Application Reference No. 4/17/9007

Proposal: Development of a new underground metallurgical coal mine and associated development including: the refurbishment of two existing drifts leading to two new underground drifts; coal storage and processing buildings; office and change building; access road; ventilation, power and water infrastructure; security fencing; lighting; outfall to sea; surface water management system and landscaping at the former Marchon site (High Road) Whitehaven;

> a new coal loading facility and railway sidings linked to the Cumbrian Coast Railway Line with adjoining office / welfare facilities; extension of railway underpass; security fencing; lighting; landscaping; construction of a temporary development compound, and associated permanent access on land off Mirehouse Road, Pow Beck Valley, south of Whitehaven; and

> a new underground coal conveyor to connect the coal processing buildings with the coal loading facility.

Location: Former Marchon Site, Pow Beck Valley and area from Marchon Site to St Bees Coast, Whitehaven, Cumbria

Applicant: West Cumbria Mining Ltd

Date Valid: 31 May 2017

Reason for Committee Level Decision: This is an Addendum to the Report considered and approved by Members of DC & R Committee on 19th March 2019, together with the Update Report dated 19 March 2019 (referred to together in this report as the “Original Committee Report”). It considers the implications of a potential challenge to that decision.

1.0 RECOMMENDATION

Having considered carefully the details of the letter from Leigh Day Solicitors, Committee resolve to ratify their original decision that:

Planning permission be GRANTED subject to:

i. The Committee determining the application on the basis of the reasons set out in the Original Committee Report as updated by this Addendum Report;
ii. the conditions set out in the Original Committee Report;

iii. the applicant (West Cumbria Mining) and other relevant interest holders first entering into a Section 106 legal agreement with the County Council covering the heads of terms set out in the Original Committee Report and an additional financial contribution of £68,327 index linked for improvements to the Mirehouse Road / St Bees Road junction and the Mirehouse Road / rail load facility access road junction; and

iv. The Secretary of State withdrawing the direction preventing the Council from granting planning permission.

2.0 BACKGROUND AND CONTEXT

2.1 In March 2019 the Committee resolved to grant planning permission for the Mine, subject to conditions and a s106 agreement to secure various obligations including highway and heritage improvements and also a restoration bond. The latest redline boundary plan for the planning application as submitted on 10th December 2018 is shown on the drawing in Appendix 1. The s106 agreement is nearing completion. However the Secretary of State has issued a direction under article 31 of the Town and Country Planning (Development Management Procedure) (England) Order 2015. This prevents the release of the Council’s decision until the Secretary of States decides whether to call in the application to determine it himself.

2.2 On the 21st June 2019 the Council received a letter from Leigh Day Solicitors acting on behalf of “Keep Cumbrian Coal in the Hole” (KCCH) who were one of a number of objectors to the planning application. The letter contended that there had been material changes in circumstances since the Committee’s resolution that required the application to be reconsidered by Committee. The letter also contended that there were a number of alleged flaws in our Original Committee Report that could form the basis of a legal challenge to the Council’s decision.

2.3 We have reviewed the contents of the letter carefully and decided to address those matters in an Addendum to our Original Committee Report, given the time available due to the Secretary of State’s direction. This report itemises each of those issues and provides our response to them. We have also taken the opportunity to propose adding an obligation to the S106 Agreement for a financial contribution to the Council to ensure that works to the access with the junction with the public highway and necessary improvements to the Mirehouse Road / St Bees Road junction are carried out. The works are necessary to ensure the safe access and egress to the site and at the Mirehouse Road / St Bees Road junction and this has been agreed with West Cumbria Mining.

2.4 Normally the only recourse to challenge a decision to grant planning permission is a Judicial Review after the planning permission has been issued. However because we have yet to release the formal decision notice, Leigh Day has raised the issues in advance and the additional agreed S106 obligation, it is considered appropriate in this particular instance for the Committee to ratify its original decision having considered the issues raised and the additional S106 obligation.
The key considerations are whether any of the issues raised would have been capable of affecting the outcome of the Council’s original decision.

3.0 ALLEGED CHANGES IN CIRCUMSTANCES

3.1 The Council needs to consider whether any alleged new factor would have been capable of affecting the outcome of the Committee’s decision. What is required is a change that might have had a material effect on the Committee’s deliberations had it occurred before the decision was made. The crucial question is whether the new factor might have led the Committee to reach a different decision.

3.2 It is considered that neither the liquidation of British Steel, nor the change to a zero net carbon target might have led to a different decision. However, given that the Committee is being updated in this report on other matters, for completeness and, as a matter of prudence, these matters are addressed below.

3.3 a) Leigh Day consider that with the liquidation of British Steel in May, this reduced the need for coking coal in the UK and as a result undermined the rationale for approving the planning application.

3.4 The position regarding the liquidation of British Steel naturally has the potential to be a fluid situation, which might potentially evolve or change again, but it is not considered a factor that might have led to a different Committee decision in any event.

3.5 However, an update is provided on what is understood to be the current position from publicly available information. British Steel now has a preferred buyer. A subsidiary of the Turkish Military Pension Fund has agreed Heads of Terms to buy the Company subject to a two month period of due diligence (Reported in BBC news 16th August 2019). The expectation is that the Company will continue to produce steel and with that, there will be a need for coking coal at British Steel.

3.6 In any event our recommendation was not premised on the need for coking coal being solely dependent upon the fortunes of British Steel. In paragraph 6.514 of our Original Committee Report we said that “the UK’s steel manufacturing industry requires a supply of suitable grade metallurgical coal and that this proposal will be able to provide the industry with this essential raw material for the foreseeable future”. Furthermore, “the supply of indigenous metallurgical coal to support the UK steel industry in place of imported coal is positive and should be afforded considerable weight”. It was clear that we were talking about the British steel industry as a whole in paragraph 6.514 and not one particular company. In paragraph 6.404 of the Original Committee Report we clearly identified not just British Steel as a major UK steel producer but also Tata Steel and Celsa. However, it was also noted in the Original Committee Report that the target markets were wider than the UK in that “A mine located at Whitehaven would therefore provide a more local source of this essential raw ingredient for the European steel industry (including the UK)” (paragraph 6.406) and that in this context “The proposed scheme envisages that around 180,000 tonnes of
coking coal would be supplied annually to the UK steel plants at Scunthorpe and Port Talbot (360,000 tonnes total), with the remaining tonnage (just over 2 million tonnes) being transported to Redcar for onward distribution and / or export” (paragraph 6.412). Whilst there may be some current uncertainty around the future of British Steel, we do not accept that there has been a change in circumstance of such magnitude that it undermines or materially changes the overall “need” case for coking coal as set out in the Original Committee Report.

3.7 b) Leigh Day assert that the amendment to the Climate Change Act 2008 (on 27th June) to change the carbon reduction target for the UK from 80% lower than the 1990 baseline to 100% represents another material change in circumstance that impacts upon our original decision.

3.8 Our view here is that whilst the amendment makes the target more challenging, the assessment made in the Original Committee Report in respect of the impact on climate change and efforts to reduce CO2 emissions would not change materially as a result of the change in the carbon reduction target for the UK. In the event both were treated as a key considerations in our Original Committee Report. (See paragraphs 6.39 to 6.56 of the Original Committee Report).

4.0 ALLEGED FLAWS IN DECISION MAKING

4.1 a) Leigh Day argue that there has been a failure to consider greenhouse gases (GHG) resulting from the mining operations.

4.2 The greenhouse gas emissions of the mining operations were not estimated, because our assessment in the Original Committee Report proceeded on the basis that coal production at Whitehaven would substitute for coal production elsewhere. Therefore, we consider that the greenhouse gas emissions of the mining operations would be broadly carbon neutral.

4.3 In paragraph 6.47 we said that “the opening of the mine would be unlikely to create additional demand for coking coal as the demand for coking coal is led by the demand for steel. Therefore, it is reasonable to assume that coking coal produced from a mine in the proposed location is very likely to end up as a substitute for coking coal produced further away”. Furthermore in paragraph 6.406 we said “since the opening of the new mine is unlikely to have any impact on the overall demand for steel, it is reasonable to assume that the coal extracted would be used primarily as a substitute for (as opposed to in addition to) coal currently extracted in other parts of the world and imported by ship”. What we meant by this is that the emissions from mining operations at Whitehaven would most likely be a substitute for those of similar operations elsewhere rather than being a source of additional emissions. Perhaps put more simply, if the coking coal from Whitehaven proved more competitive because it is located closer to steel manufacturing plants of the UK and Europe than the rest of the world, then mining operations elsewhere would be very likely to reduce their output by a similar level of production, leaving CO2 emissions from extraction and processing in balance globally. Furthermore, if the coal from
Whitehaven became less financially competitive than alternative sources, then there would be no market for its product, which would mean it would then remain in the ground, leading once again to a carbon neutral situation.

4.4 In paragraph 6.503 of the Original Committee Report we attributed moderate weight against the proposal from the release of CO2 emissions resulting from the extraction and processing of coal. It would have been clearer if this statement in 6.503 had simply said that greenhouse gas emissions globally as a result of the extraction and processing of coal would be broadly in balance. However, this point was made in other paragraphs of the Original Committee Report (paragraphs 6.47 and 6.406), and additional explanation has been provided above in respect of the thought processes behind the views set out in the Original Committee Report.

4.5 The applicant has made provision for the capture and reuse of methane when the mining system is sufficiently developed to freely liberate methane and allow it to be effectively captured. This is encouraged by Policy DC13 and a proposed planning condition is included as part of the Original Committee Report that requires a Mine Gas Capture Management scheme including for methane to be submitted and approved before mineral working takes place and requires the gases to be managed and used beneficially in accordance with the approved scheme.

4.6 In summary, whilst the greenhouse gas emissions of the mining operations are very likely to be carbon neutral, it is still considered that some carbon savings must exist from reduced transportation distances associated with the more locally sourced coking coal at Whitehaven, as noted in paragraphs 6.43 and 6.46 of the Original Committee Report. This supports the original recommendation in the Original Committee Report.

4.7 b) Leigh Day believe that there has been a failure to consider the need for, and GHG impacts of, middlings coal.

4.8 In the Original Committee Report at paragraph 6.68 we assessed middlings coal as a by-product of coking coal alongside waste (predominantly rock). In other words it would be extracted from underground at the same time. By implication therefore it would produce no more CO2 emissions than that necessary to extract coking coal.

4.9 Although the Original Committee Report did not calculate what CO2 emissions might arise from the eventual use of middlings coal, we identified cement manufacture as a possible use (paragraph 6.70) and in paragraph 6.71 we said “I do not consider its use a substitute for other products for non-energy generation uses in processes such as cement manufacture would result in unnecessary environmental or social impacts. There are valid arguments made in respect of climate change, but I consider these issues could be better managed by applying regulatory controls at the point of use. The planning system has no direct control over the eventual uses to which this product is put, but it would be expected they are used in accordance with government policies and regulations which are requiring a shift away from the use of coal as an energy source. If there was no demand for middlings
coal, it would be disposed of within the mine in the same way as the rock”.

4.10 The premise of the Original Committee Report was that middlings coal could have a beneficial use that would not result in unacceptable environmental or social impact and that it was not unreasonable to allow material extracted as a by-product of the coking coal operation (up to a maximum of 15% of coking coal production) to be used as a substitute for other sources of fuel in industrial processes (instead of requiring this product to be disposed of as mine waste).

4.11 The exact markets would be likely to change over time, although the applicant suggested the cement industry was one possible customer. The burning of middlings coal would undoubtedly result in the generation of some CO2, and it is for this reason that the Original Committee Report drew attention to the fact that “there are valid arguments made in respect of climate change” on that issue (paragraph 6.71). However, the Original Committee Report went on say that we considered that the control of climate change impacts from the middlings coal by-product would “be better managed by applying regulatory controls at the point of use” (paragraph 6.71).

4.12 The reason we considered regulatory controls at the point of use would be the best method of managing CO2 emissions is because of the difficulty in attempting to control the use of the middlings coal product through the planning system, since the uses to which a product is put is not a land use issue, and could not be controlled through the use of planning conditions or legal agreements. Furthermore, we do not consider that it would be possible to predict all the future markets for the product at a variety of unknown sites during the lifetime of the mine and be able to assess the environmental effects of using middlings coal or weigh the emissions in a carbon balance on the basis of what it might substitute for in any meaningful way. An assessment of this basis would not be a reasonable requirement to expect.

4.13 Industrial uses for the middlings coal would have impacts proportionate to the alternative fuel source it was substituting for, and in some cases this might be carbon neutral, but in others cases potentially not. However, an important issue that was made clear in the Original Committee Report at paragraph 6.70, is that middlings coal was not suitable for burning in thermal power stations due to its inherent characteristics and the nature of the boilers. Government policy in any case, is to stop coal being used to generate energy in the near future.

4.14 In acknowledging the valid arguments made in respect of climate change and the middlings coal, we were clear that this issue was weighed in the planning balance, but was not considered of sufficient weight as to justify the refusal of the planning permission for the extraction of coking coal, or to require a condition requiring disposal of the middlings coal product within the mine in order to make the development acceptable, as there were other determinative factors as set out above and in paragraphs 6.70, 6.71 and 6.74 of the Original Committee Report, including that there would be a condition restricting the output of middlings coal from the mine to a maximum of 15% as considered necessary as a matter of planning judgement.

4.15 c) Leigh Day allege a failure to consider the GHG impacts of an increase in
coal production.

4.16 This ground of alleged error is based on the assumption that the Whitehaven mine would add substantially to the global stock of fossil fuels and thereby increase the likelihood of GHG emissions. However, we did not consider that this was likely to be the case and this point has already been covered by my paragraph 4.1 a); there would be no increase in CO2 as the opening of the mine would be offset by the very likely reduction in production elsewhere due to competition.

4.17 The middlings coal by-product of the coking coal is addressed in 4.6 b) above.

4.18 It was also claimed that it would be possible for metallurgical coal to be exported further afield from Europe. In the Original Committee Report at paragraphs 6.408 and 6.410 however we confirmed that there was “undoubtedly a current demand within the UK and EU for coking coal” (para 6.413) and concluded that it was “reasonable to assume that demand for steel and coking coal will continue to exist both within the UK and EU for the foreseeable future” (para 6.414). In addition the Committee was told by Mr Kirkbride of WCM (see Committee minutes) “that two large steelworks (at Scunthorpe and Port Talbot) have expressed a desire to buy their product and that major steelmakers in Europe have expressed a wish to source coking coal locally instead of imports coming from afar, including the USA”. Whilst it is always possible for coal to be exported outside Europe and this cannot be controlled by the planning permission, there appeared sufficient demand for coking coal within it to justify the “need” case. Furthermore, if demand in Europe is lower than expected, then production would very likely reduce so it remains in balance with the available local markets. The more remote the potential market from the proposed Whitehaven mine site, the more likely a closer source to that potential market would be more economically competitive.

4.19 Leigh Day contend that the Whitehaven mine could depress the worldwide price of coal, which in turn could lead to an increase in demand. We acknowledged this as a duly made objection in paragraph 6.45 of the Original Committee Report. The issue was addressed in paragraphs 6.46 and 6.47 and we went onto say “however the opening of a mine would be unlikely to create additional demand for coking coal as the demand for coking coal is led by the demand for steel. Therefore, it is reasonable to assume that coking coal produced from a mine in the proposed location is very likely to end up as a substitute for coking coal produced further away” (paragraph 6.47). The whole basis of our view now and then was that there is only a finite demand for steel and if you add capacity to the supply of coking coal, it is very likely that coking coal producers further afield would reduce their production whilst they sell off their surplus stocks and that coking coal produced from a mine in the proposed location would end up as a substitute for coking coal produced further away. As such, we consider that worldwide prices would generally be unaffected.

4.20 d) Leigh Day consider that we have acted unlawfully by failing to apply Policy ENV2 of the adopted Copeland Local Plan.(2013-2028)

4.21 Policy EV2 was not listed as a relevant Policy at paragraph 6.5 of the Original
Committee Report. What that Policy says is that:

“To reinforce the Coastal Zone’s assets and opportunities the Council will:

e) Protect the intrinsic qualities of the St Bees Head Heritage Coast in terms of development proposals within or affecting views from the designation. At the same time encourage schemes which assist appropriate access to and interpretation of the Heritage Coast area”

4.22 Although not listed, we took full account of the policy in the Original Committee Report and considered it to be relevant to the application. A Policy does not have to be specifically referred to by name as long as it is clear it was otherwise fully considered. That is how the policy was addressed in the Original Committee Report, which did deal with the implications for the Heritage Coast. At paragraph 6.375, the Original Committee Report states that “the development would have also have a moderate adverse impact relating to the heritage sensitivity of the St Bees Heritage Coast” This is repeated in paragraphs 6.383 and 6.507. I am satisfied that the matter was adequately addressed in the Original Committee Report and the Committee should take account of it.

5.0 S106 OBLIGATION

5.1 The Original Committee Report states that “Works would also be carried out to the Mirehouse Road / St Bees Road junction where the turning radius will be adjusted to improve the operational safety of the junction” (paragraph 6.267). Improvements are also needed to the Mirehouse Road / rail load facility access road junction. These works are necessary in relation to the development and the applicant has agreed to fund the Council to do the works as part of the S106 Agreement. It is proposed that the additional financial contribution will be added to the Agreement.

6.0 CONCLUSION

6.1 It is unusual to have such a long gap in time between Committee making a resolution and the release of a decision, but this has been unavoidable, given the Secretary of State direction to the Council not to grant planning permission until further notice from him. However, this has given Officers the opportunity to update and advise the Committee on the matters raised by Leigh Day, along with seeking Committee approval of the additional S106 contribution. In this case I am content on the basis of this report that there is nothing that would warrant a different recommendation or that would put the Council’s original decision at significant “risk” and members should take into account all of the previous material considerations as updated by this report, including the previous representations and objections.

6.2 Officers continue to consider that the proposed development accords with the Development Plan as a whole, it is recommended that planning permission is granted and there are no other material considerations that indicate otherwise.

Appendix 1
APPENDIX 1 - PLAN OF SITE LOCATION/EXTENT