



Llywodraeth Cymru
Welsh Government

From:

[REDACTED]
Energy

Cleared by:

Ed Sherriff

Date:

27 October 2021

MINISTERIAL ADVICE

For decision by: Julie James MS, Minister for Climate Change

**Copied to: Lee Waters MS, Deputy Minister for Climate Change,
Vaughan Gething, Economy Minister.**

Subject	Coal Authority Licence Approval for Aberpergwm coal mine
100 word summary	<p>EnergyBuild, operator of the Aberpergwm colliery, applied to the Coal Authority in September 2020 seeking formal notice that the conditions precedent to the mining licence have been fulfilled, and therefore extraction of the 40 million tonnes coal reserve can commence. The Coal Authority has completed its determination of the application in accordance with its statutory duties. It has notified the Welsh Ministers that it is minded to issue the notice.</p> <p>Section 26A of the Coal Industry Act 1994 requires that the Welsh Ministers approve a licence issued by the Coal Authority before it can take effect. [REDACTED]</p> <p>[REDACTED] The Coal Authority dispute this view, and have written to officials requesting the Minister be consulted on the application.</p>
Timing	Urgent: a decision is required prior to COP26 on 31 October
Recommendation	The Minister is asked to agree to write to the Secretary of State for BEIS and to agree to officials writing to the Coal Authority, setting out it would not be appropriate for Welsh Ministers to share an opinion on this case.
Decision report	This decision does require a Decision Report, which may be published following the issue of letters to the Secretary of State for BEIS and the Coal Authority.

ADVICE

Background

1. Aberpergwm is an underground drift mine in the Vale of Neath, currently operated by EnergyBuild. All coal-mining operations require a licence from the Coal Authority¹ under the Coal Industry Act 1994 (“CIA”) which privatised the UK coal industry. The Coal Authority granted a coal mining operations licence for the site in 1996 (to the then operator). The licence permits mining operations for a period of 99 years, subject to maintaining appropriate planning permissions.
2. In 2013, the licence was varied by the Coal Authority to include two further conditional areas: i.e. the boundary of the site was extended. The ability to carry out mining in the two new licence areas cannot take effect until the Coal Authority is satisfied the conditions precedent to the licence are fulfilled. The condition precedent relevant to this advice is that EnergyBuild was required to obtain planning permission for the extended mining operations by 31 December 2020, or the conditional area of the licence would lapse.
3. Neath Port Talbot County Borough Council (NPTCBC) granted planning permission for the extended mining operations in September 2018. The new planning permission expires in 2039, and initially allows for up to 480,000 tonnes of coal to be extracted annually. The mine contains 40 million tonnes of anthracite coal reserves.
4. In September 2020, EnergyBuild applied to the Coal Authority seeking formal notification that the conditions precedent had been satisfied by obtaining the 2018 planning permission, thereby allowing EnergyBuild to commence coaling in the extended licence areas. The Coal Authority made officials aware of the application in order to consider whether section 26A CIA applied. Section 26A states:

“if or to the extent that a licence authorises coal-mining operations in relation to coal in Wales, it shall have effect only if the Welsh Ministers notify the Coal Authority that they approve the authorisation.”

5. Section 26A applies to operations under new licences and to variations to existing licences where the degree of authorisation for mining operation changes (i.e. if the licence authorises new coal extraction). Section 26A does not give the Welsh Ministers full coal licensing powers: these remain with the Coal Authority.

6. 

7. On 11 October 2021, the Coal Authority wrote to officials confirming it had completed its licence determination process, and was minded to issue a notice to EnergyBuild stating that the 1996 licence has become unconditional in relation to

¹ An executive non-departmental public body, sponsored by the Department for BEIS.

the extended part of the licensed area. The Coal Authority consider that the Welsh Ministers can make a determination under section 26A, and the October letter formally requested that the Minister be consulted on the application.

Planning permission history

8. The Town and Country Planning Notification Direction for Coal and Petroleum Development Wales 2018 was issued on 5 December 2018. The Direction requires that, where a local planning authority does not propose to refuse an application for coal or petroleum development, it must notify the Welsh Ministers. The planning application for Aberpergwm was submitted to NPTCBC on 24 July 2014, and the decision notice issued on 27 September 2018, before the Notification Direction was issued.
9. Prior to the application being considered by the Planning Committee, a request to the Welsh Government was made on 19 April 2018 to call-in the planning decision. Planning colleagues assessed the call-in request against the relevant policy contained in Planning Policy Wales (Edition 9) and it was considered the application was not in conflict with national planning policies in place at that time. Planning permission was granted by NPTCBC.
10. Subsequent to EnergyBuild obtaining this planning permission, the Welsh Government declared a climate emergency in April 2019, and published energy policy and planning policy that is clearly hostile to further coal extraction.

The Coal Industry Act 1994 and section 26A

11. The Coal Authority determines licence applications, including variations and applications to de-conditionalise licences, in accordance with its statutory duties. These are broadly to maintain an economically viable coal mining industry, with operators having a suitable level of expertise and the financial standing to honour potential liabilities. The Coal Authority will also take account of the extent to which the applicant has obtained other necessary surface access rights and consents.

12. [REDACTED]

Coal Authority consultation on the Aberpergwm application

13. The Coal Authority has now determined that the September 2018 planning permission satisfies the conditions precedent, and so intend to issue a notice to EnergyBuild confirming the authorisation for coal mining granted in 2013 can take effect. The Coal Authority have written to officials requesting that the Minister be consulted on the application.
14. However, officials [REDACTED] do not agree that section 26A is engaged, and have asked why the Coal Authority considers that it does. No response has been forthcoming. Officials consider it is possible the Coal Authority are acting according to:
 - a) the clear Welsh policy published in 2021 of objecting to coal extraction and its desire to avoid contradicting this policy;
 - b) a genuine desire to provide the Minister with an opportunity to express a view;
 and

c) the original policy intention behind introducing section 26A², which was to grant the Welsh Ministers greater control over how licences are granted in relation to coal mining operations in Wales, whilst also preserving the Coal Authority's statutory duties. The policy instructions behind section 26A noted the importance of the Coal Authority not being held liable in the event of a challenge from an operator who has been refused a licence because of an objection by the Welsh Ministers.

15. Should the Minister respond to the Coal Authority indicating that Welsh policy is opposed to coal extraction, the Coal Authority cannot take that response into account. Its statutory remit limits it only to considering the applicant's financial standing and competence, and the risk of subsidence. [REDACTED]

16. Notwithstanding the formal working arrangement agreed with the Coal Authority, the CIA requires that the Coal Authority formally issue a licence *before* the Welsh Ministers' powers are engaged, i.e. the licence comes first and then it is for the Ministers to notify the Coal Authority whether or not they approve the authorisation. The approval is required in order for the licence to take effect. In other words, the statute envisages that the Coal Authority issues a licence without knowing what the decision of the Welsh Ministers will be.

17. For these reasons, [REDACTED], officials recommend that the Minister does not offer a view on whether the authorisation should be approved.

[REDACTED]

18. [REDACTED]

[REDACTED]

² As evidenced by the instructions from DECC officials to Parliamentary Counsel to draft what became section 26A (29 April 2016).

20.

21.

Revision of the Coal Industry Act 1994 and section 26A

22. On 24 September 2021, the Secretary of State for BEIS wrote to the First Minister regarding the UK Government's commitment to ensure a future coal mine licensing regime that is compatible with our broader climate goals. Officials provided a draft response to the Minister for Climate Change on 13 October seeking clarity on the proposed changes, and a commitment to fully reflect the climate emergency. We understand this letter has not yet issued.
23. Removing the statutory duty of the Coal Authority to maintain an economically viable coal mining industry, and modifying the provisions contained in section 26A to better facilitate consideration of Welsh policy, would both require legislative changes which will not be agreed and prepared in time to inform this application.
24. Notwithstanding the absence of a quick legislative fix, the Aberpergwm case clearly highlights that section 26A is not working as it was intended and that further action is needed. The licensed activities are likely to increase Welsh, UK and global greenhouse gas emissions and therefore make it more difficult for the Welsh and UK climate change targets to be met. The licence and associated planning permission would allow for the extraction of up to 40 million tonnes (Mt) of coal by 2039. If combusted, the coal would be expected to release circa 100Mt of CO₂ (5.5Mt per annum) plus other combustion related pollutants.
25. EnergyBuild products are destined for multiple markets: water filtration, industrial colorant, brick manufacture, cement, metallurgy processes, industrial processes, domestic fuels and heritage rail. However, the non-combustion markets are limited in scale and there is no clear mechanism to enforce how and where the coal products are consumed, which means that there may be an impact on global emissions too. The inability of Welsh Ministers to prevent the licensed activities taking place highlights the deficiencies in section 26A.

Recommendation

26. As noted above, greenhouse gas emissions resulting from the coal extraction and consumption are likely to be substantial, and the expansion of mining would limit the credibility of Welsh Government's efforts to decarbonise the Welsh economy. Officials therefore **recommend the Minister agrees** to:

- write to the Secretary of State for BEIS; and to
- officials writing to the Coal Authority setting out it would not be appropriate for Welsh Ministers to share an opinion on this case.

27. A draft letter to the SoS BEIS is at Doc. 1. The official level letter to the Coal Authority will confirm that the Minister has been briefed on the issues, and that whilst the Welsh Ministers appreciate the willingness of the Coal Authority to work with the Welsh Government on the exercise of the Welsh Ministers' powers and delivery of our policy, it would not be appropriate to share an opinion in this case.

Financial implications

28. The Welsh Government does not derive any form of direct income from the mining operations or licence [REDACTED]

29. Celtic Energy, operator of the Nant Helen mine, initiated a judicial review against the decision of the Welsh Ministers to refuse to authorise their mining licence in 2020 (MA/P/LG/1454/19 and MA/FM/3632/20). Despite withdrawing the claim before court proceedings commenced, the process cost Welsh Government around £40,000, including very substantial staff time. A challenge from EnergyBuild would likely incur substantially greater costs as the judicial review would be likely to proceed to completion.

30. Further, should any unlawful delay in the granting of the licence result in a clear financial loss to the company, it is very likely that EnergyBuild would seek compensation, [REDACTED] Such compensation, if linked to lost profit from extracting the coal, could escalate to tens of millions of pounds of liability on the public purse.

Communications

31. Officials do not recommend any external communications or briefing at this time. The Coal Authority are working towards their statutory remit, and the Secretary of State for BEIS has already tentatively agreed to revise the CIA. Officials therefore recommend that dialogue with the Secretary of State continues with the aim of seeking intervention on Aberpergwm.

[REDACTED]

[REDACTED]

[REDACTED]

Annex 1: ASSURANCE AND COPY RECIPIENTS

CLEARANCE TRACKING

Aspect	Tracking	Yes	No	N/A	Clearance no.
Finance	Financial implications over £50,000?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Group Finance?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Budget & Government Business Division?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Local Government Finance?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
Legal	Legal issues?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
	Cleared by relevant lawyers?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	
Governance	Novel and contentious issues?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	
	Cleared by Corporate Governance Centre of Excellence?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	

DEPUTY DIRECTOR, STATEMENT OF ASSURANCE

In clearing this MA, I confirm that I, Ed Sherriff, have quality assured this advice, ensuring it is provided on the basis of evidence, accurately presents the options and facts and I am accountable for the recommendations made

I am satisfied that the recommended decision or action, if agreed, would be lawful, affordable and comply with all relevant statutory obligations. Welsh Government policy priorities and cross portfolio implications have been fully considered in line with delivery of the government objectives.

I have fully considered the statement of assurance contained in the MA guidance to ensure all relevant considerations have been taken into account and that the actions and decisions take account of regularity, propriety and value for money.

COPY LIST

All mandatory copy recipients (as indicated in the guidance). Additional copy recipients specifically interested in this advice:

- Mandatory CC MA
- [REDACTED]
- [REDACTED]
- Andrew Slade
- John Howells
- Sioned Evans
- Ed Sherriff

[REDACTED]
 • Neil Hemington
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

[REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]
 [REDACTED]

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