

Final Business and Regulatory Impact Assessment

FINAL BUSINESS AND REGULATORY IMPACT ASSESSMENT

1. TITLE OF PROPOSAL

1.1 Business and Regulatory Impact Assessment (BRIA) for the Town and Country Planning (Fees for Monitoring Surface Coal Mining Sites) (Scotland) Regulations 2017 (“the Regulations”).

2. PURPOSE AND INTENDED EFFECT

Background

2.1 Planning authorities are currently not empowered to recover the costs of post-consent monitoring and enforcement of planning conditions. It is unclear to what extent this may have been a factor in cases in the past where monitoring has not been conducted as effectively as it might have been expected, but it is likely to have been a contributing factor.

Objectives

2.2 The Regulations will enable planning authorities to start to recover the costs of carrying out their functions relating to the monitoring of surface coal mine permissions. The absence of charging powers contrasts with other regimes (Building Regulation, Scottish Environment Protection Agency) where a separate monitoring fee is paid. Monitoring functions, if undertaken, are currently funded from local authorities’ general revenue budgets, which are finite and where there are competing priorities this may impact on the quality of monitoring in some circumstances.

2.3 The new Regulations allow planning authorities to charge operators a fee for monitoring and to vary the frequency of reporting, with the aim of providing a greater degree of certainty and without adding any unnecessary complexity or imposing significant burdens on either a planning authority or site operator.

2.4 The Regulations will apply to operators of surface coal mines.

Rationale for Government Intervention

2.5 Introducing this legislation contributes to the National Performance Framework objective: *We value and enjoy our built and natural environment and protect it and enhance it for future generations.* Surface coal mine sites are unlike many other forms of development since their impacts on local communities and the environment can take place over many years. Whilst the experience of past shortcomings in the monitoring of surface coal mining sites - as evidenced following the demise of the two largest surface coal mine operators in 2013 - should be behind us, non-compliance with existing permissions or default on restoration obligations is an on-going risk of national importance. Planning permission for such sites is subject to a substantial number of complex and technical planning conditions which seek to avoid or address potentially adverse impacts.

2.6 Monitoring of surface coal mine permissions (and, where necessary, enforcement) is crucial if local communities are to be provided with reassurances that their interests have been properly factored into decisions and that on-going impacts on both communities and the environment are carefully considered and addressed. The Scottish Government's view is that such costs should be borne by operators and not by the public and that funding would help to ensure monitoring is undertaken properly, which in turn would offer communities a clearer indication of the standard of performance by individual sites within their vicinity.

3. CONSULTATION

3.1 Within Government, the proposals have been subject to consultation with the Directorate of Planning and Environmental Appeals, and the Energy and Finance Directorates.

Public & Industry Consultation

3.2 Public consultation took place in 2003¹ on the principles of a fees regime for those sites involved in mineral extraction and although not taken forward at that time, the comments received are reflected in these Regulations. The principle was subject to further consultation in 2008 and was discussed with representatives from the minerals industry and Scottish planning authorities through the work of the Scottish Opencast Coal Task Force.

3.3 In January 2017 informal sessions were held with a range of stakeholders including Heads of Planning Scotland, the Scottish Mines Restoration Trust and several surface mine operators. The views expressed during these informal consultations were used to inform the development of the BRIA. A full public consultation on the draft regulations ran from January to April 2017 and views were invited including on a partial BRIA.

3.4 Only a small number of responses were received to the 2017 consultation however, the respondent group was quite diverse and covered; planning authorities, the coal industry, Non Departmental Public Bodies (NDPB), environmental Non-Government Organisations (eNGO) and members of the public. It is clear from the responses that there was support for allowing planning authorities to recover some of the costs associated with monitoring requirements, a number of pertinent points were also raised which has helped to shape the final Regulations.

¹ <http://www.gov.scot/Resource/Doc/47049/0030290.pdf>

4. OPTIONS CONSIDERED

4.1 The following 3 options were considered:

Option 1: **Do nothing.** Under this option, planning authorities would have continued monitoring at the same level as at present and without express statutory provision in place for the recovery of associated costs.

Option 2: **Self-regulation by operators.** This option would have removed, to some extent but not all, responsibility of planning authorities to carry out the monitoring function in respect of sites with operators that have a good record of compliance with planning conditions and are accredited to industry schemes. Planning authorities would have needed to continue to monitor unaccredited sites and those with poorer performance.

Option 3: **A fee regime** based on a fixed charge per visit, with planning authorities determining the frequency of visits required. This option enables planning authorities to tailor the number of monitoring visits to the monitoring requirements of individual sites.

Pros and Cons of the three options

4.2 The following benefits were identified:

Option 1: **Do Nothing:** Under this option operators, would continue to be regulated without express provision for the recovery of the cost of site visits. This option would not have addressed issues in the past around any potential inadequacy in the resourcing of monitoring for certain sites. This in turn could have led to impacts on local communities and the environment that might otherwise have been resolved and addressed through regular monitoring visits.

Option 2: **Self-regulation by operators:** Under this option operators with a proven track record of compliance with planning conditions and/or Eco-Management and Audit Scheme (EMAS²) or ISO14001³ accreditation would have been entrusted with self-regulation. Planning authorities would need to carry out occasional quality control checks on these sites, and would need to respond to complaints, but the burden of the monitoring function and some of the associated costs would be lifted to some extent from planning authorities who could then devote more time and effort to monitoring and enforcement of unaccredited operations and poorer performers.

² http://ec.europa.eu/environment/emas/index_en.htm

³ <https://www.iso.org/iso-14001-environmental-management.html>

There would have been financial implications for those operators entrusted with self-regulation, as they would have needed to establish transparent systems for monitoring their performance, which would need to be available to planning authorities for checking as required. Sites run by unaccredited operators would still have required monitoring by planning authorities and those run by poorer performers would be subjected to a higher level of monitoring but the costs for this would continue to be borne by planning authorities.

The option would be of benefit to reliable and accredited operators, who would not need to arrange a schedule of visits with planning authorities and would not need to pay the proposed fees. In 2003 there was insufficient evidence that EMAS and ISO14001 accreditation on its own is a clear guide to operational effectiveness, expressed as conformity with planning conditions. However, more recently documentation provided by operators demonstrates that an open and transparent approach to self-regulation consistent with ISO 14001 could be undertaken. It is clear that this option could present some difficulties and be complex to administer on a part self-regulation, part planning authorities' monitoring basis. Yet this could be resolved through the proposal in Option 3 which would enable accreditation to be one of the factors that planning authorities could take into consideration when determining the number of site visits.

Planning authorities could then concentrate their efforts on monitoring those unaccredited sites and those with poorer performing operators with the resources freed up by not having to frequently monitor accredited sites. But there is a risk that the quality of self-regulating operator performance could gradually decline without regular independent planning authority monitoring, which could result in unacceptable impacts in some cases.

Option 3: **A fee regime:** The benefits of this preferred option are that it would place the financial costs of this regulatory function on operators, supporting the 'polluter pays' principle. Although industry representatives have expressed the view that mineral and landfill waste operators are already paying for environmental improvements to their operations through, for example, the Landfill Tax and Aggregates Levy, this option would be to introduce a monitoring fee to ensure compliance with specific planning conditions related to individual sites.

At Opencast Coal Task Force meetings, operators spoke about how statutory monitoring fees could be seen as a disincentive to invest any further in coal. Further information on anticipated costs to industry is set out below.

This option would ensure that planning authorities were able to recover some of the costs associated with monitoring and free up resources that could be used for other purposes. It would also support local community interests, ensuring potential future issues were identified

earlier and addressed. Poorer performing operators would require higher levels of monitoring visits to ensure full compliance with conditions. Consequently a system that charged for each site visit could encourage poorer performers to improve their performance, thus reducing the number of visits and total costs, and freeing up more planning authority time to devote to other issues. A regime based on a nationally-set fee for each visit has the merit of simplicity and equity.

Effective monitoring can lead to an improvement in compliance with planning permissions, particularly amongst poorer performing operators, ensuring unacceptable impacts from surface coal mines are minimised.

Costs

4.3 For the purpose of costs, it is estimated that there are approximately 24⁴ surface coal mining sites in Scotland that may be eligible for site visits attracting a monitoring fee under the new Regulations.

Option 1: **Do Nothing:** This option could mean that the costs of the current, variable, level of monitoring would continue to be met through a planning authority's budget, thereby in theory saving individual operators an average £2,000 per annum, per site. Where planning authorities face competing resourcing pressures, this can however impact on their ability to undertake monitoring activities to a satisfactory level. This could result in non-compliance with conditions with subsequent risk of negative impacts on communities and the environment. As there would be no regular liaison between authorities and operators there would be no incentive for operators to potentially raise their environmental standards.

Option 2: **Self-regulation by operators:** Under this option, planning authorities would still continue to fund the cost of monitoring. They would also need to carry out occasional quality control checks on accredited operators, and would need to respond to complaints concerning sites where operators are accredited, but the burden of the monitoring function would be lifted to some extent, resulting in some financial and time savings for local authorities, albeit unquantifiable for this purpose. This option would allow local authorities to devote more time and effort to the monitoring of unaccredited and poorer performing operators. Clearly there would be some costs implications for operators, arising from this approach and the carrying out of monitoring that had previously been performed by planning authorities. Greater self-regulation by accredited operators (if internalised) with less independent scrutiny by planning authorities runs the risk of being seen to lack of transparency/independent scrutiny.

⁴ Active sites and those requiring restoration

Option 3: **A fee regime:** It is estimated that there are approximately 24 surface coal mining sites in Scotland in various stages of coaling, abandonment or restoration. The maximum cost of this option for an operator would be £4,000 per site, per annum (based on 8 visits to an active site at £500 per visit). The annual average cost per site is however expected to be less as not all sites would require the maximum 8 visits.

Basing a fee regime on a flat fee level is capable of impacting more on smaller sites and operators although the expectation is that such sites would be visited less frequently, unless circumstances in how they were being managed meant the planning authority felt merited otherwise. There would therefore be an incentive for operators to improve performance since this could lead to a reduction in monitoring visits and therefore costs.

Issues of equity and fairness

4.4 In this section, Option 1 has not been further explored, as it does not achieve the objective, but forms the baseline from which other impacts are assessed.

4.5 Option 2 would allow operators, with a proven track record of compliance with planning conditions and/or EMAS or ISO14001 accreditation, to self-regulate, thus removing them from close planning authority monitoring, although there would be a residual requirement for quality control checks. Unaccredited operations would still need to be monitored and less compliant operators could be subjected to closer scrutiny by planning authorities, with the extra resources which would then be at their disposal. This option would only be acceptable and equitable if planning authorities had confidence that accreditation was an acceptable substitute for monitoring.

4.6 The wider mineral and waste industry's view is that ISO14001 and EMAS accreditation are good measures of performance. Accreditation demonstrates the commitment of the operator to a high standard of performance and should be taken into account. Those with accreditation are audited both internally and externally and any non-compliance with planning conditions is flagged up. Planning authorities are more sceptical about the value of accreditation of management systems as a proxy for monitoring compliance specifically with planning permissions. They feel that there is insufficient evidence that accreditation equates with operational effectiveness and compliance with planning conditions.

4.7 Under this option, the cost of quality checks at accredited sites and the cost of monitoring at unaccredited sites would remain with planning authorities.

4.8 Option 3 would transfer the cost of monitoring compliance with planning conditions, legal agreements and restoration financial guarantees from the planning authority to the operator. Where the operator could demonstrate, through continued satisfactory compliance, that it was discharging its responsibilities in a reasonable manner, the planning authority could visit the site less often than those of less reliable operators and associated monitoring costs would reduce as a consequence.

4.9 All conditions attached to a surface coal mine permission and matters arising from legal agreements and restoration financial guarantees should be complied with in order to avoid unacceptable environmental or social impacts. Poorer performing operators would therefore receive more visits to ensure compliance and thereby incur more costs. A flat rate of charge, irrespective of the size of the operation and the level of turnover of the company, could impact more on smaller operators however given the relatively small scale of the proposed charge per visit (£500) and the scope for minimising costs through a reduction in scheduled site visits as a result of compliance with planning conditions, such impacts are not considered significant.

4.10 The proposed flat rate charge will not only be administratively easier for planning authorities to operate, but with planning authorities having flexibility on the number of site visits required, the impact of the fee is less likely to affect competition within the sector. For example, smaller sites may take less time to monitor and require less frequent monitoring visits, whereas larger sites or more complex operations are likely to take longer and require more frequent visits due to the fact that the pace of change is often more rapid.

4.11 There are no issues of equity and fairness arising in respect of rural areas or race equality. However the option is likely to have a positive impact on health and well-being because monitoring can help to ensure full compliance with planning conditions. This, in turn, should ensure that polluting emissions, such as dust and noise, are minimised and that restoration is in line with mine progress plans and programmes to the benefit of local communities and the environment.

5. SECTORS AND GROUPS AFFECTED

5.1 The Regulations will primarily affect industry, specifically those operators of surface coal mines, since they will be paying for a regulatory activity. They will also affect planning authorities who will be able to recover partial costs of undertaking monitoring visits and will be responsible for administering collection of payments for monitoring.

6. SCOTTISH FIRMS IMPACT TEST

6.1 There are a number of sites that are relevant to this proposal in Scotland and some will have tighter margins and lower turnover than others. The Scottish Government proposes to bring forward new guidance to accompany the Regulations which will make clear the expectation that sites should be monitored in a proportionate manner in line with their performance, in terms of compliance. In most instances, planning authorities will have a discretionary power whether to visit a site or not so long as monitoring is conducted at least annually: a minimum which would also apply to inactive sites.

6.2 The Regulations are likely to lead to an average cost, assuming an approach in line with the Scottish Government's guidance, of £2,000 per active site per annum, making a combined total cost of between £48,000 per annum to industry. This is based on the estimated 24 surface coal mining sites in Scotland, either active or requiring restoration. The maximum cost of the Regulations can be estimated at £96,000 if all were considered to be active sites, this is based on each site costing

£4,000 per annum (8 visits). However, realistically costs of individual sites are likely to vary to reflect the amount of monitoring that is considered necessary. There are also a large number of currently inactive sites which are likely in practice to reduce the estimated business impact but as requirements can vary from site to site it is not possible to quantify this.

7. COMPETITION ASSESSMENT

7.1 The surface coal extraction industry contains a limited range of operators of various sizes. Turnover can vary considerably, depending on the size of the site and the amount of winnable coal and associated minerals and the rate of extraction. The proposals subject all active surface coal mining sites in Scotland to a flat-rate charge. Given the modest proposed charge of £500 per visit for an active site and £250 for an inactive site and the fact operators can expect to minimise their costs through a reduction in scheduled site visits as a result of compliance with the planning conditions, we would not expect the proposal to have a significantly adverse impact on the competitiveness of operators. Operators in this sector within England are already subject to a similar fees regime.

8. “TEST RUN” OF BUSINESS FORMS

8.1 The Regulations do not contain business forms. A draft “monitoring report” was included with the Regulations and this will be included in Scottish Government guidance being issued to accompany the Regulations. It will take account of comments made during the consultation process.

9. LEGAL AID IMPACT TEST

9.1 This test is not considered relevant to these Regulations.

10. ENFORCEMENT SANCTIONS AND MONITORING

10.1 Each of the options would be dependent on planning authorities having a right of entry to land in order to carry out the monitoring function. They would be able to rely on the powers in primary legislation to do so. Enforcement of planning conditions would continue as at present, under planning legislation. A material divergence between the cost of restoration and the value of the financial guarantee is one of the most significant risks which robust monitoring can help alleviate. In the event of serious breaches of conditions, it would be possible for the planning authority to suspend operations. In the event of non-payment by the operator, recovery would be expected to be pursued by the planning authority as part of existing day-to-day debt recovery powers. Any disagreements between planning authorities and operators about the proposed number of monitoring visits each year could be resolved by the planning authority’s internal complaints procedure.

11. IMPLEMENTATION AND DELIVERY PLAN

11.1 The Regulations will be introduced into Parliament in Autumn 2017.

Post Implementation review

11.2 Charging for monitoring of surface coal mine permissions is a new concept within the planning system and the Scottish Government recognises that there would be a need to monitor the progress of the regime, to ensure that it operated effectively and to see if it needed to be improved in any way. Major indications of the effectiveness of any of the options are the level of compliance with planning permissions and the reduction in the number of complaints which prove to be justified. The appropriateness of the fee and whether it should be raised from time to time to take account of inflation will also need to be reviewed

11.3 Scottish Ministers recognise that planning fees generally and the fees structure need to be looked at in more detail to make it fit for purpose and to reflect the developments now coming forward in Scotland. Following the Planning Bill we will consider the financial implications and consult on how we can better resource the planning system. Any changes will be accompanied by an impact assessment on the implication of the changes for users of the system.

12. SUMMARY AND RECOMMENDATION

12.1 The responses to this latest consultation, which are from respondents who have varying interests in this sector, supported most of the proposals. The only aspect respondents disagreed with was with limiting inactive sites to 1 visit in a 12 month period. Some respondents felt that planning authorities may have to approach inactive the same way as active sites and allow between 1 and 8 visits with a 12 month period. The revised Regulations allow a planning authority to gauge how many times they need to visit an inactive site. It is anticipated that this will help to improve compliance by allowing monitoring visits to be tailored to individual needs. Guidance will be prepared to support the introduction of the Regulations and will advise planning authorities the intention would be for 1 site visit in a 12 month period for inactive sites, unless there are mitigating circumstances.

12.2 Overall, it is considered there will be some costs falling to the surface coal mining industry, with costs to individual operators dependent upon the number of visits undertaken on individual sites. Planning authorities will however have discretion to vary the number of visits required. There will be an incentive for operators to improve performance since this could directly lead to a reduction in monitoring visits and therefore costs. By introducing new powers for planning authorities to recover some of the costs associated with undertaking monitoring visits, it is anticipated there will be benefits to local communities and the environment arising from improved performance of planning authorities in undertaking compliance monitoring of surface coal mines.

13. DECLARATION AND PUBLICATION

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date:

Minister's name Kevin Stewart
Minister's title Minister for Local Government and Housing

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