



ENERGY AND RESOURCES SUB-COMMITTEE

Position Statement on the Operation of Financial Mechanisms to Secure Decommissioning, Restoration and Aftercare of Development Sites



OCTOBER 2018

ENERGY AND RESOURCES SUB-COMMITTEE MEETING

Position Statement on the Operation of Financial Mechanisms to Secure Decommissioning, Restoration and Aftercare of Development Sites (Updated 2018)

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PURPOSE OF THE POSITION STATEMENT

The Position Statement seeks to:

1. identify the best financial tools available to secure decommissioning, restoration and aftercare of windfarm, mineral, landfill and coal extraction sites
2. develop a standardised section 75 Agreement template
3. establish a standardised template for assessment of restoration, aftercare and decommissioning costs
4. establish good practice for the review of financial guarantees through the life time of the development
5. establish standards for compliance and monitoring

The Heads of Planning Scotland (HoPS) Working Group considered the nature of the issues, known good practice, current and historical challenges and emerging issues and sought to identify what further actions are needed to address potentially significant environmental and financial risks associated with the restoration, aftercare and decommissioning of future windfarm, mineral, landfill and coal extraction sites.

It is evident from the Working Group's research that there is a lot of good work being undertaken around Scotland by individual planning authorities and at national level to address many of these issues. However, it is also apparent that there is a general lack of skills, knowledge and expertise in planning authorities in this field and an absence of clear advice to assist practitioners. The Position Statement aims to provide both guidance and good practice on the subject.

PLANNING POLICY

Scottish Planning Policy 2014 makes a number of statements in respect of decommissioning and restoration and these are:

Energy Infrastructure - para 169

- the need for conditions relating to the decommissioning of developments, including ancillary infrastructure, and site restoration

Waste - para 192

- secure decommissioning or restoration (including landfill) to agreed standards as a condition of planning permission for waste management facilities; and
- ensure that landfill consents are subject to an appropriate financial bond unless the operator can demonstrate that their programme of restoration, including the necessary financing, phasing and aftercare of sites, is sufficient

Minerals - para 235

- secure the sustainable restoration of sites to beneficial afteruse after working has ceased

Minerals - para 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.

Minerals - para 248

- Planning authorities should ensure that rigorous procedures are in place to monitor consents, including restoration arrangements, at appropriate intervals, and ensure that appropriate action is taken when necessary. The review of mineral permissions every 15 years should be used to apply up-to-date operating and environmental standards although requests from operators to postpone reviews should be considered favourably if existing conditions are already achieving acceptable standards. Conditions should not impose undue restrictions on consents at quarries for building or roofing stone to reflect the likely intermittent or low rate of working at such sites.

It is noted that for broadly the same requirements different language is used and emphasis given by government to the topic. The degree of inconsistency is not helpful in developing an effective and unified approach for Scotland. It is also apparent that this inconsistency is reflected in the wide range of policies and procedures adopted by local authorities. This Position Statement offers a starting point in developing guidance that the Working Group hopes can be applied consistently across Scotland.

1. Financial Mechanisms

When established the Opencast Coal Task Force undertook a significant amount of work looking into financial tools and mechanisms, which involved input from wide a range of stakeholders. Their deliberations have informed this Position Statement and its findings. It has therefore been important to ensure that there is consistency in the advice and guidance that was provided by the Task Force and in this Statement.

There are a number of financial tools or mechanisms available to secure the decommissioning, restoration and aftercare of windfarm, mineral, landfill and coal extraction sites and these are set out in more detail in Appendix 1. Whilst this information is drawn from May 2014¹ Report by the Depute Chief Executive at East Ayrshire Council on financial guarantees and relates to the consideration of the restoration of coal sites, it provides an excellent summary of the financial options currently available. Financial guarantees, as subsequently referred to in this document, relate to any of the options identified in Appendix 1.

The risk profile for different development types will vary but the Appendix gives a useful commentary on the associated challenges, benefits and risks of options currently available, which is a useful reference for local authorities carrying out their assessment of the most suitable financial guarantee type. It is acknowledged that mineral aggregate developments differ from other types of mineral/open cast coal operations and that there has been limited experience of serious restoration failure. The risk profile for this type of development will vary and particularly for smaller extraction sites they may be less likely to fall into the High Risk category as set out in the Appendix. Local authorities may wish to give consideration to the use of Mutual Funds as set out in the appendix for more modest developments of this type.

It is necessary to debate these challenges, benefits and risks further and to gauge the experience and views of other Scottish local authorities in using escrows, insurance policies, Parent Company Guarantees, bank guarantees, financial bonds (insurance policy), Industry Guarantee schemes, for the forms of development highlighted in this statement; It would also be helpful to develop advice on the circumstances that would trigger calling on financial guarantees. This will require further research from the Working Group, local authorities and the industry.

The Position Statement has focussed on establishing the options and risks associated with local authorities entering into different types of financial guarantee with developers to secure the decommissioning, restoration and aftercare of a development site. However, there has been concern expressed about the acceptability of the financial risks that local authorities are incurring by entering into such financial guarantee agreements.

¹ <http://docs.east-ayrshire.gov.uk/crpadmmin/2012%20agendas/cabinet/21%20may%202014/Decommissioning,%20restoration,%20aftercare%20and%20mitigation%20financial%20guarantees.pdf>

An important question that the Working Group previously sought feedback on during the consultation on this document was whether it would be feasible to solely rely upon a financial/commercial arrangement between the developer and the landowner in this regard. This is a favoured option for renewables sector as it avoids the potential issue of duplication of financial guarantee requirement, where a separate agreement would be required by both landowner and local authority. In such circumstances, the planning authority would need to be satisfied that this arrangement was in place and was sufficient to meet its objectives. The financial risks would be transferred to the landowner; the party that currently benefits from the development.

The Working Group considered the matter and concluded that planning authorities must be party to the financial arrangements put in place by the developers and/or landowners. Based on local authority experience the ability to access the financial guarantee, should the worst happen, is essential. There is a clear and understandable expectation that it is the planning authority's role to safeguard the community's interest in ensuring that sites are restored/decommissioned. Shifting the burden to the developer or the landowner would raise the need for planning authorities to regularly verify and monitor the terms of such financial guarantees, to ensure they are fit for the purpose. If planning authorities are not party to the agreements then it may not be possible to ensure that this is a transparent process and that a reliable safeguard is in place. Consequently, we would advise that planning authorities enter into agreements with developers and/or landowners ensuring that there is no financial or other resource risk to local authorities in the event of a default by a developer or landowner.

The Working Group was clear that consideration can be given to the use of hybrid/mixed methods of financial guarantee to cover restoration/decommissioning of a site, with different options possibly being appropriate at different stages of a project and throughout the life span of the development.

2. Securing a Financial Guarantee

The Working Group agreed that if a financial guarantee is necessary the first preference is that it be controlled by a legal agreement, most appropriately a Section 75 Agreement, although other forms of legal agreement may also be used. There is a suggested template for a legal agreement set out in Appendix 2, which specifically relates to a surety bond arrangement. Other forms of financial guarantee will require legal agreements suitably framed to take account of the particular circumstances of that guarantee type.

In addition, the Working Group agreed that planning conditions can be used to require the submission of a financial guarantee. In this regard when planning authorities are considering whether or not to use a condition it is relevant to note that the condition is not requiring a payment to be made to the planning authority; rather, it is a condition requiring an effective means of restoration/decommissioning be put in place. A suggested 'model' planning condition is set out in Appendix 3 which relates to minerals development and this would need to be suitably re-framed to take account of the particular circumstances of other development types.

No matter which means of securing the financial guarantee is chosen it is important that it is in place before the development can commence and that it is able to secure the full restoration, aftercare and decommissioning of the site and is in force for the lifespan of the development.

Recent court experience of some authorities has highlighted that when surety bonds are called upon, issues that have arisen have been around the wording of the bond and not the manner in which the bond was obtained. It is therefore important for planning authorities to carefully consider which approach is appropriate in the particular circumstances applicable to the proposed development.

It is important that regardless of whether a condition or legal agreement is used to secure the financial guarantee that there is close liaison between planning, legal and financial officers within the local authority on the terms of the financial guarantee and the content of any legal agreement/planning condition. The concurrent processing of planning applications and legal agreements is to be strongly encouraged as best practice to ensure that consents are issued timeously and undue delay avoided.

A question arising from the Working Group's deliberations relates to the parties who, when it is submitted, should be subject to the financial guarantee. There is differing practice evident in that some authorities include provision for the landowner to call upon a financial guarantee in certain circumstances, whilst others exclude such provision. From the views received, it was agreed that the land owner should be a party to the financial guarantee agreement. However, it is important to set out clearly the circumstances, whereby any party can draw on the financial guarantee and that this can only be done following a breach of planning control or the terms of the agreement.

There is an emerging issue of whether it is possible to apply bonds on mineral sites considered through the Review of Old Minerals Permissions (ROMPS) process. It was concluded that Schedule 10 6(5) of the Town and Country Planning (Scotland Act) 1997 allows a Local Authority to impose conditions to this effect on the grant of planning permission for mineral development but that there is no similar provision for the use of a S75 agreement or other legal/planning agreement.

In this particular scenario, the use of the recommended Grampian or fully suspensive condition, as set out in Appendix 3, cannot be applied to an already working/ partially developed quarry. A Grampian condition would most likely be viewed as a restriction of working rights which would give grounds for an operator claiming compensation. It would be appropriate to impose a condition with a partially suspensive element stating that the operator has to have a guarantee agreed and in place 3 months from the date of the ROMP decision. This approach has been adopted by South Lanarkshire Council without challenge.

South Lanarkshire Council has imposed this amended guarantee condition on 2 ROMPS applications without challenge but it should be noted that the use of the condition was agreed in advance with the operator on both ROMPS. As responsible operators, they were content to agree the imposition of a guarantee condition.

3. Restoration, Aftercare and Decommissioning Costs

It is critical that the quantum of a financial guarantee is sufficient throughout the lifespan of the development to decommission, restore and provide aftercare at the site to enable its intended final

use. If the method of calculating the guarantee quantum is flawed then no matter how efficient monitoring and review mechanisms are, the funds available will be insufficient to restore the site. This is a significant risk to compliance with the planning permission. It should also be borne in mind that when calculation the quantum consideration needs to be given to building in extra costs that might be incurred by a planning authority doing these works, as opposed to an operator already established on the site. There will be a need to assess and, where appropriate, build in supervisory costs to cover project management, given that the restoration/decommissioning would be managed by the planning authority. The level of this administrative cost will vary dependent on the nature of the proposed development.

There is detailed information on the most effective way to calculate the quantum of bonds for minerals sites contained in the "Restoration Guarantee Bonds for Opencast Coal Mines" report by Rod Smith from 2007. The report can be viewed at:

<http://www.east-ayrshire.gov.uk/Resources/PDF/C/Coal-Restoration-Guarantee-Bonds-for-Opencast-Coal-Mines.pdf>

Of the two options discussed, the "measure and value" option is considered more effective than the "disturbed area" method for open cast coal sites. The "measure and value" method would also appear to be broadly applicable to landfill sites. A persuasive case would be need to be made to justify adopting a different approach to calculating the quantum.

There is limited experience nationally regarding the actual costs involved in decommissioning and restoring a windfarm site. Initially costs have been based on a rather arbitrary price per megawatt or per turbine model. A detailed template used by Scottish Borders Council is attached as Appendix 4 which highlights a more systematic means of deriving costs but which can be adapted to each development site. It also provides for the calculation of professional costs to administer the decommissioning project and excludes the scrap value or any resale value of the turbines. It is important to note however that the purpose of the cost tables for windfarms is to provide a means of interrogating and evaluating how/why developers have arrived at a proposed financial guarantee value; but when arriving at a quantum value regard must also be had to local or site specific costs. The basis of the template was well received by contributors who agreed it was a useful tool that could be modified to include development specific on and off-site cost estimates. It was also highlighted that it should include provision for a local authority management fee, indexation and a contingency fund.

The implications of the repowering of an energy site on the restoration, aftercare and decommissioning costs is a new factor that will increasing need to be taken into account but the implications of this will be difficult to define at the commencement of a development. It is clear that funding needs to be in place for full decommissioning, restoration and aftercare, but if re-powering or redevelopment proposals come forward then the terms of the financial guarantee will need to be re-negotiated. This information needs to be an integral part of an application for re-powering a windfarm site but can also be subject to a pre-submission agreement which would only be binding should the re-powering application be approved.

It is critical that an independent professional assessment is made to establish the quantum of the financial guarantee. This assessment should also ensure that the restoration and aftercare proposals are feasible and the means of operation practicable. Planning conditions should ensure

that independent professional advice is available, at the developers' cost, for the initial assessment and for subsequent periodic reviews of the financial guarantee and restoration proposals. The periodic review of the quantum should be carried out regularly, dependent upon the nature of the development in question and should ensure that the financial guarantee available to the planning authority remains sufficient to restore the site.

In order to inform these assessments, regular reports at intervals required by the planning authority for open cast coal, minerals and landfill sites should be submitted by the developer on the progress of their operations, compliance with the method of operation and progress of restoration and aftercare, if applicable. Yearly reports would not normally be required for energy developments, as they do not involve the same progressive development and restoration proposals.

To ensure that the value of the financial guarantee is adequate throughout the life of the development, up to the end of the aftercare period, a number of planning authorities are now ensuring that the required independent professional assessment is undertaken by a 'compliance assessor' whose fees are borne by the operator/developer.

It is important in calculating the initial quantum that it is based on a realistic restoration and aftercare proposal. The Working Group consider it necessary that Draft Restoration Plans are submitted with planning applications. The plans must be sufficiently detailed in terms of their delivery to allow an effective estimate of costs. The Restoration Plan will be reviewed at pre-agreed stages and updated again to reflect best practice at 6 months to 1 year before restoration/decommissioning. This is discussed in more detail in section 5 below.

4. Review of Financial Guarantees

The Working Group considers it necessary to review financial guarantees, whatever mechanism is chosen, throughout the lifespan of the development to ensure that it remains fit for purpose. The commentary below focuses principally on surety bonds as their use has been widespread to secure restoration over a wide range of development types. However, whilst many of the same principles will apply to all types of financial guarantees, the Working Group were not able to obtain feedback from authorities with experience in managing reviews for other types of financial guarantee. This is an area that the Working Group consider further research is required.

Having identified the quantum, there needs to be a review mechanism to allow its value to be adjusted to take account of any revised quantum, as a result of a statutory periodic review or a material variation to an approved scheme. As a result of this process the quantum can increase or decrease, as in the example of progressive restoration in a minerals development.

All bonds, no matter their duration, should be indexed linked in line with inflation so that the costs of restoration, aftercare and decommissioning do not, overtime, exceed the ability of the bond to secure these requirements. The most commonly used indices are the General Index of Retail Prices (All Items) exclusive of mortgage interest published by on or behalf of HM Government and the Building Cost Information Service (BCIS) All-in Tender Price Index (TPI) indices. There are

other indices available and this is a topic where further research would be required to validate a change from the two currently used indices.

The duration of the surety bond will typically be fixed and a longstop date will be specified on the bond. This is usually expressed as being the earlier of the bond being exhausted by a claim or a defined calendar date. The starting position from the local authority's perspective will be that the restoration and aftercare bond should be in place before the commencement of development until the date of completion of restoration and aftercare. For a windfarm, this is typically a minimum of a twenty-eight-year period (25-year operational life of the windfarm plus a period for completion of the restoration). The time period for a surety bond will vary dependent on the type of development and is likely to be for a lesser period for certain types of mineral, aggregates and landfill developments. However, it is acknowledged that it remains challenging to obtain surety bonds of this duration on commercially acceptable terms.

The Working Group has established that there is already a recognised practice of bonds of a shorter duration being accepted (typically a period of three or five years; although 5 years appears the norm in recent years), with an obligation set out either in the underlying s75 planning obligation or the bond itself that a replacement be provided before expiration of the existing bond. This allows the opportunity for the bond to be modified in tandem with the periodic review of the quantum. In effect, this means that rather than providing one single bond for twenty-eight years, the developer will be asked to provide, for example, six consecutive bonds, each for the duration of five years.

In such a case, if the developer fails to replace an existing bond at year five, then there would be no security for the beneficiaries in the event of a breach of the restoration and aftercare obligations which it was intended to secure. To overcome this risk, the underlying planning obligation will typically provide that a replacement bond has to be provided before the extant bond expires (typically up to 6 months i.e. at 4 years and 6 months from the start date of the incumbent bond). In the event that the replacement bond is not provided by that longstop date, then the beneficiaries will have the ability to call upon the bond in full, with the proceeds being held in trust or in escrow until the replacement restoration and aftercare bond is provided by the developer to the beneficiaries for the following five-year period.

While this is usually a more affordable means of providing the bond in the current market, it relies upon pro-active case management by the planning authority. The longstop date should be carefully diarised so that there is no inadvertent lapse of the existing bond longstop before provision of the replacement guarantee. This introduces additional administrative burden on local authorities, as well as additional risks into the process.

At each review, the existing bond in the original sum will either (i) have to be discharged in its entirety and replaced with a single bond for the increased value; or (ii) a top up bond provided to ensure that the sum of both bonds in place equates to the total revised value. The approach adopted will depend upon the administrative fee and the basis on which the bond is provided - for example whether cash backed or in terms of an existing facility agreement with the bond provider. This is a commercial decision for the developer which may differ case by case. Planning authorities would likely find a single replacement bond administratively more convenient.

In any event the legal agreement or the terms of the bond must absolve the local authority from any risk in the event of a replacement bond not being available; it is a matter for the landowner and/or operator to ensure that the funds required to secure restoration and aftercare are always in place in accordance with the terms of the legal agreement or the relevant planning condition.

5. Standards for Compliance and Monitoring

It is clear that if financial guarantees continue to be administered by planning authorities there is the need for best practice advice on how to manage that process through the lifespan of the development. East Ayrshire Council have put in place a monitoring regime involving legal, finance and planning services under the Depute Chief Executive and this may well provide a model that can be used and adapted by other local authorities.

Scottish Planning Policy is clear that, with regard to mineral permissions, planning authorities should ensure that rigorous procedures are in place to monitor consents, including restoration arrangements, at appropriate intervals, and ensuring that appropriate action is taken when necessary. While similar advice is not reflected for other development types, the principles are generally applicable to other sectors, in particular the energy industry, where proposals are time limited and require structures to be removed and ground reinstated at the end of their useful life.

The Working Group believe it is best practice for applicants of opencast coal, other minerals & landfill and energy developments to submit, along with all other necessary environmental information, at application stage a Draft Restoration Plan (RP) or a Draft Decommissioning & Restoration Plan (DRP), in the case of energy schemes. Such draft plans could comprise part of an EIA Report.

Opencast Coal

The Opencast Coal Task Force advised on the need for a 'progress plan' that can be regularly submitted setting out the extent of development carried out over a given period of time, this allows a check to be made against the compliance with the terms of the planning permission. The Group acknowledged that in the course of working a site, the development may require an amendment dependent upon, for example, geology, market demands and mineral quality. Hence the concurrent submission of a 'programme plan' would set out details of the work to be undertaken over the ensuing period, and allow a view to be taken about any material variation to the development, in turn necessitating a variation to the planning permission and potentially the financial guarantee. Non material variations can be addressed under s64 of the Act.

Attention is drawn to the Town and Country Planning (Fees for Monitoring Surface Coal Mining Sites) (Scotland) Regulations 2017. These Regulations provide for fees to be paid to planning authorities by operators in relation to the site visits they make for the purpose of monitoring compliance with surface coal mineral permissions. Following these visits the planning authority

must issue a monitoring report to the operator. The requisite fee is then payable to the planning authority on receipt of the monitoring report by the operator.

The working group considers that additionally each opencast coal site will still require an independent compliance assessor, responsible to the planning authority. Regular reports would be prepared and a checklist of compliance with approved plans and conditions set out. Monthly returns would be publically available and sent to Scottish Government, providing a regular statement on the compliance with the planning permission.

Other minerals and landfill

For other minerals and landfill development, the Working Group consider it best practice to seek from operators annual monitoring reports secured through a planning condition. This would be linked to compliance and change to the progress and programme plans. Such reports can, along with detailing annual production quantities, provide details of any rolling programme of restoration undertaken within phases of the operation in the previous year. These reports will have a bearing on phasing plans, quantum, restoration proposals and the reviewing of financial guarantee.

The report will assist in discussions on the level of any financial guarantee to be re-negotiated and in cases where progressive restoration is being implemented this could result in the lowering of the level of the financial guarantee.

The required Draft Restoration Plan (RP) should outline the broad principles of restoration and aftercare of the site and provide a framework for its revision/finalisation prior to restoration occurring.

Onshore Wind & Other Onshore Renewable Development

Typically, in the case of onshore wind, a Draft Decommissioning & Restoration Plan (DRP), would be reviewed 3-5 years prior to decommissioning and/or restoration taking place, thereafter being finalised in the form of a Detailed DRP 6 months to 1 year before decommissioning and/or restoration. This ensures that the plan remains responsive to changing circumstances and accords with policy and best-practice prevailing at that time. Similar provisions should also apply to other on-shore renewable schemes such as solar farms.

A condition of planning permission should stipulate the need to undertake decommissioning and/or restoration in accordance with the approved plans. Restoration schemes should include provision for monitoring and reporting.

For energy schemes, opportunities for phased decommissioning and/or restoration will be limited. However, provision should be made for the restoration of elements of the development where they are either no longer required or have fallen into disuse/disrepair. Monitoring and reporting arrangements should also be provided for following completion of restoration. It is now relevant to consider the implications of potential re-powering in any review of the Draft DRP.

General Provisions

In general, therefore a DRP/RP should cover the following:

- i. A brief background to, and description of, the development;
- ii. The scope and remit of the plan and its review framework;
- iii. All proposed decommissioning and restoration requirements and measures;
- iv. The methods by which work will be carried out (incl. environmental and traffic management);
- v. Timescales for the carrying out and completion of the work (incl. any phasing) and on-going monitoring;
- vi. Scheme for reporting findings of monitoring (if not subject to separate condition); and,
- vii. A schedule of the cost of the restoration and aftercare measures.

Restoration issues to be addressed should include the removal of all above and, wherever possible, below ground structures and equipment, restorative measures, landscaping/profiling and reseedling. Details for the complete restoration of any areas that are subject to temporary restoration during the lifetime of the permission should also be included in the DRP/RP.

The approval of such plans will be in consultation with other relevant bodies, such as SEPA and SNH. Justification for any infrastructure or other development that is to be left in situ, whether or not in part or whole, should be provided.

DRP/RPs should be clear, well-structured, focused and, where necessary, tie in to relevant sections of any Environmental Statement, environmental report(s) and any approved Habitat or Conservation Management Plans. Best practice should be referred to, as appropriate, and mapping and diagrams will almost certainly be required to aid interpretation.

While an indicative DRP/RP need not include full details for all measures and may be subject to change through periodic review, the finalised plan must be clear as to what measures will be undertaken, how they will be carried out and the timescales with which work will comply.

On-going monitoring and review of the plan's commitments post-restoration must also be included in a DRP/RP; although it is acknowledged that some of these elements may not be confirmed until the final draft.

The financial guarantee should only be released when the authority is satisfied that the restoration has been completed satisfactorily in accordance with the agreed scheme.

In summary, essential elements are:

- Submission of draft restoration plans at application stage
- Finalisation of restoration plans within 6-12 months prior to expiry of permission
- Conditions used to secure approval of final restoration
- Conditions used to secure monitoring and reporting
- Financial guarantee released only on satisfactory completion of restoration

Conclusion

The Position statement has taken into account and incorporated, where appropriate, the views of those who responded to the consultation. Representations were received from a number of Planning Authorities, as well as RSPB, Scottish Government, Scottish Renewables, Forestry Enterprise Scotland, Mineral Products Association, AMS Associates Ltd, Dalgleish Associates Limited, British Aggregates Association and SOLAR. The Working Group would like to thank everyone who made a contribution.

The Working Group hope that the Position Statement provides a useful guidance note for practitioners in what is an incredibly complex and difficult area of planning activity.

The paper is, by its nature, a work in progress and a statement of where we are at this moment in time. It is clear that additional work and research is required into financial mechanisms and the guidance will be modified to take account of evolving best practice.

October 2018

Appendices

- 1 Financial Guarantee Types**
- 2 Section 75 Template for Surety Bonds**
- 3 Proposed Model Planning Condition for mineral sites**
- 4 Decommissioning Costs Table for Windfarms**

APPENDIX 1 – FINANCIAL GUARANTEE OPTIONS

Financial Guarantee type	Method	Challenges	Benefits	Risk level
1. Surety Bonds	<ul style="list-style-type: none"> • Bond value based on technical appraisal, financial structure and track record of developer. • Bonds only for limited period usually 5 years. • Cost approximately 2% annually of sum bonded 	<ul style="list-style-type: none"> • If called by Planning Authority, the Bond provider will claim back money from developer leading an increased risk of liquidation. • Wording of bonds can be over complicated. • Need to be renewed every 5 years. • Risk that the developer cannot get a new bond after five years. • General approach of insurance industry may result in full value not being realised, leading to potential Court proceedings. 	<ul style="list-style-type: none"> • Can provide restoration guarantee for larger sums of development liability. 	Medium Risk
2. Bank guarantees	<ul style="list-style-type: none"> • Bank provides restoration guarantee. • Bank takes standard security over an asset of the developer or through overdraft facility. • Can be provided for periods in excess of 5 years. 	<ul style="list-style-type: none"> • If called by Planning Authority, would have a direct financial impact on the developer who may already be in financial difficulty. • Calling event could result in liquidation of company. • Bank may contest the “calling” leading to delay. 	<ul style="list-style-type: none"> • Minimal cost to developer. 	Medium Risk

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Financial Guarantee type	Method	Challenges	Benefits	Risk level
3. Parent Company Guarantee	<ul style="list-style-type: none"> Restoration Guarantee provided by parent company in the group. Legally binding document which can be used to raise court action, if necessary. 	<ul style="list-style-type: none"> If dispute occurs, and “call” is required, it is effectively with the same Company that is in breach. If the parent company is in financial difficulty settlement is unlikely. If the parent company goes into liquidation, the guarantee disappears. 	<ul style="list-style-type: none"> No cost to developer. 	High Risk
4. Mutual Funds	<ul style="list-style-type: none"> Trade guarantee scheme with existing in place for quarry operators. Developer pays into the fund. In the event of liquidation, the fund pays out up to a maximum predetermined value. 	<ul style="list-style-type: none"> Terms of the Trade Guarantee, taking quarries as an example, is limited to £500,000 per claim and an overall limit of £1m The Mineral Products Association Guarantee Fund has not been required to pay out, thus the system has not yet been tested. Not widely used in the sectors falling under this policy. There will be a limited financial value, constrained by the size of the fund 	<ul style="list-style-type: none"> Independent provision. Low cost to developer. 	High Risk

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Financial Guarantee type	Method	Challenges	Benefits	Risk level
5. Escrow Account	<ul style="list-style-type: none"> • Money is deposited in a joint ring-fenced bank account to a value equal to the outstanding liability on the development site. • Money is repaid to the developer as the value of liability is reduced. 	<ul style="list-style-type: none"> • Requires a large cash deposit by the developer. 	<ul style="list-style-type: none"> • Money readily available to carryout restoration work. • Money readily available to carryout restoration work. 	Low Risk
6. Pay as you go Escrow	<ul style="list-style-type: none"> • Money is deposited into the joint account, on an amount per unit when it is earned by the development i.e. coal extracted, wind energy generated. 	<ul style="list-style-type: none"> • Value of cash in the account does not equate to the liability of the development until at least 5 – 10 years into the development. • Regular accounting process is required to ensure the correct money is deposited in line with the progress of the development. • If liquidation event occurs during the early deficit period, the account cannot pay for the restoration. • If planning breach occurs during the early deficit period, then there would be a possibility that funds would not be available to resolve the breach. • If a planning breach occurs which requires the shutdown of the site in the deficit stage of scheme, then restoration would be unachievable. 	<ul style="list-style-type: none"> • After the breakeven point the account has enough money to resolve any breach. 	High Risk

APPENDIX 1 – FINANCIAL GUARANTEE OPTIONS

Financial Guarantee type	Method	Challenges	Benefits	Risk level
7. Pay as you go Escrow / Bond	<ul style="list-style-type: none"> • This is a hybrid of a bond and a pay as you go escrow. • The restoration bond is required to provide the restoration guarantee while the escrow account is growing. • Due to the deficit at the start of a project this may require a top-up cover of a short term bond or a cash deposit. 	<ul style="list-style-type: none"> • Developer is required to pay for the bond while making deposits to the escrow account. • Regular accounting process is required to ensure the correct money deposited in line with the progress of the development. • If called by the Planning Authority, the Bond provider will claim back money from developer and lead to an increased risk of liquidation. • Wording of bonds can be over complicated. • Bond needs to be renewed every 5 years. • General approach of insurance industry may result in full value of bond not being realised, 	<ul style="list-style-type: none"> • Addresses lack of long term bond provision. • Provides security of funds after breakeven point. • Deliverable solution for developers. 	Low Risk
8. Cash Bond	<ul style="list-style-type: none"> • Operator provides cash sum covering bond quantum value to held on account by the Council 	<ul style="list-style-type: none"> • Difficult for the operator to provide sum if bond quantum large. 	<ul style="list-style-type: none"> • Ensures Council has access to bond monies if required. 	Low Risk

APPENDIX 1 – FINANCIAL GUARANTEE OPTIONS

Financial Guarantee type	Method	Challenges	Benefits	Risk level
9. Land Surety	<ul style="list-style-type: none"> • Similar to Cash bond where Operator provides land as security in place of bond or monies as a guarantee 	<ul style="list-style-type: none"> • Land values can fluctuate • Council has to sell land to gain bond monies 	<ul style="list-style-type: none"> • Allows Council access to monies (following land sale) without challenge from financial institution. • Can be easy for operator to finance bond quantum. • Can involve parts of quarry now signed off as restored 	Low Risk

It should be noted that there is the option of using hybrid/mixed methods of financial guarantees to cover restoration/decommissioning of a site, with different options possibly being appropriate at different stages of a project and throughout the life span of the development.

**EXAMPLE SECTION 75 PLANNING OBLIGATION – RESTORATION AND
AFTERCARE BONDING**

Guarantee	means an on demand performance bond substantially in the form of the draft forming part X of the Schedule, or, if such bonds cease to be available on terms which are commercially acceptable to the Operator, such other form of financial guarantee in favour of the Council and the Landowners, on terms and conditions approved in advance in writing by the Council and provided by a cautioner of financial standing acceptable to the Council at its sole discretion.
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RESTORATION AND AFTERCARE GUARANTEE

1. Prior to the Commencement of Development and thereafter until the date of completion of the Restoration and Aftercare Conditions and in security against any failure by the Operator to perform and observe the Restoration and Aftercare Conditions, the Operator will maintain a Restoration and Aftercare Guarantee in favour of the Council and the Landowners.
2. The initial Restoration and Aftercare Guarantee will be for a minimum period of three years from the date of Commencement of Development.
3. The Restoration and Aftercare Guarantee shall be in a sum acceptable to the Council which sum shall in the first instance be £XXXX (XXXXXX POUNDS STERLING) which represents the amounts which the Council, the Landowners and the Operator agree as at the date of this agreement to be a reasonable estimate of the sums required to undertake the Restoration and Aftercare Conditions.
4. The amount of the Restoration and Aftercare Guarantee shall be reviewed at the end of each three (3) year period throughout the duration of the agreement ("the Review Date"). On the occasion of each review, the Operator shall at its own expense submit to the Council a report prepared by an independent consultant which shall set out a fully costed scheme for the implementation and completion of the then outstanding Restoration and Aftercare Conditions, which report shall be submitted to the Council not less than six (6) months prior to each Review Date. The Operator shall thereafter use all reasonable endeavours to agree the amount of any increase or decrease in the said sum with the Council and the Landowners not less than three (3) months prior to each Review Date. Failing agreement, the determination of any such increased or decreased sum shall be referred by the Council to an expert in accordance with the provisions of Clause X.
5. By no later than the date thirty days before each Review Date, the Operator shall deliver to the Council a replacement or top up Restoration and Aftercare Guarantee in the agreed or determined sum. The replacement or top up Restoration and Aftercare Guarantee will be for a minimum period of three years from the Review Date.
6. In the event that the Operator has not fully performed the Restoration and Aftercare Conditions within the relevant timescale set out within Restoration and Aftercare Conditions, then it will be competent for the Council to enter on the relevant part of the Agreement Subjects on giving not less than fourteen (14) days' notice in writing to the

APPENDIX 2 – EXAMPLE SECTION 75 PLANNING OBLIGATION – RESTORATION AND
AFTERCARE BONDING

Operator and the relevant Landowner or to take such other action as the Council may deem necessary to carry out any works required to ensure compliance with the whole or any part of the Restoration and Aftercare Conditions.

7. The cost of any works carried out (including professional fees and expenses insofar as properly and reasonably incurred) by or on behalf of the Council to ensure compliance with the whole or any part of the Restoration and Aftercare Conditions either in accordance with Clause 6 or pursuant to its statutory powers may be recovered by the Council under the Restoration and Aftercare Guarantee whereupon the obligations relating to the Restoration and Aftercare Conditions or the relevant part thereof shall cease.
8. In the event that the Operator has not fully performed the Restoration and Aftercare Conditions within the relevant timescale set out within Restoration and Aftercare Conditions and the Council has elected not to exercise its right to make a demand on the Restoration and Aftercare Guarantee under Clause 7:

(A) It will be competent for the Part One Landowner, on receipt of prior written approval from the Council, to make a demand under the Restoration and Aftercare Guarantee and to use those funds only to take such action as it may deem necessary to carry out any works required to ensure compliance with the whole or any part of the Restoration and Aftercare Conditions on Part One of the Agreement Subjects within a reasonable time having regard to the nature of the works to be carried out, whereupon the Restoration and Aftercare Conditions application to Part One of the Agreement Subjects or relevant part thereof shall cease. The Part One Landowner's ability to call upon the Restoration and Aftercare Guarantee is capped at 20% of the total value of the Restoration and Aftercare Guarantee, this being a proportion of the Restoration and Aftercare Guarantee which the Part One Landowner and the Operator agree to be attributable to completion of the Restoration and Aftercare Conditions on Part One of the Agreement Subjects;

(B) It will be competent for the Part Two Landowner, on receipt of prior written approval from the Council, to make a demand under the Restoration and Aftercare Guarantee and to use those funds only to take such action as it may deem necessary to carry out any works required to ensure compliance with the whole or any part of the Restoration and Aftercare Conditions on Part Two of the Agreement Subjects within a reasonable time having regard to the nature of the works to be carried out, whereupon the Restoration and Aftercare Conditions application to Part Two of the Agreement Subjects or relevant part thereof shall cease. The Part Two Landowner's ability to call upon the Restoration and Aftercare Guarantee is capped at 50% of the total value of the Restoration and Aftercare Guarantee, this being a proportion of the Restoration and Aftercare Guarantee which the Part Two Landowner and the Operator agree to be attributable to completion of the Restoration and Aftercare Conditions on Part Two of the Agreement Subjects; and

(c) It will be competent for the Part Three Landowner, on receipt of prior written approval from the Council, to make a demand under the Restoration and Aftercare Guarantee and to use those funds only to take such action as it may deem necessary to carry out any works required to ensure compliance with the whole or any part of the Restoration and Aftercare Conditions on Part Three of the Agreement Subjects within a reasonable time having regard to the nature of the works to be carried out,

APPENDIX 2 – EXAMPLE SECTION 75 PLANNING OBLIGATION – RESTORATION AND
AFTERCARE BONDING

whereupon the Restoration and Aftercare Conditions application to Part Three of the Agreement Subjects or relevant part thereof shall cease. The Part Three Landowner's ability to call upon the Restoration and Aftercare Guarantee is capped at 30% of the total value of the Restoration and Aftercare Guarantee, this being a proportion of the Restoration and Aftercare Guarantee which the Part Three Landowner and the Operator agree to be attributable to completion of the Restoration and Aftercare Conditions on Part Three of the Agreement Subjects.

9. In the event of the Operator failing to timeously fulfil its obligation to deliver a replacement or top up Restoration and Aftercare Guarantee in terms of Clause 5, then the Council shall be entitled to make a demand under the existing Restoration and Aftercare Guarantee. All amounts paid by the cautioner under the Restoration and Aftercare Guarantee pursuant to such demand will be credited to an interest bearing account in the name of the Council in the United Kingdom with a clearing bank and be free from any encumbrance arising or subsisting in favour of any person other than the Council. Any sums paid to the Council in accordance with this Clause 9 (and all interest thereon) shall be held on trust for the benefit of the Council and the Landowners and the bank with which such monies are held shall be notified of the trust. Amounts may be withdrawn from the trust account only in the circumstances where the Council or Landowners would otherwise have been entitled to make a demand under the Restoration and Aftercare Guarantee (as described at Clauses 6 - 8) had such an instrument been issued in its favour at the time of the demand. If at any time during which monies are so held on trust the Operator provides a replacement Restoration and Aftercare Guarantee in a sum and for a period acceptable to the Council, then all monies so held on such trust together with any interest on such amount shall be paid to the Operator forthwith. If at any time following the completion of the Restoration and Aftercare Conditions there are no amounts due and payable by the Operator which are unpaid, the trust created pursuant to this Clause 9 shall be wound up and any monies then held on such trust shall be returned to the Operator together with any interest on the repaid amount.

APPENDIX 3 – PROPOSED MODEL PLANNING CONDITION

No development shall commence until a financial guarantee to cover all site restoration and aftercare liabilities imposed on the expiry of this consent has been submitted for the written approval of the Council as Planning Authority and that such financial guarantee has been approved and is in place. Such guarantee must, unless otherwise approved in writing by the Council as Planning Authority;

- i. be granted in favour of the Council as Planning Authority
- ii. be granted by a bank or other institution which is of sound financial standing and capable of fulfilling the obligations under the guarantee;
- iii. be for a specified amount which covers the value of all site restoration and aftercare liabilities as agreed between the developer and the planning authority at the commencement of development
- iv. either contain indexation provisions so that the specified amount of the guarantee shall be increased on each anniversary of the date of this consent by the same percentage increase in the General Index of Retail Prices (All Items) exclusive of mortgage interest published by on or behalf of HM Government or the Building Cost Information Service (BCIS) indices, whichever is deemed most appropriate, between the date hereof and such relevant anniversary or be reviewable to ensure that the specified amount of the guarantee always covers the value of the site restoration and aftercare liabilities
- v. come into effect on or before the date of commencement of development, and expire no earlier than 12 months after the end of the aftercare period.

No works shall begin at the site until (1) written approval of the Council as Planning Authority has been given to the terms of such guarantee and (2) thereafter the validly executed guarantee has been delivered to the Council as Planning Authority.

In the event that the guarantee becomes invalid for any reason, no operations will be carried out on site until a replacement guarantee completed in accordance with the terms of this condition is lodged with the Council as Planning Authority.

Reason; to ensure that there are sufficient funds to secure performance of the decommissioning, restoration and aftercare conditions attached to this planning permission in the event of default by the operating company

APPENDIX 4 – DECOMMISSIONING COSTS TABLE

Please download the Excel file [here](#)