



Llywodraeth Cymru
Welsh Government

From:

[Redacted]
Planning Directorate

Cleared by:

Neil Hemington

Date:

28/07/2023

MINISTERIAL ADVICE

For decision by: Minister for Climate Change

Copied to: First Minister, Counsel General and Minister for the Constitution.

This submission advises on a planning decision; all copies of it are for information only and not for comment.

Subject	Planning Enforcement – Ffos y Fran Stop Notice Consultation
100 word summary	<p>Coal extraction has continued at the Ffos y Fran land reclamation scheme beyond the time limit set by a condition attached to the planning consent. Coal Action Network supported by the Good Law Project are threatening judicial review if the Merthyr Tydfil County Borough Council or the Welsh Ministers do not issue a stop notice to stop coal extraction, or have decided not to take any action.</p> <p>The Minister for Climate Change is asked; should a consultation letter be sent to the Council as part of the consideration of whether to use the Welsh Ministers' power to issue a stop notice.</p>
Timing	Urgent – A response to a pre-action protocol letter from Coal Action Network needs to be sent by Monday 31 July.
Recommendation	<p>The Minister for Climate Change is asked to:</p> <ol style="list-style-type: none"> 1. Note the proposed separation of duties between the determination of the enforcement appeal and the consideration of enforcement action (Paragraph 14). 2. Agree the threshold has been met to warrant giving further consideration to a stop notice (Paragraph 43). 3. <i>If recommendation 2 is agreed, agree</i> to send the consultation letter (Doc 1) proposing to use the Welsh Ministers' power to serve a stop notice to prevent coal extraction (Paragraph 45). <p>[Redacted]</p>

Decision report	This decision does require a Decision Report, which may be published once the suggested letter has been sent to the Council; or if the Ministers decides not to send the letter, once a revised decision letter has been sent to Merthyr County Borough Council.
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ADVICE

Background

1. The East Merthyr Reclamation Scheme sought to remediate areas of old iron and coal working around the town of Merthyr Tydfil. The third phase at Ffos y Fran was intended to be financed through the sale of extracted coal from the site. Progressive restoration has been taking place as the cut has moved eastwards. However, the full volume of coal intended for extraction has not been reached within the timescale originally set by the planning permission granted on appeal by a Planning Decisions Committee of the National Assembly for Wales in 2005. A subsequent planning permission (varying a condition to permit some export of coal from the site by road), granted by a planning inspector on appeal, incorporated the same extraction deadline.
2. Condition 3 set a time limit of 6 September 2022 for coal extraction then a further 2 years 3 months to complete restoration of the site.
3. A few days before the planning permission expired, the mining company submitted a planning application to extend the amount of time allowed to extract the 240,000 tonnes of coal remaining in the extraction area. While Merthyr Tydfil County Borough Council (the local planning authority (LPA)) were determining the planning application, it appears the company continued to mine.
4. The LPA refused the planning application on 27 April 2023. The LPA went on to issue an enforcement notice alleging a breach of planning control on 24 May 2023.

Pre-application Protocol Letter

5. Prior to the determination of the application, both the LPA and Welsh Ministers had received a pre-application protocol letter from campaigners Coal Action Network (CAN) on 3 April and 27 April claiming that the lack of enforcement action by both bodies was unlawful.

■ [REDACTED]

■ [REDACTED]

[Redacted]

[Redacted]

9. A further pre-action protocol letter has been received on 17 July from CAN, who we now understand are supported by the Good Law Project. This supplements their previous letters and challenges the Council's and/or the Welsh Ministers' failure to serve a stop notice to prevent a serious and ongoing breach of planning control by:
- a. failing to proceed with reasonable expedition to decide whether it is expedient to serve a stop notice, or
 - b. deciding that it is not expedient to serve a stop notice to bring the ongoing breach of planning control to an end.

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15. The Welsh Ministers have almost the same enforcement powers as LPAs and can serve both enforcement notices as well as stop notices, set out in sections 182 and 185 of the Town and Country Planning Act 1990 respectively (“the 1990 Act”). Before serving a stop notice or enforcement notice the Welsh Ministers must consult the relevant LPA.

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Consequences of either action

31. The mining company has contracts with Tata Steel until August or September. The company is likely to continue to extract coal to fulfil these contracts (unless

enforcement action stops this earlier). However, irrespective of when in the next few months extraction stops, officials consider the company is likely to seek administration after this time, although alternatively they may seek to continue to restore the site as long as they can draw down money from the escrow account to fund the work.

- 32. The escrow account is intended to pay for restoration of the site should the company fail. This was set up by the LPA under provisions of the Mid Glamorgan County Council Act 1987. The escrow account currently stands at around £15 million. Restoration of the site to the landforms currently agreed with the Council would cost, according to estimates by the Coal Authority between £120 to £175 million pounds. This is based on the amount of overburden to transport from the three mounds back into the void.
- 33. Officials have discussed the case with LPA officers and understand attempting to progress the restoration through the company has been one reason why they did not serve a stop notice. The plant at the site is all leased and once removed from the site would be costly to bring back. Other reasons include wanting to avoid an immediate loss of 150 jobs. The other reasons are the cost of securing the site to prevent trespass into unsafe surface workings, the maintenance of the two water pumps which prevent the void from filling and the cost of a hydrogeological study to understand the safety consequences of the void filling.
- 34. Once the mine ceases operation, the overburden mounds will in time become subject to the emerging coal tip safety regime. The consequences of the void filling with water however is less certain. At the former Margam opencast site, that has happened and provision has had to be made to deal with water over topping. At East Pit, geological stability issues were identified which required the formation of buttresses before the pumps were switched off and the void allowed to fill. While the mine operator still had involvement at East Pit, in the case of Unity Mine, where the company was dissolved, the land passed to the Crown who disassociated itself from the land due to the extent of the liabilities.
- 35. The Coal Authority, Natural Resources Wales and the local authority have roles to undertake should the Ffos y Fran workings be abandoned. Arguably it is for the Council to take the lead in arranging a risk assessment and setting the priority list of works required to maintain public safety due to the £15 million they would be able to spend.

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Annex 1: ASSURANCE AND COPY RECIPIENTS

CLEARANCE TRACKING

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

DEPUTY DIRECTOR, STATEMENT OF ASSURANCE

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

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

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

COPY LIST

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

- Mandatory CC – Min CC
- PS First Minister
- HoB Planning

