternative emissions sources, when he had repeatedly criticised and rejected SLACC’s case because it was uncertain. His approach is starkly inconsistent.
74. Furthermore, the correct approach to evidence under paragraph 217 of the NPPF is that it imposes a high hurdle on an applicant to satisfy an inspector that the presumption against the grant of planning permission is overcome because either of the exclusions within paragraph 217(a) and (b) apply. It is open to Rules 6 parties to show errors or flaws in the applicant’s evidence, and thus submit that the requisite cogency of evidence to overcome the presumption has not been provided, although the burden of showing that the threshold within paragraph 217 has been crossed remains with the applicant.
75. On a number of key issues, the Inspector took the opposite approach to the evidence to that which he should have taken:
  - a. He criticised the Rule 6 parties for failing to provide an alternative environmental impact assessment on GHG emissions (IR 21.75),<sup>16</sup> when there is no requirement for them to do so – the obligation is on WCM to provide a full and cogent assessment;
  - b. He accepted WCM’s case as to what could be excluded from emissions calculations because the Rule 6 parties had not provided *“other compelling evidence”* (IR 21.86) to question this; discounting the detailed criticisms made of WCM’s evidence;
  - c. He accepted that the proposed Methane Capture System could operate physically on the site because the Rule 6 parties had not provided *“contrary evidence to suggest the methane capture system is incapable of being accommodated”* (IR 21.89, 21.93), discounting the failures by WCM to provide plans and information, even to its own expert witnesses and seemingly expecting the Rule 6 parties to compile their own positive evidence when the plans showing the methane system were only provided to the inquiry on the morning of Closing Statements;<sup>17</sup> and
  - d. He accepted that WCM’s employment projections were accurate because *“no evidence was provided to suggest that the content of the organogram may be incorrect”* (IR 21.246), discounting WCM’s

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<sup>16</sup> And ignored the assessment SLACC provided, in the evidence of Prof Grubb, which amounted to expert and cogent environmental information assessing the extent of the GHG emissions (both direct and indirect) which would be caused by the mine. The proposed Claimant reserves the right to plead this confusion about and/or ignoring of Prof Grubb assessment as a freestanding error on the part of the Inspector and the Secretary of State.

<sup>17</sup> Closing §39.

inability to show how the numbers were arrived at.<sup>18</sup>

76. The Inspector's turning of the burden of proof under paragraph 217 on its head, and his imposition of an unfair differential threshold to the burden of proof, unlawfully demanding certainty of the Rule 6 parties, while holding WCM to a significantly lower standard, amounts to an error of law and rendered proper consideration of the competing cases of the parties in the planning balance impossible. It led to the Defendant adopting an unfair and unlawful approach to the parties' cases
77. For the avoidance of doubt, this ground operates entirely separately from the allegation of apparent bias particularised above, however, it is clear that the skewed analysis and unfair application of differing thresholds to the parties' cases lends further weight to the appearance that the Inspector was biased.

### **Orders Sought**

78. The following orders will be sought from the Court:
  - a. An order quashing the Decision;
  - b. An Aarhus costs order; and
  - c. Costs

### **Details of Legal Advisors Dealing with this Claim**

79. Richard Buxton Solicitors  
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### **Details of Interested Parties**

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<sup>18</sup> Closing §227.

## **Details of Information Sought**

81. As a public authority the Defendant is under a duty of candour and must make full and frank disclosure of any and all documents relevant to this matter, including those going beyond the grounds set out above (see *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941, per Sir John Donaldson at 945G).
82. As you will be aware, the Treasury Solicitor, Guidance on Discharging the Duty of Candour and Disclosure in Judicial Review Proceedings (2010) (“**the Duty of Candour Guidance**”) makes clear that the duty of candour “**applies to every stage of the proceedings including letters of response under the pre-action protocol.**” (emphasis added):
83. This section of the Duty of Candour Guidance was quoted approvingly in *K v Secretary of State for Defence* [2014] EWHC 4343 (Admin) at para 11. More recently, in *R (HM, MA, & KH) v Secretary of State for the Home Department* [2022] EWHC 2729 (Admin) at §16, the Duty of Candour Guidance was again cited with approval, and the paragraph stating that the duty applies to pre-action responses was again set out by the Divisional Court. Lord Justice Edis and Mr Justice Lane were very clear:

*“[The duty of candour] is an obligation which the executive has assumed on the advice of the Treasury Solicitor, as it was, and the court operates on the basis that that is what is expected of Government defendants when dealing with judicial review proceedings.”*

It is notable that failure in that case to comply with the duty of candour was the subject of extensive criticism by the Divisional Court.

84. The Duty of Candour Guidance states:

*“The duty of candour gives rise to a weighty responsibility. The obligation of candour is the reason why the rules as to standard disclosure do not apply to applications for judicial review as a matter of course. When responding to an application for judicial review public authorities must be open and honest in disclosing the facts and information needed for the fair determination of the issue<sup>3</sup>. The duty extends to documents/information which will assist the claimant’s case and/or give rise to additional (and otherwise unknown) grounds of challenge<sup>4</sup>.”*

(Citing *Secretary of State for Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409 at footnote 3 and *R v Barnsley Metropolitan Borough Council ex p. Hook* [1976] 1 WLR 1052 at footnote 4)

85. Whilst this is, of course, a statutory review under section 288 of the Town and Country Planning Act, the same principles clearly apply.
86. Rigorous compliance with the duty of candour has been held to be particularly crucial where a Defendant seeks a wide margin of appreciation, as per *Mott v Environment Agency* [2016] EWCA Civ 564 at [64]:

*“In my judgment, the need for a defendant to have its ‘cards upwards on the table’ is particularly important where the context is a technical or scientific one in which the defendant expects the courts to tread warily and accord a wide margin of appreciation to the decision-maker. A reviewing court needs to be given a sufficient explanation by a regulator operating in a technical or scientific area of how the science relates to its decision so that the court can consider whether it embodies an abuse of discretion or an error of law.”*

87. This principle was recently applied by Holgate J in *Friends of the Earth v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 (Admin). At [192], the learned judge noted that provision of the underlying materials is the *quid pro quo* for a defendant’s assertion of an enhanced margin of appreciation.
88. Pursuant to the Defendant’s duty of candour, the following information is sought:
- a. Copies of any information received from the Applicant after the close of the Inquiry, and in particular the representations dated 07/07/2022, 15/08/2022, and 04/11/2022 listed in Annex A to the DL.
  - b. A copy of any assessment or other document produced by the Planning Inspectorate’s Environmental Services Team with regard to the *“adequacy check of environmental information provided in the Inquiry, including that which relates to the scale of potential emissions in the proofs of evidence provided by Professor Grubb [...] and Professor Barret proof [sic] of evidence”* (see IR 21.114, DL 32).
  - c. A copy of any documents, whether produced by the Planning Inspectorate’s Environmental Services Team or not, by which this further *“adequacy check”* was *“taken together”* or analysed by comparison with the existing environmental information before the Inquiry.
  - d. A copy of any documents, whether produced by the Planning Inspectorate’s Environmental Services Team or not, by which the impact on downstream emissions of the potential blending of WCM coal with other coal in blast furnaces was evaluated or assessed.
  - e. Confirmation of whether, per IR 21.22, the Secretary of State took further legal advice on the amendment of the application (the proposed Claimant does not seek disclosure of any advice, for obvious reasons; merely confirmation of whether it was obtained).
  - f. Details of the consideration given to the selection of Inspector to hear the Inquiry, including:
    - i. Any document which sets out the desired or desirable experience for a prospective Inspector for the Inquiry, or any discussion of the same prior to the appointment of the Inspector.
    - ii. Any document in which potential prospective Inspectors were identified.

- iii. Any document in which a potential prospective Inspector is stated to be ineligible to sit at the Inquiry or to possess inappropriate qualifications to sit at the Inquiry.
  - iv. Any document which identifies the credentials of the Inspector who was appointed to sit at the Inquiry prior to his appointment, including any document in which consideration was given to the Inspector's background in the coal mining and steel-making industries.
  - v. Any document in which consideration was given to whether the Inspector's prior experience in coal mining and steel-making should (or should not) be disclosed to the parties in the Inquiry,
  - vi. Any document in which the Inspector's experience in coal mining and steel-making was discussed during the course of the inquiry or after it was closed, including any document in which the Inspector's comments at the Hownsgill Appeal were considered.
89. The claimant reserves the right to rely on any failure by the Defendant to comply with the duty of candour (either at the pre-action stage, or if litigation progresses) in seeking its costs on an indemnity basis (see *HM* at §5, and see *R(AI-Sweady v Secretary of State for Defence* [2009] EWHC 2387 (Admin)).

#### **What the Proposed Defendant is requested to do**

90. Consent to the quashing of the Decision, pursuant to the Claimant's application under section 288 of the 1990 Act, and pay the Claimant's costs of and relating to this prospective claim.

#### **Other applications**

91. If the claim proceeds, the claimant will apply for a protective costs order (PCO) pursuant to CPR 45.43 on the basis that the claim is an environmental matter: *Venn v Sec State CLG* [2015] 1 WLR 2328. If you disagree that this is an Aarhus matter or with the making of a PCO please give your reasons.

#### **Address for Reply and Service of Court Documents**

92. As at paragraph 79 above.

#### **Proposed reply date**

93. In accordance with the pre-action protocol, the Secretary of State's response is requested as soon as reasonably practicable, and in any event **by 4pm on 6 January 2023**.
94. We are aware that service of this pre-action letter falls during the Christmas period. It is observed, however, that the Defendant published his decision and the Report at 6pm on 7 December 2022 (having repeatedly delayed its publication), in full knowledge of the possibility of legal challenge and the difficulties this would present given the time of year.
95. Our clients could not have provided this pre-action letter any earlier given the length of the decision, and the time required to secure legal advice and

administrative approval to proceed. The Defendant has nevertheless been afforded over a working week to respond to this letter.

96. Given that background, there is no good reason the Defendant should not be in a position to provide a timely response with a view to narrowing the issues between the parties or avoiding further litigation entirely.

Yours faithfully

A handwritten signature in black ink, appearing to be 'RBS', written in a cursive style.

**RICHARD BUXTON SOLICITORS**

*cc by email only: Ward Hadaway (Attn: Kamran Hyder)*