

EAST AYRSHIRE COUNCIL

SOUTHERN LOCAL PLANNING COMMITTEE: 24 MARCH 2006

05/1242/FL: PROPOSED REPHASING OF THE APPROVED SCHEME OF WORKING INCLUDING AN EXTENSION TO THE EXISTING OVERBURDEN STORAGE AREAS INCORPORATING ADDITIONAL MITIGATION MEASURES AND ASSOCIATED HABITAT ENHANCEMENT WORK AT POWHARNAL OPENCAST COAL SITE, NEAR MUIRKIRK

APPLICATION BY THE SCOTTISH COAL COMPANY LIMITED

EXECUTIVE SUMMARY SHEET

1. DEVELOPMENT DESCRIPTION

1.1 Permission is sought for a proposed re-phasing of operations on site to allow a departure for the working method originally approved for the Powharnal site. The proposal also provides for an extension to the current approved site boundary. The proposed extension area relates to three distinct areas located on the eastern boundary of the Powharnal site with an area 14.43 hectares of additional land being added to the Powharnal site overall. The proposed extension areas will be used for the storage of soils and overburden. In addition to this a further 10.81 hectares of land located within the existing Powharnal site will also be used for this purpose giving a total additional area of disturbance of 25.24 hectares.

1.2 The applicant has indicated that operations at Powharnal have been continually affected by site stability problems along both the north high wall and the advancing east high wall of the excavation. At present the east face is migrating through an area previously subjected to opencast mining activities. In this area, backfill materials are not very competent. This backfill material is now slumping from the face causing a variety of stability difficulties. The applicant has indicated that to date it has been possible to continue mining operations in accordance with the approved scheme at the expense of reducing the extent of dig in certain areas of the Powharnal site.

1.3 However, matters have now reached a stage where, because of the reduction in overall dig and the numerous stability problems being encountered, operations cannot continue to progress in accordance with the approved plans. There are also significant health and safety issues arising from the current situation which are further compounded by the soil stripping season being limited to the worst weather of the winter months.

1.4 The applicant further indicates that the Powharnal site is very constrained and there is limited space to store this problematic backfill material. Consequently an additional area is required to store the material in a safe manner. The applicant therefore seeks to undertake as a matter of some urgency an over-dig operation to remove all of this material in one operation

rather than remove it in a phased manner during the next 12-18 months as currently required under the approved phasing plans for the Powharnal site. Hence consent is sought to allow for a re-phasing of operations on site and for an extension to the site boundary to allow for the storage of the overburden and soils removed in this one operation.

1.5 Due to habitat restraints imposed by the Muirkirk and North Lowther SSSI and the associated SPA, the opportunities for the formation of additional overburden and soils storage areas were severely limited but the preferred storage area that emerged from appropriate assessment was that located on the southern edge of the existing overburden tip. The proposed re-phasing of the site operations has been designed in light of additional geological, geotechnical and superficial materials that have been obtained over the last 18 months and represents a mine plan that is capable of being implemented without further amendment.

1.6 Environmental information has been provided by the applicant to suggest that the proposal will have no significant additional impacts relative to the SSSI and SPA and this also involves the incorporation of proposed additional off-site mitigation areas into the current Powharnal Mitigation Management Plan set up as part of the Section 75 Agreement for the Powharnal site. The existing operations are subject to appropriate monitoring and management measures to minimise any adverse impacts arising to the development. All other aspects of the proposed development will be in accordance with the terms of the existing planning consent for the site and associated conditions and obligations within the Section 75 Agreement.

2. RECOMMENDATION

2.1 It is recommended that the application be approved subject to the conditions indicated on the attached sheet, but that the issue of the decision notice be withheld until the Solicitor to the Council has satisfactorily concluded a formal Agreement under Section 75 of the Town and Country Planning (Scotland) Act 1997 with the applicants in respect of the matters detailed in Paragraph 7.1 of this report.

3. SUMMARY OF ANALYSIS

3.1 As is indicated in Section 5 of the report, the application is considered to be generally in accordance with the development plan. Therefore, given the terms of Section 25 and Section 37 (2) of the Town and Country Planning (Scotland) Act 1997, the application should be approved unless material considerations indicate otherwise. As is indicated in Section 6 above, there are material considerations relevant to this application. However, these material considerations are also generally supportive of the proposed development as it is considered that the objections raised are either not of sufficient weight to justify refusal of the application or are not relevant to the proposal.

3.2 The proposed development does result in further disturbance and encroachment into the Muirkirk and North Lowther SSSI and SPA but an assessment of the potential impacts and the development of additional mitigation proposals to be incorporated into the current Powharnal Mitigation Management Plan should ensure that the integrity of these designated sites are not adversely affected by the proposed development. Additional landscape and visual impacts will occur as a result of the additional overburden storage proposals, however the additional tips are not likely to substantively affect the perceived landscape character of the wider area and overall they will have a minor level of significance.

3.3 It is considered that, given the relatively remote and sparsely populated area in which the Powharnal site is located, the proposal to extend the existing consented site by an area of 14.43 hectares, with a total additional disturbed area of 25.24 hectares, will have no significant adverse effects on any local community. The proposal will not result in any breach of the required buffer distances promoted through the policies of the East Ayrshire Opencast Coal Subject Plan and it is considered that as the extension areas proposed are primarily for the storage of soils and overburden with no additional coal extraction, the proposed operations can be undertaken within acceptable environmental standards.

3.4 In respect of all relevant matters and material considerations to be taken into account, it is considered that the proposed development is consistent with policy and that there are no significant environmental or community concerns regarding the proposal. In addition the proposed development will ensure continued operations at Powharnal safeguarding some 127 jobs and ensuring a safer working environment in health and safety terms. Consequently it is considered that the application is acceptable.

CONTRARY DECISION NOTE

Should the Committee agree that the application be refused contrary to the recommendation of the Head of Planning, Development and Building Standards, the application will not require to be referred to the Development Services Committee because it would not be a significant departure from the development plan.

Alan Neish

Head of Planning, Development and Building Standards

Note: This document combines key sections of the associated report for quick reference and should not in itself be considered as having been the basis for recommendation preparation or decision making by the Planning Authority.

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APPLICATION BY THE SCOTTISH COAL COMPANY LIMITED

Report by Head of Planning, Development and Building Standards

1. PURPOSE OF REPORT

1.1 The purpose of this report is to present for determination a full planning application which is to be considered by the Local Planning Committee under the scheme of delegation because it represents an extension and variation to the approved scheme of working for an existing opencast site which is generally in accordance with the Opencast Coal Subject Plan and is subject to an objection.

2. APPLICATION DETAILS

2.1 **Site Description:** The application site lies in generally open countryside, some 2 kilometres south-west of the village of Muirkirk. The site lies immediately south of the A70 Cumnock – Muirkirk Road, in the general locality of the farmstead of Nether Wellwood. The site lies on the southern side of the valley of the River Ayr at an elevation of between approximately 200 m to 260 m Above Ordnance Datum.

2.2 The area is sparsely populated with generally only isolated farmsteads being in evidence these principally being Boghead, Nether Wellwood, Mid Wellwood, Upper Wellwood and Dalfram. These farmsteads are within the ownership of the applicant. The site generally relates to the existing opencast coal mine at Powharnal, planning permission for which was granted on 08 September 2004 with operations on site commencing shortly after this.

2.3 The existing Powharnal site extends to approximately 414 hectares (1023 acres) and lies at an elevation ranging from 200 metres to 260 metres Above Ordnance Datum. Of this area, some 150 hectares (341 acres) lie within the former Gasswater Opencast Coal Site that lies immediately southwest of the Powharnal application site. Part of the application site lies within the designated Muirkirk and North Lowther Uplands Site of Special Scientific Interest and the associated Special Protection Area (SPA) of the same name. This SPA site qualifies for protection because it regularly holds breeding populations of five bird species of European importance.

2.4 Proposed Development: Permission is sought for a proposed re-phasing of operations on site to allow a departure from the working method originally approved for the Powharnal site. The proposal also provides for an extension to the current approved site boundary. The proposed extension area relates to three distinct areas located on the eastern boundary of the Powharnal site with an area of 14.43 hectares of additional land being added to the Powharnal site overall. The proposed extension areas will be used for the storage of soils and overburden. In addition to this a further 10.81 hectares of land located within the existing Powharnal site will also be used for this purpose giving a total additional area of disturbance of 25.24 hectares.

2.5 The applicant has indicated that operations at Powharnal have been continually affected by site stability problems along both the north high wall and the advancing east high wall of the excavation. At present the east face is migrating through an area previously subjected to opencast mining activities. In this area, backfill materials are not very competent. This backfill material is now slumping from the face causing a variety of stability difficulties. The applicant has indicated that to date it has been possible to continue mining operations in accordance with the approved scheme at the expense of reducing the extent of dig in certain areas of the Powharnal site.

2.6 However, matters have now reached a stage where, because of the reduction in overall dig and the numerous stability problems being encountered, operations cannot continue to progress in accordance with the approved plans. There are also significant health and safety issues arising from the current situation which are further compounded by the soil stripping season being limited to the worst weather of the winter months.

2.7 The applicant further indicates that the Powharnal site is very constrained and there is limited space to store this problematic backfill material. Consequently an additional area is required to store the material in a safe manner. The applicant therefore seeks to undertake as a matter of some urgency an over-dig operation to remove all of this material in one operation rather than remove it in a phased manner during the next 12-18 months as currently required under the approved phasing plans for the Powharnal site. Hence consent is sought to allow for a re-phasing of operations on site and for an extension to the site boundary to allow for the storage of the overburden and soils removed in this one operation.

2.8 Due to habitat restraints imposed by the Muirkirk and North Lowther SSSI and the associated SPA, the opportunities for the formation of additional overburden and soils storage areas were severely limited but the preferred storage area that emerged from appropriate assessment was that located on the southern edge of the existing overburden tip. The proposed re-phasing of the site operations has been designed in light of additional geological, geotechnical and superficial materials that have been obtained over the last 18 months and represents a mine plan that is capable of being implemented without further amendment.

2.9 Environmental information has been provided by the applicant to suggest that the proposal will have no significant additional impacts relative to the SSSI and SPA and this also involves the incorporation of proposed additional off-site mitigation areas into the current Powharnal Mitigation Management Plan set up as part of the Section 75 Agreement for the Powharnal site. The existing operations are subject to appropriate monitoring and management measures to minimise any adverse impacts arising to the development. All other aspects of the proposed development will be in accordance with the terms of the existing planning consent for the site and associated conditions and obligations within the Section 75 Agreement.

3. CONSULTATIONS AND ISSUES RAISED

3.1 East Ayrshire Council Roads and Transportation Division has not raised any concerns with regard to the proposed development.

Noted.

3.2 The Scottish Environment Protection Agency has no objections to the proposed development as it is deemed unlikely that they will prejudice SEPA's interests provided that the following requirements are met:

(i) All contaminated run-off from the proposed new overburden areas must be collected, stored, treated and disposed of in accordance with the terms of existing consents granted to Scottish Coal by SEPA for the site. The applicant must ensure that the existing treatment facilities and the associated infrastructure have the available capacity to manage the potential volumes of run-off which may arise from these new soil storage areas, especially during periods of inclement weather. It is the responsibility of the applicant to fully liaise with SEPA in respect of these matters.

A note can be attached to any consent granted for the proposed development advising the applicant to make early contact with SEPA regarding these issues.

(ii) Any works, inclusive of vehicle movement (crossing points) in and around the bed or banks of any watercourse must be discussed with SEPA, particularly if there is a requirement to divert or culvert any of the small streams in the vicinity of the new overburden storage areas. Any engineering works proposed at the site must be discussed with SEPA as from 01 April 2006 when the Controlled Activity Regulations are fully transposed under Scottish Law. SEPA will obtain new powers to control these types of activities. SEPA would however affirm that minor engineering activities for the most part will not require to be licensed, provided that the works comply with best practice, as determined by SEPA.

A note can be attached to any consent granted for the proposed development advising the applicant to make early contact with SEPA regarding these issues.

3.3 The Health and Safety Executive has no comments to make on the proposed development.

Noted.

3.4 The Ayrshire Joint Structure Plan Team has not responded to the consultation letter.

Noted.

3.5 Power Systems and Scottish Water have no objections to the proposed development

Noted.

3.6 Muirkirk Community Council indicates that it is in agreement to support the granting of planning permission for the proposed development. This decision was not taken lightly in view of previous actions by Scottish Coal at Spireslack, LAW Mining at Tardoes, UK Coal at Burnfoot Moor and the existing workings at Powharnal. To this end the Community Council would appreciate more care in the restoration of the Powharnal site and if possible, more camouflage of the existing and future workings which are all too visible from the A70. Also among our members are ex-employees of Scottish Coal and other opencast operators who have been forced out of business etc. and to this end we feel there is a threat to employment at Powharnal and a more damaging effect on the local economy. Whilst we appreciate our heritage and the wildlife in and around our community, we understand Scottish Coal is providing sufficient precautions to protect wildlife and its habitat as far as possible and the impact to the environment is being kept to a minimal and acceptable level. Whilst protecting and improving wildlife is very noble and sometimes fashionable, there is no better gift to our community than that of jobs and the self-esteem that it brings coupled with the spending power in local businesses, through employment, increased revenue in taxes and a reduction in benefits. This is important to our community as with the granting of the extension will, in our opinion, guarantee the sustained employment of approximately 120 men in an improved safety environment. We therefore recommend approval of this extension so that no-one at Powharnal is put at risk.

It is considered that a balance can be struck between meeting the revised requirements in order to operate Powharnal in a safe manner while ensuring minimal impact on the Muirkirk and North Lowther SPA. Although the proposed extension areas comprise some 14.43 hectares of additional land take to accommodate soils and overburden storage, compensatory mitigation proposals will see the existing 1050 hectares of mitigation area covered by the Powharnal Mitigation Management Plan increased to 2325 hectares. Subject to appropriate conditions and legal agreements,

neither Scottish Natural Heritage nor RSPB Scotland objects to the proposed development.

3.7 The Royal Society for the Protection of Birds Scotland) states that the Muirkirk and North Lowther Uplands SPA is of international importance for its rare breeding birds and the Muirkirk Uplands SSSI is of national importance for its bird communities and habitats. RSPB is therefore concerned by these proposals, which will result in further loss of the SPA and SSSI to opencast operations at Powharnal. It is noted that paragraph 6.16 of the East Ayrshire Opencast Coal subject Plan states that:

“Proposals to develop coal resources within or affecting areas of nature conservation interest are unlikely to be acceptable and will only be considered favourably in circumstances when comprehensive measures to mitigate all adverse effects of the operations can be successfully implemented and achieved.”

Having considered the scale, location and temporary nature of works being proposed, it would appear from the information currently available that the proposal is unlikely to lead to an adverse effect on site integrity. RSPB therefore does not object to the application, subject to operational measures being taken to avoid impacts on breeding birds and the implementation of appropriate offsetting habitat measures being formalised within a Section 75 agreement.

The range of mitigation measures required by the RSPB in terms of the Annex to its consultation response can be incorporated within an amendment to the existing Section 75 Agreement for the Powharnal site. This would see mitigation measures incorporated into the Powharnal Mitigation Management Plan that that would ensure that the new mitigation areas are covered by the same monitoring and management afforded to the current mitigation areas.

3.8 East Ayrshire Council Environmental Health Division has no adverse comments to make on the proposed development subject to the maintenance of existing standards and conditions relating to noise, dust and other potential nuisance emissions and the continuing production and submission of monitoring data from the applicant in support of the existing agreed schemes.

Noted. Any consent granted for the proposed development would be the subject of existing conditions attached to the original Powharnal planning consent and covered by existing monitoring arrangements.

3.9 Historic Scotland has no comments to offer on the proposed development.

Noted.

3.10 The West of Scotland Archaeology Service indicates that the proposed new bunding areas narrowly avoid the recorded archaeology. However, the map base illustrating the application does not allow for detailed measurements and since this would appear to be avoidance by only 10 metres or so WOSAS would wish to see the archaeological sites marked out on the ground with temporary bunting by an archaeological contractor to try and avoid accidental damage by plant operators. There are no other archaeological issues raised by the new proposals.

A condition can be attached to any consent granted for the proposed development to meet the requirements of WOSAS.

3.11 JMP Consulting (on behalf of the SE Trunk Road Network Management Division) indicates that the proposed re-phasing of the site operations is unlikely to create significant environmental impacts on trunk road traffic levels and offers no comments on the proposed development.

Noted.

3.12 The River Ayr Salmon Fishery Board and The Scottish Wildlife Trust have not responded to the consultation letters.

Noted.

3.13 Scottish Natural Heritage states that the proposal consists of an extension to the Powharnal Opencast Coal Site by approximately 14.5 hectares, with a further loss of approximately 10ha within the existing application area. The proposed development lies within the Muirkirk Uplands SSSI designated for its upland and blanket bog habitat, moorland bird assemblage, breeding and wintering hen harrier and short-eared owl. The site is also covered by the Muirkirk and North Lowther Special Protection Area (SPA) classified for its breeding populations of hen harrier, short-eared owl, merlin, peregrine and golden plover and wintering hen harrier. The legislative requirements relating to European sites are summarised in Scottish Executive Circular 6/1995 as amended June 2000.

Noted.

SNH's advice is that this proposal is likely to have a significant effect on the qualifying interests of the site. Our advice to East Ayrshire Council is based on the information provided in the Environmental Statement (ES) and additional clarification supplied to SNH by Scottish Coal to supplement the ES. If matters are addressed as noted below in conditions and through legal agreement, then an adverse affect on the integrity of the site can be avoided. SNH objects to the proposed development unless it is made subject to conditions and legal agreements which would overcome our concerns:

1. A suitable mitigation area is identified and managed in such a way to avoid an adverse affect on the integrity of the SPA.

2. Prior to the start of any work on the proposed development area, the location of a suitable mitigation area and management of it will be agreed with the Competent Authority. Activities relating to the creation of this mitigation area shall commence in advance of work on the development area.

3. The proposed development will be temporary and opencast working and associated use for over burden will cease by 2013, unless with the agreement of the Competent Authority.

4. The proposed development will be strictly limited to the area shown on drawing 23242 in the ES unless with the agreement of the Competent Authority.

5. Restoration of the proposed development area will begin within 3 months of completion of work of the proposed development in this extension area.

6. Restoration of the extension area should be carried out in accordance with the management aims and objectives described in the Powharnal Mitigation Management Plan and as agreed with the Competent Authority.

7. No work will commence within the main bird breeding season for ground nesting birds (March to July inclusive) unless with the agreement of the Competent Authority.

SNH states that the advice given above considered the impact of the proposals on the following factors:

- The extension could potentially impact on one golden plover territory.
- There will be no direct loss of likely merlin, peregrine short-eared owl or hen harrier nest sites, although there could be a loss of foraging potential through a loss of prey species, in particular voles.
- The habitat loss will be temporary and restored to at least a similar condition to present.

These losses may have an adverse affect on the site's integrity, although such an impact can be avoided provided matters outlined in 1 to 6 above are included in conditions and legally binding agreement. If the Competent Authority is minded to grant consent without conditions and agreements that would overcome the above noted concerns, SNH's position should be regarded as an objection.

The range of mitigation measures required by the SNH in terms of the stated points within the consultation response can be incorporated within an amendment to the existing Section 75 Agreement for the Powharnal site. This would see mitigation measures incorporated into the Powharnal Mitigation Management Plan that would ensure that the new mitigation areas

are covered by the same monitoring and management afforded to the current mitigation areas.

4. REPRESENTATIONS

4.1 One letter of representation has been received objecting to the proposed development. The points of objection are summarised as follows:

4.2 We object to this proposal to extend the area of disturbance at Powharnal in order to store overburden. Great care was taken to limit disturbance to the SSSI and SPA at the time the original planning application was considered. If the ecologists took such care, it is inconceivable that this applicant did not survey ground conditions in the area they proposed to extract coal. Given that Scottish Coal was quite aware that they were intending to opencast on land previously excavated, the onus was on them to investigate the geo-technology, stability of backfill etc.

Notwithstanding the relevance of the points made by the objectors, the present stability problems within the Powharnal site are a cause for significant concern in terms of the health and safety of site personnel. The proposed area of additional disturbance equates to 10.81 hectares within the existing Powharnal site and 14.43 hectares comprising the proposed three extension areas (25.24 hectares in total) but in this regard, appropriate consultation has been carried out with SNH and RSPB Scotland who, subject to the attachment of appropriate conditions and the securing of additional mitigation measures by a Section 75 Agreement, do not object to the additional disturbance within the SSSI or the SPA.

4.3 Scottish Coal originally stated that they would not excavate below 84OD. So MEGA questions whether the problems have arisen due to the applicant's greed to extract coal at unmanageable depths. Our suspicion is reinforced by the amount of coal already extracted and the stated loss of production due to operational difficulties.

Coal extraction operations within the Powharnal site are being carried out in accordance with the original approved scheme subject to minor modifications agreed by the Planning Authority in consultation with the Powharnal Management Committee.

4.4 Scottish Coal state that they have extracted 521,442 tonnes of coal during operations to date and that stability problems have resulted in 500,000 tonnes being left in situ. The total figure which they now state they had expected to extract up to November/December 2005 would therefore have equated to 1,121,442 tonnes, twice as much as anticipated at the time of planning consent.

The objectors point is fundamentally flawed in that it takes time to extract coal from the ground. While areas of coal were left in situ to ensure site safety, other coals within the site were extracted. In other words, accessible coal seams were being extracted at the time coals originally to be taken were left unworked. There was therefore no intention to remove the cumulative total tonnage suggested by the objector within the timescale suggested.

4.5 Our second main objection to the application is therefore that Scottish Coal wish to be granted consent which would allow them to produce coal at a rate which is not acceptable while neither the long anticipated rail-head and loading facility is operational nor the Welltrees Bridge replaced as agreed. Until either or both of these transport improvements are in place, the Council should decline to determine this application.

The current application requires to be determined on its merits and the Council as Planning Authority is not in a position to decline to carry out its statutory functions. Planning permission has been granted for the proposed Powharnal rail link loading facility but it is accepted that to date this consent has not been implemented. As a consequence discussions have been taking place between the applicant and the Roads and Transportation Division with regard to the requirement to pursue road infrastructure improvements relating to the Welltrees Bridge in the event that the rail link does not proceed.

4.6 Scottish Coal proposes to destroy a further 25.24 hectares of SSSI and SPA if this application is approved. They intend extending the overburden area 135 metres southwards, uphill at 280 metres height OD, the very area which is most visually sensitive and where they acknowledge there is already substantial impact. Currently the visual impact of parts of the Powharnal site are severe. Seeding is patchy and poorly maintained.

The proposed development is the subject of a Landscape and Visual Impacts Assessment. The proposed re-phasing will result in an enlargement of the Powharnal tip, extending 100-135m to the south and will remain at a similar upper level of 10m high off the ground levels. There are 2 more relatively small areas of proposed soil storage along the southern boundary. In line with best practice guidance the boundaries generally follow the contours or come down slopes at a curve, where visible from public places. Any impacts are considered to be medium term and temporary.

SNH in its consultation response states that The Landscape and Visual Impact Assessment has been thoroughly completed and agrees with the conclusion. In summary, the visual impacts are judged to be a moderate or major level of significance at the closer range views to a minor level of significance for the medium and longer range views for the Wellwood tip and a low impact for

the Powharnal tip. The additional tips are not likely to substantively affect the perceived landscape character of the wider area and overall they will have a minor level of significance. SNH also agrees that the cumulative effects with other opencast sites will be negligible.

4.7 MEGA objects to any use of new ground for extension of overburden as this is within the SPA and SSSI. It was these very margins of the latter that SNH Board members were particularly keen to preserve near the valley centre. The proposed deposition of 'porridgey' material on a SSSI is hardly conducive to its well-being. Perhaps Scottish Coal should use it to restore Hall of Auchencross / Rigghead / Milzeoch, none of which sites have been restored.

Subject to conditions and legal agreements listed above which would overcome stated concerns, SNH does not object to the proposed development.

4.8 MEGA has referred to the need for Scottish Coal to be required to put its house in order now before permitting further environmental degradation. We enquire as to whether (i) the Liaison Group has met in the last six months or whether they have met on a regular basis since planning consent was granted; (ii) when did the Technical Steering Group last meet and has a report on its findings been published?; (iii) is there in fact a project manager for the PMMP in place and / or a replacement for the Scottish Coal funded field officer? (iv) where is the peat being stored and is the Council satisfied that its moisture content is being maintained? (v) how many archaeological finds have been reported since the main dig at site preparation stage?

The Powharnal Site Liaison Committee has met on regular occasions since the commencement of operations at Powharnal, the most recent having taken place in February 2006. The Powharnal Management Committee has met on a regular basis as well as having a number of ad hoc meetings to discuss and agree on issues raised by the ongoing development. The most recent Annual PMMP Report was presented to the Committee in January 2006. There is also a Project Manager in place to co-ordinate the operation of the mitigation management prescriptions of the PMMP. Peat is stored in agreed locations within the site within cells that are clay lined to ensure moisture retention. Archaeological work was carried out in November 2004 by an appointed archaeological contractor.

4.9 MEGA does not agree with mitigation elsewhere in order to offset the despoliation of a SPA or a SSSI. The latter can in fact be improved and managed in its own right without being used as a bargaining tool. The benefits listed all accrue to the applicant not to our land and landscape.

The consideration of off site mitigation areas is considered to be acceptable and is acceptable to both SNH and RSPB Scotland. The incorporation of additional mitigation areas into the PMMP is considered by both SNH and RSPB to deliver benefits to the qualifying interests of the SPA and the natural heritage interests associated with the SSSI.

4.10 A further decrease in mammal population in addition to the lack of complete restoration of the Gasswater site may lead to a critical shortage point for raptors. Why is there no mention of any recent surveys of the qualifying interests which led to the designation of the SPA?

Reports have been prepared in line with the obligations relating to the PMMP and additional confidential information has been submitted by the applicant in relation to these matters as part of the Environmental Assessment. Sensitive information is contained within the submitted reports access to which is restricted in the interests of preventing possible persecution of species. This information has been made available to SNH and RSPB Scotland to allow an informed response to the consultation letter.

5. ASSESSMENT AGAINST DEVELOPMENT PLAN

5.1 Sections 25 and 37(2) of the Town and Country Planning (Scotland) Act 1997 require that planning applications be determined in accordance with the development plan unless material considerations indicate otherwise. For the purposes of this application the development plan comprises the Approved Ayrshire Joint Structure Plan (1999) and the Adopted East Ayrshire Opencast Coal Subject Plan (2003).

Ayrshire Joint Structure Plan

5.2 Policy E13 states that proposals to extend the supply of land with planning consent for the winning and working of minerals shall be considered against the following criteria:

- (i) *impact on the countryside, landscape character, visual amenity and the natural and built environment.*
- (ii) *the impact caused by noise, dust and the contamination of ground and surface water.*
- (iii) *any adverse effect on communities within Ayrshire.*
- (iv) *opportunity to maximise transport by rail or sea.*
- (v) *extent of directly related community benefit derived such as enhancement and creation of landscapes and habitats, and removal of dereliction.*
- (vi) *cumulative impact of proposals in one area and the extraction period.*

The original planning application for the Powharnal opencast site (Ref. No. 99/0761/FL) was assessed and determined against the stated criteria. The proposals promoted by the current application will be implemented under the existing planning controls within the existing consent and Section 75 Agreement and subject to additional requirements referred to elsewhere in this report. It is considered that the proposed extension would not conflict with the stated criteria in terms of its operational conduct.

The current application is therefore considered to be in accordance with the Structure Plan.

East Ayrshire Opencast Coal Subject Plan

5.3 Policy MIN3 is pertinent to the application, the policy stating that, subject to detailed consideration, the Council will generally be supportive of any proposal to extend an existing operative opencast site within the Potential Coal Extraction Areas provided that all of the following criteria are met:

- (i) *that the proposed extraction operations are carried out as a sequential phase of development and not independently or in isolation from the extraction programme of the original approved site.*

No additional coal extraction will result from the proposed re-phasing and extension to the site.

- (ii) *that the extended operations utilise fully the facilities and site infrastructure serving the original opencast site.*

The development will utilise existing site facilities and infrastructure.

- (iii) *that the scale of operations, rate of extraction and number of vehicle movements generated by the extended site are commensurate with those as existing on the original site; and*

The existing scale of operations, rate of extraction and number of vehicle movements will not be affected as a result of the proposed re-phasing and extension to the site.

- (iv) *that the proposed extension does not significantly prejudice plans for the restoration of the existing site.*

The proposed extension will not significantly prejudice plans for the restoration as the site will be progressively restored.

However, the proposed Powharnal extension area does not fall within a Potential Coal Extraction Area.

5.4 Policy MIN3 states that outwith the Potential Coal Extraction Areas, the Council will assess any extension on its own merits against the above criteria, and will not generally be supportive of such developments except where:

- (v) there is a clearly demonstrated environmental benefit to be achieved through the removal of existing areas of dereliction;

There will be no additional areas of dereliction removed as a result of the proposed extension.

- (vi) there is an overall benefit for communities affected, including local employment; and

The proposed re-phasing of operations and the proposed extension areas are necessary to ensure the current stability problems encountered within the Powharnal site are appropriately addressed, thereby securing not only the health and safety of site employees but also safeguarding the continued direct employment of 127 people.

- (vii) there are no conflicts with any other Subject plan policies

See comments below.

Any extension to an existing opencast operation which would perpetuate any existing disturbance to a local community for a total extraction period in excess of 10 years will not generally be considered acceptable, unless it can be clearly demonstrated that there are significant local community and local environmental benefits to be secured by the development.

The proposed rephrasing of operations and the use of the extension areas for soils and overburden storage will not result in any perpetuation of disturbance to a local community beyond the consented life of the Powharnal site.

5.5 Policy MIN 12: The Council will seek to ensure that a proliferation of opencast coal sites within close proximity to any one community or within one particular area does not occur. In this context, any proposed new opencast developments may be considered to contribute to an unacceptable cumulative impact on the amenity of an area where that development would:

- (i) constitute a third approved or operative site within 3 Kms of each other or within a 3 Km radius of any particular community as indicated on the Opencast Coal Subject Plan Proposals Map; or
- (ii) cause or exacerbate excessive adverse amenity and environmental disruption experienced by a community or group of dwellings from an existing operative site or from successive opencast operations over a total extraction period of 10 years; or

(iii) generate volumes of heavy traffic which taken together with the volumes of coal haulage vehicles already using the routes concerned, would cause unacceptable detriment to the amenity of any community or group of dwellings located along proposed haulage routes; or

(iv) result in an unacceptable accumulation of adverse impacts on international or nationally designated sites of nature conservation interest over time and place within a particular locality, or an accumulation of individual impacts which collectively have a significant adverse effect on the integrity of such areas.

The proposed development is not a new site but a modest extension to the existing Powharnal site. Nonetheless it is considered that the proposed extension would not conflict with the provisions of policy MIN 12 with respect to the stated criteria.

5.6 Policy MIN 15: All developers are required to restore their operational sites progressively to the highest possible standards. Developers will be required to provide for the creation of new habitats appropriate to the particular after uses of the site concerned as an integral part of their detailed restoration and aftercare proposals.

The restoration of the Powharnal site is designed to improve the wildlife conservation value of the land that would provide for greater benefits to the area both in bio-diversity terms and also in general amenity terms. Restoration to high standards will be overseen by the Powharnal Management Committee which has been set up, and is operational, as part of the existing Section 75 Agreement for the Powharnal site. This Committee is responsible for the monitoring and development of the Powharnal Mitigation Management Plan which seeks to actively manage some 1050 hectares of mitigation areas designed to mitigate predicted impacts on the Muirkirk and North Lowther Special Protection Area.

5.7 Policy MIN 23: In order to ensure that opencast operations do not cause unacceptable disturbance and nuisance to residents of local communities, the Council is likely to consider opencast developments unacceptable where:

(i) a development has a boundary which encroaches within 500 metres of the community concerned.

The proposed extension area does not encroach within 500 metres of any settlement.

(ii) the proposal involves a substantial area for extraction over an extraction period in excess of 10 years.

The proposed extension to the existing site area extends to approximately 14.43 hectares but does not involve any additional coal extraction operations in the three small extension areas comprising the current application site. It is therefore considered that the development will not have any significant adverse impact on nearby communities and the proposal is considered acceptable in planning policy terms.

(iii) the proposal is likely to be the subject of repeated extensions, perpetuating disturbance to local communities for a period substantially longer than 5 years.

Given the potential impact of further opencast development on the Muirkirk and North Lowther SPA, it is not considered that the site will be the subject of repeated extensions.

5.8 Policy MIN 25: Any proposal to undertake any extraction operations or to locate operational areas relating to the storage, processing or dispatch of coal within 500 metres of any sensitive establishment, group of dwellings or individual dwellinghouses not in the ownership or under the control of the developer will only be entertained by the Council where the development can be fully justified by the developer in environmental terms and where all of the following criteria are met:

(i) the Council is satisfied that there are no objections which cannot be overcome through the expeditious use of conditions or planning agreements from residents, owners, tenants or occupiers of properties located within 500 metres of the proposed working face of the site;

There are no residential properties, outwith the applicant's ownership or control that lie within 500 metres of the proposed extension area.

(ii) the extraction or operational area does not encroach within 100 metres of any group of dwellings, individual dwellinghouse(s) or sensitive establishment concerned.

There are no residential properties, outwith the applicant's ownership or control that lie within 100 metres of the proposed extension areas.

5.9 Policy MIN26: Protection of Areas of Nature Conservation: In order to ensure that areas of nature conservation interest are adequately protected from any direct or indirect adverse effects of opencast development:

(i) there will be a presumption against development which could adversely affect sites designated or proposed for designation as Special Protection Areas and Special Areas for Conservation. Development will only be permitted in such areas where an assessment of the proposal indicates that it will not adversely affect the integrity of the site, that there are no alternative

solutions and that there are reasons of over-riding public interest, including those of a social or economic nature.

The potential impact of the proposed development has been the subject of Environmental Impact Assessment that has led to the development of appropriate mitigation measures to ensure that the proposed development can proceed without adversely affecting the integrity of the Muirkirk and North Lowther SPA. Subject to conditions and legal agreements listed above which would overcome stated concerns, SNH does not object to the proposed development.

(ii) there will be a presumption against development which could adversely affect Sites of Special Scientific Interest and National Nature Reserves. Development would only be permitted in such areas where the overall integrity of the site would not be compromised or where any significant adverse effects of the development are clearly outweighed by social or economic benefits of national importance.

The potential impact of the proposed development has been the subject of Environmental Impact Assessment that has led to the development of appropriate mitigation measures to ensure that the proposed development can proceed without adversely affecting the integrity of the Muirkirk and North Lowther SSSI. Subject to conditions and legal agreements listed above which would overcome stated concerns, SNH does not object to the proposed development.

5.10 Policies MIN29 and MIN31: Protection of landscape value and visual quality of areas from opencast developments.

A Landscape and Visual Impact Assessment has been undertaken to determine the potential impacts of the additional overburden and soils storage areas on the local area and forms part of the submitted Environmental Statement. The assessment concludes that the additional overburden tips are not likely to substantively affect the perceived character over the wider area and overall they will have a minor level of significance.

5.11 Policy MIN33: The Council will, if mindful to grant planning permission for an opencast coal development and if considered appropriate, request an applicant to enter into an agreement with the Council under Section 75 of the Town and Country Planning (Scotland) Act 1997 in order to regulate, by agreement, such matters as cannot adequately be regulated by the imposition of planning conditions.

The existing Powharnal opencast site is the subject of a current Section 75 Agreement. In order to secure and ensure implementation of the recommendations of Scottish Natural Heritage and the Royal Society for the Protection of Birds

(Scotland) it will be necessary to amend the current Section 75 Agreement to incorporate additional obligations on the part of the applicant.

5.12 Policies MIN34 and MIN35: Mineral Trust Fund contributions encouraged in respect of opencast operations to be used for community improvements. Submission of appropriate information on coal extracted from site.

The applicant is currently a contributor to the Mineral Trust Fund in respect of the existing Powharnal opencast site.

5.13 Policies MIN36 and MIN37: Requirement for operators to lodge restoration bonds and requirement to fund aftercare schemes.

The existing Powharnal opencast site is subject to a Section 75 Agreement encompassing the above matters.

It is therefore considered that the proposed development is consistent with the relevant EAOCSP policies pertinent to this application.

6. ASSESSMENT AGAINST MATERIAL CONSIDERATIONS

6.1 The principal material considerations relevant to the determination of the application are the consultation responses, representations received, Scottish Planning Policy Guidelines and relevant planning history.

Consultation Responses

6.2 There are no consultation responses that would indicate that the application should be refused.

Representations

6.3 It is considered that the points of objection have been adequately addressed and are not of sufficient weight in this instance to merit refusal of the application.

Scottish Planning Policy Guideline 16: Opencast Coal

6.4 The proposed development has been assessed against the general tests set out in the recently published SPP16 on Opencast Coal and it is considered that the proposed development meets the relevant test of environmental acceptability subject to appropriate conditions and legal agreements and also on the test of the provision of local or community benefits that would outweigh likely impacts. Many of the provisions of SPP16 are enshrined within the East Ayrshire Opencast Coal Subject Plan, a full assessment against this plan being given in section 5 above.

Planning History

6.5 Full planning permission for the extraction of coal by opencast methods at Gasswater, near Muirkirk was approved on 10 June 1998 (Ref. No 96/0496/FL).

6.6 Full planning permission for the re-instatement of the Auchinleck – Cronberry mineral rail line and construction of a rail loading facility at Gasswater, near Muirkirk was approved on 28 February 2002 (Ref. No. 99/0757/FL).

6.7 Full planning permission for the extraction of 6.8 million tonnes of coal by opencast methods at Powharnal, near Muirkirk was approved on 08 September 2004 (Ref. No 99/0761/FL).

7. FINANCIAL AND LEGAL IMPLICATIONS

7.1 There are no financial implications for the Council in the determination of this application. Legal implications will arise through the requirement to amend the existing Section 75 Agreement for the site to include the proposed extension areas and to ensure that the proposed additional mitigation areas are incorporated into the Powharnal Mitigation Management Plan as definitively agreed by the Powharnal Management Committee. The amendments should include:

(i) The preparation and implementation of a revised Powharnal Mitigation Management Plan to take account of the recommendations and prescriptions contained within consultation responses from Scottish Natural Heritage (dated 27 February 2006) and the Royal Society for the Protection of Birds (Scotland)(dated 17 February 2006).

(ii) The implementation in full of the mitigation and restoration recommendations contained with the Environmental Statement (Written Statement and Addendum dated December 2005) that accompanied the planning application.

8. CONCLUSIONS

8.1 As is indicated in Section 5 of the report, the application is considered to be generally in accordance with the development plan. Therefore, given the terms of Section 25 and Section 37 (2) of the Town and Country Planning (Scotland) Act 1997, the application should be approved unless material considerations indicate otherwise. As is indicated in Section 6 above, there are material considerations relevant to this application. However, these material considerations are also generally supportive of the proposed development as it is considered that the objections raised are either not of

sufficient weight to justify refusal of the application or are not relevant to the proposal.

8.2 The proposed development does result in further disturbance and encroachment into the Muirkirk and North Lowther SSSI and SPA but an assessment of the potential impacts and the development of additional mitigation proposals to be incorporated into the current Powharnal Mitigation Management Plan should ensure that the integrity of these designated sites are not adversely affected by the proposed development. Additional landscape and visual impacts will occur as a result of the additional overburden storage proposals, however the additional tips are not likely to substantively affect the perceived landscape character of the wider area and overall they will have a minor level of significance.

8.3 It is considered that, given the relatively remote and sparsely populated area in which the Powharnal site is located, the proposal to extend the existing consented site by an area of 14.43 hectares, with a total additional disturbed area of 25.24 hectares, will have no significant adverse effects on any local community. The proposal will not result in any breach of the required buffer distances promoted through the policies of the East Ayrshire Opencast Coal Subject Plan and it is considered that as the extension areas proposed are primarily for the storage of soils and overburden with no additional coal extraction, the proposed operations can be undertaken within acceptable environmental standards.

8.4 In respect of all relevant matters and material considerations to be taken into account, it is considered that the proposed development is consistent with policy and that there are no significant environmental or community concerns regarding the proposal. In addition the proposed development will ensure continued operations at Powharnal safeguarding some 127 jobs and ensuring a safer working environment in health and safety terms. Consequently it is considered that the application is acceptable.

9. RECOMMENDATION

9.1 It is recommended that the application be approved subject to the conditions indicated on the attached sheet, but that the issue of the decision notice be withheld until the Solicitor to the Council has satisfactorily concluded a formal Agreement under Section 75 of the Town and Country Planning (Scotland) Act 1997 with the applicants in respect of the matters detailed in Paragraph 7.1 of this report.

CONTRARY DECISION NOTE

Should the Committee agree that the application be refused contrary to the recommendation of the Head of Planning, Development and Building Standards, the application will not require to be referred to the Development

Services Committee because it would not be a significant departure from the development plan.

Alan Neish
Head of Planning, Development and Building Standards.

15 March 2006
HM/HM/SMB
FV/DVM

LIST OF BACKGROUND PAPERS

1. Application Form and Plans.
2. Statutory Notices and Certificates.
3. Consultation Responses.
4. Letter of representation
5. Adopted East Ayrshire Opencast Subject Plan (2003)
6. Approved Ayrshire Joint Structure Plan (1999)
7. Previous applications 00/0793/FL, 03/0726/FL, 04/0263/FL and 04/0717/FL

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

Implementation Officer: Dave Morris

Location	Powharnal OCCS, Near Muirkirk
Nature of Proposal:	Proposed rephasing of the approved scheme of working including an extension to the existing overburden storage areas incorporating additional mitigation measures and associated habitat enhancement work
Name and Address of Applicant:	The Scottish Coal Company Limited Castlebridge Business Park Gartlove ALLOA
Name and Address of Agent	Philip Rayson Garan House 28 Main Street MUIRKIRK

DPO's Ref: [Hugh Melvin]
PPO's Ref: []

The above **FULL** application should be granted subject to the following conditions:

1. The phasing of the Powharnal development shall be carried out in strict accordance with the submitted amended Phasing Plans (Drawing No.23162 August 2005 – Drawing No 23162 September 2013 inclusive: 10 plans in total dated 01 December 2005), or as may otherwise be subsequently agreed by the Planning Authority in consultation with the Powharnal Management Committee.

REASON: To ensure minimal impact on the Muirkirk and North Lowther Uplands SSSI and SPA.

2. The proposed development hereby approved shall otherwise be undertaken in accordance with the conditions pertaining to planning consent 99/0761/FL dated 08 September 2004.

REASON: To retain effective planning control over the proposed development in accordance with current planning consent relating to the Powharnal opencast site.

3. During the implementation of the operation hereby approved, retained sites of archaeological significance shall be demarcated on site. Details of the manner and duration of such demarcation shall be submitted to and approved by the Planning Authority prior to commencement of development.

REASON – To avoid accidental damage by site activities to the existing recorded archaeology.

➤ **NOTE TO APPLICANT**

1. The applicant is advised to make early contact with the Scottish Environment Protection Agency with regard to any amendments to existing authorisations in place for the Powharnal site in respect of legislation administered by that body.

**DUE TO ORDNANCE SURVEY REGULATIONS AND COPYRIGHT
THE MAP IS AVAILABLE FOR VIEWING AT THE COUNCIL'S
PLANNING OFFICE IN LUGAR. FOR INFORMATION ON
VIEWING PLEASE CONTACT (01563) 555320.**