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The Right Honourable Lord Justice Green
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Dear Nicholas

INTERIM RESPONSE TO THE REPORT ON REGULATING COAL TIP SAFETY IN WALES

On behalf of the Welsh Government, I am grateful to you, Nicholas Paines QC and the Public Law Team for the work undertaken to produce your detailed report on coal tip safety in Wales. It is clear substantial robust analysis has been undertaken to establish a comprehensive evidence base to inform the report and to engage with a wide range of stakeholders.

This letter is the Welsh Government's Interim Response to the Report, issued in accordance with the Protocol between the Law Commission and the Welsh Ministers (July 2015).

The Law Commission report provided a clear direction and scope which, combined with our analysis, has informed our proposals for a new statutory framework for disused tip management. We recently reached a significant milestone with the close of our Coal Tip Safety (Wales) White Paper¹ consultation. A summary of the consultation responses will be published later this year and Bill proposals are in development. I am committed to introducing legislation in Year 2 of this Senedd term.

It is clear that we agree the law as it stands is not fit for purpose. The Mines and Quarries (Tips) Act 1969 was designed for a different era. It was aimed at managing the waste of operational mines, not dealing with the legacy of those mines and it certainly was not designed to deal with the challenges of climate change. Crucially, the Act does not contain any mandatory duties on owners to ensure the safety of disused tips on their land. It provides

¹ Coal Tip Safety (Wales) White Paper: A new regulatory framework for disused coal tips in Wales (2022):
<https://gov.wales/sites/default/files/consultations/2022-05/white-paper-on-coal-tip-safety-consultation.pdf>

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

only limited powers for intervention and includes no powers at all for oversight, monitoring and enforcement.

It is not my intention to respond individually to the 36 recommendations set out in your report, as our detailed analysis and consideration of them continue. This will be the subject of our formal response next year.

Instead, I will address the key themes of the Law Commission's report, which confirmed the Welsh Government's initial assessment that the existing regime is ineffective and inadequate with insufficient requirements for the management of disused coal tips. The report summarises the current regime is no longer appropriate today because:

- there are no requirements in legislation to provide consistent categorisation, minimum levels of expertise or consistency in approach to inspections;
- there are limited powers for a local authority to intervene, for example, only where it considers there is instability;
- local authorities have no power to oversee routine maintenance of tips and no powers to compel a tip owner to undertake even basic maintenance requirements to make a tip safe; and
- there is no oversight and monitoring of inspections and maintenance of disused coal tips.

The Coal Tip Safety White Paper set out the key elements of the new proposed statutory regime to be introduced in response to this assessment and other analysis. The key themes of the new regime as set out in the White Paper are addressed in turn below. It should be noted that, where appropriate, the policy proposals may need to be modified moving forward, in light of any consultation responses and the Bill development process.

Scope

The Law Commission report focused only on coal tips but acknowledges any new regime is likely to be required to apply to all spoil tips. This approach is reflected in the proposal set out in Chapter 2 of the White Paper to provide a regulatory framework through the Bill which can be applied equally to disused coal and non-coal tips. Active tips will continue to fall under the Mines Regulations 2014 and the Quarries Regulations 1999. Whilst information on disused coal tips has been collated, it is estimated it will take a number of years to have a coherent data set on other spoil tips. To address the urgent need for an effective regime and prevent delay, the current focus of a new regime is on disused coal tips by designing a framework which can eventually incorporate other disused spoil tips in the medium to longer term, when the information is available.

The White Paper proposes the framework will gradually be extended to bring in other spoil tips through a phased transitional approach. The required scope of the framework is a fundamental consideration when looking at the proposed remit of the supervisory authority, why a new body is required and the category of public body to be established.

Supervisory Authority

Chapter 2 of the White Paper acknowledges the Law Commission's recommendation to introduce a new supervisory authority responsible for managing coal tip safety in Wales.

It is clear that, in order to ensure a consistent approach for the new regime and compliance with these new functions, oversight is required. In addition, there is also a need to ensure

there is relevant expertise available to provide the necessary technical input into delivering many of the functions required. I have considered the rationale behind the Law Commission’s recommendation, and agree a supervisory authority is required for Wales. To not do so would mean significant risk of the issues and inconsistencies identified in the current regime continuing. This would mean limited mitigation against the risk of landslides, which not only pose a risk to life but also places significant financial burdens on communities, local and central government.

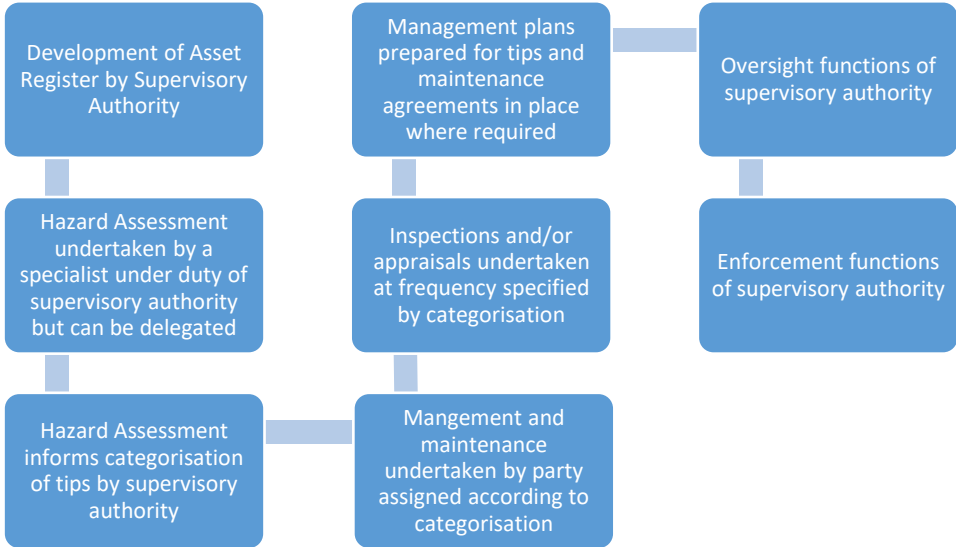
The Law Commission report recommended the creation of a new central public body, particularly in order to streamline processes and consistency. The White Paper acknowledges responses from respondents to the Law Commission consultation about the different forms a new supervisory authority could take and have considered in our analysis. We have considered various types of public body from an executive agency, a non-ministerial department to a Welsh Government sponsored body either advisory or executive.

To ensure the appropriate independence and focus on securing the safety of tips, the White Paper sought views on the proposal that the body should be arms-length from government and established as an Executive Welsh Government sponsored body.

Proposed Key Elements of the Management Framework

In developing our proposals for the management framework, the Welsh Government has considered the Law Commission’s recommendations and undertaken our own policy analysis. The proposed overarching structure for the management regime is set out in Chapter 2 of the White Paper and is summarised in Diagram 1 below.

Diagram 1: Overarching Structure for Coal Tip Safety Management Regime



Further detail on each element is set out below:

- *Development of Asset Register by Supervisory Authority*

Currently there is no definitive asset register that identifies coal spoil tips in a consistent manner. This means that there is no easy way to identify ownership or keep track of changes to data. Chapter 3 of the White Paper takes forward the Law Commission’s recommendation 7 for a central asset register to be compiled by the supervisory authority. The proposal set

out in the White Paper is to introduce a centralised national asset register comprised of uniform, coherent and reliable and up to date data. This is critical for the introduction of a consistent, comprehensive and effective management regime for disused coal tips. A central register will build upon the work undertaken by the Task Force is collating coal tip location, status and ownership data. In line with the Law Commission’s recommendation to ensure there is flexibility, it is proposed the Welsh Ministers should prescribe the minimum content of the register in subordinate legislation. To ensure the register provides up to date information, I consider there should be a requirement for parties responsible for carrying out inspections and appraisals to add recent reports to the register.

- *Hazard Assessment, Categorisation of Tips and Management Plans*

In the Law Commission report, it is recommended for a duty to arrange for the compilation of a risk assessment, risk classification and management plan for any tip included on the register. The report also stated that the development of categorisations was a matter for the Welsh Government. Working with our partners in the Coal Tip Safety Task Force, we have built upon the recommendation and provide in Chapter 4 of the White Paper our intention to introduce a new approach, which requires a hazard assessment (undertaken by a specialist), to examine the hazards (instability, pollution, flooding and combustion) of a tip and consider against the potential impact on receptors.

This provides a hazard level, which will underpin a new five level categorisation regime:

Categorisation	Status	
Category 1	High	Active Regime
Category 2	Medium	
Category 3	Low	
Category 4	Very Low	
Category 5	Exempt*	Inactive

The White Paper sets out that this approach, prescribed by Welsh Ministers in subordinate legislation will provide a consistent approach to undertaking a hazard assessment and categorising each tip. The hazard assessment and categorisation will also help to determine the type of management plan required for each tip, with categories 1 and 2 requiring a full-scale management plan setting out how the tip will be managed. To provide a proportionate response some lower rated tips may only require information on inspection schedules and any maintenance requirements.

- *Inspections and/or appraisals*

The Law Commission report reflects a distinction is required between the management of higher and lower rated tips. Our White Paper stresses a proportionate approach is required for the management of disused tips with lower rated tips unlikely to require the same level of monitoring as the higher rated tips. In Chapter 7 of the White Paper we provide our proposals for a two-tier approach to the on-going monitoring of disused tip linked to the category of the tip:

- **Inspections** - a ‘reduced-technical’ inspection where a standard pro forma is used to report the condition and performance of key feature types at the site; and
- **Appraisals** - a detailed, comprehensive technical appraisal, including site inspection. Provides a detailed catalogue of all features, their condition and general remarks on the site. Recommendations are made for maintenance works, where applicable.

The party responsible for an inspection or appraisal is to be determined by the category as illustrated below:

Category	Responsible Party	Frequency	
		Inspection	Appraisal
1	Supervisory Authority	6 months	1 year
2	Local Authorities	12 months	2 years
3	Owners	24 months	5 years
4	Owners	24 months	N/A *
5	Owners	Exempt	Exempt

The White Paper sets out that in order to ensure consistency, it is proposed the minimum content for reports are prescribed by Welsh Ministers in subordinate legislation.

- *Maintenance and remediation works undertaken by party assigned according to categorisation*

On-going maintenance is a key requirement to ensure the stability of tips. The Welsh Government’s proposal as set out in Chapter 7 of the White Paper is to follow a similar pattern of responsibility for inspections and appraisals as reflected in the following table:

Category of Tip	Responsible Party
1	Supervisory Authority
2	Local Authorities
3	Owners
4	Owners
5	Owners but Exempted

To support the maintenance of lower rated tips, the Law Commission recommended the supervisory authority can enter into maintenance agreements with owners. The proposals in the White Paper reflect the recommendations provided in the Law Commission report including the provision of a maintenance order, where there has been non-compliance with a maintenance agreement.

- *Oversight, Enforcement, Charging and Appeals*

The Law Commission report included recommendations on new rights of access, on appeals and criminal offences. In the report there was also a suggestion for the Welsh Government to consider the role of civil sanctions. The Welsh Government agree there is a need for effective rights of access and for enhanced powers or access to private land to enable inspections, maintenance works and spot checks to be undertaken.

Proposals in the White Paper also reflect the Law Commission’s recommendations that there should be rights of appeal for the following:

- For an entry onto the asset register, if the landowner can prove there is no tip on the land;
- the imposition of a maintenance order; and
- against the imposition of any charges for the work under a maintenance order, where there is disagreement about the cost.

We recognise the importance of effective and proportionate enforcement powers to ensure the regulatory regime is effective. Chapter 8 of the White Paper sought stakeholders' views on the appropriateness of civil sanctions and their role in the new regime. The White Paper also reflected the recommendation for a criminal offence for failing to comply with a maintenance order. The Welsh Government is further considering the potential options for enforcement powers, including the introduction of civil sanctions and provision of charging powers in light of consultation responses.

As we begin to prepare the Coal Tips Safety Bill for Wales, I am grateful to the Law Commission for its continued support and assistance in its delivery.

Yours sincerely



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cc. Counsel General and Minister for the Constitution