

# Petitions P-04-472 Make the MTAN law and P-04-575 Call in all opencast mining applications

## Summary of consideration

April 2018

### Introduction

The Petitions Committee has given detailed consideration to two petitions relating to opencast mining developments in Wales. Both petitions focused upon national planning policy and the approach adopted by the Welsh Government. This report contains a summary of the Committee's consideration of these issues.

### 1. Background

1. Petition P-04-472 Make the MTAN law, was submitted by Dr John Cox. It collected 680 signatures and was first considered by the Petitions Committee on 16 April 2013.

#### Petition text:

We call upon the National Assembly for Wales to urge the Welsh Government to make the MTAN Guidance Notes, notably those relating to a 500 metre buffer zone around open cast workings, mandatory in planning law for Wales.



**Additional information:**

On 20th January 2009, Jane Davidson, the Minister for the Environment, introduced newly published Coal Minerals Technical Advice guidance Notes (MTAN) for Wales, and stated: “.. the Coal MTAN will fulfil the pledges (in 2008) to introduce Health Impact Assessments for coal applications, together with buffer zones, and with an emphasis on working closely with local communities. It reaffirms the commitment (in 2008) to a 500m buffer zone.” In 2009 the Welsh Government did not have the power to make its planning guidelines law. It does now.

**2.** The Committee received a second petition on opencast mining in 2014, P-04-575 Call in all opencast mining applications. It was submitted by the United Valleys Action Group (UVAG) with 180 signatures (an associated petition relating to a specific planning application collected more than 6500 signatures on another website).

**Petition text:**

We call upon the National Assembly for Wales to urge the Welsh Government to call in all opencast mining planning applications over 10 years duration or over 350 hectares in size because the implications of these developments are far reaching and long standing with effects beyond the immediate locality.

**3.** The petitions were considered together for much of their consideration by the Petitions Committee, which spanned two Assembly terms. In the fourth Assembly (2011-2016) the Committee held evidence sessions with Dr Cox and Lynne Neagle AM, and with the then Minister for Housing and Regeneration, Carl Sargeant AM. Since 2016 the current Committee has held further evidence sessions with both petitioners and the Cabinet Secretary for Energy, Planning and Rural Affairs (then the Cabinet Secretary for Environment and Rural Affairs), Lesley Griffiths AM.

## 2. Consideration of the petitions

### The Minerals Technical Advice Note 2: Coal (MTAN2)

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- 4.** In January 2009 the Welsh Government published the Minerals Technical Advice Note 2: Coal (MTAN 2).<sup>1</sup> This provides advice on both surface (opencast) and underground coal mining for local planning authorities, applicants and other stakeholders. MTAN 2 sets out how impacts should be assessed and what mitigation measures should be adopted, and seeks to identify the environmental and social costs of coal operations so that they are able to be properly met by the operator.
- 5.** The technical advice covers a number of issues relating to coal including the role of the local development plan (LDP) (including buffer zones, development control and public participation), protecting areas of importance, reducing the impact of coal extraction (including health, environmental and social impact assessments), and restoration, aftercare and afteruse.
- 6.** Planning decisions in Wales are made by examining the application in the context of:

  - National planning policy (Planning Policy Wales) and guidance, including MTAN 2, as prepared by the Welsh Government;
  - Policies in the local planning authority's development plan for the area; and
  - Any other relevant issues, known as 'material considerations'.
- 7.** MTAN 2 should therefore be taken into account in planning decisions made by Mineral Planning Authorities (MPAs) (i.e. local planning authorities), appeal decisions made by the Planning Inspectorate, and decisions on called in applications and appeals by the Welsh Government (called in appeals are called 'recovered appeals').
- 8.** However, whilst national policy and guidance should be taken into account when making planning decisions, there is no explicit statutory requirement that they should be followed.
- 9.** This is the primary concern of petition P-04-472, which calls on the Welsh Government to put the MTAN 2 into law in order to make its contents mandatory

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<sup>1</sup> Welsh Government, [Minerals Technical Advice Note 2: Coal \(MTAN 2\)](#), January 2009

in planning decisions. The petition specifically refers to the elements that relate to a 500m 'buffer zone' around opencast mine workings.

**10.** In written evidence to the previous Petitions Committee in May 2013, Dr Cox summarised the objective of the petition as follows:

“There is a long-term and on-going contradiction between 1) Local Authorities being obliged to conform to these MTAN guidelines and 2) Planning Inspectors being allowed to reinterpret the MTAN guidelines.

[...] The petitioners believe that Planning Inspectors are servants of the process and as equally obliged as are the Local Authorities to conform with the MTAN Guidelines.”<sup>2</sup>

**11.** At an evidence session during the Committee’s meeting on 3 October 2017, he explained the background and motivation behind the petition in more detail:

“[...] the National Assembly approved the minerals technical advice note guidelines for opencasting, which I supported, which did agree to opencasting under very specific circumstances, which seemed, to me, perfectly reasonable—one of the conditions being that you didn’t do opencasting within 500m of neighbourhoods unless there were some very special circumstances [...]

“We then had an application at a place called Varteg Hill for opencasting, which clearly violated the MTAN guidelines, and Torfaen council rejected it. The coaling would be 200m from the community. In fact, because they needed a big bund to hide the noise and everything, the works were actually 0.5m from houses and everything. So, obviously, it had to be rejected as it violated the guidelines. The company went to appeal, and I attended the public inquiry, along with other people. I will always recall the shattering first few words of the inspector. He said, ‘I’m not interested in the MTAN guidelines. Those are guidelines. I make the law here.’ And he then proceeded, for the two weeks that we were in attendance, to completely ignore the MTAN guidelines, on the grounds that he knew better.”<sup>3</sup>

**12.** Dr Cox’s conclusion was that the only way to ensure consistent application of the MTAN Guidelines was to give them legal status.

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<sup>2</sup> Evidence paper from the petitioner, 28 April 2013 (PDF, 154KB)

<sup>3</sup> Record of Proceedings, 3 October 2017, paras. 166-7

**13.** The then Minister for Housing and Regeneration, Carl Sargeant AM, rejected this proposal in a February 2014 response to the Committee:

“Planning policy needs to be flexible and capable of timely amendment in response to changing circumstances rather than included in primary legislation. Making planning guidance part of an act of the Assembly would mean that an amending act of the Assembly would be required every single time the planning guidance was changed. This is not a sensible approach.

It follows that it is not possible or appropriate for MTAN 2 to be made law. The factors which need to be considered are complex and being able to obtain the right solution in the right place requires an approach whereby the unique circumstances facing any particular locality can be fully considered. For this reason, a policy based approach is a more appropriate, and effective, mechanism than legislation for securing buffer zones.”<sup>4</sup>

**14.** In her evidence to the Committee in November 2017 the Cabinet Secretary for Environment and Rural Affairs outlined similar views on the importance of flexibility in planning policies:

“As I say, the first port of call is obviously the local planning authority. If it then goes to appeal, that planning inspector has to look at it. I think it’s really important that the planning policy has flexibility, because, obviously, each local area is different. So, I don’t think they ride roughshod; they look at the planning application with fresh eyes and they come up with their decision in the way that they see fit.”<sup>5</sup>

**15.** During the Petitions Committee’s initial consideration of the petition in the fourth Assembly, the Minister for Housing and Regeneration was reluctant to comment on the specific circumstances around the Varteg Hill application because it related to a live planning process. With the separation of time, the Cabinet Secretary for Environment and Rural Affairs provided some comments in her evidence to the Committee in late 2017:

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<sup>4</sup> Evidence paper from the Minister for Housing and Regeneration, February 2014 (PDF, 152KB)

<sup>5</sup> Record of Proceedings, 7 November 2017, para. 233

“[...] my policy is the MTAN and in this case we’re talking about MTAN 2. All the TANs are obviously guidance and they should be taken into consideration at all times.”<sup>6</sup>

**16.** In response to further questioning about the comments attributed to the planning inspector at the public inquiry into the Varteg Hill development, the Cabinet Secretary stated:

“Well, the planning policy, as it stands now, should be interpreted. I don’t know what you’re quoting there, but if that’s what a planning inspector said, I would completely disagree with that.”<sup>7</sup>

**17.** The Committee queried whether assessment or auditing is undertaken on decisions reached by planning inspectors, for example in the interests of ensuring consistency of approach, and received confirmation from Welsh Government officials that the process is carried out within the Planning Inspectorate and overseen by the Chief Planning Inspector for Wales.

### The powers of Welsh Ministers to ‘call in’ planning applications

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**18.** The second petition considered by the Committee, P-04-575, calls for all opencast mining planning applications over 10 years duration or over 350 hectares in size to be called-in by Welsh Government. The petition argues that the implications of these developments are far-reaching and long-standing, with effects beyond the immediate locality, and therefore should be considered on a national basis.

**19.** Applications for planning permission are generally considered by a Local Planning Authority. In Wales, these are the 22 Unitary Authorities and the three National Park Authorities. However, the Welsh Ministers have the power to assume responsibility from a Local Planning Authority on any planning application using powers under Section 77 of the Town and Country Planning Act 1990. This enables Welsh Ministers to decide whether or not planning permission is to be granted under the “call-in” process. It only affects a small number of applications each year.

**20.** Planning applications are normally subject to “call-in” where planning issues of more than local importance have been raised. These issues may arise where the development could:

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<sup>6</sup> Record of Proceedings, 7 November 2017, para. 235

<sup>7</sup> Record of Proceedings, 7 November 2017, para. 237

- Be in conflict with national planning policies;
- Have wide effects beyond the immediate locality;
- Cause regional or national controversy;
- Be likely to significantly affect areas of landscape, scientific, nature or historical importance;
- Raise issues of national security; or
- Raise novel planning issues.

**21.** Call-in is not concerned with the question of whether or not the proposed development should be granted planning permission but with the question of who should take that decision. In considering whether to call in a planning application the planning merits of the proposed development are not taken into account.

**22.** Early in the Committee's consideration of this petition, the petitioner expressed a view that local authorities do not have the resources, skills or knowledge to handle large scale opencast proposals and that:

“A responsible Government should consider all opencast applications of over 10 years or 350 hectares in size because the long term economic viability of coal mining is very uncertain.”<sup>8</sup>

**23.** A letter from the then Minister for Housing and Regeneration, Carl Sargeant AM, set out the Welsh Government's policy on calling in planning applications, and specifically applications for the mining and working of minerals:

“The Welsh Ministers' power to call in applications for planning permission is a discretionary power and the Welsh Government's policy on the exercise of that power is that development proposals are generally best determined locally by planning authorities which know their area, its needs and sensitivities and that the Welsh Ministers do not interfere with local planning authorities' jurisdiction unless it is necessary to do so [...]

Under the provisions of the Town and Country Planning (Notification) (Wales) Direction 2012, applications for planning permission for

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<sup>8</sup> Correspondence, [Petitioner to the Committee](#), 30 September 2014 (PDF 34 KB)

minerals development, for the purposes of the Notification Direction means development which:

- Consists of or includes the winning and working of minerals;
- Is to be carried out at a new site or an extension to an existing site; and
- Does not accord with the provisions of the development plan in force in the area where the application site is situated,

and which the local planning authority does not propose to refuse, must be notified to the Welsh Ministers. In considering whether to call in an application referred to them under the Notification Direction the Welsh Ministers will consider whether the local authority has identified the national planning policies and legislation/directives relevant to those issues, and, if so, whether it has assessed those issues in a reasonably robust way, using up to date methodology and knowledge.”<sup>9</sup>

**24.** The Minister’s conclusion was that the powers to call-in should be used “selectively”:

“The decision to call in must be made in the light of facts and circumstances of the particular case and the Welsh Ministers must not fetter [local planning authorities’] discretion by the rigid application of any particular policy towards such cases.”<sup>10</sup>

**25.** The Cabinet Secretary for Environment and Rural Affairs, Lesley Griffiths AM, wrote to the Committee on 7 March 2017 to confirm that the Welsh Government’s policy remained unchanged.<sup>11</sup>

#### Recent action on planning policy in relation to coal

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**26.** In March 2017, the Cabinet Secretary wrote to the Committee to provide an outline of recent action in relation to the MTAN and opencast coal mining:<sup>12</sup>

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<sup>9</sup> Correspondence, [Minister for Housing and Regeneration to the Chair](#), 7 September 2014 (PDF 262 KB)

<sup>10</sup> Correspondence, [Minister for Natural Resources to the Chair](#), 13 November 2014 (PDF 155 KB)

<sup>11</sup> Correspondence, [Cabinet Secretary for Environment and Rural Affairs to the Chair](#), 7 March 2017 (PDF 1 MB)



- An opencast coal summit<sup>13</sup> had been held in 2015, which resulted in a focused review of MTAN 2 Coal;
- Subsequently, a consultation event took place in January 2016 to consider focused changes to MTAN 2 and discussions centred on exceptions to the buffer zone policy, extensions and restoration/financial arrangements; and
- A statement she had made on energy in Plenary in December 2016, in which she stated support for the phasing out of unabated coal fired power and her intentions to amend planning policy to limit the opportunities for new coal development.<sup>14</sup>

**27.** During the Committee's evidence session with the Cabinet Secretary on 7 November 2017 the Welsh Government's intention to move towards a low-carbon economy and away from the use of fossil fuels was clear. The Cabinet Secretary confirmed that the Welsh Government planned to consult on changes to planning policy in spring 2018, with a view to amending policy in a way that supports this policy direction:

"I have commenced a review of 'Planning Policy Wales'. That absolutely needs to fit in with the Well-being of Future Generations (Wales) Act 2015. That's one reason for doing that. And, again, it needs to support the progress that we need to make in terms of our decarbonisation agenda and us moving to a low-carbon economy.

"I also have written recently to chief planning officers right across Wales informing them of my intentions to consult on the appropriateness or otherwise of amendments to planning policy and whether planning policy should no longer be supportive of the extraction of coal. I think we need to be moving away from any new opencast developments in Wales.

I referred before to the statement I made in October around renewable energy. Again, that will help us decarbonise our energy system. Moving towards clean energy as a foundation for a prosperous economy

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<sup>12</sup> Correspondence, [Cabinet Secretary for Environment and Rural Affairs to the Chair](#), 28 March 2017 (PDF, 69 KB)

<sup>13</sup> Attended by the petitioner for P-04-472, Dr Cox, as well as representatives from industry, local authorities and other residents.

<sup>14</sup> Oral Statement by the Cabinet Secretary for Environment and Rural Affairs, [Energy](#), 6 December 2016

requires appropriate action to move away from continued fossil fuel extraction. Currently, as it stands, 'Planning Policy Wales' is supportive of fossil fuels—coal, gas—so we need to review the planning policy.”<sup>15</sup>

**28.** The Cabinet Secretary also referred to statements made by the UK Government of its intention to end the use of coal-fired power stations by 2025, which she considered likely to result in a diminished market for coal in the future.<sup>16</sup>

**29.** On 12 February 2018 the Welsh Government published a consultation on Draft Planning Policy Wales: Edition 10.<sup>17</sup> In relation to coal it states:

“Proposals for opencast, deep-mine development or colliery spoil disposal should not be permitted. Should, in wholly exceptional circumstances, proposals be put forward they would clearly need to demonstrate why they are needed in the context of climate change emissions reductions targets and for reasons of national energy security.”<sup>18</sup>

**30.** The consultation period runs until mid-May 2018.

#### Site restoration

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**31.** Concerns relating to the legacy of opencast mining were also expressed with a number of instances highlighted where restoration work at sites in Wales had been non-existent, incomplete or inadequate once mining operations had ceased.

**32.** The United Valleys Action Group told the Committee that there should be a stronger responsibility on local authorities to ensure that appropriate provision for site restoration and reinstatement is made and enforced:

“If anything has to change, I would say that there has to be a mandatory local authority responsibility for these schemes, not the opportunity to hand over responsibility to mining companies themselves, who obviously have their own interests at heart, not ours.”<sup>19</sup>

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<sup>15</sup> Record of Proceedings, [7 November 2017](#), paras. 191-193

<sup>16</sup> Record of Proceedings, [7 November 2017](#), para. 199

<sup>17</sup> Welsh Government, [Consultation on Draft Planning Policy Wales: Edition 10](#), published 12 February 2018

<sup>18</sup> Welsh Government, [Draft Planning Policy Wales: Edition 10](#), para. 4.161 (PDF 4MB)

<sup>19</sup> Record of Proceedings, [3 October 2017](#), para. 234

**33.** Dr Cox proposed that:

“[...] no applications should be accepted unless there is a deposit equivalent to the full restitution costs.”<sup>20</sup>

**34.** The Cabinet Secretary for Environment and Rural Affairs referred to discussions that have taken place between the Welsh and UK Governments in relation to the funding of restoration works.<sup>21</sup>

**35.** The Committee also heard that there are existing powers that enable Local Planning Authorities (or Welsh Ministers) to ensure that appropriate provision for the costs of restoration is secured upfront. Neil Hemington informed the Committee of work that has been undertaken by the Welsh Government:

“We have done some work with the Coal Authority, looking at practice guidance around helping to ensure that restoration takes place, and that guidance aims to ensure that there is sufficient money in the budget to meet, if you like, the key restoration costs before the project gets to that stage. So, we are trying to ensure that we move away from a situation, which we've seen in the past, where there are unfunded restoration liabilities and, in some cases, further extensions have been suggested to sites to pay for the restoration of the first phase of the site. So, we're fully aware of that issue, and hopefully we have, by working with local authorities and the Coal Authority, plugged that gap, if we should see a further application.”<sup>22</sup>

**36.** In Draft Planning Policy Wales: Edition 10<sup>23</sup> the Welsh Government has recently further outlined its intended policy with regards to restoration, aftercare and after-use of mineral sites:

“Unless new mineral extraction provides satisfactory and suitable restoration, planning permission should be refused. Planning conditions should ensure that land affected by mineral extraction is restored to a high standard suitable for its agreed after-use at the earliest opportunity, and work begun within six months of cessation of working wherever this is practicable (except where progressive restoration has already commenced). Restoration and aftercare should

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<sup>20</sup> Record of Proceedings, [3 October 2017](#), para. 236

<sup>21</sup> Record of Proceedings, [7 November 2017](#), para. 204

<sup>22</sup> Record of Proceedings, [7 November 2017](#), para. 208

<sup>23</sup> Welsh Government, [Draft Planning Policy Wales: Edition 10](#), para. 4.161 (PDF 4MB)

provide the means to at least maintain, and preferably enhance, the longterm quality of land and landscapes taken for mineral extraction.”

**37.** The updated policy also states:

“Operators and landowners should ensure that sufficient finance is set aside to enable them to meet restoration and aftercare obligations. The full cost of restoration does not need to be put on deposit at the outset, but it should build up commensurate with the programme of activity or extraction. The objective is to ensure that the full restoration costs are covered commensurate with the stage of the development as set out in the Coal Authority’s Best Practice guidance note [...]

Sites left unrestored for a long period or delay in legitimate restoration is not acceptable [...] An authority may require financial guarantees by way of a Section 106 planning obligation/agreement as part of the approval of planning permission to ensure that restoration will be fully achieved. Some authorities have local legislation to enable them to impose this provision by way of a condition attached to the planning permission. Mineral planning authorities should have regard to the need to avoid imposing costs that are larger or longer than strictly required to meet best standards.”

**38.** The Committee welcomes these statements. We believe the Welsh Government’s priority should be to ensure that appropriate funding provision is secured or guaranteed from site operators, and that the effectiveness of policy in achieving this should be kept under close review. If necessary, appropriate measures should be taken to strengthen the requirements in this regard, for example by making appropriate financial guarantees a mandatory aspect of planning permission.

## CONCLUSIONS

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**39.** Based on our consideration of these petitions, and the Welsh Government’s recent statements in relation to the likely limited nature of future of coal extraction in Wales, we have reached the following conclusions.

**Conclusion 1.** It is clear that the Welsh Government does not anticipate, and would not welcome, future applications for further opencast coal extraction in Wales. The changes proposed in Planning Policy Wales: Edition 10 would appear to make further new opencast coal mining developments highly unlikely in the future.

**Conclusion 2.** Proposed changes to planning policy make it likely that any future planning applications for opencast coal mining would be rejected through a local planning process or “called-in”. We support this approach.

**Conclusion 3.** National planning policy should ensure that suitable financial provision for site restoration is paid or guaranteed by those responsible for any future opencast mining developments. The effectiveness of planning policy in achieving this should be kept under close review by the Welsh Government and strengthened if necessary.

**Conclusion 4.** We encourage the petitioners, local communities and others with an interest in this issue to submit their views to the public consultation on Draft Planning Policy Wales: Edition 10 prior to the closing date of 18 May 2018.