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Ms Alexandra Lewenstein
Litigation Group
Treasury Solicitors Department
One Kemble Street
London WC2B 4TS

Our ref: A651/JJL/CP
Your ref: Z1303084/ALL/B5
Date: 11 March 2013

By email and post

Dear Ms Lewenstein,

Stalled Reviews of Old Mineral Permissions and Prohibition Orders

I write further to your letter dated 28 February 2013 regarding the above matter on which we have taken the advice of Counsel:

1. Counsel is surprised at the difficulties you say you are experiencing in following our draft statement of facts and grounds ["SFG"], especially as your understanding of our interpretation of the Regulations, as put forward in your paragraph 2, is correct.

2. Our letter of 15 February 2013 and the SFG make our position clear. We restate some of the considerations which support our interpretation again below.

3. As you will be aware, as modified by regulation 26B of the 2008 Regulations, TCPA 1990, Sch 9, para 3 reads as follows:

> (1) Where it appears to the mineral planning authority –
>
> (a) that the development of land –
>
> (a.i) consisting of the winning and working of minerals; or
>
> (a.ii) involving the depositing of mineral waste,

has occurred; but

(b) **the winning and working or depositing has permanently ceased**, the mineral planning authority –

(b.i) must by order prohibit the resumption of the winning and working or the depositing; and

(b.ii) may in the order impose, in relation to the site, any such requirement **as** is specified in sub-paragraph (3).

(2) The mineral planning authority may assume that the winning and working or the depositing has permanently ceased **only when –**

(a) no winning and working or depositing [for which permission is not suspended] has occurred, to any substantial extent, at the site for a period of at least two years; and

(b) it appears to the mineral planning authority, on the evidence available to them at the time when they make the order, that **resumption** of the winning and working or the depositing [for which permission is not suspended] **to any substantial extent at the site is unlikely.**

4. Our case can be put simply. It is abundantly clear from that wording that before a mineral planning authority comes under a duty to make an order, it must appear to them that "the winning and working or depositing has permanently ceased" (Schedule 9, para 3(1)(b)). This is at odds with the view of the Secretary of State, expressed a number of times in the July 2008 Guidance (highlighted in SGF, para 11), that if automatic suspension continues for two years, the mineral planning authority is under a *duty* to make a prohibition order providing for the permanent cessation of operations.

5. Counsel takes issue with your allegation that para 17 SFG is "extremely difficult to follow". It ought to have been clear from the rest of the SFG and especially the concluding sentence of that paragraph that the "fundamental precondition" referred to therein is the requirement in Sch 9, para 3(1)(b) that it appears to the mineral planning authority that working has permanently ceased. The use of the word *only* in the introductory words to Sch 9, para 3(2) makes it clear that paras 3(2)(a) and (b) limit, or restrict, the circumstances in which an MPA can conclude that working has permanently ceased under para 3(1). They do not remove that requirement or precondition.

6. Your focus on the wording and effect of regulation 26B(5) therefore represents a fundamental misunderstanding of our case. The construction you adopt in your para 4 is simply not one we are putting forward, and the concluding part of your paragraph 6 misses the point. If there has been no working, there may well be nothing for para (5) of the 2008 Regulations to "bite on", but that does not remove the requirement that it must appear to the MPA that the working of minerals has permanently ceased.

7. To repeat it once more; nothing in the 2008 Regulations changes the fundamental requirement that an MPA must be of the view that working has permanently ceased before they must make an order prohibiting operations. It would clearly be possible for an MPA to take the view that although operations had been suspended for two-years, operations had not in fact permanently ceased. In such a case, they would not be under a duty to make an order prohibiting working. This is obviously at odds with the July 2008 Guidance.

8. Our proposed declaration clearly reflects our construction, and despite your assertion (in your para 3) it clarifies that MPAs are not under a duty to make an order unless they are of the opinion that operations have permanently ceased.

9. We trust that the above puts the issue of construction beyond doubt. We look forward to your confirmation that our construction is indeed correct and that the July 2008 Guidance misstates the correct position.

The inconsistency identified by Counsel is likely to lead to long, time consuming expensive legal processes for the Authority, the companies, and the community and voluntary sector interests involved in the two cases (as set out in para 20 of the Authority's draft application). We see the application for a declaration as a necessary step to bring clarity to the interpretation of the regulations before any particular course of action is taken in those cases.

We are prepared to extend time for responding to our pre action protocol letter by 7 days from date of receipt of this letter

Yours sincerely,

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PEAK DISTRICT
NATIONAL PARK AUTHORITY

Mr Mark Plummer
Department for Communities and Local Government
Planning – Resource and Environmental Policy Division
Eland House
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Bressenden Place
London
SW1E 5DU

Our ref: JJL/A651
Date: 15th February 2013

By Email

Dear Mr Plummer

Stalled Reviews of Old Mineral Permissions and Prohibition Orders

As promised, I am writing following our telephone conversation on Monday, 11th February, to confirm the difficult issue the Peak District National Park Authority is having with the Town and Country Planning (Environmental Impact Assessment) (England and Wales) 1999 Regulations as amended and further modified by the Town and Country Planning (Environmental Impact Assessment) (Mineral Permissions and Amendment) (England) Regulations 2008, and to provide you with additional background information. As I mentioned in my telephone call, we initially outlined this issue to you in an email dated 29 November 2012 from my colleague David Bent, Minerals Team Manager.

It has become necessary for my authority to resolve this issue, for the reasons I advised. In the National Park we have two old mineral permissions the reviews of which are stalled and which, for different reasons, have been in automatic suspension for more than 2 years, namely Longstone Edge East and Stanton Moor Quarry.

Our legal and minerals officers initially considered that Regulation 26B of the 1999 Regulations (as amended) imposed a duty on the Authority to make a prohibition order if the required information had not been produced and the two years automatic suspension period had expired. This interpretation of the Regulations was, in our view, consistent with the Explanatory Memorandum and the Guidance issued by CLG to accompany the 2008 Regulations. However, due to the complex nature of the amended Regulations, and the potential impact that making a prohibition order in these circumstances would have, external legal advice was sought.

After further and very detailed consideration the Authority has been advised by Queen's Counsel that the actual wording of Regulation 26B of the 1999 Regulations (as amended), does not seem to be consistent with the apparent intention of government, as expressed in the Memorandum and Guidance which accompanied the 2008 Regulations.

Our legal advice is that as Paragraph 3 of Schedule 9 of the Town and Country Planning Act 1990, as modified by Regulation 26B Paragraphs 4 and 5, still retains the pre-condition that the Mineral Planning Authority must be satisfied that the winning and working or depositing at the site has 'permanently ceased', the duty to make a prohibition order arises only if the MPA has concluded that mineral operations have permanently ceased other than as a result of the suspension.
On this basis, if it is considered that work is likely to resume and the permission came out of suspension, the Authority would not be entitled to make a prohibition order. This is inconsistent with the apparent 'duty' to make an order after two years of suspension which is referred to in numerous places in the Memorandum and Guidance that accompanied the 2008 Regulations.

This apparent inconsistency leaves the Authority in a very difficult position and there are practical consequences. If we fail to make an order we may be challenged judicially, particularly if we determine a related application that was contrary to policy as a replacement for the old mineral permission. In either of the cases the relevant communities may consider we have given undue weight to the existence of the old permission as a material consideration, as in both cases their view of the regulations is that we should make a prohibition order. However, if the Authority does make an order (contrary to counsel's advice), we have been informed in both cases that the owners/operators would take legal proceedings to challenge our action.

Therefore for either course of action the Authority is potentially liable to incur costs.

As I explained when we spoke, our QC is preparing an application to the High Court to obtain a Declaration on the proper interpretation of this part of the regulations. I have been given approval by the Authority's relevant committees to take this approach. I separately explained a concern with respect to the Stanton Moor Quarry case, in that a related planning appeal has been temporarily delayed with the agreement of all parties but the inspectorate has given us only until 28th February to clarify this situation.

I would welcome your attention to this issue as soon as you are able, and must ask you to treat it as a pre action protocol letter, in which we invite you to confirm that the 2008 Guidance regarding the duty of MPAs to make a Prohibition Order is not consistent with the 1999 Regulations (as amended). We need a response to us within 14 days. The Authority, the operators and owners, and the communities all need the position to be clarified.

Please therefore treat this letter as addressing the formalities of the pre-action protocol on judicial review. With this in mind, I attach our proposed draft claim form. You will see that the Authority is suggesting a Declaration in the following terms:

> 'The Government's Explanatory Memorandum of July 2008 and the Guidance of July 2008 on the effect of the Town and Country Planning (Environment Impact Assessment) (Mineral Permissions and Amendment) (England) Regulations (2008 SI No. 1556 and 2008 SI No 2093) on the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations (1999 SI No 293) misrepresent their true effect. Upon the true construction of the Regulations, they do not impose on mineral planning authorities a duty to make a prohibition order after two years suspension unless the conditions of Town and Country Planning Act 1990 Schedule 9 (3) (1) as amended are met. These conditions include the requirement that the mineral planning authority judges that mineral operations have permanently ceased.'

The Authority proposes

(1) a declaration as to the true meaning and effect of the 2008 Regulations and the 1999 Regulations as amended , whether as set out above, or otherwise

(2) the costs of the application from SSCLG whatever the decision of the court as to the true meaning and effect of the 2008 Regulations and the 1999 Regulations as amended.

I am copying this letter to the potential interested parties who are concerned with the Longstone Edge East and Stanton Moor Quarry sites referred to above.

Yours sincerely

John Lomas

John Lomas
Director of Land Use Policy

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cc Bleaklow Industries Ltd
Blockstone Ltd
British Fluorspar Ltd
Save Longstone Edge Group
Stanton in Peak Parish Council
The Thornhill Settlement