



Heads of Planning Scotland

ENERGY AND RESOURCES SUB-COMMITTEE

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



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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 best practice for the review of financial guarantees through the life time of the development
5. establish standards for compliance and monitoring

The Bonds Working Group has considered the nature of the issues, known best 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 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 the country 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 is the initial attempt at providing a consolidated guidance/best practice note 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 is a starting point in developing guidance that can be applied consistently across Scotland.

1. Financial Mechanisms

The Opencast Coal Task Force has already undertaken a significant amount of work into financial guarantees, which has involved input from a range of stakeholders. Their deliberations have informed this Position Statement and its findings. It has been important to ensure that there is consistency in the advice and guidance 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. 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. It may also be helpful to develop advice on the circumstances that would trigger calling on a guarantee. This will require further research from the Working Group, local authorities and the industry.

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 other forms of developments; in addition to opencast coal sites.

The Position Statement has focussed on establishing the options and risks associated with local authorities entering into financial guarantees with developers to secure the restoration and aftercare of a development site. However, there is an emerging debate about the acceptability of the financial risks that local authorities are incurring by entering into such guarantee agreements. An important question that the Working Group sought feedback on during the consultation was whether it would be feasible to rely upon a financial/commercial arrangement between the developer and the landowner in this regard. In such circumstances, the planning authority would need to be satisfied that this agreement 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. Due to the limited response to the consultation and the complexities involved in such an approach, at this moment in time, the Working Group would continue to advise that planning authorities enter into agreements with developers and landowners ensuring that there is no financial or other resource risk whatsoever to councils in the event of a default of a developer or landowner.

2. Section 75 Agreement Template

The Working Group agreed that if a financial guarantee is necessary it should be secured and controlled by a legal agreement, most appropriately a Section 75 Agreement, although other forms

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

of legal agreement may also be used. The Working Group considered that it could not endorse, at this time, the use of planning conditions as an appropriate or suitable means to fully secure, control and monitor such financial mechanisms. However, it was accepted that further research into the use of conditions should be carried out with relevant planning and legal practitioners in local authorities and with SOLAR.

It is important that the legal agreement is in place before any development commences on site and that it is able to secure fully the restoration, aftercare and decommissioning of the site and is in force for the lifespan of the development. It is important that there is close liaison between planning, legal and financial officers on the terms of the guarantee and the content of the legal agreement.

There is a suggested template for a legal agreement set out in Appendix 2. It has been suggested by SOLAR that it would be appropriate to develop different templates for minerals and windfarm developments. In addition, SOLAR has indicated it is setting up a short term working group to finalise such templates. The Working Group consider that this is an excellent idea and an opportunity for joint working.

A question arising from the Working Group's deliberations relates to the parties who should be subject to the financial guarantee. There is differing practice evident in that some authorities include provision for the landowner to draw down a bond 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 agreement.

3. Restoration, Aftercare and Decommissioning Costs Template

It is critical that the quantum of a performance guarantee is sufficient throughout the lifespan of the development to restore and provide aftercare at the site to 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.

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.

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 3 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 of the turbines. 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 Council management fee, indexation and a contingency fund.

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.

In order to inform these assessments, regular reports at intervals required by the planning authority for 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 progressive restoration and aftercare, if applicable. Yearly reports will not normally be required for energy developments, as they do not involve the same progressive development and restoration proposals.

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 revised at pre-commencement stage 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 on financial 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 guarantees, the Working Group were not able to obtain feedback from authorities with experience in managing reviews for other types of financial guarantee.

Having identified the restoration quantum, there needs to be a review mechanism to allow its value to be adjusted in line with inflation over the review period and to take account of any revised quantum, as a result of a statutory periodic review or a material variation to an approved methodology.

However, the value of financial bonds is fixed and cannot automatically increase over time to reflect inflationary increases. In effect, a new bond with increased value must be put in place on the occasion of each indexation calculation. Further investigation is required to examine whether flexible rather than fixed value bonds are available that would address the potential risk of increased costs between the bond review periods.

The duration of the financial 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 consenting authority's perspective will be that the restoration and aftercare bond should be in place from before the date of commencement of development until the date of completion of restoration and aftercare. 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). However, it is increasingly difficult to obtain 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 from the date on which the initial bond is put in place), with an obligation in the underlying s75 planning obligation that a replacement bond be provided before expiration of the existing bond. This allows the opportunity for the financial guarantee 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.

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 performance 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 performance 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 performance 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 performance 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 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 operator to ensure that the means of restoration and aftercare are in place.

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 are putting 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 Environmental Statement.

Opencast Coal

The Opencast Coal Task Force is advising of 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 acknowledges 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.

Additionally each opencast coal site will require to have a compliance assessor, paid for by the developer but 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 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. This process also assists in discussions on the level of any bond or guarantee to be re-negotiated.

These will have a bearing on phasing, quantum, restoration proposals and the reviewing of financial guarantees.

The Draft DRP/RP should outline the broad principles of decommissioning and/or restoring the site and provide a framework for its revision/finalisation prior to actual decommissioning and/or restoration occurring.

Onshore Wind

Typically, in the case of onshore wind, a Draft DRP/RP would be reviewed 3-5 years prior to decommissioning and/or restoration taking place, thereafter being finalised in the form of a Detailed DRP/RP 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.

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.

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 reseeded. 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.

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
- Bond 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 undertaken with Planning Authorities and SOLAR. Whilst a disappointingly small number of Planning Authorities responded to the consultation, the Working Group would like to thank everyone who made a contribution.

The Working Group would particularly like to express our appreciation for the input from SOLAR and their willingness to continue working with HOPS to develop best practice.

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.

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