

Briefing

Whitehaven coal mine legal challenge briefing

At a glance:

- On 7 December 2022, the Secretary of State for Levelling Up, Housing and Communities, Rt Hon Michael Gove MP (the “SoS”), granted planning permission to West Cumbria Mining Limited (“WCM”) for the construction of a new coalmine in Whitehaven, Cumbria, to provide coking coal for the steel industry.
- This followed a planning inquiry in September 2021 at which Friends of the Earth (“FoE”) was a main party, alongside community group South Lakes Action on Climate Change (“SLACC”). FoE and SLACC opposed the mine on climate and other grounds.
- If it proceeds, this will be the first new deep coal mine in this country in over 30 years. It will produce 2.78 million tonnes of coal per year until 2049, which is just one year before the UK Government is legally required to ensure that the country has net zero emissions in 2050, as per the Climate Change Act 2008 (the “CCA”). And in addition, UK emissions must radically fall before 2050 to meet the stringent carbon budgets under the CCA.
- Total lifetime emissions, including from the use of the coal, will exceed 220 million tonnes of CO₂ equivalent. That is equal to almost half (47%) of UK total CO₂ equivalent emissions in 2020, and almost double (195%) of our transport emissions (excluding international aviation and shipping). Claims the mine is ‘carbon neutral’ have been derided as ‘greenwashing nonsense’.¹
- WCM presents this mine as a means to plug an issue over security of supply by providing the British steelmaking industry with ‘home-grown’ coal. However, at best, only around 10% will be used in the UK, with the rest exported. Even that 10% figure is optimistic – there increasingly appears to be no UK market for WCM coal (see the Annex to this Briefing). Similarly, the market in mainland Europe, is drying up, with steelmakers turning to green technology and away from coking coal.
- FoE believes that the SoS’ decision to grant planning permission was unlawful, as he either ignored or glossed over crucial evidence in relation to

the enormous climate impact of the mine. FoE and SLACC have both brought High Court challenges to the grant of planning permission.

The planning application

WCM originally applied to Cumbria County Council (“Cumbria CC”) for planning permission in May 2017. FoE first objected to this application in July 2017, and since then has worked alongside a range of local groups who oppose the mine and who instead want to see long-term, sustainable jobs in West Cumbria.

Cumbria CC considered the application three times (following amendments to the application made by WCM), and resolved to grant planning permission for the mine. Prior to Cumbria CC issuing a final decision notice, numerous groups in civic society, and individual opponents, asked the SoS to call in the application, on the basis that it gave rise to issues of national importance, in particular given the inevitable climate impacts. However, on 6 January 2021, then SoS Robert Jenrick declined to do this, insisting that the decision raised local issues only.

That resulted in Lord Deben, Chairman of the Climate Change Committee (“CCC”), writing to the SoS concerning WCM’s application². He expressed concern over the grant of planning permission by Cumbria CC, stating that the new mine “will increase global emissions”, and that proceeding with it would give a negative impression of the UK’s climate priorities internationally. Lord Deben asked the SoS to “consider further the UK’s policy towards all new coal developments, for whatever purpose”.

In March 2021 the SoS u-turned³, calling in the application for his own determination. Given the increased ‘controversy’ around the mine, and the fact the CCC had recently published its recommendations for the sixth carbon budget (which covers the period 2033-2037), he conceded the application did raise planning issues of more than local significance.

The four-week planning inquiry took place in September 2021. [FoE’s briefing on the inquiry is here](#). FoE and SLACC participated in the inquiry as main (or ‘Rule 6’) parties, and opposed the grant of planning permission. The other main parties were WCM, and Cumbria CC. In the inquiry, Cumbria CC was neutral on whether permission should be granted (having previously been in favour).

FoE brought evidence on the mine’s negative impacts on the climate and the local landscape. FoE also challenged WCM’s assertions, firstly that there was a long-term need for the coal; and secondly that its coal would simply replace coal currently mined in the USA, which as a result would stay in the ground. SLACC’s grounds concerned climate and biodiversity impacts, and challenged WCM’s arguments as to the economic benefits of the mine.

During the inquiry, WCM argued this would be a “net zero coalmine”, as it would offset the residual emissions from the mine (but only those associated with the process of extracting the coal from the ground, not those from when the coal is actually burnt; its end-use, which is where the vast majority of emission arise). It would offset these (more limited) emissions by purchasing carbon credits from the Gold Standard Foundation, an organisation established by several NGOs including WWF. FoE believes that it is impossible to have a “net zero coalmine”, as it is a contradiction in terms. FoE therefore wrote to the Gold Standard Foundation to enquire into their position on WCM’s proposals, and they confirmed that they were “strongly against” new fossil fuel developments⁴ given the state of the climate crisis and that “voluntary carbon offsetting should not be used to justify to [sic] new fossil fuel exploration or extraction activities.” They have more recently derided the net zero claims as “greenwashing nonsense”⁵.

For more on the arguments at the inquiry, see the closing statements of WCM, FoE and SLACC.

Originally, a decision on the mine was expected by spring 2022, but it was repeatedly postponed. The UK’s term as COP President ended following the conclusion of COP27 in Cairo in November 2022. Just over a week later, on 7 December 2022, the SoS Michael Gove announced his decision to grant planning permission for the coalmine. The decision was met by strong criticism from prominent figures including politicians from across the political spectrum (see the Annex).

There is clearly a need for jobs in West Cumbria, and many other areas of the UK which have suffered from a chronic lack of investment by successive governments. WCM says the mine will create 504 direct jobs and has pledged that 80% of these will go to local people where possible. However, there is no way to guarantee this. FoE believes that the jobs desperately needed in West Cumbria (and elsewhere in the country) must be long-term, sustainable jobs – preferably contributing to the green recovery. Analysis by FoE has concluded that a programme to improve insulation and energy efficiency in homes in West Cumbria could create as many jobs as the proposed mine⁶. And Cumbria Action for Sustainability has calculated that 9,000 green jobs could be created in Cumbria in the next 15 years, including 4,500 in West Cumbria⁷. Jobs at the coalmine cannot be guaranteed to last given the rapidly shrinking market for its product, and the damage to the local environment and our climate from digging out the coal and burning it could be with us forever.

The Legal Challenge

The procedural history on the legal challenges is as follows:

- On 13 January 2023, FoE and SLACC separately applied to the High Court to challenge the grant of planning permission.
- On 31 March 2023, both claims were designated as significant planning cases by the Order of Mr Justice Holgate.
- On 12 April 2023, both claims were refused permission to proceed to trial by the Order of Mr Justice Cranston. The Order was made ‘on the papers’ i.e. without a hearing.
- FoE and SLACC have both exercised their right to a permission hearing, meaning they will seek to persuade the court to change its mind. This will be listed for 1 day (for both cases combined) and is expected to take place in May 2023.

FoE seeks to challenge the decision to grant planning permission on four grounds:

Ground 1 - Carbon Offsetting:

The SoS erred in concluding that emissions from the mine would not impact on UK carbon budgets. The carbon offsetting proposed by WCM to achieve a so-called ‘net zero mine’ cannot be considered in relation to UK carbon budgets as a matter of law, because the offsetting projects involved are exclusively international (barring one project, which is not yet operational⁸) and therefore reliance on them is not permitted under UK regulations. The Government’s own policy includes a commitment against the use of international carbon offsets for the purpose of reaching our national carbon budgets; a position which follows the repeated advice of the CCC on this issue⁹.

Ground 2 - International Impacts:

The SoS did not adequately consider the expert evidence submitted by FoE and others on the international impact of approving the mine. This included evidence from Professor Sir Robert Watson, former chair of the Intergovernmental Panel on Climate Change and John Ashton, former chief negotiator for the UK at international climate talks. The negative international impact of approving the mine in terms of the UK’s claims to climate leadership and the damaging precedent that such a decision establishes for other countries to carry on approving coalmines as well, was identified in Lord Deben’s letter to the SoS in January 2021, and was a principal and significant issue in the planning inquiry. And yet, the SoS’s decision does not address this.

Ground 3 - Demand for Coal:

The SoS failed to explain why he had disregarded evidence presented by an expert witness for FoE on global demand for coal which challenged WCM’s claims

that their coal would simply substitute for US coal and would therefore have a net neutral impact on the climate. He did not address the point that WCM's assertion was dependent (amongst other things) on a complete (as in 100%) substitution of the coal from the Whitehaven mine for that extracted from somewhere else.¹⁰

Ground 4 - Finch appeal and end-use emissions:

The Inspector concluded that the end-use emissions from the mine (i.e. the emissions arising from when the coal is actually burnt) were not indirect effects of the mine for the purpose of the Environmental Impact Assessment Regulations. On this basis, only the emissions arising from the process of digging the coal up out of the ground were included in the environmental impact assessment ("EIA"). FoE has reserved its right to argue that, depending on the outcome of the Supreme Court appeal over Surrey County Council's decision to grant planning permission for oil production in Horse Hill, the SoS's position on end-use emissions and EIA was incorrect¹¹. End-use emissions represent the vast majority of emissions from fossil fuel production. FoE has calculated that the total end-use emissions are approximately 220 million tonnes of CO2 equivalent over the lifetime of the mine. By contrast, the residual emissions (as calculated by WCM) arising from the process of digging the coal out of the ground are just under 2 million tonnes of CO2 equivalent.

The *Finch* appeal is listed for 21 June 2023 in the Supreme Court. FoE is again supporting the appellant (Sarah Finch on behalf of the community group the Weald Action Group¹²) as a legal intervener, as we did in the High Court and Court of Appeal. WCM is also intervening in the Supreme Court appeal, which suggests it is concerned that it could have ramifications for the legality of the decision to grant planning permission for the Whitehaven coalmine.

What does FoE hope to achieve through the court case?

FoE hopes that our challenge and SLACC's are successful, and that the court finds that the decision to grant planning permission for the mine was unlawful. In particular:

- A key element of our legal challenge is that the SoS either fudged or ignored difficult questions presented at the inquiry, resulting in a fundamentally confused approach to the climate impacts, in turn feeding into the absurd conclusion that the climate impacts were somehow "neutral". By forcing him to properly grapple with these issues he will need to face up the reality of the mine's devastating impacts.
- A successful challenge should result in the decision to grant planning permission being quashed by the court, and the matter returned to the government for reconsideration.
- This could in turn lead to the reopening of the planning inquiry, at which updated evidence on climate change could be considered by the SoS,

including, the IPCC's latest report, published in March 2023. This report made clear that the window of opportunity to prevent the worst of climate breakdown is fast closing. It is abundantly clear that in order to limit warming to 1.5 o C, no further fossil fuel projects should go ahead.¹³ It is equally clear that the UK and European markets for WCM coal are fast drying up with the move to green steelmaking.

Next Steps

FoE and SLACC are renewing their applications for permission to proceed with their legal challenges. At the renewal hearing, which will likely take place in May 2023, we will seek to persuade the court to grant the claims permission to proceed to a full trial.

If the claims get permission to proceed, then the substantive hearing is likely to take place in the summer or autumn 2023. If permission is refused at the renewal hearing, then FoE will consider appealing this decision to the Court of Appeal.

Meanwhile, an amendment to the Energy Bill to prevent further coalmines being opened in England was passed by the Lords on 17 April 2023. It was put forward by the Liberal Democrats, and was backed by Labour and Crossbench Peers, and won by 197 to -194¹⁴. If this becomes law, it would require the government, within 6 months of the Energy Act being passed, to prohibit the opening of new coalmines and the licensing of new coalmines by the Coal Authority. It is too early to say whether such a law would impact WCM's ability to open the Whitehaven mine.

Separately, Labour has said that if elected, it would seek to prevent the 'climate-destroying' WCM mine from opening, and would instead deliver green jobs (see the Annex).

Conclusion

FoE believes that the decision to grant planning permission for the coal mine was unlawful, as the SoS did not properly consider the climate impacts of this mine. FoE is therefore taking this legal challenge, alongside SLACC, given the very significant and negative effects this mine would have on the climate, and our ability to meet our upcoming carbon budgets. As a decision, it has been described as "absolutely indefensible" by the CCC (see the Annex), and FoE will seek to convince the High Court that it was unlawful, so that the SoS is required to reconsider it, and this time, engage with the climate issues adequately.

Katie de Kauwe and Niall Toru, Lawyers
Friends of the Earth Limited

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Further Information

For media enquiries, please contact the Friends of the Earth press team:
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FoE is represented in its High Court challenge by Paul Brown KC and Alex Shattock, both of Landmark Chambers, and by Toby Fisher of Matrix Chambers, and by the law firm Leigh Day. FoE's lead in-house lawyer on the case is Niall Toru. SLACC is represented by Estelle Dehon KC and Rowan Clapp of Cornerstone Barristers Chambers, and by the law firm Richard Buxtons.

Annex: Opposition to the coalmine

Numerous prominent figures and organisations have strongly criticised the decision to grant planning permission for the mine:

- Chris Stark, chief executive of the Climate Change Committee (the government’s official advisors) said “*This is a very bad decision – supporting a technology of the past, with a very poor prospectus for new UK jobs*”¹⁵ and “*the UK’s global influence on climate is greatly diminished by today’s decision*”¹⁶.
- Lord Deben, chair of the Climate Change Committee, said “*The whole of the Climate Change Committee, they’re experts, they’re scientists, every one of them thinks this is entirely wrong*”¹⁷ and that the proposal was “*absolutely indefensible*”¹⁸. On 17 April 2023, Lord Deben further stated in a House of Lords debate on an amendment to the Energy Bill to ban coal mines (which was passed in the Lords), that “*As chairman of their independent advisory body, I say to the Government that there is no doubt whatever that allowing this coal mine undermines our international ability to lead the world to a solution which alone will stop the existential threat of climate change. The reason I rise to speak now is to say to my noble friend [Lord Callahan]—again, I hope he will accept that this is a genuine matter to be answered in that way—that this is the most serious issue that he will have to look at, and in it is held the Government’s credibility.*” He also questioned the independence of the planning inspector (who’s recommendation to the SoS was to grant planning permission), and who had previously worked in the mining industry: “*There is a lot of argument about the independence of the inspector, and I think the Government have to look very carefully at when people feel that they should excuse themselves from making decisions of this kind—but that is for another place.*”¹⁹
- Ron Deelen, former chief executive of British Steel, said “*This is a completely unnecessary step for the British steel industry, which is not waiting for more coal as there is enough on the free market available. The British steel industry needs green investment in electric arc furnaces and hydrogen to protect jobs and make the UK competitive.*”²⁰ (British Steel has since proposed closing its coking ovens and Tata is asking the government for support to move away from coal – meaning neither UK customer might buy the coal).
- Baron (Adair) Turner of Ecchinswell, former chair of the Climate Change Committee and former chair of the Financial Services Authority, described the decision as “*Climate vandalism and economic incompetence on a scale difficult to believe. Global coking coal demand will plummet from now to 2050*

as iron-making moves to new tech. Future govt will have to bail out bankrupt asset and deal with unemployed workers stuck in dead end jobs”²¹.

- On 14 December 2022, 450 UK Church leaders wrote an open letter to Prime Minister Rishi Sunak and the SoS strongly criticising the decision and stating *“Coal from this mine will continue to heat up the planet, pollute the atmosphere, and most severely impact those in the world’s poorest countries who have done the least to cause the climate crisis²² and urging the UK Government to “practice what you preached by keeping coal in the ground and investing in a sustainable future.”*
- Rain Newton-Smith, then chief economist at the CBI (now Director General), said *“It’s a huge step backwards. Coal is hugely damaging, we have the resources in the UK to accelerate our investment in renewables not go backwards. A sad day for our climate leadership & sends the wrong signal on policy. Business wants more climate leadership not less”* .²³

In addition, the decision has been criticised by politicians from across the political spectrum:

- Shadow Climate Change Secretary Ed Miliband has said: *“A Labour government will leave no stone unturned in seeking to prevent the opening of this climate-destroying coalmine, and instead ensure we deliver the green jobs that people in Cumbria deserve.”²⁴*
- Caroline Lucas MP has said: *“This government has backed a climate-busting, backward-looking, business-wrecking, stranded asset coalmine. This mine is a climate crime against humanity – and such a reckless desire to dig up our dirty fossil fuel past will be challenged every step of the way”*.²⁵
- Former Liberal Democrat leader and Cumbrian MP, Tim Farron described the decision as *“daft”²⁶* and the business case as *“ridiculous”*, pointing out that the two potential customers in Britain – British Steel and Tata – *“have no plans whatsoever to buy a single piece”*. He compared it to *“celebrating the opening of a Betamax factory”* and further added *“it makes us a laughing stock when it comes to us trying to talk to other countries like China about how they reduce their carbon emissions.”*
- Conservative MP Alok Sharma, the former UK COP President, stated shortly before the decision to grant planning permission was published that approving the mine would be a *“backward step”* and that *“A decision to open a new coalmine would send completely the wrong message and be an own*

goal. This proposed new mine will have no impact on reducing energy bills or ensuring our energy security.”²⁷

- Conservative MP Chris Skidmore, who was commissioned by the Government to lead the Net Zero Review, has described the decision to approve the coal mine as a “*mistake*”.²⁸
- Conservative MP Philip Dunne, chair of the cross-party Environmental Audit Committee in parliament, said: “*Coal is the most polluting energy source, and is not consistent with the government’s net zero ambitions. It is not clear cut to suggest that having a coalmine producing coking coal for steelmaking on our doorstep will reduce steelmakers’ demand for imported coal. On the contrary, when our committee heard from steelmakers earlier this year, they argued that they have survived long enough without UK domestic coking coal and that any purchase of coking coal would be a commercial decision.*”²⁹

¹ <https://www.theguardian.com/environment/2022/dec/13/gove-defence-of-uk-coalmine-dismissed-as-greenwashing-nonsense>

² Lord Deben’s letter dated 29 January 2021 to the SoS: <https://www.theccc.org.uk/publication/letter-deep-coal-mining-in-the-uk/>

³ <https://www.gov.uk/government/publications/decision-to-call-in-west-cumbria-coal-mine>

⁴ <https://inews.co.uk/news/environment/net-zero-coal-mine-cumbria-gold-standard-condemned-carbon-climate-cha-1191140>

⁵ <https://www.theguardian.com/environment/2022/dec/13/gove-defence-of-uk-coalmine-dismissed-as-greenwashing-nonsense>

⁶ <https://friendsoftheearth.uk/climate/home-insulation-programme-west-cumbria-could-create-many-jobs-proposed-new-mine>

⁷ <https://cafs.org.uk/2021/03/12/cumbria-could-create-9000-green-jobs-cafs-report-shows/>

⁸ Only one is based in the UK, it is not operational, and even when it is, it is estimated that it will equate to no more than 10,000 tonnes CO₂e per annum; a tiny fraction of the residual emissions of 1.85 million tonnes CO₂e that WCM says it will offset.

⁹ See for example the CCC’s advice on the Sixth Carbon Budget <https://www.theccc.org.uk/publication/sixth-carbon-budget/#downloads> at p424

¹⁰ Even were there to be complete substitution, which is strongly disputed, the decision to grant planning permission would still be unlawful given the other grounds.

¹¹ FoE’s briefing on the Horse Hill Court of Appeal judgment *R (oao Finch & Others) v Surrey County Council and Others* [2022] EWCA Civ 187 is here: <https://friendsoftheearth.uk/climate/briefing-horse-hill-oil-development-court-appeal-judgement>

¹² The Weald Action Group is an umbrella for local communities resisting onshore oil and gas projects <https://www.wealdactiongroup.org.uk/>

¹³ <https://friendsoftheearth.uk/climate/ipcc-report-latest-climate-warnings-groundhog-day-0>

¹⁴ <https://www.libdems.org.uk/press/release/govt-defeated-as-lib-dems-win-vote-to-ban-new-coal-mines>

¹⁵ <https://twitter.com/ChiefExecCCC/status/1600603757418582034>

¹⁶ <https://twitter.com/ChiefExecCCC/status/1600603765752664069>

¹⁷ <https://www.bbc.co.uk/iplayer/episode/m001fyzm/newsnight-07122022>

¹⁸ <https://news.sky.com/story/cumbria-coal-mine-should-never-have-been-approved-says-governments-climate-tsar-12788168>

¹⁹ <https://www.theyworkforyou.com/lords/?id=2023-04-17a.509.2&s=speaker%3A10249#g514.0>; see also <https://www.thetimes.co.uk/article/former-miner-approved-cumbrian-coalmine-5c73q788t>

²⁰ <https://www.theguardian.com/environment/2022/dec/08/government-approves-cumbria-coalmine-legal-challenge>

²¹ <https://twitter.com/AdairTurnerUK/status/1600621003268292608>

²² <https://www.businessgreen.com/news/4061637/%E2%80%98lament-great-injustice-450-uk-church-leaders-slam-cumbria-coal-plans>

²³ <https://twitter.com/RainNewtonSmith/status/1600609423902269440>

²⁴ <https://www.theguardian.com/environment/2022/dec/08/labour-says-would-stop-cumbria-coalmine-opening-ed-miliband>

²⁵ <https://www.theguardian.com/environment/2022/dec/08/government-approves-cumbria-coalmine-legal-challenge>

²⁶ <https://www.theguardian.com/environment/2022/dec/08/tim-farron-calls-approval-of-first-uk-coalmine-in-30-years-daft>

²⁷ <https://www.theguardian.com/environment/2022/dec/03/alok-sharma-cumbria-coal-mine-backward-step-government-climate-expert>

²⁸ <https://www.energylive.com/2023/01/17/cumbria-coal-mine-decision-was-a-mistake-says-chair-of-net-zero-review/>

²⁹ <https://www.theguardian.com/environment/2022/dec/08/government-approves-cumbria-coalmine-legal-challenge>