



26.8.2015

NOTICE TO MEMBERS

Subject: Petition 0617/2008 by Richard M Buxton (British), on behalf of Residents against Ffos-y-fran, on the detrimental impact of the opencast mining at Ffos-y-fran, Merthyr Tydfil (South Wales) on the health of the residents

1. Summary of petition

The petitioner objects to the opencast mining at Ffos-y-fran, Merthyr Tydfil (South Wales). According to the petitioner, the extraction operations are carried out just 36 metres away from houses and would result in a serious detrimental impact on the health of the residents. The petitioner considers that, by granting permission for this coal mine, the Welsh government would have breached EC Directive 85/337 on environmental impact assessment as well as overall commitments on fighting climate change. The petitioner explains that residents have unsuccessfully challenged the permit in court. He maintains that extracting operations on this coal mine would be the largest in United Kingdom and asks the European Parliament to look into the matter.

2. Admissibility

Declared admissible on 13 October 2008. Information requested from Commission under Rule 216(6).

3. Commission reply, received on 30 January 2009.

The petition

Despite the failure to annul the planning permission for the project through court, the petitioners maintain that the coal extraction is unlawful and that opencast coal operations contradict European principles and the need to urgently reduce greenhouse gas emissions. The reasons evoked by the petitioners against the project relate mainly to:

- the scope of the project being assumedly greater than set out in the application;
- the failure to provide for sufficient buffer zones protecting nearby residents from the impacts of noise, dust and blasting;
- the fear of extractions close to the site boundary;
- the assessment of health impacts, considered insufficient ;
- the supposed lack of effective monitoring and regulatory control;
- the impact on climate change.

The absence of sufficient buffer zones or separation distance is a particular concern of the petitioners. They take the view that the decision to undertake extraction operations at a short distance (approx. 40 m) from people's houses is unlawful and that the Welsh Government has failed to properly implement the EIA Directive.

The petition suggests that the developer's application which formed the basis of the public inquiry, the environmental impact statement and assessment and hence of the planning consent, was different from the development actually intended by the developer. The activities foreseen would comprise extraction works right up to the site boundary of the reclamation scheme and not, as assumed by the administrative planning authorities, at approximately 125 m from homes.

The petitioners also claim that the Welsh Government has failed to provide guidance on a recommended distance of coal operations from people's homes. According to the petitioners, it is only now – after the planning permission for the Ffos-y-fran scheme – that the Government is recommending that there should be buffer zones between opencast coal excavations and sensitive housing areas (homes, schools).

The Commission's comments on the petition

The 'Ffos-y-fran Land Reclamation Scheme' (South Wales) which includes opencast extraction of coal, was granted formal planning consent in April 2005 after a public inquiry in September 2004 and the subsequent submission of the inspector's report. The scheme intends to reclaim some 400 ha of derelict land and to extract coal in the order of circa 11 million tonnes over a planned period of 15-20 years. It is one of the most important open cast sites in the UK.

The scheme represents the revised third and final stage (phase III A) of the wider East Merthyr Reclamation Scheme, launched in the mid 1980s to recover land that had suffered from severe dereliction due to former industrial activities and deep-cast mining activities until the 1980s. Reclamation activities of phases I and II included opencast coal mining operations but also land restoration for residential and recreational as well as for light industrial purposes.

Local residents are opposing the scheme. Their numerous claims and appeals have been unsuccessful. In May 2007, a House of Lords committee refused permission for further appeals considering that there was no "arguable point of general public importance". In December 2007, the Welsh Government declined to revoke the planning permission. In the meantime, the project has been launched and works are underway.

Open-cast mining over a area exceeding 25 ha is subject to an environmental impact assessment in accordance with the requirements set out in Directive 85/337/EEC¹ as amended (so called EIA Directive). The project described by the petitioner falls under the projects of annex I of the EIA Directive for which an environmental impact assessment prior to granting a development consent, (EIA Directive - article 4.1) is compulsory.

The environmental impact assessment needs to take account of the specific characteristics of the project as well of the environmental features which it will most probably affect. In accordance with annex IV of the EIA Directive, the assessment needs to provide information, *inter alia*, about the situation and impact of the project on population and climatic factors - two of the aspects highlighted by the petition - including a description of the measures foreseen to prevent, reduce or even off-set any significant adverse effects on these features.

One of the main purposes of the environmental impact assessment is to take account of concerns to protect human health and to ensure quality of life by means of a better environment.

It is incumbent to Member States to ensure that these objectives and requirement are duly met during a project's environmental assessment and approval process, taking account of the specific situation of a project, which can comprise a series of factors such as the size, location, topography, the type of extraction material and working methods, existing and expected effects from noise and emissions, etc.

From the information available to the Commission, it cannot be established where Community law could have been violated. Further information would be required to clarify the buffer zone/separation distance issue and, in particular, to establish if the impact assessment and subsequent decision were made for an explicit distance (125 meters) but not respected at the project implementation stage.

Conclusions

From the information provided by the petitioner and from other information available to the Commission, it cannot be assumed that a breach of EU legislation, in particular of Directive 85/337/EEC as amended and transposed into UK's national legislation, has occurred.

The petitioner should be invited to provide additional information to substantiate in detail the concerns about the alleged failure of the national authorities to correctly apply the requirements of the EIA Directive in relation to the permission and implementation of the 'Ffos-y-fran Land Reclamation Scheme', especially as regards the distance of extraction from the borders of the reclamation area. The Commission would then be able to further analyse this matter.

4. Commission reply (REV.), received on 5 May 2011.

Buffer Zone

¹ OJ L 175, 5.7.1985, p. 40.

The Council Directive 85/337/EEC¹ as amended by Directives 97/11/EC², 2003/35/EC³ on the assessment of the effects of certain public and private projects on the environment (known as the "EIA" -Environmental Impact Assessment Directive) requires an assessment to be carried out by the competent authority for certain projects which have a significant effect on the environment and lays down mainly procedural obligations for the Member States.

The directive requires in its Article 8 that the results of consultations and the information collected during the assessment process need to be taken into consideration in the development consent procedure. It is for the national competent authorities to judge the extent to which these results will be taken into consideration, based on their knowledge of the specific local circumstances as well as of possible national standards, provisions and practices – such as Unitary Development Plans and Technical Advice Notes for Coal and Aggregates - when applying the EIA Directive.

Against this background, the Commission cannot identify a breach of the directive with regard to the EIA process carried out for this development and the assessment of the need for a specific buffer zone between the excavations and the nearest residential dwellings.

Enforcement action to control pollution emissions

The permit authorised under the national Pollution Prevention and Control Regulations by the Merthyr Tydfil County Borough Council (MTCBC) in October 2007 provides for a series of conditions that the operator has to fulfil so that "there shall be no visible emission of airborne dust from the process or its operations across the site boundary causing harm or a nuisance". The operators are bound to adhere to these conditions and to inform the Merthyr Tydfil County Borough Council (MTCBC) without delay of any emission likely to have an effect on the local community or of any malfunctioning or accident that may cause significant pollution. It is for the competent authorities at county level to ensure the permit's conditions are duly respected.

According to the petitioner, local residents suffer from significant noise and dust emissions and they claim that the competent Merthyr Tydfil County Borough Council (MTCBC) authorities fail to undertake enforcement action. The petitioner states that the affected residents have now undertaken to bring private nuisance proceedings against the operator of the Ffos-y-Fran open cast mine.

On the basis of the information provided by the petitioner, the Commission cannot identify any breach of environmental EU legislation.

Effects of opencast mining on climate change

1 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 5.7.1985, p.40.

2 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ L 73, 14.3.1997, p.5.

3 Directive 2003/35/EC of Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p.17.

The EIA Directive requires under article 3 that, if an impact assessment is undertaken in accordance with the directive's articles 4 to 11, the assessment shall identify, describe and assess direct and indirect effects of a project also on the climate..

The non-consideration of the wider impacts of supplying the coal extracted to a coal fired power plant in the region and the indirect effects of the open pit coal mining, including the coal processing, to global "climate change" by the decision making authority, in this case, would, however, not constitute a breach of the directive.

EIA Screening for Cwmbargoed Disposal Point (CDP)/ Cwmbargoed Coal Preparation and Despatch Facility

The planning application for the Cwmbargoed Disposal Point clearly connects this "disposal" project to the Ffos-y-Fran scheme (FFS) stating that it is "required for the duration of the associated mining and restoration activities at Ffos-y-Fran". This interdependency is further evidenced by the description of the foreseen "additional facilities" comprising "mineral processing and preparation plant, coal washing plant, coal haulage, vehicle workshop, water storage, [...] coal stacking and preparation facilities and other ancillary works"¹. Similar descriptions of the functions of the CDP were given in the judgements of the Courts when they refer to activities such as receiving, processing, washing, storing and onward transporting of coal, mainly from the new scheme at Ffos-y-Fran, at a rate of some 15-20 000 tonnes of Welsh dry steam coal a week.

The Commission is of the opinion that the activities of the CDP (increased capacity to process 1 million tonnes p.a. at a rate of 500 tonnes/h after refurbishment) could be understood as the final stages of the typical workflow of a mining scheme before delivering the finished product to interested (end-) users. Both, the excavation of the coarse coal at Ffos-y-Fran and the further treatment/processing/handling of the coal form integral parts of the mining process and cannot be separated from each other as stand-alone operations, as this would lead to a congestion of the extraction fields (no exporting of coarse "run-of-mine" coal – ROM) or to an halt of the operations at the CDP (no coal to treat, store and haul). Also, the transport infrastructure linking the two excavation sites - treatment/storage over a relatively short distance give evidence of this process integration.

Depending on their size, open cast mining projects exceeding a surface of 25 hectares, fall under Annex I (point 19 – surface of site exceeds 25 ha) of the EIA Directive which lists those projects for which an EIA is compulsory, or under Annex II (point 2(a) projects not included under Annex I) to which Article 4.2 applies (determination by Member States). Depending on the nature of its activities, the CDP may also belong to the class of projects referred to under Annex II point 3.e (surface storage of fossil fuels). Any change or extension of projects listed in Annex I, concerning an area below the threshold of 25 ha, and which may have significant adverse effects on the environment, fall under point 13) of Annex II of the EIA Directive for which articles 4.2, 4.3 and 4.3 apply (so called "screening"). In addition, projects for the "surface storage of fossil fuels" also fall under the projects of Annex II (point 3 (e) to which article 4 of the EIA Directive applies.

¹ Application P/08/0091 of 25th February 2008

In the present case, a screening examination would have led to a determination by the competent national authorities whether or not to undertake an EIA based on an assessment of the characteristics of the foreseen changes or the extension of CDP activities, its location as well as of the characteristics of the potential significant effects by having – *inter alia* - regard to the extent of the impact on the population and the geographical area.

With regard to the alleged failure by the Court of Appeal to refer the case to the Court of Justice before giving its final judgment, the Commission can not identify sufficient elements in the information presented that this would indeed be the case here.

The petitioner also claimed that the cost of legal proceedings in the United Kingdom were prohibitively expensive in breach of the requirements of Article 10a of Directive 2003/35/EC. The Commission has already been alerted to this matter and issued a Reasoned Opinion against the United Kingdom in 2010 outlining concerns about the expense to applicants of legal proceedings. This case continues to be actively pursued by the Commission.

Conclusions

Considering that the Environmental Statement (page 214) which accompanied the application for planning permission (May 2003) referred to potential environmental impacts associated with the "handling, processing and loading of coal", the Commission will seek further, more comprehensive and detailed information from the national authorities in order to assess to which extent the application for the mining operation, in a broad and inclusive way, covered all activities and operations, constituent of the mining scheme, so that the environmental impact assessment could identify, describe and assess in an appropriate manner their direct and indirect impacts as required by Article 3 of the EIA Directive.

5. Commission reply (REV.II), received on 20 April 2012.

The petitioner has provided additional information (February 2012), to complement further and up-date his earlier submissions for this petition especially with regard to the screening of environmental impacts of the Cwmbargoed coal processing plant as a part of the opencast coal mining scheme at Ffos-y-Fran, Wales.

During the inquiry to follow up on an application of the coal mine operator to review a condition of the planning permission, a representative of the competent County administration took the view that the coal disposal point (CDP) and processing facilities at Cwmbargoed (CDP) should be understood as forming part of the Ffos-y-fran Land Reclamation Scheme (FLRS). The petitioner took this opportunity to apply to the Court of Appeal to open again the Court's decision of May 2010, dismissing the petitioner's earlier request for judicial review of former court rulings. In its submissions, the County administration maintained its initial view that the CDP does not form part of the proper Ffos-y-Fran mining project. The Court of Appeal refused the petitioner's application.

The national administration accepts that there is a close relationship between the open cast mining operation (the Ffos-y-fran Land Reclamation Scheme) and the coal washing/processing

activity undertaken by the industrial installations at the CDP. However, it considers that the CDP is a separate project that does not form part of the FLRS project, as it had been used for processing and preparing coal from a number of mines in South Wales since 1958. The plant was not screened on the occasion of the environmental impact assessment for the FLRS in 2003, because it was already pre-existing and operational and no significant changes to the plant were required. Furthermore, the CDP is not considered to be part of the same planning unit and, consequently, no combined EIA has been undertaken for the CDP/FLRS and separate planning permissions issued.

During the application approval process in 2007 for the further extension and refurbishment of industrial installations at CDP, the planning committee issued a screening opinion saying that the extension project was not falling under Annexes I or II of the EIA Directive. The committee which included environmental authorities, considered, however, some environmental aspects such as the Great Crested Newts (amphibian survey), dust suppression measures, limitation of daily operation hours and avoidance of water contamination. The application was also advertised, no responses or comments from the members of the public were received.

Having completed exploratory drilling works in the area (Nant Llesg valley) adjacent to the CDP and close to the Ffos-y-Fran site, the operator of the FLRS intends to submit a planning application in summer 2012 with a view to creating a second major opencast mine. Currently preparatory studies are being undertaken to assess the possible environmental impacts.

Pre-application discussions are being held with the competent Borough Council administrations. In accordance with the requirements of Directive 2011/92/EU¹ as set out in Annex IV, the applicant shall provide a description of the physical characteristic of the whole project during its operational phases, as well as a description of the possible environmental impacts of the scheme covering, inter alia, cumulative, indirect and secondary effects. As the planned new mining operation would also have to use the industrial installations at CDP for the preparation, storing and dispatch of coal, using its railhead facilities, the impact on the installations at the CDP site shall also be addressed and reflected in the environmental statement and be accessible to the public during consultation and prior to permit issuing. Any further extension of the permissions for the operation of the industrial installations at CDP, would have to consider measures to prevent, mitigate or minimise significant impacts on the environment

First information meetings with the residents of the nearby towns likely to be affected by the planned revival of mining activities were held in 2011 and it is expected that if the planning application goes ahead, extensive public consultations would be organised to allow the public to influence the proposed scheme and to ensure that the appropriate measures are undertaken to mitigate the expected impact.

The Commission considers that the opencast operation is aiming to produce marketable coal, i.e. coal of a quality that satisfies the needs of potential clients (in the present case a power plant). The processing and handling activities undertaken at the CDP site form part of the "production process" of the wider Ffos-y-fran Land Reclamation Scheme which embraces all operations from excavation to the dispatch of coal to clients.

¹ EIA Directive (codified) OJ L26, 28.1/2012

Conclusion

In line with the requirements of the EIA Directive, the assessment of any significant impact shall also take into account the cumulative, indirect and secondary effects of the project. The Commission has asked the UK authorities to provide a copy of the screening opinion.

In the event of an application for an extension of surface mining in the area, the Commission will also request further information about the consequences of the totality of the scheme.

6. Commission reply (REV.III), received on 30 April 2013.

The national administration has provided additional information in March 2012 about the screening process applied to the proposal to modify the Ffos-y-fran reclamation project by allowing the transportation of coal also by road from Ffos-y-fran rather than as originally foreseen only via the rail connection at Cwmbargoed Coal Disposal Point (CDP).

According to the information provided, the competent authorities (Welsh Ministers) considered the proposal in the context of the planning permission for the existing Ffos-y-fran Reclamation Scheme, the CDP and the coal handling facilities, and in the context of the CDP having consent to deal with coal and sandstone sourced from other sites.

The screening focused on the movement of coal by road to and out of the CDP, reasoning that the transport of coal partly by lorry has no significant effects on the environment even when considering the cumulative effect of the amendment with the overall reclamation scheme. Taking into account the criteria in Annex III of the relevant Directive 85/337/EEC¹ as amended (the "EIA" – Environmental Impact Assessment Directive) including the direct, indirect and cumulative likely significant effects of the proposal, the national authorities concluded that significant effects on the environment were not likely and an EIA therefore not necessary.

Moreover, the national administration informed the Commission that there were no planning applications in relation to the Ffos-y-fran site under consideration at the time of reply. But a non-statutory pre-application consultation is being undertaken by the developer of a site to the east of Ffos-y-fran called Nant Llesg and therefore further planning applications for coal opencast are likely. These developments could also include proposals to alter the CDP. In due course the local planning authority will have to consider the need for an EIA in the light of the location, scale and type of the operations proposed.

Conclusion

From the information available to the Commission, a breach of the Community law with regard to the EIA process could not be established.

7. Commission reply (REV IV), received on 26 April 2015.

¹ Council Directive 85/337/EEC on the assessment of the effects for certain public and private projects on the environment, OJ L 175, 5.7.1985, p. 40; this Directive has since been codified as Directive 2011/92/EU of the European Parliament and of the council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p.1)

The Commission has now had a chance to assess the additional information provided by the petitioners following the meeting of the Petitions committee of 17 March 2015.

The petitioners took legal action nationally to enforce the rights of their client. The Commission was supplied with a copy of the judgment of the Court of Appeal in *Austin v. Miller Argent* of 21 July 2014. The Court of Appeal rejected the petitioner's client's claim for a protective costs order to support her action. The claim proposed before the national courts was that the failure to ensure that planning conditions requiring dust and noise nuisance from the open cast mining operations be controlled had been breached and that this in turn constituted a breach of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. The national courts rejected this claim on the basis that this goes beyond the scope of application of the Directive which focuses on assessments of projects that need to be carried out before they are given development consent. The national courts found that the Directive does not then go on to extend a monitoring role for the implementation of the project after consent. As such the national courts found that the petitioner could not rely on Article 11 of Directive 2011/92/EU as the basis for conferring on her the right to have her costs controlled. The petitioner's claim therefore appears to fall outside the scope covered by EU law.

It should be stressed that Directive 2014/52/EU amending Directive 2011/92/EU obliges Member States to ensure that the features of the project and/or measures envisaged to avoid, prevent or reduce and, if possible, offset significant adverse effects on the environment are implemented by the developer (Article 8a.4) following the development consent. However, the transposition deadline of the above Directive only expires in May 2017.

Conclusion

The Commission has assessed these arguments, but must conclude that there is no evidence on which it would re-open its investigation of the petition. As was explained at the last oral hearing of this petition, the Commission is continuing to pursue implementation of the judgment against the United Kingdom in Case C-530/11 on prohibitive costs but this was a case brought under the remit of Directive 2011/92/EU and as such does not cover cases falling outside its scope.