

Opencast Coal Restoration: Effective Regulation

Scottish Wildlife Trust Consultation Response



Consultation Question 1

Do you consider that the current or proposed Scottish Planning Policy is fit for purpose and if not do you consider that it could be strengthened to provide for more effective regulation of restoration?

No. With recent experiences regarding restoration of sites and the damning “Independent Review of Regulation of Opencast Coal Operations In East Ayrshire” report the Scottish Wildlife Trust does not believe that the draft SPP is fit for purpose with regard to restoration.

Finance

The Scottish Wildlife Trust would like to see significant strengthening of SPP to guarantee that the full cost of restoration is fully absorbed by the developer so that the public does not bear the cost of repairing environmental damage. The new SPP should specifically state that planning authorities should not consent applications that require continuing mitigation, restoration or clean-up until an appropriate level of financial security has been guaranteed and independently verified. It is the opinion of the Trust that it will not be possible to demonstrate adequate and secure financial provision for environmental mitigation and restoration without an independent guarantee.

It is also important that a rigorous and regular monitoring system is implemented both for the actual restoration taking place and the “financial health” of the funds put aside for restoration.

The Trust would like to see the same financial principles applied to other types of development (for example renewable energy projects, or landfill sites) so that lessons learned from negative experiences with opencast coal, and not repeated.

Habitat and Sensitive Sites

SPP should give stronger protection to habitats and sensitive sites. This is particularly relevant to areas which contain deep peat (which is a significant carbon store). SPP should be amended to align with wider

Scottish Government policy on peatland conservation and restoration, and in particular RPP2 which recognises that “peatlands should be conserved”.

The mitigation hierarchy should be more explicitly referenced and explained in SPP. It should not be taken for granted that mitigation is the default option or indeed always possible. For example, 1 m of peat takes approximately 1000 years to form; it is not possible to simply re-create it.

Any mitigation that takes place (provided it is an appropriate option) should be planned to complement existing schemes and projects (for example under SRDP) and work towards creating a national ecological network.

LOW CARBON SCOTLAND

Continued extraction of fossil fuels (and destruction of soil stored carbon) can release large volumes of carbon dioxide and is contrary to the aims of the Climate Change (Scotland) Act 2009. Economic valuations of the climate change impacts of carrying out coal extraction as opposed to leaving the fuel in the ground should be carried out.

Financial viability of opencast coal extraction

The Trust has concerns about the future long-term viability of the Scottish coal industry given the sharp fall in global coal prices. An unstable coal market may lead to further collapse of the Scottish coal industry therefore SPP should require local authorities to take a long term view of the viability of restoration proposals and their financial backing.

Consultation Question 2

Y N

A. Do you consider that a model based on the UK Guarantees scheme offers any opportunities for more effective regulation of restoration in the opencast coal sector?

x

Y N

B. Where Guarantees are not available from the commercial markets, should the state be assisting with the provision of guarantees, albeit at costs that reflect the commercial value of that guarantee?

x

No. The tax payer should not provide guarantees to the industry as this would artificially “prop-up” the industry which may lead to increased risk taking. Guarantees would put an unfair and unnecessary burden on the tax payer.

Consultation Question 3

Y N

A. Do you consider that the coal industry could maintain a mutual restoration guarantee fund? If so how could such a scheme operate? x

Y N

B. Do you think there is merit in considering some form of industry levy to help deal with legacy restoration? If so how should such a scheme operate? x

A mandatory levy, similar to the one used in aggregate industries, has some positive aspects, however this must be over and above guaranteed funds for restoration and never seen as a substitute.

To suggest that a levy would only be paid into once coal prices reach a certain threshold is completely unacceptable as it undermines the polluter pays principle by removing the burden of externalities from the producer; it also sends the wrong message to industry.

Any levy scheme must be operated independently and be open and transparent in its actions.

Consultation Question 4

How can we achieve a balance between the need for flexibility of site operations whilst ensuring compliance with planning conditions?

The possibility of a “worse case scenario” should be considered at the scoping and EIA stages of the project, this should encourage the planning authority and the developer to have stringent operational procedures in place. It is acknowledged that there will have to be a small degree of flexibility during operation.

Consultation Question 5 **Y N**

A. Should Mine Progress Plans have a more central role in the planning and planning compliance programs? x

B. How should Mine Progress Plans be used to most effectively support monitoring and compliance?

C. How do you consider that site surveys should be used to contribute to monitoring and compliance?

A. A MPP should include all aspects of restoration and monitoring, the Trust believes MPPs must have a more central role in the planning and planning compliance programs.

B. The MPP should detail an accurate as possible, independently verified, prediction of extraction and restoration programmes so that progress can be benchmarked and monitored. Both

engineering and ecological expertise must be drawn on to produce the MPP.

- C. The site survey should be used to check if the “benchmark” of the MPP is being met. Site surveys should be carried out regularly and as stated above should be carried out by people with not only technical engineering knowledge but also ecological expertise.

Consultation Question 6

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

Y N

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

X

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

- A. The planning authority should have responsibility for compliance monitoring; however, they must be adequately resourced in order to do this.

As was highlighted by the “Independent Review of Regulation of Opencast Coal Operations In East Ayrshire” there must be a step change in the culture of some local authorities so that action is taken if activity outwith planning permission occurs.

Local authorities must also seek specialist ecological, financial and engineering advice to inform compliance monitoring; it may be financially difficult for local authorities to obtain this advice so Government may have to help provide this expertise.

- B. An independent service could regulate the financial side of restoration as well as providing advice and expertise to local authorities. An independent service could also evaluate and monitor the MPPs.

- C. The operating costs of the independent service should be funded by the industry.

Consultation Question 7

Y N

A. If you support the establishment of an independent unit do you consider that secondary legislation should be amended to make the unit a statutory consultee?

X

Y N

B. Do you consider that to be appropriate and proportionate? x

- A. Yes. This would be necessary to make sure that the ecological and financial views of the independent unit were taken into account.
- B. Yes, as resource constrained local authorities must take account of the views of a statutory consultee. This would give the independent unit a similar standing as SEPA or SNH which would seem appropriate.

Consultation Question 8

Which options do you consider remain practicable to operators and planning authorities on the “menu” of financial assurances? Are there any others? Please explain your reasoning.

The Trust believes that a single standardised mechanism should be introduced to fund restoration. The Trust is of the opinion that a “menu” of options would require a higher administrative input from local authorities and could carry a greater risk of things “falling between the cracks”.

This could be done combining site based Escrow between the transacting parties and the mandatory levy discussed above (Q.3). The system should be transparent, open to review, allow funds to be easily accessed when they are needed and not overly complex.

Consultation Question 9

Can you offer comments on the restoration bonds heads of terms drawing attention to any proposed modifications you consider appropriate?

Recent experiences of bonds being used as financial security have shown that they are ineffective. Bonds are controlled by the bond provider and can be liable to default (which is in the bond provider’s interest), this can lead to long term legal disputes; whilst environmental damage continues to take place.

The Scottish Wildlife Trust is of the opinion that bonds should be replaced with an Escrow and joint levy based approach.

Consultation Question 10

Y **N**

A. Do you consider that an aspect of effective regulation should be that site surveys/site investigations are subject to minimum advisory or statutory parameters concerning core drilling data? x

B. What factors do you consider would be material alterations to the MPP requiring adjustments to restoration bonding or the planning permission?

A. The Scottish Wildlife Trust has experience with reviewing planning applications for windfarm developments where there is often insufficient core sampling for peat depths. This can lead to an underestimate of the habitat and climate change impacts of a project. Therefore, inaccurate assessments of environmental impact are of concern to the Trust. It would be desirable to make site surveys/site investigations subject to minimum advisory or statutory parameters concerning core drilling data and peat depth assessments.

B. Material alterations to the MPP would be changes that are likely to affect the habitat by the end of the restoration period. If there is a significant change a new planning application should be required to be resubmitted.

Consultation Question 11

Y **N**

A. Should landowners contribute towards the wider restoration of opencast coal sites?

Y **N**

B. Where currently optional, should landowners in all cases be signatories to any Mine Progress Plan and the restoration plan? x

A. The Trust has intentionally not answered 11.A as it is the opinion of the Trust that the main responsibility for restoration must be with developer, however, it is inevitable that some costs would eventually be passed onto landowners. It is essential that clearly defined legal agreements that define each party's responsibility are drawn up.

The Escrow should allow funds to be accessed by the landowner if restoration is not complete.

Consultation Question 12

A. What do you consider to be the benefits of a Mine Progress

Plan in pursuit of effective regulation?

Y N

B. Where they are not publicly available do you consider that they should be and on what platform e.g. planning authority e-planning websites?

x

A. The benefits of a MPP, in pursuit of effective regulation, are that it would provide a “benchmarking” tool so that site management and monitoring could be compared to what has been agreed at specific predicted times, this would also allow for a more easily understandable “outcome scenario” for stakeholders at given points in time.

B. Yes. E-planning and in council planning offices or libraries

Consultation Question 13

Y N

Do you consider that the enforcement guidance (notably paragraph 32) should be strengthened in respect of the special circumstances of the opencast coal sector? If so, please propose alternative wording.

x

Consultation Question 14

Y N

Do you consider that planning enforcement raises any other issues that require to be addressed in the opencast coal sector?

x

Local Authorities should be more prepared to take enforcement action if there are breaches of planning agreements especially with regard to habitat restoration.

Consultation Question 15

A. How do you consider that a local enforcement plan for opencast coal sites produced by planning authorities would benefit the site restoration programme in Scotland?

Y **N**

B. Do you consider the planning charters with which you are familiar in your local area to be tailored effectively to the opencast sector?

x

A. Local Enforcement Plans would give a basic structure for monitoring and compliance.

B. No. They are not specific enough to the opencast sector.

Consultation Question 16

Y **N**

A. Should a suite of standard conditions be assembled as part of the guidance available to planning authority planners?

x

Y **N**

B. Arising from this consultation, do you consider that Planning Advice Note 64 could be updated to provide further advice on financial guarantees?

x

A. Yes. Anything that can assist local authorities and introduce some standardisation would be welcomed.

B. Yes. PAN 64 should advocate the Escrow and levy approach.

Consultation Question 17

Y **N**

Do you think that a central resource for legal advice relating to opencast developments would be a service to your organisation and how would you envisage that you might engage with it?

x

This is not directly applicable to the Trust, however, a central resource would help make the process simpler and reduce the risk of legal disputes.

Consultation Question 18

What value do you consider could be gained from use of processing agreements in the opencast coal sector?

There must be clear guidelines in place to ensure that processing agreements do not result in pressure being placed on local authorities to issue consents before implications of consent have been fully considered.

Consultation Question 19

Y N

A. Would more effective restoration benefit from a requirement in planning conditions for individual sites that a community liaison committee should be set up prior to commencement of operations; to meet periodically and with its minutes published until the site is handed back to the landowner upon completion?

x

Y N

B. Where relevant, do you consider that such a proposal could be serviced from within the human resources available to your organisation?

A. Yes, community liaison committees would help the local community raise concerns and provide real time, on the ground feedback.

B. It is not possible to say at this stage, however, it should not be assumed the eNGO community have the spare capacity to engage.

Consultation Question 20

Y N

Do you consider that part or all of the payment to the Coal Authority for coal worked that goes to the Treasury should be ring-fenced for the purposes of site restoration or restoration-related activity concerning opencast coal workings?

x

No because this essentially amounts to tax payer money (i.e. money paid to the treasury) being used for restoration.

Consultation Question 21

Y **N**

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.

x

Respondents are invited to consider this question in the light of Consultation Question 6.

Yes. The restoration record / history and financial probity of the operator (including the board and major stakeholders) should be considered and reviewed by the Coal Authority.

Consultation Question 22

What implications do you consider there to be on compliance monitoring and on financial guarantees at opencast coal sites arising from the implementation of the Management of Extractive Waste (Scotland) Regulations 2010?

The Trust has no expertise in this area.

Consultation Question 23

What implications do you consider there to be on restoration and on financial guarantees at opencast coal sites arising from the implementation of the Review of Old Mineral planning Permissions legislation?

Consultation Question 24

Y **N**

A. Do you consider that buying in expertise to build capacity within the Planning Authority planning service about financial guarantees or other restoration-related matters would assist effective regulation?

x

B. How do you think it should be implemented and by when?

C. How do you think expertise can be maintained and who should manage that?

- A. There is clearly a need for a higher level of ecological and financial expertise within local authorities. The lack of ecological expertise within planning departments is of great concern to the Trust. Local authorities are over reliant on advice from eNGOs such as the Trust, RSPB, local raptor groups etc... These organisations and are essentially providing free consultancy.
- B. The independent service referred to in Q.6 should provide the advice this would ensure value for money and consistency across Scotland. However, there should be a greater general provision of ecological expertise within local authorities.
- C. Local authorities should be required to maintain dedicated ecological staff.

Consultation Question 25

A. In relation to the Equalities Impact Assessment, please tell us about any potential impacts, either positive or negative, you think the proposals in this consultation may have on any particular groups of people.

B. In relation to the Equalities Impact Assessment, please tell us what potential there may be within these proposals to advance equality of opportunity between different groups and to foster good relations between different groups.

Consultation Question 26

In relation to the Business and Regulatory Impact Assessment, please tell us about any potential impacts, either positive or negative, you think the proposals in this consultation may have on business.

Consultation Question 27

Do you have any other comments? If so please specify the relevant section and/or paragraph.