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Welsh Ministers
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Ref. **CA11/DM/95/0025.1/C;**
Aberpergwm Colliery

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Aberpergwm Colliery

Attn: Legal Department,
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Attn: Director of Legal Services;
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8 February 2022

PRE-ACTION PROTOCOL LETTER THIS LETTER REQUIRES YOUR URGENT ATTENTION

Re: Aberpergwm Colliery; Licence for expansion of existing mine

Dear Sirs

1. This is a letter before action sent in accordance with the pre-action protocol for judicial review.

Claimant

2. We are instructed by Coal Action Network ("**CAN**"). CAN work for justice for communities affected by the UK's current and historical coal consumption and mining.

Proposed Defendant(s)

3. The Coal Authority, Lake View, 200 Lichfield Lane, Mansfield NG18 4RG (“**the First Prospective Defendant**”); and
4. The Welsh Ministers, Welsh Government, Cathays Park, Cardiff CF10 3NQ (“**the Second Prospective Defendant**”).

Decision(s) to be Challenged

5. As explained in detail below, the proposed claims relate to:
 - (a) The Coal Authority’s decision to approve a licence application by Aberpergwm Colliery for a “Full Underground Licence”, reference **CA11/DM/95/0025.1/C**, thereby deciding to make an offer of a licence to the applicant.
 - (b) To the extent it has been made, the decision, taken by the Welsh Ministers, to approve the authorisation of the licence referred to in (a) above under section 26A of the Coal Industry Act 1994 (“**CIA 1994**”).

Dates of Decision(s)

6. In relation to the decision by the Coal Authority, the date appears from correspondence to be 25 January 2022;
7. In relation to the Welsh Ministers’ approval, it is (as explained further below) entirely unclear whether this has actually been given. To the extent that it has, correspondence indicates the decision was communicated to the Coal Authority on 10 January 2022.

Factual background

8. The key factual background, as far as the proposed Claimant and its legal representatives are aware, is as follows:
9. In 2018, planning permission was granted by Neath Port Talbot County Borough Council (ref. P2014/0729) for a consolidation and extension of planning permission for surface development and operations and an application for an extension to and reconfiguration of the underground coal workings at Aberpergwm Colliery, Glynneath, Neath SA11 5SF (“**the 2018 Permission**”). The decision provides that the extraction of coal at the site may continue until 31 December, 2039.
10. The Officer’s Report which supported the grant of permission advised that the proposal would provide for the extraction of “approximately 70 million tonnes of run of mine coal over a period in excess of 25 years, of which it is estimated that approximately 42 million tonnes will be saleable coal.” It was also estimated that approximately 10.4 million cubic metres of mine waste would be generated over the life of the mine, which would be transported by dump truck to an associated “mine waste repository.”

11. It may also be noted that the Officer's Report made no mention or assessment in relation to climate change other than mentioning the term in reciting relevant planning policies. The Officer's Report also noted that the Coal Authority as consultee "supports the application".
12. On 16 September 2020, Energybuild Mining Limited made an application to the Coal Authority for a Full Underground licence.
13. On the same date, Energybuild Mining Limited made a separate application for a "Conditional Underground Licence – Variation". This application was given an identical reference by the Coal Authority. According to the Coal Authority's website, this application was subsequently withdrawn, apparently on 17 March 2021. It is not clear precisely what this application related to.
14. On 4 November 2021, BBC News reported that Welsh Ministers had "called for the mining licence for Aberpergwm colliery, near Glynneath, to be cancelled."¹ The story quoted Deputy Climate Change Minister Lee Waters as saying that Welsh Ministers "have a 'clear policy of stopping using fossil fuels'" and that he had "urged the UK government to stop '40 million tonnes of coal' being extracted 'from Welsh soil' over the next 18 years."
15. The BBC News article further set out an apparent disagreement between the Welsh Ministers and the UK Government over the legal authority to act:

"The Welsh government says it is up to the UK Secretary of State for Business, Energy and Industrial Strategy (BEIS), Kwasi Kwarteng, to act to intervene to prevent "the coal being extracted from Welsh soil" and they have written to request his intervention.

"We don't want it to happen and the only reason it might happen is because of their [UK government] inaction and their policies," Mr Waters said.

But a UK government spokesperson said it was a matter for the Welsh government.

"The Coal Authority is responsible for licensing coal mines, including for Aberpergwm," they said

"The BEIS Secretary of State is not involved in this process, as Welsh ministers have the power under the Coal Industry Act to make the final decision on whether coal mining operations in Wales can be progressed."

But the Welsh government insists they don't have the power to cancel licences that were granted before they were given control over mining regulation.

Aberpergwm was originally granted a licence to mine coal before licencing powers were handed over to the Welsh government.

¹ BBC News, "Climate change: Welsh ministers demand scrapping of mining licence" (4 Nov. 2021) <https://www.bbc.co.uk/news/uk-wales-politics-59164533>

The mine operators have recently applied to the Coal Authority for formal recognition that the conditions attached to their original licence have been fulfilled.”

16. Apparently on 25 January 2022, the Coal Authority made an offer of a licence to Energybuild Mining Limited. The proposed Claimant learned of this decision on Wednesday 26 January 2022 after visiting the Coal Authority’s webpage on Coal Mining Licence Applications² and noting that the column labelled “Decision” in relation to full application CA11/DM/95/0025.1/C stated “Approved”.
17. A member of the Coal Action Network wrote to the Coal Authority by email on 26 January asking when the determination of the application was made.
18. The Coal Authority sent a letter to the proposed Claimant in response dated 2 February 2022. In that letter, the Coal Authority states, inter alia, that:

“To operate a coal mine an operator needs relevant rights and permissions, including planning permission, a licence from the Coal Authority and to notify the Health and Safety Executive.

Under current legislation, when considering a coal licence application the Coal Authority needs to consider:

- *Whether the applicant can finance coal mining operations and related liabilities*
- *The nature of the land or property that may be impacted by subsidence and that damage can be properly compensated by the operator*
- *That the operation will be carried out by properly experienced people*

*If these tests are met then **we have a legal duty to approve the licence application under current legislation.***

Energybuild Mining Limited has operated Aberpergwm Colliery in Wales since July 2004. In September 2018 the operator received planning permission from Welsh authorities to expand the mine, a key step in the approval process, and applied for a full operational licence for the expanded area from the Coal Authority in September 2020.

*As part of this determination process, we have engaged with Welsh Government for any direction they would wish to give under the Wales Act 2017. On the 10 January 2022 the Welsh Government informed the Coal Authority that Welsh ministers **will not be making a determination in this case.***

The operator has demonstrated that they have met the requisite tests under current legislation which includes planning permission from the relevant Welsh authorities. The Coal Authority, having consulted Welsh Government on the application, has a legal duty to approve the licence application. This was done on 25

² <https://www.gov.uk/government/publications/coal-mining-licence-applications/coal-mining-licence-applications>

January 2022. The approved licence has now gone to the operator for final checks and confirmation. If appropriate confirmation is received within 2 months then the licence will be granted and issued. This is the final step in allowing expansion of the existing mine.” (emphasis added)

19. On 27 January, 2022, news broke that the Coal Authority had made a decision in favour of granting a licence. In the BBC News article reporting the news, the Welsh government was quoted in response saying

“We have been clear that we do not support the extraction of fossil fuels and are focused on the climate emergency.

As the original licence was issued before powers in relation to coal licences were devolved, Welsh ministers are not able to intervene in the licensing process and appropriately apply Welsh policy.”¹³

Summary of legal principles

20. The Coal Authority’s powers and duties regarding coal mine licensing derive primarily from the CIA 1994. Section 7 vests in the Coal Authority all rights for the “searching for, boring for, working or getting of coal” in Great Britain (for ease, these are hereinafter described as “coal-mining rights”). Section 26(1) gives the Coal Authority the general power to licence any of those coal-mining rights to an applicant.
21. Section 26(3) states that the Coal Authority “may issue such general or specific invitation as it thinks fit for applications to be made” in respect of an area of Great Britain where the Authority considers it “appropriate” to allow the “interests or rights” in the land to be acquired from the Authority. Accordingly, an application for a licence prompts the Coal Authority to consider whether to make an “invitation” to the applicant to acquire some or all of the coal-mining rights on a piece of land. The applicant may then accept the invitation, which, along with payment, results in the grant of a licence to exercise those coal mining rights. This is reflected in paragraph 3 of the Coal Authority Guidance.⁴
22. Section 26(3) is drafted to give the Coal Authority broad discretion to make (or not make) such invitation “as it thinks fit”. This gives a wide discretion to the Coal Authority to take into account any matters it considers to be relevant. This is explicitly confirmed in section 26(5), which refers to the Authority’s power “to take into account all such factors as it thinks fit in determining whether, and subject to what conditions, to grant a licence”.
23. Without prejudice to that broad power, section 26(5) requires the Coal Authority to consider the terms on which the applicant is offering to acquire the coal-mining rights from the Authority (i.e. the terms of the application).
24. Section 2 of the CIA 1994 imposes a number of duties on the Authority. In particular, when the Authority is exercising its discretion under section 26(3),

³ BBC News, “Coal: Aberpergwm colliery gets OK to mine 40 million tonnes” (27 Jan. 2022) <https://www.bbc.co.uk/news/uk-wales-politics-60147423>.

⁴ <https://www.gov.uk/government/publications/coal-exploration-licences/guidance-notes-for-applicants-for-coal-exploration-licences>

section 2 requires that it act in “the manner that it considers is best calculated to secure, so far as practicable”, in summary:

- (a) The maintenance of an economically viable coal-mining industry in Great Britain;
 - (b) That licensees are able to finance the coal mining operation and discharge any liabilities arising from those operations; and
 - (c) That any damage or loss sustained due to subsidence can be compensated by the licensee;
25. Section 2(2) further provides that the Coal Authority should have regard to the desirability of securing:
- (a) That licensees have at their disposal such experience and expertise as are appropriate for properly carrying on licenced operations and that competition is promoted in the coal industry.
26. Section 2 only obliges the Coal Authority to “secure” these matters “so far as practicable” (for (a)-(c) above) or to have regard to the desirability of securing (d) above. It does not require the Authority to grant licences if those criteria are met; nor does it otherwise limit the very broad discretion to take into account and make its decision based on any other factors the Authority thinks fit.
27. Section 26A(1) of the CIA 1994 provides: “If or to the extent that a licence under this Part authorises coal-mining operations in relation to coal in Wales, it shall have effect only if the Welsh Ministers notify the Authority that they approve the authorisation.”
28. “Coal-mining operations” are defined broadly in section 25(2) to mean: “the winning, working or getting (with or without other minerals) of any coal, in the treatment of coal in the strata for the purpose of winning any product of coal or in the winning, working or getting of any product of coal resulting from such treatment”, which is not exclusively for exploration.”
29. Section 26A was added to the CIA 1994 by section 67 of the Wales Act 2017. Section 67 came into force on 1 April 2018: see section 71(4) of the Wales Act and regulation 3(m) of SI 2017/1179. This means that the power in section 26A was fully in force:
- a) When the 2018 Permission was granted. Although this is a planning permission and not anything to do with the Coal Authority, it is notable that the mining operations for which the Full Underground licence was sought were only given planning permission after the Welsh Ministers had been granted the statutory power to approve (or decline to approve) the licence authorisation;
 - b) When Energybuild Mining Ltd made both applications to the Coal Authority concerning Aberpergwm Colliery on 16/9/2020;
 - c) When the Welsh Ministers apparently indicated that they would “not be making a determination” in relation to the licence; and
 - d) When the Coal Authority offered the licence to Energybuild Mining Ltd around 25/1/2022

Grounds of Challenge - Decision by Coal Authority to grant licence

Ground 1: No approval from Welsh Ministers as required by s26A

30. Section 26A(1) of the CIA 1994, as amended, is drafted in unambiguous terms. It sets out that a licence “shall have effect only if the Welsh Ministers notify the Authority that they approve the authorisation.”
31. The response letter from the Coal Authority indicates that no such approval has been issued, but only that the Welsh Ministers indicated on 10 January 2022 that they “would not be making a determination in this case.”
32. As no approval has been issued, as required by s26A, the decision by the Coal Authority to issue a licence was unlawful. Alternatively, the Coal Authority should notify the applicant that the offer of the licence is of no legal effect until and unless the Welsh Ministers grant such approval.

Ground 2: Unlawful fettering of discretion / misinterpretation of legal powers

33. As set out above, the CIA 1994 grants the Coal Authority wide discretion to consider such matters as it considers relevant in considering whether to grant a licence.
34. However, the Coal Authority indicated in its correspondence with the proposed Claimant that if three “tests” were met then it considered that it has “a legal duty to approve the licence application under current legislation.”
35. This is clearly not simply unartful drafting as the short letter reiterates, only a few paragraphs later, that the Coal Authority considers that “The operator has demonstrated that they have met the requisite tests under current legislation which includes planning permission from the relevant Welsh authorities. The Coal Authority, having consulted Welsh Government on the application, has a legal duty to approve the licence application.”
36. This is a clear misunderstanding of the Coal Authority’s legal powers under the CIA 1994, and thus represents an error of law which independently infects the decision to grant the licence. The Coal Authority appears to have proceeded on the basis that it could not take matters other than those enumerated in s 2 of the CIA 1994 into account when making its decision and/or that, if it considered the matters in s 2 CIA 1994 would be secured, it was obliged to approve the licence.
37. The Coal Authority thus unlawfully fettered its discretion and/or otherwise erred in law by determining that it could consider only those enumerated factors. See R v SSHD ex p Venables [1997] AC 407 at 496.
38. Further or alternatively, the Coal Authority failed to take into account material considerations, namely all circumstances that did not go to the enumerated factors in s2, including but not limited to (1) the Welsh Ministers’ announced stance that an appropriate application of Welsh policy would not see the licence granted, (2) the potential climate change impacts of the granting of a licence.

Ground of Challenge – Decision of Welsh Ministers in relation to powers under section 26A of the Coal Industry Act 1994

39. As above, it appears from the information available to the potential Claimant that no approval has been issued by Welsh Ministers. However, the proposed Claimant has not seen the communications between the Welsh Ministers and the Coal Authority. To the extent that the communication from the Welsh Ministers is deemed to be an “approval” which is legally sufficient for the purposes of s 26A of the CIA 1994, it appears ministers considered they could not decline to issue such approval because they did not have power to do so in this case. This apparent legal interpretation would represent a misunderstanding of the Welsh Ministers’ legal powers under section 26A and represent a legal error which vitiates the decision to grant an approval.
40. As set out above, s 26A applies to any licence for coal-mining operations which are to any extent licenced under the CIA 1994 after 1 April 2018. This is regardless of whether any underlying or existing licence was granted earlier.
41. In any event, in this case, the application for a full licence was made on 16 September 2020, meaning that even if the Welsh Ministers were correct that the power to approve licences applied only to those licences for which applications had been made after the legislation came into effect, the licence in this case meets that criterion.
42. The Welsh Ministers’ concerns apparently stem from the transitional provisions in Schedule 7 of the Wales Act 2017. Paragraph 6(1) of Schedule 7 states: “Nothing in a provision of this Act affects the validity of anything done by a ... public authority before the provision comes into force.” Paragraph 6(2) maintains the effectiveness of anything a public body is “in the process” of doing when a provision of the Wales Act 2017 comes into force. Finally paragraph 6(2) maintains the effectiveness of anything done by a public authority “which is in force when a provision of this act comes into force” and which was done for/under a function transferred to the Welsh Ministers.
43. Accordingly, it is the case that any licences granted prior to 1 April 2018 remain effective and are not subject to the Welsh Ministers’ power in section 26A. But the transitional provisions are irrelevant where a new application for a licence for any type of coal-mining operation is made and considered by the Coal Authority after 1.4.2018 (including a new application for a variation to an existing licence, though this case does not appear to concern such an application). Thus, section 26A applies and the Coal Authority can only issue the licence with the Welsh Ministers’ approval.
44. To the extent that the Welsh Ministers considered otherwise and issued any document which is deemed an “approval” under section 26A, this was based on a misunderstanding of their legal powers and the decision was thus vitiated by an error of law.

What the Coal Authority is requested to do

45. For the reasons set out in this letter, the First Prospective Defendant, the Coal Authority, is asked to withdraw its offer of a licence to the applicant. If the Coal Authority does not consider that it has the power to withdraw the licence, it should set out the basis on which it considers this to be the case, including by reference to relevant legislation.

46. If the Coal Authority does not consider it has the power to withdraw its offer, then it is asked to agree to the quashing of its decision made on or about 25 January 2022 to approve a licence application by Aberpergwm Colliery for a “Full Underground Licence”, reference **CA11/DM/95/0025.1/C** and to agree to pay the Claimant’s costs of and relating to this prospective claim.

What the Welsh Ministers are requested to do

47. To the extent that the Second Prospective Defendant, the Welsh Ministers, consider that they have not issued an approval in relation to application CA11/DM/95/0025.1/C, they should clarify this immediately in correspondence with the proposed Claimant and other recipients of this letter.

48. If the Welsh Ministers have not issued an approval, but have instead only indicated to the Coal Authority that they will not be making a determination in this case, they are asked immediately to write to the Coal Authority and notify the Authority that they do not approve the authorisation.

49. To the extent that Welsh Ministers consider that they have issued an approval in relation to application CA11/DM/95/0025.1/C, they should set out the basis on which they have done so and indicate the legal basis for their decision. To the extent that they considered, as appears from public sources, that they were unable to withhold such approval, they should immediately withdraw such approval and direct the Coal Authority to immediately withdraw the offer of a licence. If the Welsh Ministers do not consider that they have the power to withdraw their approval, they should set out the basis on which they consider this to be the case, including by reference to relevant legislation.

50. If the Welsh Ministers do not consider they have the power to withdraw any approval, they are asked to consent to judgment based on the fact that they have erred in law as to the meaning of section 26A of the CIA 1994 and sections 67, 71(4) and Schedule 7 of the Wales Act 2017 and agree to pay the Claimant’s costs of and relating to this prospective claim.

Details of Information Sought

51. Both the First and Second Prospective Defendants are required to make full and frank disclosure in judicial review proceedings.

52. We therefore require full information on how both of the prospective Defendants have dealt with each of the points raised above.

53. In addition, we request that the First Prospective Defendant provide the following documents:

(a) both licence applications i.e. the (1) determined application and (2) to the application for a Conditional Underground Licence – Variation (made under the same reference); and

(b) the full set of application documents pertaining to both applications;

(c) the documents sent to the applicant, Energybuild Mining Ltd, on or about 25 January 2022, by way of an offer to grant a licence;

- (d) any other licences relating to Aberpergwm Colliery; and
- (e) communications received from Welsh Ministers in relation to the licence.

54. In addition, we request that the Second Prospective Defendant provide the following documents:

- (a) any communications with the UK Government in relation to this licence and/or the Welsh Government's authority to approve and/or withhold approval of this licence or similar licences generally; and
- (b) documents evidencing the Welsh Ministers' decision to notify the Coal Authority of the Ministers' response in relation to application CA11/DM/95/0025.1/C, so that the content of the decision and the basis for it can be understood.

Orders Sought

55. Should the prospective Defendants not take any of the actions set out at §§45-50 above, the following orders will be sought from the Court:

- (i) A quashing order in respect of the offer of licence and/or any grant of the licence;
- (j) A quashing order of any approval from Welsh Ministers in relation to the said offer/grant;
- (ii) An Aarhus Costs Order;
- (iii) Costs.

Other applications

56. 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.

Details of Legal Advisors Dealing with this Claim

57. Solicitors

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Details of Interested Party

58. Energybuild Mining Ltd

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Address for Reply and Service of Court Documents

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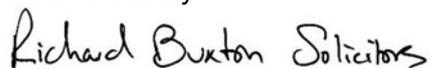
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Proposed reply date

60. As the Coal Authority has made an offer to the Energybuild Mining Ltd, there is a prospect that the offer will swiftly be accepted and the licence granted. It is plainly preferable for everyone involved that the legal status of the offer of the licence and the lawfulness of the Welsh Ministers' position be clarified before the licence is granted. **Accordingly, we ask that the Proposed Defendants respond urgently, and at the latest within 7 days (ie by 15 February 2022) with an indication as to whether they would be willing to take the steps set out in §§45-50 above.** Failing this, the Prospective Claimant will be required to consider whether to seek an injunction to 'hold the ring.'

61. We request a full response from the Proposed Defendants within 14 days i.e by 22 February 2022.

Yours faithfully


Richard Buxton Solicitors
Environmental, Planning & Public Law

cc: Energybuild Mining Ltd