

## **EAST AYRSHIRE COUNCIL**

**DEVELOPMENT SERVICES COMMITTEE: 10 MARCH 2004**

### **MONITORING AND ENFORCING MINERAL PERMISSIONS**

#### **Report by Director of Development Services**

#### **1. PURPOSE OF REPORT**

- 1.1 The purpose of this report is (a) to advise on a consultation paper entitled 'Monitoring and Enforcing Mineral Permissions' prepared by the Development Department of the Scottish Executive; and (b) to seek the views of the Committee on a series of options proposed by the Scottish Executive in order to homologate an officer response on the consultation.
- 1.2 The consultation paper seeks the views on the need for new arrangements to ensure that the conditions attached to planning permissions for the extraction of minerals (including opencast coal) are more effectively monitored and enforced by planning authorities. It considers a number of possible options for new charging regimes and identifies the Executive's preferred option for securing improvements to the existing arrangements.

#### **2. BACKGROUND INFORMATION**

- 2.1 The minerals industry plays an essential role in supporting the Scottish economy by providing important jobs, power generation and construction materials. However, extracting minerals can also have significant environmental consequences and it is important that these are carefully managed as, unlike most other forms of planning consent, such developments can continue in operation for many years. Permission is therefore generally subject to the attachment and implementation of a considerable number of detailed conditions that are intended to protect surrounding communities and the environment from adverse impacts.
- 2.2 Effective monitoring and, if necessary, enforcement of these conditions is necessary to ensure high environmental standards and to maintain the credibility of the planning system, particularly with those communities that are most directly affected by the extraction process. The Scottish Executive recognises that doing so is both costly and time-consuming for planning authorities and that the existing statutory fee provisions in the Town and Country Planning (Scotland) Act 1997 only covers the cost of processing an application and does not permit recovery of recurring monitoring and enforcement costs.
- 2.3 In line with the 'polluter pays' principle, the Scottish Executive believes that there is a case for such costs being borne by operators and not by the public and that any charging regime must deliver clear and guaranteed community

and environmental benefits. Over the past 5 years, a number of reports have concluded that there is a strong case to empower planning authorities to recover the costs of monitoring and enforcing mineral permissions. Further, the quarrying industry has also raised its own concerns regarding the effectiveness of existing arrangements with growing concerns that mineral planning authorities do not have sufficient resources to adequately enforce all operations and operators.

### 3. THE CONSULTATION PAPER

#### Existing Provisions

3.1 The consultation paper comments on existing provisions that may be available to Scottish local authorities for ensuring that operators contribute to the costs of monitoring mineral operations. Two routes were identified as follows:

- Section 75 Agreements (Town and Country Planning (Scotland) Act 1997) – such agreements enable planning authorities to enter into agreements for the purpose of restricting or regulating the development or use of land either permanently or during a prescribed period and the Agreement may contain incidental or consequential provisions, including financial ones if considered necessary or expedient.

***Comment: Some local authorities are already using Section 75 Agreements to secure contributions to the costs of dedicated monitoring staff within the Council or by using external expertise paid for by the operator to carry out tasks such as calculating restoration bond requirements or monitoring conditions. To date, this authority has not considered the potential of using Section 75 Agreements to secure contributions from operators for monitoring and enforcement costs. In terms of the adopted East Ayrshire Opencast Coal Subject Plan however, Policy 35 requires the provision of restoration guarantees by operators and, as an integral part of regular assessment of guarantee levels, an independent consultant would be engaged, funded directly by the operator to make such assessments.. This policy is now being applied to new opencast developments within East Ayrshire, secured through Section 75 Agreements.***

***There may well be merit in extending the use Section 75 Agreements to encompass provisions for meeting costs of the wider role of monitoring and enforcement of operational mineral sites. However, the disadvantage of this method is that such Agreements are entered into voluntarily by the relevant parties. Furthermore, this method could only apply to new mineral developments and would not address the costs relative to existing operational sites. If the Scottish Executive is serious about the requirement for operators to bear the costs of monitoring and enforcement, then this requires to be secured by a compulsory scheme.***

- Power of Well-Being – The Scottish Executive wishes to explore provisions made in the Local Government in Scotland Act 2003 which gives local authorities a ‘power to advance well-being’ to enable them to work in a more innovative way in responding to the needs of their communities. The Executive indicates that planning authorities may wish to consider whether they are likely to use these new powers in relation to monitoring and enforcing mineral permission, particularly for existing sites where inadequate monitoring arrangements are in place.

***Comment: The power to promote and improve well-being is presented in the 2003 Act to ensure it encompasses a wider range of actions that might contribute to the well-being of an area. It is for the local authority to determine what actions it could take, but activities entered into could involve the entering into agreements (contractual and non-contractual), the provision of goods and services, the formation of companies, joint ventures, trusts and partnerships, the provision of funding (grants, loans or indemnities) and the secondment of staff.***

***It is unclear, without further detailed examination or legal guidance, how the use of such powers could be used to secure a scheme for the recovery of the costs of monitoring and enforcement from mineral operators.***

#### Proposal for a Dedicated Fees Regime

- 3.2 The Scottish Executive recognises that the use of Section 75 Agreements (and planning conditions) or bonds could only be applied incrementally over time when considering new mineral developments or extensions. However, it is important that existing sites are also monitored effectively and unless the new power of well-being is considered a satisfactory option, it is likely that a new dedicated fees regime will require to be introduced to cover these sites. Such a new regime could also be extended to cover new developments.

***Comment: It is known that some planning authorities already have in place Section 75 Agreements that secure contributions towards the costs of dedicated monitoring staff within these authorities or by using external expertise. It is considered that the introduction of a dedicated fees regime could be introduced to ensure a mandatory minimum scheme but, as suggested by the Scottish Executive, this could be waived in circumstances where planning authorities and operators have already, or in the future, secured adequate arrangements through other means.***

- 3.3 The Scottish Executive considers it is important to acknowledge that any regime should be fair and not impose burdens on planning authorities or operators and that any regime should seek to ensure that income generated is used for monitoring and enforcement purposes and not appropriated into the general funds of local authorities. This suggests that, at the very least, any scheme should be linked to best practice, an informed and sensible cost structure and clear outputs.

- 3.4 Research undertaken in Scotland confirmed that the existing staff resources dedicated to monitoring and enforcement generally fall considerably short of meeting the required standards and that, even if detailed information was available, it would not provide an indication of what needs to be done to carry out the necessary tasks effectively.

***Comment: While, the consultation paper recognises shortfalls in meeting required standards it does not consider the need for appropriately trained or specialist staff (or indeed the procurement of appropriate equipment) to undertake the significantly wide range of monitoring tasks. At present within East Ayrshire, conditions are attached to mineral consents that require operators to set up, in agreement with the planning authority, various monitoring schemes to assess for example potential noise, dust and blast vibration impacts. However, these are generally self-policing schemes, with results of such monitoring being submitted to the planning authority for scrutiny. This very often creates doubts and suspicion in local communities where the independence of results is open to question.***

- 3.5 Due to the lack of adequate information which would enable the costs of mineral monitoring and enforcement to be properly quantified, the Scottish Executive has looked at research undertaken in England by ARUP Economics and Planning, on behalf of the Department of Environment, Transport and the Regions. The Researchers found that there was a very wide variation in the total costs of monitoring activities. Cost estimates were made as follows:

- average cost per monitoring visit - £200 (estimates did not include some of the specialist and legal advice that may at times be needed)
- average cost per site per annum - £800 (equating to around £41 per hectare of permitted working)
- average cost – less than 1p per tonne of minerals extracted

- 3.6 The Scottish Ministers believe that the objective of any fees regime should be to deliver the greatest improvement possible and the intention should therefore be to aim for arrangements that deliver best practice. If this approach was to be undertaken then ARUP estimate that the costs would rise to:

- £2160 per site per annum; or
- an average cost per visit of £360; or
- £69 per hectare per annum; or
- 2p per tonne per annum

*(These figures are based on an assumed annual salary of £25,000 per annum)*

***Comment: If all existing operational mineral sites and operational land fill sites in East Ayrshire are taken into account, this would generate a potential monitoring and enforcement revenue of around £28,000.***

- 3.7 The consultation paper suggests that some operators who have achieved appropriate accreditation or can demonstrate repeated good performance may feel entitled to some form of rebate i.e. fewer visits or a percentage reduction in monitoring charges. Such rebates could provide an incentive for improved environmental performance and better ensure that monitoring costs more closely reflect environmental impact.

***Comment: If the confidence of local communities in monitoring and enforcement is to be maintained and the best practice approach ensures the greatest improvement possible, then the proposed scheme must underpin a minimum standard approach regardless of the performance of an operator. It is considered that underperforming operators should incur penalties, perhaps through the need for additional chargeable visits.***

#### Possible Charging Options

- 3.8 The charging options are based on the ARUP findings in England, and ARUP believes that all four options have some merit and are capable of justification. All four options, which are still under consideration in England, are laid out in detail in Annexes C to F in the consultation paper (see Appendix 2 of this report) and can be summarised as follows:

- Option 1: Fees based on the area of the site being worked / filled
- Option 2: Fees based on the expected or actual output / input levels
- Option 3: As a flat rate per site irrespective of frequency per visit
- Option 4: As a rate per visit with the Mineral Planning Authority determining frequency

ARUP concluded that the best basic option to achieve the desired improvement in monitoring performance and public confidence is based on a charging system that is based on a fee per visit i.e. Option 4. It puts the onus on monitoring squarely in the hands of the planning authority and allows for a nationally set fee structure. The consultation paper also indicates that the Scottish Executive considers that Option 4 would best deliver clear and guaranteed community benefits whilst also ensuring that account can be taken of local circumstances. It is recommended that the cost structure should be set down nationally by the Scottish Executive (index linked) to avoid inconsistencies between Authorities.

- 3.9 The consultation paper seeks responses to a total of 21 specific questions which are laid out in Appendix 1 of this report together with suggested responses. The introduction of monitoring and enforcement fees would need a statutory authority and is therefore a matter for the Scottish Parliament. Subject to the necessary Parliamentary time and resources being available, the Scottish Executive will consider bringing forward legislation in the course of the current Parliament.

## **4. FINANCIAL IMPLICATIONS**

4.1 There are no financial implications for the Council as a result of the consultation exercise itself; some possible financial implications should the proposal be implemented are indicated in point 3.5 above.

## **5. LEGAL IMPLICATIONS**

5.1 There are no legal implications for the Council as a result of the consultation exercise. The Committee may wish to consider and explore further the legal implications in using the powers to advance well-being as an alternative mechanism to secure recovery of the costs of monitoring and enforcement of mineral operations.

## **6. PERSONNEL IMPLICATIONS**

6.1 There are no personnel implications for the Council as a result of the consultation exercise itself; however there may be workload implications relating to implementation of the proposals and these would be quantified in staff terms in a subsequent report to Committee.

## **7. RECOMMENDATIONS**

7.1 It is recommended that the Committee agrees:

- (a) to approve the contents of this report;
- (b) to indicate its full support to the principle of a statutory, national fees regime for the recovery of monitoring and enforcement costs relating to mineral and land fill operations in accordance with preferred Option 4; and
- (c) to authorise the Director of Development Services to submit a copy of this report to the Scottish Executive in response to the Consultation Paper.

**Stephen Chorley**  
**Director of Development Services**  
26 February 2004  
HM/HM  
FV-AN

### **LIST OF BACKGROUND PAPERS**

1. Monitoring and Enforcing Mineral Permissions: A Consultation Paper

Any person wishing to inspect the background paper listed above, should contact Mr. Hugh Melvin on 01563 555481.

**Implementation Officer: Alan Neish**

## APPENDIX 1: LIST OF QUESTIONS

Q1	Do existing provisions have a continuing role to play in securing adequate monitoring and enforcement arrangements?
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***Suggested Response: The use of Section 75 Agreements to encompass provisions for meeting costs of the wider role of monitoring and enforcement of operational mineral sites could have a continuing role to play. However, the disadvantage of this method is that such Agreements are entered into voluntarily by the relevant parties. It is considered that a statutory scheme is more appropriate to ensure minimum standards are equitably applied to deliver best practice led community benefits.***

Q2	Is the new power of well being considered an option for securing the effective monitoring of mineral sites?
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***Suggested Response: This option will require to be explored further but again unless this can deliver an equitable compulsory scheme, it will not deliver the benefits to be gained from a statutory fee regime.***

Q3	What relationship should existing arrangements have with any new charging regime?
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***Suggested Response: Existing arrangements should only continue to be applied either where such arrangements offer greater benefits than a nationally applied statutory scheme would offer or the exiting arrangements would offer greater flexibility in taking account of local circumstances.***

Q4	What "best practice" monitoring is needed to provide a level of scrutiny for mineral permissions that is both robust and reasonable?
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***Suggested Response: It is considered that the ten best practice points relating to monitoring raised within the consultation paper represent a robust and reasonable approach. It is agreed that the adoption of standardised and transparent reporting systems is necessary to ensure consistency of approach particularly if a national scheme of charging is promoted.***

Q5	What "best practice" is acceptable to ensure proper and ongoing dialogue with local communities?
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***Suggested Response: This authority currently endorses and promotes the use of community liaison groups in terms of proper and ongoing dialogue and communication with the planning authority and mineral operators. The presentation of regular monitoring reports to such groups would in most cases give greater confidence to local communities in terms of how monitoring and complaints are being addressed.***

Q6	Is the ARUP cost estimates, which would eventually be updated using GDP
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	inflaters, a reasonable basis for quantifying "best practice" monitoring and enforcement costs in Scotland?
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**Suggested Response: In the absence of detailed cost estimates in a Scottish context, it is considered appropriate to use updated ARUP cost estimates.**

Q7	Should there be a rebate for a good operator?
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**Suggested Response: If the confidence of local communities in monitoring and enforcement is to be maintained and the best practice approach ensures the greatest improvement possible, then the proposed scheme must underpin a minimum standard approach regardless of the performance of an operator. It is considered that underperforming operators should incur penalties, perhaps through the need for additional chargeable visits.**

Q8	What should authorities produce to show that effective monitoring is taking place?
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**Suggested Response: It is considered that local authorities should, as part of any effective charging scheme, provide detailed reports on each monitoring site visit indicating the purpose of the visit, an assessment of progress of operations, assessment of compliance with conditions and obligations, any matters of concerns raised through complaints, progress of restoration and aftercare.**

Q9	Do respondents agree that Option 4, waived where alternative local agreement is reached, represents the most appropriate way of ensuring effective monitoring arrangements are in place?
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**Suggested Response: It is accepted that Option 4 represents the most appropriate way (of the four options considered) of ensuring effective monitoring arrangements are put in place and covers costs.**

Q10	Are there other charging options that should be considered?
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**Suggested Response: In order to be effective and accepted by both local communities, operators and local authorities, charging options should be set nationally, should be equitable and the scheme simple to understand and operate. Option 4 would therefore seem the appropriate way forward. Alternative charging options could be appropriate if they satisfy these criteria.**

Q11	Should any fee levels be set on a case by case basis or centrally by the Scottish Executive?
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**Suggested Response: Response as per Q10 above. Departures from a nationally agreed fees regime could be secured through existing Section 75 Agreement mechanisms, where local circumstances indicate that variation to**

***the fee level is required and appropriate to specific sites. The setting of fees in a case by case basis should otherwise be avoided.***

Q12	Are existing enforcement powers considered adequate to ensure that planning authorities can respond effectively to breaches of planning permission?
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***Suggested Response: It is considered that existing powers of enforcement are adequate to ensure that planning authorities can respond effectively to breaches of planning control. However, the issue is one where the process is reactive rather than proactive in terms of monitoring and enforcement. The introduction of an appropriate charging regime would ensure a more proactive approach to the monitoring and enforcement of mineral operations.***

Q13	What should be defined as a chargeable visit?
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***Suggested Response: Formal planned monitoring should be chargeable. The question of addressing complaints is however more complicated. Operators would feel aggrieved at continual site visits carried out in response to formal complaints, particularly if complaints are subsequently assessed as being unfounded. Planning Authorities are also becoming more involved in setting up and participating in Technical Working Groups and Liaison Committees, which are advocated as good practice in Planning Advice Notes. As these are also part of the monitoring and enforcement processes, such participation should also be viewed as a chargeable visit.***

Q14	Is there a need to define what constitutes a "site"?
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***Suggested Response: It is not considered that there is a need to define what constitutes a site for monitoring and enforcement purposes.***

Q15	How many visits should be made annually?
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***Suggested Response: It is considered that there should be a minimum requirement under a charging system of 4 planned monitoring visits per year (i.e. on a quarterly basis).***

Q16	What should site visits cover?
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***Suggested Response: Site visits should cover an assessment of compliance with conditions, assessment of compliance with any obligations contained within associated Section 75 Agreements, progress on operations in terms of permitted timescale for development, discussion of complaints received, receipt of appropriate information on output, restoration etc.***

Q17	How should dormant/inactive sites be monitored?
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***Suggested Response: Such sites should still be monitored although the frequency of chargeable visits would probably be less for such sites.***

Q18	Should the fees regime continue during the restoration and aftercare period?
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***Suggested Response: It is considered that any fees regime should continue during the restoration and aftercare period, although it is anticipated that during aftercare in particular, the frequency of site visits would be less.***

Q19	What action should be taken against operators who do not pay a fee?
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***Suggested Response: It is hoped that if the fee charging scheme is to be introduced, then consideration will also be given by the Scottish Executive on penalties for failure to comply with the scheme.***

Q20	Should monitoring and enforcement fees apply to other forms of permission and if so which ones?
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***Suggested Response: It is considered that monitoring and enforcement fees should apply to any developments that involve the disturbance of land for exploitation of mineral resources or the infilling of land, carried out over a period of time, that requires ongoing monitoring by the planning authority.***

Q21	What impact will the proposals outlined in this paper have on mineral operators?
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***Suggested response: It is clear that the proposals outlined within the consultation paper will result in additional financial burdens on mineral operators. The full response on this will of course presumably come from the operators themselves.***