

Cumbria Coalmine – Deep Dive– Part 1



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On 7 December 2022, the Department for Levelling Up, Housing & Communities released the Secretary of State, Michael Gove's, highly anticipated decision on a coal mine located in Whitehaven, West Cumbria. The decision granted planning permission to West Cumbria Mining Ltd under s 77 of the Town and Country Planning Act 1990 for a metallurgical coal mine. The mine will produce "coking" coal, which is used for steel production (as opposed to thermal coal which is used for power generation).

The mine would be the first new deep coal mine in the UK in over 30 years and will produce 2.78 million tonnes of coal per annum until 2049.

The Decision Letter was immediately subject to controversy and wide-reaching domestic and international criticism, including by Friends of the Earth ("FoE") and local environmental group, South Lakeland Action On Climate Change ("SLACC"). Both charities filed separate requests for Statutory Review at the High Court challenge in January 2023, arguing the decision was unlawful (see further on the claims). In mid-April, the High Court ruled on both claims. Both groups have to renew their application for permission at an oral renewal hearing, which will likely take place later this month.

Considering the public backlash regarding a new coal mine in the UK, this blog contextualises some of the key points from Mr Gove's called-in decision and looks at some of the related grounds of the legal challenges. Together these issues may have broader implications for environmental and climate change litigation.

Key Points from the Decision Letter

The Decision Letter is 15 pages long, but the underlying Inspector's Report is a hefty 280 pages. It is impossible for us to cover all the points raised, or to go into too much detail. In short, we look at how the following are considered by the Secretary of State:

- (a) the need for a new mine
- (b) climate change impacts, including,
 - (i) the 'net zero' nature of the mine,

- (ii) import substitution arguments and
 - (iii) downstream emissions, and
- (c) any impact of the decision on the UK's international reputation as a world leader in tackling climate change were considered.

Due to the number of issues raised, we have divided this blog into two parts. Part 1 covers points (a), (b) (i) and (ii), and Part 2, which will be published subsequently, will cover points (b) (iii) and (c) and offer some concluding thoughts.

References to the Decision Letter and Inspector's Report are in the format "DL" and "IR" respectively, along with the paragraph number.

(a) A Need for Metallurgical Coal – But From Where?

Overall, the Secretary of State gave "moderate weight" to the benefits attaching to the supply of coal for the UK market (DL 24). He agreed with the Inspector that the mine gained some support from para 209 of the NPPF (according to which "[i]t is essential that there is a sufficient supply of minerals to provide the infrastructure, buildings, energy and goods that the country needs") and further agreed with the applicant's argument that a diverse and secure supply network can help to avoid disruption to supply chains as a result of natural disasters, poor weather or geo-political considerations (DL 24). Ultimately, the Secretary of State agreed with the Inspector that the demand for coking coal is led by the demand for steel and, moreover, that the mine would be unlikely to materially impact on the price of coking coal, or indeed that demand for steel (DL21).

However, in amongst the Secretary of State's reasoning on the issue of "need", is an interesting consideration of *where* that need may be. Both the Secretary of State and the Inspector were satisfied that there is *currently* a UK and European market for the coal (DL18, IR21.33), but both also accepted that there was no consensus on what future demand in these markets may be (DL18, IR21.60). In fact, both recognised the prospect that the current reliance of the European and UK steel industries on the supply of suitable metallurgical coal may decrease over the lifetime of the development (DL24, IR22.13). Within that context, they nonetheless concluded that "it is highly likely that a global demand would remain" (DL18, IR21.60) and that there would "remain a market for the coal" (DL24, IR 22.13), yet neither of these references give specifics for where in the world the coal from this mine is expected to end up. That is an interesting omission, bearing in mind that the permission allows for ongoing extraction right up until 2049 and there is no export restriction on the coal. It is further echoed by the Inspector's findings at IR21.58 that even "[i]f there ceases to be a market for seaborne coking coal in the UK and Europe by 2040, there would still continue to be a demand which could be partially satisfied by WCM coal" (emphasis added). This, again, begs the question as to where in the world such a continued "demand" is expected to exist.

Another interesting point is how both the Secretary of State and Inspector considered the report. That report underlined that there is no need for new coal mines or extensions of existing ones under a net zero pathway and had been relied on by objectors as supporting a case against need. However, the Secretary of State agreed with the Inspector that just because existing sources of production were sufficient to cover demand through to 2050, that did not necessarily mean that other resources should remain unused, especially where such new resources could be extracted using mining methods that were deemed to be 'net zero compliant' (discussed further below).

According to the Inspector, the scenario presented by the IEA report did not suggest that there would be no need for coking coal by 2050, and moreover, the IEA scenario actually conflicted with other evidence provided in the Inquiry, namely the fact that "there is currently no planning policy or guidance in England

to suggest that proposals for coal extraction should not come forward” in contrast to the current policy prohibition on peat extraction under NPPF paragraph 211(d) (IR 21.55). This was an interesting signal to the Secretary of State (i.e., a reminder that national policy could, but does not, prevent new coal mines from being permitted) who appears to have responded by re-emphasising that the “coal test” in paragraph 217 of the NPPF sets a high hurdle on new coal developments, notwithstanding it does not set a prohibition (DL23).

(b) Climate Change Impacts

It might, at first, appear surprising that under the heading “planning balance” for a new large-scale coal mine, there is no mention of climate change impacts or GHG emissions as a factor weighing against the development (see DL71). However, that is because the Secretary of State reached an overall conclusion that the mine would have a “neutral effect on climate change” (DL38). That conclusion explains how the Secretary of State could reach a broadly positive conclusion as to the mine’s compliance with various national and local policy relating to climate change impacts (see the above quote, as well as DL38 which finds the proposed development to be consistent with paragraph 152 of the NPPF).

There are a number of factors which appear to have fed into this overall conclusion. Not least, the fact that the mine was accepted to be “net zero” in its operations and the way the Secretary of State considered downstream emission impacts. In this blog, and the blog which follows, we consider a number of these points in more detail.

(i) A Net Zero Mine?

As noted above, the Secretary of State essentially accepted the applicant’s arguments that the mine would be a “net zero” mine, which was a key point in favour of the development. To be clear, the “net zero” claim relates solely to the carbon footprint of the mine’s operational running and did not include any downstream, or scope 3, emissions associated with the mine’s output. The applicant’s environmental assessment concluded that the mine’s GHG emissions (from operations) would be relatively neutral and not significant (DL27).

However, notably, that conclusion was based on considering all mitigation, including avoidance, reduction *and* compensation through off-setting. In order to qualify for “net zero” status, the applicant agreed to a section 106 agreement obligation which required the applicant to produce an annual GHG performance report quantifying its GHG emissions over the previous 12 months and describing actions the applicant had taken to mitigate them. That mitigation would include evidence of the purchase of Gold Standard offsets to show that the mine was net zero over the past 12 months (see IR21.79). The Secretary of State accepted that the applicant would need to rely on offsetting, as “some small amount of GHG release from the proposed development is inevitable” even after mitigation (DL31).

The reliance on offsetting to achieve “net zero” status is a point which factors into the legal grounds of challenge. Friends of the Earth have argued that the Secretary of State erred in concluding that emissions from the mine would not impact on UK carbon budgets, due to his reliance on the use of such offsetting proposals.

Notably, the mine’s “net zero” status was a crucial factor impacting on the Secretary of State’s conclusion on climate change impacts, as evidenced by what he says at DL37:

“For the reasons given at IR21.125–21.134, the Secretary of State agrees that given no evidence was provided to suggest that any other metallurgical coal mines in the world aspire to be net-zero, the proposed mine is likely to be much better placed to mitigate GHG emissions than from

comparative mining operations around the world (IR21.125). He further agrees that the commitment in the proposed development to be net zero over the whole life-time is entirely consistent with the approach proposed by the Industrial Decarbonisation Strategy (IR21.130), and that the proposal would be consistent with paragraph 215(d) of the Framework which encourages coal extraction development to capture and use methane from active coal mines, as well as paragraph 15 of the Framework (IR21.132). He further agrees that the proposal would be consistent with Policy SP13 of the CMWLP which require that proposals for mineral development should demonstrate that energy management and carbon reduction measures have been included in their design (IR21.132)."

(ii) Import substitution arguments

The Secretary of State and the Inspector accepted that coal from the mine would be at a competitive advantage to US coal that would otherwise be imported to the UK and Europe. From this, they concluded that "it is highly likely that there is the potential for a significant degree of substitution to occur" (DL21, IR21.52). The Secretary of State also accepted that "many mines in the USA operate towards the top of the cost curve and are regarded as 'swing suppliers' due to their role in switching production on or off to respond to demand, such that "if the coal were not needed it would not be extracted" (DL21, referring to IR21.50). These findings combined with the Secretary of State's conclusion that the "proposed development is unlikely to materially impact the demand for steel" (see above), to result in the Secretary of State's overall conclusion that the proposal would not have a "material effect on total emissions from burning coal during the steel-making process, regardless of whether there is perfect substitution or not" (DL21).

The fact that the mine would not have a material effect on global emissions appears to be a relatively clear conclusion from the Secretary of State's DL. Yet, other parts of the Inspector's report appear to recognise the uncertainty associated with this conclusion. For example, at IR21.127, the Inspector states (emphasis added):

"The extent to which the proposed development would result in a material reduction in GHG emissions from international shipping is not possible to quantify. Nonetheless, my findings above suggest that the coal from the mine would likely substitute for some coal imported into the UK and mainland Europe. Consequently, there would likely be some, but unquantifiable, likely reductions in GHG emissions from transportation. However, this would be offset in the event that the coal is transported to wider markets beyond the UK and Europe and is therefore a matter to which I have attached little weight."

It is not altogether clear from this whether the Inspector is actually predicting that such offsetting will occur, or is simply recognizing this as a possibility. In any event, it is arguably unclear whether this potential for offsetting via exports would, or could, undermine the Secretary of State's above conclusions on import substitution and, in turn, emissions impacts.

Similarly, at IR21.133 the Inspector concludes (emphasis added):

"In conclusion, I have considered whether the modelled GHG emissions of the proposed development are acceptable in the context of national and local guidance. There may be some unquantifiable reduction in GHG emissions as a result of transportation savings and the potential substitution of some coal to be sourced from a net-zero mine. However, such benefits are likely to be of relatively small scale and potentially offset by the exportation of the coal to wider markets. The GHG Assessment concludes

that the residual likely effects of the proposed development on GHG emissions to be relatively neutral. Having considered all of the evidence, I am content that Ecolyse 2 provides an appropriate GHG Assessment that supports my conclusions and I therefore attach significant weight to its findings.

Again, the Inspector is recognizing here the potential for the identified import substitution benefits to be offset due to the exportation of the coal to wider markets.

The Secretary of State does not appear to expressly endorse these particular points (by reference to those specific paragraphs of the Inspector's Report), but nor does he dissent from them. It seems we are left, therefore, with some uncertainty as to the extent to which the Secretary of State's decision relies on the import substitution argument. However, in Part 2 of this blog, we will also look at how the import substitution further factors into the Secretary of State's assessment of *downstream* emission impacts.

Both FoE's and SLACC's challenges argue that the Secretary of State's approach to the issue of substitution, and in particular the notion that there would be complete (i.e. 100%) substitution, was unlawful.

To read on, see .

Merrow Golden is a barrister at FTB specializing in environmental, public and planning law.

Hannah Blitzer is a PhD Candidate in environmental law. She works as a Senior Researcher (Fossil Fuel Transitions) at E3G, an independent climate change think tank, and is a member of the Executive Committee at Action4Justice.