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Welsh Government

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Best Practice Guide on Restoration Liability Assessments for Surface Coal Mines



The Coal
Authority

February 2016

This document has been prepared by the Coal Authority on behalf
of the Welsh Government

Introduction

This guidance has been produced by the Coal Authority, on behalf of the Welsh Government. It is intended to help mitigate the financial problems caused by the failure to restore opencast coal sites in Wales.

The primary purpose of the guidance is to assist in the interpretation of policy and guidance contained in Planning Policy Wales and Minerals Technical Advice Note 2 - Coal. It also gives more certainty to those working in the industry as to what financial controls are required to ensure site restoration and aftercare. Moreover it reinforces the high expectation the general public and local authorities have to see early and quality restoration.

This guidance will be available on-line only so that it can be reviewed on a regular basis to ensure that working practices can continue to be refined and improved as and when necessary.

I extend my sincere thanks to all those who have contributed to the document, including a significant number of representatives of the community who live in close proximity to opencast coal sites. Their experiences have been invaluable in focussing on what changes need to be made to give appropriate financial protection on such sites to avoid abandonment.

Carl Sargeant
Minister for Natural Resources



February 2016

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The Role of the Coal Authority

The Coal Authority has produced this guidance on behalf of Welsh Government by building on the Coal Authority's restoration liability assessment model that has been used in Wales since 2014.

Working on behalf of Welsh Local Authorities they have fulfilled the role of an independent expert assessor and applied a consistent approach to the phased calculation of security arrangements to reflect restoration liabilities in the surface coal mining sector.

The review process has gathered the views and inputs of several stakeholders including Welsh Government, Local Authorities, Operators and the local communities.

"We at the Coal Authority are delighted to be able to have delivered this guidance, based on our expertise and the risk based liability assessments we have done in Wales so far. I believe it offers clarity to the communities, Operators and Local Authorities and provides the basis for a structured, standardised framework to ensure better regulation going forward." **Dr Simon Reed, Chief Operating Officer, The Coal Authority.**

1. Executive Summary

This is the National Best Practice Guide issued by Welsh Government to Local Authorities in Wales. It sets out Welsh Government's expectations for how the public purse and the environment of Wales should be safeguarded when Operators seek to work coal related mineral extraction. It also sets out the principles as to how restoration liability should be assessed and how security arrangements for surface mines will be calculated, assessed and agreed.

This Restoration Liability Assessment Framework (the Framework) has been written as technical guidance for Local Authorities and Operators by the Coal Authority on behalf of the Welsh Government. It complements policy and guidance contained in Planning Policy Wales and Minerals Technical Advice Note 2 – Coal.

The three key recommendations from the review are:

- Surface coal mines shall have an annual restoration liability assessment to ensure the liability is fully secured
- The assessment shall be led by an independent expert assessor
- The Local Authority will determine the level of risk it is willing to accept

Discussions with Local Authorities and Operators have been most beneficial and this liaison should continue. Such collaborative working will ensure that common language is used, trust is developed and the drivers and position of others is understood.

This National Best Practice Guide (the Guide) will be reviewed periodically to ensure it reflects current best practice.

2. Introduction and Scope

- 2.1. This Framework has been requested by Welsh Government (WG) and builds on recent Restoration Liability Assessments undertaken by the Coal Authority (CA) on behalf of Local Authorities in Wales. It details how those surface mine assessments should be delivered in Wales. Surface mining sites need to be restored to the agreed restoration plan first and foremost by the Operator, or in a situation of Operator default, funding needs to be available to allow the Local Authority to deliver this work.
- 2.2. This Framework has been produced to highlight, address and prevent the potential risks that could lead to the abandonment of surface mines prior to completion. It aims to ensure that sufficient security arrangements are in place so that the public purse and impacted communities are protected against a situation whereby the Operator is unable to complete restoration.
- 2.3. This Framework standardises the process for Restoration Liability Assessment calculations and develops a review mechanism via a tripartite approach of Local Authority, Operator and an independent expert assessor. The independent expert assessor should provide advice on the surface mine design, operation, costing, risk and liability.

- 2.4. The independent expert assessor is appointed by the Local Authority and funded by the Operator and should calculate the cost of restoring the site to the planning permission and Section 106 conditions.
- 2.5. This National Best Practice Guide applies to:
 - (a) Sites in operation including mobilisation, extraction or restoration phases
 - (b) planning applications submitted for new sites or for lateral, depth or time extensions
 - (c) pre-application discussions relating to prospective new sites.

3. Matters that the Local Authority should consider

- 3.1. In the absence of in-house expertise, the Local Authority should collaborate with an independent expert assessor or a lead authority shared service, if this is available.
- 3.2. The environmental and safety impact of an unrestored abandoned site.
- 3.3. The cost to the public purse of mitigating these risks and fully restoring the site from any point in time.
- 3.4. The risk of failure of an Operator (e.g. contracts/financial standing) leading to site abandonment and the cost of transition to a new Operator.
- 3.5. The risks associated with any proposed security arrangement.
- 3.6. Whether they have access to the appropriate technical knowledge and experience required to fully assess the surface mining scheme design and operational risk complexities and its associated cost models to determine the restoration liability and risks associated with the scheme.
- 3.7. The need for regular monitoring and the review of the security arrangement is essential, preferably by an independent expert assessor.
- 3.8. Expert legal advice should be sought at the outset to ensure that any Section 106 agreement attached to the planning permission is drafted in a manner which reduces the opportunity for an Operator to be able to abandon a site without carrying out final restoration in accordance with the approved restoration plan. Further guidance on the contents of the Section 106 is contained in Appendix A.

4. Key Principles to be Adopted

- 4.1. At any point in time a site's restoration liability is fully secured.
- 4.2. The security arrangement should be specific and appropriate to the site and the Operator. It needs to be accessible on demand and pose a minimal risk to the Local Authority.
- 4.3. Restoration Liability Assessments should be undertaken by an independent expert assessor, engaged by and working on behalf of the Local Authority, to work with the Operator to ensure an appropriate security arrangement sum is calculated. To protect the commercial position of

either party an agreement will be signed by the independent expert assessor prior to the assessment starting.

- 4.4. The cost of the assessment will be borne by the Operator.
- 4.5. The restoration liability should be reassessed at least annually to ensure the security arrangement reflects the restoration task required and should consider the liability 12 months in advance.
- 4.6. A Restoration Liability Assessment will include a time-based risk profile of the liability at specific times throughout the site's life that reflects the operational phasing of the site.
- 4.7. An Operator's track record and financial standing should be taken into account when determining a risk profile and the appropriateness of the security arrangement.
- 4.8. Assessments must include a sum to cover for costs associated with care and maintenance and contract re-tendering. These are the costs associated with maintaining the site safely in the interim period after the Operator vacates and before an alternative contractor is appointed. These costs include provision for site security, site inspection and the site's environmental management, including pumping costs.
- 4.9. By agreement between the Local Authority and the Operator, asset value within the site may be considered as part of the security. This includes the value of the mineral yet to be mined within the scheme.
- 4.10. By agreement, and subject to the granting of any necessary planning permission, enhanced end use land values may be used for security. But it should be acknowledged that the Local Authority will have the ultimate control over securing such end use.
- 4.11. Operators must have timely access to the security during the restoration phase to fund the restoration tasks detailed in the assessment schedule. The security should be released at a rate which reflects the diminution of liability as the site is restored.
- 4.12. A method of effective collaboration shall be established between Local Authorities, the Coal Authority and Operators to offer mutual support, guidance and to review this Guide annually to ensure it remains suitable and effective.

5. Assessment Framework

- 5.1. The Assessment is required to ensure a consistent approach is adopted in calculating a restoration liability sum as:
 - a) No two Operators are the same; they have different cultures, risk profiles, track records, financial standings and sales contracts; and
 - b) No two sites are the same; they have different geography, geology, and operational and restoration schemes.
- 5.2. The assessment should be broken down into four distinct parts (the Framework)

- a) Part 1: Costs to replace the overburden to restoration profile
 - b) Part 2: Costs to replace soils to restoration profile, rehabilitation and aftercare tasks
 - c) Part 3: Costs to undertake care and maintenance, and contract re-tendering
 - d) Part 4: Other costs associated with the implementation of planning agreements and releasing of security monies and other generic off-site utilities.
- 5.3. The restoration liability will be the sum of these four parts and the restoration liability will vary throughout the life of the site and therefore it should be calculated to reflect the site's operational phasing to determine the liability profile as the site progresses. An example of a typical risk profile graph is shown in the Appendix D.
- 5.4. Upon completion of the Assessment the independent expert assessor will facilitate a tripartite meeting between the Local Authority and the Operator to discuss the Assessment and the report's recommendations.

6. Assessments - Site and Operator Specifics

6.1. The Assessment should identify, calculate and confirm:

- a) The terms of the planning permission, restoration plans, conditions, and section 106 agreement.
- b) The impact of any departures from the planning permission programme and phasing on the security arrangement.
- c) Total excavation quantities, initial box cut excavation volumes and maximum void position.
- d) The schedule of coal estimated quantities (SEQ) and extraction phasing.
- e) The excavation bulkage percentage.
- f) The overburden dumps have the capacity to store the bulked excavated overburden from the box cut and at maximum void.
- g) The soil dumps have the capacity to store the stripped soils at maximum void and throughout the operational phasing of the site.
- h) The proposed plant fleet and excavator hourly output rates are appropriate.
- i) The rehabilitation and aftercare task unit rates are appropriate and that costs are reviewed for inflation and other price rises.
- j) The external income and cost drivers and their respective impacts are assessed
- k) Whether the mineral is in contract.

- l) The cost for managing the site safely until an alternative contractor is appointed, if the site is vacated.
 - m) The costs of re-tendering for the outstanding restoration, rehabilitation and aftercare task, if the site is vacated.
- 6.2. The Assessment should confirm both the site and financial risk profiles at the various planned operational phases.
- 6.3. The Assessment should consider if the site offers flexibility to change operational methods between assessments to increase or decrease the liability.
- 6.4. The Assessment report should include a suite of key performance indicators (KPI's) to monitor on-going progress. These will give an early warning of any potential issues and associated risks including the impact of the external market on both the Operator and the scheme e.g. mineral and fuel prices and trends.
- 6.5. The Assessment should consider the potential impact of inflation on the security arrangement.
- 6.6. The security repayment process should be timely and efficient to reduce the exposure of the Operator during the restoration phase. The Local Authority and the Operator should agree the process to repay the security and the Assessment should set out the schedule for repaying the security back to the Operator to reflect the planned restoration phasing and as the restoration task occurs.
- 6.7. The impact of a change in land owner as new owners may lack the resources, understanding and land management skills to oversee restoration and aftercare.

7. Financial Risk Assessment

- 7.1. Once the security sum has been agreed following the Assessment and the tripartite meeting, the Local Authority should seek independent financial advice to confirm the financial status of the Operator and the risks associated with the proposed security arrangement offered by the Operator.
- 7.2. The type and choice of security arrangement accepted by the Local Authority should be specific to the site risk profile, the Operator and subject to a financial status risk assessment it may be either a:
 - a) Third Party Performance Bond: which has the potential risk of the provider being reluctant to release funds without first contesting liability, quantities and the timing of release.
 - b) Cash deposit and/or escrow: which have the advantage of accessibility but have to be accumulated at a rate which keeps pace with the restoration liability as the site progresses.
 - c) Balance sheet positions: which are linked to financial stability and risk profile of the Operator.

- d) Parent Company Guarantees: which are linked to financial stability and risk profile of the Parent Company.

8. Community Awareness

- 8.1. The local community should be informed by the Local Authority that an Assessment has been scheduled and the planned re-assessment timeframe. Details of the engagement process, as envisaged by MTAN2, should be set up to foster transparency i.e. site liaison committees, prompt circulation of minutes post meetings, community site visits and other means of communication/liaison such as websites.
- 8.2. The local community should be informed by the Local Authority that an Assessment has been completed and the type of security that is agreed.

Appendix A: guidance on the contents of the Section 106

Any legal advice relating to the Section 106 agreement should include an assessment of the following matters which should not be considered exhaustive as the nature of each site will vary:-

- A clause in the Section 106 agreement enabling the Local Authority to vary the amount in the Security Arrangement, commensurate with changes in operations.
- A clause in the Section 106 agreement which ensures that no repayment of any sum in any Security Arrangement is repaid to the original transferor even if a release under S106(4) is provided. Note that S106(4) states that *'The instrument by which a planning obligation is entered into may provide that a person shall not be bound by the obligation in respect of any period during which he no longer has an interest in the land.'*
- A requirement to notify a change in ownership before that change takes place.
- No release of the original developer/Operator from the Section 106 obligations until the Local Authority is satisfied that the transferee has provided equivalent and any necessary top-up security for restoration costs.
- A requirement to pay all reasonable costs incurred by the Local Authority and its qualified agents in the monthly monitoring of the works and associated obligations.
- Appropriate trigger events which enable the Local Authority to have access to the Security Arrangement for the purposes of compliance with the obligations.
- To reimburse the Local Authority for any withdrawal from the Security Arrangement so that it is maintained at the appropriate level.
- The reasonable costs of running and managing the Security Arrangement including the Local Authority's reasonable costs in approving matters and operating the terms of the Section 106 to be borne by the Operator.
- No obligation on the Local Authority to change any of the provisions or to reduce the security arrangements.

Appendix B: Abbreviations, acronyms and Glossary of Terms

IA:	Independent expert assessor
KPI:	Key Performance Indicator
LA:	Local Authority
MPA:	Mineral Planning Authority
NDA	Non Disclosure Agreement
SEQ:	Schedule of coal estimated quantities
TCA:	The Coal Authority
WG:	Welsh Government

Glossary of Terms

Aftercare Scheme: The agreed scheme will be included in Conditions or planning obligations (and also cover off-site works, water areas, amenities or, if appropriate, extended periods of aftercare). The schemes should seek to maintain or enhance the environment for the benefit of local communities and the long-term quality of the land for the intended afteruse.

Agreement: Confidentiality or Non-Disclosure agreement signed by the relevant parties.

Key Performance Indicators: measure delivery of progress to an agreed schedule of activity.

Lead authority shared service: responsibility for certain activities is transferred from within an organisation to a separate 'shared services unit' which also manages similar activities for other organisations or teams.

Legacy sites: those which on privatisation of the Coal Industry in 1994 were allowed a 10 year period without a security arrangement being required, and remain unrestored.

Local Acts: In South Wales, local Acts contain powers to impose bonds or other financial guarantees for the restoration of coal sites in the event of default by the developer. The Dyfed Act (1987), the West Glamorgan Act (1987) Mid Glamorgan County Council Act 1987 require financial guarantees for coal mines. This private legislation was introduced in response to the problems arising from the restoration of small coal mines in the 1970s/80s. The private-sector successors to British Coal Corporation acquired certain long-term leases over coal reserves, along with the mining assets which they purchased. The provisions in the Local Acts did not apply to British Coal, nor did they apply to the successor companies for a period of ten years; a period which has now expired.

Maximum void position: Occurs where there is the maximum volume of material above restoration levels which needs to be excavated and replaced to achieve the restoration scheme.

Minerals Technical Advice Note 2 – Coal: [MTAN2](#) sets out detailed advice on the mechanisms for delivering the policy for coal extraction through surface and underground working by Local Authorities and the coal mining industry.

Overburden: Material which has to be removed before a mineral can be worked.

Planning Policy Wales: [Edition 8 published January 2016](#) says ‘Land will be restored to a high standard and to a beneficial and suitable after-use.’

Rehabilitation and Aftercare: The planting, cultivation, fertilising, fencing, draining and other treatment required by the Aftercare Scheme for agriculture, forestry or amenity (including biodiversity) to the “required standard” as defined in schedule 5 of the Town and Country Planning Act 1990, for the duration of the aftercare period. These definitions accord with schedule 5 of the Town and Country Planning Act 1990 relating to mineral workings and PPW and MTAN2.

Restoration: The replacement of subsoil, topsoil and soil making materials to a landform which accords with the planning conditions and in such a way as to minimise damage to soil structure and to other characteristics important for the growth of plants.

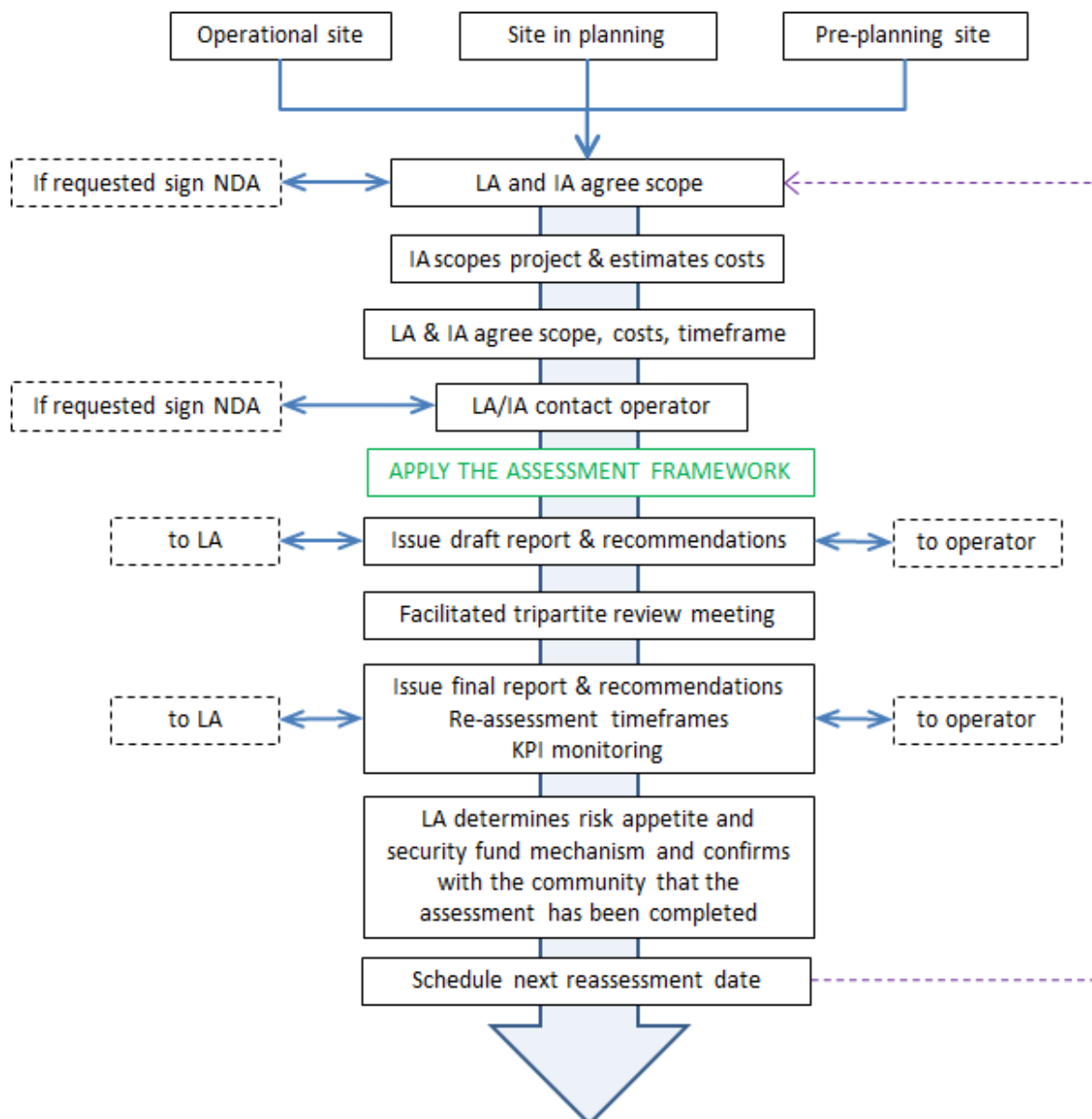
Restoration Liability Assessment: the review undertaken by the Independent Expert Advisor using the framework.

Restoration Liability sum: amount calculated by the Restoration Liability Assessment

Security Arrangement: The security sum and mechanism agreed between the Local Authority and the Operator. Includes an Escrow account in the full sum of restoration or, in larger sites, linked to a levy of an amount per tonne of coal mined; and a Bond which provides for a “cash up front” sum to cover operations undertaken prior to coaling, indexed annually to the Retail Price Index.

Security Sum: the amount agreed between the Local Authority and the Operator.

Section 106 agreement: made under the Town and Country Planning Act 1990 and allows for Local Planning Authorities and persons interested in land to agree contributions, arrangements and restrictions.

Appendix C: Assessment process-flow diagram

Appendix D: Typical Security Fund Risk Profile Graph

