

Whitehaven coal mine: Friends of the Earth's legal challenge

Introduction

The Inquiry presented the Secretary of State with a series of difficult questions, some of the highest importance. Friends of the Earth and others presented detailed expert evidence on a variety of key climate change matters, including the acceptability of carbon credits to offset the mine's emissions, the international precedent that opening a new mine would set, and the impact of opening the mine on the global coal market. Despite their difficulty, these questions could not be avoided, and needed to be adequately grappled with.

It is therefore a striking feature of the decision that in respect of these key issues, the Inspector and the Secretary of State either glossed over the points they were required to address, or else failed to address the points at all. This led to a fundamentally confused approach to the climate change impacts of the proposed development, which constitutes legal error.

In summary, Friends of the Earth's grounds are as follows.

Ground 1: Approach to considering the effect of the development on the UK's Sixth Carbon Budget

The impact of the mine on the UK's Sixth Carbon Budget, which covers the years 2033 to 2037, was a key issue in the Inquiry.

The mining company had entered a legal agreement requiring it to buy international carbon offset credits to offset residual emissions from the mine. In his decision letter the Secretary of State concluded that this requirement meant the mine would be net zero for the purposes of the Sixth Carbon Budget. That conclusion was wrong and unlawful. Such offset credits do not count towards the UK's carbon budgets. The conclusion also misunderstood the Climate Change Committee's consistent advice, and the Secretary of State's own policy position, which is to not rely on international offsets to meet the Sixth Carbon Budget.

Ground 2: Approach to considering the international impacts of the decision

This was also a key issue in the Inquiry.

Objectors, including Friends of the Earth, argued that granting a coal mine at a time when the UK was claiming a global climate leadership role would undermine both the UK's global reputation and its ability to influence others to increase mitigation ambition. They also argued that granting a coal mine while claiming a global climate leadership role would set a bad precedent that other countries would follow, leading directly to an increase in global emissions.

Cogent evidence was given to the Inquiry on this issue, including that of:

Professor Sir Robert Watson, the former chair of the Intergovernmental Panel on Climate Change and a former chief scientific advisor to DEFRA and the World Bank.

In his view the grant of planning permission “would have material consequences in the form of reduced ambition from other countries, and therefore increased GHG emissions globally” and the fact that granting planning permission “would have the effect of undermining the UK’s climate strategy on both a national and international level.”

John Ashton CBE, former Special Representative for Climate Change for three successive Foreign Secretaries in the Labour and Coalition governments, who gave detailed evidence on the detrimental impact of the grant of permission on the UK’s global climate leadership.

The Chair of the Climate Change Committee, Lord Deben, who wrote to the Secretary of State on 29 January 2021. His letter stated that “The opening of a new deep coking coal mine in Cumbria will increase global emissions and have an appreciable impact on the UK’s legally binding carbon budgets” and “it is also important to note that this decision gives a negative impression of the UK’s climate priorities in the year of COP26.”

There could not have been more qualified or experienced people giving evidence on this point. Despite this, the Inspector made only passing – and legally inadequate - reference to this issue in his report, and the Secretary of State’s decision letter did not address the international impacts of the decision at all. This glossing over of the issue was unlawful.

Ground 3: Approach to ‘substitution’ of WCM coal and the global coal market

The extent to which the coal extracted from the proposed mine would “substitute” for other coal in the market or be “additional” to it was a key issue in the inquiry that had a direct bearing on the climate change impacts of the proposal.

Expert evidence was presented that anything less than perfect substitution would result in a significant increase in global emissions from the combustion of coal, at a time when the science and diplomacy was clear that urgent reductions in emissions are needed.

In his decision the Secretary of State concluded there would be no net increase in carbon emissions from coking coal as a result of the mine, on account of their being “some degree of substitution” and/or “the potential for a significant degree of substitution to occur”. He failed to deal with the point that there needs to be complete substitution of WCM coal to ensure a “neutral” effect on climate change globally.

In reaching his decision the Secretary of State also relied on the fact that only the mining company had called an expert on this issue. That was incorrect - Friends of the Earth had called its own expert who gave detailed evidence for over half a day at the inquiry. This evidence – which undermines the position ultimately adopted by the Secretary of State - is not referred to anywhere in the Inspector or Secretary of State’s analysis.

Ground 4: *Finch* and downstream emissions

The Secretary of State did not consider that the downstream emissions from the coal mine needed to be included in the development's environmental impact assessment. Downstream emissions result from the end-use of a product, in this case when the coal is burnt in the steelmaking process. The case of *R (Finch) v Surrey County Council & Ors* [2022] EWCA Civ 187, which concerns whether downstream emissions should be subject to environmental assessment, has been granted permission to appeal to the Supreme Court. Accordingly, Friends of the Earth has reserved the right to argue, if the *Finch* appeal succeeds, that the Secretary of State's approach to downstream emissions was unlawful in relation to the Whitehaven coal mine. NB: Friends of the Earth has applied for permission to intervene in the *Finch* appeal.