ClientEarth

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Jason Chang, CEO and Managing Director
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By email

Dear Mr Chang

Your investment in West Cumbria Mining and the proposed Whitehaven coal mine

ClientEarth is an international non-profit environmental law organisation headquartered in London. Our Climate Finance initiative focuses on the legal implications of climate change-related financial risks and impacts for a wide spectrum of market participants, including investors, asset owners and asset managers, banks, companies, directors, professional advisors and regulators.

We are writing to you as CEO and Managing Director of EMR Capital to raise the issue of how the ongoing investment of one of its managed funds, EMR Capital Resources Fund 1 LP (together with any affiliated fund vehicles managed or advised by entities in the EMR Capital group, the **Fund**), in the West Cumbria Mining group (the **WCM Group** or **WCM**) and its proposed coal mine in Whitehaven (the **Cumbria Mine**) is compatible with:

(a) the duties owed by EMR Capital to third-party investors in the Fund, including fiduciary duties;

(b) the appropriate management of climate-related financial risks;

(c) the expectations of investors in the Fund; and

(d) EMR Capital's public commitments to: (i) responsible investment and the incorporation of environmental, social and governance (**ESG**) considerations in investment decision-making, management and exit, including as a signatory to the UN Principles for Responsible Investment (**UN PRI**); and (ii) the climate objectives of the Paris Agreement.

As explained in this letter, there is a risk that EMR Capital could be acting in breach of its legal duties (leaving itself open to potential legal challenge by investors) by financing the Cumbria Mine, due to the climate-related risks associated with the project.

ClientEarth maintains that the scientific consensus on climate change necessitates that investors and asset managers of all kinds (including private equity funds and their managers), especially those that have publicly committed to support global climate objectives, should **no longer provide financial support to companies involved in projects known to be fundamentally incompatible with the achievement of global climate goals – chief within this category of projects is new coal mines, whether for thermal or coking coal.** The proposed Cumbria Mine is one example of a project which is incompatible with global efforts to mitigate climate change, and faces dubious economic prospects as a result.

The proposed Cumbria Mine and its climate impact

The WCM Group has been developing plans for the Cumbria Mine, an underground metallurgical coal mine at the former Marchon Works near Whitehaven, since 2014.

The original planning application was submitted on 31 May 2017 and revised in December 2018. On 19 March 2019, 31 October 2019 and 2 October 2020, the Development Control Committee (**DCC**) of Cumbria County Council granted planning approval for the Cumbria Mine. On 9 February 2021, the application was returned back to the DCC following the publication of the Sixth Carbon Budget report by the UK Government's advisor, the Climate Change Committee (**CCC**), in December 2020. On 11 March 2021, the application was 'called in' by the Secretary of State for a Planning Inquiry, which took place from September to October 2021. In April 2022, the Planning Inspectorate confirmed the planning report had been submitted to the Secretary of State for determination on or before 7 July 2022.[1] ClientEarth understands the determination has since been delayed and is now expected on or before 17 August 2022.

The climate impact of the Cumbria Mine would be significant, as WCM proposes to produce up to 2.78 million tonnes of coal for the steel industry per year, to its intended end-of-life in 2049.[2]

It was originally projected to increase UK emissions by 0.4MtCO_2e per year[3], although subsequently a report estimated that the total lifetime emissions associated with the construction and operation of the mine in a 'mitigated scenario'[4] would be approximately 1.9MtCO_2e.[5] Those are its 'residual emissions' that the WCM Group assumes would need to be 'offset' by the purchase of carbon credits. However, this use of carbon credits is: (1) inappropriate in the context of fossil fuel extraction; and (2) plagued with limitations that make offsets an imperfect and unreliable solution, including issues around achieving additionality and permanence.[6]

It should be noted, however, that the emissions above are only the Cumbria Mine's *operational* emissions, ignoring the 'downstream' or Scope 3 emissions from the use of the Cumbria Mine's coal by steelmakers. The potential lifetime downstream emissions have been estimated to be up to 194MtCO_2e.[7]

[1] WCM, 'What is the Plan', here (accessed 4 July 2022).
[2] Ecolyse, 'Greenhouse Gas Assessment for the Woodhouse Colliery, West Cumbria Mine, Version 2', here at para 2.15.
[3] The CCC's January 2021 letter to Robert Jenrick MP, here.
[4] The 'mitigated scenario' accounts for the year-on-year decarbonisation of the economy, including of the national grid and transportation sector, consistent with the CCC- and Government-published emissions projections, and also the effects of mitigation committed to by WCM for the project: see Ecolyse, 'Greenhouse Gas Assessment for the Woodhouse Colliery, West Cumbria Mine, Version 2', here at para 3.4.
[5] *Ibid*, here at para 7.6; however, ClientEarth notes that the robustness of Ecolyse's assessment was questioned by South Lakes Action on Climate Change (**SLACC**) during the Planning Inquiry, here at paras 40-42 (at pages 2241-2242).
[6] For further detail on reasons offsets are problematic, see Friends of the Earth's Closing Statement to the Planning Inquiry, here at paras 75-86 (at pages 1976-1980).
[7] Professor Barrett's Proof of Evidence on behalf of Friends of the Earth, here at para 3.4.7, which was later revised to reflect for the lower coal output identified in the Ecolyse report in Professor Barrett's Evidence in Chief, here at 5:28:00 to 5:29:40.

Even if the significant emissions associated with the Cumbria Mine are left to one side, it is clear that the mine is not aligned with the pathways required to meet the 1.5°C warming limit goal under the Paris Agreement.

In May 2021, the International Energy Agency (**IEA**) published a landmark report, the Net Zero Emissions by 2050 Roadmap (**NZE**). It states that to reach net zero by 2050, "*no new coal mines or extensions of existing ones are needed in the NZE as coal demand declines precipitously. Demand for coking coal falls at a slightly slower rate than for steam coal, but existing sources of production are sufficient to cover demand through to 2050*" (emphasis added).[8]

The Sixth Assessment Report 'Climate Change 2021: The Physical Science Basis'[9] published in August 2021 by the Intergovernmental Panel on Climate Change (**IPCC**) found that unless there are immediate, rapid and large-scale reductions in greenhouse gas emissions, limiting warming to close to 1.5°C or even 2°C will be beyond reach.[10]

As a new coal mine that will increase global emissions[11], and is not required in the most credible 1.5°C-aligned scenario available at the time of writing, the Cumbria Mine is fundamentally incompatible with achieving net zero emissions by 2050.

The CCC has been vocal in its opposition to the Cumbria Mine, saying the mine will "*increase global emissions and have an appreciable impact on the UK's legally binding carbon budgets*."[12] Lord Deben, Chair of the CCC, has recently said the "*coalmine is absolutely indefensible*."[13]

Financial risk associated with the Cumbria Mine

In light of the net zero transition, EMR Capital should also be aware of the serious climate-related financial risks associated with the Cumbria Mine, even if it is approved. As explained further below, these risks are equally relevant regardless of whether EMR Capital has a near-term exit strategy or intends to hold the mine through its operation phase and profitably extract coal from the site.

Falling demand for the Cumbria Mine's coking coal

The WCM Group assumes that up to 360,000 tonnes of the coal produced would be used in the UK, i.e. up to 13% of total production.[14] The remaining 87%+ would be exported, with WCM's intended primary market as "Northern, Southern, Western Europe and Turkey."[15] All but three of the blast furnace steel plants in that geographical area are within the European Union.[16]

The UK market for this coal is by no means guaranteed in the immediate future or beyond 2035:

- The UK steel industry has two blast furnace steelmaking sites to which WCM hopes to sell its coal: British Steel in Scunthorpe and Tata Steel in Port Talbot. However, concerns have been raised that WCM's coal might not be useable by or financially attractive to these

[8] IEA, 'Net Zero by 2050: A Roadmap for the Global Energy Sector', here at page 103.
[9] IPCC, Sixth Assessment Report, 'Climate Change 2021 – The Physical Science Basis', here.
[10] IPCC, 'Climate Change widespread, rapid and intensifying', here.
[11] We note that arguments were made in the Planning Inquiry that coal from the Cumbria Mine might substitute for coal mined elsewhere, but the evidence does not appear to be conclusive on this: see here at paras 7.69-7.94.
[12] The CCC's January 2021 letter to Robert Jenrick MP, here.
[13] The Guardian, 'Government policies will not get UK to net zero, warns damning report', here.
[14] Report by Cumbria County Counsel's Executive Director – Economy and Infrastructure of 2 October 2020, here at para 7.17.
[15] Jim Truman's Proof of Evidence on behalf of WCM, here at para 5.5 (at page 378).
[16] Friends of the Earth, 'Green steel and Cumbrian coal', here at page 2.

companies. Although Tata Steel stated an intention to use the product if the specification and price were acceptable, British Steel informed Cumbria County Council in 2020 that the sulphur content in WCM's coal as applied for in the proposal is an issue for British Steel, due to their operations and blend sulphur limit.[17] It is therefore by no means certain that WCM would be able to sell 13% of its coal into the UK market.

- The Materials Processing Institute, the UK's national centre for steel industry research, has said there was no demand from the UK industry for the mine.[18] Similarly, a recent inquiry by the Environmental Audit Committee (**EAC**) heard evidence that there will be limited domestic demand from any new coking coal mine[19], and British Steel confirmed to the EAC that it is not lobbying for the mine to be built.[20] The trade body UK Steel has said that the industry will continue to buy coking coal on the world market in the future.[21]

- The CCC has stated that deeper decarbonisation of the steel industry will be needed for the UK to meet its legally binding net zero targets. It has recommended that UK ore-based steelmaking be near-zero emissions by 2035 (i.e. halfway through the mine's planned lifetime). It has stated that coking coal use should only be used in steelmaking in the UK beyond 2035 if a very high proportion of the associated carbon emissions is captured and stored, but that coking coal use could be displaced completely by 2035 by using hydrogen direct reduction and electric arc furnace technology.[22] Similarly, the decarbonisation pathways modelled by the Department for Business, Energy & Industrial Strategy (**BEIS**) requires the UK iron and steel sector to be "*largely decarbonised by 2035*."[23]

- Doubts have been raised about the suitability of coal with carbon capture and storage (**CCS**) for the UK steel industry, both from a CO_2 storage perspective[24] and the proportion of emissions it could capture.[25] We are not aware of any blast furnace steel plants in the world with operational CCS at present.

- In light of the current geopolitical setting and concerns around energy security, it should be noted that WCM Group does not intend its coal to replace UK imports of Russian coal.[26] Steelmakers blend different coking coals together to produce a consistent coke, and WCM's coal would have different physical and chemical properties to Russian coal; it would be a high volatile coal similar to that which is currently sourced from the US, and WCM Group's target is to replace coal from US East Coast producers.[27]

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[17] Report by Cumbria County Counsel's Executive Director – Economy and Infrastructure of 2 October 2020, here at paras 7.91-7.92.
[18] The Guardian, 'Steel boss dismisses claim that sector needs new Cumbrian coalmine', here.
[19] EAC, 'UK steelmaking could be jeopardised unless new, clean technologies are progressed, EAC argues', here.
[20] EAC, 'Oral evidence: Technical innovations and climate change: green steel', here at Q73.
[21] EAC, 'Oral evidence: Technical innovations and climate change: green steel', here at 14:45:40; and EAC, 'Oral evidence: Technical innovations and climate change: green steel', here at Q10.
[22] The CCC's January 2021 letter to Robert Jenrick MP, here; and the CCC's Sixth Carbon Budget, here.
[23] BEIS, Industrial Decarbonisation Strategy, here at page 53.
[24] BEIS Committee report, here at para 172; and Caroline Leatherdale's Proof of Evidence on behalf of WCM, here at para 3.27 (at page 223).
[25] EAC, 'Oral evidence: Technical innovations and climate change: green steel', here at 15:10:10.
[26] The CEO of MPI has said that the mine would not displace a single tonne of Russian coking coal from the UK, and noted that Tata Steel does not use any Russian coking coal: see here.
[27] Wood Mackenzie, 'Steel and Metallurgical Coal Expert Report' prepared for WCM Group, here at para 2.34 (at page 410); and Report by Cumbria County Counsel's Executive Director – Economy and Infrastructure of 2 October 2020, here at para 7.17.

The demand from the EU steel industry is also likely to decline significantly up to and beyond 2035:

- EU steelmakers are already making decisions to replace blast furnaces with low-carbon technologies at the end of their working lives (as 74% of EU blast furnace steelmaking capacity is estimated to reach the end of its working life and would require reinvestment by 2030, rising to 90% by 2035).[28] To date, announcements to build low-carbon steel capacity by 2030 have been made by EU steelmakers covering almost 50 Mt per annum of blast furnace steelmaking capacity[29], over half of the EU's current 95 Mt per annum capacity[30], including by steelmakers ArcelorMittal, Salzgitter and SSAB.[31]

- We are not aware that any EU steelmaker has yet announced the deployment of CCS, with the exception of a demonstration project by ArcelorMittal to be in operation by 2035.[32]

- This transition is likely being driven by the European Commission's "Fit for 55" proposals – which include proposals for a Carbon Border Adjustment Mechanism and for progressively reducing the free allowances that steelmakers currently receive under the EU Emissions Trading System by 10% per year from 2026, to zero in 2035[33] – and the demand for green steel from car manufacturers.[34]

It is clear that the broad direction of travel is that the demand for the Cumbria Mine's coking coal in the UK and Europe, WCM's intended markets, is going to fall significantly in the years to 2035, well before the mine's intended end-of-life in 2049. It is not guaranteed that WCM Group would find a replacement market for its coking coal in other jurisdictions such as Asia, given there are existing supplies of coking coal with comparable specifications to the coal from the Cumbria Mine.

This should be of serious concern to EMR Capital and its investors, as the Cumbria Mine could become a stranded asset, and this risk must be factored into financial projections and expected exit valuations.

Future delays to the planning process

While planning approval has not yet been granted by the Secretary of State as at the date of this letter, it is quite possible that any approval could be the subject of future legal challenges, especially in view of the strong opposition to the Cumbria Mine, and the controversial climate change and planning issues surrounding the mine. Even if planning approval is ultimately obtained, future steps in the statutory planning process, such as applications for environmental permits[35], could also be the subject of further opposition.

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[28] Agora Energiewende, Global Steel Transformation Tracker at slide 6, here (accessed 4 July 2022).
[29] *Ibid*, slide 8, here.
[30] *Ibid*, slide 6, here.
[31] Announcements regarding ArcelorMittal here; Salzgitter here; and SSAB here (all accessed 4 July 2022).
[32] Announcement by ArcelorMittal announcement, here (accessed 4 July 2022).
[33] For a summary, see Shearman & Sterling, 'CBAM and revised EU ETS: implications for the steel industry', here (accessed 4 July 2022).
[34] Comments from BusinessGreen, here; Volkswagen Group, here; and Environment & Energy Leader, here (all accessed 4 July 2022).
[35] For example, a licence from the Marine Management Organisation for the extraction of coal from under the seabed, as noted in Appendix 1 (Proposed Planning Conditions) to the Report by Cumbria County Counsel's Executive Director – Economy and Infrastructure of 2 October 2020, here at para 22.

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Such challenges would further delay the construction and operation of the mine – perhaps indefinitely, if it is so delayed that UK and EU policies on transitioning steelmaking to net zero develop further in the interim.

This could give rise to further material uncertainties and financial implications for WCM Group and the Fund, which would need to provide additional funding during any legal challenge despite the uncertain prospects of the site becoming and remaining profitable though its lifecycle.

EMR Capital's investment in the Cumbria Mine

Fund structure and management

The Fund, which raised $430 million from 54 investors between 2013 and 2015[36], and as of March 2022 had a gross asset value of c.$305 million[37], is the majority owner of the WCM Group and the Cumbria Mine, having acquired its controlling interest in June 2014.[38]

We understand that the Fund is structured as a Cayman Islands limited partnership managed by its general partner, a Cayman Islands limited company in the EMR Capital group called EMR Capital GP 1 Limited (the **General Partner**). One or more affiliated entities controlled by EMR Capital provide management / advisory services to, or in respect of, the Fund. These include EMR Capital Management Limited, a Cayman Islands limited company, EMR Capital Advisors Pty. Ltd.[39], an Australian limited company, and EMR Capital Advisors Limited[40], a Hong Kong registered limited company (together, the **Advisory Entities**).

Ownership of the WCM Group

The WCM Group is comprised of two UK limited companies: West Cumbria Mining Limited (**WCML**)[41], and its parent company, West Cumbria Mining (Holdings) Limited (**WCMHL**).[42] The Fund owns the WCM Group through a holding company called EMR Capital Investment (No.3B) Pte. Ltd. (the **Holding Company**) which holds approximately 81% of the equity in WCMHL, and is the principal holder of both shares and loan notes in WCMHL.[43] The Fund's investment in WCMHL has funded an equity investment in WCML of at least £35,014,203[44], which in turn has funded the investment by WCML in licence fees and exploration costs related to the Cumbria Mine (c.£24 million, as at 30 June 2020[45]).

[36] Latest Form D filed by the Fund with the US Securities and Exchange Commission (**SEC**) in January 2015, here (accessed 4 July 2022).
[37] Form ADV filed by EMR Capital Management Limited with the SEC in March 2022, here (accessed 4 July 2022).
[38] '*West Cumbria*' section of the '*Investments*' page of the EMR Capital website, here (accessed 4 July 2022).
[39] ACN 158 369 450.
[40] Company registration number 2977180.
[41] Company registration number 07144109.
[42] Company registration number 07143398.
[43] Note 17 to the financial statements of WCMHL for the year ended 30 June 2020 (the **WCMHL 2020 Accounts**) at page 30, here. The funding provided to WCMHL by the Holding Company includes £7,400,000 in fixed rate unsecured convertible loan notes issued in 2019 (the loan note facility has since been extended by at least £2,627,000) which have had their maturity date extended at least twice: note 12 to the WCMHL 2020 Accounts at page 26.
[44] As of 30 June 2022 – note 10 to the WCMHL 2020 Accounts, at page 25.
[45] Note 4 to the financial statements of WCML for the year ended 30 June 2020 (the **WCML 2020 Accounts**) at page 10, here.

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As a result of its controlling interest, the Fund is uniquely exposed to the concentrated financial risk associated with the Cumbria Mine. So far, the Fund's investment in the mine has been lossmaking – the WCM Group had accumulated losses of £12,138,710 as of 30 June 2020.[46] Nevertheless, the Holding Company has expressed its intention to provide sufficient additional funding to WCMHL, in the form of cash and / or loan deferrals, for the WCM Group to meet the costs of the public inquiry and any other liabilities as and when they fall due. This is the basis on which WCMHL is able to continue as a going concern.[47]

The WCM Group will require continued financial support from the Fund at least until planning approval for the development of the Cumbria Mine is granted by the Secretary of State (if this is the outcome of the public inquiry), any necessary environmental permits have been obtained, and the resolution of any associated legal challenges. As noted above, and acknowledged in the financial statements for the WCM Group, the planning application has been a source of material uncertainty for the WCM Group.[48] Nevertheless, the Group's financial statements have been prepared on the assumption that the Secretary of State grants planning permission, subject to the completion of a s.106 agreement, and it must be on this assumption that the Fund has continued its financial support for the project thus far.

However, even if planning permission and subsequently any necessary environmental permits are granted, the economic prospects of the Fund's investment in the Cumbria Mine will remain highly uncertain and subject to significant climate-related risk. They will also depend on the Fund's strategy for exiting its investment and returning the proceeds to investors.

Exit strategy

We have not been able to determine the Fund's exit strategy from publicly available information. For the reasons discussed in this letter, a plan to generate profits for distribution to investors in the Fund from the extraction of coal from the Cumbria Mine over its projected life would be subject to significant financial risks due to reducing demand for coking coal as the sector transitions towards low-carbon steel capacity and net zero emissions.

Given the maturity of the Fund (which will be 10 years old in 2023), EMR Capital's exit strategy may instead be to sell its interest in the Cumbria Mine (with planning permission) to a buyer willing to develop the site and manage the mine through its operational life. However, the climate-related financial risks associated with the Cumbria Mine are equally relevant to an exit by the Fund in the near term, as the uncertain future profitability and limited economic life of the Cumbria Mine is likely to translate into a depressed exit valuation.

Given the current state of knowledge regarding the incompatibility of new coal mines with a 1.5°C-aligned transition pathway, and the necessary decarbonisation of the steel sector, EMR Capital should expect any potential buyer of the mine to be conscious of how climate-related stranded asset risks affect the investment case for the project. Given its commitment to responsible investment and the goals of the Paris Agreement (see below), we would also expect EMR Capital to share the analysis presented in this letter with any prospective buyer or investor (as well as with its own investors).

As explained in the remainder of this letter, EMR Capital's exposure to the concentrated financial risk associated with the Cumbria Mine raises serious questions for EMR Capital

[46] Note 6 to the WCMHL 2020 Accounts at page 22, here.
[47] Going Concern statement on pages 2-3 of the WCMHL 2020 Accounts, here.
[48] Page 15 of the WCMHL 2020 Accounts, here.

about how the investment can be considered compatible with its public climate and responsible investment commitments, its fiduciary and other duties to the investors in the Fund, and the expectations of those investors.

EMR Capital's public support for responsible investment and global climate goals

Through a series of public commitments and policies, EMR Capital identifies climate risk as being financially material and commits to manage it accordingly. EMR Capital also claims to support principles for responsible investment, and the climate goals enshrined in the Paris Agreement. However, it is not clear how the Fund's continued support for the WCM Group can be compatible with these commitments. EMR Capital must consider how it can justify this investment to the investors in the Fund.

EMR Capital has made a public commitment to responsible investment as a signatory, since February 2020[49], of the UN PRI. Although EMR Capital is yet to submit a public report on its responsible investment activities, membership of UN PRI requires EMR Capital to design and implement a responsible investment policy providing guidance on how it approaches ESG factors (including climate change), with appropriate senior-level oversight.[50] Membership of UN PRI also means that EMR Capital has endorsed six responsible investment Principles, including:

> ***Principle 1**: We will incorporate ESG issues into investment analysis and decision-making processes.* [51]

In addition, UN PRI expects private equity fund sponsors like EMR Capital to use their influence to ensure that their portfolio company boards (i.e. the WCMHL and WCML directors) take responsibility for the identification and management of ESG factors, as required under the legal duties owed by company directors to their companies.[52]

In its own ESG policy, dated May 2021, EMR Capital highlights its commitment to UN PRI and claims to: (a) support the objectives of the Paris Agreement "*through a focus on reducing greenhouse gas emissions and efficient energy use*"; and (b) consider climate risks in investment decisions in line with the requirements of the Task Force on Climate-Related Financial Disclosures (**TCFD**). EMR Capital also claims to "*[respect] the human rights of those affected by EMR Capital's investment activities*" and *"[consider] environmental, public health, safety and social issues and opportunities when evaluating whether to invest in a particular company or entity, as well as during the period of ownership."*[53]

It is clear from these policies that EMR Capital recognises the material financial risks posed by climate change, and considers its commitment to responsible investment and ESG integration to be salient to both: (1) the generation and preservation of investment value in the funds that it manages, and (2) the trust placed by investors in EMR Capital as a manager of their money, including at the point they decide to invest with EMR Capital. However, **EMR Capital's continued support for the**

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[49] EMR Capital's UN PRI signatory page is available here.
[50] See the minimum requirements for UN PRI investor membership, here (accessed 4 July 2022). It is clear from UN PRI resources that signatories are expected to consider and manage their climate-related risks and impacts as part of their responsible investment approach – see, for example, the UN PRI's investor resource guide on climate risk, here.
[51] The UN PRI Principles are available here.
[52] See UN PRI's guidance for private equity signatories: directors' duties and ESG, here (accessed 6 July 2022).
[53] EMR Capital's ESG policy, here (accessed 4 July 2022).

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development of the Cumbria Mine is fundamentally incompatible with the requirements of EMR Capital's own ESG policy, and its membership of UN PRI:

- EMR Capital cannot credibly claim to support the Paris Agreement while investing in a new coal mine which has been shown by the best available climate science to be incompatible with the Paris Agreement goal of limiting warming to 1.5°C. EMR Capital's public claims to support the Paris Agreement are therefore untenable while support for the Cumbria Mine continues.

- The TCFD framework requires asset managers to disclose how climate-related risks and opportunities are factored into relevant products or investment strategies and managed, and describe how each product or investment strategy might be affected by the transition to a low-carbon economy.[54] As explained above, investors in the Fund, and any prospective buyer of or investor in the Cumbria Mine, should be concerned about the serious risk that the mine becomes a stranded asset through the transition of the steel industry. However, it is not sufficiently clear from public disclosures made by EMR Capital how EMR Capital intends to manage the concentrated climate-related financial risk associated with the Cumbria Mine, or how the Fund's overall performance might be affected by the low-carbon transition.

- Given the severity of these risks, it is not clear how EMR Capital has delivered on its commitment as a signatory to the UN PRI, and under its own ESG policy, to integrate the consideration of climate change into its investment decision-making. EMR Capital's public website disclosures suggest that EMR Capital's ESG framework for the Cumbria Mine has focused on local environmental factors such as noise, particulate pollution and environmental disturbance. Climate change is not mentioned.[55] EMR Capital should note that this apparent contradiction has previously attracted media attention questioning EMR Capital's commitment to UN PRI principles and the UN PRI's position on investments made by members which are damaging to the climate.[56]

- Climate change is increasingly recognised as a human rights issue by courts, the UN, and other international bodies worldwide, both in its own right and as a consequence of the potential for climate change to infringe other fundamental rights, such as the rights to life and to respect for private and family life.[57] It is not clear how EMR Capital has considered, or sought to mitigate, the potential adverse human rights impacts attributable to the emissions (including downstream emissions) associated with the Cumbria Mine in the course of its decision to fund the project, as required by its own ESG policy.

EMR Capital must consider how its support for the Cumbria Mine and the WCM Group is consistent with the public commitments it has made to responsible investment, the disclosure and management of climate-related financial risk in line with TCFD recommendations, and the global climate change goals enshrined in the Paris Agreement. EMR Capital must also be conscious that these public claims will have shaped the expectations of its investors, who are likely to have their own climate

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[54] Supplemental guidance for Asset Managers provided by TCFD at pages 44 to 49 of its October 2021 updated guidance, here.
[55] '*West Cumbria*' section in the '*Portfolio Companies'* section of the EMR Capital's ESG page, here (accessed 4 July 2022).
[56] Responsible Investor, 'UK's re-entry into deep coal mining financed by PRI signatory', here (accessed 4 July 2022).
[57] See, for example UN OHCHR, 'Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment', here; and UN OHCHR, 'OHCHR and climate change', here (accessed 4 July 2022).

and ESG policies and requirements in place (including expectations of the asset managers to whom they entrust their money).

EMR Capital should consider whether the initial and ongoing disclosures provided to investors in the Fund provide adequate information on the climate-related risks and impacts associated with the Cumbria Mine and the Fund's other investments. If not, EMR Capital may fail to live up to its commitment to "*provide timely information to [its] limited partners on ESG matters*"[58] and risks misleading investors. We urge EMR Capital to share the analysis provided in this letter with investors to alert them to the climate-related risks and impacts associated with the project.

EMR Capital's fiduciary and other duties

EMR Capital's approach to climate-related financial risk and responsible investment also has implications for the fiduciary duties owed by EMR Capital to the Fund and its investors.

As general partner, investment manager and / or advisor to the Fund (as applicable), the General Partner and the Advisory Entities owe fiduciary duties to the investors in the Fund. The exact scope of these duties varies by jurisdiction[59] but typically fiduciaries in common law jurisdictions are required to act: (1) honestly and in good faith in the interests of their beneficiaries, avoiding or managing any conflicts of interest (the **duty of loyalty**); and (2) with due care, skill and diligence (the **duty of prudence**).[60]

For example, the General Partner would generally be bound by a duty of loyalty to the Fund and its investors under Cayman Islands partnership law[61], and would owe a duty of care to the Fund and its investors. The Advisory Entities are likely to have corresponding duties of loyalty and prudence.[62]

By recognising, through its public responsible investment commitments and its ESG policy, that climate change poses material financial risks to the Fund, and pledging support for the climate goals of the Paris Agreement, EMR Capital has indicated that it considers this to be a course of action which is most likely to further the interests of investors in the Fund and other EMR Capital-managed funds. To the extent that the General Partner (or another Advisory Entity) causes the Fund to make investments (such as its investment in the Cumbria Mine) which conflict with such commitments, the General Partner (or other Advisory Entity) may be acting in a way that does not further the best interests of Fund investors, and consequently risks breaching its fiduciary duty of loyalty to the investors.

Furthermore, if the General Partner (or other Advisory Entity) inadequately considers, consciously disregards or wilfully ignores the foreseeable material climate-related financial risks associated with the investment in the Cumbria Mine, it risks breaching the duties of loyalty and prudence it owes to Fund investors. As explained in this letter, these foreseeable risks include the stranded asset risks associated with the investment in the WCM Group, and the related risks to exit valuation.

[58] See EMR Capital's ESG policy at footnote 53.
[59] As the Advisory Entities are based in the Cayman Islands, Australia and Hong Kong.
[60] See, for example, page 12 of UNEP FI, 'Fiduciary duty in the 21st Century', here.
[61] Unless the limited partnership agreement for the Fund expressly restricts this duty. See Article 19 of the Cayman Islands Exempted Limited Partnership Act (2021 Revision), here.
[62] The precise duties of the Advisory Entities will depend on the law applicable to them and the contractual arrangements between EMR Capital and the Fund.

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It is increasingly clear that a failure to consider and manage climate risk can lead to a breach of fiduciary and other duties by company directors.[63] Similar principles have been established in the fund management context, including by a UN-sponsored fiduciary duty project which concluded that "*systemic issues, like climate change, may significantly alter the investment rationale for particular sectors, industries and geographies and may have generalised negative impacts on economic output. Ultimately, the consideration of ESG issues has become one of the core characteristics of a prudent investment process*."[64] These principles are equally applicable to EMR Capital's management of investors' money and the Fund's investments.

In addition, in circumstances where EMR Capital's fiduciary duties to investors are breached due to inadequate management of climate-related risks and impacts, the General Partner, or another Advisory Entity, may also be found to be in breach of contractual duties owed to the Fund or its investors[65] or duties established under relevant regulations.

Armed with the information in this letter about the climate-related financial risks associated with the Cumbria Mine, EMR Capital must consider, and explain to investors, how continued support for the project is compatible with the best interests of investors in the Fund. Even if the Cumbria Mine is approved, EMR Capital may be exposing the Fund and its investors to such risks unreasonably and unnecessarily, and may have failed to act with due care, skill and diligence in failing to protect the Fund from such risks.

Investor expectations

Investor engagement on climate change

Ultimately, EMR Capital is accountable to the investors in the Fund. Increasingly, pension funds, endowments and other asset owners and institutional investors expect their asset managers (including private equity managers) to consider and manage climate change-related risks and impacts, and disclose their approach as part of the investor's overall approach to ESG and climate change.

EMR Capital should be aware that climate change is likely to be a priority issue for its own investors, especially those which have made their own climate-related commitments and / or are members of investor coalitions focussed on responsible investment and climate change.

For example, the signatories to the UN-sponsored Net Zero Asset Owner Alliance (**NZAOA**), which represents 73 asset owner members with a combined $10.6 trillion in assets under management, have committed to transition their investment portfolios to "*net-zero GHG emissions by 2050 consistent with a maximum temperature rise of 1.5°C above pre-industrial levels, taking into account*

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[63] See, for example, the Commonwealth Climate and Law Initiative's country papers on Directors' Liability and Climate Risk, here (accessed 4 July 2022). This applies to the directors of WCMHL and WCML, including any directors nominated by EMR Capital, who are required to exercise independent judgement, promote the success of those companies for the benefit of their shareholders, and meet the applicable standard of care. See Debevoise & Plimpton's 2019 opinion on the duty of UK company directors to consider relevant ESG factors, available through the UN PRI website, here. See also sections 172 and 174 of the UK Companies Act 2006.

[64] See page 8 of UNEP FI, 'Fiduciary duty in the 21st Century' at footnote 60. The project also concluded that ESG issues (including climate change) are financially material, and that the fiduciary duties of investors require them to incorporate ESG issues into investment analysis and decision-making: page 12.

[65] Including those set out in the limited partnership agreement governing the Fund and investment management or advisory agreements between the General Partner, the Fund and / or the Advisory Entities.

the best available scientific knowledge including the findings of the IPCC."[66] The NZAOA's most recent target setting protocol requires members to set targets for the reduction of their portfolio emissions which are aligned with the latest climate science, and to participate in at least one engagement with asset managers.[67] In relation to asset manager engagement, the protocol requires members "*to evaluate the manager's climate change mitigation efforts, their management of climate risks/opportunities, and to ensure their alignment of stewardship activities and public messaging with the long-term climate interests of the Alliance on climate change*."[68]

In addition, the Institutional Investors Group on Climate Change (**IIGCC**) has released a draft set of private equity components for its Net Zero Investment Framework for consultation[69] to provide guidance for general and limited partners on the alignment of private equity portfolios to net zero. The private equity components of the Framework will require private equity managers to assess the alignment of their portfolio companies with net zero and invest in climate solutions.[70] Although it may be some time before the private equity components of the Framework are implemented across the private equity market, they provide another indication of investor expectations for private equity in relation to climate change.

This trend is likely to increase the pressure on EMR Capital's approach to climate change, as investors seek to align their choice of, and engagement with, asset managers with their overall climate objectives and commitments. **EMR Capital should therefore be prepared to justify its continued investment in the Cumbria Mine to investors, despite the known climate-related financial risks, and harmful climate impacts, associated with the project.**

Potentially misleading claims

Moreover, EMR Capital must acknowledge that its public commitments to responsible investment and the climate goals of the Paris Agreement will have shaped the expectations of its own investors at the point they invested in the Fund and on an ongoing basis. If the inconsistency of the Fund's continued support for the Cumbria Mine with climate science and EMR Capital's public commitments is not presented transparently to investors in the Fund, EMR Capital is at risk of communicating its responsible investment and climate credentials in a misleading manner.

Asset owners and financial regulators are increasingly alert to the risk of greenwashing by asset managers.[71] If EMR Capital's communications around climate change and responsible investment do mislead investors in practice, it could face legal action, such as tortious liability for misrepresentation. To the extent EMR Capital made or makes climate- and responsible investment-related claims in the course of marketing the Fund in regulated jurisdictions such as the US and the EU, it should also consider the risk that such communications may be held to breach applicable

[66] Page 2 of NZAOA, 'Commitment Statement for Participating Asset Owners', here.
[67] Page 13 of NZAOA, 'Target Setting Protocol', 2nd edition, here.
[68] *Ibid*, page 62. Note that, although private equity investment holdings are not included in the most recent edition of the NZAOA's target-setting protocol, they are expected to be included from 2023, and many of the principles currently set out in the protocol, such as asset manager engagement, are likely to apply equally in in the private equity context. See page 32 of the protocol.
[69] The consultation closed on 27 February 2022.
[70] IIGCC's 'Paris-Aligned Investment Initiative: consultation on proposed components for private equity', here.
[71] See, for example, the SEC's recent charges against BNY Mellon Investment Advisor, Inc. for misstatements and omissions regarding the integration of ESG considerations in investment decisions for certain BNY-managed funds. The SEC's May 2022 press release is available here.

marketing regulations unless they are “fair, clear and not misleading”.[72] **EMR Capital should be aware of the tortious legal liability and regulatory consequences that may stem from misleading communications to investors, and consider whether its public commitments regarding climate change and responsible investment have the potential to mislead investors.**

Investor scrutiny of metallurgical coal investments

Finally, we note that some endowments and other institutional investors are already taking a discerning approach to metallurgical coal assets in practice. For example, the University of Pittsburgh’s $5.65 billion endowment fund[73], which faces its own “divest” movement and published its inaugural ESG report in March 2022, has committed to divest from private fossil fuel investments by 2035.[74] The endowment fund recently decided against renewing its commitment to, and taking up a new co-investment in, a metallurgical coal mine due to concerns about “*the ability to exit the investment in the future as major mining firms seek to reduce their greenhouse gas profiles*” and “*coal’s becoming a stranded asset (e.g. not able to achieve financial returns for its full lifetime) as global economies transition to a lower-carbon economy.*”[75]

This example demonstrates that investors are alert to the economic and commercial risks associated with metallurgical coal investments like the Cumbria Mine. **This adds further to the need for EMR Capital to disclose and discuss the risks associated with the project with the investors in the Fund, and consider in good faith if continued support for the project by the Fund is compatible with investors’ best interests. Continued support for the Cumbria Mine (should the mine be approved, and particularly if that approval is subsequently subject to legal challenge) may lead to scrutiny by investors of EMR Capital’s approach to climate risk management, particularly in the event that the project ceases to be economically viable or the investment is exited at a significant discount to the valuation investors are expecting.**

Considerations for the EMR Capital executive team

In light of the significant climate-related risks associated with the Cumbria Mine and the Fund’s investment in the WCM Group, EMR Capital must consider how it can justify its continued support for the project in light of its legal duties owed to the Fund’s investors, the appropriate management of climate-related financial risks, the expectations of the Fund’s investors, and its commitments to responsible investment and to the climate objectives of the Paris Agreement.

We would appreciate a response to the issues set out in this letter. We recognise the need for EMR Capital to respect the confidentiality arrangements relating to the Fund, but this should not impede a transparent discussion of the principles explained in this letter.

[72] This is the standard applied under EU marketing regulations – other standards may apply in other relevant jurisdictions.
[73] Form 990 filed by the University of Pittsburgh for the tax year ending 30 June 2021, here.
[74] WESA News, ‘Pitt Pledges To Divest From Private Fossil Fuel Investments By 2035; Students Say It’s Not Enough’, here (accessed 4 July 2022).
[75] See page 15 of the University of Pittsburgh’s ‘Inaugural consolidated endowment fund environmental, social and governance report, 2020-21’, here.

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We would be pleased to discuss the contents of this letter further with you.

Yours sincerely,

James Thornton

Chief Executive Officer, ClientEarth