

SURFACE COAL MINE RESTORATION - TOWARDS BETTER REGULATION

**A final report to the Scottish
Opencast Coal Task Force by its
Compliance and Finance Sub-
groups**



October 2015

CONTENTS

EXECUTIVE SUMMARY

i

	Paragraph
PART 1	
BACKGROUND	1
SUB-GROUPS' PURPOSE AND REMIT	4
THE FUTURE OF COAL	8
LAND USE PLANNING CONTEXT	9
PRE-PLANNING PROCEDURES	14
SECONDARY PLANNING LEGISLATION - MINE MONITORING FEES	25
OPTIONS OPEN TO MINISTERS IN THE STATUTORY PLANNING PROCESS	39
MINE PROGRESS PLANS	48
PLANNING ENFORCEMENT	50
LEGAL AGREEMENTS – Planning	54
STANDARD PLANNING CONDITIONS	56
PRIMARY AUTHORITY	57
NATIONAL STANDARDS	60
PROCESSING AGREEMENTS	63
MONITORING AND COMPLIANCE - EXPERTISE AND PRACTICE	65
UPDATING SCOTTISH GOVERNMENT PLANNING ADVICE	80
COMMUNITY INVOLVEMENT	81
PART 2	
FINANCE	82
FORMS OF RESTORATION GUARANTEES	88
LANDOWNER LIABILITY	109
LEGAL AGREEMENTS – Finance	127
PART 3	
COMMUNITY ENGAGEMENT AND RELATIONS	129
BUSINESS IMPACT	133
LESSONS FOR OTHER SECTORS AND AN OUTSTANDING WORKSTREAM	134
CONCLUSION	137
REFERENCES	
ANNEXES	
GLOSSARY	

EXECUTIVE SUMMARY

A. This report compiles the work of the Opencast Coal Task Force Compliance and Finance sub-groups; set up during 2014 to implement change and consider the outcome of a public consultation on Opencast Coal Restoration: Better Regulation. A summary of the consultation's main findings is in Annex C. The outcomes and recommendations in the report are aligned with the planning reform and better regulation agendas. Sub-group meetings benefitted from input by contributors in or close to the energy minerals, finance, audit, environment and community sectors.

B. The groups have received and considered advice on:

- the land use planning context
- secondary planning legislation introducing mine monitoring fees
- planning procedure options open to Scottish Ministers
- mine progress plans
- primary authority, the idea of mandatory "advice" and shared services
- national standards
- the filling of skills gaps amongst planning authorities
- bank guarantees, the de-risking of parent company guarantees, the health of and prospects for the insurance bond market
- landowner liability

C. It is clear from reviewing existing planning legislation, policy and guidance that there is in place a regime that if followed correctly would ensure competent monitoring and effective compliance. This has been described as the use of "the tools in the box". In practice there were substantial restoration shortcomings at several sites brought about by poorly managed operations ahead of the insolvencies of two major companies. They are no longer operating in the sector. Remaining and new operator practice and planning authority practice has improved. The sub-groups recognise the opportunity to provide further assurances to local authorities, the industry, communities and Scottish Ministers. We have looked at where the existing compliance framework can be augmented consistently across Scotland also drawing on practice from elsewhere.

D. The skills gap across the local authorities will be addressed in the actions arising from this report supported by additional funding and a climate of co-operation. However skill-sets including financial and legal will need to be embraced if all that this report proposes is to be implemented effectively. This signals a move towards a more consistent approach to all aspects of surface coal mining in the form of national and best practice standards. Scottish Government, stakeholder involvement or oversight, and others should be involved directly with assistance (perhaps mandatorily where appropriate) where that is necessary. Visibility over these enhancements is crucial to Scottish Ministers. The Task Force has benefitted from regular site by site feedback from industry and from the local authorities on surface

coal mining activity. We recommend that should be built on by adopting a simple structured approach to periodic reporting.

E. In terms of financial assurance both the financial marketplace and the risk appetite of existing suppliers has changed so we have looked at alternatives that will give local authorities and others the level of assurance they require. Bank Guarantees are a new instrument that should be taken seriously in some cases as a replacement for insurance bonds where are no longer available in a form that gives long term assurance. Bank guarantees also ensure that financial due diligence has been done on the developer by the bank but they are flexible enough to change as required. They are also used widely in other commercial environments for this purpose. Other financial instruments remain on the menu. However rather than each local authority preparing a guarantee for each site, this is an area where a single standard guarantee format and documentation will be developed for common use. Due diligence, up-skilling and resourcing amongst the local authorities is also highlighted. Local authorities will wish to ensure or take advice that financial institutions offering bank guarantees are sound. It may also be possible to signal which banks would be deemed acceptable to issue the guarantees. Further work with Scottish Futures Trust is envisaged.

F. The groups have considered the detail of and case for an independent compliance unit or a shared-services approach. The report concludes that the favoured approach is more to do with consistency and the availability of assistance and documentation to call on when needed than about a central unit. The Scottish Government is working with Heads of Planning Scotland and the local authority Improvement Service through grant funding on training and support for joint working amongst planning officers in coalfield authorities. We aspire to 'national standards' which will be needed both to ensure good practice across the local authorities and that they have knowledge and expertise to turn to in order to carry out their obligations. Heads of Planning Scotland is already paving the way in some areas on which we will collaborate.

G. The report is evidenced throughout with sub-group minutes (set out in full at Annexes E and K) and consultation analysis findings. The report takes account of sub-group feedback on a December 2014 draft; a commitment at the 16 December 2014 Task Force to revisit its contents; followed by further sub-group representative meetings in April 2015 to enhance visibility and oversight for Scottish Ministers and actions on restoration bank guarantees. A political consensus on the report by COSLA was also reached (Annex K refers). The report also reflects the wider concerns of communities well experienced with living in the vicinity of surface coal mines day-to-day. It reflects sub-group and Task Force sentiment about the provisions that could be put in place that would be seen to be making a real difference.

H. There remain areas of disagreement but there is also consensus on many of the report's recommendations. All of these will require further work and the sub-groups have developed a spirit of collaboration which will serve that process well. The Task Force endorsed the report at its 28 October 2015 meeting. A project plan within Scottish Government has been developed to take recommendations forward during 2015/16 and progress will be publicised on-line.

PART 1

BACKGROUND

1. The Scottish Opencast Coal Taskforce was set up in 2013 in response to two coal company liquidations which had repercussions for employment, continued coaling and restoration at a number of sites across the Scottish coalfields. The Taskforce is represented by the affected councils, the Coal Authority, the relevant Unions, Coal Operators, Scottish Government including Partnership Action for Continuing Employment (PACE¹), DECC, the Scotland Office, Parliamentarians representing the coalfield communities from across the political parties and SEPA.
2. The Taskforce and the Scottish Government are working together to ensure the optimum outcome for all concerned both for sustained employment, energy supply, host communities, the environment and for site restoration. This report focuses on restoration.
3. Since the Scottish Government's 2013 consultation 'Opencast Coal Restoration: Effective Regulation', two Taskforce sub-groups have been considering its findings. They have looked at how more effective regulatory processes could be put in place working alongside existing local authority structures but also taking evidence on how new forms of regulation and wider visibility over procedures and outputs might secure improvements. Crucially they have been considering perhaps the paramount concern which is to ensure that we prioritise a better understanding of financial guarantee options for site restoration and aftercare and take steps to underpin support in that complex field by addressing skills gaps. This report is the conclusion of those discussions and provides a platform for further initiatives and consultation on its recommendations by lead partners.

SUB-GROUPS' PURPOSE AND REMIT

4. The Taskforce set up two sub-groups during 2014 to consider in detail the specific compliance monitoring and financial factors relevant to surface coal mines restoration. A summary of the sub-group remits is given in Annexes A and B respectively. Operators and planning authorities need to be better equipped to ensure that future surface coal mines are operated effectively with better regulatory systems in place. Systems should ensure that planning authorities are safeguarded against incurring costs or bearing risks arising from departures from the terms of planning permissions so that sites are fully restored at no cost to the public purse. Exceptionally in the circumstances of a breach of a planning condition (i.e. a break in its terms), default or insolvency, an initial outlay recoverable from operators' or administrators' financial guarantees may be possible but that is complex. Some of the complexities are set out in the landowner liability section of this report and may be overcome by the opportunities concerning bank guarantees. Nonetheless, local authorities cannot be expected to forward-fund any works in the event of a breach of planning control by an operator.

¹ <https://www.ourskillsforce.co.uk/skills-planning-hr-support/pace/>

5. The sub-groups were charged with exploring more effective regulation of continuing active and future surface coal mines. While this report only focusses on surface coal mining, the Task Force recognises that many of its recommendations could apply in due course to practice on other onshore minerals, landfill and electricity infrastructure developments, specifically the works associated with solar/PV and transformer and energy storage systems. There is an opportunity to apply learning from this in other sectors.
6. Following consideration of the draft report at the December 2014 task force, the sub-groups' work was extended to a further four representative meetings. The first was held in January 2015 by CoalPro, COSLA, East Ayrshire Council, HOPS, Scottish Government and SOCA and then in April 2015 with a wider group to resolve matters of importance to Scottish Government and stakeholders concerning an appropriate level of oversight and guidance on bank guarantees. The January meeting was resolved by adjustments to this final report. A summary of the April meetings is given in Annex K with appropriate adjustments applied to the text of this report and its recommendations.
7. This report considers the future of surface coal mine restoration under the two broad headings of compliance/monitoring and finance: with supporting evidence and final recommendations. It then considers other matters to support the better regulation of restoration.

THE FUTURE OF COAL

8. National Planning Framework 3 ascribes national development status to the Carbon Capture and Storage (CCS) Network and Thermal Generation, referring to the construction of new or refurbishments to thermal generation power stations including Grangemouth and Longannet. The closure in March 2016 of Longannet power station notwithstanding, Scottish Planning Policy also acknowledges the "national benefit of indigenous coal...in maintaining a diverse energy mix and improving energy security".

2013 Consultation main finding

The consultation was based on an assumption that coal will continue to play a role in Scotland's energy supply mix into the foreseeable future.

Communities that replied to the consultation are generally opposed to any future development of coal. Several respondents disagreed with the view of the future of the coal markets and economics of the industry presented within the consultation document. It was suggested that the starting point for the consultation should have been one of an industry in terminal decline.

Sub-groups' discussion

The profitability of future coal production is very dependent on the international price of coal as any coal produced in the UK will have to compete with imported coal that is available at the international price. The international coal price is set in US\$ and is currently very low. There is uncertainty over when international coal prices will recover and indeed some market commentators have the view that no significant recovery may take place in the next one to two years. If international coal prices rose by between £5 and £10, either through a strengthening of coal prices or a weakening in Sterling, that would bring a lot more production options back into play other things being equal; for example power station demand.

Domestic coal prices remain comfortably above cost of production but domestic coal production yields are typically low and therefore can only be produced alongside a viable thermal coal market.

*A proposal put before UK Government by industry which would provide a **carbon price support (CPS) exemption** on restoration related coal is acknowledged by Treasury and is to be considered.*

Carbon Capture and Storage (CCS) would also create a market as supported by National Planning Framework 3 in the form of national development status. Indigenous producers have the ability to supply long-term fixed-price contracts (indexed to UK inflation measures). This can provide a CCS project with a cost of fuel that is more closely matched to energy off-take by providing greater insulation from variation in international coal prices, foreign exchange movements and greater security of supply. Linked in with a sterling based energy price or CfD contract, this would provide a very attractive project financing proposition.

Coal burn is also affected by the energy policy components reserved to UK Government. There will certainly be interest in further sites in Scotland with indigenous coal attractive even to a declining coal-fired electricity sector.²³

The indigenous coal sector is considered to have a life of 20 years or more although geographically it may become more isolated and concentrated as coalfield resources shrink because they are in hard-to-reach areas or are sterilised owing to other environmental and land use planning constraints to the point where economically recoverable resources diminish and become exhausted.

It was also remarked by environmental NGO sub-group members that some of the assumptions about future prospects including CCS, carbon tax, the future of coal after the proposed closure of Longannet power station are highly speculative.

² Finance sub-group minutes 30 July 2014

³ For example the future of Longannet coal fired power station

LAND USE PLANNING CONTEXT

2013 Consultation main finding

The requirement for more detailed working methods plans to be submitted with planning applications, therefore reducing the likelihood for material variations to a planning permission and its associated planning obligation requiring to be made after site operations commence.

While site survey information was felt to be a matter of judgement for the operators, more effective regulation can be enhanced through a more rigorous approach to detailed information that supports planning applications. Given the recent issues regarding the restoration of sites in the wake of the liquidation of two main coal producers, there is very considerable support for change to ensure that such situations do not arise again in the future. Inevitably there is considerable variation in opinion on how that is best achieved.

Sub-groups' discussion

Whilst the 2013 consultation broached the question of more detailed knowledge about proposed sites only very cursorily, it is clear that adequate information provided to the Coal Authority may not reach the planning authority in the same format, nor did consultees agree that it would necessarily be well understood, whether for the planning assessment or for bonding requirements.

Less than adequate site surveys about the coal and its surrounding rock formations could give rise to problems later on. It is considered therefore that more detail should be identified in high geological risk areas by developers in pre-application discussions with planning authorities and agencies for example on the water environment, faults and the coal to overburden ratio etc., – i.e. better site surveys.

9. Put simply, surface coal mining is development of land requiring planning permission. Planning applications should be determined in accordance with the development plan and other material considerations.
10. All local development plans must be replaced at least every five years. Where recoverable coal resources or reserves may exist, they should be highlighted as a main issue in development plan preparation.
11. The National Planning Framework 3 Action Programme (Action 23) states: We will take action based on the outcome from our consultation on Opencast Coal Restoration: Effective Regulation. It is incumbent upon this report to progress the actions required. Scottish Planning Policy (SPP) on minerals including coal is provided under the Promoting Responsible Extraction of Resources heading. Extracts are included in Annex I.

12. Planning conditions imposed on a grant of planning permission can enable many development proposals to proceed where it would otherwise have been necessary to refuse planning permission. Planning conditions should only be imposed where they are:
- necessary
 - relevant to planning
 - relevant to the development to be permitted
 - **enforceable**
 - precise
 - reasonable in all other respects
13. In many cases surface coal sites also have planning obligations (legal agreements) attached to the permission to regulate other matters related to the use of the land. Historically they have covered the financial guarantee and other matters that cannot be conditioned. Developers and planning authorities therefore require expertise across a range of topics including access to monitoring, compliance and enforcement skills. Access to legal and financial expertise is also required by developers and local authorities in order to ensure that legal agreements and financial guarantees that incur no financial risk to councils for restoration are understood and implemented. In some local authorities those skills are not available in-house and require to be commissioned.

PRE-PLANNING PROCEDURES

14. Pre-application discussion provides a developer, a planning authority and relevant agencies with an opportunity to share information and to be advised on application content and process. It front-loads the process effectively and may support better prepared pre-application consultation and environmental statements ahead of more fully formed applications.

Sub-groups' discussion

COSLA argues that the planning fee penalty clause is a disincentive to supporting unfunded development management processes such as pre-application discussions. They recognise the importance of improved performance but consider the clause is inappropriate for the desired outcome without resources from full cost recovery. Better ways to improve performance are sharing best practice, investing in technology and recognising progress achieved in the last 2 years.

Community representatives on the sub-groups have commented that the submission of incomplete and inadequate applications by professional developers is unacceptable. They suggest that minimum national standards should apply, encouraging a deeper understanding of forthcoming surface coal mine proposals. Community representatives also raised the issue of transparency throughout the planning and mining process.

The industry value pre-application discussions but there's a cost to planning authorities as no fee applies.

Recommendation 1

For opencast coal proposals, the sub-groups recommend supporting and encouraging pre-application discussions in order to shape proposals ahead of the pre-application consultation, environmental assessment and application phases.

15. There are a number of examples of ways in which development proposals can be given wider prominence or alternative means of handling as discussed in the following paragraphs.
16. SEPA now publishes data under its Compliance Assessment Scheme⁴ and it is recommended that planning authorities should do the same for surface coal mine developments both at the pre-consent stage and also during the life of the opencast and beyond if there is aftercare involved. Just across the border, Northumberland County Council provides open access on-line monitoring reports⁵.
17. The Scottish Government's Energy Consents and Deployment Unit gate-checks applications for new wind and hydro development proposals. A gate check can identify any issues at an early stage which may arise during the consultation and ideally quality-assure the application. It can streamline the process by avoiding the need for requests for supplementary information and late addenda. More detail is set out in Annex D.
18. In strategic environmental assessment (SEA), which applies to plans and programmes rather than projects, the role of the statutory Consultation Authorities within SEA is to bring their individual environmental expertise to the assessment process. That can help to ensure that the future consultation process undertaken by a Responsible Authority is more robust. That in turn means that the public can gain a better understanding of the likely effect of a plan on the environment and meaningfully contribute to the plan's preparation process by offering an informed view.
19. Good standards are also important to environmental impact assessment (EIA). Scottish Government's October 2014 EIA Forum⁶ covered scoping for efficiency in order to highlight the application of minimum standards in environmental statements ahead of the submission of planning applications. Deficient or misleading environmental statements may be more a matter of perception rather than fact. However it is important that planning applications are better supported by clear up-to-date and appropriate information in environmental statements and that the presentation of information for example on mitigation and restoration is clearly presented and can be understood by communities. SEPA has introduced a pilot scoping response detailing the measures required to provide better evidence for environmental statements on hydro schemes. These turn on maps and plans, infrastructure placement and sensitivities focusing on the likely significant impacts in order to improve environmental outcomes rather than the provision of generic

⁴ <http://apps.sepa.org.uk/compliance/>

⁵ <http://www.northumberland.gov.uk/default.aspx?page=1440>

⁶ <http://www.scotland.gov.uk/Resource/0045/00455948.pdf>

advice. It can not only improve but also streamline the process. SEPA believes this approach can be adapted to surface coal mine EIAs. SEPA and SNH have agreed to facilitate a joint approach and work commenced in May 2015.

20. Currently, the development management regulations state that the classes of development prescribed for the purposes of section 35A(1) of the Act (pre-application consultation) are national developments and major developments. For major developments (specified in the hierarchy regulations); and in minerals these comprise developments of over 2 hectares, statutory pre-application consultation with communities is required for 12 weeks. Pre-application consultation for an application under s.42 to vary the terms of an opencast planning permission is not necessary even though the proposal may have implications for a host community. Powers specified by section 26A of the Town and Country Planning Act 1997 (as amended) make provision for Scottish Ministers as respects a particular local development, to direct that the development is to be dealt with as if (instead of being a local development) it were to be a major development. Those powers can be used on merit. Section 35A(1) of the Act states that before submitting an application an applicant may pre-screen for pre-application consultation procedures.
21. The purpose of extending the reach of pre-application consultation would be to give wider publicity to development proposals that merit promotion from “local” to “major” but no more than is required to maintain proportionality in all the circumstances of the case. Representatives of the sub-groups have agreed that the provision of guidance on non-material variations would help to clarify the boundaries of extended reach.
22. The Scottish Government and COSLA have published *Guidance On The Role Of Councillors In Pre-Application Procedures*⁷. This clarifies the extent to which local authority members may feel confident in engaging at the pre-application stage on substantial development proposals, adding value to the process, while continuing to act within the terms of the Councillors’ Code of Conduct.
23. Those examples indicate what can be done to enhance the consideration of development proposals. Enhanced pre-application procedures do not impact on determination timescales although clearly once an application has been validated any additional processes such as voluntary pre-application consultation in the circumstances described in paragraph 21 could have an effect on performance: the judgment to be made in each instance being the perceived value added in opencast coal application situations.
24. For surface-mined coal an additional layer of expertise may be beneficial to ensure that at the validation stage of a planning application, applications are comprehensive. The sub-groups place emphasis on the range of expertise necessary to front-load improvements in the development management process, far less the expertise that is also required to discharge conditions in planning consents and monitor and ensure compliance during and after site operations. They are also alert to the costs of such new procedures. They conclude that those examples indicate that as a matter of good practice, pre-application discussions ahead of a

⁷ <http://www.scotland.gov.uk/Resource/0044/00444959.pdf>

possible gate-check process by a planning authority or shared service could front-load and build capacity for the planning authority development management service. For major planning applications pre-application consultation with communities is mandatory. While some opencast proposals may not currently fall into that category it is recommended that as a matter of local discretion taking account of the precedent that may be set, there are opportunities to process them as if they were major in order that consultation takes place to ensure that all parties are involved in the pre-planning application stage. The existing opportunity to make variations to consents under Section 42⁸ is important and should not require additional consultation procedures. [See footnote 9 and recommendations 4 and 9.]

Recommendation 2

Scottish Government will work with SEPA, SNH, Historic Scotland and Heads Of Planning Scotland (HOPS) in consultation with stakeholders on improving scoping information requirements at the EIA scoping stage.

Recommendation 3

The sub-groups recommend planning authorities should promote a skilled support gate-check procedure for surface-mined coal development proposals including EIA, so that proposals can be validated before entering the formal planning process.

Recommendation 4

The sub-groups recommend that further consideration be given to the extent to which applications for surface coal mines not classed as major developments may benefit from the same publicity and consultation procedures as if they were major applications (to make PAC mandatory) subject to;

- * minor variations under section 42 applications not being subject to PAC**
- * local discretion depending on the nature of the application, and**
- * guidance on non-material variations being produced.**

⁸ See paragraphs 2.8-2.10 of Circular 3/2013
<http://www.scotland.gov.uk/Publications/2013/12/9882/4>

SECONDARY PLANNING LEGISLATION - MINE MONITORING FEES

2013 Consultation main finding

There was no specific question on the introduction of mine monitoring fees

A review of planning application fees for mining and quarrying development was suggested by a third sector organisation, which could provide funds in part for pre-approval review of applications.

Key concerns for the coal industry are increased costs associated with planning fees.

One local authority suggested these should now be introduced as a matter of routine within Scotland. It suggests that such fees should be proportionate to the nature and scale of development and the amount of time and resources used by the planning authority in regulatory activities.

Sub-group' discussion

Although with only some support as opinion remains split, the sub-groups discussed whether an appropriately scaled, mine monitoring fees could be introduced in a way which supports the other initiatives set out in this report.

While the sub-groups consider that mine monitoring fees may not achieve the outcomes all parties seek those matters are discussed below. There is a view that a specific developer contribution to an acoustician, hydrologist or other specialist might be more fit for purpose in order to secure full and adequate restoration but that isolates the opportunity to access the full range of skills under a single payment.

The absence of full cost recovery in the processing of planning applications was discussed. There is also the view that if a monitoring fee regime is introduced it should not be duplicated by costs borne under legal agreements that currently cover the same matters.

Some operators have indicated that statutory monitoring fees could be seen as a disincentive to invest any further in coal and that it is rather an "after the horse has bolted" reaction to a situation that is now behind us. They would also need to be matched by penalties in the absence of planning authority rigour in the monitoring process. The environmental NGO voice on the sub-groups sees no connection between such fees and any decision to invest.

The sub-groups wish to highlight two things in particular:(a) whether fees for site visits could be absorbed to the extent that companies for example with corporate responsibility manifestos or with ISO 14001 environmental management accreditation are not dissuaded from development investments and;(b) whether the regime would be welcomed in other quarters as a regulatory measure. SEPA charge the cost of their duties to permit holders and experience difficulties in recovering costs from some. The sub-groups have discussed one of SEPA's charging regimes which is scaled to process complexity, environmental risk and permit compliance. It has been suggested that charging could be set out more simply – perhaps to the size or life of the site.

25. Material provided to Heads of Planning Scotland by the Planning Advisory Service and CIPFA on costing the planning service in Scotland is instructive. Their survey methodology (which was focused on development management) indicates that, whilst not fully definitive, there are:
- direct costs (applications handling and preparation of legal agreements),
 - indirect costs (other development management excluding enforcement and legal agreements),
 - compliance and delivery costs (site, condition and legal agreement monitoring and enforcement) and
 - planning policy costs (these are less robust owing to longer timescales involved)
26. The planning penalty clause is an outstanding matter for discussion between Scottish Government and COSLA through their high level group. The sub-groups have noted the increase in planning fees to cover the cost of processing planning applications. An approximate 5% increase in planning fees across the board took effect from 1 November 2014. The objective is to strengthen the resources and capability of planning authorities to deliver a high performing planning service whilst maintaining a supportive business environment which supports sustainable economic growth. For minerals sites the fee is now £202 for each 0.1 hectare of the site area subject to a maximum of £30,240.

See: http://www.legislation.gov.uk/ssi/2014/214/pdfs/ssi_20140214_en.pdf

27. An alternative is the introduction of mine monitoring fees to cover costs of inspection and monitoring. Fees for monitoring of mining and landfill sites in England were introduced in 2006 by Regulation (since amended by 2012 Regulations⁹). On introduction, the rate charged in England was £288, with chargeable site visits limited to 8 a year. Preparations and draft Regulations were made by Scottish Government to do likewise but these were not introduced at the time given Ministers' focus on general increases in planning fees linked to improved performance.
28. The associated guidance in England explains mineral and landfill operations involve a continuous process of development, sometimes over many years and even decades in accordance with mineral and landfill waste permissions. Such permissions are subject to complex and technical planning conditions to mitigate the physical environmental impact of mineral and waste working. The objective of introducing fees is to ensure that permissions are monitored in accordance with good practice. In that respect surface coal mine sites are included within the scope of the Regulations in England.

Discussion

29. Aside from the routine monitoring and compliance role of planning authorities on planning permissions more generally and the subsequent enforcement role where required, the scale and at times the pace of surface coal mining (as distinct from aggregates quarries and landfills) requires operators and planning authorities to be vigilant as to the state of the site with reference to the consent at all times. Surface coal mines are dynamic operations from "cut 1" to "completion and aftercare" and

⁹ http://www.legislation.gov.uk/uksi/2012/2920/pdfs/uksi_20122920_en.pdf

may experience change, delay or suspension of normal operations requiring a degree of on-site flexibility to accommodate unforeseen circumstances such as geological formations or unfavourable weather. Arguably the limited introduction of a fees regime is a reaction to past events. Conversely, a structure that in part funds and otherwise addresses the skills gap and the need for regular and routine knowledge about site operations by the planning authority has credibility and may have been long overdue. The crux is the value of a fees regime leading to better land use planning, stewardship of the environment and confidence amongst coalfield communities. These are matters that should be considered in a public consultation and which could be tailored to a range of scenarios (for example whether it should be retrospective).

30. The associated regulations in England go much wider than would necessarily now be required in Scotland. At present our working assumption is that any such regulations if supported should only apply to sites where the principal mineral to be worked was coal; such sites are often associated with the presence of recoverable fireclay reserves so that mineral would also be covered in a “whole-site” approach. Our assumption is that the regulations would apply to site extensions. Where coal is a secondary mineral our working assumption is that a fees regime would also be required. Where discarded coal is being *reworked* on a site that is substantially undergoing restoration under a revised planning permission, a fees regime would not necessarily be required but again those would be matters for a public consultation. Additionally, the Task Force has discussed an industry initiative on ‘restoration related coal’ with a reduced carbon price support tax to which the fees regime might also be applied. The fees regime would not in our assessment be required for the wider and more geographically dispersed construction aggregates and specialist minerals industry.
31. The money generated is therefore likely to be insufficient, in itself, to ensure rigorous monitoring of sites in Scotland unless underpinned by a minimum number of visits linked to the predicted life of the site (which can be calculated based on volume of recoverable coal divided by annual production rates) or by the consented or time-limited life of the site (to account for variations in production). The compliance sub-group discussed a proposal that would assume a fee per visit, assume the number of visits and calculate that as a lump sum charged up-front in order to provide a sufficient level for the specialist services that may be required. A previous Scottish consultation confirmed that, for some existing sites, adequate monitoring arrangements were already being secured as part of a Section 75 agreement and these often result in costs being met by operators that are considerably higher than could be achieved through a statutory fees regime. While monitoring should be specified in planning conditions, Section 75 agreements can now be modified or discharged following an application with the setting out of the changes which the applicant wishes to be made to the obligation and the grounds on which the applicant seeks modification or discharge of the planning obligation. The appointment of a compliance assessor, paid for by the developer but accountable to the planning authority, provides a means of ensuring that compliance, tailored to the needs of a particular site, can be carried out at no cost to a planning authority. The appointment of monitoring and compliance assessors has been considered further by the sub-groups, with Scottish Government and SOLAR considering how they may

be secured at the expense of a developer either through a planning condition or legal agreement.

32. A ministerial group convened prior to the opencast coal task force was set up in order to address financial burdens arising from regulatory controls on an industry faced with high fixed costs, increased diesel prices and international competition. While recent lower oil prices have reduced fixed costs, introducing fees might be perceived as running counter to the direction of travel on reducing burdens but may also demonstrate that the Scottish Government recognises not only the value to local communities of local jobs but the impact of the industry on those who live in its midst. In isolation, fees are not the only effective means of better regulation but could sit alongside other measures as discussed in this report.
33. A consultation might address matters such as whether fees should apply retrospectively to the 12 or so sites coaling actively in late 2014; whether fees should apply to sites with inadequate bonding or to sites with planning permission but not yet started; or only to sites for which planning permission does not at present exist but might do after the introduction of the regulations.
34. Introduction of fees, if agreed, would require a public consultation, an associated business regulatory impact assessment and an equalities impact assessment to be undertaken before analysing responses ahead of ministerial consideration.
35. A consequence of fee-based structured monitoring could be the routine publication of site inspection reports. Since November 2014, SEPA has enhanced accessibility to its Compliance Assessment Scheme¹⁰ and publishes assessment reports on-line. These include a search facility for all regulated activities including discharges from surface coal mines. Operators are provided with final assessment authorisations on a 6-point scale from Excellent to Very Poor. Lower risk operations will tend not to be inspected every year but every 2 or 5 years depending on compliance performance. Some councils publish monthly inspection reports. On the planning side it would be possible to replicate an inspection reports system that echoes the SEPA scheme but instead reports on compliance with planning conditions. It should be noted that responsible operators publish environmental audits. This is attractive to Scottish Ministers. Reporting would provide a level of oversight (and potentially early warning) that stops short of regulatory duplication over local authority responsibility. Publicly available reports would provide a wider audience with visibility over site activity, reporting on which has in any event been a feature of recent Task Force meetings. Sub-group representatives have discussed how this can be brought forward in a structured way along with other report-back topics featuring financial guarantees and community liaison (see Recommendations 19, 21 and 25).

¹⁰ <http://apps.sepa.org.uk/compliance/>

Summary on mine monitoring fees - benefits and disbenefits

36. Benefits include:
- cost-recovery for planning authority monitoring input
 - potential lump sum available for specialist services
 - an assurance to communities that the Scottish Government is prepared to act, yet proportionately
 - across the board - a strengthened regulatory approach to environmental stewardship
 - partial parity in monitoring and inspection control between England and Scotland
 - the polluter pays
37. Disbenefits include:
- Risk (potentially low) of a fees regime turning away future surface coal mine investment
 - The time it would take to implement a regulatory instrument
 - The regulatory burden upon operators
 - More effective arrangements can be secured through existing planning legislation (Section 75 agreements)
38. This section has sought to conclude whether a fees regime should be introduced. It is considered on balance that a limited fees regime alongside other measures is a credible proposal meriting a positive recommendation to the Task Force. While this relates to opencast coal only, financial cover for decommissioning and restoration for example in the onshore wind and infrastructure sectors is widely recognised¹¹.

Recommendation 5

The sub-groups recommend that Ministers should consider and consult on a mineral monitoring fees regime during 2015.

Recommendation 6

In combination with Recommendation 5 the sub-groups recommend that work should be undertaken based on the SEPA charging model which could consider bespoke charging – scaled to the size and lifespan of the site, the bought-in service and moderated by the frequency of visits depending on performance.

¹¹ http://www.snh.org.uk/pdfs/publications/commissioned_reports/591.pdf

OPTIONS OPEN TO MINISTERS IN THE STATUTORY PLANNING PROCESS

39. Determination of planning applications is conducted under the development management system - the process of deciding whether to grant or refuse planning permission and other related consents. Planning authorities normally deal with applications for planning permission. Scottish Ministers become involved in a very small minority of cases, but only do so where it involves a matter of genuine national interest.
40. The Town and Country Planning (Scotland) Act 1997 requires that decisions on planning applications should be made in accordance with the development plan unless material considerations indicate otherwise. Material considerations should be related to the development and use of land. More information on material considerations is provided in [Circular 3/2013](#): Development Management Procedures.
41. Scottish Planning Policy states that where relevant policies in a development plan are out-of-date or the plan does not contain policies relevant to the proposal, then the presumption in favour of development that contributes to sustainable development will be a significant material consideration. Decision-makers should also take into account any adverse impacts which would significantly and demonstrably outweigh the benefits when assessed against the wider policies in this SPP. The same principle should be applied where a development plan is more than five years old.
42. Where planning authorities intend to grant planning permission for surface-mined coal working where the site boundary falls within 500 metres of an existing community or sensitive establishment, they are required to notify Scottish Ministers who can then review the application and decide whether to call it in for their own determination or whether to return the application to the council without further intervention.
43. With the case for Scottish Ministers becoming routinely involved in surface coal mine development proposals turning on national interest, the bar is set relatively high and there would need to be an evidence-base for recommending a change. The legacy, concentration and scale of unrestored sites have been identified as a national risk. The life of active sites (and commonplace extensions thereto) can extend across generations. This led to sub-group representatives' discussions on two fronts:
- the scope and case for time-limited consents and
 - the Scottish Ministers' role in the statutory planning process and how that might be modified to provide further oversight concerning activity in the surface coal mining sector and how that might be achieved.
- CoalPro has indicated it is not averse to the idea of time-limited consents; achievable by a diligent approach to an evidence base about the site and its surroundings at the pre-planning application phase. The idea is considered worthy of exploration in order to give decision-takers a clear idea of the development they are to determine and communities a sense of predictability that a surface coal mine development can be concluded (achieving restoration) within a set time-frame.

44. The two principal areas where coal is worked at the surface are East Ayrshire and South Lanarkshire although there are substantial reserves elsewhere in Dumfries and Galloway, Fife, West Lothian and at an unworked site in Midlothian. East Ayrshire and South Lanarkshire have minerals development plans providing planning policies and detailed assessment criteria for new proposals and site extensions. To provide confidence, these and planning policies elsewhere require to be implemented effectively in the development management situation set out in other recommendations in this report.
45. The Coal Authority has also published [Coalfield Plans for Local Planning Authority areas](#)¹² which enable planning authorities locally to take informed decisions on a number of matters relating to coal mining risk area plans, legacy plans and surface coal resource plans. In principle these information sources add to the argument that decisions can be made locally without further intervention by Scottish Ministers provided matters such as geological risk are better understood at the outset.
46. In any event Scottish Ministers have powers to issue case-specific directions requiring planning authorities to notify them of applications where they intend to grant planning permission. That allows Ministers to review any application in much the same way as they would do under the 500m notification criterion on surface coal mine proposals. This does not mean that they would routinely use those powers or that they would decide to call-in applications for their own determination unless there was a clear national interest. The important point is that they have such powers and may use them if required.
47. Ministers can also alter the criteria for notification. With surface mining envisaged for the next 20 years or so, there is an opportunity to review the criteria in the notification direction specific to coal. While the sub-groups believe that rigorous compliance, monitoring and financial cover exercised locally, linked to our proposals to provide additional support that might justify the continuance of current arrangements there is an additional compelling pressure. Further discussions by sub-group representatives and Scottish Ministers' interests in enhanced oversight have concluded that the time is right to take the opportunity to consult on the matter of extending the reach of the notification direction. A working assumption is that notification for example, could extent to 'major' category developments.

Recommendation 7

The sub-groups recommend the Scottish Government works with SOLAR and other stakeholders to explore the scope for time-limited consents; the circumstances in the coal sector when it may be appropriate to apply such a constraint and provide guidance on the matter (see Recommendation 20).

¹² <https://www.gov.uk/government/collections/coalfield-plans-for-local-planning-authority-areas>

Recommendation 8

The sub-groups recommend that, taking account of risk management, and potential enhancements to oversight the current arrangements for Scottish Ministers on notification and call-in should be the subject of a short and focused consultation on additional notification criteria.

MINE PROGRESS PLANS

2013 Consultation main finding

There was 93% support for the idea that Mine Progress Plans have a more central role in the planning and planning compliance programmes. There was 85% support for MPPs being available to the public although less so from the business sector who commented they are already available in support of applications. There was also some support for assessors' reports of MPPs being made available.

Sub-groups discussion

The sub-groups' view of mine progress plans is that they rightly accommodate the necessary flexibility to account for changes in site conditions but that there should be clarity about their purpose. The impression that they are only secured by condition post-consent was corrected. They are up-front plans submitted with the application. They are publicly available. They should cross-refer to inspection reports.

48. Mine progress plans were commonly derived from 'method working' statements and are now an integral and vital part of the process of compliance monitoring. Our consultation reflected the view that the right resources are required to ensure MPPs are kept up-to-date and reviewed by competent people. The MPP can provide the baseline and record progress over an agreed period reinforced by legal obligations. They can be used to identify material change whilst accounting for difficult operating conditions. MPPs need to be read in conjunction with a 'mine programme plan' and any proposed change, if material, would require to be subject to an application under s.42 of the 1997 Act. Non-material variations can be addressed by a planning authority under s.64 of the Act. Where a planning condition requires any material change in the MPP to be notified to the planning authority for its approval taking account of the views of consultees as specified in the condition, a judgement needs to be made on whether that amounts to a material change requiring the submission of an application for variation and all of the public engagement and other procedures that entails.

49. MPPs are living plans subject to modification and should be monitored by the planning authority with professional or shared service support to identify changes on site, the reasons for them and appropriate modification¹³. Mine progress plans are tools for routine monitoring and do not necessarily require enforcement. The important point is to ensure that the relevant skills are available to the local authority to allow MPPs to be monitored more effectively – with open channels of communication to the planning authority’s enforcement service.

Recommendation 9

The sub-groups recommend that Mine Progress Plans need to be sustained and improved and be secured by condition. MPPs and their periodic assessments are of value to site Technical Working Groups and Community Liaison Committees and should be signed off to ensure that progressive coaling and restoration conforms to the MPP. MPPs should be made available publicly (as part of the site inspection report) on planning authority e-planning websites.

PLANNING ENFORCEMENT

2013 Consultation main findings

The majority of planning authorities and the opencast coal operators were in agreement that no change was required.

Enforcement action, however immediate and efficient, cannot always be relied upon as a means of resolving breaches of planning control. It can often be too late to avoid irreversible damage to the environment reinforcing the importance of complementing any enforcement work with a robust compliance monitoring of developments to lower the risk of such scenarios taking place.

Planning conditions are ineffective in regulating site restoration in the event of default by the operator, in such circumstances direct action by the local authority under section 135 of the Planning Act is the only real solution, albeit with significant financial implications and uncertainties as set out in the report under landowner liability.

Ensuring that any proposal is sound in every respect prior to the granting of planning permission with robust compliance monitoring arrangements in place rather than relying on enforcement action as a means of reacting to and rectifying issues if and when they arise.

¹³ *The extent to which a modification to a MPP requires to be approved by a planning authority through full statutory procedures in circumstances where modification causes an application to be made under section 42 of the 1997 Act to develop land without compliance with conditions previously attached is relevant to proportionate planning discussed in paragraph 21 of this report and to Recommendation 19 (inspection reports).*

Sub-group's discussion

The sub-group has discussed the shortcomings of section 135 of the Act (execution and cost of works required by enforcement notice). There is a view that enforcement provisions are written very widely and not designed to deal with situations such as large water-filled voids or large quantities of misplaced overburden. However their wide scope ranging from planning contravention to interdict means that they apply in equal measure.

The comment has been made that a local authority's enforcement charter sets out the expectations of the service within which coal operators should not be singled out. Planning Performance Framework¹⁴ National Headline Indicators include key outcomes on review of enforcement charters every 2 years with the number of breaches identified/resolved.

Complications may arise in targeting the offence to the appropriate parties where breaches on part of the site if under joint and several ownership have occurred. With limited statutory fines levied in the courts, the prospect of counter-actions increase financial risks to planning authorities which is why direct action under (s.135 (1)(b) of the Act is rare.

Subsequent discussion amongst sub-group representatives has identified scope in the light of current circumstances and experience, to enhance the minerals section (paragraphs 33-36) of Circular 10/2009 'Planning Enforcement'.

50. Adequate financial cover and a transparent mine progress plan will not necessarily prevent the need for enforcement action.
51. Enforcement is a discretionary power. Part VI of the Act provides that non-compliance with an enforcement notice or breach of conditions notice is an offence. Circular 10/2009 - Planning Enforcement, provides that the general principles and policies applicable to enforcement apply equally to cases of mineral working. Nevertheless, unique problems may arise from unauthorised developments of this type. In particular, the issuing of an enforcement notice, combined where appropriate with a stop notice, may prevent damage either to the site itself or to the surrounding area, which would otherwise be irreversible or irremediable. A temporary stop notice may be used if the matter is urgent. Where necessary, planning authorities may decide to apply for an interdict. Examples of situations requiring rapid enforcement action might be where an operator is moving soil materials in contravention of planning conditions, so as to jeopardise the restoration and aftercare of the site; or if unauthorised excavations outside the permitted boundary cause concern for the safety and stability of surrounding land. However, it always remains preferable for liaison and contacts between planning authorities and mineral operators to be sufficiently good to avoid such contraventions, and to resolve any problems through discussion and co-operation. The purpose of planning enforcement is to resolve the problem rather than to punish the mistake. In addition, any action taken has to be

¹⁴ <http://www.scotland.gov.uk/Resource/0044/00448461.pdf>

appropriate to the scale of the breach.¹⁵ Priority will be given to significant breaches of planning control including:

- breaches of condition for major development;
- irreversible damage to listed buildings;
- unauthorised felling of trees and matters affecting trees protected by Tree Protection Orders;
- significant detrimental impact on amenity

Enforcement charters will set out where it can be expected that enforcement action will be taken against any unauthorised development that unacceptably harms public amenity, public safety or the existing use of land and buildings which need protecting in the public interest. Scottish Ministers will take an interest in the effectiveness of the enforcement regime in the surface coal mining sector in the recommendation that periodic reports should be submitted to Scottish Government by planning authorities (Recommendation 19).

52. As set out in the Scottish Government’s consultation on Opencast Coal: Restoration: Effective Regulation, Circular 10/2009 Planning Enforcement provides advice on enforcement of planning control over mineral working. While suggestions were made in the consultation for amendments to the advice, they were limited to slight adjustments to indicate “very serious” situations requiring rapid enforcement. Direct action is a complex area – often the option of last resort if all else fails and as discussed under the section of this report concerning landowner liability. The comment has been made at the Task Force in the context of the two 2013 company liquidations about the difficulties concerning pursuit of company directors for damages.

53. In summary, the sub-groups recognise the limitations placed on planning authorities by enforcement primary legislation but also that action on breaches of control may need to be taken.

Recommendation 10

The sub-groups recommend minor adjustments are made to Circular 10/2009 (Planning Enforcement) with a focus on the minerals section (paragraphs 33-36).

The sub-groups recommend that monitoring takes place for the coal sector arising from Planning Performance Framework headline indicators on breaches identified and resolved and reported to Scottish Ministers annually.

¹⁵ <http://www.scotland.gov.uk/publications/2009/12/17093151/1>

LEGAL AGREEMENTS - Planning¹⁶

2013 Consultation main findings

There was an 82% response to the question about the provision of a central resource for legal advice and 84% support for the idea although with qualifications.

For example there is a strong feeling amongst the local authorities for retaining ownership on legal agreements or bought-in legal advice to prepare agreements.

Sub-group's discussion*

The sub-groups know that a local authority planning service relies heavily on legal services to support the effective preparation of legal agreements and the matters they cover. Since in some authorities, there is only limited or indeed no requirement to prepare surface coal mine legal agreements, expertise in the sector is inconsistent.

The need for expertise is recognised and whether that comes from central services through an organisation like Scottish Futures Trust or from another source may be an option. Local authorities are likely to be reluctant to support a formal national shared service but SOLAR sees the value of a small group of lawyers acquainted with the minerals sector sharing expertise. Much will depend on drive and initiative yet to be addressed or the geographical concentration of future sites and in which local authority areas future development pressures will be felt and which is consistent across Scotland.

There is a strong view that the 6 month target for legal agreement sign-off can be improved upon and that it can combat drift which is a concern to communities. At the very least the heads of terms of the agreement should be available in draft to decision-takers when applications are being determined and be approved with the application.

Further discussion by sub-group representatives in April 2015 has identified an area of debate concerning whether the instrument for the financial guarantee should be a planning condition or whether it is more appropriate to stick with the more conventional wrapper of a legal agreement. The debate turns on the point that a guarantee is not a payment (which could not be required by condition) and the ease with which a planning authority may gain access to the guarantee monies if required. A conclusion to the debate is being pursued by Scottish Government, SOLAR and HOPS.

** external to the sub-groups, a SOLAR view was requested¹⁷.*

54. Scottish Government officials met with the SOLAR General Committee on 23 January 2015. They committed, along with HOPS, to closer short-term engagement

¹⁶ See also 'LEGAL AGREEMENTS – Finance' section of this report

¹⁷ The Society of Local Authority Lawyers and Administrators in Scotland
www.solarscotland.org.uk/

in relation to skills services and options to support the sharing of expertise. HOPS conducted a short consultation until 20 February 2015 on a Position Statement on the Operation of Financial Mechanisms to Secure Decommissioning, Restoration and Aftercare of Development Sites including (a) an analysis and risk assessment of financial guarantee types and (b) a Section 75 Planning Obligation – Restoration And Aftercare Bonding template. This is an example of good collaboration in areas where this report’s recommendations can avoid duplication of effort. The HOPS position statement has now been published.¹⁸

55. Findings on legal support services are inconclusive. The conclusion of legal agreements efficiently is essential in order to improve planning performance. On legal agreements as such, the Scottish Government has with the COSLA High-Level Group been working towards a target to conclude (or reconsider) legal agreements on applications within 6 months of ‘resolving to grant’ which will require production of supporting guidance, following wider stakeholder input. We believe this initiative can be augmented by providing a template approach on the required content of legal agreements for surface coal mines suitably supported by oversight by the expertise required for quality assurance purposes. As far as legal agreement sign-off is concerned, there are already examples of the ultimate sanction in the dismissal of planning appeals in the face of uncompleted legal agreements and of planning authorities who will review progress on legal agreements after 2 months with recourse thereafter to committee for a decision to refuse if conclusion cannot be reached.

Recommendation 11

The sub-groups recommend that standard templates for legal agreements for surface coal mines should be drawn up and kept up to date; including the financial elements agreements are expected to cover, and that agreements are concluded effectively and efficiently well within 6 months. This should be consistent with a consultation conducted by HOPS (see paragraph 55).

Recommendation 12

The sub-groups recommend prioritisation and supply of legal support required to achieve planning performance targets. Monitoring legal agreement content should be explored further. To achieve that, Scottish Government has begun work with SOLAR and the Improvement Service and others to identify the skills gaps and bring that work to a conclusion during 2015.

¹⁸ <https://hopscotland.files.wordpress.com/2014/08/hops-6-7-15-position-statement-on-bonds-with-appendices2.pdf>

STANDARD PLANNING CONDITIONS

56. Whilst recognising that each site is different, there are many common factors and themes that enable a standard approach to planning conditions to be considered – the 30 model conditions in Annex C of Planning Advice Note 64 refer. For example, there is a legislative requirement for a mandatory planning condition attached to planning permissions in order that extractive waste is managed in accordance with a waste management plan and that it is accompanied by the necessary documentation.¹⁹

2013 Consultation main findings

80% response and 94% positive support for this idea.

Sub-group's discussion

There has to be a case for at least having the majority of standard conditions being provided in a template for all to use. This would achieve consistency on the key elements of what is required to ensure sound planning and compliance but allow for variations for local or site-specific issues. Whether HOPS or SG in consultation with LAs should produce this is a matter for discussion about who leads but a series of central planning and other templates that all can use is needed.

Recommendation 13

The sub-groups recommend that a suite of standard planning conditions which would not be exhaustive, should be progressed by Scottish Government in association with HOPS during 2015 in consultation with stakeholders. This shall include a reference to the mandatory extractive waste condition referred to in paragraph 57.

Recommendation 14

Legislation concerning a mandatory condition as set out in the Management of Extractive Waste (Scotland) Regulations 2010²⁰ shall be notified to all planning authorities for clarification, by Scottish Government during 2015.

¹⁹ The Management of Extractive Waste (Scotland) Regulations 2010, Regulation 14.

²⁰ <http://www.legislation.gov.uk/ssi/2010/60/regulation/14/made>

PRIMARY AUTHORITY

57. Following public consultation during 2013 an analysis of consultation responses found that there is clear support for a Primary Authority model to be available in Scotland as part of a Better Regulation toolkit. It was also clear that **primary authority should not encroach on the legitimacy of local democracy**. Under the provisions of the scheme within the Regulatory Reform (Scotland) Act regulatory function has the same definition as for other provisions within the act so **'does not include any such functions exercisable by a planning authority'**.
58. The surface mined coal sector relies on a number of public sector services regulating the planning, water environment, noise, air quality, habitat management elements of the development. To some extent these can be regarded as fragmented across the local authority and wider public sector. It may be however that individual specialisms could be identified; representing a pool of expert advice that can be drawn down. This would require further work, given that a carefully constructed centre of excellence for the sector may be at risk if it were to rely on one individual then they leave or retire. Drift of expertise and retirement out of public sector minerals planning is an issue that has been identified by the UK Minerals Forum.
59. As with primary authority the Scottish Regulators' Strategic Code of Practice also came out of the Regulatory Reform (Scotland) Act. This Code will apply to regulators listed in Schedule 1 of the Act (see glossary) and will set out a high level, strategic approach to encourage and support regulators in applying regulatory principles and contribute to achieving sustainable economic growth. The Code was laid before the Scottish Parliament on 12 January 2015 before it can be issued.

Sub-groups' discussion

The sub-groups have discussed the UK Government's established Primary Authority scheme which offers business the opportunity to form a partnership with one local authority in order to receive tailored advice in relation to a specified range of regulation and The Scottish Government's work concerning Primary Authority Partnerships for devolved regulatory matters²¹. Primary Authority works on the principle that a business operating in at least two local authority areas can form partnerships with one local authority to receive robust and reliable advice for specific regulatory matters. This then becomes the template that other local authorities must take into account.

There is sense that if the way an operator and a local authority in putting together an opencast plan have developed something that is seen to work and is deemed good or best practice, then it could form the basis for that operator working elsewhere. While each opencast will have some of its own issues there are many similarities and given the resource and expertise constraints that are discussed and highlighted elsewhere in this paper, considering what has been learned from Primary Authority would seem sensible.

²¹ <http://www.scotland.gov.uk/Topics/Business-Industry/support/better-regulation/BetterRegulationBillConsultation/PrimaryAuthorityConsultation>

There may be merit in growing a 'centre of excellence' in a 'primary authority' or 'national standard' type way and this is discussed later in the report in the context of what might flow from the idea of a Coalfield Planning Officers Forum.

Recommendation 15

The sub-groups recommend that Scottish Government and COSLA monitor any benefits to effective regulation from primary authority noting that it is not intended that a primary authority scheme in Scotland would apply to planning

NATIONAL STANDARDS

2013 Sub-groups' discussion

From reports and issues produced and highlighted by the Scottish Government's independent Regulatory Review Group and others it has become clear that there is general agreement across all stakeholders that some things are better being done the same way across Scotland and are mandated to be so. National Standards are how these have manifested themselves in the Regulatory Reform (Scotland) Act 2014 which now provides the vehicle for this to happen. National Standards apply where all parties involved in something agree that it should be done the same way across Scotland; and that it would be beneficial. Through both sub-groups and from previous working groups on opencast there is a desire for consistency and 'templates' that all can use. National Standards could be used and are already partly in place but less likely in planning yet where best practice is merited. What now needs careful consideration is to assemble the elements of an opencast operation that would be best done through National Standards. There could be difficulties with a 'one-size-fits-all' approach.

We have looked at national standards across the board and believe that our recommendations on bespoke improvements for example on templates for conditions and legal agreements, growing skills and sharing expertise addresses the criticism of the 'one-size-fits-all' approach.

60. The Regulatory Reform (Scotland) Act 2014 introduces a range of measures to deliver consistent and proportionate regulation and promote in all Scottish regulators a broad and deep alignment with the Government's overall Purpose of sustainable economic growth. This includes powers to make the delivery of regulations more consistent through national standards and systems.

61. The provisions within the Act apply to regulators listed within Schedule 1 of the Act. This includes local authorities but it excludes the regulatory functions "**exercisable by a planning authority**" It was considered that the application of the Act provisions to Planning was not the appropriate way to deal with matters. However as set out below, continuous improvement and minimum standards are important to planning performance in a number of areas addressed in this report: environmental assessment, gate checking, processing agreements, conditions and

legal agreements. There is nothing to prevent us working to achieve consistency and national standards in those planning-related issues.

62. The Planning Performance Framework²² was introduced by Scottish Government and Heads of Planning Scotland (HOPS) in 2012. It has been the culmination of an intensive period of discussions and consultations undertaken by HOPS with the Scottish Government, RTPI, COSLA, SOLACE, the Improvement Service, Key Agencies and a range of private sector organisations. It has still to be ascertained whether the provisions of the Regulatory Reform Act would apply in all the circumstances surrounding the consenting and operation of an opencast mine. Scottish Government, Scottish Futures Trust and HOPS with input from industry and other sources as appropriate will work to achieve consistent and standard approaches. It will be dependent on the scale of future developer interest recognising that each planning authority will wish to retain autonomy and local accountability for statutory functions.

Recommendation 16

The sub-groups support a consistent approach to implementation of the report's recommendations; standardisation through nationally agreed templates and 'mandatory' roles to achieve greater control of the process.

PROCESSING AGREEMENTS

2013 Consultation main finding

The majority of respondents supported wider use of processing agreements.

Sub-groups' discussion

The compliance sub-group discussed the view that processing agreements may bring limited value to the sector and is perceived to build in certain risks to developers. It was clarified that it is a two-way idea but strongly encouraged by Scottish Government.

Processing agreements do not short-circuit statutory public consultation nor are they intended to trigger a questionable decision by a planning authority in order to achieve targets.

63. A minimum standard is provided in planning by the promotion of further use of Processing Agreements²³. Ministers in cooperation with the COSLA High-Level Group have been discussing them as a matter of good practice in modernising

²² <http://www.scotland.gov.uk/resource/0039/00390612.pdf>

2014 Annual Report <http://www.scotland.gov.uk/Resource/0044/00448461.pdf>

²³ <http://www.gov.scot/Topics/Built-Environment/planning/Development-Management/Processing-Agreements>

planning to provide certainty. Taking into account the proposal for gate checking and whilst processing agreements are chiefly planning authority-applicant project management tools, they can provide greater clarity about the process of determining planning applications, consultation with statutory bodies and agreed timescales. Planning authorities recognise that not all developers wish to be part of a processing agreement.

64. It is implicit that the skills need to be available to service a processing agreement application. Concerns raised in relation to the continuing right of appeal against non-determination are covered in Circular 3/2013.

Recommendation 17

The sub-groups recommend that all surface coal mine development proposals should be associated with a processing agreement.

MONITORING AND COMPLIANCE - EXPERTISE AND PRACTICE

65. This section focuses on the areas for development and improvement supporting the planning function. The financial guarantee element is dealt with later in this report and our recommendations bring together those two complementary streams.
66. The central question of an independent compliance unit floated in the Scottish Government's consultation [question 6] gave rise to a detailed response. It was in three parts and it is important that this report sets out the main findings once again.

2013 Consultation main findings

Question 6A: What roles should rest with local and national government in relation to compliance monitoring?

6 out of 8 local authorities, 5 businesses, 4 out of 5 responses from the third sector, 2 professional bodies, 1 consultant and 2 political responses stated that it is the role of planning authorities to ensure compliance with planning conditions.

3 businesses and 2 third sector responses questioned the skills, experience and resource of local authorities to undertake this role with 1 third sector response favouring an independent agency.

3 local authority responses commented that it is the role of national government to provide policy advice, direction and guidance to ensure consistency of approach.

Question 6B: Is there a role for an alternative method such as a shared or independent service to undertake effective restoration bonding regulation?

There was majority support but only a 68% response rate on Q6B and Q6C and uncertainty about operation of a unit although support for a shared service. Some businesses expressed the opinion that local authorities do not currently have the capability to undertake assessments of different financial packages to meet restoration liabilities.

Of the 6 local authority responses to Q6A, 1 response also suggested the assistance of independent specialist expertise to assist planning authorities with compliance monitoring.

The majority of local authority respondents considered that the advice from such a unit should be discretionary for a planning authority.

There was strong but not unanimous support (Q7) that an independent unit should be a statutory consultee under secondary legislation and that by definition this was proportionate.

In relation to building skills capacities (Q24) some businesses cautioned against duplication of the local authority function by any central unit.

Question 6C: If so can you describe how you might see that operating and how it might be funded?

Local authority and third party respondents expressed their strong concerns about any cost burdens being placed on them to cover the funding of the service. Instead, local authority respondents suggested that the service be funded either by the developer or from additional government funding. On the understanding that such a service would undertake all of the development management functions of the planning authority, the majority of business respondents felt that such a service should be funded from planning application fees.

The majority of respondents identified the need for further investigation and discussion on the delivery and funding of such a service.

Question 21: Do you consider that another authority or agency such as the Coal Authority could perform an advisory function to planning authorities when considering the status of the licence applicant or licensee in deciding whether to issue or transfer a surface coal mining licence? Please provide supporting information.

There was a general view that the Coal Authority might play a more active advisory role although there were comments on its resource capability and impartiality.

Sub-groups' discussion

The sub-groups have been presented with shared service or compliance unit models that would be scaled to the size of the task on active sites across the Scottish coalfields with opt-in or opt-out provisions. Some disagree with the consultation finding that advice from a unit or service should be discretionary and instead that it should be accepted without question.

The sub-groups also recognise the downward pressures on planning authorities to multi-task, placing specialist skills at a premium – in fact there may be skills gaps - all the more reason to explore ways and means of building expertise, sharing services and enhancing processes as set out in this report.

The other ideas worked up in this paper do however provide certainty that front-loading the development management process can be enhanced based on a series of straightforward measures. There is an opportunity to learn from the Planning Officers Society in England.

67. While there is support for local authority autonomy sustained by additional professional services, this report points to a need to move us from theories and options to implementation. It must take us beyond the status quo sufficiently to make a lasting and robust difference. Research conducted into the failure to restore opencast coal sites in South Wales recommended that planning authorities could use the expertise of an adjoining authority which has more familiarity with opencast projects and the benefits of a 'centre of excellence'.²⁴ With something of the order of 12 active surface coal mines across Scotland and with the other options on the table e.g. further developer charges for specific services and a potentially improving wider financial guarantee landscape and better understanding of it, the case for an independent unit with statutory consultee status would need to be overwhelming. Should such a unit or centre of expertise ultimately be established, its role would be dependent on the scale of future planning applications for opencast coal mining and the geographical spread of developer interest. Individual planning authorities have expressed the view that they would want to retain a considerable degree of autonomy in determining and regulating an opencast coal proposal.
68. A response to the Scottish Government consultation remarked on whether more centralised control was appropriate given the small scale of the remaining industry in Scotland. The sub-groups recognise that it is not the scale of the industry but the risk of significant impacts and further reputational damage arising from difficulties at individual sites. Furthermore, a unit would need to be set up following a public consultation and on best estimates that might be two years off even assuming a funding model could be developed for it and that the unit could be staffed. Simply extending consultee arrangements to SEPA and the Coal Authority would not provide the best fit but the Coal Authority's skills were referred to in the Scottish Government consultation although the question of its impartiality had been raised in

²⁴ <http://wales.gov.uk/topics/planning/planningresearch/publishedresearch/failure-to-restore-opencast-coal-sites-in-south-wales/?lang=en> see page 6.

the consultation. The Coal Authority has responded that as an organisation it has no agenda on the scale of the industry²⁵.

69. Whilst we have focused on the legal and financial aspects of skills deficiencies, research for the Welsh Government with our emphasis concludes: “*It has become evident from our discussions, that the designing, accumulation, holding, management and phased release of a bond is a specialist and very time consuming activity which can run throughout the operation of a site. It falls over and above the normal LPA task of processing and conditioning the original planning application / permission for the site, along with the subsequent monitoring of the project in terms of liaison and auditing compliance with the planning conditions.*”
70. “The design and control of bonds requires significant initial inputs from lawyers / engineers / surveyors / quantity surveyors experienced in large mineral, earthmoving and restoration projects, to establish the size and cashflow mechanisms of the bond. But once the project is operational, it will require regular inputs from those specialists, to ensure that operations are in accordance with the programme upon which the bond is based and monies are being accumulated. Any significant departure from that programme must be assessed, and any adverse implications on the level of bond cover identified and a correction negotiated. As the site liabilities pass their peak and start to diminish, those overseeing the management of the bond, must ensure that the bond is released at a rate commensurate with that diminution in liability, but not at a rate which leaves a shortfall. The objective must be to adequately recompense the operator and not tie up their funds unnecessarily whilst retaining adequate protection for the LPA. The costs of these activities, and the need to provide basic quantity data and cost estimates should fall on the operator. It would be advantageous to establish a clear protocol by which the site operator should, annually, provide to the LPA, a review of current site earthworks quantities in terms of void and overburden heaps, and an estimate of the cost of site restoration at that time and at any future worst case. The LPA could then use this data as a start point to review the adequacy of the current and future adequacy of the bond provision for the site. The site operator should be required to notify the LPA of any departure from the anticipated programme of works if it would increase the scale of restoration cost and bond requirement determined at the previous review.”
71. *Finally it is worth noting that LPAs and the Coal Authority have very clear and legally defined roles in relation to the licencing and planning / operational compliance for opencast coal sites, but both bodies shared a view that over and above those formal roles they might well benefit from closer dialogue and the exchange of information, views and difficulties.”*
72. In accordance with findings in Wales it is right to look at the skills-base and skills gaps. There is not surprisingly a similarity between the Welsh and Scottish situations (see consultation main finding below). The Scottish Government consultation responses noted the infrequency of opencast submissions – a factor echoed in the Welsh research which noted that some LPAs might receive only one or two applications per decade, and hence be unable to fully employ, afford or retain

²⁵ Minutes of compliance sub-group 27 August 2014 appended to this report.

such specialist staff. Comments ascribed to that research are not accepted verbatim by Scottish local authorities.

2013 Consultation main finding:

A high 82% response to questions on skills referred to lack of specialist experience.

A shared service/ central body (or certification of individuals by such a body) was suggested by several respondents as the most efficient means of providing this expertise (along with potentially expertise in other monitoring, compliance, planning and restoration issues, and occasional legal advice), rather than its being held in-house in planning authorities.

A business suggested that the Coal Authority could provide this service.

* Skills gaps:

* Compliance, Monitoring and Restorations, Legal Advice

73. The Welsh research recommended a closer working relationship between the Coal Authority and planning authorities for example by the Coal Authority attending the Wales Planning Officers Waste and Minerals Forum. That might be regarded as too informal a way of securing lasting planning performance improvements but it might be an appropriate stepping stone towards shared expertise or to develop the more formal recommendations set out in this report. Owing to limited staff resources and increased pressures, it has been a number of years now since the disbanded Scottish Minerals Officers Forum met but that could be reinvigorated. However, it is important to recognise that the HOPS Energy and Resources sub-committee now address the issues previously covered by that forum although it has yet to be considered whether it has the resources to pick up all of the slack. New fora could be modelled on the Restoration Bonds Working Group which advised the Task Force in its early stages – the key being to gather coalfield planning authorities around the table periodically in order to inspire mutual support connected with a programme of action. What is clear is that if this skills gap is not addressed and resolved much of what is recommended in this report will not work.

74. The sub-groups note that the UK Minerals Forum²⁶ receives a small contribution of funding from the Confederation of British Industry to support operations, meetings, consumables and venue hire. In subsequent discussions with SOLAR, central funding of the Electoral Management Board for Scotland (EMB) which was created by the Local Electoral Administration (Scotland) Act 2011, was discussed and its funding model can be pursued. Scottish Government, HOPS, SOLAR, CIPFA (if required), the Improvement Service and CoalPro will enter into discussions and gather evidence about financial and operational support (see paragraph 76), service capacity, aggregation of specialist services (potentially a Coalfield Planning Officers Forum) and oversee this wider work bringing proposals back to Scottish Ministers and Council Leaders. The forum could include legal support, a planning presence from SEPA, SNH, industry input and others as required

²⁶ <http://www.ukmineralsforum.org.uk/>

and Scottish Government representation on planning, environmental quality and finance, in order to develop an authoritative source of information, advice and standards freely available at the point of delivery to relevant planning authorities. Its task would be to ensure that each part of the process that this report recommends, is supported and managed by those that have the appropriate skills to do so.

Recommendation 18

The sub-groups recommend the idea of a Coalfield Planning Officers Forum and development of further proposals in that respect.

Recommendation 19

That planning authorities follow the SEPA model on publishing inspection reports concerning opencast coal sites including monitoring and compliance reports²⁷ and that these are submitted to Scottish Ministers quarterly.

75. The sub-groups have considered further information about the structure of the skills and support that would improve compliance and monitoring whilst maintaining planning authority autonomy. It is acknowledged that expertise in a range of disciplines is required at the beginning of the application process and through the life of the consent with all that entails.

Consultation main finding

Recognising that some degree of variation to the approved working of a site is common as coaling progresses and with potential restoration cost implications, monitoring for compliance and re-evaluation of the financial guarantees is essential throughout the working life of sites. There is perceived to be a serious skills shortage within planning authorities to undertake such work; a number of options for the future require further consideration.

Sub-groups' discussion

If there is support amongst the planning authorities for independent advice, how it is commissioned and the extent to which such advice is actioned, its status needs to be clear. However the sub-groups recognise the challenge that conflicting views from consultees, the basis of any independent advice, the position of decision-takers at official and political levels may present. The sub-groups are clear that without legislative change there needs to be a way of securing that buy-in.

76. Scottish Government has provided Heads of Planning Scotland (HOPS) – represented on our sub-groups, with £20,000 to provide minerals planning training in order to upskill the next generation. The Scottish Government is working with the

²⁷ <http://apps.sepa.org.uk/compliance/>

Improvement Service to deliver training (which commenced in April 2015), primarily targeted at mid-career planners but also involving experienced officers. A further £40,000 was provided to HOPS in March 2015 focused on coal-specific support to:

- provide information on any existing or emerging shared services / joint working in planning
- consider innovative approaches to shared services / joint working more generally, and
- define required governance arrangements.

77. The initial training is being designed in co-operation with industry to comprise site visits, as well as facilitating inter-authority benchmarking and sharing of good practice. The second tranche will require HOPS to embark on the elements and detail of the better regulation project highlighted above, with a Scottish Government steer on expected outcomes. Given that experience in dealing with minerals applications can be fragmented over time and between authorities, training should be harmonised with HOPS' Energy and Resources sub-committee effort to explore the potential of a community of coalfield officers. This can include local authority environmental health officers who have a day-to-day role in regulating matters such as noise, dust and blasting. We will explore with HOPS whether this can be established as a sub-group of their Energy and Resources sub-committee and are investigating scope for Scottish Government to provide support to the group on a longer term basis.

78. In line broadly with the Scottish Government consultation's findings, HOPS has already identified 4 main skills gaps: 1 restoration and aftercare, 2 mine progress plans, 3 legal agreements and 4 financial guarantees.

79. Where any Coalfield Planning Officers Forum's experience develops it should draw in expertise on legal advice to enhance consistency of approach. A question remains about how to draw on other expertise such as mine engineering, quantity surveying and financial services but we believe the Improvement Service can also be asked to bring forward workable proposals or identify the barriers that require to be overcome. **The main finding coming out of the skills discussion is about how to ensure advice provided by any independent support is adopted by the consenting authority. If support is to be pursued, its remit will need to be carefully thought through; positioning the weight given to its advisory role by individual planning authorities.** That is something that will require further work as set out in recommendation 18. The HOPS skills gap analysis is key to any recommendation on securing a platform for better advice and its providers.

UPDATING SCOTTISH GOVERNMENT PLANNING ADVICE

2013 Consultation main finding

66% response and 97% support for an update to Planning Advice Note 64 – Reclamation of Surface Mineral Workings (2002).

Support for new advice on forms of acceptable financial guarantees.

Sub-groups' discussion

Broadly supported.

80. With such strong support, an update to PAN 64 will be required. Typically consultation on new planning advice does not undergo wide public consultation. However there will be greater interest in this revised advice than might otherwise be the case given the focus on the surface coal mine restoration legacy. It may be that only a partial revision and 're-brand' is required and in any event its role will be to support Scottish Planning Policy, not other regulatory regimes other than where necessary by appropriate signposting. Planning authorities feel that there is also a case for a review of Standards set out in PAN 50 'Controlling the Environmental Effects of Surface Mineral Working; and its 4 Annexes.

Recommendation 20

The sub-groups recommend that Scottish Government should bring forward draft revised Planning Advice Note 64 on reclamation of surface mineral workings during 2015 then conduct a 12 week public consultation.

Areas for inclusion may be processing agreements, standard conditions, templates for legal agreements, financial guarantees, a structure for community liaison and advice on the regulation of material and non-material variations.

COMMUNITY INVOLVEMENT

2013 Consultation main finding

Community liaison committees are already by and large custom and practice. 94% support for setting up committees prior to site commencement

Question about whether they can lead to more effective regulation.

Question about whether planning authorities could resource CLCs from within existing budgets but developers positive about making staff available.

Role for PAN64 to provide further advice.

Sub-groups' discussion

Communities will now have an even stronger view that they need to be involved in what happens in the future. From the community input to the sub-groups, one of the issues has been the differing ways that planning authorities involve communities affected and there is again no consistency across Scotland. What is clear is that communities need a more transparent view of what is going on and how it is being managed. While Local Groups can help, their history has not been always positive. However if our recommendation of mandatory multilateral pre-application consultation is accepted then community involvement is on firmer foundations and can be built into each situation.

Further discussion by sub-group representatives in April 2015 identified the importance of attending to a more structured approach to community liaison. For example it is important that a site visit is offered to CLCs over and above typical evening round-table meetings. Scottish Ministers will welcome periodic reporting on such engagement.

81. The Scottish Government sponsors the 'charette' approach to community involvement in connection with the Scottish Sustainable Communities Initiative²⁸. While that is directed at design of new development, it suggests that there may be merit in gathering the coalfield communities of interest together to evaluate some of the recommendations in this report either in their development or once in place and in practice. There may be an opportunity for some support to take stock of the community involvement element of the enhancements to the planning process this report recommends, in respect of the ultimate goal of achieving full site restoration. It could for example be piloted with an existing CLC concerning the bedding down of new processes where relevant to a site in question. We propose to work potentially with an existing CLC, the Association of Community Councils, a volunteer planning authority or group of coalfield community interests to provide for consistency. It was suggested that a day be set aside for this in summer 2015. In relation to liaison

²⁸ <http://www.scotland.gov.uk/Topics/Built-Environment/AandP/Projects/SSCI/Mainstreaming>

committee meetings, current practice in some planning authorities ensures that CLCs are established as a requirement of the section 75 planning agreement and they may be the model nationally. Evolving practice is that the developer will pay for the meeting; it will be chaired by the planning authority and minuted. These records can be made public on websites. It will always be helpful to have the right representatives around the table including operators, landowners, agencies, the community council (where active) but also individuals. This can be promoted on operator or council websites constituted in such a way as to manage numbers.

Recommendation 21

The sub-groups support best practice on Community Liaison Committees (CLCs) at every site or assemblage of adjacent sites and recommend that Scottish Government targets main stakeholders to ensure that they are consulted on draft Planning Advice on reclamation of surface mineral workings to promote a more structured approach on CLCs. Publishing of planning documents and monitoring compliance and inspection reports should also help communities to be more involved in what is going on. Engagement with communities should be structured around periodic site visits, formally minuted, made available publicly and reported to Scottish Ministers periodically but not less than annually.

Recommendation 22

Scottish Government Planning and Architecture Division will explore an opportunity for a 'community engagement' type project to research some of the multi-lateral proposals in this report.

PART 2

FINANCE

82. **The sub-groups consider that the financing of restoration is the top priority for action.**
83. There are three aspects to finance within opencast mining namely,
i) that financial assurance is in place at the outset to ensure that the restoration and aftercare requirements of planning permission can be implemented,
ii) the operator pays for compliance, decommissioning, restoration and as the case may be mitigation and aftercare,
iii) that agreement is reached at the outset on the contribution and what form it will take that will go to the community involved in the disruption caused. While this has been done under Community Benefit clauses in current agreement it is a subject that warrants examination in its own right given the plethora of such benefits that now exist for opencast, wind etc. where the guidance has developed piecemeal, is consistent and can be done in a better way.
84. The 'who pays for what' in terms of planning and compliance will come out of the sections above. It is highlighted here that 'who pays' is not forgotten in all the other financial aspects around opencast as it is not without size or substance. In exercising its statutory planning function there must be no financial or resource cost or risk whatsoever to a planning authority.
85. In terms of Community Benefit there needs to be an examination of whether this can be improved to bring more consistency to it across Scotland and whether it would be better with a single fund for a community rather than the multitude that now exist. However this should be the focus of a separate piece of work so is highlighted here just to make that issue a live one (see Part 3 of this report and Recommendation 29).
86. Finally the Group looked at and discussed how the rewards that landowners, mineral rights holders (who can be different to the landowner) and operators receive while the mining is on-going can be linked to restoration. The operator would argue, understandably, that they are already paying the price for the assurance and compliance but currently the landowner or other party gaining reward pays nothing towards either. This is an area that the group considered. While it is considered that the opportunity should be taken to engage in a spirit of cooperation with Scottish Land and Estates on the matter, local authorities are clear that any future planning permission for opencast coal mining should carry with it no financial or human resource costs or risks whatsoever. Engagement with landowners could alert the sector to its obligations and the importance of a forward look on financial planning in relation to land holdings when surface coal mining is proposed on privately held land. It would be an important reminder to landowners of their obligations under the 1997 Act concerning land management obligations arising from the income from development.

87. However the group felt that those discussions should be carried out on the basis that if the landowners and others do not come up with their own way of holding back finance until full restoration then Scottish Government may take a view itself on whether part or all of any dividend taken from coaling should be held 'in trust' until such time as the site is fully restored. While the landowner will in many cases be the developer that is not always the case and also many land ownership exchanges on these sites assume that the land will revert to the original owner when restoration is complete at no or just a nominal cost.

FORMS OF RESTORATION GUARANTEES

2013 Consultation main finding

There was split opinion on the best way to deal with Financial Guarantees but support all round for the identification and implementation of the means of securing guarantees to protect the interests of Planning Authorities, the industry and the communities. There is a need for further discussion on this matter with all relevant stakeholders.

Sub-groups' discussion

The section below set out the sub-groups view but in summary what we have currently, even if it worked correctly, is not fit for purpose as in the case of bonds which are the main assurance tool it takes no account of the financial viability of the developer and relies solely on an actuarial evaluation of the risk involved. A new way of providing better and more robust assurance that removes much of the due diligence burden from Local Authorities (who do not have the skills or resource to do it) is needed.

The view has been expressed that the cost of restoration and aftercare should come from the revenue generated on site, with restoration guarantees the backstop and not a separate activity.

All through the consultation and discussion process there has been a division on the best form of financial guarantee. The introduction of 'first tier' bank guarantees is of interest and planning authorities will wish to ensure or take advice on the standing of the provider financial institution. Industry access to bank guarantees is also subject to company diversity or exposure to for example the coal sector.

It has been commented that the use of combined securities has a place and the sub-group can provide good examples.

It has also been commented that each site is unique and in the circumstances may require 'traditional' guarantee options.

Further discussion by sub-group representatives in April 2015 identified scope to bring together HOPS and SOLAR to agree headings for a draft guidance note on bank guarantees. That would then be shared with the RBS representative's technical team for further consideration, report back and shaping into a final guidance note.

It has also been noted that financial guarantee milestones should be monitored routinely and are appearing in local authority reports. The Scottish Ministers will welcome periodic reports on such matters in site monitoring and compliance reports. (see Recommendation 19).

88. Prior to the financial crash of 2008 and the business collapse of the then key mining companies in the UK, insurance bonds had been the prime way of Local Authorities and communities gaining comfort that restoration was guaranteed. An escrow account has worked particularly well in West Lothian. However even then, some financial guarantees were not monitored by Local Authorities in a way that gave real cover or they were revised as the site developed. This is again primarily due to placing a level of responsibility on planning authorities owing in part to a lack of expertise in putting in place Insurance Bonds by Local Authorities and a belief that significant breach far less default would never happen.
89. Before we come therefore to what financial instruments should be used in future there is a key question about who sets the terms of whatever is put in place and how those terms are varied over time.
90. It is clear from discussions with planners from local authorities and indeed with HOPS that the role of overseeing the financial guarantee of an opencast site should not automatically rest with a council. Only if, on a site specific basis, such a mechanism is seen to be acceptable to a council then expertise in setting the terms for insurance or other financial bonding instruments is not one that is prevalent there so there is a desire for assistance in the form of:
- i) Standard terms for bonds and guarantees that can apply across all Local Authorities
 - ii) Some central or other expertise that can advise Local Authorities on specific issues as they arise
91. There is also a recognition of the resource that it takes to do much of this initial due diligence and on-going work and HOPS do not believe that Local Authorities have that resource locally to do that.
92. Scottish Government Finance Directorate already works with Local Authorities on complex or challenging financial issues and would appear to be the appropriate place to inform on what is outlined below. They could also draw in assistance from Scottish Futures Trust as required. The key message however is that due diligence on the type and quantum of the restoration guarantee needs to be undertaken. In the case of the insolvencies that gave rise to the abandonment of unrestored sites across Scotland it is self-evident that the due diligence was found wanting.

93. Planning authorities believe that this is a matter for the developer and the landowner, and that planning permission should not be granted until such time as an independent verification has been undertaken, confirming that those parties have in place the necessary security to restore a site if a breach of planning control relating to restoration and aftercare takes place. This requires significant further discussion between Scottish Government and local authorities. Amongst the range of financial instruments, the role of escrow accounts that give local authorities comfort insofar as finance is readily available for restoration (but only once coaling has begun) must not be overlooked. Failure to ensure that a local authority has immediate access to finance to procure the restoration of a site will be resisted at the planning application stage. National and international procurement regulations must not be overlooked in this regard.
94. There may be difficulties with identifying the “perfect” financial product for reinstatement – they all provide (at a cost) funds in the event of a risk crystallising and Scottish Government would not want to constrain landowners’ or local authorities’ ability to assess the best choice of an appropriate product at a competitive price. Local authority chief executives, finance directors and where in post, insurance managers (or as the case may be a service bought-in) are recommended to ensure that this is addressed and that any skills gap is plugged. Audit Scotland asked all local authorities with coal reserves for an update that the Controller of Audit would report in 2014/15. Local authority capacity in financial expertise is a concern and is reflected in their 2011 report into skills drift and early retirement in planning. Audit Scotland stands by and supports Local Authorities’ impartial decision-making role so any advice on new financial guarantee options available to planning authorities will come with the message that the Scottish Government and COSLA can only offer support to ensure that affairs are conducted along best practice lines.
95. In terms of the assurance instruments themselves the group looked at what existed historically and what was available now. Part of that focussed on the amount of due diligence that needed to be done and how it could be done.
96. Historically as is stated above, insurance bonds were the main form of assurance although Parent Company Guarantees (PCGs), and escrow accounts were also issued in some cases. While local authorities consider that greater emphasis is needed on the establishment of an escrow account and industry considers that PCGs remain an option there is in reality a place for a mix of options tailored to site-specific circumstances.
97. Insurance Bonds are actuarially-based bonds which are costed on the basis of what is the insured risk happening and the fee is fixed around that. There is therefore nothing in that calculation that examines the financial viability of the operator only in terms of their ability to pay the premium. However unlike other insurance policies all or part of some of the bonds were cross-guaranteed to the operator primarily to penalise the operator if the bonds were called if the operator did not perform their duties effectively. Since all the bonds have been called because the operator went out of business then the cross-guarantees were of little effect other than tying up part of the company’s available credit.

98. The Group wrote to the key insurers in this sector and the majority have decided to withdraw from this sector and those that do still exist are only prepared to give bonds for short periods of time with no guarantee of renewal which does not really give much assurance to a Local Authority.
99. Therefore while short term insurance bonds might play a part in a menu of instruments that are available they do not appear to offer a viable way forward in isolation.
100. Also since company demise has been the main reason for opencast restoration default, Local Authorities are extremely reluctant about taking bonds on. However the view of the Group is that they should not be totally discounted as in certain circumstances they still offer good and safe insurance and again can form part of a menu of options for Local Authorities to use for example in the early phases of a site where an escrow account derived from a per-tonne levy has not built up sufficient cover. Primarily however councils consider that it is the role of the landowners and beneficiaries of the planning permission that have responsibility for guaranteeing against default.
101. The Group spent some time examining and taking evidence on using bank guarantees and the group see these as a primary new and potentially attractive instrument to use because:
- a. They are used widely and successfully in other industries and are therefore a standard part of the commercial market
 - b. The bank who issues the guarantee on behalf of the company does the due diligence to ensure that the company can afford to pay it as it falls within its overall credit exposure calculation for the business.
 - c. It is the bank who pays, not the company if the company does fail.
 - d. It can be varied over time to take account of changes in restoration cost and again the bank would carry out the due diligence so the Local Authority would know in advance if the company could afford to cover the changes it was proposing if those increased the restoration cost.
102. While one local authority has classed bank guarantees as 'medium risk' (which would not rule them out), the finance sub-group has concluded that where Bank Guarantees are on offer in a site-specific situation they should be 'on the table' but that PCGs, escrow accounts, and short terms insurance bonds should remain part of the assurance menu in this area as it may be that a combination of these can be used in certain circumstances. Advice on when a financial product should not be used would be beneficial.
103. However it is recommended that Scottish Government Finance Directorate work with Local Authority Finance Directors, insurance managers, SFT and HOPS to put in place standard terms for opencast which ensures that the guarantees are paid out if needed and that Local Authorities be obliged to use them always recognising that there can be local variances. Scottish Government Finance cannot advise Local Authorities on which banks they could accept guarantees from.

104. The outcome though of going down this route is that it is likely that only large financially stable organisations will fall within the criteria where these instruments will be available to, so there may be some resistance from smaller operators but given where we are, the group feels that this is unavoidable as insurance bonds can no longer be seen as the lead or only instrument.
105. Finally in terms of financial assurance the issue of landowner share of the coal output was raised.
106. Currently the deal between the operator and the landowner is a private commercial transaction that exists outside of the agreements that the public sector is involved with. Therefore landowners can and have taken large rewards from the coal extracted from their land without having any obligation to put funds back into restoration if the operator failed. While a planning permission and the section 75 agreement always falls back onto the landowner if the operator fails, none have ever been pursued owing to cost and other legal issues. With agreements open to modification there are complexities.
107. The group feels that landowners should be brought more into the risk side of the equation; local authorities consider that their role as landowner is central to this. The group would wish so see if the planning or other legal rules surrounding this could be changed or varied and make it obligatory that the landowner set aside all or part of their coaling benefit funds until such time that restoration and aftercare is complete mindful that they are responsible through planning legislation for a breach of planning control on their land.
108. The downside of this approach is that landowners may not now allow mining to take place on their land but the group feels strongly that there needs to be more balance in this arrangement than currently appears to be the case.

Recommendation 23

The sub-groups recommend that Scottish Government should work with Local Authority Finance Directors, insurance managers, the Scottish Futures Trust, HOPS and industry to put in place elements to be included in agreements for surface coal mine restoration guarantees.

HOPS and SOLAR will agree headings for a draft guidance note on bank guarantees. That will then be shared with the RBS representative's technical team for further consideration, report back and shaping into a final guidance note.

LANDOWNER LIABILITY

2013 Consultation main finding

There was a 73% response rate but majority support for landowner contributions to restoration: highest amongst the local authorities and third (community) sector but stronger resistance from business (coal operators). It was also commented that local authorities benefit financially from development. It was commented that with royalties comes responsibility. In any event a close link was observed between liability and being party to enforcement.

Sub-groups' discussion

The sub-groups have discussed the difficulties of joint and several responsibility for site operations and the complex and potentially insurmountable problems that could arise from the need for separate and additional bonding causing potential legal disputes about responsibility. In some senses the local authorities and operators agreed such complex situations may be able to be avoided as the resolution of litigation situations to reasonable conclusion could be very protracted and not cost effective to the public purse.

Landowners should be aware of their responsibilities under s.135 of the Town and Country Planning (Scotland) Act 1997 (which allows a planning authority to enter the land and take steps) and indemnify themselves in the event of a breach of a planning control takes place on their land.

The environmental NGO voice on the sub-group has suggested royalties could go into an escrow fund.

109. The sub-groups have taken legal advice on landowner liability.
110. The legal liability of the owner of land on which opencast mining has taken place for the post-mining restoration of that land has not been tested in the courts and there is therefore no judicial guidance on what, if any, such liability may be. Nevertheless, under section 127(1)(a) of the 1997 Act a council can serve an enforcement notice on the owner of the land and any other person who has a material interest affected by the notice.
111. The Town and Country Planning (Scotland) Act 1997 regulates the use of land. In a subsidiary sense and from first principles, the owner of land can do what the owner likes with that land but only subject to planning control and subject to anything done on the land not causing foreseeable loss to any third party - there are for instance numerous cases on the right of the owner of lower ground to prevent mineworkings on higher ground if the mineworkings would increase or decrease the flow of water from the higher ground to the lower ground.

112. In respect of land drainage the general principle taken from the 1985 decision of the House of Lords, as the senior court in the UK, in *RHM Bakeries Limited v Strathclyde Regional Council* is that the owner of lower land affected by water coming from higher land can only obtain damages from the owner of the higher land for any loss or damage caused by the water to the lower land if fault on the part of the owner of the higher land for the loss or damage caused by the water is established.
113. Opencast mining sites can be remote but can cause nuisance or loss of amenity, loss or damage to neighbouring proprietors and the environment generally and therefore neighbouring proprietors will have grounds on which to require restoration of the mined land.
114. The first principles mentioned above are, however, qualified by the planning legislation, and in particular by the Town and Country Planning (Scotland) Act 1997 ("the 1997 Act"), noting that in terms of section 124 of that Act no enforcement action can be taken under that Act in respect of any planning breach more than 10 years after the breach (and the time period is reduced to four years from the date on which operations were substantially complete or where mining operations have been carried out without planning permission).
115. In effect the 1997 Act empowers the relevant planning authority to serve a notice on the owner of land requiring that owner and any other person with a material interest in the land, to comply with any restoration condition in any planning permission granted in respect of that land and, if the owner does not comply with the enforcement notice, to carry out the restoration work and to recover the cost of the restoration work from the owner.
116. The owner of land which has been mined, whether or not it was the owner of the land who mined the land or a third party whom the owner allowed, for example by a lease or licencing agreement, to mine the land can therefore be required through the enforcement of the planning permission granted for the mining operations to restore the land in accordance with any restoration or aftercare condition in that planning permission. However, enforcement of a restoration or aftercare condition would require the restoration obligation to be sufficiently well defined. That should make it clear what restoration work needs to be carried out and would assume that the owner of the land has sufficient financial resources to meet the cost of the restoration work. Further, if the owner failed to comply with the enforcement notice, the planning authority may itself carry out and pay for the restoration work before the planning authority could seek to recover the cost of the restoration work from the owner.
117. The owner of the land may, as a requirement of getting planning permission for mining operations on the land, have entered into an agreement under Section 75 of the 1997 Act with the planning authority requiring restoration or other work on the land as required by that agreement, and such an agreement, if recorded in the Sasine Register or registered in the Land Register is enforceable against subsequent owners, as well as the original owner, of the land. Nevertheless that does not guarantee that the necessary work will be done unless the landowner has in place the necessary financial guarantee.

118. Any legal agreements that have been countersigned by landowners are not explicit or specific in terms of the responsibility that agreement places on the landowner in the event of a default by the operator on site restoration. The consequence is that landowners are neither protected through insurance against the risk nor specifically aware of their liability.
119. The land needing to be restored may be part of an estate, or the landowner may have other property, of significant value, but whether the landowner can pay for restoration out of ready cash or would have to sell assets or borrow to fund the restoration is likely to be a significant factor in the landowner's willingness, or otherwise, to spend on the restoration. The means of financing the restoration of the land is a matter for a landowner but a local authority would wish to be assured that the work will be carried out by the landowner before granting planning permission.
120. The annual "running cost" of unrestored land in comparison to the restoration cost may be a factor - the running cost could for example include the maintenance of and compliance with environmental responsibility, dealing with health and safety and insuring against public liability.
121. What value the landowner places (and value may be financial or aesthetic) on the land as unrestored and on the land as restored – is in simplistic terms – ‘will the cost of restoration be covered by the restoration enhancing what the landowner perceives to be the value of the land’? This however is not a planning matter. The landowner is responsible for a breach of planning control and must be able to remedy that breach when required by the planning authority even if the post-restoration use, or possible post-restoration use, of the land does not justify the restoration spend. Quite simply, a site cannot remain unrestored because of the commercial reasons of the landowner who was party to a joint venture with the developer. Whilst some landowners may look at restoration on an altruistic basis - that restoration is an end in itself - most landowners will take a commercial approach and focus on what financial return/savings the cost of restoration will achieve.
122. Against those variables, a landowner faced with a planning authority seeking to enforce a planning consent may:
- proceed to restore "at best", complying both with the letter and the spirit of the restoration condition in the planning permission;
 - proceed to do as little restoration as possible in the hope that if something is done the planning authority will "take no action";
 - do something between 1 and 2 above, again in the hope that if something is done the planning authority will "take no action";
 - do nothing - leaving the planning authority to carry out the restoration work and then seek to recover the restoration cost from the landowner - in the hope and expectation that the planning authority, when push comes to shove, may not have the funding or resources to carry out the restoration work and may therefore not proceed with the enforcement action;
 - if the site is toxic – i.e. the post-restoration value of the land will be less than the restoration cost - sell the land for a nominal consideration - say £1 - to a shell company with no assets, so that the planning authority is faced with a landowner

with no resources to restore the land and with no resources to reimburse the planning authority for the restoration cost if the planning authority restores the land.

- **None of these matters is acceptable to planning authorities and there would be no basis for granting planning permission for opencast mining against that background.**

123. In the Scottish Government's consultation on land reform²⁹, one of the aims is to address barriers to sustainable development and begin to diversify patterns of land ownership: by providing powers for Scottish Ministers, or other public bodies, to intervene in situations where the scale or pattern of land ownership in an area, and the conduct of a landowner, is acting as a barrier to sustainable development.³⁰ The vast majority of land in Scotland is owned by the private sector. Landowners are instrumental in promoting sustainable local development and supporting communities.

124. Looking to the future, the control of restoration requires significantly more detailed discussion on the role of the landowner; a local authority will not underwrite a landowner's risks and obligations under the Planning Act covering:

- restoration strategy
- Secure funding
- Active policing
- Scope for flexibility

125. As to the question of why no landowner has ever have been pursued, the short answer is because it is not cost-effective for the planning authority to pursue a defaulting landowner, because either:

- the landowner does not have the wherewithal to carry out the restoration (which is why the planning authorities are not seeking to enforce restoration by Mines Restoration Limited³¹); or
- the planning authority does not have the wherewithal to carry out the restoration (if the planning authority has to carry out the restoration and after paying for the restoration to seek to recover the restoration cost from the landowner, the chances are that the landowner does not have the resources to reimburse the planning authority for the restoration cost); or
- there are extenuating circumstances

The need for no financial risk to a planning authority is paramount. This may require the structure of any legal agreement to which the landowner is a party to be reappraised.

126. The sub-groups have discussed briefly the complex situations that may arise but the above sets out in more detail the legal challenges concerning those complexities. Further discussion and awareness-raising with landowners is a theme running through this report. This should be on the basis that it is important to foster better understanding of the challenges big engineering operations at surface coal mines present to land management, risk and liability and the obligations of landowners under planning legislation.

²⁹ <http://www.scotland.gov.uk/Publications/2014/12/9659>

³⁰ <http://www.scotland.gov.uk/Resource/0046/00464887.pdf> until 10 February 2015.

³¹ <http://www.smrtrust.org/contact-us/media/mri-begins-restoration-engagement.aspx>

Recommendation 24

The sub-groups recommend that engagement with Scottish Land and Estates should be conducted to ensure that the future of surface coal mining and landowner accountability or liability run hand-in-hand.

Recommendation 25

The sub-groups recommend that while there should remain a menu of options that can be used to provide assurance, Bank Guarantees may be appropriate and the best approaches to put in place will be pursued as a basis for the guarantee including the due diligence measures that require to be conducted. It is proposed that the Scottish Government will approach stakeholders to explore this matter further. Moreover, it is proposed that quarterly reports on the status of site financial guarantees should be supplied by planning authorities to Scottish Ministers in this area of acknowledged 'strategic risk' to provide oversight on performance without supplanting local authority responsibility.

LEGAL AGREEMENTS - Finance

2013 Consultation main finding

The consultation responses focussed on the fact that support for a central resource was based on the assumption that it would form part of the function of an independent unit.

127. While there is a good case for standardising the wording of legal agreements for the sector in planning terms, there is no consensus that this should be or needs to be outsourced. SOLAR and HOPS are working with Scottish Government on the case for a planning condition rather than an a planning agreement as the wrapper for the financial guarantee: the basis of the debate being that a guarantee is not a payment and a condition may be less complex – giving more straightforward access to the guarantee fund. Moreover, the debate suggests that either a condition or a legal agreement simply provide the framework for access to the funds which are held independently; in place for access by the planning authority and the guarantor should they be required to be drawn down.
128. There is a legislative requirement for a mandatory financial guarantee in respect of the accumulation of extractive waste in site waste facilities. In some cases this obligation may have been omitted from planning consents and requires to be regularised. Findings, views and recommendations on legal agreements are covered at paragraphs 54-55.

Recommendation 26

For clarification, the legislation concerning a mandatory financial guarantee as set out in Management of Extractive Waste (Scotland) Regulations 2010³² shall be notified to all planning authorities by Scottish Government during 2015.

Recommendation 27

The sub-groups recommend a template approach on the required content of legal agreements for surface coal mines to provide consistency, with a specific section devoted to the wrapper for the financial guarantee. Should it be concluded that a condition is adequate cover for the financial guarantee, guidance will still be required and produced.

³² <http://www.legislation.gov.uk/ssi/2010/60/regulation/14/made>

PART 3

COMMUNITY ENGAGEMENT AND RELATIONS

2013 Consultation main finding

A potential area to improve was communication between operators, local communities, regulatory bodies and other stakeholders, to help to improve public confidence in effective regulation – which has been largely lost in recent years.

Several community bodies and third sector organisations suggested information used to inform the planning application and monitoring and compliance could be made more transparent and publicly available – especially to communities close to proposals. In addition, communities indicated their views should be given more weight when taking decisions.

129. Part of this finding is also dealt with under the report's recommendations on community liaison and a more multi-lateral approach to engagement that culture-change can engender. Local authority e-planning systems now routinely upload all documents, related properties, consultation responses and reports on planning applications so there is no question of information being reserved.
130. To avoid duplication of effort but to maintain transparency for all groups, where reports to planning authorities by ecological clerks of works or site technical working groups have been monitoring progress with site restoration these activities should be reported to CLCs.
131. The determination of planning applications and how transparency can be enhanced is described under the Land Use Planning Context section of this report.
132. In order to improve transparency further and to provide a wider understanding of planning for surface coal mining to the lay reader and the place of coal in the energy mix, a draft 'flier' has been produced for local authorities to tailor to their particular local circumstances. It could describe the way coal as a mineral is planned for in their area and a covers a range of expectations on good practice arising from this report to the Task Force. It can be kept up-to-date on-line but as it stands it can be printed off as a four page A5 size leaflet. The flier is in Annex J of this report.

Recommendation 28

Planning authorities are recommended to make available a leaflet based on the flier in Annex J of this report and place it on-line during 2015.

BUSINESS IMPACT

2013 Consultation main finding

Local Authorities raised the requirement to ensure any negative impacts of operations were balanced against the need to ensure acceptable long-term impacts on the environment and residents, while making business in the area profitable.

Skills training, employability and community development, investment in connectivity and improved perception of coal mining areas are considered to be important areas for intervention and investment by Local Authorities to improve conditions for businesses.

It is generally considered that proposals to improve and clarify the regulatory system - assuming they are proportionate- could be of benefit to all parties, including businesses.

Key concerns for the coal industry are increased costs associated with planning fees, compliance arrangements and duplication of regulatory effort, if the PA and a Central Unit are both used as a separate level of regulation. In addition, restoration guarantees could threaten the viability of new sites, with associated losses in employment and supply chain, as well as potential problems for supply at power stations.

Sustaining a coal industry is also important for Scotland's economy, as part of a balanced energy policy. It is noted that if proposals are too restrictive, coal would likely be imported, and increased imports would have associated impacts on communities around terminals (such as Hunterston).

Sub-groups' discussion

The sub-groups recognised the potential business impact of the introduction of mine monitoring fees which may have the potential to dissuade operators from investing in further surface coal mining. Likewise the restructuring of legal agreements around firm financial guarantees with landowner liability fully accounted for ought not to affect investor appetite. It should be noted that in the event of a public consultation on the matter a full Business and Regulatory Impact Assessment in association with the consultation would need to be conducted.

133. Those findings are considered throughout this report and lie at the heart of the future of the coal industry in Scotland, site management and restoration and host communities.

LESSONS FOR OTHER SECTORS AND AN OUTSTANDING WORKSTREAM

134. The sub-groups are clear that the recommendations in this report have wider applicability in established sectors such as landfill, quarries, onshore renewables and emerging sectors such as onshore unconventional oil and gas. This has also been reflected upon by Audit Scotland. East Ayrshire Council has agreed that decommissioning, restoration, aftercare and mitigation financial guarantees will be required across a range of land uses (Cabinet on 21 May 2014)³³. The HOPS Energy and Resources sub-committee is engaged in such work and there is an opportunity to align that with recommendations 11 and 13 in this report amongst others.
135. The sectors likely to be implementing findings from this report include Scottish Government, the local authorities principally in the planning and environmental health portfolios (through COSLA and HOPS), but also environmental agencies SNH and SEPA. There are also important messages for the community sector and a relationship with the Coal Authority which could be developed.
136. A single approach to governance on community benefit is an outstanding workstream that the Scottish Government will pursue during 2015 in consultation with the the HOPS Energy and Resources sub-committee in the first instance prior to a potential public consultation.

Recommendation 29

That the Task Force notes:

- the value of the work conducted on surface coal mining restoration guarantee financing and the potential to draw parallels for other sectors in connection with better regulation and**
- the community benefit work stream.**

CONCLUSION

137. At the 16 December 2014 Task Force meeting it was agreed that a small group of sub-group members would finalise the report's recommendations. That work was conducted on 14 January 2015 and revisited at Scottish Ministers' request during April 2015 to further enhance visibility and oversight of operations in the surface coal mine sector. This report is now in its final form endorsed by Task Force members at their 28 October 2015 meeting. It will form the basis of future consultations, where appropriate, following the agreement of Scottish Ministers. Some of its recommendation are already being actioned by Scottish Government in line with a project plan, HOPS and others. Recommendations will be more fully developed into a consultation on mine monitoring fees with other actions being taken forward to achieve better regulation. Progress will be publicised on-line.

³³ <http://docs.east-ayrshire.gov.uk/crpadmmin/2012%20agendas/cabinet/21%20may%202014/Decommissioning,%20restoration,%20aftercare%20and%20mitigation%20financial%20guarantees.pdf>

REFERENCES

Scottish Planning Policy

<http://www.scotland.gov.uk/Publications/2014/06/5823>

Planning Advice Note 64 – Reclamation of Surface Mineral Workings

<http://www.scotland.gov.uk/Publications/2003/01/16122/16256>

Opencast Coal Consultation

<http://www.scotland.gov.uk/Publications/2013/12/7688>

Analysis

<http://www.scotland.gov.uk/Resource/0045/00457043.pdf>

Main findings

<http://www.scotland.gov.uk/Resource/0045/00457044.pdf>

East Ayrshire

Steps to recovery report Sept 2013 <http://docs.east-ayrshire.gov.uk/crpadmmin/2012%20agendas/council/19%20september%202013/Open%20Cast%20Mining%20Report.pdf>

Decommissioning, Restoration, Aftercare And Mitigation Financial Guarantees – report to East Ayrshire Council cabinet 21 May 2014 <http://docs.east-ayrshire.gov.uk/crpadmmin/2012%20agendas/cabinet/21%20may%202014/Decommissioning,%20restoration,%20aftercare%20and%20mitigation%20financial%20guarantees.pdf>

Wales

<http://wales.gov.uk/docs/desh/research/140424failure-to-restore-opencast-coal-sites-in-south-wales-en.pdf>

UK Minerals Forum

<http://www.ukmineralsforum.org.uk/>

Fees for monitoring mining and landfill sites - England

<http://planningguidance.planningportal.gov.uk/blog/guidance/fees-for-planning-applications/fees-for-monitoring-mining-and-landfill-sites/>

Scottish Natural Heritage - The natural heritage interest of bings (waste tips) in Scotland. <http://www.snh.org.uk/publications/on-line/advisorynotes/50/50.htm>

ANNEX A

Finance sub-group remit and membership³⁴

- assess the financial climate in assurance
- make an assessment of parent company guarantees, the market in insurance policies and the pros and cons of escrow accounts
- recommend how planning authorities should approach financial guarantees in future
- consider the value of drafting bond templates
- explore the matter of landowner accountability, and
- meet periodically to discuss evidence and draft conclusions

The group held its first meeting on 30 July 2014 and met again on 10 October 2014.

Membership of the finance working group:

Russel Griggs	Chair
Mark North	Kier Mining
Phil Garner	CoalPro
Iain Cockburn	Hargreaves
David Martin	Banks Group
Chris Norman	Heads of Planning Scotland
Lin Buntin	SEPA
Elizabeth Morton	Deputy Chief Executive East Ayrshire Council
Barry White	Scottish Futures Trust
Robin Caldow	CC Services
Professor Niall Lothian	Heriot Watt University
James Fowlie	COSLA
Graham Marchbank, Stuart McKay,	
Caroline Stafford	Scottish Government Policy and Secretariat

³⁴ This information was provided in answers to written parliamentary questions in August 2014. <http://www.scottish.parliament.uk/parliamentarybusiness/28877.aspx>

Members were selected by the Scottish Government with reference to expertise and experience in the opencast coal sector with particular care to ensure broad representation across all parties interested in the sector. Substitutes or replacements attend from time to time.

Both groups will call on a presence from or write to other experts in relevant fields as required. So far this has included:

- RSPB
- Department for Energy and Climate Change
- Heads of Planning Scotland
- Institute of Civil Engineers Scotland
- CoalPro
- Coal Authority
- Mineral Products Association (Scotland)
- Community Alliance
- Audit Scotland
- Royal Institution of Chartered Surveyors
- Health and Safety Executive
- RBS Group
- Euler Hermes
- Zurich Global
- ACE European Group

ANNEX B

Compliance and monitoring sub-group remit and membership

- take forward the options relating to compliance monitoring, mine progress plans, site surveys, enforcement and related matters
- consider legislative and non-legislative measures
- consider the value of a shared service or an independent compliance unit supporting planning authority autonomy,
- meet periodically to discuss evidence and draft conclusions

The group held its inception meeting on 12 June 2014 and met again on 27 August and 4 November 2014.

Membership of the compliance working group:

Russel Griggs	Chair
Lin Buntin	SEPA
Graeme Walker	SNH
Professor George Fleming	Association of Environmental and Ecological Clerks of Works
George Eckton	COSLA
Alan Doak	AED Planning and Development Ltd.
Mark North	Kier Mining
Barney Pilgrim	Banks Group
Jerry Mulders	community representative
Elizabeth Morton	Depute Chief Executive East Ayrshire Council
David McDowall	Acting Head of Planning and Economic Development East Ayrshire Council
Malcolm Spaven	Scottish Opencast Communities Alliance
Nicky Wilson	NUM Scotland
Jim Birrell	Fife Council
Tim Brian	Scottish Government Inquiry Reporter
Graham Marchbank, Stuart McKay and Caroline Stafford	Scottish Government Policy and Secretariat

ANNEX C

Key Findings of consultation on opencast coal restoration: Effective Regulation

- Although there is support for reinforcement of policy within SPP, greater emphasis tended to be placed on the provision of guidance and technical advice which was widely supported.
- It was evident that financial arrangements to guarantee future restoration of opencast coal sites was a key issue for many respondents, although there were considerable variations between respondents on how that might be best achieved.
- There was considerable support for the view that monitoring of sites during working held the key to preventing or minimising emerging issues and was central to ensuring compliance with the terms of the planning permission so preventing or dealing with issues that might otherwise lead to future restoration problems arising.
- There was some support for some changes to information requirements for planning applications particularly from planning authorities but generally opposed by the industry.
- There was clear division of opinion particularly between the industry and planning authorities and public bodies on the form of information to be made publicly available for compliance monitoring.
- There were common concerns that there is a significant shortage of relevant staff skills available to planning authorities in the discharge of their responsibilities in relation to the restoration of sites.
- A number of respondents questioned the whole basis for further coal extraction in Scotland, and for others there was no real distinction between the issues of legacy sites and future regulation of restoration. The consultation explicitly excluded issues associated with legacy sites.

Summary of findings from public consultation

Consultation on Opencast Coal Restoration: Effective Regulation RPS Consultants

This report summarises the results of a consultation carried out by Scottish Government between **5 December 2013 and 27 February 2014**. A consultation paper was published and views sought.

Background

This consultation was undertaken to seek views on how best to secure effective site restoration at opencast coal mines in the future following issues that have arisen as a result of the liquidation of two of Scotland's largest coal producers. The consultation covered a wide range of relevant technical and financial issues including governance, securing better monitoring and compliance, financial arrangements options, information requirements and the respective roles of stakeholders.

The consultation resulted in the submission of 45 responses plus a campaign resulting in 85 submissions.

Findings on Key Issues

1. The consultation confirmed that the current roles and responsibilities between national and local government in relation to opencast coal extraction and site restoration were supported by other stakeholders.
2. Although over 50% of respondents suggested that SPP was not fit for purpose, few questioned the policy principles of national policy. Particular emphasis was placed on the wording of policies in order to remove any ambiguity or debate from issues of site restoration which are integral to the granting of planning permission for extraction.
3. While there was little disagreement over the need to underpin site restoration with appropriate financial arrangements there were a wide variety of views over the respective potential sources of such guarantees. This issue has taken on particular significance in the wake of the liquidation of two large coal producers and potential consequences for the future availability of funding guarantees from commercial markets.
4. Recognising that some degree of variation to the approved working of a site is common as coaling progresses and with potential restoration cost implications, monitoring for compliance and re-evaluation of the financial guarantees is essential throughout the working life of sites. With a serious skills shortage within planning authorities to undertake such work, a number of options for the future require further consideration.

5. There were significant differences in opinion between planning authorities and the industry regarding the public availability of information for effective monitoring purposes.

6. There was strong support for the use of community liaison committees.

Conclusions

- Given the recent issues regarding the restoration of sites in the wake of the liquidation of two main coal producers, there is very considerable support for change to ensure that such situations do not arise again in the future. Inevitably there is considerable variation in opinion on how that is best achieved.

SPP and PAN 64

- A need to consider the terms used in the SPP as they relate to opencast coal (and other minerals) with a requirement to consider these views further in relation to an updated PAN 64 and/or Supplementary Guidance produced to assist PAs as part of the skills agenda.

Finance

- There was split opinion on the best way to deal with Financial Guarantees but support all round for the identification and implementation of the means of securing guarantees to protect the interests of PAs, the industry and the communities. There is a need for further discussion on this matter with all relevant stakeholders.

Development Management

- There is a need to benchmark against other PAs in Scotland and the UK to establish best practice; and for the revised policy position (see above) to provide guidance on the most appropriate and consistent ways of resourcing PAs to ensure proper compliance monitoring. The roles and responsibilities of any ICU including legal resource within it also need to be defined as part of the debate on creating a model for overseeing the opencast coal industry in the future.

Mine Progress Plans; Site Surveys; Core Drilling Data

- The use of Mine Progress Plans (MPPs) and submission of site survey information is regarded as appropriate as part of the planning application process and given overwhelming support. There is a need to define the form, role and content in the interests of consistency.
- This could provide estimates of the amount of workable coal reserves and assist in the calculation of appropriate financial guarantees. This would also allow the PA through the Compliance Assessor to monitor the financial arrangements and allow for a phased increase/decrease of the guarantee.

The Role of Central and Local Government (including an ICU)

- The roles of central and local government as defined above as proposed have been made clear. The establishment of an Independent Compliance Unit (ICU) has been given support and with their roles and responsibilities properly defined and the body appropriately resourced this is regarded as a valuable asset to assist PAs in the future. This would include the incorporation of a legal resource.
- The PAs autonomy needs to be preserved to allow them to determine planning applications but this will be done so this will be based on a better informed process assisted by the ICU and all other proposals arising out of the Consultation.

Community Liaison Committees (CLCs)

- There is a need to have the establishment of CLCs embedded in an agreement; for the meetings to be timetabled for the duration of the site operations; to be attended by appropriate personnel; and the meetings to be run to avoid a “talking shop”. There was an offer for the coal industry to attend the CLCs with 100% in favour but the Council should control the meetings and the debate.

Skills

- An appropriate schedule of training (including financial aspects) should be introduced to assist PA staff in their understanding of opencast coal and Mineral developments. This would sit alongside the proposals for revised policy guidance; MPPs and staff resources bolstered by Compliance Assessors and the establishment of an ICU to provide assistance and expert guidance.

ANNEX D

The Scottish Government Energy Consents and Deployment Unit Gate check process

Online guidance encourages applicants to submit a draft of the environmental statement to the ECDU two weeks in advance of formal submission, to ensure that all requirements of the scoping opinion have been met prior to submission. In practice, there is a two stage gate check process, which includes an additional stage to the process outlined in the online guidance. The two stage process was introduced in response to feedback from applicants on perceived limitations of the process described in the online guidance.

At gate-check stage 1, the applicant is asked to produce a paper outlining how requirements of scoping and subsequent direct engagement with consultees has been reflected in the EIA work undertaken. The case officer will circulate the applicant's gate-check report to consultees, inviting comments on whether all issues have been addressed and opinions on whether the applicant's engagement has been meaningful and constructive. The case officer will then provide feedback to the applicant on additional issues which consultees have raised and will form a view on whether an all-party meeting is required to progress matters. Gate-check stage 1 is encouraged at project design freeze stage, when there is more information available to the case officer and to consultees on the final layout and siting of the proposed development than is available at scoping stage. Gate-check stage 1 is properly viewed as a continuation of pre-application discussion around scoping and design iteration.

Gate-check stage 2 is a pre-application validation exercise, where case officers use the scoping opinion to undertake a check that all requirements have been met prior to submission, as described in the online guidance.

Gate-check discussion does not attract an application fee.

ANNEX E

WORKING GROUP MINUTES

Meeting of the Scottish Opencast Coal Task Force

**Compliance and Monitoring Working Group on Thursday 12 June 2014 at
9.30am at Victoria Quay, Edinburgh**

1. Welcome and introductions

Russel welcomed everyone to the meeting and, before introductions; he acquainted members new to the group with a brief history of events:

- Collapse of Scottish Coal and ATH
- Intervention of KPMG
- Creation of Task Force and progress made
- Restoration bonds working group (superseded now by Finance Working Group – first meeting t.b.a.)
- Start of the consultation on Opencast Coal Restoration: Effective Regulation drafting last July and launch for 12 weeks last December.
- Formation of SMRT
- Site disclaiming process
- Active sites all across central Scotland (Banks, Kier, Halls, Hargreaves)
- New site in Midlothian with consent
- Next steps, to report back to task force by the end of 2014 (or sooner)

The group agreed this was a good opportunity to create a national standard.

2. Terms of reference

The draft terms of reference were discussed and views sought. It was clear from these discussions that the remit of the group might be transferable into other areas with lines of commonality.

The level of risk was also discussed and the group agreed that the terms of reference should remain fairly broad until the work plan is agreed and there is a clear plan and availability of sufficient material and evidence.

The group also agreed that community benefit should feature on the terms of reference.

The role of the group is to remain independent and provide recommendations.

It was agreed that discussions should remain structured with written submissions in the first instance. It was noted that the Auditor General should be invited to give evidence.

Discussion ensued around the data collection of skills gaps and it was agreed that an analysis should be carried out to pin point where these gaps are.

Russel advised the group that discussions at the compliance and finance working groups will be shared.

The draft Terms of Reference were approved pending minor edits.

Action: Liaise with Emma Hay around a skills audit of local authorities via the Scottish Planning Skills Forum

Action: Write to the Auditor General, Tim Brian (Inquiry Reporter) and Environmental Health interests to include in the working group

Action: Professor Fleming to circulate a list of potential trainers at the Association of Environmental and Ecological Clerk of Works.

3. Future meetings

It was agreed that it would perhaps be useful to meet at least 3/4 times before the end of October.

Action: Write to Coal Pro, Coal Authority, DECC, RICS, HSE, RSPB, river interests seeking views and opinions

Action: Think about method of letting public know that this working group is happening

4. Update from SMRT

Russel explained that SMRT are now the owners of 7 of the residual SRG site and work around these sites is progressing well.

5. Update from Scottish Government Planning

Graham Marchbank updated the group on National Planning Framework 3 and Scottish Planning Policy and then went on to introduce the consultation paper process and the draft analysis report. Members had already been asked to read the executive summary and invited to comment with further detailed responses requested for the next meeting.

The new Scottish Planning Policy will be launched in Glasgow on 23 June 2014. Jim Birrell commented that a recent Reporter's decision requiring "best endeavours" to form a liaison committee at a minerals site within 12 months or it would fall, was not a strong signal on implementation of policy.

It was agreed that 'risk' 'clarity' and 'transparency' should be the guiding topics throughout this process.

Action: Graham Marchbank to let the group know the details of the launch of the SPP.

Action: Members discussed the wording of the consultation document and agreed to send Graham revised wording as appropriate in order to develop final recommendations.

Action: Formally write to SEPA regarding current legislation and which rules and regulations fall to the agency.

6. Shape and form of an independent compliance unit

Graham provided members with some ideas as a graphic. It was agreed that it in no way represents a settled view.

It was noted that in connection with the idea of an independent unit, Scottish Government has provided Heads of Planning Scotland with £20000 to provide minerals planning training in order to upskill the next generation. The Scottish Government is working with the Improvement Service on that.

Action: George Fleming to email list of people in the IEMA and AEECOW role

Action: George Fleming to forward recently published AEECOW guidance document for planners

Action: Write to John Sheridan of Mineral Products Association re minerals input.

7. Guest speakers

Members were asked if they wish to hear from other invitees at the next meeting. It was agreed that letters should be written to parties in the first instance before any invitations were extended.

8. AOB

There was no other business.

9. Date of next meeting

TBA following responses to write-around.

Scottish Opencast Coal Taskforce

Meeting of the Compliance Working Group on Wednesday 27 August 2014 at Victoria Quay, Edinburgh

1. Welcome and introductions

Present:

Russel Griggs	Chair
Philip Baker	Banks
George Fleming	AEECOW
David McDowall	East Ayrshire Council
David Wilbraham	SEPA
Ross Johnston	SNH
Nicky Wilson	NUM
Jerry Mulders	community
Mike Shiel	DPEA
George Eckton	COSLA
Mark Roberts	Audit Scotland
Graham Marchbank	SG Planning
Stuart McKay	SG Head of Fossil Fuels
Wendy McCutcheon	Regulatory Review Group

For Item 4 only:

Philip Lawrence	Coal Authority Chief Executive
Simon Reed	Coal Authority Director of Operations
Rachael Bust	Coal Authority Chief Planner

Apologies were received from Mark North (Kier), Alan Doak (AED Planning) and Lin Buntin (SEPA).

2. Minutes from the previous meeting and matters arising

The minutes of the 12 June 2014 meeting were agreed. An action log had been circulated.

ACTION 1: The outstanding action was a paper by Heads of Planning Scotland on the minerals skills audit that GM circulated. It outlines skills gaps in restoration aftercare, decommissioning and mine progress plans, legal and financial guarantees. See Annex F.

The terms of reference were agreed with the exception that Scottish Opencast Communities Alliance be invited onto the group and contact be made with the Mining Institute of Scotland enquiring as to their views on the opencast coal industry.

ACTION 2: GM to contact Malcolm Spaven (SOCA). GM to contact MIS.

RG provided an update on intentions to invite RBS Group to the next Finance Working Group meeting. In relation to finance DM commented that a big concern was the shortfall in cost recovery through planning fees.

3. Audit Scotland

RG welcomed Mark Roberts. MR explained Audit Scotland's (AS) interest in the operation of the coal sector and that long-term liability was now high on the agenda in relation to risk registers. AS has asked all local authorities with coal reserves for an update then the Controller of Audit will report in 2014/15.

Local authority capacity in financial expertise is a concern and is reflected in a 2011 report into skills drift and early retirement in planning.

AS gets the idea of an independent unit or shared service but stands by and supports LAs' impartial decision-making role. There is a question of value to the applicant from planning fees. AS is now seeing similar risks in landfill, renewables and with unconventional gas across the horizon. AS agrees these are national risks for example in relation to the habitats impacts in E Ayrshire.

RG asked for views on how this could be handled in view of no new money in LA budgets. GE referred to a shared service model in trading standards but there are few others: perhaps shared chemical expertise in the Fire Services.

In reaction to costs and risk, there was a brief discussion about minerals monitoring fees in England. DW reported that SEPA charge their duties to permit holders and experience difficulties in recovering costs from some.

ACTION 3: GM to circulate link to English monitoring fees legislation and other links.

<http://www.legislation.gov.uk/uksi/2006/994/regulation/2/made>

<https://www.gov.uk/government/publications/fees-for-monitoring-of-mining-and-landfill-sites-in-england-guidance>

<http://www.scotland.gov.uk/Publications/2003/10/18360/28108>

4. Coal Authority

The Coal Authority gave a presentation on effective regulation which is attached as Annex G.

They offered views on objectives (slide 3), an independent unit role (slide 4), site activity in Scotland (slide 6) and a contractual or other service (slide 7). It was explained that they were rich in technical skills lacking amongst some planning authorities (slide 5).

The CA is well versed in accounting for company, financial and other risks and being proactive on monitoring and early intervention through clear reporting which could assist the local authority enforcement role. The CA has a Scottish presence on mine licences and land securities.

Questioned about the Coal Authority enduring, it was pointed out that a favourable outcome was expected from the triennial review (slide 10). Questioned on conflict of interests the CA stated that yes, they licence sites but there is no agenda on the scale of the industry. GF commented that the public are more interested in environmental restoration and that expertise is required.

PB suggested there were attractions to the CA approach for the sake of consistency provided the group was clear about the outcome it is trying to secure.

ACTION 4: WM to circulate regulatory reform material on “primary authority”.

ISO 14001 Environmental Management – a globally recognized environmental management standard was also raised for further consideration.

JM asked if the ICU should have regulatory power. PL commented that was a matter for how much risk the Scottish Government was prepared for a unit to bear. SM raised the issue of CA’s statutory consultee status.

ACTION 5: GM to clarify with RB and internally.

SR commented compliance is best measured as being against a mine progress plan. RG said the group would need to be clear about available powers for advice from a unit or shared service not being ignored – i.e. a mandatory function.

DM commented that these days any advice would likely be accepted by LA members. NW asked who monitors the unit or service. MS supported DM's point insofar as LAs need to overcome failure risks.

ACTION 6: Potential for a service level agreement?

JM queried accuracy of CA data on employment.

RG thanked the CA representatives for their presentation to the group.

5. Update from Scottish Mines Restoration Trust

RG provided detail on SMRT and its subsidiary Mines Restoration Limited (MRL) activity across a number of sites. In July 2014 MRL, a wholly owned subsidiary of SMRT took ownership of the seven SRG unrestored sites and began developing plans to restoration plans. MRL have let out a contract for the care and maintenance of the sites whilst plans continue to be developed. The seven sites now under ownership are:-

- In East Ayrshire:- Dunstonhill, Powharnal/Dalfad and Shiel Farm and Spireslack;
- In Fife:- Blair House; and
- In South Lanarkshire:- Glentaggart and Mainshill.

The Trust will be working in partnership to source funding for restoration and to plan, project manage and implement restoration for the public benefit, with the aim of achieving the best restoration solution for each site in the light of financial and other resources available. Discussions on next steps are underway. The overarching aim of SMRT in respect of each site is to provide the local community with a restored landscape and where possible economic benefit.

6. Towards an independent compliance unit

The circulated diagram on LA coal site activity was questioned for its accuracy but GM commented this was LA-derived data and also posted ideas not final answers. RJ commented that regulation needs to account for volatility in the market and site by site. RG confirmed the idea of a unit or service applied to opencast only meantime but may be transferrable.

ACTION 7: Re-check to be undertaken.

7. Review of written evidence

GM said there had been little response for views and that Caroline Edmonstone would pursue outstanding replies from ICE, CIEEM, IEMA, RICS and IMechE.

GM circulated a page with headings to act as a template on which comments are welcome for a final report to the task force. Annex I refers.

ACTION 8: GM and RG agreed to fill out on basis of a unit or service for discussion at the next meeting including “status and ownership”. It can be based on legislative options, lessons from regulatory review, national standards and action on advice. GE offered to put it to COSLA leaders. It was agreed that it should also be run past community interests for their views.

8. Date of next meeting

ACTION 9: Caroline Edmonstone will canvass for dates avoiding 13-17 October 2014.

9. AOB

GM referred to parliamentary questions that Willie Rennie MSP had asked about the groups answered recently. These are S4W-22209, 10, 11, 12 and 13 and can be found on the Scottish Parliament website at this link

<http://www.scottish.parliament.uk/parliamentarybusiness/28877.aspx>

Scottish Opencast Coal Taskforce

Meeting of the Finance Working Group on Wednesday 30 July 2014 at 10.30am
at

Victoria Quay, Edinburgh

1. Welcome and introductions

Present:

Russel Griggs (chair)

Graham Marchbank (SG Planning)

Mark North (Kier)

Phil Garner (CoalPro)

Iain Cockburn (Hargreaves)

David Martin (Banks)

Michael McGlynn (Heads of Planning Scotland)

Lin Buntin (SEPA)

Elizabeth Morton (East Ayrshire Council)

Barry White (Scottish Futures Trust)

Robin Caldow (independent advisor)

Apologies were received from Niall Lothian (Heriot-Watt), James Fowlie (COSLA), Caroline Stafford and Stuart McKay (both Scot Gov)

7. (brought forward) Update from SMRT

RG updated the group on SMRT activities (Item 7). He explained that SMRT are now the owners of 7 of the residual SRG sites and work around these sites is progressing well.

4. (brought forward) Sites over the next 10 years

RG brought forward Item 4 for views from industry on how many sites might be brought forward over the next 15 years. This is considered coal price-sensitive (there's a feeling price may not move over next 2 years) and sensitive to exchange rates but if it rose £5-£10 per tonne interest might grow. CCS could also create a market. Activity also affected by UK Gov energy policy. There will certainly be interest in further sites in Scotland with indigenous coal attractive even to a declining coal-fired electricity sector.

ACTION 1: It was agreed that several sites could come forward so a process not a single solution on restoration guarantees was worth pursuing. It was agreed that secretariat should write to industry for written views accepting this will be caveated.

2. Terms of reference

The draft terms of reference were discussed and with two small adjustments agreed.

ACTION 2: Adjusted minutes to be circulated at next meeting for verification.

3. Future meetings

It was agreed to meet again in September 2014 on a date to be arranged.

ACTION 3: Caroline to trawl for dates.

5. Financial options

There was a detailed discussion about the bond market (no longer on the table) and caution in the banking sector. Even for an escrow a company might need to borrow; although safe, it is inefficient (borrow at 4% interest at 0.5%).

It was agreed PCGs have their place where companies are well diversified and can rely on real “scale” but that SMEs or potential new entrants to the industry may need to be assessed for their health. DM mentioned the protection which could be built into a PCG in circumstances where a parent company may fail, or where a parent may sell the guaranteed subsidiary. It was suggested that the provisions of the PCG covering alternative guarantees, or assignability, would be too complicated for planning officers to comprehend. It would be wrong to remove the PCG from the menu of options for that reason, as the planning authorities all have legal and financial officers who could lend their expertise in those circumstances in substitution for the planners.

GM advised that government would be looking for a policy rather than legislative fix. A “how-to” service rather than compliance unit providing such advice was supported. There was a discussion about company goodwill showing on balance sheet assets and a need to identify situations where “assets” are really liabilities.

Risks concerning parent company creditworthiness when shifted to subsidiaries to suit the financial statement of the holding company or wider group were recognised.

At IC’s suggestion it was agreed banks were best placed to offer simply worded on-demand guarantees. This transfers risk and policing of creditworthiness from the company (which is hard for SEPA or a LA to assess) to the bank. The local authority side was assured by industry that bank guarantees were secure whilst practice on PCGs could be modified to secure trigger points or trigger value [mention of the style of a bank covenant?] on revision and renewal. RC made the point that the life of a typical bank guarantee is often very much less than the working and after-care

periods associated with larger surface mine site - hence problematic for LAs at grant of any planning permission.

ACTION 4: EM to send GM East Ayrshire Council's May options report.

RC said there's a place for escrow accounts but it is highly specialised.

Points were made about where a local authority sits in the pecking order on the list of creditors when a bond is called (e.g. why the bank is typically first); and the availability of re-insurance. BW noted negotiation of this settlement is a difficulty.

Bonds should not be pegged at restoration value but be flexible to the situation on the ground as it unfolds. It was agreed further discussion about the lock-on figure within the section 75 agreement should be pursued.

BW cautioned that: wording of guarantee needs to be checked; that the quantum of the guarantee is adequate; and that there is a mechanism for renewal. He also suggested the UK Guarantee Scheme would be unlikely to cover opencast mining but might cover a railhead as UKGS guarantees infrastructure investment not liability.

LB stated the risk is to the country which is part of SEPA's balancing exercise in licensing. She queried why bank guarantees were not pursued in the past, the answer being that bonds were cheap backed by re-insurers market.

ACTION 4: RG to contact RBS for further advice to group.

6. Impact of planning law

Not discussed.

8. Update from Scottish Government Planning

GM was unable to provide an update owing to a fire alarm and building evacuation. The analysis of responses to the Scottish Government's consultation on Opencast Coal Restoration: Effective Regulation is now published at <http://www.scotland.gov.uk/Resource/0045/00457043.pdf>

ACTION 5: For ease of reference, attendees to note the analysis of responses to the consultation has a summary of finance-related questions on page 48 of the report to which should be added Q16B. For future deliberation, attendees should also be mindful of response rates to yes/no questions which vary from 43% to 86%.

ACTION 6: Group to comment if required, on handouts showing a schematic of an independent compliance unit including one populated with real sites data per authority.

9. Guest speakers

ACTION 7: RG agreed to contact banking sector and invite a speaker to next meeting. He will also speak about derisking PCGs to Niall Lothian who was unable to attend.

10. AOB

The meeting finished 5 minutes early owing to a fire alarm and attendees dispersed.

Scottish Opencast Coal Taskforce
Meeting of the Finance Working Group on
Friday 10 October 2014 at 1.30pm at
Victoria Quay, Edinburgh

1. Welcome and introductions

Russel welcomed everyone to the meeting.

Present: Russel Griggs (chair), Graham Marchbank (SG Planning), Phil Garner (CoalPro), Iain Cockburn (Hargreaves), David Martin (Banks), Craig McArthur representing Depute Chief Executive

(East Ayrshire Council), Lin Bunten (SEPA), Robin Caldwell (Independent Advisor)

Caroline Edmonstone (Scottish Government)

David Salter and Rob Kellar (RBS) Item 3 only via teleconference

Apologies: James Fowlie (COSLA), Mark North (Keir), Barry White

(Scottish Futures Trust), Elizabeth Morton (East Ayrshire)

2. Minutes and actions from previous meeting held on 30 July 2014

The minutes of the previous meeting were approved, pending some minor edits to be made. The East Ayrshire Council May 2014 decommissioning, restoration, aftercare and mitigation financial guarantees report has now been received. It is available at this link:

<http://docs.east-ayrshire.gov.uk/crpadmmin/2012%20agendas/cabinet/21%20may%202014/Decommissioning,%20restoration,%20aftercare%20and%20mitigation%20financial%20guarantees.pdf>

Action: Caroline to update the minutes reflecting changes sought.

3. Bonding

Rob Kellar and David Salter from RBS took the group through their presentation on RBS Bond processes which the Chair and the group found very useful.

The sub-group asked a range of questions arising from the presentation, covering the absence of a need for an evidence-base in the event of a claim. RBS stated that banks are not as actuarial as insurance companies in the financial guarantee market.

A bank guarantee was described as the bank's risk which is where it differs from a PCG.

NL asked about the banks' consideration of company liquidity after 6 months and RBS stated they use a cash model and a judgement about what it would take for a company to go under. RBS confirmed collateral could include cash but also property.

CN continues to see the restoration of abandoned opencast coal sites as a potential very high financial risk to local authorities. In the event of a site being abandoned the full cost of implementing the restoration and aftercare works may require to be carried out by a council that is then reliant on recovering the expenditure from the bondsman.

The carrying out of a restoration scheme will require accurate surveying of the site for the preparation of bills of quantities and tender documents and a very lengthy and complex procurement process all at initial very high cost outlay to a local authority. A local authority is unlikely to have sufficient skilled resources to carry out this procurement procedure.

Equally, by being a signatory to a s75 agreement, a local authority may have entered into a contractual obligation with landowners who may take issue if a council is unable or unwilling to carry out the work timeously and expose itself to financial risk.

The failure of an opencast mine to be restored is a breach of planning control.

It is felt that the enforcement regime is not designed for the eventuality of restoring large water filled voids such as may occur at surface coal mines by direct action. Cost recovery is a last resort for planning authorities owing to the investment risk, counter-action and low level of action in the courts. Complications may arise notwithstanding the joint and several responsibilities of owners, operators and potentially previous owners. It was noted that historically, that ability of recourse by a Local Authority against a landowner had sometimes been complicated by potential threat of counter-claims around the failure of Local Authorities to fulfil their own obligations to the landowner under the same s75 agreement.

Discussion took place over the practicality of trapping landowner royalty payments, or a portion thereof, in escrow accounts pending completion of restoration. **Industry consensus was that this would lead to landowners demanding higher royalty rates which could impact the viability of the proposed scheme.**

DM and IC agreed Joint Ventures arrangements between landowners and mining companies to achieve greater landowner accountability were felt to be too complex on commercial grounds to implement in practice.

PG reminded the group that bank guarantees might not be available to all operators dependent on their business portfolio, gearing etc., at a point in time and that cash bonds in escrow accounts were a potentially robust alternative.

There was a suggestion that as long as monitoring was conducted, and a s75 compliant bond was in place, Local Authorities should, as a last resort, already be in a position under planning laws to enforce s75 restoration obligations against a landowner in the event of a failure of the an operator and a shortfall on actual restoration funding..

Action: RG to capture salient points of discussion in draft report. A role for SFT to get involved in developing and supporting this area to be identified.

4. SEPA's PPC Charging Scheme

Lin took the group through the paper circulated before the meeting and they agreed this was an interesting concept and worth considering.

5. Final reporting / future meetings

RG and GM are working on the draft recommendations to put before the Coal Industry Taskforce which the Energy Minister, Mr Ewing, chairs. Any future correspondence with this group will be done via email.

Action: A draft report will be circulated to both sub-groups during November.

6. AOB

There was no other business arising.

**Meeting of the Scottish Opencast Coal Task Force Compliance and Monitoring
Working Group on Tuesday 4 November 2014 at 1.30pm**

Victoria Quay, Edinburgh

Present:	Russel Griggs	Chair
	Graham Marchbank	SG Planning
	Philip Baker	Banks
	George Fleming	AEECOW
	David McDowall	East Ayrshire Council
	David Wilbraham	SEPA
	Ross Johnson	SNH
	Jerry Mulders	Community
	Malcolm Spaven	Community
	George Eckton	COSLA
	Alan Doak	AED Planning
	Simon Bingham	SEPA
	Sandra Reid	Regulatory Review Group
	Graeme Walker	SNH
	Stuart McKay	SG
	Caroline Edmonstone	SG
Apologies:	Jim Birrell	Fife Council
	Mark North	Kier Mining
	Elizabeth Morton	East Ayrshire Council

1. Welcome

Chair Russel Griggs (RG) welcomed everyone to the meeting and the above apologies were noted.

SR was then invited to speak about National Standards. Sandra reminded the sub-group that national standards do not apply in planning. Scottish Government is still working on scope of primary authority. JM asked whether in legislation the enforcing

authority has to take the primary authority view and it was commented they have to take it into account.

2. Minutes from the previous meeting held on 27 August 2014

The minutes were approved as an accurate record of discussions and all actions noted as either complete or in progress.

3. Update from the Finance Working Group

RG reminded the sub-group that at the last meeting of the finance working group on 10 October representatives from RBS took the group through a presentation on bank guarantees, which is their preferred option. This guarantee is an agreement between the bank and the local authority (the LA does not need to conduct the due diligence).

It was clear that members of both groups were keen to have a more user-friendly approach to guarantee templates and welcomed the news that Scottish Government finance teams would play a part in this process also, given that they carry out a similar function for other complex local authority work streams. SG will also rate the banks on a national standards approach.

There was also a discussion around landowners taking more responsibility. In respect of bonding and enforcement, multiple ownership difficulties had been discussed by the finance sub-group and the complexity and risk of JV is understood. An approach to representative body Scottish Land and Estates (SLE) was supported.

Action 1: GM to contact SG Finance Directorate to explore SG/SFT/LA provision of a structure on bank guarantees.

Action 2: GM to consider a way of approaching SLE in the report to the Task Force.

4. SEPA compliance scheme

SEPA have been measuring compliance since 1998 with their scheme in place since 2009 which looks at 10,000 site licences across the country. SB noted that SEPA's annual report on compliance is due to go live on Wednesday 5 November 2014.

The group agreed that this was a helpful incentive to drive compliance and lengthy discussion ensued around this. Generally SEPA's compliance monitoring has been annual but is moving to continuous rolling. DM highlighted planning authority enforcement charters; the fact that a planning condition may ask SEPA to do certain things and asked how reserving enforcement action would chime with SEPA-style licensing. This was important for public perceptions of who does what and why.

Action 3: PB agreed to provide GM with a copy of the compliance scheme that Banks adhere to in Northumberland.

Action 4: PB to provide JM with community liaison papers.

Russel then invited MS to take the group through the paper which he circulated prior to the meeting providing the thoughts from the Scottish Opencast Communities Alliance (SOCA). These fell into three headings: strategic context; shared services/new processes and assessing financial information. His concern was the scaling back of restoration. Offering operators some slack was not supported by SOCA. His paper referred to stalled sites to which the new regime should also in SOCA's view apply. Appropriate skills gaps and commercial confidentiality must be overcome as far as possible in assembling adequate financial guarantees.

RG commented that disciplines in the system e.g. a £10m bank guarantee would prevent a £10 overdraft facility. It was commented that this may make the industry a business for big safe companies.

Action 5: RG offered to show MS around a site with scaled back restoration which was supported by the community.

5. Draft report to Task Force by sub-groups

GM and RG are currently working on the draft report. The group notably COSLA noted the tight timescale for comments in order to meet the deadline for the final report to go to the next and final meeting of the Scottish Coal Industry Taskforce on 16 December with, where necessary on actions that require it, a consultation period thereafter.

The group all agreed that the report should reflect the need for a robust system that can operate consistently.

GM had circulated a graphic to take the group through highlights of the report and noted comments made by the group to feed into it, reminding the sub-group it should be their report. The generally front-loaded non statutory ways of improving the planning process were broadly supported. On the matter of a statutory mine monitoring fees regime RG commented that the idea of mine monitoring fees would be to assess number of visits over predicted life of site and require a site lump sum up front for specified purposes.

PB commented this may be seen as an up-front disincentive to investor confidence

Action 6: Draft report to be circulated to both sub-groups by the end of November.

6. Any other business

There was no other business raised.

ANNEX F – Heads of Planning Scotland Minerals Skills Paper



ER-14-01-03

Minerals Planning Skills Programme

Overview

1. The Scottish Government has requested that HoPS develop a tailored programme of training in minerals planning for local and national park authorities. This request has been supported by a £20,000 fund. The objective is to “tackle the neediest of authorities, perhaps those with significant minerals workloads”. The training should be open to all, however, to “encourage succession planning and bring forward a new generation of planners with a background appreciation of the sector and confidence to marshal all the information that is associated with minerals applications”. The funding must be used for the sole purpose of minerals planning training and provide some enduring benefit.
2. HoPS asked the Improvement Service to become involved in the development and delivery of this programme, linked to the work of the Planning Development Programme. The intention is for the Improvement Service to manage the creation and implementation of a programme of minerals planning skills and knowledge development opportunities, with oversight and guidance provided by the HoPS Energy & Resources sub-committee.

Minerals Planning Workload

3. In 2012/13, 35 local and 23 major minerals applications were decided by 15 authorities. In 2013/14, 15 major and 49 local minerals applications were decided by 16 authorities. Excluding legacy cases, there was a significant improvement in decision making timescales in relation to both major and local applications from 2012/13 to 2013/14. Those authorities with a more ‘significant’ minerals workload (3+ major applications and/or 10+ local applications decided in last 2 years) are Aberdeenshire, Argyll & Bute, Dumfries & Galloway, Fife, Highland, Midlothian and North Lanarkshire.

Skills Requirements

4. In July 2014, a minerals planning skills questionnaire was circulated to all 34 planning authorities. A copy of the questions is provided in Appendix 1. Responses were received from 22 authorities (as of 13th August 2014). Although not all of the authorities with a more significant minerals workload responded to the questionnaire (specifically Dumfries & Galloway, Fife, Midlothian and North Lanarkshire), the responses still provide a useful basis for targeting of knowledge development opportunities.
6. A key question in the survey was about the current availability and level of knowledge and skills in authorities. The question related to planning staff and internal specialists outwith the planning service. The results are set out in the table below. A particularly noteworthy result is that the highest development needs (adequate but needs developing/limited/non-existent) relate to industry/technical knowledge, specifically:
 - Aggregates awareness (geology, extraction methods, industry regulation, market conditions etc.)
 - Restoration and aftercare
 - Decommissioning
 - Mine progress planning, phasing of extraction and site monitoring.

Legal agreements and financial guarantees (including bonds) are also identified as a significant development need. This, however, is a wider issue for planning authorities so any skills/knowledge development opportunities will need to be considered in that context.

	Very good/ solid	Good but could be developed	Adequate but needs developing	Limited	Non- existent
Aggregates Awareness*	5%	18%	36%	32%	9%
Ecology/biodiversity	36%	27%	32%	5%	-
EIA (including hydrology noise, air quality etc.)	18%	32%	50%	-	-
Transportation of extracted materials	18%	27%	41%	9%	5%
Restoration and aftercare	5%	13%	41%	41%	-
Archaeology/cultural heritage	41%	18%	27%	9%	5%
Landscape	36%	13%	36%	13%	-
Decommissioning	5%	9%	41%	32%	13%
Legal Agreements and financial guarantees	5%	18%	41%	32%	5%
Mine progress planning, phasing of extraction and site monitoring	5%	18%	36%	32%	9%

*Geology, extraction methods, industry regulation, market conditions etc.

Support from the Minerals Industry

5. In 2011, the IS worked with the Minerals Products Association to deliver 4 events in quarries across Scotland. These events provided a general overview of development management, planning policy and site management for officers from 24 authorities, and were well attended. Benefits from participation have not been assessed but initial feedback from the events was very positive. These events were only possible thanks to the involvement of minerals operators and the hosting of events at working quarries.
6. The renewed commitment to developing minerals planning skills and knowledge in planning authorities has been discussed with the Minerals Products Association and its member companies. The industry is keen to support the programme, within the context of the reduced workforce resulting from the recent recession. We therefore intend to utilise the expertise available within the industry as much as possible. John Sheridan (Regional Director, Minerals Products Association Scotland) is also a member of the Minerals Products Qualification Council, therefore providing helpful contact with academia, including the University of Derby Centre for Mineral Products Professional Development (<http://www.derby.ac.uk/corporate/sectors/minerals/>).

ER-14-01-03

Possible Programme Content

7. It is proposed that initial effort is focused on running a short series of events involving industry experts which cover various aspects of aggregates awareness, progress planning/phasing, site monitoring, decommissioning and restoration/aftercare. Each event will include a site visit to one or more operational quarries. One benefit of these events will be the opportunity for officers from different authorities to network and learn from each other.
8. Alongside these events, links to academic institutions will be made to explore possible contributions they can make. It is also likely that the issue of different models for providing expertise across local authorities will require discussion.

Next Steps

9. Following discussion about the proposed programme content at the Energy & Resources sub-committee, a more detailed proposal will be drawn up which can form the basis for gaining the commitment of industry experts. The detailed proposal will be drafted by October, with a view to running events during the winter months.

ANNEX G – Presentation to Compliance Working Group on Effective Regulation



Scottish Opencast Coal Task Force
Compliance and Monitoring Working Group
27 August 2014

Phillip Lawrence
Simon Reed
Rachael Bust





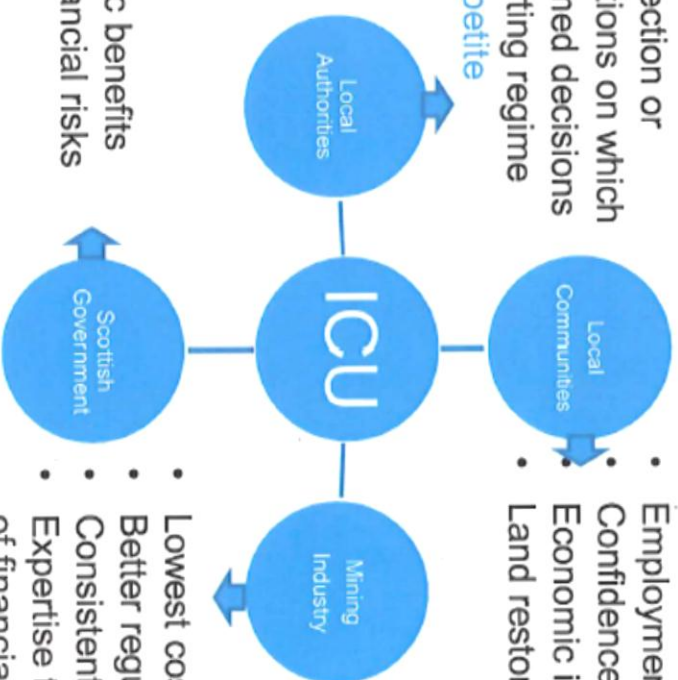
Effective Regulation

Content

- Desired Outcomes
- Role of an Independent Unit
- Why use the Coal Authority?
- Further benefits
- Discussion points and conclusion
- Appendices

Desired Outcomes

- Clarity – either in direction or quality recommendations on which they can make informed decisions
- Monitoring and reporting regime that matches **risk appetite**
- Protect public purse

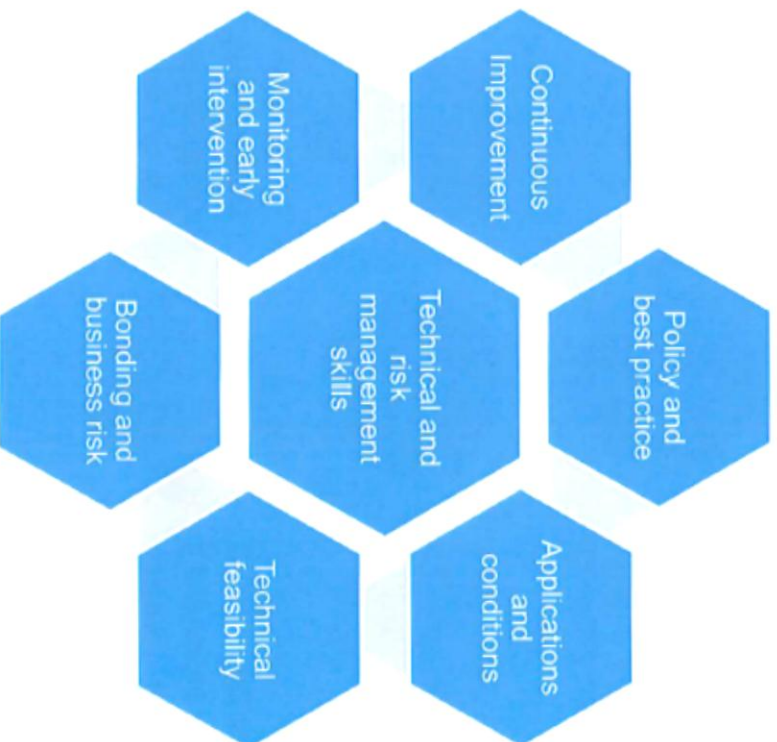


- Employment
- Confidence and transparency
- Economic income for land owners
- Land restored to use

- Delivering economic benefits while managing financial risks

- Lowest cost base
- Better regulation
- Consistent approach
- Expertise that supports matching of financial bonds with mining profile and **LA risk appetite**

Role of an Independent Unit



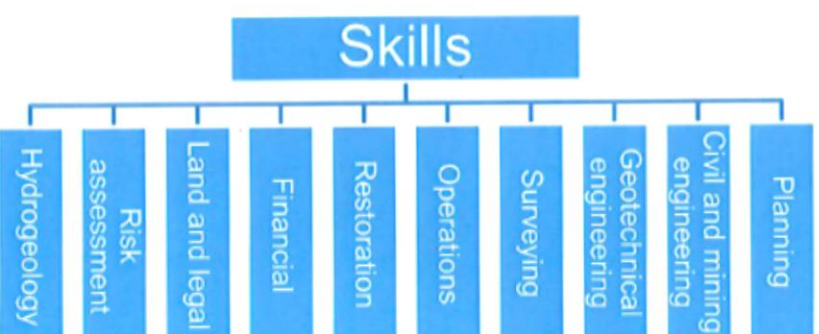


The Coal Authority

Why use the Coal Authority?

Core business and in line with strategy

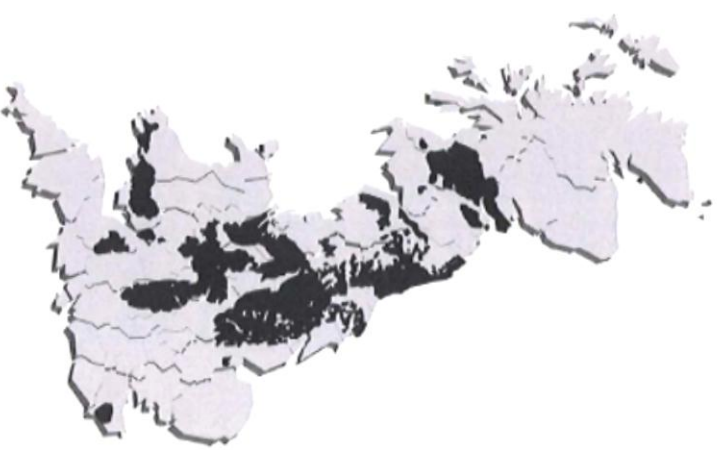
- Employ these core skills
- Presence in Scotland
- Complementary to existing role
 - Planning Statutory Consultee
 - Granting mining licences
 - Obtaining security
- Complementary not a conflict of interest
- We are already providing these services
- Wider regulation role
 - Bring efficiencies
 - Provide critical mass
- Strategy to grow our role
 - Metal mine remediation



Coal Mining Licences at July 2014

	Scotland	England	Wales
Planning Appeal	3	4	4
Pre-operating Approved	0	1	0
No. of Planning Authorities involved	17	9	3
Developing	9	8	3
Producing	1	2	1
Operating Restoring	9	7	6
No. of Planning Authorities involved	2	3	1
Care & Maintenance Abandoned	5	8	5
Non-operating No. of Planning Authorities involved	10	0	1
SITES	1	1	1
TOTALS	3	1	2
PLANNING AUTHORITIES	43	27	17
	9	12	7

Approved = decision by Planning Authority or on appeal



Points for discussion

- Contractual service or new regulation?
- Mandatory or optional for local authorities?
- Funding model
- Multiple suppliers or centre of excellence?

Conclusion

We support a change and an independent unit

See benefits

- Consistency
- Economies of scale and depth of skills

We have complementary skills and an aligned strategy

We can provide whether part of wide Scottish regulator or UK service

We believe we can provide to Government and industry an efficient solution

Appendices

What we do for the public

- Resolve the £1bn in-perpetuity physical impacts of coal mining
- Expertly manage safety issues to give peace of mind
- Provide creative solutions to protect the environment
- Evaluate impacts and communicate risks to inform decision-making
- Regulate the coal industry and support Governments on Coal Industry matters to protect the public purse
- Generate income which covers 35% of our costs and reduces public funding
- Continuously pursue a reform and better regulation agenda to ensure we are fit for the future and support Government's agenda

Triennial Review Outcome – Stage 1

- Our four functions are valuable and the Authority should be maintained
 - Licensing of coal industry
 - Subsidence and public safety
 - Treatment of polluted mine water
 - Provision of mining information
- The functions were best delivered as an NDPB
- Broadening of our role is encouraged

Funding Options

Options	Comments
Operator: Based on time spent	<ul style="list-style-type: none"> • Encourages efficient and open process • More efficient operators benefit from providing quality data • Low risk sites benefit
Operator Levy on pence per tonne	<ul style="list-style-type: none"> • Variable tonnage and hence funding levels • Not reflect the operator risk
Operator Enhanced planning fee	<ul style="list-style-type: none"> • Set by statute so not easy to adjust
Government	<ul style="list-style-type: none"> • Tax burden

ANNEX H – Towards a Shared Service

SCOTTISH OPENCAST COAL TASK FORCE

COMPLIANCE AND FINANCE WORKING GROUPS

TOWARDS A SHARED SERVICE – SKELETON

Background

Purpose

Remit

Planning context

Skills gaps

- Restoration and aftercare
- Mine progress plans
- Legal agreements
- Financial guarantees
- Env and ECOW

Nature of the Service and Local Authority relationships – buy-in and buy-out – choice or not. Mandatory “advice” – SGLD COSLA view

“Customer base” – planning authorities

Suppliers

- Consultancy
- Coal Authority
- Developers
- SG
- SFT

Costs, maintenance, support

Footnote: lesson for other sectors.

COMMENTS AND CONTRIBUTIONS WELCOME TO

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ANNEX I

Scottish Planning Policy (extracts)

Planning Policy on minerals including coal is provided under the Promoting Responsible Extraction of Resources heading

NPF Context

234. Minerals make an important contribution to the economy, providing materials for construction, energy supply and other uses, and supporting employment. NPF3 notes that minerals will be required as construction materials to support our ambition for diversification of the energy mix. Planning should safeguard mineral resources and facilitate their responsible use. Our spatial strategy underlines the need to address restoration of past minerals extraction sites in and around the Central Belt.

Development planning

237. Local development plans should safeguard all workable mineral resources which are of economic or conservation value and ensure that these are not sterilised by other development. Plans should set out the factors that specific proposals will need to address, including:

- disturbance, disruption and noise, blasting and vibration, and potential pollution of land, air and water;
- impacts on local communities, individual houses, sensitive receptors and economic sectors important to the local economy;
- benefits to the local and national economy;
- cumulative impact with other mineral and landfill sites in the area;
- effects on natural heritage, habitats and the historic environment;
- landscape and visual impacts, including cumulative effects;
- transport impacts; and
- restoration and aftercare (including any benefits in terms of the remediation of existing areas of dereliction or instability).

Development management

244. Consent should only be granted for surface coal extraction proposals which are either environmentally acceptable (or can be made so by planning conditions) or provide local or community benefits which clearly outweigh the likely impacts of extraction. Site boundaries within 500 metres of the edge of settlements will only be environmentally acceptable where local circumstances, such as the removal of dereliction, small-scale prior extraction or the stabilisation of mining legacy, justify a lesser distance. Non-engineering works and mitigation measures within 500 metres may be acceptable.

247. The Scottish Government is currently exploring a range of options relating to the effective regulation of surface coal mining. This is likely to result in further guidance on effective restoration measures in due course. In the meantime, planning authorities should, through planning conditions and legal agreements, continue to ensure that a high standard of restoration and aftercare is managed effectively and that such work is undertaken at the earliest opportunity. A range of financial guarantee options is currently available and planning authorities should consider the most effective solution on a site-by-site basis. All solutions should provide assurance and clarity over the amount and period of the guarantee and in particular, where it is a bond, the risks covered (including operator failure) and the triggers for calling in a bond, including payment terms. In the aggregates sector, an operator may be able to demonstrate adequate provision under an industry-funded guarantee scheme.

ANNEX J

PROPOSED LOCAL AUTHORITY FLIER – printable as an A5 sized four pager – two columns per page.

[name and crest of local authority]

GOOD PRACTICE GUIDANCE ON SURFACE COAL MINING DEVELOPMENTS

Why this guide has been produced

This guide provides information on recent work to ensure that the development of surface coal mines follows good practice. It follows a 2013 Scottish Government consultation - Opencast Coal Restoration: Effective Regulation³⁵ and work by the Scottish Opencast Coal Task Force.

What this guide is about

This council is responsible for the planning process but besides that, development of good practice covers areas in associated professions including:

- Environmental impact assessment
- Mining engineering
- Legal services
- Environmental and ecological services
- Hydrology
- Acoustics
- Financial services

The guide is also about agreed and forthcoming changes to improve the planning process for surface coal mines. It will be kept up to date as new practices emerge.



³⁵ <http://www.scotland.gov.uk/Publications/2013/12/7688>

Who this guide is for

Applicants are recommended to adopt the roadmap in this leaflet at appropriate points in the development management process.

Landowners should be aware of their responsibilities. Estates and land management is a specialised and intensive business; the relationship with surface mine operators is crucial to the long-term success of the surface mine and the productivity of the land post-extraction. With royalties comes responsibility and that will be evident in any legal agreement. It applies to the landowner as well as to the operator and successors in title.

Communities in coalfield areas may benefit from:

- economic activity and jobs
- restoration of long-term dereliction
- improved countryside access

Disbenefits may include:

- lorry traffic
- dust
- blasting
- noise

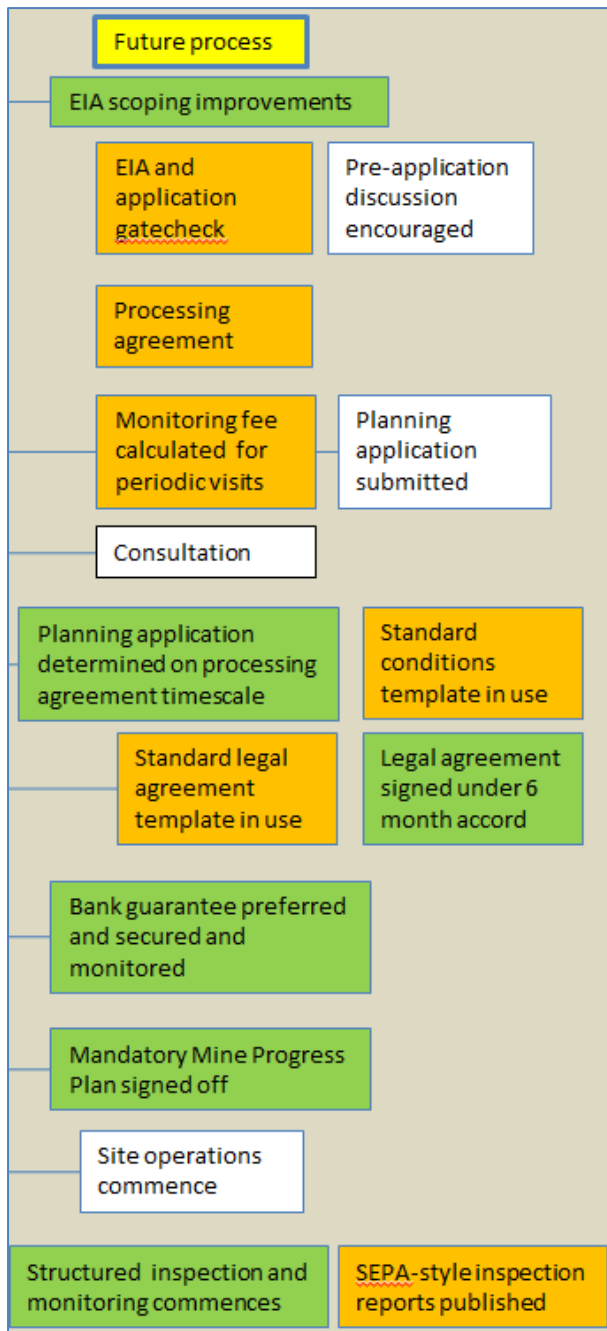
These factors are already addressed in this council's local development plan or supplementary guidance and in Scottish Planning Policy and advice.

Where this guide applies

To [name of authority] only.

Similar guides are available from other local authorities with coal resources in order to provide consistent "national standards".

Good Practice: Areas of focus



The Task Force has identified new processes (coloured amber) and amended processes (coloured green) that can enhance the progress of an application for a surface coal mine.

EIA scoping improvements

EIA scoping allows all relevant matters to be “scoped-in” rather than missed until later which can lead to the need for addenda, increased costs and delayed decisions.

The Scottish Government, SEPA and SNH are working to improve the information required in Environmental Statements for surface coal mines focused on maps, the development’s infrastructure, sensitivities and significant environmental impacts.

Gatechecking

Gatechecking is simply pre-planning quality assurance about the process.

This council will now require applicants for surface coal extraction to engage in a pre-application discussion in order to ensure that once the application is submitted it is associated with all the necessary information in order to improve quality. There is no fee.

Processing agreements

[describe]

Where the applicant enters into a processing agreement, the planning authority will publish it on-line.

Legal agreements

Agreements under section 69 of the Local Government (Scotland) Act 1973 or section 75 of the Town and Country Planning (Scotland) Act 1997 are often needed to deal with matters that cannot be prescribed by a planning condition. Until a legal agreement is signed a permission cannot be implemented. Legal agreements will be signed in a timely manner in accordance with Planning Performance Framework [\[link\]](#).

Agreements under section 96 of the Roads (Scotland) Act 1984....

Legal agreements may cover a range of matters, importantly; the nature of the financial guarantee that will be required from the operator to ensure that restoration and where necessary aftercare is secured.

Financial guarantees

The Task Force has adopted a report paving a way towards new methods of financial assurance on site restoration. A range of options is available; secure and adequate funding is absolutely fundamental to adequate site completion. This council [xxxxxxxxxxxxxxxxxxxx]

Scottish Government, working with the Scottish Futures Trust and [xxxxxxxx] has developed.....

Mine Progress Plans

These plans are prepared for submission with the planning application and act as guides to a surface mine during its inception, extraction, progressive restoration and aftercare programme. A mine progress plan will be flexible enough to accommodate changes in ground conditions, the weather or other circumstances. "Material" change to the plan may require a fresh planning application and if so, monitoring and compliance procedures can be altered to ensure that breaches of planning permission are avoided.

Site monitoring

This is the responsibility of [name of council] as planning authority but it may be conducted with the assistance of a shared or bought-in service e.g. through consultancy where specialist skills not available to the council in-house are required. It will normally be funded by the operator but be conducted independently.

Inspection Reports

These will be made available periodically, on time and on-line.

What you can expect from this good practice

Where surface-mined coal can be worked satisfactorily this good practice will be expected to apply.

Benefits of the good practice guidance include:

Applicants: can expect to be provided with more certainty about the information required and the service they will receive

Planning authorities: will target effort and resources more efficiently and effectively

Landowners: heightened awareness of land management responsibilities and environmental stewardship

Elected members: will be better sighted on the financial provision associated with restoration

Agencies and statutory consultees: will be party to processing agreements where there are particular sensitivities. Their service level agreements will be adjusted to reflect expectations on surface coal mine development proposals

The Scottish Government: is drafting a further consultation on the range of improvements to effective regulation that the Task Force supports. It is planned to consult during 2015. This may include Regulations to introduce a focused and limited mine monitoring fees regime. It is expected that if they are introduced this council will be able to apply them flexibly depending on the nature of the application and site conditions.

The Scottish Government will update planning advice to reflect good practice when the Task Force's work streams are concluded

Communities: located in coalfield areas should expect improved levels of transparency in matters relating to applications with open access to associated documentation that is in the public domain. Community liaison committees and technical working groups run by the council can be expected.

Communities and individuals should be confident that the good practice this leaflet describes is to serve their best interests in the context of land use planning policy, planning decisions and the energy sector more widely.

During 2015, further work will be done on community engagement arising from some of the relevant workstreams of the report to the Task Force. Communities will be involved in that work.

Sources of help

British Geological Survey

The Coal Authority

Coal Pro

SNH

SEPA

Scottish Futures Trust

Scottish Land and Estates

Scottish Government

Summary

Most of this good practice is about doing things that are done well better: for a purpose.

For as long as coal provides an important part of this country's energy mix, indigenous reserves where they can be worked will remain a competitive alternative to imported coal, for the electricity, domestic, cement and other markets.

Status of development plans

Section 25 of the Town and Country Planning (Scotland) Act 1997 requires that the determination of planning applications shall, be made in accordance with the plan unless other material considerations indicate otherwise.

The development plans of this authority relevant to surface coal mining can be found at

[local authority hyperlink]

Enforcement

The planning authority's enforcement charter can be found at

[insert hyperlink]



ANNEX K

Coal Task Force – Towards Better Regulation Report: Meeting with HOPS, COSLA and Scottish Government – 15 April 2015

Workstreams to be completed (additional to those identified in draft report AND NOW REFERRED TO IN THIS REPORT). These were largely proposed by Scottish Government to enhance visibility and oversight.

... ..on monitoring

- Site visit proforma developed
- **Completed proformas submitted to SG (recipient to be identified)**
- Guidance on non-material variations produced
- Material variations regulated
- Compliance officers employed
- Timetable for site visits secured
- Tests and accreditation of compliance officers produced
- PAN 50 Noise annexe revisited

... ..on finance

- Quarterly bond review proforma developed (guided by LA finance officers)
- **Bond review conducted and submitted to SG**
- Agreed bank guarantee statement for all planning authorities drafted
- Meeting with banks, LA risk and finance officers to be held (RG)

... ..on enforcement

- SG ability to serve an enforcement notice and if so would it be a useful lever?
- Minerals section of Enforcement Circular revised
- **[an action that submits an indicator to SG was not agreed but it was later considered by SG that this could concern enforcement charter or planning performance framework indicators on sector-specific breaches and resolutions: provided in summary updates]**

... ..on community liaison

- Structure for periodic community meetings including mandatory site visit (retrospective) developed
- **Community meeting reports submitted to SG**

... ..on COSLA political buy-in

- has been stalled by the timing of Task Force meetings and COSLA Leaders' meetings but will be pursued at official level.

Coal Task Force – Towards Better Regulation Report: Meeting with SOCA, CoalPro, SOLAR and Scottish Government – 17 April 2015

Workstreams to be completed (additional to those identified in draft report AND NOW REFERRED TO)

- Regulation needs to be fit for purpose in the worst of market conditions
- Balance between local democracy and central oversight
- A single checklist with the local authorities about reporting quarterly to Scottish Government on site activities, financial guarantees, enforcement and community liaison may be possible arising from discussion on 15 April 2015
- SG and SOLAR to explore time-limited consents
- A more forceful position on enforcement of financial guarantee provisions insofar as they relate to mine phasing and restoration funding.
- Better development planning picture of coal in future
- Shared website
- The sub-group report to task force should be fit for purpose as a platform for a ministerial statement
- Bank guarantee template – joint work with HOPS
- Recognised that Escrows also affect bank liquidity
- A financial guarantee is not a payment so SOLAR and SG looking at whether a condition or a legal agreement is appropriate.
- Recognise that a future developer inheriting legacy sites may suffer increased exposure
- Community liaison would benefit from technical working group insights.

Coal Task Force – Towards Better Regulation Report: Meeting with RBS Group, SOLAR, HOPS, Hargreaves, and CMS Law and Tax – 29 April 2015

The purpose of the meeting was to bring further clarity to the group about the effectiveness of bank guarantees as a financial instrument concerning the restoration of surface coal mines in the event of a default on condition or insolvency situation.

A discussion was held covering bank, corporate, local authority and Scottish Government risk. The transfer of risk to the bank underpins the rationale of a bank guarantee, removing other parties to the agreement (namely planning authority, operator and/or landowner) from the liability to incur and/or recover costs. The usual milestones and governance (monitoring) processes apply but the advantage of a bank guarantee is that it is an on-demand irrevocable instrument. The guarantee takes account of all up-front mining costs conducted and calculated by an appropriate professional.

After further discussion about skills shortages, bank due diligence, corporate structures and legal concerns, it was agreed that HOPS and SOLAR would agree headings for a draft guidance note on bank guarantees. That would then be shared with the RBS representative's technical team for further consideration, report back and shaping into a final note which accommodates the necessary explanation of

sometimes unfamiliar terms, the appropriate planning and legal connections for circulation amongst local authorities.

GLOSSARY

Breach of condition

An action leading to breaking the terms of a condition in a planning permission and depending on the severity of the breach, leading to a requirement to remedy the breach either by agreement or powers available under the enforcement action regime.

CfD

Contracts for difference. See this website:

<https://www.gov.uk/government/publications/electricity-market-reform-contracts-for-difference>

CCS

Carbon capture and storage of CO₂.

CIPFA

The Chartered Institute of Public Finance and Accountancy, is the professional body for people in public finance.

CLC

A community liaison committee.

CoalPro

Confederation of UK coal producers. <http://www.coalpro.co.uk/index.shtml>

Consultation authorities

The organisations consulted under statutory requirement in strategic environmental assessment (SEA). They are Historic Scotland, Scottish Environment Protection Agency and Scottish Natural Heritage.

COSLA

The Convention of Scottish Local Authorities.

DECC

The UK Government's Department of Energy and Climate Change.

Direct action

In enforcement of planning control, where a person does not fully comply with an enforcement notice, planning authorities have 'default' powers to enter land and carry out any unfulfilled requirements of a notice themselves.

HOPS

Heads of Planning Scotland (HoPS) is the representative organisation for senior planning officers from Scotland's local authorities, national park authorities and strategic development planning authorities.

LPA

A term for local planning authority in England and Wales. In Scotland the correct term is planning authority.

Primary authority Scottish regulators listed in Schedule 1 of the Regulatory Reform (Scotland) Act 2014

Accountant in Bankruptcy

Food Standards Agency

Healthcare Improvement Scotland

Local authorities (excluding planning authority functions)

Scottish Charity Regulator

Scottish Environment Protection Agency

Scottish Fire and Rescue Service

Scottish Housing Regulator

Scottish Natural Heritage

Social Care and Social Work Improvement Scotland

VisitScotland

Responsible Authority

The term used for the owner of the plan, policy or programme under strategic environmental assessment.

Section 75 agreement

An agreement entered into by a planning authority with any person interested in land for the purpose of restricting or regulating the use of land either permanently or during such period as may be prescribed by the agreements (Section 75 of the Town and Country Planning (Scotland) Act 1997) as amended.

Section 96 agreement

An agreement in terms of Section 96 of The Roads (Scotland) Act 1984 if it is considered likely that extraordinary expenses may be incurred as a result of heavy vehicles travelling on local roads to and from the site.

SEPA

Scottish Environment Protection Agency

SNH

Scottish Natural Heritage

SOCA

Scottish Opencast Communities Alliance.

SOLACE

Society of Local Authority Chief Executives and Senior Managers

http://www.solace.org.uk/branches/branch_scotland/

SOLAR

The Society of Local Authority Lawyers & Administrators in Scotland

<http://www.solarscotland.org.uk/>



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