The Planning Inspectorate

Costs Report to the Secretary of State for Levelling Up, Housing and Communities

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an Inspector appointed by the Secretary of State

Date 7 April 2022

TOWN & COUNTRY PLANNING ACT 1990

SECTION 77

APPLICATION BY WEST CUMBRIA MINING LTD

Inquiry Held on 7–10, 14-17, 21-24, 28-30 September 2021 and 1 October 2021.
Site visit held on 4 October 2021

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

File Ref: APP/H0900/V/21/3271069

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

- The application is made under the Town and Country Planning Act 1990, sections 78 and 320, and the Local Government Act 1972, section 250(5).
- The application is made by South Lakes Action on Climate Change for a partial award of costs against West Cumbria Mining Limited.
- The inquiry was in connection with an application called in for decision by the Secretary of State by a direction, made under section 77 of the Town and Country Planning Act 1990, on 11 March 2021.
- The development proposed is:
  - 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;
  - a new underground coal conveyor to connect the coal processing buildings with the coal loading facility.

Summary of Recommendation: That the application for a partial award of costs be granted in the terms set out below.

Documents submitted at the Inquiry (Inquiry Documents) are listed at Annex C of the Inspector' main report and are prefixed with ID. Core Documents are listed at Annex E of the main report and are prefixed with CD. Both sets of documents can be accessed via the electronic library at https://www.cumbria.gov.uk/planning-environment/wcm.asp

The Submissions for South Lakes Action on Climate Change (SLACC)

1. This section is based largely on the Partial Costs Application by SLACC.[1]

Introduction

2. The Planning Practice Guidance ("PPG") on Appeals[2] states that an interested party which chooses to be recognised as a Rule 6 party may have an award of costs made to it (paragraph 056 Ref ID: 16-056-20161210). Such an award may be a procedural award, arising from unreasonable behaviour[3] of the type exemplified in paragraph 052 of the PPG, including:

[1] ID71
[2]Paragraph 034 Reference ID: 16-034-20140306"
[3] The word "unreasonable" in this context is given its ordinary meaning as established in Manchester City Council v SSE & Mercury Communications Limited [1988] JPL 774, per the guidance in the NPPG at paragraph: 031 Reference ID: 16-031-20140306.

a. resistance to, or lack of co-operation with the other party or parties in providing information;

b. delay in providing information or other failure to adhere to deadlines;

c. introducing fresh and substantial evidence at a late stage necessitating an adjournment, or extra expense for preparatory work that would not otherwise have arisen.

Procedurally Unreasonable Behaviour

3. It is submitted that the applicant, West Cumbria Mining (WCM), has engaged in procedurally unreasonable behaviour in two separate ways during the course of the consideration of this called-in application:

a. the late provision of information on the Greenhouse Gas (GHG) and climate change impacts of the proposed development, both in relation to 6th Carbon Budget and updated mitigation, despite SLACC requesting that information at an early stage and it clearly being a key issue for consideration; and

b. the repeated refusal to provide timely information in relation to the "trenchless construction" (to become "pipe-jacking") proposals, despite early and repeated requests for that information by SLACC. These two aspects of the applicant's unreasonable behaviour are addressed in turn.

Climate Change Information

4. It was clear from 11 March 2021, the date of the call-in letter from the Secretary of State, that the climate change impacts of the application, and specifically the consistency with the Climate Change Committee's recommendations for the 6th Carbon Budget were key matters to be considered at the Inquiry. In that letter the Secretary of State noted that whilst reasons are not normally given for call in decisions, he considered it appropriate in this case to do so. The first reason mentioned was the publication of the Climate Change Committee's (CCC) recommendations for the 6th Carbon Budget.[4] Further reasons given included that there was a "potential conflict with national policies in Chapters 14 and 17 of the National Planning Policy Framework (the Framework) and substantial cross-boundary or national controversy" in relation to the application which satisfied various limbs of the call-in policy.[5]

5. Indeed, before that, on 9 February 2021, the County Council had decided to refer the application back to Committee to consider the implications of the 6th Carbon Budget, albeit that the applicant had filed judicial review proceedings challenging that decision.[6] Nevertheless the applicant could not have been in any doubt as to the relevance of the CCC's recommendations on the 6th Carbon Budget to the determination of its application.

6. The Secretary of State's call-in letter also set out matters on which the Secretary of State "particularly wishes to be informed" the first of which was "the extent to which the proposed development is consistent with Government

[4] PB/3 Appendix 1 page 25-26 (paragraph 6 of the call-in letter).
[5] Ibid
[6] Council's Statement of Case CD 15 pg 59 paragraphs 4.6 – 4.7.

policies for meeting the challenge of climate change, flooding and coastal change in the Framework".[7]

7. It was therefore obvious from 11 March 2021 at the latest that climate change was a key issue to be considered by the Inquiry and that the environmental information accompanying the application and relating to climate change would need to be updated in light of (at least) the CCC's recommendations for the 6th Carbon Budget.

8. SLACC was granted Rule 6 party status by letter of 9 April 2021. This letter set out the Inquiry start date of 7 September 2021 and provided that proofs of evidence were due on 10 August 2021. From the date of that letter WCM should have been aware that it should provide any material updates to the environmental information in good time before 10 August when proofs of evidence were required from all parties.

9. Statements of Case were exchanged between the Parties on 5-7 May 2021. Both of the Rule 6 parties' cases clearly raised the issue of compliance with the 6th Carbon Budget.[8] SLACC's Statement of Case specifically set out its concerns that the operational impacts of the mine were not in accordance with the CCC's recommendations,[9] that the true emissions would be much greater than claimed by the applicant[10] and that the environmental impact assessment of the GHG emissions had thus far been inadequate.[11]

10. The applicant's Statement of Case also recognised the importance of compliance with Government policies on climate change, arguing that the proposal would "help support the transition to a low carbon future, in accordance with paragraph 148 of the Framework"[12]and stating that applicant would "show how the Proposed Development has been designed to help reduce GHG emissions" as well as indicating that the applicant would "commit to ensuring that […] residual emissions are offset"[13] by the funding and development of "an accredited 'carbon sink' forest scheme".[14]

11. Though WCM disputed the relevance of the end use emissions of the coal at that stage, its Statement of Case clearly accepted that the emissions from the construction and operation of the mine were relevant considerations and that new information would have to be provided.[15]

12. On 7 June 2021, the Case Management Conference was held. During that meeting, the Inspector made clear that a Regulation 22 request would shortly be made by PINS and informed the applicant what would be required, including updating of the assessment of the likely significant effects presented in Environmental Statement (ES) Chapter 19 (Greenhouse Gas Emissions) to

[7] PB/3 Appendix 1 page 25-26 (paragraph 11 of the call-in letter).
[8] See e.g. SLACC Statement of Case at 5.3-5.5, 5.14, 6.22; FOE Statement of Case at 4.21-4.23.
[9] SLACC Statement of Case at 5.2.2, 5.14.
[10] SLACC Statement of Case at 5.13-5.16.
[11] SLACC Statement of Case at 6.22-23.
[12] WCM Statement of Case para 108.
[13] WCM Statement of Case para 110.
[14] WCM Statement of Case para 20.
[15] WCM Statement of Case para 107 – 108(c).

consider the 6th Carbon Budget. To the extent that there had been any doubt previously, the applicant was therefore clearly on notice from early June of the need to update the environmental information.

13. On 10 June, SLACC wrote to WCM seeking information on, inter alia, details of the proposed "carbon offsetting measures", including the proposed "carbon sink forest scheme" and specifically noted that it was requested that any update to the environmental information be provided in good time for SLACC to consider the requested information with its instructed experts well in advance of the date for submissions of proofs of evidence.

14. On 14 June, the Inspector's CMC note was sent to the parties. This confirmed in writing what had been said in the meeting, that, among other things, further information in the form of an addendum or update to the ES would be required in relation to the 6th Carbon Budget.

15. Further requests reiterating the need for information were made by SLACC on multiple occasions before the deadline for proofs of evidence. Despite this, the only information that WCM provided by correspondence in relation to the climate change impacts of the development was:

    a. By letter of 12 July 2021 there was the first mention of "the acquisition of Gold Standard verified emission reductions". It was not clear at that stage whether "Gold Standard" related to a particular scheme, or was simply a turn of phrase. Nothing was said to indicate that the "carbon sink forest scheme" was no longer relied upon.

    b. By letter of 30 July 2021, there was a statement that the offsetting proposed by WCM related to a particular scheme labelled "The Gold Standard" and that the planning obligation would be worded "by reference to the Gold Standard Scheme 'or such equivalent'". It was also stated in that letter in response to SLACC's concerns about the incomplete nature of the prior GHG assessment that "as you are already aware, the GHG assessment is currently being updated in response to the Regulation 22 request and we would caution against undertaking any work in respect of the old assessment which is clearly subject to change." Whilst SLACC was of course aware of the Regulation 22 request, no indication prior to this had been given that the AECOM Report would not be relied upon (albeit updated) prior to 30 July 2021.

16. On 2 August 2021, the applicant provided a draft section 106 Agreement to the parties under cover of an e-mail to the other Rule 6 Party, Friends of the Earth, drawing attention to a revised GHG mechanism. At that point, it became clear that the proposed carbon sink forest had been abandoned; a different GHG mitigation scheme was proposed and the AECOM assessment previously incorporated into the s106 Agreement would be replaced by a report by "Ecolyse". Although referred to, the report was not appended.

17. WCM had previously, on 16 July 2021, written to the PINS Environmental Services Team indicating that the need to await certain traffic modelling results would delay the final production of information in relation to the Regulation 22 request until 3 September 2021, but asserted that any other information which "becomes available ahead of the updated traffic information, we will so far as

we are able share that remaining information with the parties at the earliest possible moment."

18. Despite this assurance the Ecolyse report was produced as an appendix to the Proof of Evidence of Ms Leatherdale and was sent to the Rule 6 parties by email at 9:47 am on 11 August 2021. Ms Leatherdale confirmed in evidence that Ecolyse was probably appointed in May or June and that a first draft of the report was available to the applicant in June 2021.

19. As a result of the applicant's behaviour, when SLACC was preparing its proofs of evidence in July and early August 2021, the only environmental information from the applicant on GHG impact was the AECOM report, which was in fact no longer relied upon by the applicant.

20. The applicant did not provide the updated GHG assessment in good time. Rather, well after SLACC's work on the proofs of evidence had commenced, on 30 July 2021 (ie more than 19 weeks after the Secretary of State called in the application) the applicant wrote to SLACC cautioning "against undertaking any work in respect of" the AECOM report.

21. As a result, SLACC was forced to consider the main elements of the applicant's case on climate impact – the extent of GHG emissions; a wholly new methane capture system design and a new carbon offsetting scheme (different from the one referred to in the applicant's Statement of Case) in less than four weeks in the run-up to the inquiry. All of these new aspects of the WCM case/scheme were required to be dealt with via rebuttal evidence.

22. The 10 August 2021 Ecolyse Report gave every impression that it represented the full and final assessment of greenhouse gas emissions on behalf of the applicant. It explicitly stated after identifying reasons for the update that:

> "Following the receipt of the Regulation 22 Request, and mindful of the importance of avoiding a so-called "paper chase" through various documents and the need to ensure that an environmental statement is easy to understand (Berkley v Secretary of State for the Environment [2001] 2 AC 603, per Lord Hoffmann at p. 617), it was decided to present all of the updates to the GHG Assessment as one composite document prepared by Ecolyse.
>
> Accordingly, the Ecolyse Assessment should be read as a stand-alone document that updates and replaces the previous work carried out by AECOM in its entirety thereby allowing all the matters identified above to be addressed in a single document."

23. The applicant's behaviour in only providing the updated assessment after the deadline for exchange of proofs of evidence caused the Inspector to amend the inquiry timetable such that, exceptionally, the deadline for rebuttal evidence on climate change was changed from 24 August 2021 to 8 September 2021, i.e. after the opening of the inquiry. This impact on the inquiry timetable is a strong indicator that the applicant's behaviour was procedurally unreasonable.

24. The applicant then compounded its unreasonable behaviour. At 19h26 on 3 September 2021, ie one working day before the opening of the inquiry and two working days before the extended rebuttal deadline, the applicant

provided, unheralded, a Revised ES Chapter on GHG Emissions and another report from Ecolyse, dated 1 September 2021 ("Ecolyse 2").

25. The applicant did not, in its e-mail or in the Revised ES Chapter, indicate that Ecolyse 2 was different from Ecolyse 1. On previous occasions when the ES had been updated, amended text was highlighted in yellow.[16] SLACC only discovered by happening to notice that the date on the Ecolyse 2 Report was different to Ecolyse 1, and then had to compare the two documents in detail to discover that Ecolyse 2 adds a whole category of emissions, from the steel and concrete etc that will be used to build the mine, as well as further mitigation measures it is said that WCM will employ. The additional emissions amount to an additional half a million tonnes of CO2e over the lifetime of the development: 509,823 tonnes more, to be precise. The change was made by the addition of one unhighlighted sentence at paragraph 1.9 of Ecolyse 2, stating that the report had been updated to include "additional data on GHG emissions embedded in materials consumed over the operational lifetime of the Development", and then further unhighlighted changes to the numbers in tables and text throughout the Report.

26. WCM has now indicated that Ecolyse 2 had been commissioned on 13 August 2021, and updated data provided by Ecolyse to applicant on 25 August 2021 with the final report finalised on 1 September.[17] It is not clear, given the impending inquiry:

    a. Why the Parties were not put on notice to expect an updated ES Chapter and a further report, given the applicant was aware from 13 August 2021 that this would be the case;

    b. Why the applicant only provided data to Ecolyse on 25 August 2021;

    c. Why it then took a week to finalise the report once given that none of the conclusions of the report were altered based on that the updated data; and

    d. Why Ecolyse 2 was not provided when it was finalised on 1 September 2021, rather than after close of business on 3 September 2021.

27. As a result of the late provision of the Revised ES Chapter and Ecolyse 2, the Inspector again extended the deadline for provision of climate change rebuttals to 10 September 2021.

28. As a result of the late production of the Revised ES Chapter on Climate Change and Ecolyse 2, SLACC incurred costs in undertaking abortive work to analyse aspects of Ecolyse 1 and the figures reproduced and relied on from Ecolyse 1 in other analyses in various WCM proofs of evidence and appendices (in particular CL/1, CL/2, JT/1 and JT/2) which comprised what SLACC was led to believe was the full complement of evidence from the applicant in relation to climate change when it began to prepare rebuttal proofs of evidence.

    Amendment of the Proposal and Failure to Provide Information on Trenchless Construction or Pipe-Jacking

[16] See, eg CD 1.83 ES Chpt 5 pg 502 ff.
[17] Leatherdale note on factual points dated 30.9.21.

29. The Design and Access Statement 2018 (WCM-PA-EIA-Design and Access Statement - 4/17/9007) described the development as follows:

> "A further consideration was how to get the coal from the clean coal store to the loading facility. The use of road vehicles was dismissed at an early stage for both environmental and economic reasons. Similarly, the option of a surface conveyor was dismissed because of its environmental impacts. A sub-surface conveyor installed by a cut and cover method was the chosen method of coal transportation. This prevented the location of the facility being in any residential areas or for residential areas to be between the main mine site and RLF as these would require tunnelling to achieve access."[18]

30. Accordingly, the application described a "sub-surface conveyor installed by a cut and cover method" as the "chosen method of coal transportation".

31. The description of the development in paragraphs 5.3.79 – 85 of the 2018 ES Project Description chapter, similarly, described how the conveyor would be installed using a 'cut and cover' technique.[19] Various plans were provided showing the proposed culvert, cross sections, construction phasing, the location of the intermediate station.[20] The ES also included a "Conveyor construction methodology" dated 23 August 2017, which described the cut and cover operations and contained an appendix of "Cut and Fill Balance Calculations".[21]

32. When the application was amended in April 2020, an updated Design and Access Statement was produced, which only gave revised wording in relation to the middlings coal.[22]

33. Accordingly, the application before the Council, and thus the application before the Secretary of State when it was called in, was for development that included a "subsurface conveyor installed by a cut and cover method".

34. Without providing any further information, and without drawing attention to the amendment, the applicant sought to amend the application through a single sentence in its Statement of Case, introducing "trenchless construction techniques".[23] The use of the plural is notable – "trenchless construction" encompasses at least five different techniques.

35. SLACC therefore wrote to the applicant on 10 June; 5 July; 24 July and 27 July taking issue with the amendment and asking for factual clarification of what the "trenchless crossing" entailed and what its impacts would be, as well as at which woodlands the method was proposed to be used. This correspondence is summarised in Appendix 3 to Mr Bedwell's proof of evidence pages 22-31.[24]

36. The applicant's responses provided little additional information by which to evaluate the impacts of the trenchless construction proposal. By letter of

[18] CD 1.66 page 162.
[19] CD 1.83 pages 525-526.
[20] CD 1.36, 1.37, 1.38, 1.39.
[21] CD 1.84 at pages 542-543 and pages 567-568 respectively.
[22] CD 1.67.
[23] CD 15.1 §118(a) page 44.
[24] The full correspondence is provided in a separate appendix.

25 June it was asserted that this "will follow a method for construction that is well established. The precise details will be subject to approval under a condition. However, the intention is that the depths and separation distances will ensure that there will be no adverse impact on the ancient woodland" but no detail was given as to what the method would be or what depths and separation distances would be proposed or where the technique would be used.

37. On 12 July 2021, the applicant first mentioned the construction of access shafts and indicated a concrete tunnel would be driven between these, but provided no plans or any information on depth other than that it was "currently anticipated" that the "invert of the tunnel would be at least 5m below ground level". It may be noted that the invert is the lowest inside point of the tunnel.

38. On 30 July 2021, the applicant provided certain limited additional information, including for the first time indicating that the trenchless construction method would be used in relation to both Roskapark/Benhow Wood and Bellhouse Gill Wood, and indicated that: "We anticipate being able to provide a method statement that will provide more detail on the construction method that is proposed to you next week." None materialised.

39. Unknown to SLACC, the applicant had prepared a "Pipe Jacking Work Package" document, the first draft of which was dated 19 April 2021. The final version of this document was produced on 4 August 2021, but not disclosed at that time or with the proofs of evidence on 10 August 2021.

40. Instead, on 10 August 2021, a single paragraph of the applicant's planning witness's proof of evidence introduced the term "pipe jacking," for the first time, again unheralded and unacknowledged as an amendment;[25] two paragraphs in the applicant's ecology witness's proof of evidence asserted that the use of pipe-jacking would reduce impacts on the ancient woodlands to negligible levels.[26]

41. It is clear therefore that the applicant was in possession of significant information in relation to the pipe-jacking proposals, but continually refused to provide the most basic factual information requested by SLACC.

42. On 23 August 2021, SLACC wrote to the Inspector raising the prejudice that was being caused by the lack of information. SLACC submitted that if the Inspector intended to consider the scheme as revised, this would require a delay to the Inquiry to accommodate for WCM to provide plans and further information to allow the feasibility and impacts of pipejacking to be assessed and to give adequate opportunity for the parties (and third party consultees) to consider the new information. SLACC submitted that an adjournment would be preferable to a part heard inquiry.

43. On 24 August 2021, in response to this request for adjournment, WCM apparently decided it was in its interests to disclose the Pipe-Jacking Work Package document, which had first been produced in April 2021. The document indicated that since April 2021, updates had been made and minor errata fixed in sections 8.1, 9.1 and 13 only. The changes had been finalised on

[25] WCM/ST/1 §5.131.
[26] WCM/PS/1 §§5.4 – 5.5.

4 August 2021, almost a week before the deadline for proofs of evidence on 10 August 2021. Despite this, the applicant described the failure to provide the document until 24 August 2021 (and only as a result of the application by SLACC) as a "slight delay … due mainly to annual leave commitments during the August holiday period".[27]

44. Reference was also made to the need for care "to be taken to ensure that the methodology addresses the recent concerns expressed by SLACC at the end of July 2021 regarding the hydrogeological impacts of the works." The Work Package did not in fact address the hydrological impacts; SLACC had raised those concerns on 24 July 2021 because the applicant had, for the first time on 12 July 2021 indicated that the pipe-jacking may require temporary diversion of a water course.

45. On the evening of 3 September 2021 the applicant provided, with the Regulation 22 material (although it did not directly relate to any part of the Regulation 22 request) a document titled "Buried Conveyor Route: Pipe-jacking Option Design Assessment Summary" dated August 2021 (but without any specific date or version history[28]); a letter dated 31 August 2021 from Harding Hydro on hydrology impact and a letter dated 23 August 2021 from a contractor. No explanation was given for the delay in providing these documents.

46. As a result of the applicant's behaviour, when the inquiry opened, there was no amended Design and Access Statement, no diagrammatic information for the amended application, aside from what the applicant's ecologist Dr Shepherd referred to as "schematic" overhead plans; no plans showing the pipejacking construction in comparison to ground levels or the steep topography, no plans showing the relationship between the cut and cover works and the trenchless pipe-jacking part of the scheme; and no updated plans in relation to other matters such as access, construction phasing, or construction staging areas, all of which remain consistent only with the cut and cover scheme. Whilst the Pipe-jacking Design Statement purported to update the cut and fill balance calculations,[29]this relates only to the area where the pipe-jacking takes place and takes no account of the transition areas on either side where significant additional excavation is likely to be required due to the depth of the culvert being much greater than anticipated in the cut and cover scheme in those areas.[30]

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[27] Letter from Ward Hadaway dated 24.08.21.
[28] On 28 September, during the ecology roundtable, SLACC requested that this information be provided, UT at time of writing it has not been forthcoming).
[29] Pipejacking Design Statement p. 7.
[30] Compare the WCM cross sectional drawing provided on 27.9.21 (which shows in one area, for instance, that the depth to the conveyor will be 6 metres – meaning that the trench will need to be at least 8.6 metres taking account of the 2.6m conveyor box structure). It is not known how far this area of deep trenching may extend and thus how much additional material may be generated. (It may be noted that whilst some of this material will be used to fill the trench, the new calculations do not take account of whether there is adequate temporary storage nor do they consider the "bulking factor" applied in the cut and fill balance calculation [CD1.84 567-568] which takes account of the fact that only a proportion of the soil excavated will be able to be used when filling the trench.

47. After a request from the Council for sections of the entire conveyor length showing how the construction would relate to the topography of the site, a single further plan was provided on the last week of the Inquiry, on the evening of 27 September 2021 at 20:41 (Long Section 1).[31] This illustrates only the sections of the culvert tunnel that will pass directly under the woodlands and does not constitute a full response to the information requested by the Council. Nor, for instance, does the plan show the full extent of the area in which the trench will be required to be deeper than previously proposed in relation to the transition between the pipe-jacked and trenched areas.

48. In his evidence, the applicant's planning witness Mr Thistlethwaite was asked about the paragraph in his main proof of evidence which introduced pipe-jacking and about the information he had available at the time. He stated he had not seen the Pipe-Jacking Work Package or the Design Assessment, but had been briefed on what the document would contain and had seen a presentation on what would be involved. He indicated he thought he had seen a drawing showing where the access shafts would be and undertook to provide the drawing. On 30 September 2021, two drawings were provided, dated September 2021 ("Long Sections 2[32] and 3[33]"). Plainly those could not have been available to Mr Thistlethwaite when he drafted his proof of evidence dated 10 August 2021.

49. These plans cause further confusion as they are different from Long Section 1:

    a. The drawing of Roskapark Wood in Long Section 2 shows a Launch Shaft which is 9.5m deep and 9m wide and a Reception Shaft 6.5m deep and 6m wide. The drawing in Long Section 1 shows a Launch Shaft 8m wide (no depth given) and a Reception Shaft 7m wide (no depth given);

    b. The drawing of Bellhouse Gill in Long Section 3 gives a depth of 9m for the Launch Shaft and 10m for the Reception Shaft, neither of which depths appear on the drawing in Long Section 1.

50. As a result of the applicant's behaviour, the position on the second last day of the inquiry is that none of the application documents describe the pipe-jacking scheme; the majority of the plans show the cut and cover scheme and the two plans showing the pipe-jacking scheme are different.

51. SLACC incurred additional costs in significant correspondence with the applicant before and during the inquiry seeking information necessary to consider the pipejacking proposals, as well as in having to address these proposals and the new information piecemeal and at a late stage, all of which required significant additional work of its legal team and instructed Ecologist. SLACC also incurred additional costs in making two sets of legal submissions on whether the Secretary of State has the power to permit the application to be amended and on the lawfulness of granting planning permission on the basis that significant environmental information, needed to understand the likely significant effects of the pipe-jacking scheme, can be deferred for provision via condition.

[31] Plan 869/SK/5001.
[32] 869/AC/010 Rev A (Sept 2021) Roska Park Conveyor.
[33] 869/AC/011 RevA (Sept 2021) Bellhouse Gill Conveyor.

Conclusion

52. For the reasons set out above, the applicant's behaviour falls within the examples of unreasonable behaviour set out in the PPG and cited in SLACC's introductory paragraph above.

53. SLACC asks for a partial award of costs. The applicant's behaviour has been particularly egregious and appears to have been designed to cause difficulty to the Rule 6 Parties by withholding information; amending or changing information central to the application without warning and without drawing attention to the changes and providing additional late information, again without any warning. This in and of itself is a sufficiently exceptional circumstance to justify an award of costs to a Rule 6 Party.

54. That position is strengthened because of the neutral position taken in the inquiry by the Council, with the Rule 6 Parties therefore largely shouldering the role of highlighting where further information is necessary adequately to consider amendments to the scheme, and where potential uncertainties in relation to the revisions give rise to conflicts with existing plans and documents, and where risks and harms may arise.

55. Instead of behaving fairly and sensitively in these circumstances, the applicant has repeatedly acted so as to make the inquiry as difficult and time-pressured as possible for the Rule 6 Parties and has tried to use the neutrality of the Council as an excuse for its behaviour.

56. SLACC seeks the costs of the pre-inquiry correspondence and legal submissions necessitated by the unreasonable behaviour; the proportion of its costs of preparing evidence and preparing for the inquiry that were incurred in addressing (1) the AECOM Report, and abortive costs addressing aspects of Ecolyse 1 which were then amended, and (2) the lack of clarity concerning the pipe jacking proposal; and its costs in producing legal submissions for the Secretary of State on the pipe jacking scheme.

The Response by West Cumbria Mining Limited

57. This section is based largely on the Applicant's Response to the Partial Costs Application by SLACC.[34]

Context

58. At the outset it is important to put any questions of reasonable conduct into the context of the development application as a whole.

59. This is a substantial infrastructure application for an EIA development which has been the subject of three resolutions (following lengthy officers' reports in support) to grant planning permission. The second resolution to grant planning permission was subject to an application for judicial review which was subsequently withdrawn.

60. The planning application was first submitted in May 2017. The Secretary of State having twice refused to "call in" the application, finally doing so on 11 March 2021. A result of this delayed decision making process for this EIA

[34] ID78

development is that it has been necessary to update existing evidence. Indeed, as the Secretary of State himself stated when justifying his decision to "call in" the application:

> "It is noted that the planning application for this development was first submitted to Cumbria County Council in May 2017 and has been considered by their planning committee on three occasions, without a final outcome being reached. Four years later, it is now being reconsidered a further time… … The Secretary of State has decided to call this application in because of the further developments since his original decision. The Climate Change Committee's recommendations for the 6th Carbon Budget have been published since he was advised on this decision…."

61. The Secretary of State concluded his letter at paragraph 7 by informing the parties that: "The Planning Inspectorate (PINS) will write to you shortly about the procedure for determining the called-in application." This was followed by the case management hearing and then with the PINS Regulation 22 letter, signed with the authority of the Secretary of State, which stated that: "Following examination of the ES, including all updates and addenda to date, the Secretary of State notifies you by this letter, pursuant to Regulation 22 of the 2011 EIA Regulations, that, to comply with Schedule 4 of those regulations (Information for inclusion in environmental statements) the applicant is required to supply the following further information". The letter then set out the need for a series of additional pieces of information that had arisen due to time lapse which had taken place, including:

a. "that Cumbria County Council would advise the applicant of any new other development that has come forward (subsequent to the other development included in the cumulative effects assessment presented in the ES) which needs to be assessed cumulatively with the application proposals. If any such new development is identified by the Council, an updated description of likely significant cumulative effects should be provided;

b. "With regards to the description of the forecasting methods used to assess the effects on the environment, traffic modelling used to inform the ES assessments was based on the year 2019 as 'peak construction'. A new peak construction period should be identified and traffic reprofiled taking into account any new other development (as per the point above) that needs to be factored into the traffic modelling. The worst-case assessment of likely significant effects presented in relevant ES chapters should be updated to reflect the updated traffic modelling;…"

c. An updated Phase 1 habitat survey completed in March 2020 (provided with the ES Addendum in April 2020) explained that a small reptile population had now been confirmed in the north of the Main Mine Site and that "robust mitigation measures" would be implemented, to ensure this population is safeguarded during the construction phase of the development. A description of the measures envisaged to prevent, reduce or offset any significant adverse effects on reptiles should be provided, along with an updated description of likely significant effects;…

As well as the general updating work required outlined above, the letter also required the GHG assessment to be updated due to the publication of the 6th Carbon Budget.

d. "The Carbon Budget Order 2021 secures the carbon budget for 2033- 2037 (the 6th Carbon Budget). The applicant's Greenhouse Gas Emissions assessment (ES Chapter 19) (provided in the ES Addendum, April 2020) is based on the 3rd, 4th and 5th Carbon Budgets. The operational life of the Proposed Development (circa. 50 years) would extend into the 6th Carbon Budget period (2033- 2037). Therefore, the assessment of likely significant effects presented in ES Chapter 19 (Greenhouse Gas Emissions) should be updated to consider the 6th Carbon Budget;…"

e. "Based on the outcome of the updated Greenhouse Gas Emissions assessment, an updated description of measures envisaged to prevent, reduce or offset any significant adverse effects on the environment as a result of greenhouse gas emissions should be provided, where relevant;…"

62. The letter also noted that "Although it is not a statutory requirement, in the interests of transparency and openness the applicant may wish to publicise the availability of the further information in accordance with Regulations 22(3), 22(4) and 22(8) of the 2011 EIA Regulations." The applicant duly did so.

63. So, not only did the delays in the decision-making process mean that the applicant was faced with producing substantial additional material in a short space of time to meet the inquiry timetable, but also more specifically the Applicant was required to update GHG assessment in the light of the 6th Carbon Budget and address its consequences. This letter was copied to the Rule 6 parties, including SLACC. SLACC thus knew full well that the GHG assessment was to be materially updated for reasons which were not in any way related to the conduct of the applicant.

64. SLACC had previously made criticism of the AECOM GHG assessment. Given that the applicant was, in any event, being required to materially update the GHG assessment, it took the opportunity to respond to objector criticisms including those from SLACC by commissioning independent experts to review the AECOM GHG assessment and produce an updated appraisal of the associated GHG emissions.

65. The applicant's approach was expressly in accordance with the PINS advice. However, for these particular purposes, it is relevant to note that at no stage did SLACC make any request for any additional information to be supplied by way of a further Regulation 22 request.

66. It is also to be noted that despite the claims of a need for a range of information (e.g. in respect of pipe-jacking and GHG) SLACC (and indeed no-one else) has even responded to the Regulation 22 consultation.

Climate change information

67. There appear to be two aspects to this costs application:

a. First, it is argued that it was unreasonable not to provide the GHG assessment produced by Ecolyse ("Ecolyse 1") at an earlier date;

b. Secondly, it is suggested that it was then unreasonable to produce an update the GHG assessment ("Ecolyse 2") when the applicant provided its response to the Regulation 22 request for further information.

68. The applicant will address these issues in turn, before proceeding to consider the second limb of the test for an award of costs, which is barely covered in SLACC's application.

Provision of Ecolyse 1

69. It is regrettable that SLACC's lengthy summary of the procedural history[35] ignores key dates and facts, such as the Regulation 22 request from PINS. The essential chronology is as follows:

a. On 30 June 2021 PINS issued a formal Regulation 22 request for further information on a number of topics.[36] This included a request to update the assessment of likely significant effects presented in Chapter 19 of the ES to consider the 6th Carbon Budget. Depending on the outcome of the updated GHG assessment, the request also indicated that "an updated description of measures envisaged to prevent, reduce or offset any significant adverse effects on the environment as a result of greenhouse gas emissions should be provided". The Regulation 22 request asked the applicant to inform PINS how long the preparation of this further information was anticipated to take.

b. In a letter dated 16 July 2021, which was copied to SLACC, the applicant indicated that the full information would not be available until 3 September 2021. However, recognising the time pressure that all parties were under, the applicant fairly and reasonably undertook to share any information that became available before that date with the other parties at the earliest possible moment.

c. In an email dated 28 July 2021 from Ms Cottam, the Environmental Services Team at PINS acknowledged the anticipated date (3 September 2021) for the formal submission of the Regulation 22 response and the applicant's intention to provide any information that is available sooner in advance of that date, and requested an anticipated date for the submission of that other information. In response, the applicant subsequently stated by way of email dated 4 August 2021, which SLACC's solicitors were also copied into, that it hoped to be able to provide a copy of Ecolyse 1 by 11 August 2021.

d. Ecolyse 1 was finalised on 10 August 2021, and provided on that day (in advance of the suggested deadline) as an appendix to Ms Leatherdale's proof of evidence.

70. As the key timetable set out above makes clear, SLACC's central complaint that Ecolyse 1 was not provided in good time is baseless. There was no delay in providing the report or failure to adhere to deadlines.[37] The applicant prepared Ecolyse 1 in response to the Regulation 22 request for further information from PINS which the applicant was required to respond to. The provision of that response accorded with the timetable agreed with PINS, which SLACC was aware of. Moreover, the applicant provided Ecolyse 1 to the Rule 6 Parties in

[35] See paras. 3 – 19 of SLACC's Costs Application.
[36] In addition to GHG emissions, the regulation 22 request required updated traffic modelling, an updated vibration assessment and updated habitats surveys, as is set out above in more detail.
[37] Cf. the PPG guidance cited at para. 1(b) of SLACC's Costs Submissions.

advance of the agreed timetable, as soon as it was available, as it had undertaken to do.

71. It plainly cannot be unreasonable to provide a document, which the applicant was required to produce,[38] in accordance with the timetable set by the Inspector. If SLACC believed that the timetable set by the Inspector was unlawful or unreasonable, it should have challenged it by way of judicial review, but did not do so. Moreover, it did not even formally ask the Inspector to reconsider the timetable in this regard.

72. The applicant cannot provide a document that is not physically ready. All it can reasonably do is provide that document as soon as it is available. That is what the applicant undertook to do, and that is what the applicant did.

73. The fact that a first draft may have been available before 10 August 2021 does not take SLACC's case any further.[39] As one would expect given the importance of the GHG assessment and its interrelationship with other matters, such as the methane mitigation proposed by Mr Tonks and the GHG review mechanism included in the section 106 agreement, there was a need for ongoing collaboration between various experts when preparing the final GHG assessment (as indeed occurred when such cooperation was necessary to produce additional notes on GHG to answer points raised by the Rule 6 parties). The key date is when the document was finalised not when an initial draft, however incomplete it may be, was first provided. It is not unreasonable for an applicant not to provide earlier, incomplete versions of technical assessments. Indeed, it would be positively unhelpful to do so since this approach may well lead to unnecessary and abortive work being carried out on parts of an assessment that has not been finalised and may be subject to change.

74. The suggestion that SLACC was somehow unaware of the nature and extent of the updated GHG assessment is also baseless, not least, because SLACC specifically requested that "WCM consider and address the concerns raised by SLACC about the ES methodology, described in detail in SLACC's letter to the Council dated 21 June 2020 at pages 13-22" as part of the additional assessment undertaken pursuant to the Regulation 22 request.[40] These concerns about the methodology included: (i) the appropriate baseline for the assessment; (ii) the estimation of operational GHG emissions; (iii) the approach to end use emissions; (iv) the use of UK carbon budgets when assessing the significance of emissions; and (v) the magnitude criterion used when assessing significance.[41]

75. As soon as the applicant became aware that SLACC may be undertaking additional work regarding the previous AECOM assessment (not previously foreshadowed in its Statement of Case),[42]the applicant wrote to SLACC

[38] In response to a formal regulation 22 request for further information.
[39] See para. 17 of SLACC's costs submissions.
[40] See para. 3 of SLACC's letter dated 10 June 2021.
[41] See pages 16 – 26 of SLACC's letter dated 21 June 2020 at CD3.5, pp. 73 – 83.
[42] In paragraph 5 of its letter dated 24 July 2021, SLACC indicated for the first time that the AECOM report "appears to provide a materially incomplete estimate of the likely GHG emissions from the construction, operation and decommissioning of the mine" and that it

expressly to caution against their undertaking any such work until the updated Regulation 22 response had been provided.[43] At the same time, the applicant also requested that SLACC provide further details on why it considered that the estimation of operational emissions was materially incomplete, in an attempt to assist the inquiry by providing an agreed figure so as to reduce areas in dispute. However, no response to this request was ever received from SLACC.

76. Finally, contrary to the assertion at paragraph 22 of SLACC's costs application, the amendment to the inquiry timetable does not provide any indicator (let alone a "strong indicator") that the applicant's behaviour was procedurally unreasonable. As the Inspector made clear on a number of occasions, he was simply seeking to accommodate what was a challenging timetable for all parties as fairly as possible. That timetable was driven by a number of external factors outside of the applicant's control, including the delay in the determination of the application, the date fixed for the inquiry, and the need to provide further information in response to the Regulation 22 request. If the Inspector or PINS thought that the applicant's suggested timetable for its response was unreasonable, then they would have said so and either requested a revised date for submission or adjourned the inquiry.

Provision of Ecolyse 2

77. The revised GHG Chapter, which included Ecolyse 2 as an appendix, was submitted as part of the applicant's response to the Regulation 22 request in accordance with the agreed deadline for submission (i.e. on 3 September 2021).

78. It is self-evident that, given the updates to the GHG assessment, the GHG Chapter of the ES would need to be updated accordingly and provided with the Regulation 22 response. Moreover, it is not suggested that the updates to the GHG Chapter caused any prejudice to SLACC. That is not surprising given that the body of the chapter is included in the GHG assessment, which had already been provided to SLACC in advance of the formal Regulation 22 response on 10 August 2021.

79. Ecolyse 2 contained one small update regarding the provision of additional data on GHG emissions embedded in materials consumed over the operational lifetime of the Development, which was explained at paragraph 1.9 and included at appendix B of the assessment where an additional entry for "Purchased Goods and Services" had been included in the tables.[44] This update was provided in order to address a specific concern that had been identified by one of SLACC's own witnesses, Professor Grubb, in his proof of evidence. Any other amendments were simply consequential adjustments to reflect the provision of this additional data.

80. It is unbelievable that SLACC now seeks to suggest that it was unreasonable for the applicant to update Ecolyse 1 in order to address a specific concern regarding the estimated GHG emissions that had been raised by SLACC's own witness. It is even more unbelievable when one considers that the applicant

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would also "question the methodology behind the estimates that are provided in the AECOM Report".

[43] See paragraph 11 of the letter from the applicant dated 30 July 2021.

[44] See Tables B-1, B-2 and B-3.

had specifically invited SLACC to provide information regarding these concerns in its letter dated 30 July 2021, in the hope that they could be addressed in Ecolyse 1 and agreed, but SLACC (unreasonably) failed to provide any response.

81. It was plainly reasonable for the applicant to seek to update Ecolyse 1, which was provided early and in advance of the wider Regulation 22 response to assist the Rule 6 Parties and the efficient conduct of the inquiry, to address the issue that had been raised by Professor Grubb before the further information went out for consultation.

82. If the complaint is simply that the applicant did not expressly highlight which sections had been updated, then the appropriate response would have been for SLACC to ask the applicant. No such request was ever made.

Unnecessary expense

83. In order for an award of costs to be made, it is necessary to demonstrate not simply that a party has behaved unreasonably, but also that that unreasonable behaviour has directly caused another party to incur unnecessary or wasted expense.[45]

84. For all the reasons set out above, it is categorically denied that the applicant has behaved unreasonably in any respect. However, even if is found that any of SLACC's complaints are justified (contrary to the applicant's submissions), there is no basis for finding that any of these complaints have caused SLACC to incur unnecessary or wasted expense.

85. With regard to the provision of Ecolyse 1, SLACC's submissions do not even set out what unnecessary expense it is said to have incurred as a result of the failure to provide the assessment at an earlier date, and the applicant reserves the right to comment on this if it is subsequently set out in any response. However, in order to assist the inquiry, the applicant will attempt to address points which it anticipates SLACC may be trying to make:

    a. Insofar as it is suggested that work was initially carried out by reference to the original AECOM Report (notwithstanding the considerable updates SLACC had invited the applicant to make to this), that work had already been undertaken by SLACC when objecting to the Application last year. It is therefore wholly unclear what additional expense SLACC would have directly incurred from any delay in receiving Ecolyse 1.

    b. Insofar as it is suggested that the preparation of rebuttal proofs amounted to additional work that would not have been required if Ecolyse 1 had been provided earlier,[46] that work would have been required whenever the GHG assessment was provided. Moreover, SLACC has not been shy in providing rebuttal evidence from its other witnesses, and those responding to the GHG assessment also responded to other matters through their rebuttal evidence. It is therefore clear that rebuttals would have been provided by SLACC irrespective of when Ecolyse 1 was provided.

[45] See PPG reference ID: 16-028-20140306.
[46] See para. 20 of SLACC's costs submissions.

86. When considering whether SLACC has directly incurred unnecessary additional expense, it is also important to note that all of SLACC's witnesses who provided evidence on GHG emissions have expressly confirmed that they have done so on a pro bono basis. Therefore, plainly, any additional work carried out by these witnesses in reviewing documents or preparing proofs or rebuttals cannot have resulted in any additional expense.

87. Insofar as it is being suggested that any additional unnecessary expense has arisen from lawyers acting from SLACC needing to carry out additional unnecessary work, SLACC will need to set out what this is and provide the relevant fee agreements which demonstrate that it has directly caused SLACC to incur additional costs.

Pipe-jacking

88. SLACC's submissions on its partial costs application relating to pipe-jacking are inaccurate and incomplete.

89. First, as already indicated on a number of occasions, the applicant does not accept SLACC's characterisation of the change to the construction method of part of the underground conveyor as an "amendment" to the application. Nor did the applicant consider that this change was likely to be controversial. Indeed, given the concern that had been raised about the loss of woodland that would result from the adoption of the cut and cover method, it had (perhaps naively) been assumed that the change, as an acknowledged environmental improvement, would have been welcomed by SLACC.

90. The applicant made it clear in paragraph 118(a) of its Statement of Case that trenchless construction techniques would be employed for the buried conveyor under the woodland areas. Despite being in receipt of the applicant's Statement of Case in advance of the case management conference, SLACC did not raise any issue or concern about this proposal.

91. At some point following the Case Management Conference, SLACC then decided that it was not clear about what was being proposed and requested further information. The applicant sought to respond to these requests,[47] however, there was plainly a disagreement between the parties as to the extent of detail that needed to be provided. Moreover, as the applicant made clear, the details were still being considered and there were a number of outstanding matters (including those raised by SLACC and the applicant's own ecologist) that needed to be addressed. Accordingly, the applicant considered that it would be preferable for the relevant details to be provided comprehensively in one go rather than being drip-fed through correspondence. The applicant was correct in this respect, as has been borne out by the misunderstandings and additional correspondence that ensued.

[47] See correspondence from applicant's solicitors (filed with SLACC's application for costs) dated 25 June 2021, 12 July 2021, 30 July 2021, 24 August 2021 (and specifically paragraph 12 thereof) enclosing a method statement for the trenchless construction of the conveyor), complete submission of Regulation 22 response to Pins by email 3 September copied to all parties which included a detailed design statement for the conveyor's trenchless construction design

92. Any delay in the provision of information arose because the applicant was seeking to respond to the additional information requested by SLACC during the August holiday period, when a number of its experts were away. Furthermore, it was relatively minor and did not have any material effect on the timetable for evidence.

93. The bottom line in respect of this issue is that there has been a disagreement between the parties regarding the level of detail that needs to be provided, borne out of different professional opinions on the matter. To the extent, that disagreement remains, it should be noted that SLACC's planning witness (Mr Bedwell) agreed that sufficient information was available to allow the matter to be dealt with by way of condition requiring the submission of further details. However, notwithstanding the applicant's position that it had provided sufficient information, it has continued to respond to further requests from SLACC for additional information. It has done so to help SLACC, the Council and the Inspector understand what is proposed. It is difficult to see how this can ever be regarded as unreasonable conduct. On the contrary, the applicant has gone above and beyond what it considered was necessary in order to assist with the efficient conduct of the inquiry.

Unnecessary expense

94. The alleged unnecessary expense incurred by SLACC appear to relate to three aspects:

a. First, having to consider the "amended" proposal at all;

b. Second, making legal submissions on whether the Secretary of State has the power to permit the application on the amended basis; and

c. Third, correspondence seeking additional information.

95. The first two matters can be dealt with together. The applicant has provided separate legal submissions in response to SLACC's Pipe-Jacking Submissions, setting out why they are misconceived and devoid of all merit. It is respectfully submitted that the applicant's response to those submissions (which should be regarded as being repeated mutatis mutandis herein) clearly indicates why any costs in respect of considering the "amended" proposal and SLACC's legal submissions in respect of them have not been unnecessarily incurred as a result of unreasonable conduct on behalf of the applicant.

96. With regard to the third matter, as has already been set out above, any additional correspondence was not the result of unreasonable conduct and, moreover, was driven by SLACC and not the applicant.

Conclusion

97. For the reasons set out above there is no merit in this partial cost application. The application is hopeless and is itself entirely unreasonable which would justify an adverse costs award for the time spent in replying.

98. The partial costs application was made the day before closing submissions in a lengthy inquiry. No prior notice was given but it is evident that much unnecessary cross examination time was spent endeavouring to build a costs application in a wide variety of issues (beyond those finally pursued). The

conduct of SLACC at various places throughout the inquiry in constantly asking for further information in respect of matters which ultimately went nowhere was itself unreasonable. It is very important that such conduct is not rewarded.

South Lakes Action on Climate Change Counter Response

99. This section is based largely on the Reply by SLACC to the Applicant's Costs Response.[48]

Introduction

100. This Reply does not address every element of the applicant's Costs Response ("the Costs Response"), but instead focuses on the main issues.

Climate Change Information

101. As set out at paragraphs 3-10 of SLACC's Partial Costs Application, it was obvious in March 2021 and blatantly obvious in May 2021, well before PINS was obliged to make a formal Regulation 22 request in June 2021, that the applicant's environmental information needed to be updated. The applicant has not disputed this; rather, it has ignored the point.

102. Under the guise of "Context", the applicant suggests in paragraphs 3-8 of its Costs Response that "delays" in the decision-making process (i.e. before March 2021) were responsible for changing the circumstances in which the application was made. This is no response to the procedurally unreasonable approach to climate change information which the applicant adopted after the application was called in on 11 March 2021. Second, the applicant does not acknowledge that the main "delay" in the application process was the failure by the applicant and the Council to finalise a Section 106 Agreement once the Council had approved the application i.e. something over which the applicant had a significant degree of control.

103. In paragraph 8 of its Costs Response, the applicant states that SLACC knew, because of the Regulation 22 request, that the GHG assessment was to be materially updated. This ignores, and does not respond to:

a. The fact that, prior to 30 July 2021, the applicant gave no indication that the AECOM Report would be abandoned, rather than simply updated to address the 6th Carbon Budget,[49] despite the extensive correspondence with SLACC in June and July 2021.[50]

b. The fact that the applicant was made aware of the Regulation 22 request on 7 June 2021,[51] which does not justify the applicant failing to provide the updated climate change information until after the deadline for proofs of evidence on 10 August 2021, particularly when it was well aware of that deadline; and

c. The fact that the only justification ever given by the applicant to PINS for the delay in providing the Regulation 22 response was the need to await certain

[48] ID86
[49] See §14(b) of SLACC's Partial Costs Application.
[50] ID70 pages 3-30.
[51] See §11 of SLACC's Partial Costs Application.

traffic modelling results,[52] which is plainly irrelevant to, and should not have held up, the provision of the climate change information.

104. The applicant suggests in paragraphs 15-16 of its Costs Response that a Regulation 22 timetable was "agreed" with PINS or was "set" by the Inspector. That is not correct. PINS simply acknowledged the applicant's correspondence on when it would provide the information. There was no "agreed" timetable and certainly none "set by the Inspector".

105. In paragraph 11 of its Costs Response, the applicant unreasonably criticises SLACC for not responding separately to the Regulation 22 consultation. That is no answer to the procedural unfairness set out in SLACC's submissions arising from when the Regulation 22 information was provided; in fact, it demonstrates the point that SLACC could not reasonably be expected to respond separately to the consultation, at the same time as engaging with the inquiry, which very often sat late because of the significant volume of inquiry work which needed to be undertaken.

106. Turning to Ecolyse 2, the applicant ignores and fails to respond to the fact that Ecolyse 1 gave every impression that it represented the full and final assessment of greenhouse gas emissions on behalf of the applicant.[53] Given that, it was not at all "self-evident" that the GHG Chapter of the ES would be updated, contrary to paragraph 23 of the applicant's Costs Response.

107. Further, Ecolyse 2 was not provided due to changing policy landscape or upon the Inspector's request (as was other Regulation 22 information), it was to correct and update Ecolyse 1 in response to an error identified by Professor Grubb, as conceded in the applicant's Costs Response at paragraph 24. It is wholly inappropriate for the applicant to suggest, as it does at paragraph 25 of its Costs Response, that this was a concession to satisfy a narrow 'specific concern' raised by SLACC: the original AECOM Report was erroneous and contained an incomplete and misleading assessment of the greenhouse gas emissions of the proposed development, which mistake was repeated by Ecolyse 1.

108. The provision of Ecolyse 2 is not evidence of the applicant being accommodating to the Rule 6 parties. Instead, Ecolyse 1 is an example of the applicant providing partial and/or incorrect information and Ecolyse 2 an example of the applicant, without explanation or demur, and late in the process, correcting information upon SLACC having pointed out an error. That has been a pattern throughout the inquiry.

109. The applicant ignores and does not respond to the delay in providing Ecolyse 2 once it was finalised.[54] The applicant itself asserts in its Costs Response that all it could reasonably do is "provide [a] document as soon as it is available".[55] Plainly, that was not the approach taken with Ecolyse 2, which was finalised on Wednesday 1 September 2021, but was not provided until after close of business on Friday 3 September 2021, and one working day in advance of the

[52] See §16 of SLACC's Partial Costs Application.
[53] See §21 of SLACC's Partial Costs Application.
[54] See §25(b)-(d) of SLACC's Partial Costs Application.
[55] See §17 of the applicant's Costs Response.

inquiry. This is an unreasonable and unjustified delay for which no justification is given.

110. The applicant downplays the extent of the changes in Ecolyse 2 (paragraph 24 of the Costs Response). The extent of greenhouse gas emissions and their proposed mitigation were central aspects of the inquiry and topics on which the Inspector was to hear detailed technical expert evidence; it is no small matter that the Ecolyse 2 added a whole new category of emissions amounting to over half a million tonnes of CO2e over the lifetime of the development.[56]

111. It is remarkable that the manner in which the applicant provided Ecolyse 2 to the inquiry attempted to brush this change under the carpet. But perhaps most worryingly, in paragraph 27 of its Costs Response the applicant brazenly suggests that it was acceptable not to draw the changes in Ecolyse 2 to the parties' or the Inspector's attention; instead suggesting that SLACC should have asked if the document was different. This is the type of unreasonable behaviour by a party which the costs regime is designed to discourage.

112. Contrary to paragraphs 30-32, SLACC made it clear that the unnecessary expense incurred as a result of the unreasonable behaviour on climate change evidence was:

    a. pre-inquiry correspondence;

    b. the proportion of its costs of preparing evidence and preparing for the inquiry that were incurred in addressing the AECOM Report, and abortive costs addressing aspects of Ecolyse 1 which were then amended.[57]

113. On the AECOM Report, contrary to paragraph 30(a) of the Costs Response, there is plainly a significant difference in time and cost between an objector responding to an application and a party to an inquiry instructing expert witnesses (even where the witnesses themselves are appearing pro bono) and reviewing and physically producing proofs of evidence and appendices for a planning inquiry.

114. Contrary to paragraph 30(b), there is a difference between the time and cost required to produce rebuttal proofs when key evidence has been able to be addressed in main proofs, and the time and cost required where rebuttal proofs are the first opportunity to address a main piece of evidence, such as Ecolyse 1 and 2. It is obvious that much more significant, time-consuming and costly work is involved in the latter circumstance. That is the unnecessary or wasted expense which arose as a result of the applicant's key greenhouse gas evidence only being provided after the deadline for main proofs of evidence.

115. The Appeals PPG makes it clear that any application for costs must demonstrate "how any alleged behaviour has resulted in unnecessary or wasted expense", which can include unnecessary or wasted expense "for part of the process", arising from time spent by the party's representatives preparing for the inquiry.[58] That does not oblige the applicant for partial costs, at this stage, to quantify the wasted expense, contrary to the suggestion in paragraph 32 of the

[56] See §24 of SLACC's Partial Costs Application.
[57] See §55 of SLACC's Partial Costs Application.
[58] Paragraph: 032 Reference ID: 16-032-20140306.

applicant's Costs Response. Indeed, the PPG confirms "the Inspector or Secretary of State can only address the principle of whether costs should be awarded in full or in part, not the amount."[59]SLACC has demonstrated why the applicant's unreasonable behaviour led to unnecessary or wasted expense in correspondence before the inquiry opened and in preparing aspects of the inquiry and evidence for it. It has therefore justified why, in principle, a partial award of costs should be made in its favour.

Amendment of the Proposal and Failure to Provide Information on Trenchless Construction or Pipe Jacking

116. This aspect of the partial costs application goes beyond a disagreement as to the extent of evidence required to be provided on an aspect of the development. Very unusually, until well after proofs of evidence were exchanged, there was no information other than the previous cut and cover element was no longer part of the application and instead the applicant proposed "trenchless construction methods", which were asserted to be preferable. In particular:

    a. The applicant stated in correspondence on 30 July 2021 that it anticipated a method statement would be provided the following week, but nothing materialised, despite the fact that the applicant had prepared a document (the first draft of which it had in April 2021), which was finalised on 4 August 2021 but was not provided until 24 August 2021, and only in response to SLACC's submissions to the Inspector on the prejudice that the applicant's behaviour was causing;[60]

    b. The applicant provided further information on the proposed pipe jacking after close of play on 3 September 2021, i.e. one working day before the inquiry opened, with the Regulation 22 information (despite nothing in the Regulation 22 request relating to pipe jacking; a point not disputed by the applicant), and despite that information having been finalised and with the applicant by the end of August.[61] The applicant does not proffer any real explanation in its response for this delay, apart from a vague reference to it being preferable for details to be provided "in one go"[62]and any delay being "relatively minor".[63]

117. The applicant ignores and does not respond to the dearth of information when the Inquiry opened (detailed in paragraph 45 of SLACC's Partial Costs Application), nor is there any response to SLACC's points on the very late plans (provided on the evening of 27 September 2021 and 30 September 2021, detailed in paragraphs 46-47 of SLACC's Partial Costs Application).

118. The applicant's behaviour falls squarely within the procedurally unreasonable behaviour described in the PPG and set out at paragraph 1 of SLACC's Partial Costs Application.

119. SLACC set out the wasted expense incurred as a result in paragraph 50. The applicant's Costs Response on the legal submissions is to disagree with their

[59] Paragraph: 044 Reference ID: 16-044-20140306.
[60] See §§37-42 of SLACC's Partial Costs Application.
[61] See §44 of SLACC's Partial Costs Application.
[62] See §36 of the applicant's Costs Response.
[63] See §37 of the applicant's Costs Response.

substance and label them misconceived because the amendment is not "substantial", despite the applicant's own planning witness accepting that the amendment relates to an aspect of the development which is crucial to whether the development comes forward and which is central to the grant of planning permission. In paragraph 40 of its Costs Response, the applicant repeats "mutatis mutandis" its submissions in response to SLACC's legal submissions.

120. On the correspondence seeking the additional information, the applicant's Costs Response appears to be that this was "driven by SLACC",[64] ignoring: a. That SLACC had no other way of asking for the requisite information other than by correspondence; and b. That the protracted nature of the correspondence was in fact driven by the applicant's drip-feeding information and failing to be forthcoming.

Conclusion

121. Nothing in the applicant's Costs Response changes the position: its behaviour falls within the examples of unreasonable behaviour set out in the PPG and has caused SLACC unnecessary or wasted costs.

122. As previously submitted, the applicant's behaviour has been particularly egregious and appears to have been designed to cause difficulty to the Rule 6 Parties by withholding information; amending or changing information central to the application without warning and without drawing attention to the changes and providing additional late information, again without any warning. The applicant's belligerent and high-handed response reflects its approach throughout. It is important that PINS and the Secretary of State not tolerate the type of behaviour displayed by the applicant in this inquiry.

Inspector's Conclusions

123. The Planning Practice Guidance advises that in 'called-in planning applications' a party's failure to comply with the normal procedural requirements of inquiries risks an award of costs for unreasonable behaviour.[65] As also set out in the PPG, examples of unreasonable behaviour giving rise to an award of costs are a lack of co-operation with the other party or parties in providing information, introducing fresh and substantial evidence at a late stage or a delay in providing information or other failure to adhere to deadlines.[66]

Climate Change Information

124. At the time the planning application was called-in for determination by the Secretary of State on 11 March 2021, the information contained within the application submission documents relevant to GHG emissions was that provided in Chapter 19 (Greenhouse Gas Emissions) of the ES which was primarily based on the AECOM GHG Assessment dated 6 May 2020.[67]

125. The 'call-in' letter set out that the Secretary of State wished to be informed, amongst other things, "on the extent to which the proposed development is

[64] See §41 of the applicant's Costs Response.
[65] Paragraph: 034 Reference ID: 16-034-20140306
[66] Paragraph: 052 Reference ID: 16-052-20140306
[67] CD1.145

consistent with Government policies for meeting the challenge of climate change". At that time there may have been an inference that the AECOM GHG Assessment may need to be updated. However, it was not until the letter from the Planning Inspectorate (PINS) dated 30 June 2021 pursuant to Regulation 22 of the 2011 EIA Regulations, that there was a formal requirement to update Chapter 19 of the ES to consider the 6th Carbon Budget. At that point, I consider that all parties were aware of the requirement for the GHG Assessment to be updated and therefore reliance could not wholly be placed on the 6 May 2020 version of the AECOM GHG Assessment.

126. On 16 July 2021 the applicant advised PINS that the information required to be provided pursuant to Regulation 22 would not be available in its entirety until 3 September 2021, although if information became available earlier, then this would be provided. Although it was inferred in a draft copy of the Section 106 Agreement on 2 August 2021 that the AECOM GHG Assessment would be replaced by the 'Ecolyse GHG Assessment' (Ecolyse 1), a copy of this was not made available to SLACC until 10 August (the date identified for the submission of proofs of evidence). This was contained in an appendix to Ms Leatherdale's proof of evidence.

127. Whilst the applicant may have had an earlier initial draft of Ecolyse 1, I have no clear evidence of the date that this may have been available or the extent to which its content required further revision. On 30 July 2021 the applicant wrote to SLACC cautioning against undertaking any work in respect of the AECOM GHG Assessment.

128. As a consequence of the Regulation 22 request set out in the letter dated 30 June 2021, the applicant was obliged to update Chapter 19 of the ES to consider the 6th Carbon Budget and had no alternative but to undertake additional work to address this. In these circumstances, I do not consider that the intervening time period during which a new report, by new consultants, was procured and produced to be unusually lengthy.

129. As the Inquiry dates had been fixed, with no requests from any party for a delay to the opening date, I recognise that Ecolyse 1 would have needed to be addressed in rebuttal proofs of evidence. The Inquiry Programme was adjusted to ensure that matters relating to climate change were considered in the third week of the Inquiry commencing on 21 September 2021 with the deadline for the submission of rebuttal proofs extended to 8 September 2021. As such, Ecolyse 1 was available for almost six weeks before any evidence that may have related to its contents was considered in the Inquiry and four weeks prior to the submission of rebuttal proofs.

130. Taking the above matters into account, I do not consider that the applicant acted unreasonably with regard to the production of Ecolyse 1. Whilst there may have been an inference that the AECOM Assessment may have required revision prior to 30 June, it was only on this date that PINS formally set out its requirements in the Regulation 22 request. The final version of Ecolyse 1 was provided approximately six weeks after the notice which I do not consider to be an overly lengthy period of time to undertake the required work and nor do I consider that it would have been appropriate for any earlier drafts to have been shared.

131. Furthermore, I do not consider that the preparation of rebuttal proofs would have amounted to additional work that would not have been required had Ecolyse 1 been provided earlier. Its contents would likely have required addressing whether in main proofs of evidence or in rebuttals.

132. Late on 3 September 2021 (one working day before the opening of the Inquiry) a further revision to Ecolyse 1 was submitted by the applicant. This revision (Ecolyse 2) was dated 1 September 2021 and included new information on emissions from materials to be used to construct the mine and details of additional mitigation measures.

133. I accept that Ecolyse 2 was submitted prior to the deadline for the responses to be provided pursuant to the Regulation 22 request (i.e. 3 September 2021). However, there was no prior indication that Ecolyse 1 was to be updated. It is therefore understandable that SLACC sought to prepare rebuttal proofs on the basis of Ecolyse 1 as constituting the full complement of evidence from the applicant in relation to climate change.

134. As a consequence of the submission of Ecolyse 2, the deadline date for the submission of climate change rebuttals had to be extended to 10 September 2021. The applicant considers that there were only small updates contained in Ecolyse 2. Nonetheless, its unexpected submission gave only five working days for SLACC to review its contents and provide rebuttal proofs. This would have likely resulted in some abortive work by SLACC in the preparation of the rebuttal proofs that were based on Ecolyse 1.

135. I consider that the late and unexpected submission of Ecolyse 2 by the applicant constitutes unreasonable behaviour as prescribed in the PPG. This led to the incursion of additional cost by SLACC in having to consider Ecolyse 2 at a late stage.

136. Taking the above factors into account, I do not consider that the applicant acted unreasonably in the events or process that led up to the submission of Ecolyse 1. However, I consider that the late submission of Ecolyse 2 constitutes unreasonable behaviour of a kind prescribed in the PPG and for which an award of partial costs should be awarded. However, I consider that such award should be limited to those aspects of SLACC's costs involved in reviewing Ecolyse 2 and preparing amendments to rebuttals that were previously based on Ecolyse 1. In this regard, I am mindful that SLACC's witnesses who provided evidence on climate change confirmed that they had done so on a 'pro bono' basis. Therefore, the extent to which additional legal expense was incurred will need to be demonstrated in the consideration of the financial amount of the partial costs award.

Pipe-jacking Information

137. The application, as considered by the Council, described a "sub-surface conveyor installed by a cut and cover method". The applicant's Statement of Case in relation to ecological impacts identified that "Trenchless construction techniques for the buried conveyor under the woodland areas will significantly reduce the disturbance to woodland areas".[68]

[68] CD15.1 page 44

138. Despite correspondence between SLACC and the applicant regarding the requests for more detailed information on the pipe-jacking proposals, SLACC alleged that only limited information was provided. On 30 July 2021 the applicant indicated that pipe-jacking would be intended to be used beneath Bellhouse Gill Wood and Roskapark/Benhow Wood and that a method statement would be provided, albeit SLACC alleged that this did not materialise.

139. In proofs of evidence submitted on 10 August 2021 by the applicant's planning and ecological witnesses, reference was made that pipe-jacking would reduce impacts on the woodlands to negligible levels. On 24 August 2021 the applicant provided a 'Pipe-jacking Work Package' Document. This indicated that it was first issued on 19 April 2021 and revised to its final version on 4 August 2021.

140. On 3 September 2021, the applicant provided the Regulation 22 material which included a document titled "Buried Conveyor Route: Pipejacking Option Design Assessment Summary" dated August 2021 and a letter from Harding Hydro on the hydrological impact of pipe-jacking dated 23 August 2021. SLACC alleges that there were no detailed plans at that stage to show, amongst other things, the construction phasing, access and topographical details/vertical alignment of the pipe-jacking sections.

141. In advance of the intended discussions on planning conditions, the Council requested the applicant to provide sections of the entire conveyor length and details of how this would relate to the topography of the site. On 27 September 2021 a plan "Long Section 1" was provided by the applicant illustrating the sections of the culvert tunnel to be constructed by pipe-jacking that would pass directly beneath the woodlands. SLACC consider that this does not represent the extent of information requested by the Council and does not show the full extent of construction works, particularly in relation to the transition areas from cut and cover technique to pipe-jacking and vice-versa. Further drawings (Long Sections 2 and 3) were submitted to the Inquiry on 30 September 2021, albeit it is alleged that there is some confusion regarding aspects of the information contained on these plans.

142. SLACC suggests that the repeated requests for additional information, the suggestion that the applicant was withholding information, and the late submission of this constitutes unreasonable behaviour. In addition, it is suggested that the introduction of the pipe-jacking technique resulted in SLACC incurring additional costs in the production of legal submissions for the Inquiry on pipe-jacking.

143. It is clear that the applicant sought to introduce the pipe-jacking technique as a construction methodology to reduce the disturbance to the woodland areas. Pipe-jacking itself is neither a new nor novel technique. In my view, one of the main areas of disagreement between SLACC and the applicant regarding this aspect of the claim for an award of costs is the extent to which detailed information should be provided.

144. I do not consider that the applicant acted unreasonably in submitting the amendment to the construction methodology of the underground conveyor beneath the woodlands by use of the pipe-jacking technique. There were clear planning reasons for this to mitigate the impact of construction works on the woodlands. In my recommendation to the Secretary of State on the planning application, I have set out the reasons why I consider pipe-jacking to be an

acceptable amendment to the application to help mitigate an environmental impact. In my view, the fact that SLACC chose to submit legal representations to the Inquiry on this matter is not of a consequence of unreasonable behaviour on behalf of the applicant.

145. With regard to the submission of the details of pipejacking, there is some merit in SLACC's concerns that the Pipe-jacking Work Package' Document was available at the time proofs of evidence were exchanged, if not before, and therefore could have been provided well before 24 August 2021 to assist in the preparation of relevant proofs of evidence by SLACC's witnesses. In this regard, there is clear evidence that SLACC sought to obtain more information prior to 10 August 2021.

146. It was clear in the applicant's Statement of Case that trenchless construction was to be used and therefore SLACC were aware that there was an intent to use this technique. Therefore, this could have been taken into account in the preparation of proofs of evidence.

147. I endorse the view of SLACC's planning witness, Mr Bedwell, provided during the last week of the Inquiry that there was sufficient information available to allow the more detailed design information on pipe-jacking to be dealt with by way of planning condition, albeit this was after the submission of Long Section 1 which followed the Council's request for its provision.

148. I recognise SLACC's perception that there may have been more information available on the pipe-jacking technique prior to the submission of the proofs of evidence that could have been provided earlier. I also consider that it would have been beneficial to all parties for the 'Pipe-jacking Work Package' Document, as a minimum, to have been disclosed earlier and certainly prior to 10 August 2021.

149. However, I am mindful of the applicant's view that "the details were still being considered and there were a number of outstanding matters (including those raised by SLACC and the applicant's own ecologist) that needed to be addressed. Accordingly, the applicant considered that it would be preferable for the relevant details to be provided comprehensively in one go rather than being drip-fed through correspondence".

150. Whilst the 'Pipe-jacking Work Package' Document may have been available as an initial draft on 19 April 2021, I have no evidence to indicate its content at that time and whether the information contained therein was suitably useable in an advanced form so that it could be relied upon with a degree of certainty by SLACC.

151. I have set out above that I do not consider that the applicant acted unreasonably in submitting the amendment to the construction methodology of the underground conveyor. Furthermore, I do not consider that SLACC demonstrably incurred abortive costs as a consequence of the late provision of the information as the content contained therein would have had to have been considered whether that be at an early or late stage.

152. An earlier sight of the information may have enabled SLACC's witnesses to make a more informed view on the impact of the use of pipe-jacking at an earlier stage. However, there was no doubt on 10 August 2021, when proofs of

evidence were exchanged, that pipe-jacking was proposed to be used to minimise the impact on the woodlands. Furthermore, pipe-jacking itself is not a novel technique to the extent that there is considerable technical information available, as a basic minimum, to gain an understanding of what the technique may entail.

153. On the basis of the evidence before me, it appears that the 'Pipe-jacking Work Package' Document' was not available in its issuable format until 24 August 2021. Whilst I recognise the attempts by SLACC to gain an earlier sight of the information contained therein, I do not consider that there is demonstrable evidence of abortive costs being incurred as a consequence of its late provision. Indeed, the is an argument to suggest that abortive costs may had been incurred if SLACC sought to rely on earlier drafts that were subsequently changed.

154. In light of the above, I do not consider that there is demonstrable evidence to suggest that more detailed information could have been provided earlier of an extent that could be relied upon with a degree of certainty. Moreover, the information would have required to be considered whether at an earlier or later stage. I am also mindful of Mr Bedwell's views in the Inquiry that there was sufficient information available to allow the more detailed design information to be dealt with by way of a planning condition. In my view, the principles of what pipe-jacking entailed were known prior to the opening of the Inquiry.

155. In the circumstances, I accept that the provision of earlier information may have been helpful but I do not consider that this amounts to unreasonable behaviour by the applicant of an extent that has demonstrably caused abortive costs to be incurred by SLACC. As such, an award of partial costs regarding the issues outlined above in respect of the pipe-jacking information would not be justified.

Recommendation

156. I recommend that the application for a partial award of costs be granted, but that it be limited to those costs incurred only in reviewing Ecolyse 2 and preparing amendments to rebuttals that were previously based on Ecolyse 1. However, in recognition that SLACC's witnesses who provided evidence on climate change confirmed that they had done so on a 'pro bono' basis, such costs should be limited to legal expense only.

Stephen Normington

INSPECTOR