

Annex 1

WELSH GOVERNMENT RESPONSE TO THE LAW COMMISSION'S INDIVIDUAL RECOMMENDATIONS ON REGULATING COAL TIP SAFETY IN WALES

The summary of our proposals in the main letter is intended to provide the broader policy position. It also sets the context for recommendations where the overall intent is welcomed, but where there are aspects of the delivery we will seek to vary to reflect the Welsh Government's policy position.

We have considered the regime in relation to a far greater number of tips – both coal and non-coal – than was considered by the Law Commission. This has influenced our approach to the regime, for example in the decision to place direct duties on parties beyond the supervisory authority, or to require management plans only for higher category tips to ensure a proportionate regime.

With that in mind, I will now turn to detailed consideration of the report's individual recommendations.

- Scope of the legislation (R.1, R.2)

The report concluded that the Mines and Quarries (Tips) Act 1969 is outdated, having been introduced when the mining industry, and the majority of the spoil tips, were active. We agree the law covering disused tips, as it stands, is not fit for purpose.

Active tips currently fall under the Mines Regulations 2014 and the Quarries Regulations 1999. We agree that the legislative framework currently governing them is adequate (R.1), and that this should not be changed (R.2).

The report focused only on coal tips but acknowledged any new regime is likely to be required to apply to all types of spoil tips. Our White Paper proposed an overarching framework suitable for both disused coal and non-coal tips. The consultation responses to this proposal had a high level of support, with many respondents agreeing that phasing non-coal tips in over time is a pragmatic approach. One which would prioritise coal tip safety and ensure other types of tips which could pose similar risks are not overlooked.

In contrast to coal tips, where much work has been undertaken in recent years to map them, there is little information on the far-more-numerous disused non-coal tips. It is likely to be a long and complex process to build a complete picture. It is estimated there are 20,000+ disused non-coal tips in Wales. To balance this with the need for swift action in relation to coal tips, we are proposing a phased approach to implementation with the initial focus on coal tips.

The 1969 Act would continue to apply to any disused tips until they are added to the proposed asset register. This will allow for a manageable process for phasing non-coal tips into the regime over time.

- Supervisory Authority (R.3 – R.6)

The report recommended the establishment of a new supervisory authority – a central public body – with responsibility for the safety of all disused coal tips, and subject to a general duty to ensure the safety of coal tips.

Oversight is required to ensure a consistent approach for the new regime and compliance with it. In addition, there is a need to ensure relevant expertise is available to provide the necessary technical input into delivering many of the functions required. We therefore agree with the rationale behind the Law Commission’s recommendation that a supervisory authority is required (R.3).

However, in light of the significantly greater number of non-coal tips, it is not practicable that the supervisory authority is *directly* responsible for all disused spoil tips in Wales. We are therefore proposing allocation of a responsible party to a tip based on its category.

Category of Tip	Responsible Party ¹
Category 1	Supervisory Authority
Category 2	Local Authorities for tips in their estate and privately owned tips
Category 3	Owners
Category 4	Owners
Category 5	Owners but exempted

Table 2: responsible party by tip category.

We have considered various options for such a body, including the need for appropriate independence from both Welsh Ministers and other bodies with their own tip estates (both coal and non-coal). We therefore support the Commission’s recommendation that a new body be established (R.4) and will seek to establish it as a new executive Welsh Government sponsored body (satisfying R.5).

Though not directly responsible for all disused tips, the supervisory authority will be under a general duty to carry out its functions so as to ensure the safety of disused spoil tips in Wales (R.6).

This will sit within a framework where duties also fall to other parties, and the supervisory authority will ensure consistency of approach in relation to inspections, appraisals, categorisation, and development of management plans.

We consider this captures the rationale behind the Law Commission’s recommendation.

- Tip Register (R.7 – R.14)

Currently there is no definitive asset register that identifies coal spoil tips in a consistent manner. This means there is no easy way to identify ownership or keep track of changes to data. An asset register will ensure the new regime is founded upon a single set of uniform, coherent and reliable data. We intend the supervisory authority to be under a duty to keep and maintain such a register (satisfying R.7).

The report’s recommendation for flexibility in relation to the asset register will be of even more importance as non-coal tips are phased into the regime. We are proposing that the minimum content of the register be prescribed by the Welsh Ministers in subordinate legislation (R.8).

Our proposals are for the extension of the regime to non-coal tips, and for this to be achieved by phasing them onto the register. As such, a duty on the supervisory authority to include on the register any tip of which it is aware (R.9) would risk undermining that approach and create practical issues for the supervisory authority.

¹ The Coal Authority and Natural Resources Wales will be the responsible party for all tips they own.

The report also recommends a right to appeal inclusion on the register on the grounds that there is no tip situated on the land, but that the exercise of such a right should not delay urgent work. The Welsh Government agrees with this approach (satisfying [R.10](#)).

We do not, however, intend to propose a summary offence of failure to notify the supervisory authority of the existence of a tip not currently included on the register ([R.11](#)). Though we indicated our agreement with the premise of this recommendation in the White Paper, we consider the increase in scope of the regime to encompass non-coal tips, and the phased approach to adding those tips, may increase both the likelihood of such an occurrence and inadvertently place confusing or onerous burdens on tip owners.

Whilst we agree with the intention behind the recommendations that there should be public access to the tip register ([R.13](#)) and that its contents should be governed by whether it is in the public interest to be publicly available ([R.12](#)), we will seek to achieve the same ends though a slightly different approach.

As we are proposing that the regime place duties and functions on a range of responsible parties, the asset register will be a core tool in enabling those parties to engage with the regime. This will require differentiated access to the register by responsible parties, both to access and update the data held. As such, we do not intend for the asset register to be a public resource in its entirety.

We instead intend to require the supervisory authority to make specific information publicly available, in particular the location of tips. This information will, as per the recommendation in the report, be governed by whether it is in the public interest to be publicly available.

The report also recommended engagement on establishing a search of the register as part of a standard conveyancing search in relation to property in Wales ([R.14](#)). We see merit in this proposal, though are currently minded to make such a search voluntary. This is an area we will continue to explore with our stakeholders.

- *Tip Inspections, Risk Assessments, Tip Management Plans and Risk Classifications* ([R.15](#) – [R.20](#))

The approach we are proposing builds on the recommendations in the report and the responses to both the Law Commission's consultation and the White Paper. We have sought to capture the intention of the recommendations in the report within a regime which also encompasses non-coal tips.

As outlined in my letter, and in Chapter 4 of the White Paper, our proposals require a hazard assessment upon entry of a tip to the asset register, rather than an inspection ([R.15](#)). The intended purpose of the initial inspection was to undertake a risk assessment and to design a tip management plan. Whilst much of the intention is preserved – that is to provide important information on the status of a tip - we have taken a modified approach to align with the rest of the proposed regime.

The report recommends a duty be placed on owners and occupiers to share documents in their possession of relevance to the tip or land on which it is situated at the time of an inspection ([R.16](#)). To work within our policy approach, we have evolved this proposal to place a duty on holders of relevant information and evidence relating to an identified tip to share it with the supervisory authority where requested for the purpose of carrying out a hazard assessment or developing a management plan.

The recommended duties on the supervisory authority to arrange risk assessments, to arrange and approve management plans, and to allocate a 'risk categorisation' based on the inspection report and risk assessment (R.17) have been modified to align with our policy proposals, as outlined in my letter.

We have similarly proposed a power for Welsh Ministers to prescribe the contents of risk assessments and management plans. It differs from the Law Commission's specific recommendation (R.18) as it is aligned with our proposed approach to hazard assessment, and the greater number of proposed tips. It will allow Welsh Ministers to prescribe the minimum content of hazard assessments, and of management plans for the higher rated tips, with the supervisory authority able to issue further guidance.

The report also made several suggestions on considerations to which risk classification should have regard (R.19 and R.20). Our proposals seek to offer a broader approach to hazard assessment and subsequent categorisation, to enable robust assessment for both coal and non-coal tips. That approach would, where appropriate, incorporate the considerations in the Law Commission's report.

- Securing the Maintenance of Lower Risk Tips (R.21 – R.24)

We recognise the value of maintenance agreements as proposed in the Law Commission's report and fully accept the recommendation (R.21).

Rather than providing for authority-arranged inspections to ensure compliance with maintenance agreements (R.22), our proposal is to require responsible parties to arrange for inspections and appraisals at minimum intervals (as outlined in my main letter), and to update the register with the subsequent reports. In addition to this, the proposals provide a power for the supervisory authority to undertake spot checks to ensure compliance with the regime, including that inspections, appraisals, and works are being carried out as agreed.

The Welsh Government welcome and accept the proposals in the report relating to tip orders, including in relation to both appeals and urgent works (satisfying R.23).

We broadly accept the recommendation to provide a power to enter into agreements with tip owners (R.24). Our specific proposal will also mean that local authorities can enter into such agreements for category 2 tips and that maintenance agreements, other than those agreed by local authorities, will be supervised by the supervisory authority.

- Prioritising Work on Higher Risk Tips (R.25 – R.28)

We have considered the report's recommendations and believe our proposals reflect the Law Commission's intent. Whilst not based on the designation of tips into higher and lower rated tips, we believe our policy approach reflects a number of the considerations presented by the Law Commission and respondents to its consultation. In particular, the interconnection between a risk assessment, a risk categorisation and designations.

Our proposed approach is based on the five categories of tip outlined in my letter. Categorisation is to be informed by a hazard assessment and linked to a proportionate maintenance and monitoring regime. As such, though we have not pursued a policy involving the designation of higher risk tips, categorisation will achieve a similar outcome (R.25).

Our approach has built on the report, which left the technical aspects of categorisation to the Welsh Government. It has evolved in response to the experiences of the interim categorisation undertaken by the Coal Authority, as well as the responses to the White Paper and the expansion of the scope of the regime to non-coal tips.

Our proposals provide Welsh Ministers with a power to amend the categories and their descriptors and the approach to hazard assessments which inform categorisation (which links to [R.25](#)). These powers will be used in consultation with experts ([R.26](#)).

For the highest categories of tip, the supervisory authority (category 1) and local authorities (category 2 tips which are in their estate or privately owned) will be the responsible parties, and therefore under a duty to manage and maintain the tips. The exception to this is tips owned by the Coal Authority or Natural Resources Wales, who will be the responsible party for their own tips, and on whom the duty will fall.

For lower-category tips (category 3 and 4), the owner will usually be the responsible party and subject to the duty. For category 5 tips, there is a duty to inform the supervisory authority if there is a significant change to the tip. In all instances, the responsible party may contract a suitable party to undertake works on their behalf.

Our proposals therefore extend the responsible parties to whom the recommendation applies, whilst keeping the intention of the second part to enable such work to be contracted out ([R.27](#)).

Our approach to specifying works to be undertaken is outlined in my letter and in chapter 7 of the White Paper, and makes use of maintenance agreements and, where required, tip maintenance orders. However, as we do not propose to make use of the designation of tips, this necessarily differs from the specific recommendation ([R.28](#)).

- [Definitions \(R.29\)](#)

We accept the Law Commission's recommended definition of an owner, subject to a need to consider the exact drafting in the context of the wider Bill (satisfying [R.29](#)).

- [Enforcement Powers, Offences and Appeals \(R.30, R.31\)](#)

As outlined in my interim letter, 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. The Welsh Government fully accepts the recommendations relating to power of entry ([R.30](#)).

We also recognised the need for effective and proportionate enforcement powers to ensure the regulatory regime is effective, and that this should include both civil sanctions for failing to comply with a tip maintenance order, and a criminal offence where urgent works are not completed without a reasonable excuse ([R.31](#)).

The proposed regime will, following Law Commission recommendations, also provide for appeals. These will not interfere with the undertaking of urgently required works.

- [Financial Terms of Agreements and Others \(R.32, R.33\)](#)

We accept the recommendations relating to the provision of payments in maintenance agreements and tip maintenance orders ([R.32](#)), and that the principles governing these will be set out by the Welsh Ministers by statutory instrument ([R.33](#)).

- [Specialist Skills \(R.34\)](#)

My officials are exploring the establishment of a Task and Finish Group with industry and academics in relation to capacity and capability issues in this area and will publish an update

in due course. This engagement is at an early stage but will include consideration of the need for a register of professionals competent to undertake tip safety work (R.34). This work will not form part of the Bill under development.

- Tip Safety and Environmental Legislation (R.35, R.36)

The intersection of the proposed regime with existing environmental and planning legislation is a complex one. This is especially the case where emergency work is required in relation to a spoil tip (R.35, R.36). My officials are currently scoping these intersections across a number of policy areas. This work is supported by a report on environmental law considerations and implications undertaken for the Welsh Government by academics at the University of Birmingham.