

EAST AYRSHIRE COUNCIL

CABINET – 21 MAY 2014

DECOMMISSIONING, RESTORATION, AFTERCARE AND MITIGATION FINANCIAL GUARANTEES

Report by the Depute Chief Executive

1. PURPOSE OF REPORT

2. The purpose of this report is to seek Cabinet approval of proposed arrangements and supporting principles for the submission, agreement, implementation and monitoring of financial guarantees that are required in respect of the decommissioning, restoration, aftercare and mitigation of opencast coal mines, quarries, landfill, onshore wind farms, electrical infrastructure projects and, should such proposals be forthcoming, fracking developments (or any other similar projects and developments) that are subject to current and future planning applications considered by East Ayrshire Council in its capacity as Planning Authority.

3. BACKGROUND

4. Planning conditions and/or Section 75 legal agreements attached to planning consents for specific developments can require appropriate decommissioning (in the case of onshore wind developments), restoration, aftercare and mitigation financial guarantees to be put in place. The purpose of these financial guarantees is to ensure that if the development has not been carried out in accordance with the approved planning consent (specifically the requirements for restoration of the development site) and, having been given the opportunity, the developer has not rectified the breach, the Planning Authority can, as part of a wider range of actions to mitigate the breach, call on either all or part of the financial guarantee to rectify the breach. A fundamental of this concept is that the value of the financial guarantee must be sufficient to cover the outstanding works required to rectify the breach. Similarly, should an operator become insolvent, the financial guarantee will require to be utilised to allow for the Planning Authority to arrange for the site to be restored to its approved end use.
5. The Council's current arrangements for the provision of financial guarantees relating to restoration and aftercare obligations connected with planning permissions are derived from a number of sources, including:
 - Scottish Planning Policy
 - Scottish Government Planning Advice Note (PAN) 64: Reclamation of Surface Mineral Workings dated December 2002.
 - East Ayrshire Local Plan 2010
 - Ayrshire Structure Plan
 - East Ayrshire Council Opencast Coal Subject Plan approved in 2003 (under review).
 - Accounting Policy Bulletin (APB) 8A: Performance Bonds, dated April 2014.
 - Extractive Waste (Scotland) Regulations 2010.
6. In addition, as Members are aware, following the liquidation of the Scottish Coal Company Limited (SCCL) and of Aardvark TMC Limited (Aardvark) in April 2013 and May 2013 respectively, the Council approved its Steps to Recovery plan at its

meeting on 19 September 2013 which addressed a range of matters relating to opencast coal complexes within East Ayrshire, including the difficulties associated with the sufficiency and settlement of existing restoration bonds. A comprehensive progress update on the Steps to Recovery was considered by Council at its meeting on 28 January 2014.

7. At the same meeting of the Council on 28 January 2014, it will be recalled that the report from the Independent Review of the Regulation of Opencast Coal Operations in East Ayrshire which, inter alia, comprised 14 recommendations, all of which were accepted by the Council, including a specific recommendation about the use of guarantee bonds.
8. At a national level, emerging Planning Policy is expected following the assessment and publication of the outcomes from the Scottish Government's consultation on Opencast Coal Restoration: Effective Regulation. This consultation closed on 27 February 2014 and the Council's response was approved by Cabinet at its meeting on 19 February 2014. To assist with the consideration of the outcomes from the consultation, it was announced at the recent meeting of the Scottish Coal Industry Ministerial Taskforce held on 7 April 2014 that 2 sub-groups had been established to consider the related issues of Finance and Compliance Monitoring. The Council will be represented on the respective sub-groups by the Depute Chief Executive and the Operations Manager – Building Standards and Development Management.

9. FINANCIAL GUARANTEES

10. It is considered that financial guarantees, when properly applied and monitored, are an important means of ensuring that restoration and aftercare obligations will be met in the event that the developer is unable or unwilling to meet these obligations. They are also an important means of providing reassurance to local communities that decommissioning, restoration, aftercare and mitigation obligations will be met. Effective financial guarantees should reflect the scale and type of development proposed, drawing on the expertise and professional assessment of industry specialists or consultants. The financial guarantee should be reviewed at regular intervals based on the nature of the development to ensure that it is in line with the cost of meeting any decommissioning, restoration and aftercare obligations at any point in the development with the ability for funding to be decreased or, if necessary, increased as various stages of a development are completed and the extent of disturbance is reduced (or increased). For clarity the review should assess the extent of development undertaken to the review date and include and assessment of likely future actions that may be undertaken on site until the next review date.
11. There are a number of different types of financial guarantee that are provided by large financial institutions and insurers, including:
 - **Insurance Company Guarantees (Surety Bonds):** These are provided by insurance companies and guarantee payments when operators are unable to satisfactorily complete decommissioning, restoration and aftercare works required by a planning condition or legal agreement. Insurance companies base these bonds upon an appraisal of the technical ability, financial structure and track record of the operator. Insurance companies will typically only offer bonds for up to 5 years. This may mean that surety bonds are not appropriate for long term works. Insurance companies may be unwilling to provide a new bond after the initial period if a company appears to be in financial difficulty.

- **Bank Guarantees:** These guarantees are underwritten by a standard security taken over assets or against a company's overdraft/borrowing facility. The bonds are secured against tangible assets and can be granted for extended periods of time in excess of 5 years.
- **Parent Company Guarantees:** A holding company or parent company may offer this type of guarantee for one of its subsidiary companies. The guarantee can however be lost if the parent company or another subsidiary company encounters financial difficulties.
- **Mutual Funds:** These are guarantee schemes covering several operators, where risks are spread and the group offers security. Planning authorities can call upon the funds in the event of financial failure of a member that results in non-compliance with restoration or aftercare requirements. The British Aggregates Association and the Quarry Products Association both have restoration guarantee funds.
- **Pay-as-you-go or Joint Escrow Accounts:** These are ring-fenced finance arrangements available to the Council to use to effect a restoration and aftercare contract. In the case of opencast coal mining, the escrow works by levying an amount per tonne once the development begins on the basis of the restoration cost calculated at the beginning of operations and the tonnage in terms of coal or other minerals that are to be taken from the site. These two numbers would be regularly re-assessed during mining operations at a frequency that fits with the development of each site and will vary with individual circumstances but should be as frequent as all parties feel will give an accurate current position. The funds would be set aside and ring-fenced with the regulator in a way that operators or their financier could not access them other than for restoration and aftercare work even in times of financial challenge. Due to the deficit at the start of a project this may require a top-up cover of a short term bond or a cash deposit.

12. The various types of financial guarantee, including those described above, are set out in more detail in Appendix 1 to this report. In addition, a current risk assessment for each type of financial guarantee has been provided which is intended to be used to inform consideration of the appropriateness and acceptability of each in the context of individual planning applications. Such risk rating will inevitably vary as a consequence of industry and market fluctuations or broader economic influences. Notwithstanding that each planning application will be considered on its own merits, those financial guarantees with a high risk rating are likely to be considered unacceptable by the Council, subject to any alternative agreement and/or additional compensatory arrangements that may be put forward by an operator.

13. EAST AYRSHIRE PLANNING POLICY

14. The East Ayrshire Opencast Coal Subject Plan, which was published in 2003, established the principle of ensuring that restoration and aftercare guarantees are in place for all future opencast operations. This is currently under review following the decision of Cabinet on 28 August 2013 to develop a Minerals Local Development Plan to supplement the proposed East Ayrshire Local Development Plan. Whilst work to develop the new Minerals Development Plan is underway, it is anticipated that this process will not be concluded until October 2017. In support of the Opencast Coal Subject Plan (2003) a strengthened Compliance Monitoring regime has been developed, details of which have been reported previously to the Council.

15. In the meantime, the Council is committed to pursuing all legal means of ensuring the satisfactory restoration of new major developments at no cost to the residents of the Authority area. All applicants for new projects comprising opencast coal mines, quarries, landfill, onshore wind farms, electrical infrastructure projects and fracking (or similar developments) are, therefore, required to provide an appropriate financial guarantee, supported by payments towards compliance monitoring, to ensure that all decommissioning, restoration and aftercare conditions attached to planning consents issued are fully met.
16. In order to monitor the financial liability of the project and to ensure that the planning conditions and legal obligations are fully met, compliance monitoring by an independent consultant on behalf of the Council is essential to monitor compliance to achieve the agreed scheme. The basic principle of the revised approach to be implemented is that the costs of Compliance Monitoring will be passed on to the operators wherever it is appropriate and competent to do so.
17. The proposed approach set out within this report is based on three principles of practical importance:-
 - Applicants will be expected to set out within their submissions in support of their application the specific details of the financial guarantee arrangement they propose, and this will in turn form part of the assessment and reporting of their application to the Planning Committee for determination;
 - Any such financial guarantee arrangement in respect of any relevant development approved by the Planning Committee will require to be put in place prior to commencement of the development on site; and
 - Any variation or deviation which an applicant may subsequently propose to a financial guarantee arrangement previously considered by the Planning Committee when approving their application will require to be reported back to the Planning Committee for their further consideration.

18. ACCOUNTING POLICY BULLETIN 8A: PERFORMANCE BONDS

19. Accounting Policy Bulletins (APBs) underpin the Council's Financial Regulations and are issued as a part of the Council's ongoing commitment to provide information and guidance to user departments on a wide range of financial and accounting matters.
20. Accounting Policy Bulletin (APB) 8A relating to Performance Bonds was last reviewed in April 2014 and notes that planning conditions and legal obligations can be attached to planning applications for developments relating to opencast coal mines, quarries, landfill, onshore wind farms, electrical infrastructure projects and fracking. Whilst, in general terms, APB 8A in its current form is consistent with the proposed arrangements within this report, the opportunity will be taken to further review its contents to ensure it fully reflects the proposed arrangements and, thereafter, will be kept under regular review.

21. PROPOSED ARRANGEMENTS

22. The report from the Independent Review of the Regulation of Opencast Coal Operations in East Ayrshire that was presented to the meeting of East Ayrshire

Council on 28 January 2014 included the following recommendation which was accepted by the Council:

Recommendation 7: The drawing up of restoration guarantee bonds should not be led by the Planning Service, instead it should be a wider corporate task drawing on independent financial advice and led by the Executive Director of Neighbourhood Services in her capacity as Depute Chief Executive.

23. In response, it was agreed that any financial guarantees that are required by current or future development proposals will be managed corporately, led by the Depute Chief Executive, taking into account assessments by:
- Independent Mining Engineers;
 - Independent Environmental Consultants;
 - Finance Services;
 - Legal Services;
 - Planning and Economic Development Services, and
 - Additional external advice as required.
24. In practical terms, it is proposed that any relevant planning application under consideration by the Planning Authority (including all decommissioning, phasing and restoration plans and all other relevant documentation) shall be assessed by the Council's independent mining engineers or independent environmental consultants, who shall review the proposed scheme (as detailed in Paragraph 10) and provide the Council with an assessment of the costs of decommissioning, restoration and aftercare (and if required mitigation) throughout the life of the proposed development (including the operational, restoration, aftercare and mitigation periods), with the costs of the assessment being met by the developer for future developments.
25. On receipt of the assessment of the costs of decommissioning, restoration and aftercare (and if necessary mitigation) as provided by the independent mining engineer or independent environmental consultant, the maximum decommissioning, restoration, aftercare and mitigation figures will be required to be used by the Council as the quantum amount in any financial guarantee to be provided.
26. During the assessment of the planning application by the Planning Authority (after the independent mining engineer or environmental consultant has supplied details of the restoration and aftercare (and if necessary mitigation) costs to the Authority), the applicant shall be provided with details of the engineer's assessment of costs and shall be requested to supply the Planning Authority with details of what financial guarantee will be provided by them in relation to the restoration and aftercare (and if necessary mitigation) obligations arising from the proposed development.
27. The Council's Finance, Legal and Planning Services will consider, at the earliest possible opportunity:
- the purpose(s) of any proposed financial guarantee;
 - the associated risk rating of the proposed financial guarantee with reference to the risk assessment contained within the Appendix to this report, and
 - the sufficiency of any quantum proposed taking into account any assessment provided by the independent mining engineer or environmental consultant.
28. Consideration shall also be given at this stage as to any requirement for further external advice.

29. The following matters will be considered by officers when assessing the terms of any financial guarantee proposed:
- The reason why the financial guarantee is required i.e. decommissioning, restoration, aftercare, mitigation or in combination;
 - The risk it is required to cover i.e. breach of any planning conditions, associated legal obligations relative to decommissioning, restoration, aftercare or mitigation or insolvency;
 - The length of time the financial guarantee is required to cover and its expiry;
 - What will constitute a valid call being made on the financial guarantee;
 - When can the monies be claimed i.e. before or after money expended by the Council in rectifying any breach, and
 - The financial guarantee's quantum profile and the triggers for reduction in value and associated timescales.
30. The proposed terms of any financial guarantee will be considered by the Depute Chief Executive, taking into account all of the details of the proposed development and associated internal and external advice that has been provided. The proposed terms of the financial guarantee will then be included within the relevant report to be presented, as appropriate, for determination under delegated authority or to the relevant decision-making forum of the Council in accordance with the terms of the Council's Scheme of Delegation.
31. The foregoing principles, as they are applied to opencast coal operations, will be applied to the full range of operators as previously agreed by Council and as set out in paragraph 1 and throughout this report, namely, opencast coal mines, quarries, landfill, onshore wind farms, electrical infrastructure projects and, should such proposals be forthcoming, fracking developments or any similar developments that will require decommissioning, restoration, aftercare, mitigation or a combination of these factors.
32. During the operation of these types of developments, there are a number of factors which can affect the overall restoration liability of a development. To ensure that the restoration liability is closely monitored and caters for all aspects of the site operations, it is essential that planning conditions obligations are monitored by the Compliance Assessor. This Compliance Monitoring regime shall ensure that the operators comply with the agreed scheme and that their actions do not adversely affect the site restoration liability.
33. It is acknowledged that the funding of all forthcoming compliance assessments will be borne by the operator and subject to the planning conditions and legal obligations. However, with a number of existing projects where there are no planning obligations to introduce compliance monitoring then the cost shall be borne by the Council. It should be noted that where an existing development is being amended then legal agreements shall be altered to reflect the requirement of operators to meet the costs of any compliance monitoring activity.
34. Standardised wording for financial guarantees, planning conditions and legal obligations will be developed and once finalised shall be used as the template for any financial guarantee to be provided, associated planning conditions and Section 75 obligations. For the avoidance of doubt, the proposed approach set out within this report will also be applied to any future development which falls out-with the types of applications described.

35. PENDING APPLICATIONS

36. It should be noted that a number of applications under Section 36 of the Electricity Act 1989 for the construction or extension, and operation, of electricity generating stations and other planning applications for onshore wind farms, are in the process of being finalised, and before presenting these to the Planning Committee for consideration due consideration will have been given to the provisions of the proposals contained within this report.
37. Section 36 Applications relate to any wind farm proposal with a capacity in excess of 50 megawatts and require Scottish Ministers' consent. These applications are managed by the Scottish Government's Energy Consents Unit and the Planning Authority is formally consulted in the process.
38. The services of Ironside Farrar have been procured to allow an assessment of the cumulative impact of these proposals and this has led to a target schedule for consideration of current Section 36 applications by the Planning Committee as follows:

	Comments from Ironside Farrar	Target Committee Date
Whitelee 3	Mid May	13 June 2014
Afton	Mid May	27 June 2014
South Kyle	Early June	4 July 2014
Keirs Hill	Mid June	8 August 2014
Glenmount	Mid/End June	22 August 2014

39. These target dates may be subject to change depending on the advice of the consultants, as a key element of this process will be the cumulative effect of the proposed developments. A schedule for determination of the other outstanding planning applications for wind farms will also follow after advice is received from Ironside Farrar. These additional current planning applications, which the Planning Authority requires to determine, relate to Harehill Extension, Ashmark, High Cumnock, Garleffan and Penbreak. All applicants have been advised of these target dates for determination as have the Scottish Government's Energy Consents Unit.
40. Similarly, those pending applications for mineral and opencast coal operations that are scheduled for consideration by the Planning Committee will be considered with due regard to the terms of the proposed arrangements set out in this report.

41. LEGAL IMPLICATIONS

42. The legal implications arising from this report are in relation to (1) any future call which may be required to be made on the financial guarantee; (2) existing statutory obligations which may become enforceable upon the local authority in the event that any financial guarantee was found to be insufficient to cover any necessary restoration, aftercare or mitigation condition or obligations; and (3) other actionable claims which may arise against the Council if the Council was found to be have caused actionable loss.
43. The responsibility of calling the financial guarantees will rest with the Council and will be determined depending upon the circumstances of each case. The success of any call upon the guarantee will depend upon the circumstances of each particular case arising from any failure to adhere to the decommissioning, restoration, aftercare and mitigation obligations of the development. The specific wording of any

financial guarantees and the type of guarantee provided will dictate the ability of the Council to call upon the financial guarantee, and importantly the prospects of recovery under that guarantee.

44. Additionally, while it has been set out in detail in earlier reports to Council (namely the Steps to Recovery report of 19 September 2013) that failure to carry out decommissioning, restoration, aftercare and mitigation under the terms of any planning permission does not in itself become a legal liability upon the Council, it should nonetheless be noted that in the event that restoration obligations are not met, then in those circumstances, this may lead to the Council becoming responsible to carry out certain works arising from statutory obligations set out within various Acts of Parliament, including for example statutory nuisance obligations arising under the Environmental Protection Act 1990.

45. **HUMAN RESOURCE IMPLICATIONS**

46. Consideration is being given to the potential requirement for specific training for employees who are involved in the assessment and development of financial guarantees particularly in the Legal, Finance and Planning Services

47. **FINANCIAL AND RISK IMPLICATIONS**

48. There are no Financial Implications for the Council arising directly from this report; the proposed approach is predicated upon costs in respect of compliance monitoring being met by developers and the effective application of the terms of financial guarantees will ensure that any potential decommissioning, restoration, aftercare and mitigation liabilities are addressed.

49. In terms of risk, the Appendix to this report sets out the current assessment of the risks associated with each type of financial guarantee and this will be kept under regular review to reflect industry and market fluctuations or broader economic influences. It must also be recognised that should the Planning Authority refuse an application in the absence of a sufficient financial guarantee any refusal can be appealed to the Chief Reporter for Scotland.

50. **COMMUNITY PLANNING IMPLICATIONS**

51. The impact of the situation in relation to decommissioning, restoration, aftercare or mitigation of specific sites is significant in relation to Delivering Community Regeneration but also has potential to impact on other themes of the Community namely, Improving Community Safety in relation to safety considerations at sites, and Promoting Lifelong Learning in relation to the skills development and employability of workforces.

52. **RECOMMENDATIONS**

53. It is recommended that Cabinet:

1. Approves the approach described within this report for the submission, agreement, implementation and monitoring of financial guarantees that are required in respect of the decommissioning, restoration, aftercare and mitigation of opencast coal mines, quarries, landfill, onshore wind farms, electrical infrastructure projects and (should proposals be forthcoming) fracking developments (or other similar developments);

2. Reaffirms the principle that where any future planning consents are granted in respect of any of the developments specified at 1 above, the costs of Compliance Monitoring will be expected to be met by the operator;
3. Notes the risk rating of the different types of financial guarantees as contained within Appendix 1 to the report and that these may change over time as a consequence of industry and market fluctuations or broader economic influences;
4. Notes that the terms of this report will inform the current development of the Council's new Local Development Plan (which includes wind, etc) and Minerals Local Development Plan;
5. Notes that Accounting Policy Bulletin 8A will be reviewed to reflect the terms of this report and will be kept under regular review thereafter, and
6. Notes that standardised wording for financial guarantees, planning conditions and legal obligations will be developed.

Elizabeth Morton
Depute Chief Executive
9 May 2014

LIST OF BACKGROUND PAPERS

None

Members wishing further information should contact Elizabeth Morton, Depute Chief Executive, Tel: (01563) 576518 Email: elizabeth.morton@east-ayrshire.gov.uk

IMPLEMENTATION OFFICER: Elizabeth Morton, Depute Chief Executive,

Appendix

Financial Guarantee type	Method	Challenges	Benefits	Risk level
Surety Bonds	<ul style="list-style-type: none"> Bond value based on technical appraisal, financial structure and track record of developer. Bonds only for limited period usually 5 years. Cost approximately 2% annually of sum bonded 	<ul style="list-style-type: none"> If called by Planning Authority, the Bond provider will claim back money from developer leading an increased risk of liquidation. Wording of bonds can be over complicated. Need to be renewed every 5 years. Risk that the developer cannot get a new bond after five years. General approach of insurance industry may result in full value not being realised, leading to potential Court proceedings. 	<ul style="list-style-type: none"> Can provide restoration guarantee for larger sums of development liability. 	Medium Risk
Bank guarantees	<ul style="list-style-type: none"> Bank provides restoration guarantee. Bank takes standard security over an asset of the developer or through overdraft facility. Can be provided for periods in excess of 5 years. 	<ul style="list-style-type: none"> If called by Planning Authority, would have a direct financial impact on the developer who may already be in financial difficulty. Calling event could result in liquidation of company. Bank may contest the "calling" leading to delay. 	<ul style="list-style-type: none"> Minimal cost to developer. 	Medium Risk
Parent Company Guarantee	<ul style="list-style-type: none"> Restoration Guarantee provided by parent company in the group. Legally binding document which can be used to raise court action, if necessary. 	<ul style="list-style-type: none"> If dispute occurs, and "call" is required, it is effectively with the same Company that is in breach. If the parent company is in financial difficulty settlement is unlikely. If the parent company goes into liquidation, the guarantee disappears. 	<ul style="list-style-type: none"> No cost to developer. 	High Risk
Mutual Funds	<ul style="list-style-type: none"> Trade guarantee scheme with existing in place for quarry operators. Developer pays into the fund. In the event of liquidation, the fund pays out up to a maximum predetermined value. 	<ul style="list-style-type: none"> Terms of the Trade Guarantee, taking quarries as an example, is limited to £300,000 per site and £500,000 across the company. The Quarry Products Association has not been required to pay out, thus the system has not yet been tested. Not widely used in the sectors falling under this policy. There will be a limited financial value, constrained by the size of the fund 	<ul style="list-style-type: none"> Independent provision. Low cost to developer. 	High Risk
Escrow Account	<ul style="list-style-type: none"> Money is deposited in a joint ring-fenced bank account to a value 	<ul style="list-style-type: none"> Requires a large cash deposit by the developer. 	<ul style="list-style-type: none"> Money readily available to carryout restoration work. 	Low Risk

	<p>equal to the outstanding liability on the development site.</p> <ul style="list-style-type: none"> • Money is repaid to the developer as the value of liability is reduced. 		<ul style="list-style-type: none"> • Interest paid on money, although this may be lower than the general increase in retail prices. 	
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Financial Guarantee type	Method	Challenges	Benefits	Risk level
Pay as you go Escrow	<ul style="list-style-type: none"> • Money is deposited into the joint account, on an amount per unit when it is earned by the development i.e. coal extracted, wind energy generated. 	<ul style="list-style-type: none"> • Value of cash in the account does not equate to the liability of the development until at least 5 – 10 years into the development. • Regular accounting process is required to ensure the correct money is deposited in line with the progress of the development. • If liquidation event occurs during the early deficit period, the account cannot pay for the restoration. • If planning breach occurs during the early deficit period, then there would be a possibility that funds would not be available to resolve the breach. • If a planning breach occurs which requires the shutdown of the site in the deficit stage of scheme, then restoration would be unachievable. 	<ul style="list-style-type: none"> • After the breakeven point the account has enough money to resolve any breach. 	High Risk
Pay as you go Escrow / Bond	<ul style="list-style-type: none"> • This is a hybrid of a bond and a pay as you go escrow. • The restoration bond is required to provide the restoration guarantee while the escrow account is growing. • Due to the deficit at the start of a project this may require a top-up cover of a short term bond or a cash deposit. 	<ul style="list-style-type: none"> • Developer is required to pay for the bond while making deposits to the escrow account. • Regular accounting process is required to ensure the correct money deposited in line with the progress of the development. • If called by the Planning Authority, the Bond provider will claim back money from developer and lead to an increased risk of liquidation. • Wording of bonds can be over complicated. • Bond needs to be renewed every 5 years. • General approach of insurance industry may result in full value of bond not being realised, leading to potential Court proceedings. 	<ul style="list-style-type: none"> • Addresses lack of long term bond provision. • Provides security of funds after breakeven point. • Deliverable solution for developers. 	Low Risk