

REPORT OF INDEPENDENT REVIEW OF REGULATION OF OPENCAST COAL OPERATIONS IN EAST AYRSHIRE

Jim Mackinnon CBE (Chair)
Chris Norman
James Fowlie

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1. INTRODUCTION

1.1 In June 2013, East Ayrshire Council (EAC) agreed the terms of reference for an Independent Review of the processes and procedures around the management, determination, implementation, monitoring and review of the planning processes in relation to opencast coal operations within EAC, all within the governance arrangements in place throughout the relevant period.

1.2 The aim of the Review is to inform the Council and its communities by determining:-

- the circumstances which led to the current position;
- why and how these circumstances prevailed;
- if the current situation could have been anticipated and prevented; and
- what action requires to be taken to ensure these circumstances never recur.

A fuller description of the terms of reference for the Review is at Annex A. We were also advised that we could extend and develop the remit and we have done that in a number of ways. The focus of the Review related to the Council's processes and procedures, although allegations were made to the Review Team about some of the operational practices of the companies that have gone into administration and we have made references to this in the report. In addition we also believe that some of the issues which emerged are relevant to the Scottish Government and the Royal Town Planning Institute.

1.3 The Independent Review was chaired by Jim MacKinnon CBE, formerly Director for the Built Environment and Chief Planner at the Scottish Government, with expert input from Chris Norman, Development Management Manager, West Lothian Council and James Fowlie, Director – Integration and Development, Convention of Scottish Local Authorities.

1.4 The Review Team agreed that the relevant period should be from 1996 when EAC took over the planning function from the former Kilmarnock and Loudon and Cumnock and Doon Valley District Councils (CDVDC).

1.5 The Team recognised the importance of not applying a counsel of perfection to the review, nor did we seek to look at practice and procedure 10–15 years ago by present day standards. Our focus was not on purity of process or procedure but on the consequences or outcomes as a result of action or inaction by EAC.

1.6 The Review received excellent support and assistance from EAC staff, in particular Donna Leitch who was temporarily assigned to the Review Team and is a credit to the Council. She was a pleasure to work with – a model of common sense and efficiency combined with the most engaging personality. In addition we cannot speak too highly of the Coal Team who have done an outstanding job in assembling and cataloguing information on the various opencast sites across East Ayrshire, and were unfailingly obliging in responding to requests for additional information and analysis.

KEY FINDINGS

From the above we make the following key findings which could be regarded as positive:-

- Although opencast coal extraction is generally a controversial activity for local communities, in East Ayrshire – certainly based on the volume of objections - that has not been the case.
- The clear priority articulated by elected members - and we believe with widespread support within local communities - was to create and maintain jobs.
- The policy framework at the national level for opencast coal mining was clear and comprehensive – this was confirmed by independent research.
- If the policies at the local level, reflected in the East Ayrshire Open Cast Subject Plan (EAOCSP), had been applied they would have provided a robust framework for decision making and ensuring progressive restoration.
- The processes leading up to the determination of applications for opencast coal extraction did not lead to unreasonable, far less perverse, decisions.

However these are far outweighed by major and persistent failings in procedure and practice within EAC:-

- Over many years East Ayrshire has been a major producer of opencast coal within Scotland and the UK, but the staff resource to regulate the industry has not been commensurate with the scale of challenges this presents.
- A number of reports on planning applications did not highlight lack of progress with restoration and aftercare on existing sites on land within the control of the applicant when applications were being considered to extend sites or open up new coal seams - this is inexplicable as suspensive conditions could have been used to progress outstanding restoration before further excavation commenced.
- The process for calculating and monitoring restoration guarantee bonds was wholly deficient and defective. Moreover the figures for inclusion in bonds were not verified by specialist/independent advice – as advised in PAN 64 (2002) – and were accepted as client instructions by Legal Services.
- Monitoring progress on sites was wholly inadequate. This, combined with the alleged practices of the operators who have gone into administration, which by focusing on coal extraction, contrary to the terms of planning consents and Section 75 Agreements, has created extensive environmental degradation.
- The failure to appoint independent assessors, paid for by the operators, as required by the EAOCSP and Section 75 Agreements is completely inexplicable.
- Routine complaints about issues such as noise, blasting, dust and lorry movements were addressed albeit not always to the satisfaction of the complainants, although there is an outstanding issue about noise from the Glenburn complex.

- It is clear that sites were not visited or inspected on a regular basis, particularly in recent years. But even if the visits were not as frequent as they should have been, persistent failures to comply with the terms of planning permissions and legal agreements should have been identified and addressed.
- Mining Progress Plans – where they were submitted - did not achieve what they were set out to do, partly because the form in which they were submitted make no reference to the approved scheme and were not systematically assessed by council officials. This is equally true of Environmental Audits.
- The Technical Working Groups and Community Liaison Groups did not provide an adequate forum for addressing concerns over restoration, arguably being run by the operators for the operators with little/no challenge to their practices.
- The warnings in the 2006 Independent Study of Restoration Guarantee Bonds should have been heeded and acted on.
- The 2009 Report to the Southern Area Planning Committee was an inaccurate statement on the state of restoration on opencast sites/complexes, while not providing an annual update as requested by the Committee was a significant failing.
- Neither elected members nor senior management were provided with any accurate or authoritative assessment of the scale of the problem or the funding required to address it, despite the restoration problems and costs getting ever greater and bonds either inadequate to meet these costs or running out altogether.
- The lack of awareness within the senior management of EAC of the environmental damage being wreaked by the operators who have gone into administration and the financial implications of their actions/inactions is something we have found difficult to understand or explain. There is no evidence to suggest that these issues were raised with the Director of Neighbourhood Services or the Chief Executive.
- The failings are many and varied but at their core lie significant and ongoing individual, management and communication failings, particularly within the planning service.

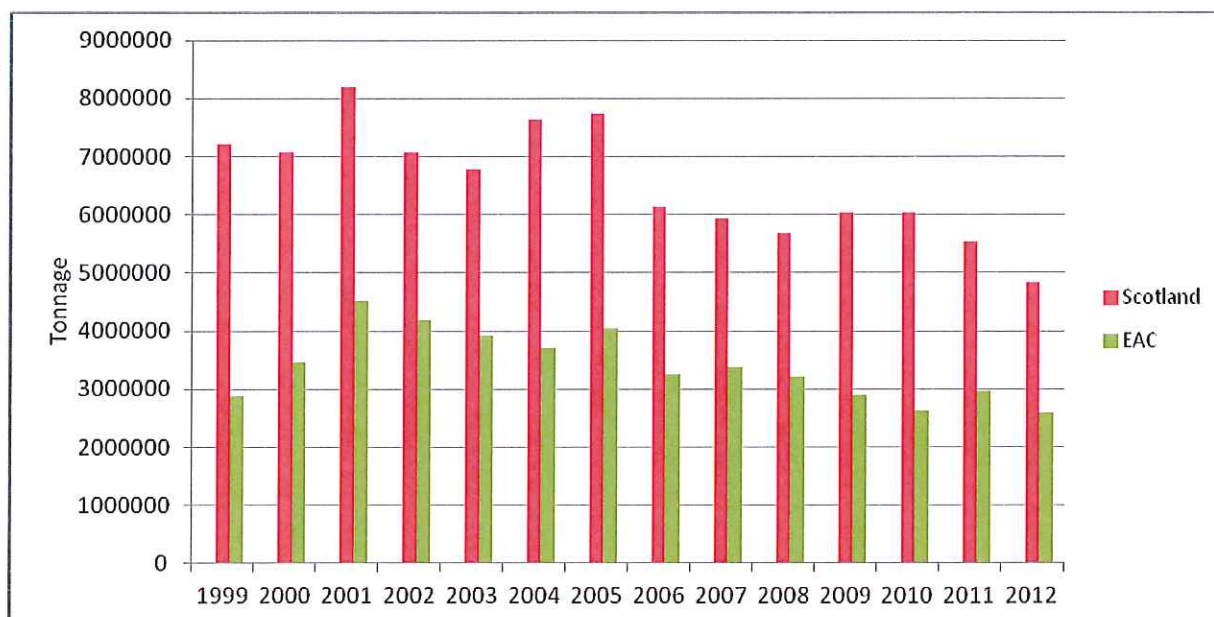
SUMMARY OF RECOMMENDATIONS TO EAST AYRSHIRE COUNCIL

- The East Ayrshire Opencast Coal Subject Plan should be reviewed and an up to date planning policy framework put in place.
- Greater efforts should be made, for example through improved Environmental Statements, to ensure that individuals and communities understand more clearly the implications of planning applications for surface mining.
- EAC must consider the adequacy of staff resources – numbers and knowledge - for dealing with opencast coal development, including monitoring compliance with planning conditions and Section 75 Agreements.
- Two knowledge sets need to be available to the Council, firstly to ensure authoritative advice is provided on methods of working and restoration; and secondly to assess the financial viability of proposals.
- Senior managers must engage more actively on opencast coal matters and provide clear direction and supervision.
- Personal permissions to operators should be discontinued and conditions attached to permissions should be rigorously monitored.
- 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.
- Measures should be taken to counter the perception that the conduct of the Planning Committee is not sufficiently impartial.
- A more rigorous approach to filing must be introduced and the new e-planning system provides opportunities to alert planning staff on, for example, dates by when conditions should be discharged or Mining Progress Plans submitted.
- The Enforcement Charter should be revised with a specific section devoted to the regulation of the opencast mining industry.
- Mining Progress Plans and Environmental Audits should be seen as a single document and should always be the subject of consultation with key stakeholders with feedback/action points provided to the operators.
- Technical Working and Community Liaison Groups should be combined and should be led by a senior EAC official, not the operators.
- Complaint handling should be improved with officials and elected members more persistent in following up issues and concerns.

- Quarterly reports should be submitted to councillors recording progress on sites/complexes and highlighting outstanding issues.

2. COAL AND EAST AYRSHIRE

- 2.1 The extraction of coal has been a major source of employment within Central Scotland. At its peak 10,000 miners were employed in East Ayrshire but between 1945 and 1988 there was a massive decline in the deep mining industry with over 30 pit closures in the Cumnock and Doon Valley sector of the Ayrshire coalfield. The last deep mine closed in 1989 but with large quantities of high quality coal remaining, much of it at shallow depths, opencast mining operations grew during the 1980s.
- 2.2 The importance of the East Ayrshire coal resource within Scotland and in the UK as a whole is clear. For much of the period from 1999 East Ayrshire produced more coal than was produced in all of England and in some years over 50% of coal production in Scotland.

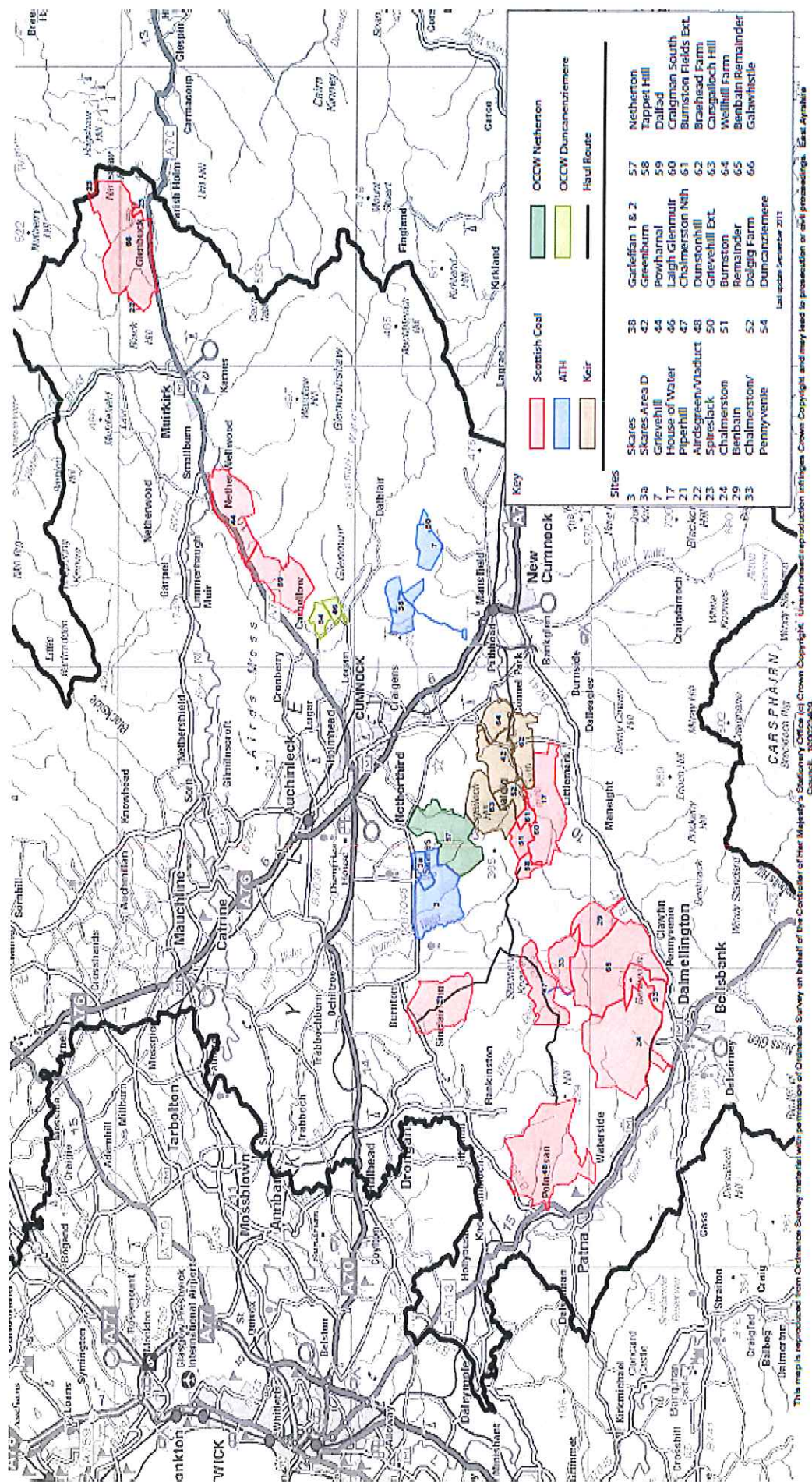


Source: The Coal Authority

Considering the volume of opencast coal production and its potential environmental impact, the Council had a duty to ensure that its regulatory functions for this type of development were adequately resourced with the right number of staff with the appropriate knowledge and skill sets.

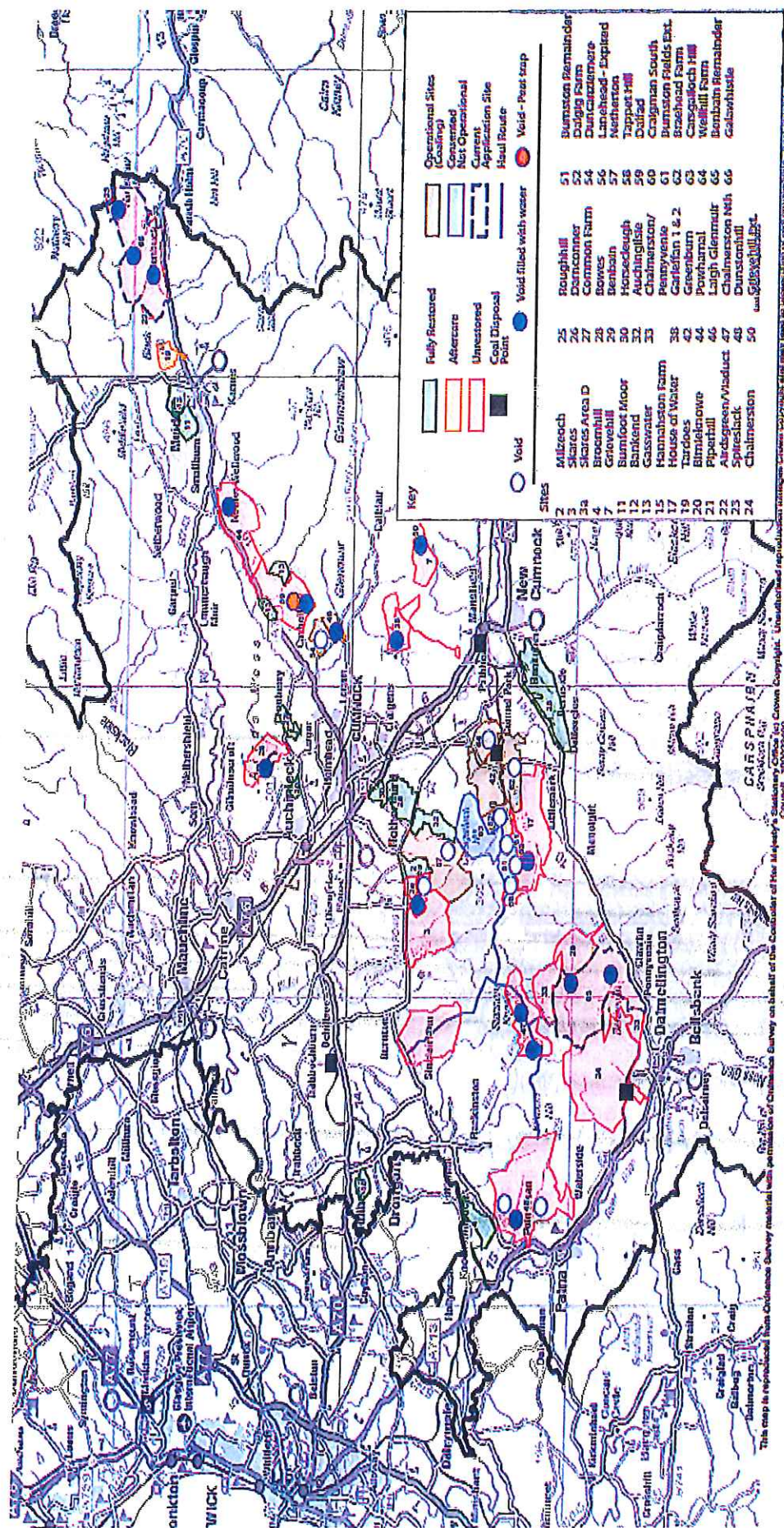
- 2.3 Over time opencast operations were consolidated into 3 companies – Scottish Coal, Aardvark TMC Limited and Kier Mining. In April 2013 Scottish Coal was placed in administration; the following month Aardvark was also placed in administration. Reasons for this included the fall in world coal prices, cheaper coal imports, rising fuel costs, rail freight charges and new environmental legislation. Only Kier Mining continues to operate with Hargreaves Surface Mining now also operating 2 sites on behalf of Hive Cos set up by the administrators KPMG – OCCW (Netherton) Limited and OCCW (Duncanziemere) Limited. (Map 1). Hive Cos are special purpose vehicles set up by KPMG to take forward the assets of the companies who have entered administration.

MAP 1 - Opencast Coal Sites/Complexes: Former/Current Operator



- 2.4 As the report to the Council in September 2013 indicates, these Hive Cos were granted Letters of Comfort from the Head of Planning and Economic Development in April 2013. These letters allow the companies to temporarily operate under the terms of the existing planning permissions at Netherton and Duncanziemere and to continue to extract coal at those sites. These existing permissions, like other permissions for surface mining in East Ayrshire, were personal to the previous operators. The Letters of Comfort were granted subject to the Hive Cos seeking a variation to their planning permissions under Section 42 of the Town and Country Planning (Scotland) Act 1997 to amend the personal permissions at the above sites and at House of Water. These applications remain under consideration by EAC.
- 2.5 The Council has also been in discussion with the Hive Cos and their agents regarding the terms of alternative restoration proposals. The report to Council notes that "whilst longer-term alternative solutions are being discussed to ensure that the Hive Cos do not increase the restoration liability, at present, the Hive Cos are operating without sufficient guarantees being in place for the restoration of the Netherton and Duncanziemere sites."
- 2.6 The immediate, most obvious, consequence of the 2 companies going into administration was the loss of 311 jobs locally. But the scale of the environmental devastation left in East Ayrshire and the possible implications soon became evident. This is of a completely different magnitude to the challenges facing other Scottish councils affected by the companies going into administration. The scale of devastation is difficult to comprehend, it is massive and not repeated elsewhere in Scotland. It is estimated that there are almost 2000 hectares of unrestored and disturbed land within East Ayrshire, with almost 25% of this area comprising 22 voids, 16 of which are filled with water over 50 metres deep and/or have unstable cliff faces (Map 2). In addition there is a peat trap over 40 metres deep in places at Dalfad. Independent mining engineers have estimated restoration liabilities in line with the original planning permissions and approved restoration plans at £161 million with total restoration and aftercare bond coverage at £28.6 million. The Review was not required to assess these figures and, although it was suggested to the Team that restoration to the standards originally approved would be impractical and there are doubts over the full value of the bonds being recovered, the figures highlight the scale of the challenge facing the Council and its communities.

MAP 2 - Opencast Coal Sites/Complexes: Restoration Position (Nov 2013)



3. CONDUCT OF REVIEW

3.1 The work of the Review Team involved:-

- Site Visits
- Interviews with a range of EAC and External Stakeholders – see Annex B
- Questionnaire
- Files Review

3.2 Visits to the opencast coal complexes were undertaken by the Chair and Chris Norman on 16/17 July 2013 and by James Fowlie on 1 August 2013. Two Scottish Government Ministers (Fergus Ewing and Derek Mackay), together with their officials, and the Leader of the Council and the Labour Group also visited the Spireslack and Powharnal complexes on 30 August 2013.

3.3 There were suggestions that the Chair and Chris Norman “interrogated” staff during our site visits. This was most definitely not the case and can be verified by Council staff who attended these site visits. Moreover we were told that the Chair had recorded conversations with employees of the mining companies who conducted the site visits. Again this is completely untrue. The Chair dictated notes about what he saw on the sites but did so away from other participants.

3.4 The Chair, with support from other members of the Review Team as necessary, met with a wide range of individuals and organisations from July onwards. A list of those interviewed is at Annex B. A meeting was held with community representatives on 28 August. In addition the Chair visited [REDACTED] Papers were also received from the Mining and Environment Group Ayrshire (MEGA) and the Chair agreed to meet a delegation from MEGA.

3.5 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] We do not believe our conclusions are invalidated as a result, [REDACTED]
[REDACTED] would have helped us understand even more fully why the current situation had arisen. The questionnaire was also completed by [REDACTED]
[REDACTED]

3.6 The Chair of the Review also received correspondence which, inter alia, indicated that [REDACTED] had stated that some EAC staff should be the subject of a criminal inquiry. This was raised with [REDACTED] in question who denied having made this statement and the Chair of the Review replied on this basis, as well as drawing what was a potentially serious allegation to the attention of the Council Chief Executive. This resulted in a suggestion that the impartiality of the Review was therefore compromised. It is difficult to see how this compromised the review; indeed if the issue had not been pursued, it could have been concluded – not unreasonably – that the review was not sufficiently rigorous.

3.7 Chris Norman reviewed the files on a sample of 12 opencast sites/complexes. The sites chosen for the sample included single and conjoined sites operated individually by both Scottish Coal and ATH/Aardvark. Specifically the Gasswater, Powharnal and Dalfad complex gave an insight in to the handling of adjoining sites between 1998 and 2011. Similarly the Spireslack/Ponesk Remainder complex is illustrative of the Council's approach between 1996 and 2009. The Duncanziemere site exemplifies a relatively recent determination adjoining the sites at Garleffan and Grievehill, both being land in the control of the applicant. The sample also included a study of the multiple consents at the Skares/Netherton complex where the site boundaries overlap. This included assessing officers' reports to elected members; evaluation of decision notices, including the wording of conditions; and the approach to drawing up, drafting and monitoring of restoration and aftercare guarantee bonds and planning agreements. This was a major task as most of the opencast sites have long and complex histories with overlapping boundaries, multiple applications to vary conditions or extend sites, and this is often compounded by convoluted relationships between planning consents, planning agreements and restoration and aftercare guarantee bonds.

3.8 Chris Norman's task would have been even greater had the Coal Team not put in a major effort to bringing together the file records. Some issues the Team uncovered were:-

- Section 75 Agreements, once recorded in the Register of Sasines and returned to Legal Services, were not consistently forwarded to Planning and, even where they were, they were not always placed within the Planning file along with details of the application and decision notice. This was not the case with Section 75 Agreements for other types of development which were held on the Planning files.
- Planning files were archived when the site remained active and where the site restoration was not completed. The file management of the opencast coal planning applications was poor with live applications located within archive filing at the Records Management Centre at the Johnnie Walker Bond.
- Information submitted directly to the Lugar office and taken into account in reaching decisions on planning applications was held manually and not, as required from 2009, within Uniform and IDOX as required under the e-planning system.
- There are significant gaps in the post decision information on the files on individual sites/complexes assembled by the Coal Team.

All this has resulted in difficulties in assembling core information following the 2 companies going into administration as well as creating difficulties and delays in responding to complaints, FOI requests and general enquiries.

4. EAST AYRSHIRE GOVERNANCE

4.1 There are 2 elements we considered here, firstly the balance of responsibility for decisions between elected members and officials, secondly the conduct of members and officials in terms of relationships with the coal industry.

4.2 There is a statutory requirement on the Council to produce a scheme of Delegation and Administration and, over time, a number of these have been produced to reflect changing circumstances. In relation to the Planning Service, one of the main functions of the scheme is to specify which decisions are delegated to the Head of Planning and which require to be referred to the relevant Planning Committee, or more recently as a result of reforms to the Planning System, to the full Council. The arrangements for delegated decision making on planning applications in East Ayrshire are similar to the position in councils across Scotland. The latest scheme of delegation was published in June 2013 which, inter alia, transferred responsibility for decisions on 3 categories of planning application from the HOP to the Planning Committee:-

- Any minor applications for opencast development.
- Any applications for variation or discharge of existing conditions relative to restoration or aftercare of sites.
- Any future proposed restoration scheme submitted for approval in fulfilment of a planning condition.

4.3 The Committee structure in EAC relating to elected member consideration of opencast coal development has been relatively stable:-

- 1996-1997 - Separate area Local Planning Committees for Cumnock and Doon Valley
- 1997/2012 – Southern Area Local Planning Committee
- 2012 – present – single Planning Committee for EAC

4.4 In the course of the Review there have been suggestions that the relationship between the mining companies and East Ayrshire Council members and officials was inappropriate or worse. [REDACTED]

[REDACTED] Para 3.6 refers to the correspondence received suggesting that criminal proceedings should be commenced against some EAC officials. [REDACTED]

[REDACTED]
We have also been told about a former councillor accepting hospitality from a company which he clearly should not have done but it was apparently recorded in the register of members' interests. So, while it is clear that there were close relationships between the operators and members/officials in EAC, this is not surprising given the significance of the industry to the local economy.

- 4.5 Councillors appear to have been assiduous in declaring an interest when opencast applications were discussed, for example if they were an employee of a coal company or were involved in disbursing funds through the Minerals Trust. Papers from MEGA suggest that not all gifts/hospitality received by members from the coal operators resulted in them abstaining from decisions on opencast coal developments, although we understand gifts/hospitality were declared in the Register of Interests of Councillors. It has been suggested that in the days of Cumnock and Doon Valley District Council and from 1996 – 2011 when a planning service operated from the Lugar office, elected members had more frequent access to officials, although the Review Team did not seek to substantiate this. There is no suggestion of impropriety in this.
- 4.6 We asked for and were provided with information on complaints about East Ayrshire Councillors that had been referred to the Standards Commissioner. Since 2003, there have been 5 complaints, none of which related to opencast coal developments.
- 4.7 There was general agreement that employment generation has consistently been the primary consideration in East Ayrshire when decisions on planning applications – not just opencast coal developments - were made. It was also felt that this represented the majority view in local communities. The priority attached to jobs is perfectly appropriate provided adverse environmental impacts are comprehensively addressed and measures put in place to mitigate their impacts. No official spoke of undue pressure from members either to approve applications without proper environmental safeguards or to turn a blind eye to possible or actual breaches of planning control. It was, however, claimed that members would ask officers to deal with applications promptly to secure continuity of local employment. We were led to understand that this form of pressure on officers was also applied by the companies directly. What we have not been able to establish is whether this resulted in less rigorous scrutiny of the environmental impacts of opencast proposals.

5.1 The Review has focused principally on the EAC Planning Service. Information on the Service can be summarised as follows:-

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6. REGULATION OF THE COAL INDUSTRY AND PLANNING POLICY IN SCOTLAND

- 6.1 Opencast coal extraction was and remains one of the most controversial forms of development regulated through the planning system. That is, however, markedly less true of East Ayrshire where planning applications have generated relatively small numbers of objection.

Regulation of Coal as a Nationalised Industry

- 6.2 Prior to 1984 the coal industry enjoyed a variety of rights as a consequence of being a nationalised industry, indeed mineral rights for virtually all of the coal in the UK were vested in the National Coal Board (NCB). Opencast coal extraction was regulated under the Opencast Coal Act 1958 under which opencast developments were authorised by the Secretary of State for Energy and authorisation carried deemed planning permission, a position similar to the consenting process for larger energy developments. Private contractors were then licensed to carry out the development on behalf of the NCB. In addition the NCB issued licenses to private developers for opencast extraction up to 25,000 tonnes although these small private sites required the express consent of the planning authority.

Privatisation

- 6.3 In the late 1980s, arrangements were completed for bringing British Coal Corporation (formerly NCB) within the provisions of the planning system. There were also parallel changes to the structure of the industry and its principal customer, the electricity industry, through the privatisation programmes in the 1990s. Privatisation of the coal industry was achieved through the Coal Industry Act 1994 and the mining interests of the British Coal Corporation in Scotland were acquired, following a bidding process, by Mining Scotland/Scottish Coal.

National Planning Policy and Advice

- 6.4 Environmental policy was developing and strengthening throughout this time, for example with the introduction of a legal requirement to undertake environmental assessment for certain developments such as mineral extraction. To reconcile the need for an adequate supply of minerals with effective environmental regulation, the former Scottish Development Department issued National Planning Policy Guideline (NPPG) 4 *Land for Mineral Working* in 1994.
- 6.5 The NPPG was supplemented by a series of Planning Advice Notes (PAN), the most relevant to opencast coal extraction being:-
- PAN 50 Controlling the Environmental Effects of Surface Mineral Working (1996), with annexes on the control of Noise (1996), Dust (1998), Traffic (1998) and Blasting (2000).
 - PAN 64 Reclamation of Surface Mineral Workings(2002) – this advised, inter alia, that financial guarantees should reflect the scale and type of mineral extraction and advocated that the calculation of bond values should be undertaken by an independent consultant and that the bond should be reviewed at regular intervals.

- 6.6 In 1996 the then Labour opposition at Westminster published a 10 point plan for opencast coal working, taking more account of environmental and community sensitivities and, following the UK General Election in May 1997, the intention to review the NPPG was announced. Following consultation a new National Planning Policy Guideline – NPPG 16 Opencast Coal and Related Minerals – was published in 1999. The objective was to safeguard local communities from the significant adverse effects of opencast mining and to protect the local environment from irreversible damage.
- 6.7 The NPPG addressed issues such as proximity to communities, cumulative impact, haulage, impact on built and natural heritage, including the contribution to biodiversity, repeat proposals, restoration and aftercare. The importance of having up to date development plans to identify potential areas for opencast coal extraction was emphasised. The NPPG also indicated that while community benefits may be proposed by a developer, they should not be treated as material i.e. relevant considerations unless they met the established legal and policy tests.



- 6.8 The NPPG introduced new tests to be applied to opencast development proposals:-

"Proposals which pose a potential risk to the amenity of communities or to the local environment generally will not be acceptable. Accordingly, in the interests of protecting communities and the local environment from the unacceptable adverse consequences of opencast working, the following tests should be applied:

- *Is the proposal environmentally acceptable, taking account of the use of planning conditions and/agreements to offset or mitigate any adverse impacts?*
- *If not, are there any local or community benefits related to the proposal, which sufficiently outweigh any material risk of disturbance or environmental damage?*

If the proposal does not satisfy one or other of the above tests, it should be refused planning permission unless there are exceptional circumstances."

An amendment to the NPPG, covering dust and health issues, was issued in 2001.

Scottish Parliament Petitions

6.9 In 2001, 2 public petitions were presented to the Scottish Parliament on the subject of opencast coal mining. One was from Scotland Opposing Opencast, the other from the Confederation of Coal Producers. The Committee considering the petitions concluded that there were 2 broad issues to be addressed:-

- Whether NPPG 16 struck the right balance between the level of direction provided by the then Scottish Executive and the amount of discretion left to individual planning authorities to interpret the guidance; and
- Whether planning authorities are interpreting in a way that is consistent and which reflects the guidance

The Scottish Executive, as part of its response, commissioned research to assess the impact of NPPG 16 and whether the guidance could be improved.

6.10 The principal conclusion of the research – published in 2004 - was that NPPG16 had provided a sound and robust framework of guidance, which had significantly enhanced the ability of planning authorities to effectively control the adverse impacts of opencast coal development on local communities and the environment. NPPG16 played an important role in the determination of planning applications and had been applied consistently in that regard. The effectiveness of national guidance was ultimately dependant on its translation through development plans to guide local decisions and this had been reduced in some parts of Scotland, through the failure of a number of planning authorities to review local plan policy frameworks with the degree of urgency required. That criticism could not be levelled at East Ayrshire which, in 2003, had adopted an Opencast Coal Subject Plan.

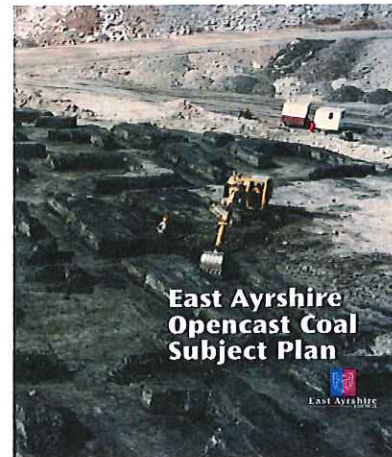
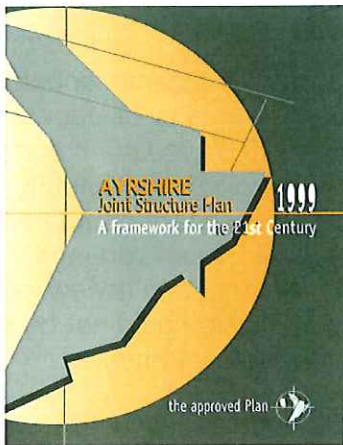
6.11 In July 2005, Scottish Planning Policy (SPP) 16 was published. SPPs were the successor documents to the NPPG series, the aim being to clarify the planning policies of the then Scottish Executive.

Scottish Planning Policy: Current Position

6.12 The most recent Scottish Government Planning Policy on opencast coal extraction was published in 2010 as part of a consolidated SPP. It comes under the heading "Surface Coal Mining" and is essentially a re-statement of previous policy in edited form along with other Scottish Government Planning Policies. A revised version of the consolidated SPP was issued for consultation in April 2013. The subject of opencast coal is dealt with under the heading "Promoting Responsible Extraction of Resources". The SPP covers succinctly the issues expected in relation to development planning and development management, including restoration and aftercare. A summary of responses to the consultation was published in October 2013. The final version will be published in 2014.

7. SCOTTISH OFFICE/EXECUTIVE/GOVERNMENT PLANNING POLICY: EAST AYRSHIRE IMPACT AND RESPONSE

- 7.1 There are 2 principal components of the planning system in determining where opencast coal extraction should/should not take place. *Development plans*, which until recently comprise the structure and local plan, indicate how development should be guided and *Development Management* (until 2009 this was called *Development Promotion* in East Ayrshire) which is the process by which individual applications are assessed.
- 7.2 The relevant development plan for East Ayrshire with policies on opencast mining for most of the period from 1996 onwards comprised the Joint Ayrshire Structure Plan and the East Ayrshire Opencast Coal Subject Plan (EAOCSF) although there was a finalised (not adopted) Cumnock and Doon Valley Local Plan which contained policies on Mineral Extraction, including figures used as the basis for the calculation of restoration guarantee bonds.

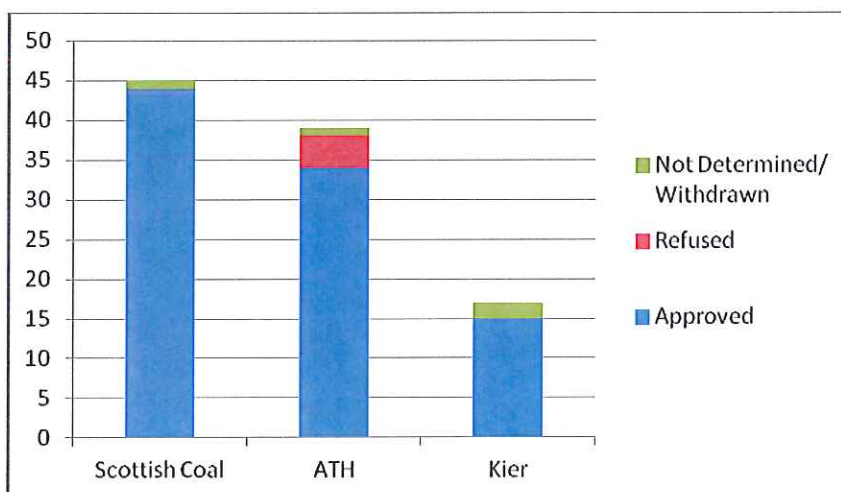


- 7.3 There are two versions of the Ayrshire Joint Structure Plan:-

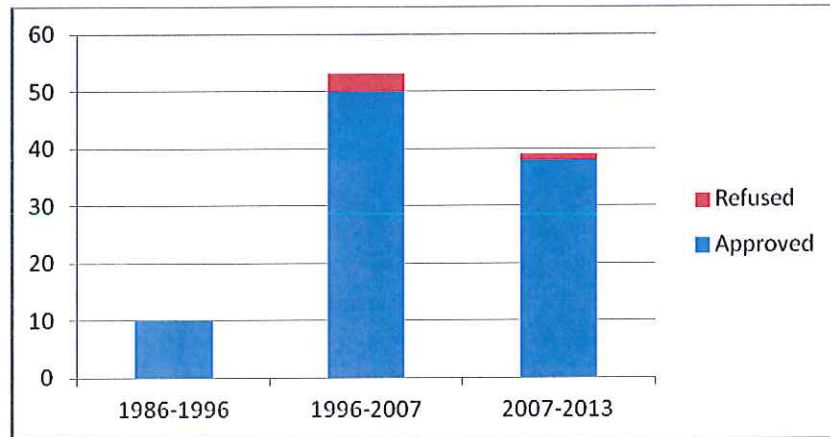
- The version approved in 2000, which identifies potential search areas for opencast coal extraction; and
- The version approved in 2007, which also identifies potential search areas but acknowledges the EAOCSF as the key policy document for determining opencast coal applications.

- 7.4 The EAOCSF was adopted by East Ayrshire Council in 2003. The plan contains a comprehensive suite of policies covering issues such as restoration guarantees, legal agreements, liaison committees and site monitoring all aimed at the effective regulation of the industry and the establishment of a Minerals Trust Fund to support community improvements. A development plan devoted solely to opencast coal is unique in Scotland and the quality of the plan was recognised through commendations/awards in the Scottish Awards for Quality in Planning and by the Royal Town Planning Institute.

- 7.5 EAOCSF should have been reviewed in 2008 but was not. Not reviewing the plan meant that the effectiveness of the policy framework, including an evaluation of the cumulative impact of opencast mining, the failure to appoint an independent assessor(s) and, from 2003, the means of calculating bonds, was not addressed and the opportunity to assess the state of restoration and aftercare was missed. In 2009 the East Ayrshire Local Development Plan scheme proposed that opencast coal extraction should be an integral part of the proposed new Local Development Plan (LDP) for East Ayrshire. This approach was reaffirmed in the 2010 Local Development Plan Scheme with a revised timescale for adoption of the East Ayrshire LDP (2014). The LDP Scheme in 2012 stated that a full review of the EAOCSF will be incorporated in to the East Ayrshire LDP with the timescale for adoption slipping back to 2015.
- 7.6 The Main Issues Report (MIR) for the LDP was published in 2012. In drawing up this report, there were discussions with the opencast industry around their forward programme and with key officials in Development Promotion with opencast coal responsibilities. The MIR sought views on a new potential search area and the future of the Minerals Trust Fund but restoration (or the lack of it), does not feature significantly in the Summary of Comments on the MIR prepared by the Development Planning Team in EAC. Perhaps this is because the issue was not raised specifically in the MIR.
- 7.7 The Review Team has been provided with information on just over 100 applications related to opencast coal extraction from 1987 - 2012 by the 3 companies referred to in para 2.3 above. This includes applications for the transport of coal, for example the conveyor belt from Glenmuckloch or variation of conditions. 45 applications were from Scottish Coal, all of them approved, bar one which was not determined. 39 were from ATH, 4 of which were refused with one proposal withdrawn. 17 applications were from Kier Mining, all approved bar one application that was withdrawn and another which was not determined.



- 7.8 There were 84 full applications or applications to extend sites. Between 1986 and 1996, 10 applications were determined (all approved); 53 applications were determined between 1996 and 2007, 3 of which were refused; and since 2007, 39 applications were determined, one of which was refused. This is a very low percentage refusal rate and is much lower than the Scottish average for all applications, which is around 10%. However it is not significantly lower than the percentage of applications refused overall by EAC.



- 7.9 A more detailed discussion of development management processes and procedures for opencast coal development is set out in section 10.

8. NOTIFIED APPLICATIONS

- 8.1 Decisions on planning applications are taken almost entirely by local authorities. There is provision for the Scottish Government to require certain categories of planning application be notified to them for consideration. Planning applications, notified to the Scottish Government are not necessarily called in for determination. Indeed in most cases, the applications are referred back to councils for final decision.
- 8.2 Since 1996, 46 opencast coal applications have been notified to the Scottish Government, 2 of which were called in and subsequently approved by the Scottish Ministers following a public inquiry. 14 applications were notified by East Ayrshire Council, none were called in.
- 8.3 The categories of planning application that require to be notified to the Scottish Government have been reduced. Circular 4/2009 introducing these changes indicated that "one area of particular and ongoing concern is where opencast coal workings would occur within 500 metres from the edge of an existing community or sensitive establishment. Therefore, this notification requirement is retained."

9. APPEALS

- 9.1 There is a right of appeal against the decision of a planning authority whether this be to refuse planning permission or against a condition of planning consent. There have been very few appeals in Scotland relating to opencast coal extraction, none in East Ayrshire.

10. SPECIFIC REMIT

10.1 The matters we were specifically asked to address were:-

- *Receipt of Applications to Determination*
- *Determination of Application to Commencement of Operations on Site*
- *Post Commencement Monitoring and Enforcement*
- *Reporting*
- *Matters Particular to Local Government*
- *External Factors*
- *Additional Matters*

Receipt of Applications to Determination

10.2 The requirement is to review the competency, sufficiency and robustness of the assessment, reporting and decision making processes applied in respect of each opencast coal site in East Ayrshire up to the point of determination of each application. We have considered:-

- *Pre-application discussions*
- *Planning Applications, including Environmental Statements*
- *Handling of applications*
- *Assessment of applications*
- *Consideration of applications*
- *Decision notices, including conditions*

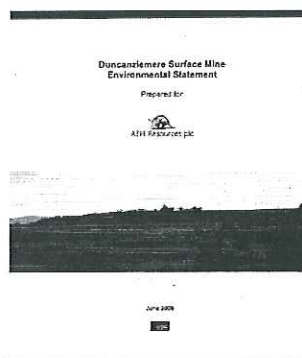
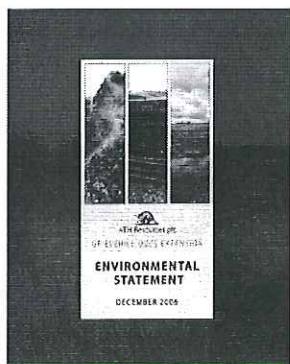
Pre Application Discussions

10.3 We understand from the HoP, [REDACTED] Neither the Coal Team nor the Independent Review was able to find records of discussions in advance of applications being submitted. The statutory requirements introduced in 2009 for developments classed as "major" should ensure that pre-application discussions take place and be recorded.

Planning Applications/Environmental Statements

10.4 Depending on the scale of opencast proposals they must be accompanied by Environmental Statements. These are invariably long and complex documents which describe the proposals and their environmental impact, for example in relation to nature conservation and landscape, noise, dust, vehicle movements, etc and how they are to be mitigated. The information in these statements is often used as the basis of planning conditions and legal agreements. The sheer size of these documents and their technical content do not make them easy to use, particularly for individuals and community groups. The sample of Environmental Statements we considered were generally very comprehensive but they vary in how effectively they deal with key issues such as methods of working and progressive restoration of land, matters which are inextricably linked. Moreover, in respect of site extensions, they do not address the state of restoration on the existing site or on land within the wider opencast complex and within the control of the

applicant. This was a matter that applicants should have been asked to be address before applications were determined.



Handling of Applications

- 10.5 Prior to April 2011 when all planning staff were co-located in Kilmarnock, opencast coal issues were dealt with in the Lugar office and [REDACTED] Other than minor proposals, [REDACTED]

[REDACTED] On receipt of applications, a wide range of departments within EAC and external groups and organisations were consulted. At the meeting with community groups a number of participants expressed concern that they were given insufficient time to comment on applications and also highlighted the difficulties they had in understanding what was being proposed. Opencast coal proposals in East Ayrshire generated relatively few objections, often 5 or less, but were likely to attract a significant number of letters of support encouraged, it was suggested, by the operators. By way of contrast, windfarm proposals in East Ayrshire can generate in excess of 1000 letters of objection.

Assessment of Applications

- 10.6 Reports on proposals for opencast mining, including new sites and extensions, [REDACTED] with a final check by the HoP. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

- 10.7 Planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise. The key plan was the EAOCSP and, although some applications were approved contrary to this plan, reasoned justification is provided in planning officers' reports for development plan departures. Responses from consultees, individuals and organisations are summarised and addressed, albeit not necessarily to the satisfaction of objectors. There are, though, a number of significant concerns about the assessment process:-

- Partly as a result of the content of Environmental Statements, Committee Reports do not give a clear explanation of how coal is to be worked and the sites restored – it is more a case of working through the policy background and the issues raised by consultees and others.
- Committee reports do not refer to the failures and shortcomings of the operators now in administration to progressively restore existing sites within their control, for example the

report on Duncanziemere in 2009 makes no reference to the restoration status of adjacent sites at LaighGlenmuir, Garleffan or Grievehill. Similarly, the report on Dalfad in 2011 failed to mention that restoration had fallen way behind schedule at Powharnal.

- By regarding sites as freestanding entities, no requirement is placed on operators to restore de-coaled or substantially de-coaled sites before extraction on new/extended sites is allowed to commence.
- Policy MIN 35 of the EAOCSP refers to the appointment of independent assessors to monitor and report on restoration and paid for by the operators but none has ever been appointed yet the report on Dalfad, in addressing objections, refers to the role of an independent monitoring regime. We were unable to establish why the report contained this reference.

The failure to highlight the scale of the failure to progress existing sites is particularly significant as it might have led to a recommendation, if not to refuse an application, then attaching conditions which would have ensured progress with restoration before work on a new/extended site commenced. At Spireslack the Council agreed in November 2005 to an extension of operations as a non-material variation of the planning permission but without assessing the status of previous workings which, at the time of the request for the variation (October 2005), were in serious breach of the terms and conditions of planning permission. That is not a matter that would have required specialist mining advice; it is simply proper professional planning practice.

- 10.8 Several of the reports state that approval of an application carries no financial or legal implications for the council; notwithstanding the deficiencies around the bonds that will be highlighted later, by definition the existence of a bond carries potential legal and financial implications for EAC. It is surprising that the Legal Department did not ensure that the report did acknowledge there were legal implications and, had the Finance Department been consulted, it would be reasonable to expect that they would have ensured that the financial implications, including the risks associated with restoration guarantee bonds, were drawn to the attention of members. It is a moot point whether highlighting the legal and financial risks would have resulted in different decisions but, nevertheless, these issues should have been drawn to the attention of members.

Consideration of Applications

- 10.9 Other than very minor cases planning applications, including extensions, for opencast coal developments have gone before the Southern Area Planning Committee. More recently planning reforms in Scotland have seen some applications, for example Dalfad, being referred to the full Council. [REDACTED] along with officials from the Legal Department, who were consulted on the drafting of Committee reports and also attended Committee meetings to ensure that decisions were soundly based, for example if members decided to overturn a recommendation from officials.
- 10.10 Concerns have been expressed, by objectors and representatives of community groups, with whom the Review Team met, at the way in which the Southern Area Planning Committee went about its business. These included the manner in which committees were chaired, not allowing sufficient time for objectors to state their case, failure to undertake site visits consistently and, where they did take place, not taking them in to account when reaching a decision and elected members generally not being sufficiently challenging or probing in the limited debates that took place. With the Dalfad surface mine application, the

Chair of the Committee and Deputy Chair, along with another councillor, removed themselves from the consideration of the application at the Southern Area Planning Committee and the Chair was taken by a councillor whose views on the employment benefits arising from opencast coal extraction in general were well known. That would not instil confidence in the impartiality of the decision making process but in our view, provided the new Chair had not expressed views on the merits of the application under consideration, it is not necessarily improper. After the Review Team reached this conclusion we learnt that the RSPB had written to the Chief Executive outlining their concerns about the conduct of the Pre-Determination Hearing at which the Dalfad surface mine application was considered. In her reply to the RSPB, the Chief Executive concluded that the consideration of the application "followed the Council's hearing procedures."

- 10.11 While there may be scope for improvements in the handling of Committee meetings, there is nothing untoward, far less perverse, in the approach to making decisions or the decisions themselves which, in virtually all cases (Laigh Glenmuir being an exception), accepted the recommendations of officials and allowed views of objectors to be heard and considered. It is also worth saying that the comparative lack of objections to opencast mining in East Ayrshire suggests a community largely supportive of the economic and employment benefits and accepting of the environmental disbenefits the industry brought. It would have been surprising if elected members generally did not share and reflect the general view of their constituents.

Decision Notices

- 10.12 [REDACTED] to the HoP for final sign off. Permissions for opencast coal granted by EAC were made personal to the individual companies contrary to Scottish Executive Circular 4/1998 on the Use of Conditions; this advises that the use of personal permissions can rarely be justified. This practice was carried over from CDVDC. One explanation for issuing personal permissions was because a high degree of confidence had been built up in the main operators, in particular Scottish Coal, whereas experience with many of the smaller companies had often been very negative. This concern over the practices of many smaller operators is true, not just of East Ayrshire, but across Scotland. Information on decisions by CDVDC indicates that a significant number of applications from smaller operators for opencast mining were refused.

Competency, Sufficiency and Robustness of Post Determination Actions

- 10.13 The competency, sufficiency and robustness of the actions taken post determination of each application is considered with respect to:-
- *Any Section 75/Section 69 Agreements required in terms of the consent*
 - *Any restoration bond or guarantee required in terms of the consent*
 - *The discharge of suspensive conditions attached to the consent prior to the commencement of operations on site in each case, with specific focus on the restoration and aftercare obligations*

We consider bonds first because the substance of these was then incorporated in to Section 75 Agreements.

Bonds

- 10.14 Prior to deregulation of the coal industry, restoration guarantee bonds were not used. Instead most opencast sites were worked by mining operators on contract to the British Coal Authority. One element of the contract price was a Restoration Lump Sum (RLS) payable, on completion of coal extraction, to the contractor to cover the cost of restoring the site. When tendering for an opencast coal contract, the potential operator would have to estimate the amount of work to be covered by the RLS, essentially the volumes of overburden and soils remaining above ground on cessation of coaling. In general this appears to have resulted in sites being restored to a satisfactory standard, not least because it was in the operator's interest to receive the RLS.
- 10.15 Deregulation of the coal industry required a new approach to ensure sites were restored following coal extraction. The finalised Cumnock and Doon Valley Local Plan (Policy MIN 5) sets out a requirement for an agreement which *"will require an applicant to lodge a bond which will be used to ensure restoration of the site should the developer fail to meet his commitments in this respect. The bond will be calculated at a rate of £25,000 per hectare with the minimum rate being £25,000 and the maximum rate being £2,500,000. Bonds will be index linked to prices as of 1 January 1995."*
- 10.16 The above policy is very badly drafted as it confuses a rate/hectare with an overall cap on restoration costs. The figure of £2,500,000 could not apply to a rate per hectare but, instead, to an overall cap on restoration costs although that approach is itself flawed as it is not based on the costs of an approved scheme of restoration. Chalmerston North/Pennyvenie (approved in 1996) appears to have been the first complex where the £25,000/hectare figure was used to calculate the restoration guarantee bond. We cannot understand why a cap on the bond quantum would be introduced as common sense would lead to a conclusion that the larger the site the greater the bond should be.
- 10.17 The files review indicated that it was generally the opencast operators who proposed a figure for the restoration guarantee bond. From our discussions and the files review it appears [REDACTED] contrary to EAOCS Policies MIN 35 and MIN 36 and contrary to the advice in PAN 64. There is no evidence that the services of a quantity surveyor or engineer to verify the figures on volumes of coal, top soil and overburden and haulage arrangements were ever sought. Following a decision to grant planning permission [REDACTED] draw up the restoration guarantee bond.
- 10.18 The figures to be included in the bond were not discussed with officials in the Finance Department of the Council, and were accepted by Legal Services as instructions from the client department. Some lawyers with whom the Review Team spoke were surprised at lawyers not challenging the figures; others were not. It could also be argued that provided the restoration calculations were based on the figures in EAOCS why should they have been challenged. [REDACTED] That issue aside, committee reports should not state that approval of applications carries no legal or financial implications for the Council. That is simply not the case. [REDACTED] In addition EA councillors were

not involved in drawing up or approving bonds; but that is normal practice across Scottish local authorities.

- 10.19 The EAOCSF states that Restoration and Aftercare Guarantees must be in place for opencast operations and that the "the Council is committed to pursuing all legal means of ensuring the satisfactory restoration of opencast sites at no cost to the residents of the Authority area". Paragraph 7.9 of the EAOCSF goes on to say that "guarantees are not likely..... to be less than an average of £25,000 per hectare of disturbed land." Policy MIN 35 requires potential opencast coal contractors to provide financial guarantees to secure the restoration of sites worked for opencast coal:-

The Council will require all applicants for opencast coal developments to provide appropriate financial guarantees prior to the issue of any planning consent in order to ensure full restoration, reinstatement and aftercare of the site should, for any reason, works be abandoned prior to completion. A financial guarantee, provided by a recognised financial institution and reassessed at regular intervals will be considered appropriate with the amount lodged being calculated on the basis of a realistic assessment of the total costs of restoration of the individual site concerned at any particular time, the amount of disturbed land, the cost of providing for the detailed afteruses agreed for the site and appropriate costs of aftercare. The Council will require a regular assessment of restoration operations to be carried out by an independent consultant, selected through an appropriate tendering process and who is financed and funded directly by the opencast developer. The consultant will be required to provide the Council with an ongoing assessment of the degree of compliance with the approved restoration plans through the submission of updated restoration drawings and with a recalculated detailed assessment of restoration costs on a 6 monthly basis. The costs in meeting any shortfall in the agreed restoration requirements will require to be met in full by the developer through an appropriate insurance scheme or other method of funding as may be agreed with the Council. It will also be a pre-requirement of any agreement entered into in respect of restoration of the site, that the Council is absolved of any liability if problems in the restoration of the site occur.

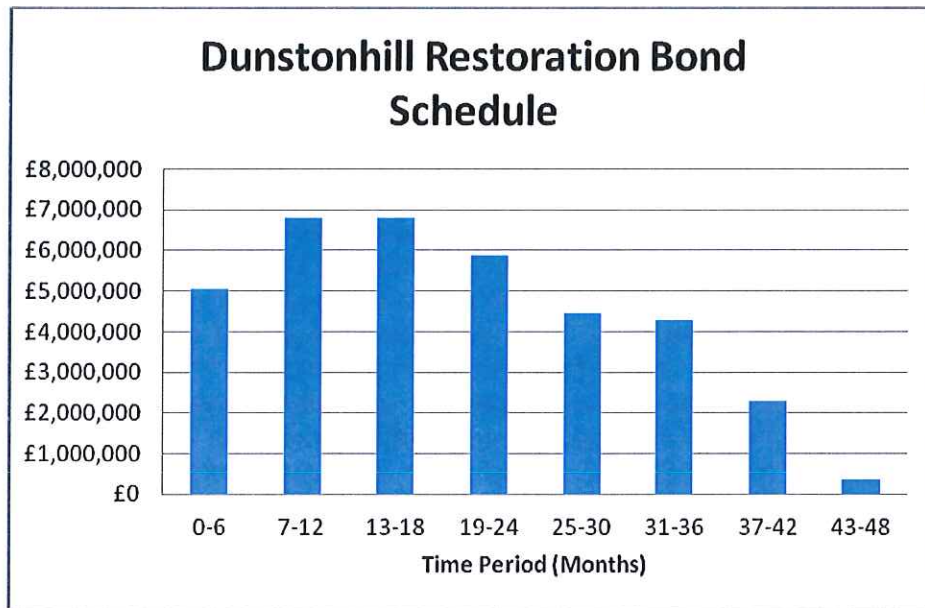
- 10.20 There are 3 points to make about this policy. The first is the lack of clarity on when the independent assessor would first become involved. Ideally a qualified mining engineer should have been advising the Council in respect of method of working and the implications for restoration and that individual would have been involved from assessment to monitoring. The second point is that we are unclear about what the final sentence which refers to the Council being "absolved of any liability" actually means. Finally, the £25,000/hectare figure of disturbed land is not set out in policy; nor, unlike the policy in the Cumnock and Doon Valley Local Plan, are there references to a cap on the total bond quantum or to index linking.
- 10.21 The £25,000/hectare rate has been used since the Plan was adopted in 2003, although the overall value of certain bonds exceed £2.5 million and this appears to be the intention of the policy in the Cumnock and Doon Valley Local Plan. The Review Team cannot understand how a flat rate/area based figure was used which took no account of the void depth or volume of material above ground. In other words the same figure is used for calculating a restoration bond whether the site is 20 metres deep or 100 metres deep. Additional problems with the £25,000 figure include:-

- No adjustments being made for inflation since 1995; and

- No account being taken of the distance between excavation of soil and overburden and the place(s) of temporary storage and the return transport for final restoration – these are very significant costs.

We have been provided with note of a meeting from 1999 [REDACTED] which states that "Restoration costs should not be based on hectares. Current system is flawed. Restoration bonds should be based on actual costs of infilling the specific void and should allow for ensuring any associated landscaping or other enhancements. Bonds should also ensure appropriate aftercare." So the fundamental flaws in the approach to bond calculations based on area rather than depth of void or restoration plan were evident to key planning officials dealing with opencast developments well before the £25,000/hectare figure was carried forward in the EAOCSF.

- 10.22 Yet these inherent difficulties could have been largely overcome, at least from the date of adoption of the EAOCSF, had the independent assessors, **paid for by the operators and therefore at no cost to EAC** been appointed to calculate the bond quantum and whether it was sufficient to meet requirements for restoration and aftercare. No-one in EAC has been able to explain why assessors were not appointed. At Netherton, however, there is no requirement on the operator to fund a compliance assessor; instead the agreement requires an independent monitoring regime to be established.
- 10.23 There were a number of failings which compounded these fundamental problems with bonds. The first is where bonds are finalised before a detailed scheme of restoration is submitted and approved. For example, in approving the Gasswater proposals, Condition 49 requires the submission of a scheme of progressive restoration. The planning agreement was signed on the same date as the planning permission but limited the bond quantum to £2.5 million based on a phased programme of restoration. Yet the bond quantum could not take account of any submission required under the condition 49. A similar situation arose at Spireslack.
- 10.24 Several of the agreements directly relate the bond quantum to specific time periods but no account seems to have been taken of whether these time periods were an accurate reflection of what was happening on the site. Over the course of a day, the value of a bond could decrease by a 7 figure sum without any understanding of the scale of restoration tasks remaining. Without regular monitoring and the ability to adjust the bond, EAC was placed in a very exposed position. An example of a bond related to fixed time periods is given below.



10.25 At Gasswater, the files review established the restoration guarantee bond was amended to cover the Powharnal site but with same financial cap. So there was a situation where the bond quantum for one site was used to guarantee the restoration of 2 very large sites. How this came about is not explained and we were surprised that this was not challenged by Legal Services.

- 10.26 A number of bonds, for example at Gasswater, Netherton and Duncanziemere, refer not to MIN 35 but to MIN 36 which covers aftercare, not restoration:-

On completion of all reinstatement, earth moving and engineering works associated with the restoration of the site and subject to all such works being carried out to the satisfaction of the Council, the Council will release the restoration financial guarantee. However, an appropriate guarantee will be retained by the Authority under the agreements agreed for the lodging of restoration guarantees described in policy MIN36 (sic) above(NB This policy should refer to MIN 35, not 36), to cover a five year period within which the operator will be required to carry out any prescribed aftercare works including the provision of site drainage, landscaping, seeding, reinstatement of Rights of Way, public footpaths etc. and the enhancement of the site for nature conservation purposes. The aftercare arrangements will be reassessed on a rolling basis and when aftercare works on any particular section of the restored site are completed to the satisfaction of the Council.

It is not clear why this should have arisen.

- 10.27 Neither the Planning Service nor Legal Services has a procedure note for drawing up bonds but we do not believe that, had such notes existed, they would have addressed the fundamental problems which stem from the underlying approach and practice to drawing up bonds. Indeed we understand that few authorities have procedure notes of this type.

Section 75 Agreements

- 10.28 Policy Min 32 of the EAOCSP sets out policy on Section 75 Agreements for opencast coal developments:-

The Council will, if mindful to grant planning permission for an opencast coal development and if considered appropriate, request an application 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. Such Section 75 Agreements as requested may cover the following subjects, although the list is not considered to be exclusive:

- (i) the provision of adequate financial guarantees to ensure restoration and aftercare of a site should work be abandoned prior to completion;*
- (ii) the routing of haulage vehicles;*
- (iii) any necessary improvements to, and provision of maintenance costs of the public road network required as a result of the proposed development;*
- (iv) contribution of monies to the Minerals Trust Fund for the benefit of communities adversely affected by opencast operations;*
- (v) the provision of visitor facilities/educational visits to operational sites;*
- (vi) the establishment of local Opencast Liaison Committees;*
- (vii) the carrying out of structural surveys of nearby properties prior to commencement of works;*
- (viii) measure for the protection and monitoring of wildlife habitats, archaeological sites etc which may be affected by nearby opencast sites;*
- (ix) the establishment of any off-site monitoring programmes relative to noise, dust, blasting etc;*

- (x) *the employment of local labour;*
- (xi) *the preparation of Ecological Management Plans for sites restored to wildlife habitat uses;*
- (xii) *subscription to the 'Transport of Minerals by Road Protocol';*
- (xiii) *subscription to the Joint Environmental Accord;*
- (xiv) *commitment to quality management procedures; and*
- (xv) *any other specific issue that may be raised as pertinent in connection with any particular opencast proposal.*

10.29 Legal Services has a procedure note in respect of Section 75 Agreements but the Planning Service does not, although there is an explanatory note on these agreements. The process of drawing up and concluding a Section 75 Agreement on opencast coal developments was broadly similar to the process outlined for bonds. [REDACTED] led the discussions and Legal Services was instructed to draw up the agreement. The final versions were not referred back to elected members for information/approval; that is normally the case across Scotland. The first draft of an agreement was often provided by the applicant's lawyers; that is not uncommon as a means of speeding up the drafting of the agreement and deficiencies in agreements are not related to this practice. Many agreements refer to and make it a requirement to appoint an independent assessor for individual sites who we know was never appointed. But that is not a defect of the agreement. It is a failure to ensure the terms of an agreement are complied with.

10.30 However, what is notable is the clause in certain Section 75s confirming that the Council accepts that the bond figures are "reasonable and realistic." While we accept that Legal Services did not possess the knowledge to challenge the restoration bond calculations, the acceptance of the figures as "reasonable and realistic" without any technical, financial or legal scrutiny, may have exposed the Council to unacceptable risks. Moreover there appears to be no provision in the agreements that we have reviewed to absolve the Council of any liability in respect of restoration of sites, contrary to Policy MIN 35 of the EAO CSP, although we are unclear what this would mean in practice.

Discharge of Conditions

10.31 Decision notices contain a comprehensive set of conditions designed to regulate a range of operations and practices which were considered environmentally damaging or potentially injurious to local amenity. A number of conditions – known as suspensive conditions – require some action to be carried out or approval sought before another operation is commenced. For example, there could be a requirement to submit a scheme of restoration to be submitted and approved before work gets underway on a site. From the review of the files provided by the Coal Team up to end November 2013, there is little evidence that suspensive conditions were discharged consistently.

10.32 It is, however, difficult, almost impossible, to establish precisely what did/did not happen with/without planning approval, although decisions about what constitutes a material variation from the terms and conditions of a planning permission is a matter of judgement. We were told about a haul road being constructed without approval. We were informed that, at Grievehill, ATH commenced operations outwith the approved site boundaries and encroaching on the Special Protection Area. This was picked up by a local farmer and resulted in a successful prosecution - where the operator pled guilty - under Nature

Conservation (not Planning) legislation. Between Greenburn and House of Water a coal barrier was removed, apparently without planning approval.

- 10.33 It is accepted that opencast operations rarely work to plan – the vagaries of geology affects decisions on extraction while some elements are weather dependant, for example soil stripping and replacement are best undertaken in drier conditions, more commonly from April - September. There will be issues that are for the judgement of the site manager; possibly in discussion with senior representatives of the company on how best to address issues that emerge as operations gets underway. There is a grey area between what might be termed straight-forward operational issues, what variations from the planning permission are “non-material” and what might require approval from the planning authority.
- 10.34 Surface mining requires expensive plant and machinery which have to be used as efficiently as possible so delays associated with securing approval will have a significant financial impact and possibly lead to temporary layoffs. There is no doubt that planning staff were alert to this. However departures from approved methods of working can have very significant and damaging environmental effects and also carry significant consequences for the validity of permissions, the value of bonds and compliance with Section 75 Agreements. In the absence of any independent assessor, EAC officials [REDACTED] [REDACTED] should have been rigorously monitoring opencast operations. It seems fairly clear that this was not the case.

Post Commencement Monitoring and Enforcement

- 10.35 The requirement is to review and assess the competency, sufficiency and robustness of the monitoring of operations on site and the enforcement of all the relevant operators' obligations as per the consent granted, with specific focus on the restoration and after care obligations. We have used the term “compliance” to discuss the issues which arise in ensuring that approved opencast sites are being operated in accordance with the terms and conditions of their planning permission, including the associated restoration and aftercare guarantee bonds and the planning agreements.
- 10.36 There were a number of mechanisms for monitoring and ensuring compliance with the terms of planning permissions, agreements and restoration guarantee bonds:-
- [REDACTED]
 - Regular Site Inspections
 - Appointment of Independent Assessor
 - Provision of Mining Progress Plans and Environmental Audits
 - Technical Working Groups and Community Liaison Groups - as required by Council Policy and enshrined in Planning Agreements
 - Complaints
- 10.37 [REDACTED] was a response to monitoring opencast operations in East Ayrshire, although from 2003, much of this work should have been carried out by the compliance assessor in accordance with MIN 35. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

10.38 *Site Inspections* - [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
This is confirmed by the record of [REDACTED] site visits from January 2012 – May 2013 which emerged as a result of a Freedom of Information request. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

10.39 *Independent Assessor* - This was a critical appointment which, had it been made for each site, as is the practice in a number of councils who have dealt with opencast coal proposals and who appear to have dealt considerably more effectively with opencast development than EAC, would have gone a considerable way to ensuring the scale of the restoration challenge on sites/complexes across East Ayrshire would have been identified and addressed. This appointment should have been made, not least because it was set out unambiguously in policy in the EAOCSP and Section 75 Agreements and the appointment would have come at no cost to EAC. While there are clear and generally understood rules which would have ensured the effective procurement of independent assessors, no-one assumed responsibility for commencing the process of procurement. We cannot understand why this has come about and why no-one within the Council, particularly those who were involved with opencast developments, did not raise the non-appointment. We can understand why the operators did not press the issue although they were signatories to Section 75 Agreements requiring this appointment to be made.



10.40 *Mining Progress Plans and Environmental Audits* - Policy MIN 39 of the EAOCSP reads:-

All opencast developers will be required, at the expiry of one year from the commencement of the development and thereafter at 12 monthly intervals, to present to the Council a formal 'Mining Progress Plan' giving an up-to-date position statement on the opencast operations. The Mining Progress Plan should indicate on an appropriately scaled plan, the following information:

- (i) the extent of ongoing coal operations;*
- (ii) areas prepared for coaling;*
- (iii) the extent of landscaping, nature conservation and agricultural works that have been implemented.*

The Mining Progress Plan should detail any proposed changes or departures from the issued planning consent pertaining to the development and address any implications that these may have on the satisfactory restoration, end uses or other operational aspects of the site.

We understand that Mining Progress Plans were provided to EAC, but often in the form of drawings rather than reports with explanatory drawings. There is no evidence that these submissions were compared with the approved proposals. The plans held by the Coal Team were in such pristine condition that it begs the question of whether these plans were ever used to assess progress on site. There is nothing to suggest that any analysis was undertaken of the Mining Progress Plans, including consultation with organisations such as SNH and SEPA, or that any responses were sent to the companies about compliance (or lack of it) with the approved schemes. This was confirmed [REDACTED] as an accurate assessment.

10.41 *Policy Min 40 of the EAOCSP* states:-

During the period of operations, restoration and aftercare, the opencast operators will be required, at the expiry of one year from the commencement of the development and thereafter at 12 monthly intervals, to present to the Council an Environmental Audit addressing the following matters:

- (i) the effects of the development on the environment including noise, vibration, dust and water impacts;*
- (ii) the measures taken to implement the operational, restoration and aftercare provisions of the consent insofar as they affect the environment; and*
- (iii) the effectiveness of mitigation measures promoted in Environmental Impact Assessments to reduce adverse environmental impacts.*

The Environmental Audit will assess the degree of compliance with all environmental conditions and obligations relating to the issued consents, including all Section 75 Agreements and detail any remedial measures which require to be taken to rectify any identified shortfalls or deficiencies in meeting agreed environmental criteria.

It would appear that, apart from one year, Kier Mining submitted Environmental Audits but we cannot find equivalent reports from Scottish Coal or ATH/Aardvark, the exception being Powharnal.

However, as with the Mining Progress Plans, there is no evidence that [REDACTED] or that SNH or SEPA were consulted. [REDACTED]



10.42 The policies in the EAOCSP, repeated in planning agreements, require the companies to set up Technical Working Groups and Community Liaison Groups. Information from the Coal Team indicates that the following sites/complexes had Technical Working Groups and Community Liaison Groups:-

- Spireslack Complex (incl Spireslack/Grasshill/Ponesk)
- Powharnal (incl Dalfad) – there was a Powharnal Management Committee because of the nature conservation interest.
- House of Water (incl Burnston and Tappet Hill)

- Chalmerston Complex (incl Pennyvenie/Dunstonhill) – a Technical Working Group was proposed – no meetings held
- LaighGlenmuir/Duncanziemere
- Netherton
- Skares
- Garleffan&Grievehill
- Greenburn

It is not clear why Dunstonhill was included with Chalmerston and Pennyvenie as the former impacts on Patna while the latter two sites are close to Dalmellington, although we understand this anomaly has been addressed.

- 10.43 These Groups were organised and chaired by the operators who also set the agenda for meetings. We understand that Kier Mining were more assiduous in arranging meetings than the other companies. [REDACTED]

- 10.44 Community groups expressed concern at the frequency and effectiveness of meetings. Many felt that the groups had no clear remit, agendas were set by the companies, site visits barely featured and, where they were, it was felt they were stage managed to present restoration and other matters in a positive light. The meetings appeared to be more focused on the loss of amenity as a result of noise/dust/lorry movements rather than the failure/lack of progress on restoration. There are suggestions of misleading statements by the two companies who have gone into administration. For example, at a House of Water Liaison Committee meeting, the operator allegedly stated that a particular area was "already fully seeded" although a community representative produced clear photographic evidence at a subsequent meeting that this was not the case.

- 10.45 At our meeting with community groups, some claimed that some councillors simply acted as a conduit or post box for complaints rather than pursuing them vigorously, although one councillor did begin to question the lack of progress with restoration of sites around Muirkirk which led him and the now Provost to oppose approval of the Dalfad application.

- 10.46 *Complaints* - [REDACTED] a schedule of complaints on opencast operations from 2006. There are not as many as might have been thought, perhaps because many people in local communities tolerated of the reduction in amenity created by opencast working as it was offset by the jobs created. But, as with the issues raised at the Community Liaison Group, many complaints concerned issues of noise/dust/lorry movements. Complaints on restoration did feature in community newsletters and in letters from organisations opposed to opencast mining but these were often positioned alongside other concerns. Some organisations produced papers which referred to their intention to write to EAC with concerns on lack of progress with restoration but, in the event, were unable to produce the letters. More recently complaints have arisen about the noise generated from the Greenburn, Netherton and House of Water sites and there is significant frustration that EAC has not effectively addressed this issue, essentially as a result of delays in piloting a modern noise monitoring system which should be able to identify the source of the disturbance.

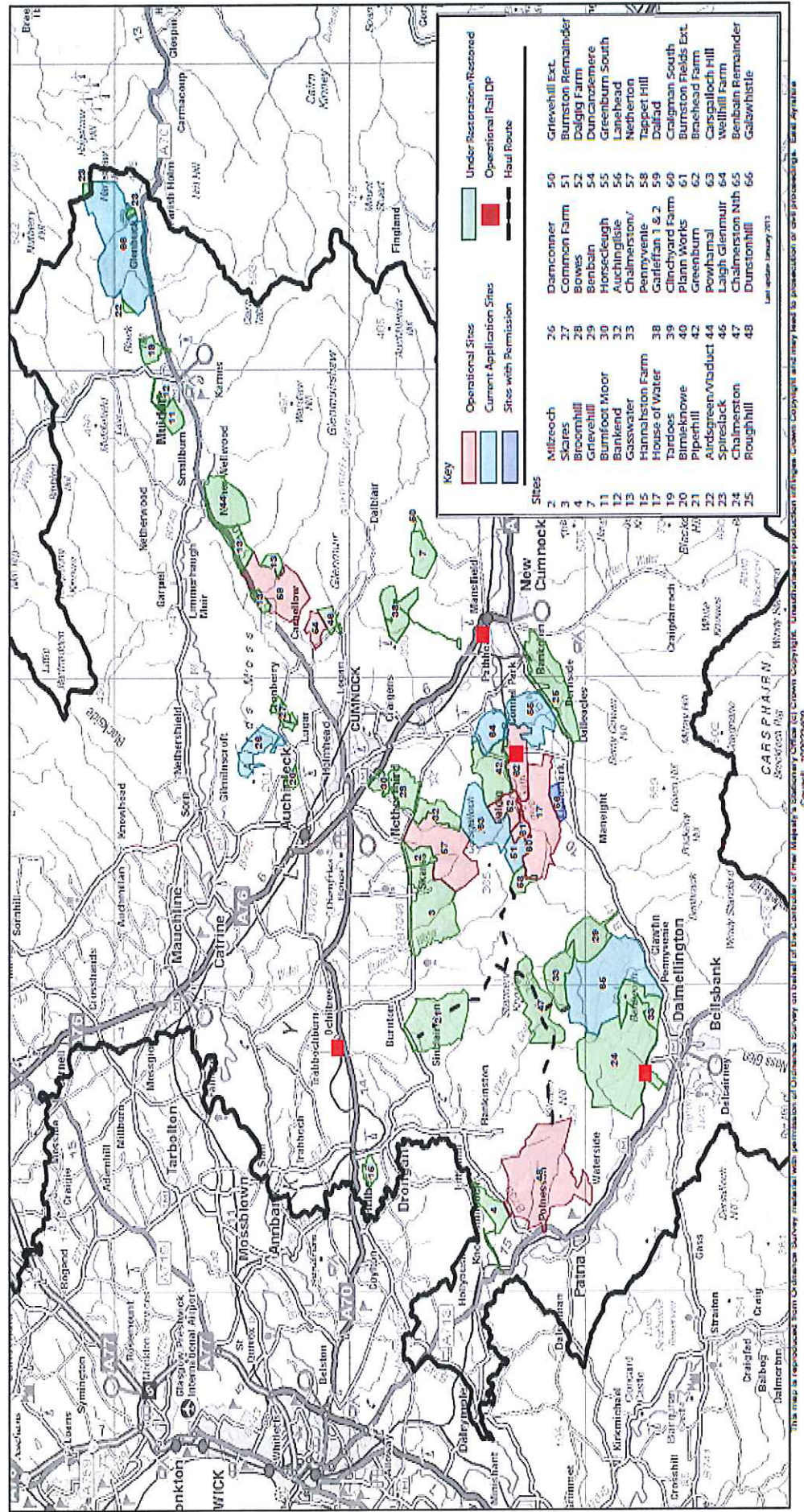
10.47 A local resident has, over the past few years, been providing telling images on the state of restoration along with damning statistics on a range of sites, for example:-

- Chalmerston – restoration overdue by 13 years
- Chalmerston North and Pennyvenie – restoration overdue by 3 years
- House of Water – restoration overdue by 3 years

It is difficult to comprehend how a member of the public with no apparent background in or knowledge of opencast mining could produce such an informed analysis of the position on restoration when EAC officials who were charged with this task could not have undertaken similar analysis and produced reports which presented accurately the situation on restoration.

10.48 In a similar vein, in May 2013 a perceptive critique of the situation around Patna was submitted to EAC by a concerned local resident with a list of almost 100 pertinent questions. We understand that the Chief Executive and the Operations Manager for Development Management and Building Standards has now met with the author and other local residents from Patna to discuss the issues. It does appear that this is a more general malaise with correspondence remaining unanswered, for example from the RSPB, or replies which were bland and/or failed to address the issues raised by complainants. A further example is where the Council delayed for some time agreeing to a request to provide a map showing the state of restoration on the various sites and complexes. Moreover when a map was produced following the companies going in to administration, it was inaccurate and understated the scale of the restoration problem (Map 3).

MAP 3 - Opencast Coal Sites/Complexes: Assessment of Restoration Position (Jan 2013)



- 10.49 *Enforcement* - There are very few examples of enforcement notices having been served by EAC to address breaches of planning control by opencast operators; most appear to date back to the late 1990s. They concern issues such as sale of coal to domestic coal merchants (which was not upheld on appeal), lorry routes and conveyor operating hours. One notice, at Hannahston, related to failure to complete the agreed scheme of restoration but this was withdrawn. Enforcement action is very much a last resort and can be effective against minor breaches of control, not the dealing with the scale of restoration with which the Council was faced.

Reports

- 10.50 The requirement is to review and assess the competency, sufficiency and robustness of the Council's internal governance arrangements in respect of reporting/responding to 1) Elected Members; and 2) the public in respect of the restoration of sites in terms of both formal reporting arrangements within the Council and responses to enquiries and correspondence.
- 10.51 The first issue we consider are the reports to planning committee. These are generally sound and comprehensive. The 2 issues about which we have reservations are firstly the failure to highlight inadequate or incomplete restoration on existing sites when applications for new/extended working were being considered. The second is the statement in several reports that approval of an application carries no significant legal or financial implications, which we believe we have clearly demonstrated was not the case. We did not find evidence of applications or variations to planning consents not being reported to the planning committee when they should have been. The recent changes to the statutory scheme of delegation will result in more applications being referred to the committee.
- 10.52 In 2007 a report written in the name of the HoP was submitted to the Cumnock Area Local Committee on Progress with Restoration. It identified 2 sites requiring additional restoration work – Broomhill, by Patna and Tardoes, by Muirkirk but the report struck a positive tone referring to the appointment of [REDACTED] so that "opencast sites continue to operate to the highest possible standards and to ensure appropriate restoration of sites within agreed timescales."
- 10.53 In 2009, at the request of members, a report was presented to the Southern Area Planning Committee on the restoration of current and former opencast sites within East Ayrshire.
[REDACTED]
[REDACTED]
The HoP was identified as the Implementation Officer although he claims not to have seen the report. The Committee was asked to note the report, although they asked for an annual update – but this was never provided. The HoP claims that he was not aware of this inaccurate and misleading report.
- 10.54 There is nothing in the 2009 report that would give members any cause for concern. Positive comments are made about Mining Progress Plans and Environmental Audits setting out levels of compliance with planning conditions and legal agreements, although how these assurances could have been given when many of these documents were not submitted; and where they were, they were not assessed and feedback given to the operators. The report claims that departures from the planning consent "including

implications in relation to the satisfactory reinstatement of sites" could be identified and proposals are discussed with the planning authority to regularise shortfalls or deficiencies. We fail to understand why such a positive assessment could have been provided to members.

Matters Particular to Local Government

- 10.55 The Review was asked to consider matters of particular relevance to Local Government in its role as Planning Authority. The report is permeated with issues of wider relevance to local government, but the particular circumstances of East Ayrshire in relation to the scale of opencast coal mining operations and the extent to which the Council has failed to regulate the industry are almost certainly unique in Scotland.

External Factors

- 10.56 The Review, while focusing on the processes and procedures of East Ayrshire Council, was asked to consider the extent to which any relevant external factors have also contributed to the current situation. The single most important factor, given the evidence we heard, means that our report must also make reference to the attitudes and practices of the 2 companies who have gone into administration as it was they who did not comply with the terms and conditions of planning permissions and agreements and, at the end of the day, it was they who failed to restore the sites they had mined. However we acknowledge that the company with sites/complexes in East Ayrshire who did not go into administration appears to have conducted their operations in a manner consistent with the terms of their planning permissions.
- 10.57 A number of individuals with whom we spoke, some of whom asked not to be named lest it affect their future job prospects, suggested that the operators were fully aware that they were operating in breach of their planning permissions and legal agreements and took advantage of their status as major employers within East Ayrshire and the failings in the Council's compliance monitoring procedures and the limited technical knowledge of surface mining among the planning staff. We heard from a number of those with whom we spoke about the operators who have gone into administration moving staff from working on coal seams before and during a council site visit, or Technical Working Group or Community Liaison Group to demonstrate that restoration was underway, only to move them back to extraction when the visits concluded. We are also informed that site managers were instructed to turn off water pumps resulting in water filled voids that pose a significant and serious risk to public safety. The attitude of at least one of the companies in administration is summarised by the following submission we received – "it was obvious that restoration wasn't high on their list of things to do and that coal production was the most important thing.....if a planning application was struggling in any way the answer to that was to announce job losses. Also tipping operations were carried out to suit the number of available trucks which meant rather than tip in to an existing excavated area they just started another tip that was to be left unrestored."



Additional Matters

10.58 This element of the brief is essentially concerned with recommendations for improvements to practice and procedure which would, if implemented, prevent any recurrence of the current situation. This is covered in section 16.

11. SPECIFIC AIMS OF THE REVIEW

11.1 The Review was set 4 specific aims. These are considered in turn.

11.2 ***Circumstances Leading to the Current Position-*** The circumstances leading to the current position do not stem from flawed planning policies or, subject to the comments below, the decisions themselves, they have come about as a result of very significant and ongoing individual, management and communication failures, particularly in respect of the drawing up and monitoring of restoration guarantee bonds; and failing to ensure that the various instruments for effective compliance monitoring were deployed.

Planning Assessments/Decisions

11.3 While some individuals and organisations could – and no doubt will - disagree with individual decisions, we concluded that, overall, decisions were not unreasonable far less perverse in the context of East Ayrshire. The priority that was attached to the maintenance and creation of jobs in areas where there were few alternative job opportunities is not something we would seek to challenge; indeed we believe that was shared by members, officials and many local people who are entitled to a decent livelihood for their families and communities. We did, however, have some concerns:-

- Reports failing to highlight inadequate or incomplete restoration of existing sites which adjoin are part of or are otherwise in the control of the applicant, when applications for new extended sites were being determined.
- As a result, no requirement was made to restore existing sites before work on new/extended sites could commence.
- Misleading statements in reports that the consideration of applications had no legal or financial consequences for the Council.

Planning Conditions

11.4 There are a number of common failings:-

- Little / no evidence from the files reviewed to end of November 2013, that suspensive planning conditions were discharged consistently.
- We had particular concerns about conditions which sought details of restoration and aftercare after the planning permission is issued but with the Section 75/bond in place. As a result there was no opportunity to vary the bond in the light of restoration/aftercare details had been submitted and approved as required by the condition. All restoration components of planning permissions should have been agreed before the consent was issued to allow adequate bond arrangements to be in place.

Restoration and Aftercare Guarantee Bonds

11.5 Arguably the biggest failings were around the calculation and monitoring of bonds, including:-

- A wholly inadequate and inaccurate method of bond calculation based on standard figures with an artificial ceiling used by CDVDC in 1995 and never updated to take account of actual costs.
- The practice, used in many bonds, where the quantum of the bond is directly related to strictly defined time periods and/or phases of operation without steps being taken to monitor works on the ground and thereby vary the bond in relation to the pace of excavation and the scale/extent of outstanding restoration and aftercare.
- The failure to reappraise bond values when approving subsequent planning permissions or when agreeing to Minutes of Variation or replacement bonds.
- Typographical errors, the most serious being where the bond relates not to restoration but to aftercare.

Section 75 Agreements

11.6 In general the agreements are perfectly sound, although we were surprised to find agreements stating that the Council agrees that the bond quantum is a fair and realistic assessment of the cost of restoration. In addition, typographical errors in agreements have compounded the deficiencies in the wording of the restoration guarantee bonds.

Compliance Monitoring

11.7 The substantial deficiencies compound and exacerbate the significant failings with the bonds, the most significant being:-

- The inexplicable failure to appoint a compliance assessor, paid for by the operators, which was a requirement of planning policy from 2003 and enshrined in planning agreements.
- Failure to capture and address existing/emerging breaches of planning control via the annual reviews required by planning conditions.
- The lack of regular and rigorous site inspections.
- The tendency of some members simply to act as a post box for constituents' complaints rather than ensuring they were thoroughly investigated and addressed.

12. WHY/HOW THE CIRCUMSTANCES PREVAILED

- 12.1 While some will wish to point the finger at the "jobs first and last" culture of EAC, the Review Team does not accept that this as the primary cause of the problems that have arisen. Elected members do not come in to politics to create environmental devastation, most come in to change their areas for the better and to respond to community priorities. Jobs were seen as an important means of achieving that. This was succinctly put in an e-mail from a local elected representative to a constituent – "these jobs are vitally important to the local area and whilst I will continue to ensure the opencast mining companies operate within planning conditions, I am generally supportive of their operations in my constituency since I believe it is in the best interests of my constituents."
- 12.2 East Ayrshire has a long tradition of mining with all its attendant environmental risks and problems. But these were recognised and measures were put in place to regulate the adverse environmental consequences through the EAOCSP, planning conditions, legal agreements and, despite their many fundamental deficiencies, restoration guarantee bonds. Overall we can find nothing that is unreasonable or perverse with the way that decisions on opencast coal applications were reached other than the officials' reports and their assessment do not demonstrate sufficient understanding of methods of working or restoration of the site. Officials should also have highlighted the failings on progressive restoration on existing sites when presenting reports on proposals for new/extended sites. But these deficiencies could and should have been redressed through regular, robust and consistent compliance monitoring, the inclusion of suspensive conditions on restoration of existing sites prior to commencement of new/extended sites and a re-quantification of bonds in Section 75 Agreements.
- 12.3 So making employment a prime material consideration in planning decisions – something that was understood and supported by most people in the area – is neither surprising nor unreasonable, not least because mechanisms – if consistently deployed – could have addressed the environmental consequences of environmentally damaging operations. The problems we believe stem from lack of technical and financial knowledge combined with significant management and communication failings, particularly within the planning service. We see 3 elements to this – setting the culture; empowering staff; and resourcing the planning service.
- 12.4 *Setting the Culture* - It is clear – to his credit – the HoP sought to promote planning in East Ayrshire as a positive, enabling service. But for developments such as opencast coal mining with the risks it carried for major and long lasting environmental damage, the regulatory role of planning is critical and should have received much greater attention. The policies in the EAOCSP which provided the robust regulatory framework were not consistently applied while planning conditions and agreements were not monitored or enforced.
- 12.5 Too often the same mistakes are repeated time after time – failing to appoint an independent assessor as required by the EAOCSP and enshrined in planning agreements, something which would have been advantageous to all involved; allowing extensions of existing sites without ensuring unauthorised development in the control of the applicant is rectified; drawing up bonds which were not related to approved schemes of restoration; having bonds in place that were time critical but not monitoring their terms; failing to ensure

Mining Progress Plans and Environmental Audits were submitted by each operator or, where they were, failing to assess them against the terms of permissions or agreements.

- 12.6 We remain bewildered as to why a report should have gone to the Southern Area Planning Committee in 2009 presenting such a positive analysis of the state of restoration on opencast sites across East Ayrshire. That would have provided a vehicle for presenting the challenges of restoration before Councillors and finding ways forward, including the recruitment of additional staff, addressing issues in subsequent planning consents and allowing uplifts in bond value when bonds were varied. However we believe that the scale of the restoration problem had become so big that recruiting additional staff would not have dealt with the issues.
- 12.7 It is difficult to explain these major failings other than to say the regulatory aspect of the planning service was not given the priority it required in relation to opencast operations. For that, management in the planning service must accept major responsibility.
- 12.8 *Empowering Staff* - Again, it is to his credit that the HoP empowered staff to take responsibility but empowered staff still need direction and supervision. It is clear this was not provided. There appears to have been little or no control or challenge to the way planning officials with responsibility for the regulation of opencast coal extraction and restoration were discharging their duties. Until recently, the HoP – despite the significance of opencast coal to East Ayrshire – accepts that he rarely visited operational sites [REDACTED]
[REDACTED]
[REDACTED] For too long, the Lugar office operated with limited oversight or supervision.
- 12.9 Effective empowerment is dependent on trusting and being confident in the staff who are being empowered. It is clear that, throughout EAC, enormous responsibility, trust and confidence was placed in [REDACTED]
[REDACTED]
[REDACTED] However knowledge and experience should not be seen as synonymous with expertise. They are not. We think there were 2 areas where this is particularly evident – technical knowledge of opencast mining operations and also the negotiation of bonds, in particular their overall quantum and phasing.
- 12.10 There is little doubt that the demands made on [REDACTED] dealing with opencast mining activities were exceptionally significant, especially when the volume of coal mined in East Ayrshire, relative to Scotland and the UK, and the number of sites/complexes are taken into account. [REDACTED]
[REDACTED]
[REDACTED]
- 12.11 [REDACTED]
[REDACTED]
[REDACTED]
- 12.12 *Resources* Para 2.2 refers to the scale of opencast coal production and, while it is difficult to make direct staff comparisons, it is clear that the staff resource EA devoted to regulation of the industry was very low compared with authorities north and south of the border who had considerably fewer and generally smaller sites. Essentially the regulation of

sites/complexes that produced consistently 50% or more of coal extracted in Scotland [REDACTED]
[REDACTED]
[REDACTED]

12.13 [REDACTED] This is a much higher level of enforcement staff resource compared with most other planning authorities in Scotland. However monitoring of opencast coal sites in East Ayrshire was a major task and [REDACTED] But no action was taken. In our view [REDACTED] that compliance monitoring was inadequate with the implications and risks this carried and taken steps to ensure that key planning conditions were discharged or adhered to and the terms of planning agreements were complied with.

12.14 The issue is not, however, just about staff numbers, it is also about knowledge and we believe that the expertise simply did not exist within EAC. **But there was one simple solution to address this part of the problem – appoint compliance assessors at no cost to EAC.**

12.15 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] indicated that the need for additional staff resources to support the demands arising from the scale of opencast operations did not feature in discussions with the management team in Planning. [REDACTED]
[REDACTED]
[REDACTED]

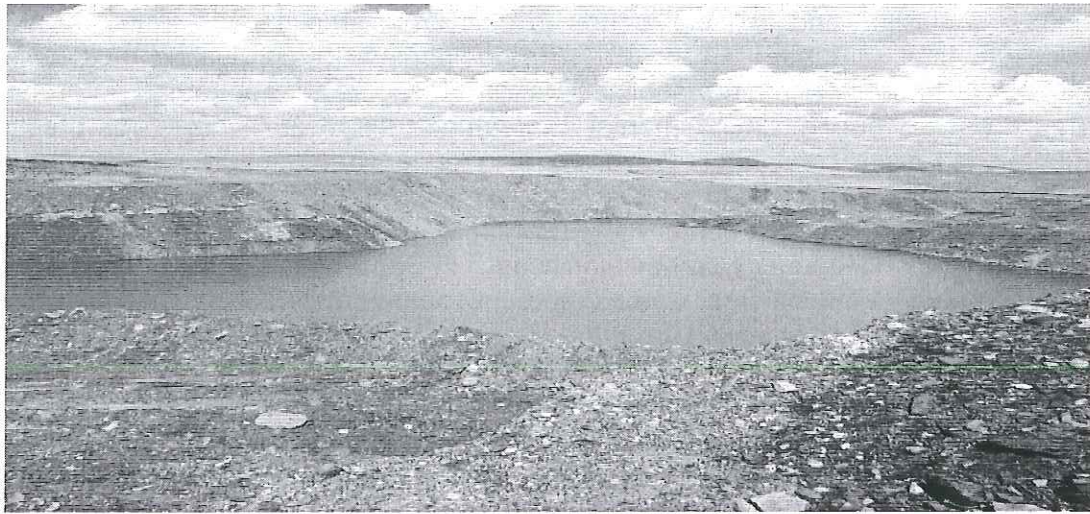
Senior Management Awareness

12.16 It was and remains a major surprise to the Review Team that no-one in senior management in East Ayrshire Council, from Head of Planning and Economic Development through to the Chief Executive seems to have been aware of the scale of environmental devastation as a result of opencast mining operations. We accept, though, that the voids and the peat trap are not generally visible from the roads between settlements, although some overburden tips can be readily seen. We would have expected that the HOP, [REDACTED] would have been aware of the situation as a result of [REDACTED] but that appears not to have been the case. We can find no evidence to suggest that the HoP [REDACTED] raised the scale of failures with progressive restoration and other significant breaches of planning control with the Director of Neighbourhood Services or the Chief Executive. Moreover, committee reports – either on individual applications or restoration generally - were sufficiently reassuring not to give grounds for concern. Notwithstanding these considerations the lack of awareness at the most senior levels within the Council of the scale of environmental damage (and the financial consequences) being created over many years by one of the largest employers within East Ayrshire is something we have found very difficult to understand or explain.

13. ANTICIPATION AND PREVENTION

- 13.1 The main reason for using planning conditions and agreements to regulate operations on opencast coal sites and financial bonds to secure progressive restoration of sites is to provide effective safeguards in the event of companies not conducting their business as originally set out in planning applications and associated supporting information, for example as set out in Environmental Statements. They are essentially precautionary measures to ensure that sites are operated in an environmentally responsible manner. However if conditions and agreements are not monitored and enforced and if restoration guarantee bonds are fundamentally flawed, effective regulation no longer exists and the environmental consequences can be significant. In East Ayrshire the consequences of the persistent and endemic failures have created environmental dereliction on a massive scale.
- 13.2 Complying with the advice in PAN 64 and implementing Policies MIN 35 and MIN 36 of the EAOCS had the potential to avert the issues with which the Council and its communities are faced. PAN 64 advised that the financial figures in bonds should be assessed independently and, in theory, that should have resulted in a more realistic financial provision to cover the costs of restoration being made at the outset.
- 13.3 MIN 35 made explicit provision for a biannual independent assessment of restoration works with potential shortfalls being met by the operator. Section 75 Agreements should have been drafted to reflect Policy MIN 35, namely that the Council would be absolved of any liability in the event of problems with restoration. Even allowing for the deficiencies in the original bond calculations, that situation could have been redressed by the appointment of the independent assessor paid for by the operators. While 6 months is too long a period between assessments they would have provided independent verification of the true state of the sites. No-one has explained why the assessor was not appointed, particularly since this appointment is referenced in Section 75 Agreements and, as recently, as 2011 was included in a report on a planning application in response to objections. Despite the typographic error, Policy MIN 36 also requires the retention of a similarly assessed and monitored fund for aftercare.
- 13.4 [REDACTED] with an independent study of Restoration Guarantee Bonds for Opencast Coal Mines. A copy of this report should be made available on the EAC website. The study covered 9 council areas across Central Scotland. In the course of the study [REDACTED] potential difficulties with EAC's approach to restoration guarantee bonds. What eventually became the Preface and the more general sections of the study were provided in full, along with extracts from parts relevant to the authority in question. One of the conclusions [REDACTED] was that "reinstatement of a site to an acceptable standard would, in most cases, be impossible to achieve without a substantial financial contribution funded in some form by the general public". The author of the study – **which remains unpublished by the author** - is nonetheless of the view that there were more than sufficient warnings in the general sections regarding lack of control over working methods and - in East Ayrshire's case in particular - the inadequacy of the fixed 'area' rates for restoration to enable an informed reader to draw a similar conclusion. [REDACTED]
[REDACTED] Moreover [REDACTED] (see para 10.21), the fundamental flaws in the area based approach to calculating restoration guarantee bonds had been recognised by EAC planning officials, [REDACTED]
We find this awareness of the deficiencies in the Council's approach to the calculation of

bonds and the absence of any action to address the issue to be a significant cause of the major shortfall between the notional cost of restoration and the value of bonds.



- 13.5 No independent assessment was carried out to establish the appropriate financial provision in the original bonds as advised in PAN 64 and no independent assessor was appointed to evaluate and report on the state of restoration every 6 months despite this being Council policy and included in Section 75 Agreements. The appointment of the independent assessor would have ensured that there were regular expert assessments of progress with restoration and appropriate financial provision was made by the operators to reflect any changes in circumstances.
- 13.6 Had the advice in PAN 64 (2002) and the Council's own policies been followed, and had [REDACTED] in the independent study of restoration guarantee bonds, the 2009 report on restoration could not possibly have presented such a positive picture on the state of restoration. That report [REDACTED] on the state of restoration at the various sites/complexes. [REDACTED] Neither situation is remotely satisfactory. We accept that the HoP did not sanction this report but are mystified as to how he failed to pick the report up though reading Committee proceedings or attending full Council meetings. This was compounded by the failure to provide annual updates as requested by Members and minuted accordingly.
- 13.7 We believe that with engaged management, direction, supervision and support the range of failings the Review has identified the situation could have been prevented.

14. KEY FINDINGS

14.1 From the above we make the following key findings which could be regarded as positive:-

- Although opencast coal extraction is generally a controversial activity for local communities, in East Ayrshire – certainly based on the volume of objections - that has not been the case.
- The clear priority articulated by elected members - and we believe with widespread support within local communities - was to create and maintain jobs.
- The policy framework at the national level for opencast coal mining was clear and comprehensive – this was confirmed by independent research.
- If the policies at the local level, reflected in the East Ayrshire Open Cast Subject Plan (EAOCSPP), had been applied they would have provided a robust framework for decision making and ensuring progressive restoration.
- The processes leading up to the determination of applications for opencast coal extraction did not lead to unreasonable, far less perverse, decisions.

14.2 However these are far outweighed by major and persistent failings in procedure and practice within EAC:-

- Over many years East Ayrshire has been a major producer of opencast coal within Scotland and the UK, but the staff resource to regulate the industry has not been commensurate with the scale of challenges this presents.
- A number of reports on planning applications did not highlight lack of progress with restoration and aftercare on existing sites on land within the control of the applicant when applications were being considered to extend sites or open up new coal seams - this is inexplicable as suspensive conditions could have been used to progress outstanding restoration before further excavation commenced.
- The process for calculating and monitoring restoration guarantee bonds was wholly deficient and defective. Moreover the figures for inclusion in bonds were not verified by specialist/independent advice – as advised in PAN 64 (2002) – and were accepted as client instructions by Legal Services.
- Monitoring progress on sites was wholly inadequate. This, combined with the alleged practices of the operators who have gone into administration, which by focusing on coal extraction, contrary to the terms of planning consents and Section 75 Agreements, has created extensive environmental degradation.
- The failure to appoint independent assessors, paid for by the operators, as required by the EAOCSPP and Section 75 Agreements is completely inexplicable.
- Routine complaints about issues such as noise, blasting, dust and lorry movements were addressed albeit not always to the satisfaction of the complainants, although there is an outstanding issue about noise from the Glenburn complex.

- It is clear that sites were not visited or inspected on a regular basis, particularly in recent years. But even if the visits were not as frequent as they should have been, persistent failures to comply with the terms of planning permissions and legal agreements should have been identified and addressed.
- Mining Progress Plans – where they were submitted - did not achieve what they were set out to do, partly because the form in which they were submitted make no reference to the approved scheme and were not systematically assessed by council officials. This is equally true of Environmental Audits.
- The Technical Working Groups and Community Liaison Groups did not provide an adequate forum for addressing concerns over restoration, arguably being run by the operators for the operators with little/no challenge to their practices.
- The warnings in the 2006 Independent Study of Restoration Guarantee Bonds should have been heeded and acted on.
- The 2009 Report to the Southern Area Planning Committee was an inaccurate statement on the state of restoration on opencast sites/complexes, while not providing an annual update as requested by the Committee was a significant failing.
- Neither elected members nor senior management were provided with any accurate or authoritative assessment of the scale of the problem or the funding required to address it, despite the restoration problems and costs getting ever greater and bonds either inadequate to meet these costs or running out altogether.
- The lack of awareness within the senior management of EAC of the environmental damage being wreaked by the operators who have gone into administration and the financial implications of their actions/inactions is something we have found difficult to understand or explain. There is no evidence to suggest that these issues were raised with the Director of Neighbourhood Services or the Chief Executive.
- The failings are many and varied but at their core lie significant and ongoing individual, management and communication failings, particularly within the planning service.

15. WHAT ACTION IS REQUIRED

- 15.1 While the Review has demonstrated what went wrong and offered some insights/explanations as to why it went wrong, the focus must be on the future to ensure that if the industry is to have a future in East Ayrshire – with all the economic benefits that brings- it needs to be very regulated proactively, firmly and consistently with deviations from approved plans agreed in advance or addressed before the consequences get out of hand. We propose to address this in section 16.



- 15.2 There was a view that a Public Inquiry with witnesses speaking under oath was the best means to conduct a review of the type we have carried out. We believe our review has provided a sufficiently clear analysis of how and why the current circumstances have come about. We doubt whether a Public Inquiry, which would have to be instructed by the Scottish Government, would reveal more about the procedures and practices of East Ayrshire Council. Should there be continued pressure for a Public Inquiry we are firmly of the view that this should consider the practices of the operators who have gone into administration, some of which appear to have been focused on maximising coal extraction to the detriment of complying with planning permissions and legal agreements.

16. A WAY FORWARD

- 16.1 We believe that surface coal mining could have a future in East Ayrshire but the breakdown in trust, dubious practices at the sites and wholly inadequate regulation will require a huge effort by the Council and the operators for the industry to be accepted as a considerate neighbour. Most of the recommendations relate to East Ayrshire Council and some have wider local authority relevance. Others are for the Scottish Government to address and there is a wider issue about the role of planning officers for the Royal Town Planning Institute to consider.
- 16.2 **However, while our recommendations should – provided they are followed – result in much more rigorous and effective regulation of the industry, the priority must be to ensure the sites are made safe. The current arrangements on the sites/complexes are wholly inadequate and we fear it is just a matter of time before a serious, possibly fatal, incident occurs. EAC and the administrators (KPMG), together with other relevant interests must address this issue as a matter of urgency.**



East Ayrshire Council

- 16.3 Planning applications must be determined in accordance with the development plan unless material considerations indicate otherwise. The key development plan is the EAOCSP and we believe this should be reviewed and updated as a separate subject plan, not as part of the Local Development Plan. We do not see this as a major task as the substantive content of the plan provides a framework for the direction and regulation of surface mining. However, search areas need to be updated; and drawn in such a way that there will be a firm presumption against working outwith these areas unless there are exceptional circumstances that would justify a departure from policy. In addition, the Council should seek to reduce the sheer volume of policy and concentrate on what must be done, rather than have a compendium which is honoured in the breach. The consequences of policies must be fully considered so that, for example, the submission of Mining Progress Plans will not in itself achieve very much so a revised Subject Plan should indicate how the Council will deal with Mining Progress Plans.

- 16.4 Major applications will be subject to Pre-Application procedures introduced in 2009 and the information presented at meetings with communities and other organisations should be sufficiently clear so that the issues arising, particularly in relation to working methods, phasing and restoration are properly understood. Related to this we believe that the form and content of Environmental Statements needs to be considered so that they become an aid to understanding not a barrier. Operators and the Council should consider funding support to affected communities to help them understand what precisely is being proposed, provide a clear understanding of potential risks and uncertainties and the measures that will be put in place to address these.
- 16.5 EAC needs to consider the staff resource it devotes to opencast working and the impact of policies and decisions on staffing must be considered. It is not though, just a case of staff numbers. Opencast coal mining comprise a highly complex set of operations and the Council must not make the mistake of using generalist planners to participate in pre-application discussions, negotiate with the companies, assess applications, draft planning decisions, conclude financial guarantees or Section 75 Agreements. It seems to us that two knowledge sets are required – one to understand and provide authoritative advice on opencast operations, including method of working and restoration which are inextricably linked; the other to assess the financial viability of projects bearing in mind issues such as possible fluctuations in coal prices and the cost of diesel. These knowledge sets, which will have to be secured externally and which EAC is in the course of procuring, should be maintained and available throughout the duration of mining and restoration.
- 16.6 Senior managers in the planning service must engage more actively in the process of preparing advice and recommendations on applications for opencast coal extraction. This does not mean that they should be involved in analysing consultation responses or taking the lead in drafting reports. However they must be prepared to challenge emerging advice, be clear that recommendations are sound and the arrangements in place to ensure compliance with commitments, conditions and agreements will be effective. Where a report issues in the name of the Head of Planning, that individual must be completely au fait with its contents and be prepared to stand by the advice and recommendations. Permissions should no longer be made personal to applicants unless there are, as advised by Circular 4/1998, exceptional circumstances. They must ensure not only that conditions and agreements are enforceable but that the service is resourced to ensure that happens. It is infinitely preferable to have conditions that are rigorously monitored and enforced than 50 which do little more than feature in a planning decision notice. Moreover inspections – whether they are carried out by a trained official(s) of the council or an independent expert(s) - should be carried out on a two monthly basis.
- 16.7 Para 3.8 draws attention to the major problems the Coal Team inherited with filing. The e-planning system offers major opportunities to address these failings ensuring all relevant papers are held together and that alerts are provided on discharge of conditions, key dates for assessments, mining progress plans and liaison meetings. The [REDACTED] [REDACTED] is already alert to this and we have every confidence that he will bring greater scrutiny and rigour to regulation which, in the period covered by the Review, has been conspicuous by its virtual absence.

- 16.8 The drawing up of restoration guarantees – in whatever form these take following the Scottish Government’s consultation on the issue – should be seen not as a matter for the planning service but of wider corporate responsibility involving planning, legal and finance departments. Independent technical and financial advice will be crucial here and we believe that the EDNS in her capacity as Deputy Chief Executive should assume overall responsibility for this element of the process and that potential financial liabilities must appear on the Council’s Risk Register which would then put these issues on the radar of the Cabinet and the Chief Executive. The recent draft guidance from Finance is a helpful first step. It is essential that, in reports to the Planning Committee on planning applications, the basis of bond calculations and the implications/risks are made clear to Elected Members so that decisions are more fully informed.
- 16.9 There have been criticisms of the planning committees but we do not believe that the conduct of these meetings has resulted in decisions that are unreasonable or perverse. However there are issues for the Council to address, including the perception that decisions have already been taken and committee members are disinclined to give objectors a fair hearing. That does not mean that those making representations at committee meetings are given unlimited time to present their case but that they should come away feeling that they have had the opportunity to make their views known and have them properly considered. There may well be scope for a dedicated training scheme to ensure that elected members have the necessary skills and competences to chair meetings in a manner that would promote public trust and confidence.
- 16.10 The Council has fulfilled its statutory duty to prepare an Enforcement Charter. The Charter is not, however, fit for purpose in relation to the regulation of the opencast industry. We recommend that the Charter be revised setting out how the Council will monitor conditions and agreements relating to opencast sites, including conditions, for example routine and independent assessments of noise, dust and blasting; bond schedules; and how complaints on the operation of the industry will be dealt with. The Charter must also make it clear that primary responsibility for regulation of the industry lies with EAC.
- 16.11 Mining Progress Plans and Environmental Audits should be combined in to a single document. The key purpose of Mining Progress Plans is to establish whether extraction and restoration are proceeding as approved. If not, the reasons for this should be clear and the actions the operators will take as a result should be specified. The Council must ensure that submissions are assessed, consulting with organisations such as SEPA and SNH as necessary, with feedback provided to the operators. A summary of the Plans/Audits and the actions taken should be provided on a routine basis, highlighting where any significant issues have arisen and what action has been taken.
- 16.12 We see little point in having separate Technical Working and Community Liaison Groups. Nor do we believe these should be organised and chaired by the operators. Instead a single Monitoring and Compliance Group should be established for each site/complex by East Ayrshire Council; that Group should be chaired by the most senior planning official in the Council; it should seek to challenge practices; notes of meetings – which should be held quarterly - with clear actions identified and individuals mandated to take forward action points. Discussions should be held with key Government Agencies such as SEPA and SNH about their ability to resource attendance at meetings.

- 16.13 We were impressed by the way some of the complainants had addressed their concerns, less so with other submissions that often bundled up a range of issues which can be difficult to disentangle. There is however scope for the Council to improve its handling of complaints as a number appeared to go unanswered and both officials and members have to pursue issues that are raised with them more assiduously and pointedly.
- 16.14 We note that the revised Scheme of Delegation (June 2013) will result in most, if not all, planning applications for opencast coal working and restoration being considered by the EAC Planning Committee. What is as important, arguably even more important, is that the Committee, indeed the full Council, should receive regular – we recommend quarterly – reports on progress with coal extraction and restoration, covering the extent to which operators are complying with the terms of planning permissions and Section 75 Agreements, along with an assessment of whether restoration guarantee bonds are sufficient to meet outstanding obligations and requirements and an update on complaints and how they have been/are being dealt with. There may also be merit in an annual stock take of opencast coal development in East Ayrshire with elected members and senior officials undertaking a site inspection conducted by an independent adviser.

The Scottish Government

- 16.15 There are a number of ways the Scottish Government can assist with the more effective regulation of the industry:-
- Increasing planning fees to reflect the true cost of processing complex opencast coal applications; this applies to other categories of planning application which raise significant environmental issues and which require early and effective local engagement.
 - Introducing fees for an inspection and monitoring regime – while councils already have powers to introduce fees as part of a legal agreement, making this a statutory requirement would send out a clear message about the importance the Scottish Government attaches to effective regulation.
 - Working with COALPRO, local authorities (planners, lawyers and financial specialists), and Government Agencies to provide clear guidance on the form and content of opencast applications, engaging with communities on promoting better understanding of proposals, model conditions and agreements. Central to this work must be a suitably qualified mining engineer with substantial experience of opencast coal working.
 - An alternative to this might be for the Scottish Government to encourage and support the establishment of a shared specialist resource available to councils with coal reserves.
 - Complete the consultation and reach conclusions on the effective restoration of opencast coal sites

The Royal Town Planning Institute

- 16.16 We are very conscious of the demands on development management/promotion staff who are involved in processing highly complex applications and we commend EAC for setting up a team specialising in minerals and renewable energy. However in authorities across Scotland planners are expected to move between dealing with applications ranging from house extensions and individual houses, shop fronts, changes of use, new housing estates, supermarkets and retail parks, waste management facilities, wind farms and mineral extraction. That is an incredibly tall order and while there is an understandable expectation that chartered planners should be able to deal with such a diverse range of proposals, the reality is very different and introduces a degree of caution in to the way that planners manage their workload. We do not think it is reasonable to expect a generalist planner to have this range of knowledge and some proposals require a great deal of specialist knowledge which will be obvious to applicants, agents and communities they do not have and which can undermine trust and confidence in the profession. We do not have the answer to the question – what is a planner? We believe the RTPI should take the lead in exploring what we believe is a fundamental issue which has significant implications for public trust and confidence in the planning profession and the planning service.

17. Conclusions

- 17.1 This Review has been demanding and we applaud the EAC for their decision to commission the work in the knowledge that it was likely to make for uncomfortable reading for councillors and officials. That has proved to be the case and we take no satisfaction presenting such a disturbing picture of major and persistent failures in EAC, particularly within the Planning Service and its handling of opencast coal issues. But we should not lose sight of the role the operators now in administration played in the creation of environmental devastation on a scale that we believe is unrivalled anywhere in Scotland and which planning and related regulatory systems were designed to prevent. The situation East Ayrshire Council and its communities now face is, if not unique, then extreme but other planning authorities in Scotland should also consider the extent to which these issues, albeit not on the same scale, exist or could arise in their areas.

TERMS OF REFERENCE

Overview

To ensure a thorough review of all of the processes, procedures and internal controls including risk management arrangements around the management, determination, implementation, monitoring and review of planning processes in relation to open cast coal operations within East Ayrshire, all within the governance arrangements in place since 1985 to date, recognising that the principal focus will be on activity during the lifetime of this Council.

Remit

- A Receipt of applications to determination
 - To review and assess the competency, sufficiency and robustness of the assessment, reporting and decision making processes applied in respect of each Opencast Coal site in East Ayrshire up to the point of determination of each application.
- B Determination of application to commencement of operations on site
 - To review and assess the competency, sufficiency and robustness of the actions taken post determination of each application, in respect of:
 - 1) Any Section 75/Section 69 Agreements required in terms of the consent
 - 2) Any restoration bond or guarantee required in terms of the consent
 - 3) The discharge of suspensive conditions attached to the consent prior to commencement of operations on site in each case, with specific focus on the restoration and aftercare obligations.
- C Post commencement monitoring and enforcement
 - To review and assess the competency, sufficiency and robustness of the monitoring of operations on site and the enforcement of all relevant operators' obligations as per the consent granted for each site, with specific focus on the restoration and after care obligations.
- D Reporting
 - To review and assess the competency, sufficiency and robustness of the Council's internal governance arrangements in respect of reporting/responding to 1) Elected Members; and 2) the public in respect of the restoration of sites in terms of both formal reporting arrangements within the Council and responses to enquiries and correspondence.
- E Matters Particular to Local Government
 - To consider and assess matters of particular relevance to Local Government in its role as Planning Authority.

F External Factors

- To consider the extent to which any relevant external factors have also contributed to the current situation.

G Additional Matters

- To consider any other matters considered relevant all with a view to presenting findings as to the factors which have caused and materially contributed to the current situation, together with appropriate recommendations as to improvements which ought to be implemented to prevent any recurrence.

ANNEX B

Councillor John	Bell	Ward 9
Andy	Brown	Community Councillor, Muirkirk
Tom	Cook	Depute Leader of the Council
Councillor William	Crawford	Ward 8
Councillor Elaine	Dinwoodie	Ward 9
Adam	Ingram	MSP
Cathy	Jamieson	MP
Fiona	Lees	Chief Executive
Craig	McArthur	Head of Finance
Councillor Neil	McGhee	Ward 7
Maureen	McKay	Leader of the Opposition

Councillor William	Menzies	Ward 8
David	Mitchell	Solicitor to the Council/Head of Legal, Procurement & Regulatory Services
Elizabeth	Morton	Depute Chief Executive
Alan	Neish	Head of Planning & Economic Development
Sandra	Osbourne	MP
Councillor Moira	Pirie	Ward 9
Councillor Stephanie	Primrose	Ward 7
Douglas	Reid	Leader of the Council
Councillor Jim	Roberts	Ward 7
Councillor Eric	Ross	Ward 8
Councillor David	Shaw	Ward 7
Jim	Todd	Provost
Opencast Community Liaison Reps		
Planning Support Staff		

