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Sir

18 November 1985

Mineral Workings—Legal Aspects Relating to Restoration of Sites With a High Water Table

1. We are directed by the Secretary of State for the Environment and the Secretary of State for Wales to bring to your attention the Annex to this Circular. It provides guidance to mineral planning authorities in dealing with applications for mineral extraction in areas with a high natural water table; and is concerned with such applications where the proposed after-use of a site would require drainage by continuous pumping. The Annex sets out a possible way of achieving this; and draws on and relates to mineral applications some of the guidance in DOE Circular 22/83 (WO Circular 46/83).

2. In determining individual planning applications for mineral working in high water table areas, mineral planning authorities will also need to take into account all other relevant national policy considerations and guidelines; and appropriate policies in approved development plans. There may also be other statutory obligations and responsibilities which will need to be complied with, or satisfied, by the applicant.

3. This Circular is not considered to have any significant expenditure and manpower implications for mineral planning authorities. There may be some small additional costs in considering suitable terms for agreements and in monitoring them over the longer term; but in the overall context of the work of mineral planning authorities this is not expected to be large.

We are, Sir, your obedient Servants,

R C MABEY, *Assistant Chief Planner*

J C LEWIS, *Assistant Secretary*

The Chief Executive
County Councils } in England and Wales
District Councils }
London Borough Councils
The Town Clerk, City of London
The Director-General, Greater London Council
[DOE M/514/4]
[WO P/87/9/01]

INTRODUCTION

1. Certain deposits of economically valuable minerals occur in areas which have a high natural water table. In determining planning applications for mineral extraction from sites within such areas, six main options exist. They are:

(i) to refuse permission for extraction;

(ii) to permit extraction and leave the site flooded;

(iii) to permit extraction and require the restoration of the site to approximately its original level, or above original level, with imported fill;

(iv) to permit extraction and to require the restoration of part of the site to its original level with on-site material and to leave the remainder of the site flooded;

(v) to permit only partial extraction of those mineral deposits above the level of the water table, with subsequent restoration;

(vi) to permit extraction, leaving the restored level of the site below the water table, but requiring the site to be adequately drained by pumping on a continuing basis.

The choice of the most appropriate option depends on the individual circumstances of a mineral planning application. The sixth option has become known as "low level restoration"; which is the term used for it in the rest of this Annex. The "low level" option may also be a relevant restoration method for mineral deposits such as clays where there is no true "water table" but where there will be a continuing need to dispose of surplus water resulting from direct precipitation.

2. In practical terms, the "low level" option is of considerable importance to land use planning aspects of certain mineral workings, particularly as regards the continuing availability of sand and gravel in parts of East Anglia and the East Midlands. In these regions significant sand and gravel deposits underlie high quality agricultural land with a high water table and where the lack of suitable available filling materials frequently precludes restoration of worked sites to original levels. This combination of factors is a major constraint on the release of these mineral resources. There are also long-term implications for aggregate resources in other parts of the country because of the complex inter-regional flow of aggregates (both sand and gravel and crushed rock). Any reduction in the potential supply of sand and gravel in East Anglia and the East Midlands might mean increased resources having to be found from elsewhere.

3. There are, in contrast, some mineral deposits in areas with a high natural water table where the level of the water table and its maintenance are important for maintaining wildlife conservation interests. Examples are the peat deposits in Somerset and Eastern England.

4. Aspects of sub-water table restoration on both the land to be worked and on adjoining land need to be considered carefully before any permission is granted. Moreover, whilst it seems likely that the option of low level restoration to an agricultural after-use will be of most relevance; it may have potential for other after-uses.

5. The Town and Country Planning Act 1971, as amended by the Town and Country Planning (Minerals) Act 1981, provides the general legislative framework within which mineral planning authorities are empowered to permit mineral extraction. The Act enables mineral planning authorities to regulate, by means of conditions imposed upon the grant of planning permission, the mining operations themselves and the subsequent restoration and aftercare of sites from which minerals have been extracted. Under Section 30A(7) of the 1971 Act, the aftercare period for restored land must be finite—at present it may be up to, but not exceed, five years (see DOE Circular 1/82; WO Circular 3/82).

6. Conditions may be imposed on the grant of planning permission for mining operations in the same way as they may be imposed on the grant of planning permission for other development. In particular, conditions must satisfy the six "tests" specified in paragraph 11 of the Annex to DOE and WO Circular 1/85.

7. Within the framework of the Town and Country Planning Act 1971 mineral planning authorities have considerable relevant experience of determining planning applications for mineral workings, using the most appropriate of the first five options referred to in paragraph 1 above. Such decisions include the imposition of conditions on the granting of permissions. However, it has not proved possible to devise an acceptable "model" condition which would enable mineral planning authorities to grant permission for applications for mining operations on the basis of the sixth option, low level restoration. The remainder of this Annex is therefore devoted to a consideration of guidance on the legal aspects associated with this option. It is stressed that the advice is based upon present legislation and experience. It is not mandatory; and may need revision in the light of further experience and any legislative changes.

LEGAL ASPECTS OF SECURING LOW LEVEL RESTORATION

8. The main problem concerns the imposition and enforceability of longer-term or "perpetual" pumping conditions. It is considered that a condition imposed on the grant of planning permission for mining operations which would require the mineral operator and, once he had left the site, the landowner, to pump the site in perpetuity or for an unspecified period would be held by the Courts to be *ultra vires*. It would impose unreasonable obligations on the landowner.

9. The use of voluntary agreements may present a practical alternative. Agreements between local planning authorities and developers to regulate matters for which provision cannot be made by conditions imposed on the grant of planning permission are becoming more widely used. In the context of low level restoration, any agreement would need to satisfy the test of reasonableness set out in paragraph 6(3) of DOE Circular 22/83 (WO Circular 46/83), ie "is otherwise so directly related to the proposed development and to the use of the land after its completion that the development ought not to be permitted without it." By their very nature, agreements must be freely entered into; a local planning authority cannot make the grant of planning permission conditional upon the completion of an agreement. However the need for continuous pumping of the restored land following mineral extraction, and for any related agreement, is likely to have been identified prior to the submission of a formal planning application. Account should be taken of this in the documents included with such an application.

10. It is necessary to consider:—

(i) the powers available for making effective agreements;

(ii) the parties appropriate to such agreements;

(iii) the contents or headings of such agreements.

(i) Powers

11. The power most widely used is Section 52 of the Town and Country Planning Act 1971. This provides that a local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of that land. It also provides that the agreement may be enforced by the local planning authority against persons deriving title from the person with whom the agreement was made as if the authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of that land. The local planning authority would therefore be in the same position, in relation to the enforcement of the agreement, as a person entitled to the benefit of a restrictive covenant. The agreement would, of course, be enforceable against the original covenantor.

12. Section 111 of the Local Government Act 1972 provides that a local authority may do anything—and this would include the making of agreements—which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. Thus the purpose of an agreement under this Section could be wider than the purpose of agreements under Section 52 of the 1971 Act which can only restrict or regulate the development or use of land.

13. Agreements under Section 52 and Section 111 suffer the disadvantage that any positive covenants contained therein are not enforceable against successors in title. But this disadvantage can be removed by invoking Section 33 of the Local Government (Miscellaneous Provisions) Act 1982 which replaced Section 126 of the Housing Act 1974. Section 33 secures for agreements relating to land made by a local authority under whatever power, the enforceability of positive covenants in the agreement against successors in title. Under subsection (3) it also gives the local authority default powers to enter the land and do what the covenant requires and to recover from any person against whom the covenant is enforceable any expenses incurred in the exercise of these powers.

14. Positive obligations affecting land enforceable by a local authority under any covenant or agreement and binding on successive owners are registerable as local land charges under Section 1 of the Local Land Charges Act 1975.

15. As regards other relevant legislation, Section 22 of the Land Drainage Act 1976 empowers drainage authorities to enter into an agreement with any person to execute at his expense, whether inside or outside their area, any drainage works which that person is entitled to execute. The improvement and maintenance of drainage works may also be the subject of such an agreement. A Section 22 agreement might, therefore, contain provisions which are sufficient to ensure low level restoration. Ordinarily, Section 22 agreements would only be enforceable as between the parties; and Section 33 of the 1982 Act could be applied to such agreements only if the parties were a drainage authority and a "principal council" as defined

in Section 33(9) of the 1982 Act. There may, alternatively, be some value in using a Section 22 agreement to supplement a Section 52 or 52/33 agreement. Four of the nine water authorities in England have powers under their own local acts which are similar to those in Section 33 of the 1982 Act. However, where such local powers do not exist, the applicability of Section 22 might be rather more limited. Much would depend on the willingness of subsequent owners to negotiate fresh agreements.

16. In addition, Section 99 of the 1976 Act contains agreement making powers for certain local authorities—principally county councils (who are also mineral planning authorities)—similar to those in Section 22. It is recognised however that the applicability of Section 99 may be more limited.

17. It would not be appropriate for the Department to give specific guidance on the relative merits of the various agreement-making powers available. The choice is for the parties involved and depends on what they wish to achieve.

(ii) Parties

18. The local planning authority, and the landowner and/or the mineral operator will normally be the appropriate parties to a Section 52/33 agreement which contains a positive covenant to continue pumping and draining restored land. "Local planning authority" is defined in section 1(2A) of the Town and Country Planning Act 1971 and includes both county planning authorities and district planning authorities. The interests of mortgagees should not be overlooked. There may also be occasions when the owner of the mineral rights is neither the surface landowner nor the mineral operator.

19. The mineral operator will often be a party to Section 52/33 agreements but it should be borne in mind that an agreement will be enforceable only to the extent of each party's interest in the land. A mineral operator will often have only a limited interest—for example, to win and work minerals under a mining lease—and his interest may well be insufficient to enable him to fulfil all of the obligations which are contained in the agreement. Whilst the entirety of the agreement may be enforceable against the mineral operator in contract, he may not have sufficient interest in the land to secure the performance of obligations which are more properly those of the landowner. It will, therefore, generally be appropriate for the landowner to be a party; although again the interests of mortgagees and tenants should not be overlooked.

20. Drainage authorities have no statutory powers enabling them to be a party to a Section 52/33 agreement and, even if they had, it is unlikely that they would be "persons interested in land" for the purposes of Section 52 of the 1971 Act. However, drainage, water level and water pollution control aspects will be major considerations in any Section 52/33 agreements. Where any such agreement is contemplated, and certainly before it is finalised between, for instance, a mineral planning authority and a landowner or mineral operator, there should be the closest consultation with the relevant water authority and, where different, the drainage authority (as defined in paragraph 21) to ensure that all the necessary requirements are taken into account.

21. The parties to a Section 22 agreement under the Land Drainage Act 1976 must be a drainage authority and another person entitled to execute drainage works on the relevant site. A "drainage authority" means a water authority or an internal drainage board (Section 17(7) of the Act). The latter bodies administer the great majority of internal drainage districts recognised under the 1976 Act, which are "such areas as will derive benefit or avoid danger as a result of drainage operations." A few districts are directly administered by water authorities. Internal drainage boards (IDBs) are statutorily required to exercise a general supervision over all matters relating to the drainage of land within their districts. Their principal function is to maintain, and where necessary improve, the main drains (excluding those comprising the main river of a water authority) and minor watercourses in their districts. Their works are separate from but complement the works which farmers carry out themselves on their field drains and ditches, but most boards have to rely on the water authority's main rivers to carry the drainage water to the sea. Water authorities are required to exercise a general supervision over IDBs in their regions although their power to carry out works only extends to watercourses designated as 'main rivers'. They do, however, have power to give directions to IDBs or to take action in default. The other party to a Section 22 agreement would normally be the mineral operator and/or landowner.

22. The parties to a Section 99 agreement under the 1976 Act must be a county council or London borough and any person entitled to execute drainage works within the council's area.

(iii) Contents of Agreements

23. It is not appropriate to formulate "model" agreements since the terms of any agreement are a matter for negotiation by the parties and will reflect the circumstances of the particular case. However, the general aim of any agreement would be to ensure the success of the long-term use of the restored land after mineral extraction—whether for agriculture, forestry or amenity purposes.

24. An agreement is likely to contain one or more clauses which link it to, and make its provisions conditional upon, the granting of a particular planning permission for mineral working. Care should be taken to avoid the imposition of obligations which are inconsistent with the requirements of conditions to be imposed on the grant of planning permission. Agreements may also need to be made conditional upon the issue of water abstraction licences, conservation notices or pollution control discharge consents.

25. An adequate hydrological investigation is likely to be a pre-requisite for determining the contents of a satisfactory agreement. This should enable assessments to be made of requirements for groundwater barriers and drainage; the costs and volumes involved in long-term pumping; and the effects of pumping on surrounding land and watercourses, including the abstraction rights of others. Aspects which are likely to be covered in an agreement include the installation, operation, maintenance and renewal of the required drainage facilities. Such facilities may include pumps, motors, drainage pipes and drainage channels. It may also be appropriate to make provision for the treatment of the side slopes of the former mineral excavation, which might be composed of the same material as the excavated mineral or might be specially constructed from impervious materials, or other treatment which may be applied to the side slopes or within the adjoining land designed to control and minimise seepage.

26. The operation, maintenance etc of the drainage facilities may be linked to certain of the planning conditions of the mineral permission, or other clauses in the agreement, which deal with the overall scheme for working, restoration and aftercare of the site. Similarly, there may need to be a linkage to possible conditions in licences or consents issued by water authorities. There may also need to be a provision for revising the practical aspects of the drainage proposals, by agreement, if mineral working and restoration are phased over a long period.

27. Some form of financial provision for the drainage facilities of a site in the longer term is likely to be required from the mineral operator by the other party or parties to an agreement. Indeed, appropriate payment to the drainage authority is the required basis of a Section 22 agreement and payment to the local authority under a Section 99 agreement. This might take the form of a commuted sum or sums paid following restoration and five years' aftercare of a site, or relevant parts of a site if phased over a long period. Deposit of a bond for a short, specific period, which was one of the options considered for restoration of mineral workings in the report "Planning Control over Mineral Working" (the Stevens Committee) is unlikely to be appropriate.

28. Parties may wish to consider whether agreements should contain a clause allowing for arbitration. Section 1(5) of the Lands Tribunal Act 1949 provides for the Tribunal to act as arbitrator between the parties to an agreement. It could be possible for the Tribunal to act as arbitrator on compensation matters if there were disputes between parties to any of the agreements mentioned in the preceding paragraphs.

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