

Minerals Planning Guidance 4: Revocation, modification, discontinuance, prohibition and suspension orders

On 5th May 2006 the responsibilities of the Office of the Deputy Prime Minister (ODPM) transferred to the Department for Communities and Local Government.

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Summary

Minerals Planning Guidance 4 (MPG4) gives guidance on the orders and effects of the Town and Country Planning (Compensation for Restrictions on Mineral Working and Mineral Waste Depositing) Regulations 1997.

Order

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Introduction

1 *The Environment Act 1995* (the "1995 Act") provided that sites with planning permission(s) for the development consisting of the winning and working of minerals or involving the depositing of mineral waste ("minerals development") must be reviewed every 15 years and, where it is considered necessary, new conditions imposed to ensure that they remain up to date. Compensation is payable if new conditions, other than restoration and aftercare conditions, restrict working rights. Guidance on these changes is given in [Minerals Planning Guidance 14: Environment Act 1995: Review of Mineral Planning Permissions \(MPG14\)](#).

2 Mineral planning authorities (MPAs) retain their powers to make revocation, modification, and discontinuance orders to act in cases of urgency or default. Paragraph 119 of [MPG14](#) explains the Government's intention to make regulations to bring the compensation entitlement following such orders in line with that for periodic reviews under the 1995 Act. The Town and Country Planning (Compensation for Restrictions on Mineral Working and Mineral Waste Depositing) Regulations 1997 [SI 1997 No 1111] (the "1997 Regulations") came into force on 25 March 1997. This note gives guidance on the orders and the effects of the 1997 Regulations. MPG4 "The Review of Mineral Working Sites" (1988) is hereby cancelled.

Use of modification and discontinuance orders to update

3 The Government attaches great importance to the need for the planning system to maintain certainty and for planning decisions to be reliable and robust. The 1995 Act established the principle that permissions for minerals development should be reviewed every 15 years. That period provides certainty for those making investment decisions based on planning permissions and should not be undermined. MPAs should not therefore use their order making powers as a substitute for, or to supplement, periodic reviews. Nor should orders to be used as a substitute for planning enforcement powers. However, there may be cases where orders are necessary because of a technical default in the use of periodic reviews or in the exceptional situation where a material change in circumstances makes it unacceptable for the development to continue on the existing terms and conditions of the planning permission.

4 Technical default would arise where the MPA failed to serve notice under paragraph 4 of Schedule 14 to the 1995 Act by the required date. The Act makes no provisions for late service of notice of a periodic review and, in such circumstances, the validity of the review and any subsequent reviews would be in doubt. MPAs are strongly advised to ensure that they have the mechanisms in place to ensure that notice of a periodic review is served in time. However, in the unlikely event of default, MPAs should use their order making powers to ensure that minerals planning permissions are updated where necessary and provision made for subsequent review. The same principles as for periodic reviews should apply: that is, orders should not be made at intervals of less than 15 years (except in the exceptional situation outlined above); and, "conditions, other than restoration and aftercare conditions, which would restrict working rights should not be imposed except in exceptional circumstances" (paragraph 174 of [MPG14](#)).

Timing of periodic reviews following orders

5 Where an order is made prior to a first periodic review, the first periodic review cannot take place until 15 years after the order takes effect (paragraph 3(6) of Schedule 14 to the 1995 Act). Second and subsequent reviews must take place 15 years after a previous review has been finally determined (paragraph 12(1) of Schedule 14) regardless of whether an order has taken effect in the interim, but it would be open to an operator to apply for postponement of the next review date by virtue of paragraph 5 of Schedule 14 (as applied by paragraph 12(2)).

6 When an order is confirmed between reviews, the Secretary of State will expect that:

- a. no further modification or discontinuance order will be made before the next periodic review; and,
- b. an application for postponement of the next periodic review date to 15 years after the date the order took effect might be favourably considered.

Order making powers available

Revocation and modification orders

7 Under section 97 and Part II of Schedule 5 of the *Town and Country Planning Act 1990* (the "1990 Act"), a planning permission for minerals development may be revoked or modified by the MPA if they consider that it is expedient to do so. The MPA can include an aftercare condition in a revocation or modification order provided it also includes, or the planning permission already contains, a restoration condition. Section 97 orders may only be made before buildings or operations have been completed or a change of use has occurred. In the case of minerals development, an order can only be made before development commences or in respect of uncompleted parts of the development. For example aftercare conditions can only be imposed before soils have been replaced and restoration conditions satisfied.

8 Where MPAs submit a section 97 order to the Secretary of State for confirmation they must serve notice on the owners and occupiers of the land affected and on any other person who, in their opinion, would be affected by the order. The notice must specify a period (not less than 28 days from the date of service) during which anyone served with a notice may request that their representations be heard by a person appointed by the Secretary of State before the order is confirmed. This may be by means of a local inquiry, a hearing or written representations. However, section 99(7) of the 1990 Act provides for an expedited procedure where all those who received notice of the order have informed the MPA that they do not wish to object to it. In such cases a section 97 order may take effect without being confirmed by the Secretary of State provided that the MPA have:

- advertised the making of the order;
- sent a copy of the advertisement to the Secretary of State not more than 3 days after it is published;
- and the Secretary of State has not:
- directed that the order be submitted to him for confirmation; or

- received notice that a person affected by the order wishes to object.

The provisions of section 99(7) do not apply where an order has been submitted to the Secretary of State for confirmation where the order revokes or modifies a planning permission granted or deemed to have been granted by the Secretary of State or where an order modifies conditions imposed by virtue of sections 91 or 92 of the 1990 Act.

9 There will be cases where a site is subject to more than one planning permission and the MPA will need to decide whether to make an order under section 97 for each permission or to make a single discontinuance order under paragraph 1 of Schedule 9. In such cases, the MPA should consider which option will best achieve their planning objectives for the site. However, it is expected that a discontinuance order will usually be more effective than a series of section 97 orders tackling individual permissions.

Discontinuance orders

10 Where the MPA consider it "expedient in the interests of the proper planning of their area (including the interests of amenity), regard being had to the development plan and to any other material considerations" they may, under paragraph 1 of Schedule 9 to the 1990 Act, make an order requiring any use of land to be discontinued, or they may impose conditions as to its continuing use or require buildings or works to be altered or removed. For the purposes of this section the winning and working of minerals is treated as a use of land. The MPA can include in a discontinuance order requirements for the alteration or removal of plan or machinery and conditions relating to the restoration of the land. If the order imposes restoration conditions, or the site is already subject to such conditions, aftercare conditions may also be imposed. Whereas revocation and modification orders can only be used where there is an express planning permission, discontinuance orders relate to the use of land. MPAs may therefore wish to consider making a discontinuance order where:

- a. minerals development was begun before the Town and Country Planning Act 1947 came into effect and no express planning permission exists;
- b. minerals development began in breach of planning control but enforcement action is not appropriate; or
- c. the making of a discontinuance order represents the most efficient method of modifying the use (eg ensuring the restoration) of a large site which is subject to more than one planning permission. (In a case of this kind, the operator may be prepared to make an application for a consolidated permission and such an application would be exempt from the normal fee).

11 Discontinuance orders take effect only if confirmed by the Secretary of State and he may modify an order as he considers necessary. When a MPA submits an order for confirmation, they must serve notice on the owners and occupiers of the land affected and on any other person who, in their opinion, will be affected by the order. The notice must specify a period (not less than 28 days from the date of service) during which anyone served with a notice may request that their representations be heard by a person appointed by the Secretary of State before the order is confirmed. This may be by means of a local inquiry, a hearing or written

representations. There is no expedited procedure for unopposed orders under this section.

Prohibition orders

12 Paragraph 3 of Schedule 9 to the 1990 Act enables MPAs to make orders prohibiting the resumption of minerals development in, on or under land where no such development has been carried out to any substantial extent for a period of at least 2 years and where, on the evidence available to the MPA at the time when they make the order, it appears that development is unlikely to resume to any substantial extent. The intention of prohibition orders is to establish without doubt that minerals development has ceased, to ensure that development cannot resume without a fresh grant of planning permission and to secure the restoration of the land. A prohibition order can encompass any number of permissions for mineral development which apply to the land or site to which it relates.

13 Parliament has expressly provided for MPAs to make orders prohibiting the resumption of minerals development where such development had permanently ceased. Prohibition Orders therefore provide the due process for extinguishing planning permissions in such circumstances. As [MPG14](#) makes clear, the Government believes that wider use should be made of these powers in respect of dormant mineral sites which have not been worked since 1982 and where resumption of development is unlikely.

14 In addition to prohibiting the resumption of development prohibition orders may impose requirements for:

- a. the removal or alteration of plant and machinery;
 - b. the removal or alleviation of any injury to amenity caused by the minerals development (except where caused by subsidence from underground workings);
 - c. compliance with any planning conditions to which the minerals development is subject;
- and,
- d. the restoration of the land.

Where the restoration condition is imposed by the order, or the site is already subject to one, an aftercare condition may also be imposed.

15 Whether or not it can be held that no working has been carried out "to any substantial extent" will depend on the circumstances of the individual case, including the scale of the operation and past levels of production. In deciding whether or not the resumption of working is unlikely, MPAs should weight evidence supplied by the operators/owners on the pattern and programme of their operations including forecasts of trends in production and markets for their products; the quality and quantity of workable mineral; and, whether there is a real genuine intention to work the site. In the event of an inquiry MPAs will need to be able to demonstrate that their decision to make an order is a reasonable one in the light of such issues and all other material considerations.

16 A prohibition order can only take effect if confirmed by the Secretary of State and he will similarly wish to satisfy himself on these and all other material considerations. The Secretary of State may confirm an order without modification or subject to such modifications as he considers expedient. When a prohibition order takes effect, any planning permission to which

the order relates will cease. This provision does not prevent the MPA making further grant of planning permission for minerals development on the site if they decide to revoke the prohibition order. Such revocation must be by order, but does not require confirmation by the Secretary of State.

17 A planning permission which is terminated by a prohibition order would not be reinstated automatically if the order was revoked. A new planning permission would be required to enable minerals development to be resumed.

Suspension orders

18 Where a MPA have reason to believe that an operator intends to resume minerals development in the foreseeable future, it would be inappropriate for them to make a prohibition order. Paragraphs 5 and 6 of Schedule 9 to the 1990 Act therefore enable MPAs to make suspension orders in respect of a site where minerals development has taken place but has been temporarily suspended. A MPA may assume that minerals development has been temporarily suspended when it has not been carried out to any substantial extent for at least 12 months but it appears to them that a resumption of operations is likely.

19 The aim of suspension orders is to deal with environmental problems arising at sites where minerals development has been temporarily suspended. They may be regarded as a holding measure pending the resumption of development or the making of a prohibition order. The orders may not include restoration or aftercare conditions but may require that steps to be taken for the protection of the environment including measures to preserve the amenities of the area in which the land is situated, to protect it from damage or to prevent deterioration in the condition of the land while development is suspended. Requirements which may be appropriate include the removal where practicable of plant or equipment, the disposal of stockpiles and waste heaps and the tidying up and maintenance of the site. Fencing and other safety measures may also be appropriate, if it is found that existing powers under the Public Health Acts and Mines and Quarries Act are inadequate to deal with a particular situation. The order should include a time limit for compliance with any steps required but, since some can be carried out relatively quickly and others may take longer to arrange, provision is made for a MPA to specify different time limits for different steps.

20 A suspension order is a temporary measure and there is provision for a MPA to take account of changing circumstances after an order has come into force by making a supplementary suspension order. For example, if the resumption of minerals development is postponed for a further period, perhaps because of changing market conditions, then a supplementary suspension order securing the site for a further period may be appropriate. Such an order may direct the operator to take additional or alternative steps to protect the environment from those specified in the original suspension order. Where minerals development has resumed sooner than had been anticipated, a supplementary suspension order can be used to direct that the suspension order should cease to have effect.

21 Before they can take effect, suspension orders and supplementary suspension orders and supplementary suspension orders must be confirmed, with or without modification by the Secretary of State. Such confirmation requirements do not apply to supplementary suspension orders which simply revoke a suspension order or previous supplementary suspension order.

The procedural arrangements are similar to those for discontinuance orders.

22 MPAs have a duty to review suspension orders and supplementary suspension orders at intervals of not more than 5 years and to determine whether a prohibition order or a (further) supplementary suspension order should be made. This is to ensure that a suspension order does not remain in force indefinitely without the MPA considering what other action to take. It is important to remember that suspension orders do not and cannot prevent the re-commencement of minerals development. If, however, an operator wishes to re-commence working land which is the subject of an order, he must notify the MPA of the intended date of re-commencement and the MPA must revoke the order within 2 months of that date of working has resumed to a substantial extent. If they do not revoke the order, the operator may apply to the Secretary of State for its revocation and either the operator or the MPA may request a hearing prior to the decision being made.

Choice of Order

23 Before deciding whether to make an order, MPAs should bear in mind that much can be achieved by constructive negotiation with the operator without recourse to their statutory powers. Orders should therefore be considered as an action of last resort where discussions with the owner and operator have been unable to resolve the problem. Where MPAs do decide to make an order, they must have regard to the development plan and any other material considerations. The selection of the appropriate order will depend on the circumstances of the individual case and the working status of the site. In considering whether to confirm an order, the Secretary of State will be concerned with its effectiveness in promoting its planning objectives in relation to the site. Each case will need to be considered on its planning merits. The basis for an order must therefore be defensible and MPAs should be able to justify the application of the order to the area of the site which is affected.

24 Orders may be used to deal with any mineral sites in the area of a MPA separately from any duty to review them under Schedules 13 and 14 to the 1995 Act, or Schedule 2 to the Planning and Compensation Act 1991 but, in making a modification order or discontinuance order imposing conditions on the continuance of a use of land, they must have regard to the advice in paragraphs 3 to 6 above.

25 Under section 288 of the 1990 Act, any person who is aggrieved by an order under sections 97, 102, paragraphs 3 or paragraphs 5 and 6 to Schedule 9 on the grounds that it is not within the powers of the Act or that a procedural requirement has not been complied with may appeal to the High Court.

Compensation following orders

26 All the orders discussed above, that is:

- revocation and modification orders (section 97 and Part II of Schedule 5, 1990 Act);
- discontinuance orders (section 102 and paragraphs 1 to 3 of Schedule 9, 1990 Act);
- prohibition orders (paragraph 3 and 4 of Schedule 9, 1990 Act); and,

- suspension orders and supplementary suspension pension orders (paragraphs 5 to 9 of Schedule 9, 1990 Act).

may attract compensation from the MPA if they are confirmed by the Secretary of State and a valid claim is made under the appropriate provisions of the TCPA 1990 . The provisions are sections 107 (or 279 as appropriate) in the case of revocation and modification orders, or sections 115 (or 280 as appropriate) in the case of other orders. However, the 1997 Regulations define the circumstances in which compensation is not to be payable following the making of a modification or discontinuance order, and modify section 115 of the 1990 Act in its application to claims for compensation following the making of a prohibition, suspension or supplementary order.

Revocation and Modification Orders (section 97 and Part II of Schedule 5, 1990 Act)

27 Regulation 3 of the 1997 Regulations provides that no compensation is payable where the following conditions are satisfied:

- a. the order does not impose any restriction on working rights; or modify or replace any such restriction, other than a restoration or aftercare condition, subject to which the planning permission was granted or which was imposed by an earlier order; and,
- b. that either the permission was granted not less than five years before the date of the order, or the planning permission which the order modifies was granted before 22 February 1982 (the date when the power to impose aftercare conditions came into force); and,
- c. the order was made more than 5 years after any previous order or orders in respect of the same land and more than 5 years after an application for determination of conditions under Schedule 2 to the Planning and Compensation Act 1991 or under Schedule 13 and 14 to the 1995 Act was finally determined.

28 Where these conditions are not satisfied section 107 applies unmodified and unabated compensation is payable.

Discontinuance orders (section 102 and paragraph 1 of Schedule 9, 1990 Act)

29 Regulation 4 provides that no compensation is payable where the following conditions are satisfied:

- the order does not impose any restriction on working rights; or modify or replace any such restriction, other than a restoration or aftercare condition, subject to which the planning permission was granted or which was imposed by an earlier order; and,
- the order imposes a condition on the continuance of the use of the land: or requires the alteration or removal of any buildings, works, plant or machinery used in connection with the development; and,
- the development began not less than five years before the date of the order; and,

- the order was made more than 5 years after any previous order or orders in respect of the same land and more than 5 years after an application for determination of conditions under Schedule 2 to the Planning and Compensation Act 1991 or under Schedule 13 or 14 to the 1995 Act was finally determined.

30 Where these conditions are not satisfied section 115 applies unmodified and unabated compensation is payable. However, it should be remembered that where an order is made to discontinue a use of land that was not lawful (see for example (b) of paragraph 10 above, any increase in value of the land by virtue of that use will not be taken into account in assessing compensation in accordance with section 5(4) of the Land Compensation Act 1961.

Prohibition Orders (paragraph 3 of Schedule 9, 1990 Act)

31 Regulation 5 modifies section 115 of the 1990 Act where certain conditions are satisfied. The conditions are:

- a. that minerals development began not less than five years before the date of the order; and,
- b. the order was made more than five years after any previous order or orders in respect of the same land.

32 Where these conditions are satisfied, the effect of the modification is to exclude from the calculation of compensation:

- the value of any mineral in, on or under the site which cannot be won or worked,
- the value of any mineral waste which cannot be deposited,
- the value of any void space which cannot be filled, or
- the cost of complying with any restoration or aftercare condition,

in consequence of the order. And, the amount of compensation assessed is then reduced by £7,800.

Suspension Orders and Supplementary Suspension Orders (paragraphs 5 and 6 of Schedule 9, 1990 Act)

33 Regulation 6 modifies section 115 of TCPA 1990. The effect of the modifications is to exclude from the calculation of compensation:

- the value of any mineral in, on or under the site which cannot be won or worked,
- the value of any mineral waste which cannot be deposited, or

- the value of any void space which cannot be filled,

in consequence of the order. And, the amount of compensation assessed is then reduced by £7,800.

Apportionment of Compensation for Prohibition and Suspension Orders

34 Regulation 7 provides for the apportionment of abatement of compensation following prohibition or suspension orders where there is more than one person with an interest in the land or minerals to which the order relates. That is, where at the time of assessing the amount of compensation to be paid, the MPA are aware that there are other persons as well as the claimant who are interested in the site the MPA must apportion the amount of abatement according to the proportion that the value of the claimant's interest in the site and minerals bears to the total value of the site and minerals to which the order relates.

Restriction on working rights

35 Regulation 2 defines "restriction on working rights" for the purpose of modification and discontinuance orders as meaning that, in relation to any land, there is imposed a restriction which has the effect that:-

- the size of the area which may be used for the winning and working of minerals or the depositing of mineral waste;
- the depth to which operations for the winning and working of minerals may extend;
- the height of any deposit of mineral waste;
- the rate at which any particular mineral may be extracted;
- the rate at which any particular mineral waste may be deposited;
- the period at the expiry of which any winning and working of minerals or depositing of mineral waste is to cease; or
- the total quantity of minerals which may be extracted from, or of mineral waste which may be deposited on, the site;

is restricted or reduced.

Secretary of State's reserve powers

36 Paragraph 11 of Schedule 9 to the 1990 Act gives the Secretary of State reserve powers to make discontinuance orders, prohibition orders, suspension orders and supplementary suspension orders, if it appears to him to be expedient, after consultation with the MPA, that one of the orders should be made. Section 100 of the 1990 Act similarly empowers the

Secretary of State to make revocation and modification orders, if it appears to him to be expedient, after consultation with the MPA, that one of the orders should be made. Where the Secretary of State made any order compensation is payable by the MPA in whose area the land to which the order relates is situated. The Secretary of State would expect to take such action only in exceptional circumstances.

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Annex A: Bibliography

Legislation relevant to Minerals Planning Guidance Note 4

Primary Legislation

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Mines and Quarries Act 1954
Land Compensation Act 1961
Town and Country Planning Act 1990
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