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Regulating Coal Tip Safety in Wales: Report





**Law
Commission**
Reforming the law

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Regulating Coal Tip Safety in Wales: Report

Presented to the Senedd

23 March 2022



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The text of this report is available on the Law Commission's website at <http://www.lawcom.gov.uk/project/regulating-coal-tip-safety-in-wales/>.

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Glossary

Abandoned tip: Under the Mines Regulations 2014, an abandoned tip is a tip associated with a mine that has been abandoned. It becomes an abandoned tip from the date of a notice of abandonment of the mine, after which the 2014 Regulations cease to apply. See also **Disused tip**.

Active tip: Under the Mines and Quarries (Tips) Act 1969, an active tip is a tip associated with an active mine or quarry.

Adit: A horizontal or sloping passage leading into a mine.

Attenuation pond: A pond which acts as a silt trap allowing any suspended sediment within the surface water to settle out (a process called attenuation). The accumulated sediment has to be routinely removed to ensure that the pond remains effective.

British Coal Corporation: Successor of the National Coal Board, set up under Coal Industry Act 1987, and commonly known as British Coal. Succeeded by the Coal Authority.

Cavitation collapse: A localised collapse of underground voids resulting from events such as piping failures, collapsed culverts or underground combustion. General tip stability is not usually affected, except sometimes in the case of lagoon embankments, although sudden collapse may be a source of danger to life if anyone is at the surface.

Coal Authority: The Coal Authority is an executive non-departmental public body, sponsored by the Department for Business, Energy and Industrial Strategy (BEIS), a UK Government department. It was established under the Coal Industry Act 1994 and manages the effects of past coal mining, including subsidence damage and mine water pollution.

Coal Tip Safety Task Force: Formed by the Welsh Government immediately following the Tylorstown slide on 16 February 2020. The Task Force's purpose is to deliver an urgent programme of work to ensure that coal tips across Wales are being managed safely and effectively. The Task Force is led by the Department for Environment and Rural Affairs, a Welsh Government department. Task Force partners working together with the Welsh Government are the Coal Authority, its sponsoring body the Department for Business, Energy and Industrial Strategy, and the Welsh Office. The technical group working with the Task Force includes Natural Resources Wales, local authorities and the Welsh Local Government Association.

Coal waste: The unwanted material produced after saleable coal is separated out from the material extracted from a coal mine in a process of washing and preparation. The material is predominantly shale but also includes other discarded material. The waste is known as refuse in the wider mining industry, and more commonly 'spoil' in coal mining.

Colliery: A coal mine and the buildings and equipment associated with it.

Disused tip: A tip which is no longer being tipped upon and is not associated with an operational mine.

Factor of safety: The factor of safety of a tip is equal to the ratio of resisting forces to disturbing forces: the higher the factor, the safer the tip. If the factor is below one, in other words less than unity, the disturbing forces are stronger than the resisting forces.

Large raised reservoir: In Wales, a large raised reservoir is a reservoir that holds or has the potential to hold 10,000 cubic metres of water above ground level.

Maintenance: Routine tip maintenance includes the clearing out, re-cutting and improvement of drainage ditches and culverts, and checking and clearing screens designed to capture detritus after heavy rainfall.

MS: Member of the Senedd. The equivalent in Welsh is AS.

Opencast mining: A mining technique that involves taking minerals, especially coal, from the surface of the ground rather than from passages dug under it.

Overburden: Material composed mainly of rock and soil which is removed in order to access a coal seam or other mineral deposit to make it ready for mining.

Receptors: A feature that could be impacted by a coal tip slide (such as a house, school or road).

Reclamation: The process by which derelict, despoiled or contaminated land is brought back into a specified beneficial use.

Remediation: The process by which health and safety and environmental risks are reduced to an acceptable level. The aim of coal tip remediation is to ensure the safety of coal tips.

Restoration bond: A bond provided by a mining company prior to beginning a mining operation for the purpose of remediation upon the cessation of the mining activity.

Senedd: The democratically elected body which makes legislation for Wales (within certain subject areas). It is known both as the Welsh Parliament and the Senedd Cymru. In this report we refer to it by its commonly used Welsh name, the Senedd.

Slurry: A mixture of solids denser than water suspended in liquid.

Spoil: See **Coal waste**.

SSSI: Site of Special Scientific Interest, a conservation designation.

Surface mining: See **Opencast mining**.

Tailings lagoon: A lagoon into which tailings are placed.

Tailings: A mixture of fine mineral particles and water left after the coal washing process.

Task Force: See **Coal Tip Safety Task Force**.

Tip: A pile built of accumulated waste material removed during mining. In the case of a coal tip, this is the accumulated material which remains after saleable coal has been separated from the unwanted material with which it has been extracted.

Websites

All websites referenced in this document were last visited on 22 March 2022.

Chapter 1: Introduction

- 1.1 The first legislation to provide for the safety and stability of mineral waste in the UK, the Mines and Quarries (Tips) Act 1969, was enacted in response to the Aberfan disaster in South Wales in October 1966, when a coal tip slide engulfed a row of houses and a school, killing 28 adults and 116 children. The Act was passed in the days of an active coal mining industry and was primarily designed to regulate the tipping of waste from active coal mines, as well as mines and quarries associated with the extraction of other minerals. Though Part 2 of the Act made provision for tips left behind by abandoned mine and quarry workings (referred to in the Act and in this report as “disused tips”), its designers regarded such tips as being typically those dating from earlier, smaller scale mining operations and a lesser problem.
- 1.2 Part 2 of the 1969 Act is still in force, but no longer provides an effective management framework for disused coal tips in the twenty-first century. In Wales today almost all coal tips are disused.
- 1.3 The Aberfan disaster was precipitated by heavy rainfall. Fifty-three years later, in February 2020, unprecedented levels of rainfall in South Wales precipitated another coal tip slide only a few miles from Aberfan, when an estimated 60,000 tonnes of coal tip waste slipped down the Llanwonno hillside at Tylorstown in the Rhondda.¹ Fortunately, owing to the tip being on the opposite side of the Rhondda Fach river from the village, no homes were destroyed or human lives lost. The slide nevertheless blocked the river, buried a water main and broke a sewer. The immediate clearance work cost £2.5 million and the total cost of dealing permanently with the displaced colliery waste is now estimated at some £13 million.
- 1.4 Wales has nearly 2,500 coal tips.² The vast majority of them are not a hazard. Many can be kept safe by maintenance of the tip’s drainage system, as proper drainage prevents the waste from becoming saturated and unstable.³ A few are likely to require more major work. Immediately following the Tylorstown slide, the Welsh Government instituted a coal tip safety work programme to be delivered by the Coal Tip Safety Task Force. This is designed to take stock of Wales’s legacy of coal mining tips and ensure that tips across Wales are managed safely and effectively. Urgent safety work has included data gathering on all tips, including location, risk category and ownership type, and walkover inspections of all higher risk tips. The inspections identified the

¹ The events which followed Storms Ciara and Dennis are described in more detail in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 1.1 to 1.9.

² Figures published by the Welsh Government on 26 October 2021 identify 2,456 tips: see <https://gov.wales/coal-tip-safety#section-72291>.

³ The causes of tip instability are discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 2.16 to 2.22. The tip’s drainage system may be natural or engineered.

maintenance and remediation work needed, with recommended timescales for completion.⁴

- 1.5 As part of its response to the Tylorstown emergency, the Welsh Government asked the Law Commission to undertake an independent review of the coal tips safety legislation and make recommendations for its reform. Our project formally commenced on 2 November 2020.

TERMS OF REFERENCE

- 1.6 Our agreed terms of reference are:

- (1) to review the law governing coal tips in Wales and consider options for a modern legislative framework, in line with Wales's existing legislation, including the Well-being of Future Generations (Wales) Act 2015 and Environment (Wales) Act 2016, for regulating their safety; and
- (2) to recommend a coherent, standardised and future-proofed system for identifying, recording, inspecting and maintaining coal tips throughout their lifecycle, identifying an overarching set of duties and adopting a uniform approach to risk assessment.

- 1.7 It was agreed in particular that the project would:

- (1) consider the current ownership and management of coal tips in Wales, drawing on the work of the Coal Tip Safety Task Force as needed;
- (2) evaluate current legislation relating to the safety of coal tips, from the perspective of human health and safety and of environmental impact, identifying gaps, inconsistencies and approaches which are unhelpful or have become outdated;
- (3) identify options for alternative regulatory models to be adopted in Wales;
- (4) identify the features needed to ensure that any proposed system is able to provide effective enforcement, and in particular a rapid and coordinated response when emergency works become necessary;
- (5) consider how other nations of the UK, and other countries with a significant history of coal mining, particularly in the EU, approach coal tip safety, where these provide useful comparison and to the extent that such information is readily available; and
- (6) consider the impact of EU law and the effect on the existing regulatory framework of leaving the EU.

- 1.8 It was agreed that the project would be conducted in an expedited timescale of 13 to 15 months. As the project would be running alongside the coal tip safety work

⁴ This work is described in more detail in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, ch 8.

conducted by the Welsh Government and the Coal Tip Safety Task Force to mitigate the immediate risk posed by coal tips in Wales, three express limitations on the project were also recognised.

- (1) The project would focus on systematic, long-term legislation to tackle the safety risk posed by coal tips.
- (2) The project would focus on the law governing coal tips only.
- (3) The project would not review wider environmental law concerns except insofar as they were directly relevant to regulating the safety risk posed by coal tips.

- 1.9 Our terms of reference do not – and could not – extend to the issue of how the cost of the work required on coal tips should be funded. We are aware that in some cases, of which the cost of dealing with the Tylorstown slide is an example, the cost can be considerable. We are also aware of discussions between the Welsh and United Kingdom Governments on the issue of how any required public funding should be provided. A number of consultation responses touched on the question of the extent to which the costs associated with coal tips should be borne by public funds or – as is the general position under the current legislation – by the owners of tips, who are themselves a mixture of public bodies and private owners.
- 1.10 It would be wrong for us to make any recommendation or express any view on these issues. Instead we have designed a scheme that incorporates the flexibility to allocate costs in accordance with a policy to be devised by the Welsh Government.

PROVISIONAL PROPOSALS AND CONSULTATION

- 1.11 Our consultation paper, published on 9 June 2021, reviewed coal tip safety law and the problems encountered in the current management of disused tips. Our preliminary research revealed a number of shortcomings in the current legal framework. The 1969 Act left responsibility for disused tips to local authorities but gave them only limited powers of intervention, confined to situations where there was perceived to be an existing risk to the public by reason of a tip having become unstable. Its mechanisms for requiring owners to carry out remedial work were cumbersome and time-consuming. The alternative that it provided, for the local authority to do the work and charge the owner, was also unwieldy. The fragmentation of powers across local authorities led to inconsistent safety standards and risk classifications.
- 1.12 We also found gaps in the provision made by the 1969 Act. It did not create a general duty to ensure the safety of coal tips, nor provide a power to require or undertake preventive maintenance to prevent a tip becoming a danger. It did not cover hazards other than instability. There was no central point of responsibility and thus no overarching mechanism to prioritise tips on the basis of risk.⁵
- 1.13 There were other difficulties which did not stem from the provisions of the 1969 Act, but which impacted on its operation. Loss of specialism resulting from the virtual cessation of coal mining in Wales, together with limitations on resources, were constraining local authorities' capacity to exercise their powers. The sustained and

⁵ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, ch 7.

impressive tip remediation work carried out in the decades following the Aberfan disaster in 1966, in particular the Land Reclamation Programme, had come to an end by 2012.⁶

- 1.14 We looked at the reasons why these deficiencies had become more significant in current circumstances. As explained above, almost all the coal mines that were operational at the time that the 1969 Act was passed have closed, and their tips have moved into the residual category governed by Part 2 of the Act. About 65% of these are in private ownership, owned by landowners with, generally, no connection with the mining industry, no vested or economic interest in the maintenance of tips, and no skill or knowledge concerning their care. In addition, rainfall has increased significantly due to climate change. This increases the risk of instability, particularly if drainage issues affecting a tip are not addressed.
- 1.15 We provisionally concluded that the regime created by the 1969 Act was no longer adequate and needed to be replaced by a new regulatory regime. A new regime could also address other problems not arising from the Act itself, by providing efficiencies of scale and addressing the shortfall in specialist skills.
- 1.16 We identified two principles that we thought should govern its construction: consistency of approach and the prevention of harm through a proactive rather than reactive approach. In our view, these principles align well with the sustainable development principle set out in the Environment (Wales) Act 2016 and the requirement in the Well-being of Future Generations (Wales) Act 2015 to act in accordance with this principle. The sustainable development principle requires a public body to take account of the long term, to take action which helps to prevent problems occurring, and to take an integrated approach.
- 1.17 We also proposed that the new framework should be capable of expansion to cover risks going beyond instability. It would need to be sufficiently robust to deal with the implications of climate change, and sufficiently flexible to work in tandem with other legislation providing environmental protection. As the 1969 Act covers all tips, not simply coal tips, we anticipated that its replacement might come to be extended to non-coal tips and should have a structure which would permit this.
- 1.18 We presented a number of provisional proposals for the new regulatory regime. Our consultation questions asked for views on these proposals. We also asked a number of open questions where we were not sufficiently sure of our preferred approach to make a provisional proposal.
- 1.19 Following publication of the consultation paper, we held a series of consultation events. These are listed in appendix 1 to this report. Consultation closed on 10 September 2021. The stakeholders who responded to our consultation are listed at appendix 2, together with an indication of the sector they represent and a chart illustrating the proportion of responses received from each sector. All responses to the consultation, save those for which confidentiality was requested, and our consultation analysis are available on the Law Commission website. The consultation analysis presents a table of the responses to each consultation question. It also explains our

⁶ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.25 to 3.27 and 7.3 to 7.8.

methodology in conducting the analysis. In some cases, we re-categorised the “yes”, “no” or “other” responses to ensure that views which were similar in content were grouped together. We have marked the analysis tables to show where this has been done.

OUTLINE OF THIS REPORT AND OUR RECOMMENDATIONS

- 1.20 Our first task is to decide the scope of our recommendations: our terms of reference extend to all coal tips in Wales, raising the question of whether law reform should extend also to the very small number of tips that are associated with active mining operations. We discuss this in the final part of this chapter, where we conclude that the existing regime for active tips is satisfactory and should not be disturbed.
- 1.21 For disused tips we recommend a new safety regime that builds upon the work done in the last two years by the Coal Tip Safety Task Force. We recommend first that the Wales-wide remit of the Task Force should pass to a newly created coal tip supervisory authority, whose precise legal form we leave it to the Welsh Government to determine; we refer to it throughout this report as “the supervisory authority”.
- 1.22 The supervisory authority’s first task should be to compile a statutory register of coal tips, which in practice will be based on the inventory of tips compiled by the Task Force. Its second task will be to arrange for an inspection of each tip, unless it considers that a sufficiently recent and thorough inspection has already been done. On the basis of that inspection, it must arrange for the compilation of a risk assessment and tip management plan, and assign a risk classification to each tip. The risk classification should be based on criteria set by the Welsh Government with input by technical experts, and should include a system for designation of those tips that require priority remediation work; this work should generally be carried out by the supervisory authority itself. Given that the majority of tips are low risk, most of the inspections will not need to be intensive.
- 1.23 As regards authorising or requiring the carrying out of work on tips, it has been necessary to devise mechanisms that are flexible enough to cater for the full range of tips. This encompasses the great majority that only require monitoring, or basic maintenance that is within the capacity of the landowner, as well as the small minority that require more sophisticated work, possibly as a matter of urgency. Consultation has confirmed our provisional view that these mechanisms should take the form of a power to make agreements with owners and/or occupiers of land containing a tip, backed by a power to make an order if an agreement is not reached or not complied with, or in a situation of emergency.
- 1.24 Such agreements or orders may either require the carrying out of work by an owner or occupier of the land or authorise its carrying out by an authority. They will also contain financial provisions regarding payments to or by the authority and to or by any person who is a party to an agreement or named in an order. This is designed to obviate the need for the complex systems contained in the 1969 Act for compensation and contributions to tip management costs as between people with an interest in the tip. It is also designed to accommodate any future decisions by the Welsh Government on the financing of tip safety work. We recommend a right of appeal against the terms of a tip order, including its financial terms.

- 1.25 Another issue that we regard as organisational rather than legal, and ultimately for determination by the Welsh Government, is how the tasks associated with coal tip safety might be distributed between the new supervisory authority and the local authorities that have exclusive responsibility at present. We consider it important, in the interests of a fully informed and consistent approach, that some of the tasks be performed by the supervisory authority itself. Reviewing initial inspections of tips and determining their risk classification fall into this category, as do entering formally into tip agreements and making tip orders and, for the most part, carrying out work on designated priority tips.
- 1.26 The associated field work – such as inspecting tips, monitoring compliance with agreements and orders, and conceivably negotiating and/or drafting agreements and orders – will in principle have the same cost whoever carries it out. But we can see some potential for efficiencies in delegating some of these tasks to local authority personnel located in proximity to the tips. We are at the same time conscious of concerns expressed to us by local authorities that any such delegation of tasks will need to be accompanied by adequate funding.
- 1.27 The paragraphs that follow expand on this brief summary with a survey of the chapters of this report which examine the responses to our consultation questions and set out our recommendations.
- 1.28 In chapter 2, we evaluate responses to our proposal for a single supervisory authority which is able to monitor all disused tips and ensure compliance with regulatory requirements to a consistent standard across Wales. We recommend that a supervisory authority should be established and that it should be subject to a general duty to perform its functions so as to ensure the safety of disused coal tips. We recommend that the supervisory authority should be a new, central public body.
- 1.29 Chapter 3 looks at our proposal for a central tip register providing information about each tip. We recommend that such a register should be compiled and maintained by the supervisory authority, with its contents prescribed by statutory instrument. We also recommend a duty on the part of the supervisory authority to include on the register any tip of which it is aware, with a right of appeal against registration. In order to ensure that all tips are captured on the register, we recommend that landowners should be under a duty to notify the supervisory authority of any tip situated on their land which is not already on the register. We recommend that there should be public access to the tip register.
- 1.30 Chapters 4, 5 and 6 look in more detail at the functions of the new supervisory authority. Chapter 4 considers our proposal for a duty to inspect every disused tip for the purpose of a risk assessment and the preparation of a tip management plan. We recommend that, upon the entry of a tip onto the register, the supervisory authority should be under a duty to arrange an inspection of the tip unless it considers that a sufficiently recent and thorough inspection has been conducted.
- 1.31 We also recommend that the supervisory authority should be under a duty to arrange for the compilation of a risk assessment and tip management plan for any tip included on the register and to allocate a risk classification to the tip based on the information submitted to it. We conclude that risk classification should have regard to the risk of tip instability and the consequences of such failure, and to risks of pollution, combustion

and flooding. We recommend that the Welsh Ministers should have power to prescribe the matters to be included in a risk assessment and tip management plan by statutory instrument.

- 1.32 We explain that, once the tip inspection, risk assessment and tip management plan have been concluded and a risk classification assigned, the supervisory authority will need to make decisions as to how the work identified in the tip management plan is to be carried out. We envisage that the supervisory authority will have a toolkit of agreements and orders with which to organise the safety work specified in the tip management plan. We consider it desirable that tip safety work should in principle be a matter of agreement; the existence of the order-making power should act as a spur to sensible negotiation.
- 1.33 Chapter 5 considers how the maintenance of lower risk tips would be secured. It looks at our proposal for a system of tip maintenance agreements with tip owners in order to ensure that proactive maintenance work and less complex remedial tasks are carried out on lower risk tips. We recommend that the supervisory authority should be empowered to enter into a tip agreement with the owner and/or occupier of land registered in the tip register, providing for the carrying out of the operations specified in the tip management plan.
- 1.34 In order to monitor compliance with such an agreement, we recommend that there should be a duty of periodical inspection of tip sites, with a power to delegate the inspection, including to suitably qualified third parties. Where it is not possible or appropriate to proceed by way of agreement with the owner or occupier, we recommend that a tip order may be made; we set out the circumstances in which we recommend that the order-making power may be exercised. We recommend that responsibility for making tip agreements and orders for lower risk tips should lie with the supervisory authority, and a duty to supervise agreements and orders, including to carry out inspections, should fall to local authorities.
- 1.35 In chapter 6, we look at the need for a process, forming part of the risk assessment and classification, to prioritise work on tips in a systematic way. This builds on our proposal for the designation of tips requiring more immediate and complex work in order to secure increased involvement of the supervisory authority. We recommend that coal tip safety legislation should provide for the designation of a tip by the supervisory authority, and that the criteria for designation should be determined in consultation with experts. We recommend that these criteria be prescribed by the Welsh Ministers by statutory instrument. Where a tip is designated, we recommend that the supervisory authority should normally be under a duty to carry out the operations specified in the tip management plan itself, though it may do so by engaging contractors. While this should be the presumption where a tip is designated, we also recommend that the supervisory authority should have power, where appropriate, to reach agreement with a suitably qualified tip owner or occupier for them to perform or commission the work.
- 1.36 Chapter 7 considers the definition of a tip and of a tip owner. We examine the elements of a satisfactory definition of a disused coal tip, although we do not make a formal recommendation as to how this should be drafted. We conclude that it is not helpful to have a single, exclusive definition of “the tip owner”. Various people having

a connection to land containing a tip will need to have rights, duties or obligations under our recommended scheme. Who they are will depend on the pattern of interests in the land and the purpose of the particular right or duty in question. To the extent that liability under our recommended scheme rests with the owner, in economic terms, of land containing a coal tip, we recommend that that owner should be regarded as the owner of the freehold estate or the owner of a leasehold estate of 21 or more years. The exception to this should be where the freehold or leasehold estate is subject to a lease granted to someone else for 21 or more years.

- 1.37 In chapter 8 we look at the enforcement powers needed to ensure that the new regime works effectively. We also look at options for avenues of appeal where the new regime creates a right of appeal. We recommend a power of entry onto land, in terms that secure an appropriate balance between the public interest and the rights of the owner or occupier. In relation to the enforcement of tip orders, we recommend that failure to comply with a tip order should be a summary offence, and suggest that the Welsh Government could also give consideration to the use of civil sanctions.
- 1.38 Chapter 9 considers the need for a power to charge for coal tip safety work, and whether the existing framework of applications to a court for compensation and contribution orders should be retained. Our views on this are influenced first by our conclusion that tip safety work should proceed by way of agreements between the supervisory authority and owners and occupiers, backed up with a power to make an order; secondly, current procedures are cumbersome and rarely if ever used.
- 1.39 We suggest that, instead of the existing system of applications, the terms of agreements and orders should extend to making financial provision as between public funds and any party with an interest in a tip site or its contents. There should be a power to charge for works or to pay for works and to allocate any charges or payments appropriately. We recommend that principles governing the allocation of financial responsibility for tip safety work between persons or entities in the public and private sectors should be laid down by the Welsh Ministers by statutory instrument.
- 1.40 Chapter 10 considers our provisional proposal for a specialist panel of engineers to inspect tips and supervise operations on them. We conclude that a less formal system than a panel would be appropriate, encompassing a range of professional skills in addition to engineering. We recommend that the Welsh Government enters into discussions with academic institutions and professional bodies in the field of tip safety work with a view to securing compilation of a register of professionals competent to undertake tip safety work.
- 1.41 In chapter 11 we look at ways to resolve clashes between tip safety responsibilities and environmental legislation. We recommend that the Welsh Ministers should have a power to give directions to the supervisory authority and other relevant parties regarding actions to be taken in response to a coal tip emergency. This could possibly be accompanied by provision to ensure that there is a lawful basis for actions which might otherwise breach planning or environmental regulations. We also recommend an amendment to the Environmental Permitting Regulations 2016 to define an emergency in the context of tip material. We look at broader strategies to improve responses to tip emergencies as well as longer-term solutions for tip material

displaced by remedial works. We do not make recommendations on these, but convey respondents' suggestions in order to assist with policy development.

- 1.42 Chapter 12 considers a wide range of suggestions for how our proposed tip safety regime could be combined with longer-term tip reclamation work in order to bring selected tips into beneficial use. Once again, we do not make recommendations, as the topic falls outside our terms of reference, but invite the Welsh Government to consider respondents' views as to the most appropriate models for reclamation initiatives, the heritage and biodiversity value of tips, and ideas for beneficial uses for reclaimed tips. Finally we take a look at the potential to extend the new regulatory framework to non-coal tips.
- 1.43 A diagram illustrating the way in which we envisage that the new regulatory framework will work is provided in appendix 3 to this report.

GLOSSARY

- 1.44 There is a glossary of technical terms at the beginning of this report.

IMPACT ASSESSMENT

- 1.45 An impact assessment and Welsh Language assessment accompanies this report. The impact assessment considers the potential costs and benefits of a new regulatory regime for disused coal tips. We are grateful to the Welsh Government for their assistance with the preparation of the assessment.

ACKNOWLEDGEMENTS

- 1.46 Our thanks go to all those who took part in the consultation process, both for participating in consultation events or meeting with us to discuss the consultation paper, and for submitting formal written responses. We are grateful for the care with which they have considered the issues covered in this report. We also thank officials from the Welsh Government who have hosted workshops to help us to understand the current tip safety system and to test our ideas for a new regulatory framework.

PROJECT TEAM

- 1.47 The following members of the Public Law and Law in Wales team have contributed to this report: Henni Ouahes (team manager), Sarah Smith (acting team manager), Lisa Smith (team lawyer) and Poppy Jones (research assistant).

THE SCOPE OF OUR RECOMMENDATIONS: TIPS ASSOCIATED WITH OPERATIONAL MINES

- 1.48 Before embarking on consideration of each element of the proposed framework, it is necessary to determine an important issue of scope: whether our recommendations should encompass tips associated with operational mines as well as disused tips.
- 1.49 We had been told by stakeholders during the pre-consultation phase of our project that the existing regulatory regime for tips associated with operational mines, under

the Quarries Regulations 1999⁷ and the Mines Regulations 2014⁸, was comprehensive and adequate. In our consultation paper we noted that there were areas of concern relating to conditions governing the closure of mines and the remediation of tips, but that these were to do with the operation of available controls rather than the existing legal framework. There are also very few such tips remaining in Wales.⁹

- 1.50 The regime for tips associated with active mines and quarries is designed for tips which remain under the control of a mine operator. The mining and tipping operations are subject to the Health and Safety at Work Act 1974. The position of disused tips is clearly distinct from the regulation of tipping. The provisional view expressed in our consultation paper was that disused tips require a separate regime tailored to the circumstances of tips that, by and large, are not on land owned or controlled by a body with mining or environmental expertise. We provisionally proposed that the existing regulatory regime for operational tips should not be altered.
- 1.51 We also noted that the 1969 Act defines a disused tip as a tip other than one to which the 1999 or 2014 Regulations apply. We provisionally proposed that, as at present, the new legislation should be expressed not to apply to tips to which these Regulations apply.
- 1.52 The sections below consider views on each of these proposals.

Consultation Question 1: We provisionally propose that the existing regulatory regime for tips associated with operational mines should not be altered. Do you agree?

- 1.53 Of the 43 respondents who answered this question, 38 (88%) agreed and four (9%) disagreed. One respondent answered “other”.

Reasons for agreeing that the regulatory regime should not be altered

- 1.54 Many of those respondents agreeing with our proposal, including Bob Leeming, Howard Siddle, ICE Wales Cymru, Professor David Petley, Kim Moreton and Lee Jones, did so on the ground that the existing regime for tips associated with operational mines was adequate and was not in need of amendment. Jane Iwanicki observed that this regime extended beyond the 1999 and 2014 Regulations:

There is an existing robust and modern system in place for the regulation of tips associated with operational mines, which is further supported and enforced by the Town and Country Planning system and environmental/pollution prevention and control legislation. A similarly robust system will have applied to mines/tips closing in recent years.

- 1.55 Professor Bob Lee agreed that failures of regulation, for example as to financial provision for the aftercare of tips, have been operational. In principle, in his view, if

⁷ SI 1999 No 2024.

⁸ SI 2014 No 3248.

⁹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.3, 3.7, 3.61 to 3.66 and 10.5.

properly administered, the requirements of planning law, environmental permitting and mining law provisions ought to be adequate to make long-term provision for mining waste.

- 1.56 Keith Bush QC noted that it would be a complex task to ensure consistency between a new regime for tips associated with operational mines and the legal framework relating to the safety of operational mines in general.
- 1.57 ICE Wales Cymru, while agreeing with our proposal, thought that tips associated with operational mines should still be listed on the tip register and categorised as “active” with links to key data. This would make their subsequent inclusion on the register as a disused tip much easier.

Reasons for disagreeing

- 1.58 The Coal Action Network did not agree that concerns relating to the closure and remediation of operational coal mines related purely to practice rather than to the regulatory framework. They referred to Celtic Energy's sale of land rights and liabilities at Margam, East Pit, and two other mines to a shell company; this was found to be lawful under the current regulatory framework, despite recognition that it could be viewed as dishonest.¹⁰

It is not possible to exclude the possibility, therefore, that operational coal mines will do likewise depending on the specific conditions around how and when the restoration bond is paid. Thus, parts of any future regulatory regime should apply to currently operational coal mines where this may prevent actions ... that compromise the financial resources required to make safe and restore currently operational coal mines and associated coal tips.

- 1.59 Steve Harford disagreed on the ground that “the experience of managing and monitoring old spoil tips could provide important learning for the management of an active tip”.
- 1.60 Owen Jordan thought that the regime for tips associated with active mines needs to be altered to require all tips to be capped and lined on environmental grounds. He thought that the best way to do this was to require all the tip material to be put back “into the hole it came out of”.

Consultation Question 3: We provisionally propose that any new legislation should not apply to a tip to which the Quarries Regulations 1999 or the Mines Regulations 2014 apply. Do you agree?

- 1.61 Of the 41 who answered this question, 32 (78%) agreed, seven (17%) disagreed and two responded “other”.

Reasons for agreeing that any new legislation should not apply

- 1.62 Many respondents referred to their answers to the question above to repeat that the provisions for working mines and quarries were adequate. They agreed that the

¹⁰ This is discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 3.66.

issues posed by disused tips were quite different from those relating to operational mining. The Mineral Products Association considered it “imperative that the two regimes remain separate and distinct”. Howard Siddle noted that these differences were recognised by their different treatment under Parts 1 and 2 of the 1969 Act.

- 1.63 Keith Bush QC also observed that legislating for tips associated with operational mines was likely to be outside the legislative competence of the Senedd as it would relate to "coal, including - deep and opencast coal mining", and to "the subject-matter of Part 1 of the Health and Safety at Work Act 1974" under the Government of Wales Act 2006.¹¹

Reasons for disagreeing

- 1.64 Some respondents, such as Steve Harford and Vikki Howells MS, thought that the best way to ensure safety was for the new regulatory regime to apply to all tips. Philip Thomas saw an opportunity to preserve uniformity of treatment if a private landowner owned both disused and active mining operations. Owen Jordan saw any division in regulation as providing an opportunity for both owners and regulators to avoid responsibility.

Other observations

- 1.65 Rhondda Cynon Taf did not agree or disagree with our proposal, but asked whether the proposed legislation would involve repealing the 1969 Act, noting that the legislation applies to both England and Wales. They also wanted to know if the new regulatory regime would be introduced by way of primary legislation or as secondary legislation amending the 1969 Act. Their members were keen to ensure that the new legislation captured the coal mining legacy in Wales, and that the disproportionate impact of this legacy on Rhondda Cynon Taf and Wales should be recognised by the UK Government.

Discussion

- 1.66 Respondents gave compelling reasons for supporting our provisional proposals. We agree that cooperation between those responsible for securing disused coal tip safety and those with expertise in managing tips associated with active mines is valuable and should be encouraged. But we do not think that this is a sufficiently strong reason to merge the two regimes. We maintain our view that conditions governing the closure of mines and the remediation of tips concern the operation of available controls rather than the adequacy of the existing legal framework.
- 1.67 The suggestion that the tips register, discussed in chapter 3, should list tips associated with operational mines and categorise them as “active” could be a positive way to promote coordination between the two regimes. We leave this possibility to the Welsh Government to consider.
- 1.68 It is not open to the Senedd to repeal the 1969 Act, which applies in relation to England as well as Wales. But legislative competence to enact new legislation

¹¹ These are reserved matters set out in the Government of Wales Act 2006, sch 7A, paras 98 and 155. Keith Bush QC’s response has been translated from the Welsh original.

applying to coal tips in Wales will extend to amending the 1969 Act so that it does not apply to tips covered by the new Senedd legislation.

Recommendation 1.

1.69 We recommend that the existing regulatory regime for tips associated with operational mines should not be altered.

Recommendation 2.

1.70 We recommend that any new legislation should not apply to a tip to which the Quarries Regulations 1999 or the Mines Regulations 2014 apply.

Chapter 2: A Supervisory Authority

- 2.1 This chapter will consider our provisional proposal that a supervisory authority with responsibility for the safety of all disused tips should be established. It will present and discuss responses to the consultation concerning the need for an authority, the question of whether it should be an existing or newly created body, the form a new body should take, and how its duty to ensure safety should be framed.

THE CASE FOR A SINGLE SUPERVISORY BODY FOR DISUSED TIPS

- 2.2 In our consultation paper, we described the allocation of responsibility for disused tips to local authorities under Part 2 of the Mines and Quarries (Tips) Act 1969. We explained how, at the time that the 1969 Act was passed, in the era of an active mining industry, disused tips were seen as a residual problem and responsibility for ensuring their safety (limited to issues of stability) was allocated to local authorities. We also explained that almost all coal tips in Wales are now disused. This has sharply increased the burden on local authorities at a time when increased rainfall due to climate change is increasing the risk of tips becoming unstable.¹²
- 2.3 The paper also discussed problems with the operation of the current safety regime for disused tips reported to us by experienced stakeholders, including local authorities with large numbers of tips in their areas. These problems included a loss within local authorities of specialist skill and experience over recent decades; this was the result of many factors, but chiefly the decline in the coal mining industry. We also heard that local authority resources were under severe strain.¹³ In addition, the breakdown of tip numbers and ownership types across Wales set out in the consultation paper illustrates the uneven distribution of responsibility for disused tips over local authorities. This places a disproportionate burden on some local authorities.¹⁴
- 2.4 Stakeholders had told us that these combined difficulties have constrained the ability of local authorities to act proactively rather than reactively in ensuring tip safety. Almost all stakeholders we spoke with in pre-consultation discussions thought that the distribution of responsibility across local authorities also impeded consistency and made it more difficult to maintain specialism.
- 2.5 In this context, a consistent approach to coal tip safety and the need for proactive safety measures suggested a need for a single oversight body. A single body would be able to provide a uniform approach to risk assessment and inspections, and prioritise the allocation of resources according to risk. We provisionally proposed the establishment of a supervisory authority whose duty it would be to supervise the management of disused tips in such a way as to ensure their safety. We asked for views.

¹² Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, chs 3 and 4.

¹³ Above, ch 7.

¹⁴ Above, paras 3.41 to 3.60.

Consultation Question 5: We provisionally propose that a supervisory authority with responsibility for the safety of all disused coal tips should be established. Do you agree? If not, please set out the alternative that you would favour.

2.6 Fifty-three respondents answered this question. Of these, 48 agreed with our provisional proposal, amounting to 91% of the total, three (6%) disagreed and two answered “other”.

Reasons for agreeing

2.7 Reasons given for agreeing included the lack of local authority resources to take on the burden of the work required, and the advantages offered by a single authority in terms of greater consistency, expertise and independence. Respondents also referred to the need to remove any ambiguity as to where responsibility for tip safety falls.

2.8 The significance of restricted local authority resources was summarised by Keith Bush QC:

The consultation paper contains strong evidence from local authorities about the difficulties faced by individual authorities in seeking to implement the current Act. Those difficulties include the impossibility of developing expertise in the skills of tip regulation, as the responsibility is spread across so many individual bodies, the disproportionate administrative burden they have to shoulder if a case arises that requires robust legal action and the lack of resources that mean they do not have the capacity to fund and oversee substantial work in order to make safe tips where the owner is unable or unwilling to carry out the work.¹⁵

2.9 WLGA (Bridgend and Torfaen agreeing), together with Neath Port Talbot and Merthyr Tydfil, stressed the relevance of resources in supporting the proposal; their agreement was conditional on provision of additional funding for the new body:

Local authorities are already stretched and it would be helpful to have one central body with the required skills to support coal tip safety activity. It would result in a consistent approach across Wales and ensure there is capacity when needed, given the loss of expertise over recent years in local authorities in the face of financial pressures. With climate change and more intense downfalls of rain expected, the demands are likely to outweigh local authority resources in most cases.

2.10 Wrexham thought that a single body was the answer because “a single authority will provide consistency, expertise and resilience, but also because many local authorities, Wrexham included, have no officers (now or in the past) with the necessary geotechnical expertise”.

2.11 The need for greater consistency was emphasised by Jacobs UK Ltd (formerly Halcrow):

A single supervisory body is essential for achieving compliance [with] regulatory requirements and achieving a consistent and quality standard across Wales.

¹⁵ Keith Bush QC’s response has been translated from the Welsh original.

It will overcome the current split of responsibility across many organisations and it will allow identification and allocation of an appropriate ring-fenced level of funding for the supervisory body, which current arrangements lack.

- 2.12 The risk that a division of responsibility for tips between different bodies could lead to a lack of clarity was also emphasised by a number of respondents. Chris Seddon observed that, in his experience “where there is ambiguity regarding responsibility for safety this is exploited by all parties to avoid taking ownership”. He thought that a single supervisory authority would mitigate this risk. CLA Cymru warned against splitting responsibility between more than one authority, as “things may slip between the two”, and supported a “one size fits all” authority for this reason.
- 2.13 A number of responses focused on the ability of a single authority to pool expertise. Dŵr Cymru/Welsh Water noted the “added benefit that specialist skills and experience are concentrated and developed rather than thinly spread across several organisations”.
- 2.14 The importance of the independence of a new authority was raised. Heledd Fychan MS, Sioned Williams MS and the Rhondda Cynon Taf Plaid Cymru Group emphasised that the new authority should be wholly independent and answerable to the Senedd. Other respondents, including ICE Wales Cymru, focused on the need for independence from tip owners, including both private and public owners. Wrexham explained the benefits of independence in the following terms:
- A single supervisory authority is more likely to make evidence-based policy making procedures and enforcement with associated priorities without undue political persuasion. It would also avoid the issue of which Council regulates a tip site that traverses two local authority boundaries.
- 2.15 Network Rail mentioned that having one overriding responsible and accountable body would be beneficial from an insurance and claims perspective. In their view tip owners should be required to obtain specific insurance or be part of a compulsory insurance scheme, possibly with some type of joint funding arrangement which could be drawn upon in the event of an incident. An agreed claims process would save costs and bring clarity.

Reservations

- 2.16 Some respondents, while agreeing with the proposal, expressed reservations. Many noted that without adequate resources the new authority would be unable to fulfil its functions.
- 2.17 The Rhondda Cynon Taf Plaid Cymru Group emphasised the need for sufficient funding:
- There should be an assurance to the new authority that any remedial work that needs to be done in order to maintain public safety will be funded. It would be pointless to have a new authority that is unable to perform its duties in full.
- 2.18 Wrexham drew on their experience of the contaminated land legislation introduced in 2001 by Part 2A of the Environmental Protection Act 1990 to warn of the need for levels of funding to be maintained. At the outset, contaminated land teams within local

authorities were well resourced, but this level of funding was not sustained. Over the last ten years, they told us, diminished funding has resulted in many authorities losing staff, struggling with workloads and losing the capacity to undertake any proactive work in the field.

- 2.19 Caerphilly agreed with the proposed authority on the condition that its roles and responsibilities were expressed flexibly:

Flexibility needs to be maintained to allow [local] authorities to take on what they can (subject to funding) or pass out this function if they have no or very little tips, or no expertise in-house to manage the function.

- 2.20 Stephen Smith warned that, without sufficient resources, a new supervisory authority could run into the same problems that had hindered tip safety work under the 1969 Act:

Understandably, one of the major problems for [local authorities] has been the loss of the essential (technical) expertise and a consequent lack of focus from the authority on their duties. This is not wholly due to the shortcomings of the Act; more than likely being due to absence of a specific funding stream.

- 2.21 A number of respondents also warned that the establishment of a supervisory body was not of itself a complete solution to tip safety. Clear definition of the functions of the authority would be essential. We agree, and the chapters which follow will consider these functions in more detail.

Reasons for disagreeing

- 2.22 Joel James MS disagreed because in his view there was already a body in existence which could take on responsibility for coal tip safety, in the form of the Coal Authority. Sue Jordan thought that rather than going to the expense of establishing a new authority, those with current responsibilities should remove all tips and return the sites to their original profile. Cllr Julie Edwards did not oppose an authority in itself, but thought that it was too expensive an option unless greater responsibilities were placed on tip owners.

Discussion

- 2.23 Responses indicate almost unanimous support for a single supervisory authority, as well as broad agreement with the reasons we gave for our provisional proposal. Reservations were expressed with regard to funding, but the way in which the new regulatory regime will be funded is a policy matter for the Welsh Government, and falls outside our terms of reference. We note, however, that our impact assessment shows that the creation of a single oversight body offers potential efficiency savings, and that there are long-term economic benefits in taking a proactive approach to tip safety.
- 2.24 We do not think that the suggested alternative approach for a supervisory authority, aimed at removing tips rather than working to ensure their safety, is a viable option. We explained in our consultation paper that the view of the Coal Authority is that in

most cases outright removal of a coal tip is not a realistic option.¹⁶ We have not been offered any reasons to take a different view.

- 2.25 We recommend accordingly that a supervisory authority with responsibility for the safety of all disused coal tips should be established.

Recommendation 3.

- 2.26 We recommend that a supervisory authority with responsibility for the safety of all disused coal tips should be established.

- 2.27 The remainder of this chapter will evaluate responses to questions concerning the form and duties of the new supervisory authority.

AN EXISTING OR NEWLY CREATED BODY?

Consultation Question 6: We seek views on whether the supervisory authority should be an existing body or a newly created body.

- 2.28 Forty-seven respondents answered this question, with 20 (43%) favouring a new body, and 18 (38%) preferring an existing body. Of those who preferred an existing body, 14 (78%) opted for the Coal Authority, 1 (6%) for Natural Resources Wales (NRW) and 1 (6%) for the Health and Safety Executive (HSE). The other two respondents suggested that the Coal Authority and NRW were equally preferable, or proposed a combination of the two. Nine respondents (19%) made observations but did not express a preference for either a new or an existing body.
- 2.29 With such evenly divided responses, it is important to look at the reasons expressed for these preferences.

An existing body

- 2.30 Reasons for preferring an existing body focused on the ability to provide expert knowledge, particularly in inspecting and maintaining tips, and existing systems. Some respondents mentioned potential cost savings. Professor Bob Lee thought that the creation of a new body would “derogate against the principle of integration”. Many of those expressing these views, including NRW and many local authorities, also expressed a preference for the Coal Authority to act as the supervisory authority. Merthyr Tydfil, for example, responded:

The most sensible and obvious existing organisation would be the Coal Authority to become the supervisory authority. They already have expert knowledge and existing systems in place which could be developed further to undertake any additional duties.

¹⁶ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 8.25.

- 2.31 Dr Peter Brabham favoured the Coal Authority, but thought that its functions in relation to coal tips in Wales would need to be in a “totally separate newly created division”.
- 2.32 Some organisations favouring the Coal Authority noted that there could be difficulties with the status of the Coal Authority as a UK-wide body. Several observed that, if the Coal Authority were to take up the role, they would need an office base within Wales and would need to be accountable to the Welsh Government. The Welsh Local Government Association (WLGA) (Bridgend and Torfaen agreeing) and Neath Port Talbot recognised that the statutory status of the Coal Authority might not permit it to take on the role. WLGA suggested that, if this proved to be the case, the Welsh Government could establish a Welsh Coal Authority, with links to the existing Coal Authority, if it had sufficient devolved powers to allow it to do so.¹⁷
- 2.33 Network Rail noted that, if there were plans in the future to widen the regime beyond Wales, “it would make roll out to the wider UK simpler in the future” if the Coal Authority were tasked with the role.
- 2.34 Some suggested a role shared between NRW and the Coal Authority, in order to make best use of the Coal Authority’s expertise and NRW’s position within the Welsh infrastructure. Professor Bob Lee commented:
- There may be room for joint responsibility with the Coal Authority undertaking responsibilities for compilation of registers, including risk assessment and management plans, and NRW pursuing matters of enforcement (including conclusion and supervision of maintenance agreements).
- 2.35 Professor Lee accepted that there was a potential drawback to this approach in that the imposition of an enforcement duty in respect of coal tips could create tensions with other NRW enforcement duties such as waste and water management, biodiversity and forestry. But he observed that it would be necessary to reconcile these tensions whether or not enforcement fell to NRW or to a separate body.
- 2.36 Some respondents noted the potential conflict of interest arising for both the Coal Authority and NRW as managers and owners of tips. Professor Lee observed:
- Such conflicts are less than ideal but not entirely unknown in regulatory settings (for example environmental health and statutory nuisance duties in respect of public sector housing or planning call-in powers by the Secretary of State where there is a clear central government interest in a site).
- 2.37 One respondent, Keith Bush QC, suggested NRW as the most appropriate body, and others proposed it as a suitable alternative to the Coal Authority. The main reason given in support of this view was NRW’s existing role as the enforcement authority for reservoirs under the Reservoirs Act 1975.¹⁸ Merthyr Tydfil was supportive of NRW as an alternative body, but noted that the role would be more challenging for NRW as they did not have existing systems or experienced staff in place.

¹⁷ The response noted that the Welsh Government had undertaken similar roles in the past, for example marine licensing before this was transferred to Natural Resources Wales.

¹⁸ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 9.7.

2.38 The British Geological Survey considered the HSE to be appropriate for the role:

HSE in Wales have a regulatory role, with a history of involvement in mines, understand risk and working in collaboration with partners – clearly in this case the Coal Authority and local authorities, as well as the British Geological Survey in a supporting role.

2.39 In contrast, ICE Wales Cymru thought the HSE would not be suitable, since the scope of responsibilities of the supervisory authority would extend beyond their remit, for example in environmental matters.

A new body

2.40 A slightly larger group of respondents favoured a new rather than an existing body. Many responses emphasised the benefits of impartiality and transparency that a new body could offer. Professor David Petley thought that “existing bodies would lack the advantages of a clean sheet organisation that is free from the complex history of tip regulation and management”. Howard Siddle supported a new body independent of all tips owners, thus excluding the Coal Authority, NRW and local authorities. In his view, no existing authority would have the knowledge, experience or resources to take on the role. ICE Wales Cymru favoured this option as a means of ensuring that the supervisory authority was free of any conflict of interest. Stephen Smith also commented on the importance of avoiding an authority acting as both “poacher and gamekeeper”.

2.41 Jacobs favoured a new body, but emphasised the need to ensure that lessons are learned from the knowledge and experience of the Coal Authority.

2.42 Monmouthshire favoured the Coal Authority, but thought that if it could not take on the role, a new body would be preferable, as “existing bodies such as local authorities and NRW are highly unlikely to have resources and the required expertise to act as a supervisory authority, either individually or collectively”. Wrexham took the same position, noting that NRW have expertise in water pollution and possibly drainage, but not in slope stability or mining.

2.43 Another theme in responses was the need to ensure that the authority’s attention was not diluted by multiple responsibilities. Steve Harford commented: “To add these responsibilities to an existing body would reduce its effectiveness and could result in the focus on tips being reduced”.

2.44 It was recognised in responses that the integration of a new authority with authorities working in related fields such as environmental protection would be important. This is in line with the requirement under the Well-being of Future Generations (Wales) Act 2015 to consider how a public body’s objectives may impact on the objectives of other public bodies. Some of those favouring a new body stressed that this should not rule out using the expertise of those previously involved in other organisations. Kim Moreton pointed out the importance of building cross-disciplinary relationships, for example with local authorities, environmental stakeholders and Network Rail. Stephen Smith suggested that the Coal Authority could provide guidance on standards to employ, and NRW have expertise in public and environmental safety.

Other criteria

- 2.45 A smaller group of respondents were of the view that it did not matter whether a new or existing body took on the role, as long as the body could satisfy certain other criteria. These were identified as an appropriate structure, requisite skills and experience, independence, clearly defined responsibilities and adequate resources. As CLA Cymru put it “the authority needs to have all the tools to do its job under one roof”.
- 2.46 We discuss the responses above together with responses to the next consultation question. This asked, if a new body is established, what form it should take.

What form should a new body take?

Consultation Question 7: If a new body is established, what form should the new body take? Should it be, for example, a central public body, a corporate joint committee of local authorities under the Local Government and Elections (Wales) Act 2021, or something else?¹⁹

- 2.47 Of the 45 respondents who answered this question, 26 (57%) favoured a central public body, and 2 (4%) preferred a corporate joint committee. The remaining responses suggested other formulations or criteria which did not correspond exactly to these two categories, but in some cases contained elements of one or the other.

Reasons to favour a central body

- 2.48 A central public body was viewed by many respondents as offering streamlined processes and consistency across the whole of Wales. CLA Cymru thought that this would promote efficiency by avoiding multiple layers of bureaucracy. A central body was also considered to be better able to collaborate with other public bodies such as NRW and to call on the expertise offered by these bodies. Wrexham, for example, thought that a single public body would support a more effective partnership with other national regulators and reduce inconsistencies in enforcement.
- 2.49 Some respondents put forward options for a central body. Stephen Smith thought that a unit within Welsh Government could work well. Benefits would include direct accountability to Ministers:

This could be similar to the former land reclamation units of Welsh Office and Welsh Development Agency, who had a critical technical and management role on the delivery of land reclamation in Wales, including budget requirements.

- 2.50 As an alternative, he suggested an “arm’s length” approach delivered through a body managed by a board “comprising representatives from existing regulatory bodies enhanced by external technical / management expertise (for example from business or universities)”. This was also the model favoured by Steve Harford, who thought that an arm’s length relationship to the Welsh Government would provide the organisation with operating flexibility. An independent board of directors appointed by the Welsh

¹⁹ The title of the Local Government and Elections (Wales) Act 2021 was mistakenly given as the Local Government and Planning (Wales) Act in consultation question 7 in our consultation paper.

Government could provide advice and guidance to the management team of the organisation.

2.51 Steve Harford also considered the option of establishing a commissioner, but observed that, as a corporation sole, the organisation would not have the support of a board of directors.

2.52 Reasons for preferring a central public body included reasons why a corporate joint committee was not considered to be suitable. ICE Wales Cymru thought that any regional approach would be less effective:

Corporate joint committees will be regional and as such, if their geographical responsibilities are considered, more than one supervisory authority would be required and this is not recommended. As corporate joint committees are a new statutory mechanism for regional collaboration by local government, this would also raise the issue of conflict of interest with a local authority tip owner. Effective lines of communication between the supervisory authority, government, corporate joint committees, local authorities and other interested parties should be developed and maintained.

2.53 WLGA (Bridgend and Torfaen agreeing) and Neath Port Talbot were also concerned about a regional approach, fearing the development of regional variations and a continuation of the disproportionate burden on local authorities with large numbers of tips in their areas. They saw local government representation on the board of the new supervisory body as the way to ensure a good relationship between the supervisory authority and local authorities.

2.54 Keith Bush QC thought that only a central public body could resolve the difficulties faced by local authorities in carrying out their current tip safety role. Although transferring the burden to regional corporate committees would “alleviate the difficulty, it would not resolve it”.

Reasons to favour a corporate joint committee

2.55 Huw Williams provided the strongest statement in support of a corporate joint committee, seeing the concentration of disused coal tips in a small number of authorities as a reason for adopting the structure. He envisaged that:

- (1) the authorities with significant numbers of tips should form a corporate joint committee;
- (2) the remaining local authorities in Wales should enter into agency agreements with the Joint Committee to enable them to utilise the expertise of the Committee's staff (which I envisage becoming a Centre of Excellence) in compiling registers for their areas and dealing with such tip safety issues as arise in their areas; and
- (3) powers for the Welsh Ministers to establish a statutory scheme to underpin this arrangement may be necessary to ensure that every local authority joins these arrangements.

Other proposals

2.56 Other suggestions including adopting a three-region approach for south, mid and north Wales (Owen Jordan). Some of these ideas were compatible with the concept of a central public body. Richard Arnold suggested a central body operating with a presence in the regions, for example by utilising local office space, workshops and plant. The Mineral Products Association thought that the authority should be a UK-wide body, and that local government involvement should be avoided as this would run the risk of politicising the regime. Dr Peter Brabham suggested a body with a wide and inclusive membership: “Coal Authority, local authorities, British Geological Survey, chartered engineers, chartered geologists and other experts in tip management and possibly mine historians”.

Discussion

2.57 Respondents were fairly evenly divided between a newly created or an existing body, with a slight majority in favour of an entirely new body. Good reasons were given for both views, but, on balance, we think that the arguments in favour of a new body are stronger.

2.58 If an existing body is used, the strongest contender would be the Coal Authority. But we do not think that the proposed duties of the supervisory authority would fit well with the Authority’s statutory structure. The Coal Authority is a statutory corporation created by the Coal Industry Act 1994. Its functions do not currently involve tip safety.²⁰ It is under the control of a UK Government department, the Department for Business, Energy and Industrial Strategy, and subject to a wide power of direction on the part of the Secretary of State as well as a power of the Secretary of State to determine its financial duties. It must produce an annual report to the Secretary of State.²¹ If the Coal Authority were to take on the role of the supervisory authority, new functions would need to be grafted on to the legislation to provide a new function in respect of Welsh coal tip safety. The legislation would also need to provide for answerability to the Welsh Ministers, which would not fit well within the existing statutory framework.

2.59 In addition, there are issues of Senedd competence. The Coal Authority is a “reserved authority” under schedule 7B to the Government of Wales Act 2006. Paragraph 8 of the schedule provides that the consent of the appropriate UK Government Minister is required for a Senedd provision to:

- (1) confer or impose a function on a reserved authority;
- (2) modify the constitution of a reserved authority; or

²⁰ These functions are set out in the Coal Industry Act 1994, s 1. They include holding, managing and disposing of interest or rights in unworked coal, licensing coal mining operations, and functions in relation to coal mining subsidence and other matters incidental to opencast or other coal mining operations.

²¹ See, for example, Coal Industry Act 1994, ss 6, 60 and sch 1, pt II.

- (3) confer, modify or remove a function specifically exercisable in relation to a reserved authority.²²
- 2.60 Sub-paragraph 8(5) specifies that the “appropriate minister” to provide consent is the Secretary of State. This is likely in practice to be the Secretary of State for Wales.²³ The Welsh Government could seek the consent of the UK Government to a modification of the functions of the Coal Authority. We cannot see the benefit of seeking such an arrangement over the establishment of a self-standing authority in Wales, save in accessing specialist skills and, possibly, saving costs. If access to skills were required, a simpler approach would be for the new authority to contract with the Coal Authority to provide services to it. We are also doubtful as to the likelihood of cost savings, as the Coal Authority would need to form a separate division to undertake the work.
- 2.61 Another proposed existing body is the HSE. This is similarly a reserved authority, and so the same problems would arise under schedule 7B. We also agree that the HSE’s existing range of functions is not sufficiently wide to encompass a tip safety role as these are primarily concerned with workplace safety.
- 2.62 We have considered concerns about a possible conflict of interest if a tip-owning public authority were to be given the role of the supervisory authority (the Coal Authority and NRW are both tip owners/managers).²⁴ We do not see a dual role as a problem in itself. Under the existing regime, local authorities have managed their own tips as well as tips in other ownership. If, as some respondents have suggested, the new supervisory role were to be given to a new division of NRW, the authority would be in much the same position with regard to its tips as local authorities are now.
- 2.63 The current functions of NRW are, however, somewhat different from the role a supervisory authority would need to play in securing coal tip safety. Its existing functions are primarily to manage natural resources and to protect the environment – although there is a degree of overlap with regulatory functions, for example in relation to reservoirs. It would be possible for the role of the supervisory authority to be performed by a newly-created division of NRW; we leave it to the Welsh Government to decide if this is a feasible option. If this is the approach adopted, it will be essential to give the division a clear identity as the Tip Safety Authority rather than as, for example, the “tip safety branch” of NRW. One possible model could be for the new division of NRW to act as the enforcement authority but to outsource tip safety management to the Coal Authority.
- 2.64 We think it essential that, whatever body takes on the role, it operates as a distinct statutory entity. In our view, it would be more straightforward to achieve this through

²² There are exceptions to this general rule. The Senedd can, without the consent of Secretary of State, confer, impose, modify and remove the devolved functions of some reserved authorities that exercise both devolved and reserved functions: see Government of Wales Act 2006, sch 7B, paras 9 and 10.

²³ Wales Office’s Devolution Guidance Note: Parliamentary and Assembly Primary Legislation Affecting Wales, para 27, last updated Sept 2020, <https://www.gov.uk/guidance/guidance-on-devolution#devolved-responsibilities>.

²⁴ These are the tips owned by the Welsh Government on the Woodland Estate. See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.1 and 3.31.

the creation of an entirely new self-standing body. For these reasons, we favour the creation of a new body.

Recommendation 4.

2.65 We recommend that the supervisory authority should be a new body.

- 2.66 If a new body is established as the supervisory authority, responses show majority support for a central public body, although a strong minority favoured a regional approach involving one or more corporate joint committees under the Local Government and Elections (Wales) Act 2021. Overall, we are persuaded that a central public body offers the most streamlined and consistent approach.
- 2.67 There are two ways that a corporate joint committee could be established under Part 5 of the Local Government and Elections (Wales) Act 2021. Under section 70, two or more authorities may apply to the Welsh Ministers to make Regulations creating a corporate joint committee to perform either an existing function of theirs or a new “economic well-being function” created by the Act. The Welsh Ministers can create a corporate joint committee under section 74 of the Act without receipt of such a request, but only in relation to a narrower range of local authority functions: the preparation of a strategic development plan or the economic well-being function.
- 2.68 Coal tip safety is an existing function of local authorities, under Part 2 of the 1969 Act, so theoretically the Welsh Ministers, could, if asked, create a corporate joint committee to perform the function. But the purpose of the new statutory regime would be to replace Part 2 with new legislation creating enhanced duties in relation to tip safety. The legislative steps needed to bring about joint corporate committees in the field of coal tip safety would be cumbersome. First, legislation would be required to reform local authorities’ coal tip safety function. Secondly, in the absence of an application from local authorities for the function to be performed through one or more corporate joint committees, section 74 of the 2021 Act would need to be amended to cover the new coal tip safety function. Finally, Regulations under the Act would be required in order to create the new committee or committees. It would be simpler to create a body directly in primary legislation.
- 2.69 We have other reservations about the use of corporate joint committees in this context. Respondents put forward compelling reasons in favour of centrality. We are concerned that a regional approach could develop in an unbalanced way across Wales because of the very uneven distribution of coal tips. If only the functions of those authorities with the most significant tip numbers were transferred to a corporate joint committee, tensions and inequalities could develop, and local government policy considerations could impede the development of a consistent tip safety strategy. Even if the coal tip functions of all local authorities were transferred to a corporate joint committee, we cannot see any advantage over the creation of a central statutory agency. A central body could have bespoke governance arrangements, rather than

being a committee composed of the senior executive members of all the local authorities.²⁵

- 2.70 A central public body would also be the most appropriate approach if the remit of the new supervisory authority were to be extended to other types of mining and quarrying waste.²⁶ Although disused coal tips are most prevalent in areas of South Wales, other types of waste are spread in differing concentrations across Wales.
- 2.71 Respondents mentioned a number of options for the form that a central body should take, including the creation of a unit within the Welsh Government, or an arm's length body with an independent board of directors appointed by the Welsh Government. Some guidance on setting up new public bodies in Wales can be found in the document "Managing Welsh Public Money".²⁷ This describes a choice of models, giving advice as to when a particular model would be appropriate, as well as explaining that the models are flexible and can be customised.²⁸
- 2.72 Possible models offer varying degrees of independence. An agency, for example, is typically a part of a government department that has been separated off in order to focus on particular administrative functions. It is usually led by a Chief Executive Officer. Ministers retain control of the direction of the agency and are able to take key decisions.²⁹ In contrast, a Welsh Government sponsored body, usually referred to outside Wales as a non-departmental public body, operates with some independence and is not under day-to-day Ministerial control. Nevertheless, the Welsh Ministers are ultimately accountable to the Senedd for their efficiency and effectiveness. Such bodies can take a number of legal forms, and are usually established by legislation.³⁰ NRW is an example of a sponsored body. We leave it to the Welsh Government to decide the appropriate form for the new central body.³¹
- 2.73 We recommend accordingly that, if the supervisory authority takes the form of a new body, this should be a central public body.

Recommendation 5.

- 2.74 We recommend that the supervisory authority should be a central public body.

²⁵ Local Government and Elections (Wales) Act 2021, s 77.

²⁶ The possibility of extending the regulatory regime to non-coal tips is discussed in ch 12.

²⁷ Welsh Government, *Managing Welsh Public Money*, WG24091, 2016, <https://gov.wales/sites/default/files/publications/2018-10/managing-welsh-public-money.pdf>.

²⁸ Above, para 7.2 and Annex 7.

²⁹ Above, Annex 7.

³⁰ Above, para 7.6.5.

³¹ We discussed executive agencies, non-departmental public bodies and Welsh Government sponsored bodies in our recent report on Devolved Tribunals in Wales (2021) Law Com No 403.

THE DUTY OF THE SUPERVISORY AUTHORITY TO ENSURE THE SAFETY OF DISUSED COAL TIPS

2.75 Our next consultation question moved away from the form of the supervisory authority and considered how its remit should be defined. We asked whether the authority's responsibility for tip safety should be framed in general terms, or as a duty limited to specified risks.

Consultation Question 8: We provisionally propose that the supervisory authority's duty to ensure the safety of tips should be framed as a general one, rather than one limited to specified risks. Do you agree?

2.76 Of the 48 respondents who answered this question, 39 (81%) agreed with our proposal that the duty to ensure safety should be cast in general terms. Four respondents (8%) disagreed, and the remaining five neither agreed nor disagreed and in some cases made alternative suggestions.

Support for a general duty to ensure safety

2.77 Respondents gave a range of reasons for supporting a general duty, ranging from the more principled to the more pragmatic. CLA Cymru said that the role of the supervisory authority "should be to protect the Welsh public and be capable of undertaking whatever is required to ensure that there are no risks associated with the old coal tips". Jane Iwanicki thought there was:

sense in adopting a holistic engineering and management approach to identified risks/hazardous sites rather than dealing with only one aspect and leaving other regulators to consider if, when and how they intervene.

2.78 Huw Williams thought that all that should be required for a duty to arise is the existence of the waste:

Once mining or quarrying waste arises and is deposited on the surface it should be regarded as presenting a permanent potential risk that requires management. The definition should reflect this by framing the duty around the fact of the deposit of the material on the surface, rather than a specification of (currently known) risks.

2.79 Other respondents emphasised the need for a flexible and agile approach to justify a general duty, as risks can evolve with time. The authority would need flexibility to allow it to address all potential impacts posed by problem tips. As Chris Seddon put it:

Framing the supervisory authority's duty in a general way will allow the organisation to adapt to unforeseen and developing hazards as legacy tips age and our understanding of their implications changes over time.

2.80 Some respondents were concerned that limiting a duty to specified risks could unintentionally create loopholes and lead to disputes. Professor David Petley reasoned that this could lead to "a scenario in which actions or directions can be contested on the basis that they do not perfectly align with specific risks". Dŵr Cymru/Welsh Water concurred:

Where there are risks to drinking water supplies and mitigation is time sensitive, it would be undesirable for time to be wasted in determining whether the authorities' specific duties were relevant or if other parties had to be pursued.

2.81 Keith Bush QC supported the proposed duty, contrasting it with the existing duty under the 1969 Act to protect members of the public from danger due to instability. He pointed to the evidence, presented in our consultation paper, that this threshold for intervention can “act as a barrier to councils taking action because such action leaves them open to the possibility of challenge in the courts”.

2.82 Jacobs thought that the uniqueness of each tip, giving rise to a range of risks which may not be readily apparent, justified the imposition of a general duty:

Each tip is unique and to assess a tip it is imperative to understand the tip holistically based on historical records, geomorphological setting/geological setting/ground conditions (including soil and rock properties)/groundwater conditions and based on its current condition and behaviour. Some influences on tip stability are less obvious for example the strains imposed by past mining. To limit to specific risks runs the risk of missing out something that could be very important.

2.83 Wrexham gave some practical examples from their experience of the way in which the risks that coal tips pose in addition to instability can interact:

Examples of other risks are pollution from ground contamination, contaminated water, dust emissions which might include fine particulates Combustion smoke and emissions can create pollution, possibly hazardous to nearby residents and might not be actionable as a statutory nuisance unless the tip site was an industrial, trade or business premises (most are not). The respondent is aware of at least one coal spoil tip that combusted (ignition source not identified) causing statutory nuisance to properties on and around the tip – an abatement notice was served and extensive works in default undertaken.

Off road bikes can create noise nuisance dealt with by the statutory nuisance regime, however these can undermine stability, create erosion, water pollution.

2.84 Stephen Smith agreed with the creation of a general duty, but thought that a framework should be drawn up to offer guidance on specific tasks for the authority.

Support for a narrower duty limited to specified risks

2.85 Some respondents thought that the focus of the authority's work should be tip instability. Bob Leeming pointed out that it was tip instability which triggered this project. Ove Arup and Partners argued that other risks such as pollution or flooding are covered by other legislation.

2.86 Howard Siddle thought there was insufficient evidence put forward in our paper to justify including risks other than instability. He thought that other safety issues should only be included where the risk is supported by reliable evidence, where such evidence can be gathered cost effectively, and where the hazard is not covered by existing regulations. He noted in particular that there may be an overlap with the Coal Authority's functions in relation to the monitoring and remediation of pollution from mines. He gave the example of the problem of contaminated “ochreous” discharges of

water coming from mine adits. These may lie within areas of disused coal tips. He also noted that tip fires are now much less frequent than in the past, and that recent fires have been surface vegetation fires rather than spontaneous combustion below the surface.

Extending the duty beyond safety

2.87 Professor Bob Lee favoured a more general duty in line with Welsh legislation, as this would align well with both the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016. In his view, this would:

offer something rather more than a guarantee of tip stability and address questions of environmental, social and economic sustainability in Welsh former coalfield communities still badly scarred by coal pit closures after so many years.

2.88 NRW also wanted a general duty going beyond safety, arguing that some tips, although not posing a safety threat, pose a risk to the environment. In their view, this environmental threat should be covered by the remit of the duty. Air quality, combustion and plant health were given as examples. They also thought wider considerations of reclamation or the recycling of spoil tips should be under the control of the authority, despite the fact that these issues might arise in respect of tips which were not hazardous.³²

Imposing the primary duty on the tip owner

2.89 WLGA (Bridgend and Torfaen agreeing) and Neath Port Talbot argued that, in the first instance, the duty to ensure safety should be on the tip owner. In their view, the supervisory authority should intervene only where necessary due to inaction on the part of the owner. Once a duty to act falls on the authority, this duty would need be defined, but their view was that this could not be done without specifying the types of risk the authority was expected to manage.

Discussion

2.90 Beyond a decision as to whether the responsibility of the supervisory authority should be drawn in general or specific terms, it is difficult to discuss the duties of the supervisory authority without looking in detail at the functions which will need to be fulfilled under our proposed new regulatory framework. The following chapters look at the following functions: compilation of a tip register; a duty to inspect, draw up a tip management plan and classify tips; the making of tip maintenance agreements or orders; and a power to designate a tip as in need of more rigorous intervention. This discussion is confined to the scope of the overarching responsibility.

2.91 There was almost unanimous support for our provisional proposal that the supervisory authority's responsibility for the safety of tips should be framed as a general one, rather than one limited to specified risks. We agree that this permits a more flexible and future-proofed approach. Risks can evolve over time, and a specific list could leave gaps. We are also of the view that risks other than instability should be covered. This is discussed below at paragraphs 4.67 to 4.98 in considering responses to consultation questions 16 and 17. Instability is likely always to be the most prominent

³² Reclamation and uses for tip material are discussed further in ch 12.

risk, but the evidence of stakeholders in the mining safety field suggests that other risks may be present and can interact with instability.

- 2.92 We have considered the argument that responsibility for ensuring safety should fall to the owner rather than to the supervisory authority. It is of course the case that the presence of a hazardous coal tip can involve the owner in civil or criminal liability by reason of both statutory provision and under the common law.³³ In addition, our recommended agreement and order-making powers will enable the supervisory authority to concretise owners' legal obligations by requiring specific action on their part. But we think that an overarching statutory responsibility for ensuring the safety of tips must lie with our recommended statutory authority in order to incentivise and inform the performance of its functions. Leaving responsibility for ensuring safety with the landowner would risk perpetuating the problems experienced by local authorities in exercising powers under the 1969 Act, where authorities have been hampered in taking action under the Act in the face of opposition from landowners contending that works are not required or are excessive.³⁴ A public responsibility for ensuring safety provides the authority with a clear rationale for intervention, which can be backed up with a framework for its enforcement.
- 2.93 This issue is distinct from the question of whether owners should be required to undertake operations on the tip in the interests of safety. We discuss this below in relation to tip inspections, tip maintenance agreements and orders, and designation of higher risk tips.³⁵
- 2.94 We also think that the authority's responsibility should be confined to ensuring safety, rather than securing broader environmental and public benefits. This is in the interests of clarity, and once again to ensure that its safety function is carried out effectively. We discuss the possibility that the supervisory authority could exercise an additional role in relation to tip reclamation in the final chapter of this report. It is possible that this could be undertaken without additional legislative provision, or by providing additional powers (rather than duties) to consider wider environmental and social benefits beyond safety.
- 2.95 The duty could be drafted in a number of ways; we leave this to Legislative Counsel. In essence, we envisage a duty of the supervisory authority to perform its functions with a view to achieving the purpose of coal tip safety. A parallel could be drawn with provisions of the Natural Resources Body for Wales (Establishment) Order 2012,³⁶ the Natural Resources Body for Wales (Functions) Order 2013³⁷ and the Environment (Wales) Act 2016 which provide for the purposes, functions and duties of NRW.
- 2.96 We also envisage, though this is again a matter of legislative drafting, that the supervisory authority should report to Welsh Ministers at appropriate intervals. This

³³ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, ch 6.

³⁴ Above, paras 7.9 to 7.25.

³⁵ See chs 4, 5 and 6 below.

³⁶ SI 2012 No 1903 (W 230).

³⁷ SI 2013 No 755 (W 90).

could be, for example, on a biennial basis, as is the case for NRW in discharging responsibilities under the Reservoirs Act 1975.³⁸

- 2.97 We recommend for these reasons that the supervisory authority's duty to ensure the safety of tips should be framed as a general one, rather than one limited to specified risks.

Recommendation 6.

- 2.98 We recommend that the supervisory authority should be subject to a general duty to perform its functions so as to ensure the safety of coal tips, without limitation to specified risks.

³⁸ Reservoirs Act 1975, s 3. Reg 7 of the Reservoirs Act 1975 (Capacity, Registration, Prescribed Forms, etc.) (Wales) Regulations SI 2016 No 80 (W 37) gives more specific information on what must be reported.

Chapter 3: A tip register

- 3.1 Our consultation paper considered the steps taken by the Welsh Government since the Tylorstown slip in February 2020 towards the compilation of a central database of coal tips. This has included extensive data gathering, and a proposal to hold the data on DataMapWales.³⁹ We explained the views of stakeholders such as the Coal Authority as to the importance of a single database for the long-term development of tip management. We also looked at other regulatory frameworks which rely on asset registers as models for our proposed new framework. These models included the reservoirs and flood risk management regimes.⁴⁰
- 3.2 We made a provisional proposal that it should be one of the duties of the supervisory authority to compile and maintain a tip register, drawing on the work already undertaken, and suggested that the register entry for each tip should include stipulated standardised information to provide an initial template for its management. We provisionally proposed that the contents of the tip register should be prescribed by statutory instrument.⁴¹
- 3.3 We explained that, as a record of all known coal tips would be compiled, we did not think it necessary for landowners to notify the authority of all those tips afresh. But we acknowledged the possibility that previously unknown tips might come to light, and that there would be active tips, albeit very few, which would become disused. In order to ensure that the register was comprehensive, we suggested that landowners should be under a duty to notify the authority of the existence of any tip of which they became aware that was not already in the register. Although we appreciated that the duty could encompass very small deposits of mining refuse which would not be of practical concern, we thought that stipulating a threshold of tip size would not be workable.⁴²
- 3.4 We envisaged that the supervisory authority would notify a tip owner that a tip had been entered on the tip register at the time the register was compiled or upon the later addition of a tip. We suggested that the landowner should be placed under a duty to notify the supervisory authority of the existence of a tip unless the owner had reason to believe that it had been registered. We acknowledged that it might be difficult for owners to know whether they have a tip on their land, or that it might be difficult to trace the owner of land. For this reason, we provisionally considered it important to provide the supervisory authority with a power as well as a duty to add a tip to the register of its own motion.⁴³

³⁹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 5.45, 8.4, 8.14 and 8.36. DataMapWales is a secure hosted platform within Welsh Government. See <https://datamap.gov.wales/>.

⁴⁰ Reservoirs Act 1975, s 2 and the Flood and Water Management Act 2010, s 21(2) and (4). See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 9.12 and 9.65.

⁴¹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.28.

⁴² Above, para 10.31.

⁴³ Above, paras 10.32 and 10.33.

- 3.5 We asked an open question seeking views on whether a duty to notify should be imposed on landowners, as we could foresee little likelihood that potentially dangerous tips would come to light as a consequence of the duty. We were also concerned that a duty to notify could engender disputes as to whether the owner was aware that their land contained a tip. We recognised that, to be meaningful, the duty would have to be accompanied by a sanction for breach such as a fine.⁴⁴ We provisionally considered that a right of appeal should be given where ownership or the identification of the land as a tip was disputed.⁴⁵
- 3.6 We recognised that the information on the register would need to be kept up to date. We saw the duty to update the register with new information known to the supervisory authority as forming part of the authority's duty to maintain the register. In some instances the authority would be dependent on the provision of information to it by third parties, such as where ownership of land containing a tip changed or where tip owners were carrying out their own maintenance.⁴⁶
- 3.7 Finally, we looked at whether the information on the register should be public. We recognised that one of the overarching principles in Welsh legislation was the need to act collaboratively, including ensuring public involvement and participation. But there was a risk that the information contained in the register could detrimentally affect property prices and the cost of insurance. While this was an important factor for consideration, the purpose of our provisional proposals was to minimise risk through detailed prescription of inspection, maintenance and remediation requirements.
- 3.8 We thought that the fact that risks were being addressed should mitigate any deterrent effect of a property being publicly identified as containing a coal tip. We also thought it preferable that those considering dealing with a property should be able to discover the position from a public register. On balance, we thought that the information on the tip register should be public, subject to the exclusion of any information which needs to remain confidential in order to comply with data protection law. We asked for views on the issue.⁴⁷
- 3.9 The following sections consider views on each of these aspects of the way in which a tip register might work.

SHOULD A TIP REGISTER BE COMPILED AND MAINTAINED?

Consultation Question 9: We provisionally propose that a central tip register should be compiled and maintained. Do you agree?

- 3.10 There was overwhelming support for our provisional proposal that a tip register should be compiled and maintained. Of the 56 respondents who answered this question, 52 (93%) agreed. One (2%) disagreed and three answered "other".

⁴⁴ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.34.

⁴⁵ Above, para 10.35.

⁴⁶ Above, para 10.38.

⁴⁷ Above, para 10.39.

- 3.11 Reasons given for supporting the proposal included the need for an accurate and consistent picture of coal tips across Wales, and the difficulty of building any process of supervision without uniform and reliable data. Respondents saw the creation of a single, coherent register as the starting point for any risk-based management structure. In the words of ICE Wales Cymru:

A comprehensive central tip register is critical to consistent, holistic, comprehensive and effective risk management of disused coal tips.

- 3.12 Other benefits of a register included “ease of updating and harmonising of records” (Lee Jones) and ease of access in providing a single reference point for those needing information on location, risk and management. This included, for example, water authorities needing information of relevance to drinking water supplies (Dŵr Cymru/Welsh Water). Network Rail observed that a tip register would allow them “to assess risks to each line in Wales, based on proximity to the railway network, steepness of slope etc”. ALGAO thought that it would be a valuable resource for archaeological decision-making.

Collaboration between agencies

- 3.13 While agreeing with the establishment of a register, the need for collaboration between agencies was raised by some respondents to enhance the content of the register and avoid duplication. ALGAO pointed to the records kept in Historic Environment Records and the National Monuments Record of Wales. These include data on many tips. They suggested establishing a protocol for the provision of relevant information from the register at regular intervals to Historic Environment Records, National Monuments Record of Wales and Cadw. This would allow them to maintain the currency of their own databases, and to include links in each register to allow databases to be cross-referenced. Transport for Wales wanted a requirement to share the information in the register with stakeholders such as transport authorities.
- 3.14 Steve Jones of the Emergency Planning Department at Pembrokeshire County Council commented on the Welsh Government proposal to hold the register data on DataMapWales.⁴⁸ He suggested also placing data on Resilience Direct, the secure government portal to which emergency services, NRW, local authorities and the military have controlled access. In his view, this would assist with a better shared understanding of a situation in the event of an incident. He explained that this system was used to brief COBRA at the time of the Toddbrook Reservoir incident.⁴⁹
- 3.15 Kim Moreton noted that new geospatial technologies would make it straightforward to share the information on the register via, for example, the Land Registry, local authority registers and Ordnance Survey technical registers.

Maintaining the register

- 3.16 Keeping the register up to date will be important. Jane Iwanicki responded:

⁴⁸ See para 3.1 above and Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 5.45.

⁴⁹ COBRA is the UK Government’s Civil Contingencies Committee that is convened to handle matters of national emergency or major disruption.

There would need to be clear obligations for reviewing and updating the register otherwise it will become a snapshot in time rather than a useful management tool.

- 3.17 NRW emphasised the need to ensure that users can trust the register. Agreeing the format, content and type of data with stakeholders would be essential to ensure that the register holds what is required, and not more, that stakeholders have confidence in the register, and that a situation was avoided “where we have numerous registers all containing different data”. NRW drew attention to the latest Digital Services guidance and suggested that the principles set out in it should be adopted. This would ensure that customer needs were central in the design of the register and that it was capable of efficient delivery of the correct content through easily accessed media.⁵⁰ Paul Funck also stressed the need to maintain data in a form accessible and relevant to all involved parties. He urged involvement of stakeholders in advance to agree what data is required. This could save time and cost in later stages of development by avoiding a need to merge new data and prevent the duplication of data.
- 3.18 The sole respondent who opposed the register (Owen Jordan) did so on grounds of the cost and time required to compile it.

Discussion

- 3.19 There was almost unanimous support for our proposal. We broadly agree with the reasons put forward for this support. The tip safety regime needs to be founded on a single source of uniform, coherent and reliable data. We also agree that the form of entry on to the register should be accessible and relevant and that the duty to maintain the register should be sufficiently specific to include reviewing and updating its content. We think that such detail could be included in a statutory instrument providing for the content of the register. This is discussed further in relation to the next consultation question at paragraphs 3.25 to 3.41 below.
- 3.20 The points raised by respondents about the need for collaboration between record-holders are very useful. We have heard from stakeholders about experiences of searching for historic tip records. Many are missing or incomplete. One way to resolve this could be establishing a protocol for the sharing of relevant documents or information between appropriate authorities.⁵¹
- 3.21 Ensuring that records are shared does not resolve the problem of previously lost records, but would make it possible in the future for authorities to access records held by the supervisory authority where relevant to their work. This is discussed further in the final section of this chapter, which looks at the extent to which tip register should be publicly accessible.
- 3.22 We recommend accordingly that a central tip register should be compiled and maintained.

⁵⁰ See the 12 Digital Service Standards: <https://digitalpublicservices.gov.wales/toolbox/digital-service-standards/>.

⁵¹ Distributed Ledger Technology could be used to aid the sharing of documents. A distributed ledger provides a database that is consensually shared and synchronized across multiple sites. Information is stored in a secure and accurate manner using cryptography.

Recommendation 7.

3.23 We recommend that a central tip register should be compiled and maintained by the supervisory authority.

3.24 The question of whether the content of the register needs to be formally prescribed is the subject of the next section, which considers our provisional proposal that the contents of the register should be prescribed by Welsh Ministers by statutory instrument.

PRESCRIBING THE CONTENTS OF THE TIP REGISTER

Consultation Question 10: We provisionally propose that the contents of the tip register should be prescribed by the Welsh Ministers by statutory instrument. Do you agree?

3.25 Of the 45 respondents who answered this question, 38 (84%) agreed with our proposal. Five (11%) disagreed and two answered “other”.

The nature of the prescribed content

3.26 Many of those agreeing with our proposal, particularly local authorities, thought that prescription of the register’s content was a way to ensure a clear and consistent approach. Ove Arup and Partners thought it important that there was a legal requirement to provide specific content.

3.27 Others, while agreeing, stressed the need for flexibility in the required content. In NRW’s view, the register “needs to be agile enough that it can be altered for future requirements if required. It needs to be flexible to deal with possible new requirements in the future”. Keith Bush QC warned that “the understanding of the range of detail to be included may change over time”.⁵² Richard Arnold thought the contents should be kept “simple and fluid”. Dr Tom St John thought that the prescribed contents should be considered the minimum content required. In addition to the stipulated requirements, some sites might require site-specific content.

Who should decide on the content and what should be included?

3.28 A need for thorough consultation with relevant stakeholders as to the nature of the details to be included in the register was identified by a number of respondents as an essential preliminary step. This discussion inevitably led some to specify what should be included.

3.29 Some respondents stressed the need to take account of expert advice. ICE Wales Cymru thought that:

in prescribing the content of a tip register, Welsh Ministers should take full account of recommendations from expert advisors with knowledge of past, current and

⁵² Keith Bush QC’s response has been translated from the Welsh original.

potential future coal tip events (for example tip instabilities), legislation and climatic or other trends.

This would ensure that the register was “robust and future-proofed”. Professor Bob Lee mentioned the need to build on the work already done by the Welsh Government.

- 3.30 The importance of incorporating historical data on tips was emphasised by Stephen Smith, Howard Siddle and Jacobs UK Ltd (formerly Halcrow). Stephen Smith noted the need for all entries to be based on all available data, including historic records of investigation or remediation. Howard Siddle explained that the National Coal Board compiled a list of over 800 tips in their ownership following the Aberfan disaster, and NRW also held tip records. He explained that historic records would cover many tips owned or formerly owned by the Coal Authority and some local authorities or managed by NRW. The records include inspection reports and reports prepared to meet legislative requirements, record dangerous occurrences on tips, and in connection with land reclamation projects. In his view:

These reports are of the utmost importance in future management as they provide information on their history, past behaviour, stability, drainage and the design standards, if any, adopted in their construction. The register for each tip should include references to all previous reports and their custodians to ensure existing and future owners can access them.

- 3.31 Jacobs envisaged “an interactive database of all tip records, including inspections, technical reports and tip management plans going forward and also historical records”. ALGAO referred to the information held by Historic Environment Records, National Monuments Record of Wales and Cadw on disused tips, and recommended that those compiling the register consult the record managers about this information and the scope for data sharing.

Is a statutory instrument the best approach?

- 3.32 The Law Society of England and Wales agreed with the use of a statutory instrument, and proposed that this should be subject to Senedd scrutiny via the affirmative procedure. Keith Bush QC also agreed with the use of subordinate legislation because this would allow flexibility as the understanding of the detail required may change over time. Huw Williams thought that the whole of the statutory scheme could be established by statutory instrument, and that this could include specification of the contents of the register
- 3.33 CLA Cymru in contrast thought that primary legislation was required to ensure full debate and scrutiny of proposals. Jane Iwanicki disagreed with the need for prescription at all. She thought it better to confine the process to consultation with technical advisers and draw on the recommendations of local authorities and the Coal Authority. The Mineral Products Association thought that all the nations of the UK should be involved in setting the standard for the register.

Discussion

- 3.34 We agree that there is a need for clarity as to the required contents of the register. We also agree that the system for prescribing content needs to be sufficiently agile to permit changes, as what is required may evolve over time. The content itself is a

matter for the Welsh Government, and in determining it, they will need to have regard to expert advice. But we consider, for reasons discussed in the final section of this chapter, that in doing so they should be guided by whether it is in the public interest for particular information to be accessible.

- 3.35 We see a risk of the register becoming unwieldy if too much information is included in it. For our part, we do not envisage the register as constituting an archive of everything that is known about each coal tip, nor a need for it to contain every piece of information that is required for the tip's safety management. In some cases the volume of such information could be considerable, making the compiling and updating of the register burdensome and leading to the supervisory authority effectively conducting its operations in public. We nevertheless see it as desirable to publish a basic amount of information on risk levels and safety management for the purpose of reassuring the public that tip hazards are being engaged with.
- 3.36 We conclude that particulars of ownership should not be included on the register, for reasons discussed later in this chapter. We suggest that the information on the register should include the location of a tip (preferably by way of a map) and basic information on risk classification and tip management measures, including whether any tip agreements and orders have been made.⁵³ We think that prescribing content by statutory instrument, using the affirmative procedure, is the best way to achieve both clarity and flexibility. The affirmative procedure permits Senedd scrutiny. The list should represent the minimum information which must be held on the register, leaving it open to the supervisory authority to include further information that it thinks it desirable to include.
- 3.37 The statutory instrument should also include requirements for updating content. This might be, for example, when a tip inspection is conducted. Detail of the process to be followed can be left to guidance, but a statutory instrument could lay out the supervisory authority's obligations to update the register where there are specified triggers such as an inspection. In some cases, an obligation may fall on the owner to provide information to the supervisory authority, for example where it is the owner who is carrying out prescribed work.
- 3.38 We agree that wherever possible regard should be had to historic records. We understand from the Welsh Government that they are already working to locate and collate historic data in preparation for the development of the register. We look at the duty to compile a risk assessment and tip management plan in the next chapter, and consider at that point duties to have regard to historic reports. Whether specific reference is required on the register to these reports would need to be decided by the Welsh Government in conjunction with technical experts.
- 3.39 As we have already indicated, we accept that the supervisory authority and others will need to hold information relevant to the tip that is likely to go beyond the contents of the register. We think it should be left to the supervisory authority to determine what

⁵³ Tip management and risk classification are discussed in ch 4. Tip agreements and orders are discussed in ch 5. The information to be provided on the register is discussed further in the section at the end of this chapter on the public accessibility of the register.

information it needs without compelling it to include all such information on the register.

- 3.40 We recommend that the contents of the tip register should be prescribed by the Welsh Ministers by statutory instrument.

Recommendation 8.

- 3.41 We recommend that the contents of the tip register should be prescribed by the Welsh Ministers by statutory instrument.

- 3.42 The next section considers responses to our questions about the process by which tips would be entered on the register, and the provision of a right of appeal against inclusion on the register.

ENTRY OF A TIP ON THE REGISTER

Consultation Question 11: We provisionally consider that (1) the supervisory authority should have a duty and a power to include on the register any tip of which it is or becomes aware; and (2) an owner of land should have a right of appeal against the inclusion of the landowner as owner of land on which a tip is situated; the grounds of appeal should be (a) that the land owner is not the owner of the land in question and/or (b) that there is no tip situated on the land. Do you agree?

- 3.43 Of the 47 respondents who answered this question, 39 (83%) agreed or broadly agreed with both parts of our proposal. Five (10%) disagreed, and three answered “other”.

Views on the creation of a duty and power to include a tip on the register

- 3.44 Reasons for supporting a requirement for the supervisory authority to register a tip of which it is aware included the need to ensure that the register is complete and comprehensive (Bob Leeming). Jacobs noted the importance of the register as a “live” document which should contain new information as soon as it becomes apparent.
- 3.45 Professor Bob Lee agreed that the authority should be able to act independently of owners. But he saw no need to impose both a duty and a power to register on the authority. He thought that it would be sufficient, at the point that the authority becomes aware of information suggesting the presence of a tip, to impose a duty to register on the authority. This would in turn trigger further duties.⁵⁴
- 3.46 Reasons for disagreeing included a broader objection to placing responsibility for tip safety on the supervisory authority rather than on the owner.

⁵⁴ We consider the duties which would follow registration in ch 4.

Discussion

- 3.47 A large majority supported our proposal as a means of ensuring that the register is comprehensive. We agree that the duty does not also need to be expressed as a power, as the creation of a duty will implicitly provide a power to perform it. On reflection, we also think it sufficient for there to be a continuing duty of the authority to register any tip of which it is at any time aware.
- 3.48 We accordingly recommend that the supervisory authority should be under a duty to include on the register any tip of which it is (at any time) aware.

Recommendation 9.

- 3.49 We recommend that the supervisory authority should be under a duty to include on the register any tip of which it is aware.

Views on a right of appeal against inclusion of a tip on the register

- 3.50 CLA Cymru endorsed the provision of a right of appeal on the ground that mistakes were always possible. Any decision which could affect an owner's land and potential liabilities should in their view attract a right of appeal.
- 3.51 Professor Bob Lee saw a clear need for appeal rights, but thought there might be other grounds of appeal, depending on the prescribed contents of the register. He gave the example of the inclusion on the register of the presence of a receptor such as a protected habitat. If that information were considered to be inaccurate, the owner might want to contest it.
- 3.52 Others had observations on the specific grounds of appeal proposed.

Ground a: tip ownership

- 3.53 Keith Bush QC broadly agreed with the proposal, but opposed including an appeal against the recording of ownership on the register. This was because he did not think that it should be assumed that the register would give details of ownership of a tip, which is information available on the register maintained under the Land Registration Act 2002 (save where the title is not yet registered). In his view, entering ownership on the tip register would create a parallel system for recording ownership and the register would have to be amended each time that ownership changed. He proposed in the alternative that there should be a right of appeal against the contents of the register, without making any assumption as to what that content will be.

Ground b: tip identification

- 3.54 Some respondents questioned the need to include a ground of appeal in relation to whether or not a tip exists on the land. Blaenau Gwent thought that the issue should be "relatively non-controversial". Chris Seddon thought that this ground of appeal would be difficult to evidence, particularly in the case of overburden tips or where colliery waste has been purchased as an earth working material by a previous owner. Transport for Wales thought that there could be difficult questions of evidence

necessary to prove that there is no tip situated on the land “particularly around the type and weight of evidence that would be considered sufficient”. They thought that the burden of proof should rest with the appealing party.

3.55 The need for a clear definition of a tip was emphasised in a number of responses. Howard Siddle thought that the ground of appeal could be misused by owners if the definition of a tip were not precisely crafted. Other respondents, including NRW and Network Rail, also emphasised that the definition of a tip would be critical.⁵⁵

3.56 ICE Wales Cymru indicated that there would need to be exclusions:

The register should be comprehensive and inclusive of all coal tips regardless of classification except where such tips have been physically removed, for example tip material has been incorporated into a separate project and engineered in place in line with all relevant legislation, regulations and codes of practice.

3.57 Professor Lee mentioned the need to clarify whether *de minimis* deposits of coal waste would be included in the definition.

Other observations

3.58 Other respondents expressed reservations about the right of appeal. Lee Jordan thought it important that it should be time limited, and suggested a period of 21 days from the time the supervisory authority notifies the landowner. Stephen Smith agreed with a right of appeal to correct any errors on the register, but thought the process of data gathering and cleansing already embarked upon should be robust enough to avoid this. Steve Harford thought that the final decision as to entry onto the register should rest with the authority, as “disputing who owns the land does not remove the fact that there could be a tip present”.

3.59 WLGA (Bridgend and Torfaen agreeing) and Blaenau Gwent thought that it was unlikely to be the fact of the entry on the register that was contentious, but the details contained on the register. This is because these would contribute to a decision on whether the tip should be designated as higher risk.⁵⁶

3.60 Huw Williams noted that the two proposed grounds of appeal raised different issues. He thought that identification of the landowner was a question of law best determined by a devolved tribunal. The question of whether there was a tip situated on the land was one more suited to the Planning Inspectorate.

Discussion

3.61 A large majority of respondents were supportive of our proposals for a right of appeal against inclusion of a tip on the register. We agree that it is important to provide for a right of appeal, given that identification of land as containing a tip is likely to be disadvantageous rather than advantageous to the owner and particularly in view of

⁵⁵ The definition of a tip to be adopted in the new regulatory regime is examined in ch 7.

⁵⁶ A power to designate certain tips as higher risk in the new regulatory framework is discussed in ch 6. This includes consideration of whether there should be a right of appeal against a decision to designate.

our recommendation that there should be a sanction for failure to notify of the existence of an unregistered tip.⁵⁷

- 3.62 As already mentioned, we are no longer of the view that the register should include particulars of tip ownership. This is essentially for the reasons advanced by Keith Bush QC: the information is generally available from the publicly available register maintained by HM Land Registry; duplicating it on the tip register would cause unnecessary additional work for the supervisory authority and landowners. This removes the need for an appeal against the erroneous inclusion of a person as owner. If that view is accepted, the only ground of appeal that will be required in relation to entry of land on the register will be as regards the identification of it as containing a tip. We agree that in most cases the issue should be uncontroversial; whether or not a tip exists will be a technical matter, but anything that falls within the definition of a tip should be on the register. The issue of the definition of a tip is discussed further in chapter 7.⁵⁸
- 3.63 We do not see a need for further grounds of appeal. Any wider right of appeal against the contents of the register could engender disputes over technical detail.⁵⁹ We agree that appeal rights should be time limited and should not be permitted to delay urgent work.
- 3.64 Our consultation question proposed that “an owner of land” should have the right of appeal. Having given further thought to the definition of an “owner” for the purposes of the new legislation, we now recommend that the right of appeal should attach more broadly to a person aggrieved by the entry of a tip on the register. This would include an owner or occupier of all or part of the land identified in the disputed register entry, whether or not they fall in the category, discussed below, of persons under a duty to notify an unregistered tip. Unmeritorious appeals could be deterred if the appellate body had power to award costs against the losing party. The issue of who should hear the appeals is discussed below in chapter 8.

⁵⁷ See the next section of this chapter for discussion of a duty to notify. For further discussion of avenues of appeal, see paras 8.51 to 8.60 below.

⁵⁸ We note in ch 7 that the definition is likely to include a minimum size threshold, with the result that insignificant accumulations of coal waste are unlikely to be included. We expect appeals to be rare. We can envisage situations in which the issue might be complex, either as regards the quantity or the distribution of the spoil, or because the coal is mixed with other minerals. The issue could be of sufficient economic importance that interested parties should have the ability to have it tested in an appeal.

⁵⁹ The issue of appeals against technical decisions is discussed further in relation to a right of appeal against designation of a tip in ch 6.

Recommendation 10.

- 3.65 We recommend that an owner or occupier of all or part of land identified in an entry on the tip register should have a right of appeal on the ground that there is no tip situated on the land.
- 3.66 We recommend the exercise of the right of appeal should not be permitted to delay urgent work.

- 3.67 Our next consultation question considered the extent of any duty to notify the supervisory authority of the existence of a tip.

Consultation Question 12: We seek views on whether an owner of land should be under a duty to notify the supervisory authority of any tip of which the landowner is or becomes aware situated on land owned by the landowner, unless the landowner has reason to believe that it has already been registered.

- 3.68 Of the 50 respondents who answered this question, 39 (78%) agreed or broadly agreed with the suggestion that a landowner should have a duty to notify the supervisory authority of a tip in the circumstances set out in the consultation question. Those who broadly agreed expressed some caveats or had additional observations. Five respondents (10%) disagreed. Six answered “other”.

The nature of the duty on the landowner

- 3.69 Keith Bush QC formulated his agreement in the following terms:

This is a reasonable idea, as land-based activities may reveal the presence of a previously unknown tip. The nature of the duty should be to notify the authority if the owner has reasonable grounds to believe that there is a registerable tip on land in which he or she has an interest, unless the tip is already registered correctly.⁶⁰

- 3.70 Chris Seddon warned that care should be taken in the definition of when a landowner “becomes aware”. He posed the example of a landowner who conducts a small scale ground investigation for foundations for a residential buildings and receives a report that material encountered is suspected to be colliery spoil, but a desk study shows that no tip has been identified on the land. He questioned the nature of the duty in this situation. It could be for the owner to notify the possibility of there being a tip on the land, or to carry out additional investigation before informing the authority. Alternatively, there could be no duty at all where the existence of the tip had not been confirmed.
- 3.71 Dr John Perry doubted whether the landowner would be sufficiently competent or experienced to recognise a tip. He thought it would be better for an independent body to prepare the register and consult with the owner.

⁶⁰ Keith Bush QC’s response has been translated from the Welsh original.

3.72 Jane Iwanicki disagreed with the duty as possibly onerous:

Tips are historic features and may not be within the corporate memory of the current owners or even on the public record. Owners should not be penalised for not having knowledge of such features - how do you gauge "awareness" of whether a feature is an old coal tip or comprised of other materials?

3.73 In contrast, the Coal Action Network believed that the duty should be an active duty on the part of the landowner, to incorporate checking the land for signs of a coal tip.

3.74 Howard Siddle thought that the duty should be extended to include a duty of disclosure to the supervisory authority of the existence and availability of previous reports on tips in their ownership, whether or not commissioned by them, to ensure that crucial information is not lost over time. The duty of disclosure should extend to reports of dangerous occurrences on the tip.

Reasonable belief that the tip is already registered

3.75 Caerphilly thought that this exemption should be removed entirely on the ground that it was too vague. They thought that there should be a duty to check the register. Professor David Petley also proposed a proactive duty on the landowner to check whether the tip has already been registered. Keith Bush QC's reformulation of the test discussed above would provide this element.

3.76 WLGA (Bridgend and Torfaen agreeing) and Neath Port Talbot noted that even with maps of tip boundaries being made available to landowners, it may be difficult to prove that a landowner has "reason to believe" that the tip on their land has been registered, especially if it is adjacent to a tip which is already registered. Neath Port Talbot were of the view that it would be more effective for the supervisory authority to agree the baseline data and notify the landowner.

Third party notification

3.77 The Coal Action Network thought there should be an easily accessible process for members of the public to report a suspected coal tip which might fall on someone else's land. It would then be for the authority to assess the report. ICE Wales Cymru suggested that the duty to notify should extend to third parties who become aware of an unrecorded tip:

As an example, a consultant completing a desk study for a new scheme may, through review of desk study sources, become aware of a tip [of which] neither the supervising authority nor the landowner nor the tip owner is aware.

3.78 Network Rail suggested the introduction of a mechanism rather than a duty by which third parties can inform the authority of the suspected presence of a tip, leaving the supervisory authority to investigate and to add the site to the register if appropriate.

Need for minimum size

3.79 Dr Peter Brabham observed that there are thousands of small tips associated with individual mine adits throughout the South Wales valleys. He thought that the duty should be formulated to exclude tips below a certain size. Philip Thomas also thought

that the duty should attach only to a tip of a significant size, and that the duty should stipulate a threshold size.

Duties at the time of conveyance

- 3.80 Some respondents noted the need to make provision for changes in ownership. Rhondda Cynon Taf thought that landowners should be under a duty not only to notify the presence of a tip, but also to notify any changes of ownership of the land. Dr John Perry suggested that the conveyancer should be under a duty to check the register for entries. Paul Connolly thought that, in the same way that home sellers are under a duty to make buyers aware of defects during a house sale, landowners should be required to notify the buyer as to whether they believe a tip on the land to be registered. Kim Moreton also thought disclosure at the point of conveyance to be essential.

Enforcement difficulties

- 3.81 While there was strong support for the imposition of a duty, concerns were expressed about how difficult it might be to enforce the duty. NRW and Monmouthshire stressed the need for measures to make landowners aware of their responsibilities. They also questioned landowners' incentive to comply, as registration could create burdens without any corresponding benefits. Blaenau Gwent commented that it was "going to be difficult to enforce or expect landowners to come forward with information that is going to cost them money or blight their land/property".

- 3.82 Joel James MS thought that, because the safety to the public from coal tips is paramount, there should be no fees on landowners to register, as this might discourage them from doing so. Richard Arnold urged simplicity:

If it becomes too complex and time-consuming it will defeat the objective of having a definitive register. Landowners will quickly determine if it becomes counter-productive to get involved.

- 3.83 NRW warned about the scope for disputes with landowners, who might disagree with mining records or the authority's findings as to the presence of a tip.
- 3.84 Bob Leeming and the Mineral Products Association both looked at penalties as key to enforcement. Bob Leeming thought it important that it should be an offence to fail to comply with the duty to notify.

Application to higher risk tips only?

- 3.85 One suggestion to avoid enforcement difficulties came from WLGA (Bridgend and Torfaen agreeing), who thought that it would work better to attach the duty to higher risk categorisations – for example, under the provisional classification system applied, to category C and D tips. They pointed to the experience of NRW in dealing with registrations of septic tank and private sewage systems, under which low risk systems are registered free of charge.⁶¹

⁶¹ See Natural Resources Wales, Register your septic tank of small sewage (package) treatment plant, <https://naturalresources.wales/permits-and-permissions/water-discharges-and-septic-tanks/register-your-septic-tank-or-small-sewage-treatment-plant/?lang=en>. Septic tanks and small sewage (packet) treatment

Reasons for opposing a duty and alternative approaches

3.86 Huw Williams considered enforcement difficulties and disincentives to comply and concluded that he opposed the creation of a duty altogether:

If such a duty backed by sanctions were to be introduced, the question arises as to what steps would be required to draw the attention of landowners throughout Wales to such an obligation. Such a duty may actually have a positively disincentivising effect on landowners to examine their land too closely if signs of historic unsuspected tipping start to manifest themselves.

3.87 He thought it preferable to give the supervisory authority the comprehensive powers of entry and investigation it would need, and to use new technologies such as drone flying and satellite mapping to establish the presence of a tip.

3.88 NRW, although broadly in agreement with the creation of a duty, thought that it would be a better solution for the authority to be as proactive as possible in establishing the existence of a tip. This could be achieved, for example, through the use of remote sensing, in order to rely as little as possible on a duty to notify.

3.89 CLA Cymru also expressed doubts, emphasising the need for the duty to arise in as narrow a category of cases as possible. They agreed that a “belt and braces” approach required the existence of the duty, but thought that in practice there should be very few tips falling under the duty given the extensive work already undertaken by the Coal Tip Safety Task Force to identify tips since the Tylorstown slip. As coal tips were a legacy issue, this should in their view amount to a one-off exercise.

Discussion

3.90 A strong majority of respondents favoured an owner’s duty to notify, although some doubts were expressed. We agree that the duty may arise in only a very small number of cases, but we think that it remains important. An awareness of the duty should have an effect on landowners’ behaviour. For example, a developer building a housing estate on land which is then found to contain tip material should report the discovery so that it comes into the public domain before individual homeowners acquire interests in the properties built on the site.

3.91 While it is true that there may be disincentives to register, we think that, as a matter of policy, it is in the public interest to ensure that the register includes previously unknown tips as well as tips where mining operations have recently ceased.⁶²

3.92 We agree that there could be difficulties in establishing that a person has “become aware” of a tip. We welcome Keith Bush QC’s suggestion and recommend that the

plants must be registered with Natural Resources Wales. In order to qualify for free registration, the system must meet certain criteria. Those which do not meet the criteria, for example due to larger discharges or proximity to a protected site, indicating that the system poses a higher risk of pollution, require a bespoke permit for which a charge is made.

⁶² There are already duties arising from arts 12 and 13 of the Mineral Waste Directive (Directive 2006/21/EC of the European Parliament and Council of 15 March 2006 on the management of waste from extractive industries). These provide for the post-closure phase of a mining waste facility where the facility was in operation on or after 1 May 2008. For further consideration of the Mining Waste Directive, see Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 5.3 to 5.12.

duty to notify should only arise where there are reasonable grounds to believe that the land contains a tip. We accept that, as with any imprecise element in the formulation of a duty, there will be borderline cases of the sort instanced by Chris Seddon. We envisage that, in a case of doubt, it will be open to a landowner to make a precautionary notification which will discharge the putative duty. We do not favour a lower threshold such as “reasonable cause to suspect”, which might engender anxiety and stimulate over-cautious precautionary notifications.

- 3.93 We agree, in the light of our conclusion below at paragraph 3.137 that particulars of tips should be publicly available on the register, that the proposed defence based on reasonable belief that the tip has been registered is unnecessary. A person who discovers a tip will be able, in accordance with our recommendations, to search the register for it. The duty should therefore apply where the tip is not already registered.
- 3.94 We think that it would be excessive to impose the duty on any person who discovers grounds to believe in the presence of a tip on land with which they have no connection. We consider instead that the duty should apply to a person having a substantial degree of connection with the land, and that an acceptable and workable indicator of such a connection is ownership of the freehold or of a leasehold granted for a term of more than seven years. We do not think it should attach to any person in occupation of the land or to a third party.⁶³ Where there are multiple interests in the land, only those who come to have reasonable grounds to believe in the existence of a tip will be vulnerable to prosecution. We agree that it is important for third parties to be able to notify the authority if they suspect the presence of a tip, but do not think that a formal process for notification is required for this. We think it better to have an accessible process to allow concerns to be reported to the authority informally, for example by the provision of a telephone number or an online form.
- 3.95 Responses also indicate concerns about liability arising where a tip is too insignificant to warrant inclusion on the register. This difficulty may be alleviated by the definition of a tip to be adopted by the new regime, discussed in chapter 7. The duty to notify would only arise where there were reasonable grounds to believe that any tip material discovered on land crossed the threshold of the definition.
- 3.96 We do not see a need for any other criminally sanctioned duties to notify. The aim of our recommendation is to combat the concealment of possibly dangerous tips rather than to ensure the detailed accuracy of the register. The need for a duty to answer requests for information and provide documents of relevance to tip safety to the supervisory authority is discussed in the next chapter. In the light of our decision not to recommend the inclusion of particulars of ownership on the tip register, we do not see a need for a duty to notify the authority of changes of ownership. We suggest instead that tip agreements and orders could contain a standard term requiring notification to

⁶³ We consider the position of tenants under agricultural holdings or farm tenancies at paras 5.30, 7.48 and 7.67 below. We do not regard the likelihood of unknown coal tips being discovered on land held under such tenancies as sufficiently great to warrant imposing the notification duty on agricultural holdings or farm business tenants as such.

the supervisory authority of an impending change of ownership or cessation of occupation.⁶⁴

- 3.97 We do not consider that it would be helpful to apply the duty to higher risk tips only. Additional technical expertise would be likely to be required to determine not only whether land contains a tip, but also whether the tip is higher or lower risk. It is also preferable for the duty to notify to be consistent with the requirement that the tip be included on the tip register.⁶⁵ Moreover, there is a public interest in the supervisory authority being aware of the existence of a tip which, even if presenting as lower risk, might require preventive maintenance.
- 3.98 Finally, we agree that there must be a penalty for breach of the duty in order to give it practical effect. We find it simplest to make breach of the duty a summary offence, punishable by a fine. We trust that prosecutions would be rare or non-existent, given the possibility of a precautionary notification. The provision is intended to foster a culture of openness in the probably rare event that a landowner discovers the presence of a previously unrecognised tip. We expect such tips to be small in scale, unproblematic and few in number, but the range of available fines, which we leave it to the Welsh Government to determine, would need to reflect a range of culpability from apathy to concealment for commercial gain.⁶⁶
- 3.99 We also recognise that the duty to notify should not come into effect as soon as the register is created. Those who come under the duty will need a period following its creation to establish whether a tip situated on their land has been included on it. It is also likely that steps will be needed to raise public awareness of the duty. For this reason, it will be desirable to provide a transitional period before the duty to notify arises. Similarly, those who discover a previously unknown tip will need a period of time within which to notify it.
- 3.100 We recommend accordingly that it should be a summary offence, punishable by a fine, for an owner of the freehold or of a leasehold interest in land granted for more than seven years, who has reasonable grounds to believe that the land contains a coal tip not already on the register, to fail to notify the supervisory authority of the existence of the tip.

⁶⁴ We discuss searches of the tip register at the time of a conveyance at paras 3.133 and 3.134 below. Tip agreements and orders are considered further in chs 5 and 6.

⁶⁵ The definition of a tip is considered in ch 7.

⁶⁶ For discussion of the factors to be considered in assessing whether there is a need for a criminal intervention in a regulatory framework, and the need for a fair process, see the proposals in *Criminal Liability in Regulatory Contexts* (2010) Law Commission Consultation Paper No 195, paras 3.137 to 3.143.

Recommendation 11.

3.101 We recommend that it should be a summary offence, punishable by a fine, to fail to notify the supervisory authority, within a prescribed time limit, of the existence of a coal tip particulars of which are not included on the tip register.

3.102 We recommend that the offence should be capable of being committed by

- (1) a freehold owner of land containing the whole or part of such a coal tip; and
- (2) the owner of a leasehold interest in such land originally granted for a term of more than seven years

who has reasonable grounds to believe that the land contains all or part of a coal tip.

SHOULD THE INFORMATION ON THE TIP REGISTER BE PUBLICLY ACCESSIBLE?

Consultation Question 13: Do you think that the information in a tip register should or should not be publicly accessible? Are there any particular categories of information that should not be published?

3.103 Fifty-two respondents answered this question, with 42 (81%) agreeing that information should be publicly accessible. Five (10%) thought that it should not, and the remainder answered “other”.

Reasons the register should be publicly accessible

3.104 Respondents in favour of making the register publicly accessible relied most commonly on the need to promote public trust, accountability and transparency. As the Coal Action Network put it:

We think it is vital that the tip register be made open-access and user-friendly for public trust and accountability – particularly for the communities that have suffered in the shadow of coal tips, with little recourse to action.

3.105 Professor Bob Lee commented that “anything other than a public register would run counter to the spirit of existing Welsh legislation”. He also thought that risks of property devaluation were probably already “baked in”:

I do not accept that there will be great likelihood of blight, which discounts considerable local and lay knowledge in the communities in question, though I can see that insurers might make use of any register and it would be difficult to guard against this if, as it should be, this information is available to the public.

3.106 Some emphasised that knowledge empowers those who may be affected by a tip. Keith Bush QC acknowledged the potential impact of the presence of a tip on the register on the value of land, but said that:

As the whole purpose of the regime is to safeguard people and property against the consequences of unstable tips, the public should have a right to know about the

presence of tips so that they can ask relevant questions about the condition of those tips.

- 3.107 Some respondents relied on parallels with other types of register which were open to the public. Dr John Perry thought that a buyer of land should be able to consult the register in the same way as a flood map. Huw Williams noted the similarity of the information to the information contained on other public registers such as those relating to contaminated land.
- 3.108 Specific uses for the information on the register were also cited in support of public access: risk assessment to inform the design of new infrastructure on the railway network and the risk management process for insurers of land (Network Rail); university research projects (Dr Peter Brabham); the safety of drinking water and private water supplies (Dŵr Cymru/Welsh Water); and guidance on safe development and the avoidance of destabilising activities (Howard Siddle).

Reasons the register should not be publicly accessible

- 3.109 The most prominent reason given against making the contents of the register public was the risk of “blight” on properties adjacent or near to high risk tips, with an impact on land values and property prices and on the cost of insurance. There could also be an impact on properties built on remediated sites. These views were emphasised by Blaenau Gwent, Caerphilly, Merthyr Tydfil and Neath Port Talbot in opposing public access to the register.
- 3.110 In addition, there were concerns about causing unnecessary alarm to the public. ICE Wales Cymru agreed with accessibility, but warned that “cognisance should also be taken with regard to the publication of data that could heighten public anxiety without due cause”.

Concerns expressed despite agreement

- 3.111 Other respondents, including NRW, Philip Thomas and Richard Arnold, agreed with public accessibility, but also expressed concern about the potential for blight. WLGA (Bridgend and Torfaen agreeing) expressed the same concern and answered “other”. Philip Thomas suggested a compensation scheme for loss of property value. Stephen Smith observed:

This is a difficult area (for instance adoption of Part 2A of Environmental Protection Act 1990 had a lengthy delay over issues such as blight), but, on balance, I feel access to the register would be beneficial – unlike contamination buried in the ground, the presence of a tip is very visible.

- 3.112 The Law Society highlighted the impact on home insurance, and the need to consult with home insurers. Insurers’ responses to recent tip safety incidents would give an indication of possible effect.

Property information searches

- 3.113 The Law Society, WLGA (Bridgend and Torfaen agreeing) and NRW raised the importance of property information searches in considering public access to the register. These already investigate Coal Authority records of coal mine assets, flood risk areas and landfills. WLGA suggested that the standard searches required at the

time of a conveyance could be extended to include a search of the tip register. The Law Society proposed that the information on the register should be included as part of the standard CON29M (Official Coal Mining) search without requiring an additional question, as this would necessitate an additional fee. In their view, risks associated with tips, as with subsidence, would be likely to require specialist advice outside the retainer of a solicitor.⁶⁷

Categories of information that should not be publicly accessible

3.114 A number of categories of information were identified by respondents as requiring exclusion from the tip register.

GDPR/personal

3.115 Many respondents noted the need for the register to conform with GDPR requirements. WLGA (Bridgend and Torfaen agreeing) and Neath Port Talbot identified a need to ensure that personal information about landowners was compliant with GDPR requirements. NRW suggested that the prescribed contents of the register (discussed above at paragraphs 3.25 to 3.41) could stipulate that, for example, bodies corporate and associations should be identified, and provide a “private landowner” status to be applied for public release. Professor Thomas Watkin also identified a need to exclude any record of past proceedings against owners. Rhondda Cynon Taf and Vikki Howells MS thought personal information beyond ownership such as in relation to calculations and costings should be excluded. Kim Moreton suggested the exclusion of commercially sensitive lease information where a business is in place on the land.

3.116 In contrast to concerns raised about including information about ownership, CLA Cymru pointed out that information on ownership is publicly available from the Land Registry. They saw no reason to exclude details of the owner.

Risk categorisations and inspections

3.117 Many respondents thought that it would not be appropriate to include information relating to risk assessment and inspections on the register. Howard Siddle’s view was that the information on the register should be factual and that opinions on security should remain on reports lying behind the register. Similarly, CLA Cymru thought that details relating to remediation works, contractual details, and any appeals should be confidential. Steve Jones of the Emergency Planning Department at Pembrokeshire County Council thought that the risk rating should be confidential. Transport for Wales thought that risk categorisations with implications for third parties needed to be managed sensitively. Professor Bob Lee saw a distinction between information on the face of the register and background documents underpinning registered information:

For example, although inspection frequencies could be registered, inspection reports might not be - in the interest of keeping the register of thousands of tips relatively accessible.

3.118 Lee Jones thought that:

⁶⁷ A search of the register could reveal, for example, the existence of a tip order. See para 3.129 below.

The ongoing determinations of the authority in relation to tip stability should not be published as these would need to be reviewed on a regular basis due to expected changes in the tip characteristics.

He thought that the better approach would be to use “the proper communication routes” to release the necessary information to those likely to be affected in the event that a tip was deemed an imminent danger to the public.

3.119 In Rhondda Cynon Taf’s view, tip inspections could appear on the register as long as there was a standard uniform approach to inspection and classification.

3.120 Professor Bob Lee thought that inspection reports and other documents underpinning risk ranking could be accessed by Freedom of Information Act 2000 and/or environmental information requests, and he could see no case for exempting them.⁶⁸ As considered above, in his view blight would be avoided as local knowledge of tips meant that any impact on property values was already “baked in”. He also observed that a successful new regulatory framework should promote greater tip safety, thus offsetting any commercial disadvantage of registration.

3.121 In contrast, Ove Arup and Partners specified that the register should be sufficiently comprehensive to include information from which a risk based assessment could be made, as well as set out the consequences of instability or tip failure.

Enforcement information

3.122 Lee Jones also thought that ongoing considerations relating to proposed enforcement actions should not be accessible to the public, but could go on the register once determined and actioned. This could involve, for example, served maintenance and remediation orders.

Security-sensitive information

3.123 NRW and Steve Jones of the Emergency Planning Department at Pembrokeshire County Council both cited a need to keep information about certain physical attributes of a tip confidential where these could be exploited by those with hostile intent. They thought that some characteristics of a tip, for example a liquid tip, could reveal vulnerabilities and open up the potential for malicious acts capable of causing immense damage and risk to life. NRW drew our attention to several Information Commissioner decisions which have upheld refusals to release sensitive material relating to reservoir safety.⁶⁹ The Reservoirs Act 1975 provides that information on the reservoirs register may be withheld where its inclusion would be contrary to the interests of national security.⁷⁰

⁶⁸ An environmental information request is made pursuant to the Environmental Information Regulations SI 2004 No 3391.

⁶⁹ Freedom of Information Act 2000, Environmental Information Regulations 2004, Decision Notice Ref FER0899827, <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618059/fer0899827.pdf>; Freedom of Information Act 2000, Environmental Information Regulations 2004, Decision Notice Ref IC-48075-B0D4, <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618499/ic-48075-b0d4.pdf>.

⁷⁰ Reservoirs Act 1975, s 2(2A).

Type of access

3.124 Some respondents looked more closely at the concept of public access. NRW, as discussed above, stressed the quality of the access, requiring the use of the best digital services. ALGAO thought that it might be appropriate to provide different levels of access for different user groups, for example stakeholders and the public. They also thought that where information had been provided by a third party, the originating body should be consulted on copyright, access or usage restrictions prior to publication.

Discussion

3.125 There was strong majority support from respondents for making the tip register public. We agree with the reasons expressed. As already mentioned, we consider that its contents should be governed by whether there is a public interest in particular information being publicly accessible.⁷¹ The register should not attempt to be a complete database of all information that exists about tips, nor should it be so comprehensive that the supervisory authority in effect performs its entire role in public. Responses on the issue of access to the register have assisted us in coming to this view.

3.126 If that recommendation is followed, there should not be a need for a closed section of the register or for tiers of access to it. Instead, we believe that the supervisory authority should be trusted to acquire that information necessary for the effective performance of its functions and to share it with those having a legitimate interest in receiving it, but that process should take place outside the register.

3.127 We understand the concerns expressed about blight and unnecessary alarm but these need to be set in context. The purpose of the new regulatory framework, including the tip register, is to minimise risk through detailed prescription of requirements for inspection, maintenance and remediation. These functions will be considered in detail over the next three chapters of this report. Where public reassurance is needed because of a higher risk categorisation, entry on the register may need to be accompanied by additional public information as to the work required on the tip and the timetable for its completion. But, again, this does not invariably need to be provided through the register. The Welsh Government can work with the supervisory authority and local authorities to provide additional information to local residents and with insurers to ensure that they understand the new system is about proactive work to ensure safety.

3.128 We agree that the information on the register should be kept simple and factual. Historic records, for example, would be documents of which the supervisory authority might hold copies, and which might also be available elsewhere, but would add considerably to the bulk of the register if also available on it. Such records could be appended to the register as background information underpinning the register rather than appearing on the face of it. Including complex or lengthy technical reports would present information in an inaccessible form. In addition, some records, such as older tip records, could be misleading and cause unnecessary alarm if published officially by

⁷¹ See para 3.34 above.

the authority; they might, for example, record earlier safety concerns which have since been rectified.

- 3.129 We have proposed above that the information on the public register could cover location and basic information on risk classification and tip management measures. We suggest that this could include the following: a summary of the report of the initial inspection that we have recommended at paragraph 4.32 in language accessible to the non-specialist; the risk classification assigned to the tip (including whether it has been designated in accordance with our recommendation at paragraph 6.70); and a copy (or accessible summary) of the tip management plan that we have recommended at paragraph 4.63. Other information that could be included is the date of the last inspection, the date of the next scheduled inspection, summaries of subsequent inspection reports, information on any planned works and whether any tip orders are in force. Such information must necessarily be based on a uniform approach to inspection, tip management and risk classification, discussed further in the next chapter.
- 3.130 We do not think that the whole of the technical reports leading to the categorisation should be included. We also agree with respondents that some information needs to be excluded from public view; for example contractual details relating to works to be carried out, cost calculations, appeals, enforcement activities, and sensitive security information. We see the guiding principle here as the desirability of demonstrating to the Welsh public that the supervisory authority has the problem of coal tips in hand, and is confronting it.
- 3.131 The information that the authority will need to hold is likely to be more complex than that required for the purposes of public reassurance. We take the view that the authority should adopt an open approach to sharing information with other authorities, including the emergency services, Local Resilience Forums, local authorities and organisations involved in specialist work such as environmental protection, historic environment conservation and archaeology. This would need to include those responsible for maintaining Historic Environment Records and the National Monuments Record of Wales.
- 3.132 By way of comparison, other regimes requiring an asset register have varying approaches to public access. The flood risk register, for example, must be available for inspection, but is only required to contain a list of structures or features likely to have a significant effect on a flood risk in the area. There is an additional duty to keep a record containing information about the ownership and state of repair of the structure or feature, but it is left up to the Local Lead Flood Authority to decide whether to make the record available for inspection. The intention behind the legislation was to provide the authority with flexibility in determining the way information was recorded and the amount of detail included.⁷² Registers of reservoirs in Wales must also contain information specified in regulations, but the list of

⁷² See Flood and Water Management Act 2010, s 21(1) and Department for the Environment, Food and Rural Affairs, *Information Note on the Lead Local Flood Authority Duty to Maintain a Register* (2011) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/218672/Ifa-register-infonote.pdf. The Act provides a power to make regulations to provide for the content of the register and record: s 21(2). It also provides a power to make regulations to provide for information of a specified description to be excluded from the register: s 21(4).

prescribed information is much more extensive. The regulations require NRW to keep the register at their principal offices.⁷³

3.133 We agree that standard conveyancing searches should include a search of the tip register. Existing searches may reveal the presence of a coal tip, but the searches conducted by particular conveyancers may vary. Searches are not compulsory unless required by a mortgage lender. A CON29M search, offered by the Coal Authority, provides information on “surface hazards related to coal mining”. Local authority searches cover a search of the local land charges register (LLC1) and replies to the CON29 standard set of enquiries. CON29 enquiries relate to public highways, proposals for new roads, rail schemes or planning decisions that could affect the property, outstanding statutory notices, breaches of planning or building regulations, compulsory purchase orders and environmental factors such as whether the house stands on contaminated land.⁷⁴

3.134 Though these searches could reveal the presence of a coal tip, it would be more straightforward, once the register is established, for conveyancers to conduct a search of the register itself. We consider it highly desirable that a search of the tip register should form part of a standard conveyancing search. We leave it to the Welsh Government to investigate the form of search that would fit most effectively into existing provisions. Whether it would be most appropriate to include a search of the register as part of the CON29M search, directed to the Coal Authority, or part of the CON29 enquiries, directed to local authorities, will require further investigation.

3.135 We agree with suggestions about quality of access to the register, and the need to ensure that the information on the register can be readily understood, but leave it to Welsh Government to work out the best approach. It may be that this can be coordinated with the development of other digital services.

Recommendation 12.

3.136 We recommend that the prescribed content of the tip register should be governed by whether it is in the public interest for particular information concerning coal tips to be publicly available.

⁷³ Reservoirs Act 1975 (Capacity, Registration, Prescribed Forms, etc.) (Wales) Regulations SI 2016 No 180 (W 37), sch 1, paras 1 to 10 prescribe the information to be given in Welsh registers of large raised reservoirs. The list includes location of the reservoir, the name and address of the undertaker, summaries of certificates or reports required by statute and whether the reservoir has been designated as high risk. Natural Resources Wales have told us that most information requests concern location, ownership and the date of the last and next inspection.

⁷⁴ Under the Infrastructure Act 2015, responsibility for local land charges registers in England and Wales passed to HM Land Registry in a phased approach. Local authorities continue to respond to CON29 enquiries. See <https://www.gov.uk/government/publications/hm-land-registry-local-land-charges-programme/local-land-charges-programme>.

Recommendation 13.

3.137 We recommend that there should be public access to the tip register, providing an accessible summary of relevant information.

Recommendation 14.

3.138 We recommend that the Welsh Government engages with the Law Society, the Coal Authority and local authorities in Wales with a view to establishing a search of the tip register as part of a standard conveyancing search in relation to property in Wales.

Chapter 4: Tip inspections, risk assessments, tip management plans and risk classifications

- 4.1 Our consultation paper explained that one of the main problems with the Mines and Quarries (Tips) Act 1969 was the absence of a general duty to inspect all tips. The 1969 Act was premised on the view that disused tips were a residual problem, that they were less likely to be dangerous, and that any problems of instability could be dealt with by local authorities. The mechanism provided by the 1969 Act to protect the public was a local authority power to gain access to information and enter land to carry out exploratory tests to determine whether a disused tip “is stable and whether any instability is or is likely to constitute a danger to members of the public”.⁷⁵
- 4.2 Some local authorities had told us that they interpreted the power as requiring them to show cause to suspect instability before investigating. This created a “Catch 22” situation in which authorities were only able to investigate if they had evidence of instability which they could only obtain by investigating. Others interpreted the power more broadly.⁷⁶
- 4.3 Local authorities had also told us that they wanted greater clarity around their powers to go on site to carry out an inspection. They did not want to be tied to a need to justify their intervention by reason of a perceived danger to the public. They also wanted the duty to be accompanied by a standardised approach to risk classification.⁷⁷ The Coal Authority team undertaking work for the Welsh Government as part of the Coal Tip Safety Task Force also told us that they thought that there were clear benefits in the adoption of a standardised process of inspection and reporting founded on a clear definition of what is to be checked. This could be supported by the use of a single reporting format and uniform training standards for inspectors.⁷⁸
- 4.4 For these reasons, we provisionally proposed that the supervisory authority should have a duty to inspect all tips following entry on the register. We explained that information from the work commissioned by the Welsh Government since February 2020 could be used in some cases as a first inspection. We also suggested that the supervisory authority should have a power to delegate the inspection function to other appropriately qualified bodies such as local authorities if the number of inspections required within a given time was not practicable. This could apply, for example, to lower risk tips.⁷⁹
- 4.5 Drawing on the views of stakeholders and aspects of the model provided by the regulatory regime for reservoirs, we envisaged that the purpose of the initial inspection

⁷⁵ Mines and Quarries (Tips) Act 1969, pt 2; Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 4.36 to 4.38.

⁷⁶ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 7.11.

⁷⁷ Above, para 7.55

⁷⁸ Above, paras 8.29 and 8.30.

⁷⁹ Above, para 10.42.

would be to undertake a risk assessment for the tip and to design a tip management plan. The risk assessment would be based on the physical profile of the tip and the receptors that would be impacted in the event of a tip failure. In this way, both the likelihood and consequences of failure would be considered. We suggested that data collection could include factors related to a range of hazards rather than solely to stability. The tip management plan would be specific to the tip or cluster of tips. It would include specifications such as the frequency of inspection, the maintenance and remediation work required and a timescale for any work to be completed.⁸⁰

- 4.6 We thought that it would be appropriate, at a general level, to give Welsh Ministers a power to prescribe the matters to be included in a risk assessment and tip management plan. We envisaged that it would be open to the supervisory authority to draw up the plan itself, or arrange for the plan to be prepared.⁸¹
- 4.7 Accordingly, we provisionally proposed that the supervisory authority would be under a duty to arrange for the compilation of a risk assessment and tip management plan for any tip included on the tip register, and that there should be a power for Welsh Ministers to prescribe the matters to be included by statutory instrument. We also provisionally proposed that the risk classification of the tip should have regard to the risk of instability of a tip, and the consequences of a slide of spoil, and asked for views as to whether, in addition, classification should have regard to risks of pollution, combustion and flooding.
- 4.8 The following sections discuss responses on these aspects of the proposed new regulatory framework.

DUTY TO INSPECT

Consultation Question 14: We provisionally propose that, upon the entry of a tip onto the register, the supervisory authority should be under a duty to arrange an inspection of the tip unless it considers that a sufficiently recent and thorough inspection has been conducted. Do you agree?

- 4.9 Of the 50 respondents who answered this question, 45 (90%) agreed. One respondent (2%) disagreed and four replied “other”.

Reasons for agreeing with a duty to inspect

- 4.10 Reasons put forward by respondents for agreeing with this proposal included an appreciation of the contribution an across-the-board duty of inspection would make to public confidence in tip safety. The importance of establishing a consistent and high quality baseline was also emphasised. This would allow identification of the appropriate steps to be taken to ensure safety and provide a reference point against which to review future inspections. Kim Moreton called it:

⁸⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.44 to 10.46.

⁸¹ Above, paras 10.47 and 10.48.

a contemporary “record of condition” which would enable a baseline to be established against which risks due to deterioration or unforeseen future events could be modelled.

- 4.11 Jacobs UK Ltd (formerly Halcrow) thought the “on entry” inspection would need to be a “high level assessment of the tip to accurately classify the tip, which will drive the actions going forward”. They also identified the drain on resources which results from a failure to take this initial step:

A lack of or poor baseline data is likely to make interpretation of future inspections more difficult, time consuming and at greater cost.

Content of initial inspection

- 4.12 In terms of the content of the first inspection, some respondents emphasised the need for clear guidelines and expectations. In NRW’s words, “a clear standard of what an acceptable inspection is” would be required. Cllr Julie Edwards referred to the creation of a “tick list” to ensure that all tips are inspected to the same standard without exception. In relation to how to approach the inspections, Dr Peter Brabham suggested that teams could perhaps use imagery first, followed by a walk-over survey.
- 4.13 Howard Siddle emphasised the importance of historical tip records. He thought that the initial inspection, subsequent risk assessment and management plan, however thorough, would count for little if the inspector had no previous knowledge of the history of the tip.⁸² In his view:

Registration needs to be preceded by a review of previous reports so that the history of the tip, and previous instability and remedial measures can be understood and critically reviewed during the inspection and inform its conclusions Previous reports, if available, will contain factual information on, inter alia, design factor of safety on which to assess the degree of stability of tip slopes An inspection and its report will need to conclude with the inspector’s opinion on security of the tip which should be based not only on their inspection but also design criteria, if any, such as factor of safety of slopes all of which will be recorded in reports.

- 4.14 Jacobs also emphasised the importance of historic records:

There is a lot of very useful historical information on many of the colliery tips in South Wales, including stability assessments, liability/risk assessments, remediation/reclamation schemes, inspection records, all of which will be of great value with regards tip classification and also future tip assessment work in respect of robustness against climate change.

Prioritisation of inspections

- 4.15 Some responses reflected on the practical impact of a general duty to inspect in a context of inevitably limited resources. NRW observed that, with around 2,500 disused coal tip sites across Wales, the inspection workload would be very high at the time of the creation of the register. They suggested that “inspections may need to be prioritised and the approach may need to be pragmatically defined”. Stephen Smith

⁸² This is also discussed at para 3.30 above.

also concluded that “full inspections from day 1 would be a huge task”. He suggested reliance on the initial data gathering exercise undertaken since February 2020, as, if “comprehensive and properly authenticated”, it will have identified all “at risk” tips requiring more rigorous inspection. There should be very few “new” entries after the initial establishment of the register.

- 4.16 Similarly, Professor Bob Lee thought that the concept of a “sufficiently recent” inspection would assist with prioritisation. As there are likely to have been relatively recent inspections of the higher risk tips, inspection frequency according to risk category could dictate the timetable for future inspections. Otherwise, in his view, “to demand that all newly registered tips be inspected anew would impose a possibly unmanageable burden”.
- 4.17 Huw Williams also concluded that establishing a baseline of information by conducting initial inspections of all tips was likely to take a number of years. In his view, it should be for the supervisory authority to prioritise the order of inspections based on current knowledge.
- 4.18 For ICE Wales Cymru, the qualifications of those conducting the most recent inspection should be a determining factor:

If the competence of the person(s) completing a ‘sufficiently recent’ inspection is unknown or uncertain then the supervising authority’s own competent person(s) should complete a new inspection. The arbiter of ‘competent’ in these circumstances should be the supervisory authority.

- 4.19 In contrast, Cllr Julie Edwards thought that it should not be possible to rely on a recent inspection, as different standards may have been applied. Richard Arnold thought that only the supervisory authority inspection should be permitted to establish the initial inspection.

Who should carry out the inspection

- 4.20 ICE Wales Cymru, Professor David Petley and NRW commented on the level of expertise needed to undertake an inspection. ICE Wales Cymru defined this as “a competent person with suitable expertise in disused coal tips and the new regulatory environment”. Professor David Petley referred to a “professional with relevant expertise”.
- 4.21 NRW questioned our proposal that the duty of inspection should fall to the supervisory authority. They noted that we had discussed the reservoirs regime as a possible model, but observed that the Reservoirs Act 1975 does not itself require the enforcement authority to carry out the inspection. The authority instead has a duty to ensure that the “undertaker” appoints an independent and suitably qualified engineer to conduct the inspection.⁸³ Under this approach, the owner is liable to cover the costs

⁸³ In Wales the undertaker is defined in the Reservoirs Act 1975, s 1(4) as: Natural Resources Wales, if the reservoir is managed and operated by Natural Resources Wales or a statutory water undertaker; or, in any other case, as either the person carrying on an undertaking where the reservoir is used or intended to be used for the purposes of the undertaking, or the owner or lessee of the reservoir where there is no use of it or intention to use it for the purposes of an undertaking. See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 9.9.

of the inspection. NRW has a reserve power to appoint an engineer following default of a statutory notice requiring an inspection. If the specialist panel approach considered in our consultation paper were to be adopted (discussed below in chapter 10), they proposed that the duty to inspect conferred on the supervisory authority could include a power to direct an owner to appoint an engineer from the panel to conduct the inspection.

Relevance of tip definition

4.22 WLGA (Bridgend and Torfaen agreeing) and NRW also raised the importance of the definition of a tip in determining whether a tip would be included on the register and thus require inspection. This has already been touched on in chapter 3 in relation to the duty to include a tip on the register, and will be considered in greater detail in chapter 7 below. In the context of the duty to inspect, both raised concerns about tips that have been developed. NRW pointed out that where historic plans indicated the existence of a tip which had subsequently been the subject of significant reclamation works, a visual inspection or ground investigation would be needed to determine whether the tip still existed at all. WLGA suggested that separate criteria might need to be applied to the inspection of developed tips to ensure a consistent and appropriate approach.

Reasons for disagreeing

4.23 Only Owen Jordan disagreed with the proposal for a duty to inspect. In his view, all tips pose risks, and should be put into a programme for treatment.

Discussion

4.24 Respondents indicated almost unanimous support for a duty to inspect following registration. We agree with the reasons they gave. We are conscious that inspections of the intensity that has been required for the more problematic tips are time-consuming and costly, and that there are nearly 2,500 disused coal tips in Wales. We do not intend the duty of inspection to be unnecessarily burdensome. Both the priority and the intensity of inspection could be tailored to the circumstances of individual tips. We also recommend that the duty to inspect be subject to the proviso that a sufficiently recent and thorough inspection could stand as the first inspection.

4.25 In addition, provision for the type of inspection required for each category of tip could be sufficiently flexibly formulated to allow the duty to be workable for the new authority. The content of the inspection is a technical matter, and is not for us for to determine. It is essential that the approach is standardised, but the requirements applied may differ according to the type of tip. The standard approach to a high risk tip inspection is likely to be significantly more complex than a more generic process for lower risk tips. The sort of factors that could be taken into account in determining the intensity of inspection might include matters such as the stability history of a tip, its likely size and/or gradient and the nature of the “receptors” that would be affected by instability. For lower risk tips, it might be possible to rely more heavily on, for example, satellite imagery. We understand from the Welsh Government that a standardised approach to inspection is under development.

4.26 Prioritisation of inspections will be crucial. Even with differing intensities of inspection, it is unlikely to be possible to complete inspections of all tips simultaneously at the

time of first registration. We think that it should be for the supervisory authority to determine the order of priority. The data already gathered since February 2020 will be available to inform the exercise. It might also be possible to provide in legislation for the phased introduction of the duty. For example, commencement of the duty in relation to the tips currently allocated to the A and B categories could be deferred in order to allow inspections of higher risk tips to be prioritised.⁸⁴

4.27 We agree that historic records should be drawn upon where available and relevant. It will be important for authorities such as the Coal Authority and local authorities to share records from their archives with the supervisory authority. This is discussed in chapter 3.⁸⁵ We also think it important that tip owners share any documents in their possession at the time of the first inspection following registration, if these are not already in the supervisory authority's possession. There is a similar provision in the 1969 Act.⁸⁶

Who should carry out the inspection?

4.28 We envisage that the supervisory authority will have a duty to “arrange for” the inspections to take place. This would include a power to delegate the inspection to others as long as those inspecting have appropriate expertise and a consistent approach is maintained.⁸⁷

4.29 The suggestion that the owner should carry out the inspection rather than the supervisory authority could form part of the overall strategy employed by the supervisory authority in arranging for the inspection of all tips. For example, the supervisory authority could decide to delegate the inspection of the lowest risk tips to tip owners, including private owners, provided they employ an approved specialist to do the work and complete it within a stipulated time frame. This approach could provide the authority with the flexibility it needs to prioritise work on higher risk tips while ensuring that lower risk tips are inspected as quickly as possible. If this approach were adopted, it would be essential to ensure that a uniform approach to inspections is maintained.

4.30 An approach which provides the supervisory authority with flexibility in order to prioritise higher risk tips chimes well with the recommendations made recently for improvements to the regulation of reservoirs. Recommendations made by the independent review which followed the Toddbrook incident include the division of high

⁸⁴ The provisional categories A to D are explained in *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 8.6 and 8.7. They are also explained by the Welsh Government, at the time of publication of provisional coal tip figures in October 2021, as follows: A = Minor tip/restored tip; B = Unlikely to cause risk due to size or location; C and D = higher potential risk. See <https://gov.wales/coal-tip-safety#section-72291>.

⁸⁵ See paras 3.20 and 3.21 above.

⁸⁶ *Mines and Quarries (Tips) Act 1969*, s 12(1) provides that the owner of a tip can be required by the local authority to “produce to the authority such documents in his possession or control (whether in the form of maps, surveys, plans, records of work or otherwise and whether relating to the tip itself or the land on which it is situated”): see *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, para 4.38.

⁸⁷ See our discussion of how best to provide for appropriate coal tip safety specialist skills in ch 10.

risk reservoirs into different classes of hazard to ensure that greater effort and resources are directed at those at the higher end of the hazard range.⁸⁸

- 4.31 We recommend accordingly that the supervisory authority should be under a duty to arrange an initial inspection of each tip unless it considers that a sufficiently recent and thorough inspection has been conducted. It will be important in the legislative formulation of this duty to recognise that the authority will need flexibility as to how it brings inspections about. In order to enhance the quality of inspection, and the efficiency with which it is carried out, we recommend that owners and occupiers should be under a duty to provide any relevant documents relating to the tip or to the land on which it is situated.

Recommendation 15.

- 4.32 We recommend that, upon the entry of a tip onto the register, the supervisory authority should be under a duty to arrange an inspection of the tip unless it considers that a sufficiently recent and thorough inspection has been conducted.

Recommendation 16.

- 4.33 We recommend that, at the time of inspection, there should be a duty on tip owners and occupiers to provide to the supervisory authority documents in their possession of relevance to the tip or the land on which it is situated.

RISK ASSESSMENT, TIP MANAGEMENT PLANS AND RISK CLASSIFICATION

- 4.34 As explained at the beginning of this chapter, the purpose of the tip inspection is to compile a risk assessment and design a tip management plan. This section considers views on our provisional proposal to place the supervisory authority under a duty to arrange for the compilation of a risk assessment and management plan for any tip included in the register. We examine the process by which this will lead to the allocation of a risk classification. We also consider our proposal that Welsh Ministers should have power to prescribe the matters to be included in the risk assessment and management plans by statutory instrument.

Consultation Question 15: We provisionally propose that (1) the supervisory authority should be under a duty to arrange for the compilation of a risk assessment and management plan for any tip included on the register; and (2) the Welsh Ministers

⁸⁸ The independent review was set up by the UK Government in 2019 following the Toddbrook reservoir incident at Whaley Bridge, Derbyshire, when storm damage to a spillway (overflow channel) raised fears of a dam collapse and triggered the evacuation of the surrounding area. The second stage of the inquiry, known as Part B, undertook a wide assessment of reservoir safety legislation and its implementation. See D Balmforth, *Independent Reservoir Safety Review Report* (2021) <https://www.gov.uk/government/publications/reservoir-review-part-b-2020>.

should have power to prescribe the matters to be included in a risk assessment and management plan by statutory instrument. Do you agree?

4.35 Of the 51 respondents who answered this question, 43 (84%) agreed with our proposals. Three (6%) disagreed, and five answered “other”.

Reasons for agreeing with a duty

4.36 Respondents supporting our proposal emphasised the benefits that supervisory authority oversight of risk assessments and tip management plans would bring. In their view, this would ensure that risk assessments and management plans were based on a consistent methodology and high quality information. In NRW’s view, “one authority overseeing this, rather than multiple authorities, is the best way to ensure a consistent approach”. Jacobs and WLGA (Bridgend and Torfaen agreeing) made similar observations. Ove Arup and Partners noted the parallel with the provisions for flood and emergency plans under the Reservoirs Act 1975.

Concerns about a uniform duty

4.37 As discussed above in relation to inspections, some respondents raised concerns about prioritisation. Professor Bob Lee said:

Some tips will already be appropriately and consistently managed such that existing plans can be approved but other high risk sites may be in need of more urgent consideration.

4.38 Some respondents pointed to a need to differentiate the amount of attention given to a tip depending on the degree of risk it poses. Keith Bush QC proposed that our recommendation should:

include an explanation that the complexity of the risk assessment would vary from case to case. It can be very substantial in some cases but, in others – for example, a small or remote tip – it can be short and simple.⁸⁹

4.39 Stephen Smith thought that only defined categories of tip should require a tip management plan:

This proposal does not appear to recognise that a majority of the identified tips will need very little (if any) maintenance. In these cases, a “management plan” would not be required. As a result, I feel there needs to be a defined category of tip that would need such a plan rather than it being a general duty.

4.40 In the view of Steve Jones of the Emergency Planning Department at Pembrokeshire County Council:

Remediated tips on flat areas of ground posing no danger or environmental hazards should not require a management plan, other than a periodic assessment to confirm previous 'zero risk' ratings and no material changes in the intervening period.

⁸⁹ Keith Bush QC’s response has been translated from the Welsh original.

- 4.41 Jane Iwanicki warned against taking an over-prescriptive or rigid approach to risk assessment and planning. She stressed that “not all risks will apply to all sites so the authority needs to be able to prescribe the matters that are relevant on a site specific basis and avoid unnecessary work and cost”.

Responsibility for the tip management plan

- 4.42 Another aspect of our proposal which generated debate was the question of responsibility for drawing up the tip management plan. As in the case of the duty of inspection discussed above, NRW thought that the tip owner should be responsible for drawing up the plan. While many owners would not have the technical competence to do this themselves, the owner could contract out the preparation of the management to a third party, who could be the supervisory authority itself. This is the approach currently adopted by NRW in contracting out the care of the tips it manages to the Coal Authority.⁹⁰
- 4.43 WLGA (Bridgend and Torfaen agreeing) looked at the possible meaning of a “duty to arrange” for the compilation of a management plan. They thought that this could include imposing responsibility on the tip owner for the preparation of the plan, at least in relation to lower risk tips. They explained that, in preparing their response, they had received differing views from local authorities on the topic:

Some felt that the tip owner should be made legally responsible for drawing up the plan, with the supervisory body then signing it off. Others felt that such an approach would be acceptable for low risk tips only. And yet others felt that for reasons of consistency, and subject to its budget, the supervisory body should be responsible for all assessments and plans.

- 4.44 NRW considered the best way to approach a tip management plan where there were clusters of tips creating issues of collective impact. In these cases, a group plan might be more suitable. They explained that this is the approach used in tackling Water Framework Directive targets, when a water catchment approach is adopted to raise multiple environmental standards. Contaminated land issues have been approached in a similar way.

Content of tip management plans

- 4.45 Responses included a number of suggestions for additional sources of content for tip management plans. Howard Siddle and Jacobs stressed the need to incorporate information from historic records in order to ensure that the tips is “understood holistically”. Steve Harford thought that the Coal Authority should be under a duty to provide the authority with access to any relevant data it holds on the tip, associated mine workings below the tip, and shafts and adits in the vicinity of the tip.
- 4.46 Buglife and Clare Dinham flagged up the need to include biodiversity as a consideration in all tip management plans and made suggestions for coordination with relevant bodies:

In order to ensure that biodiversity is adequately embedded into tip management plans it is essential that ecological experts within local authorities, Natural

⁹⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 3.24.

Resources Wales, non-government organisations (for example environmental charities such as Buglife, Plantlife, Bumblebee Conservation Trust, Butterfly Conservation, Amphibian and Reptile Conservation, Wildlife Trusts) and any other relevant stakeholders (for example individual experts) are involved in the process and that plans are designed using their input. An Ecological Stakeholder Task Force may be one useful means of ensuring that the biodiversity importance of old coal tips is given due consideration.

- 4.47 Graham Hathaway also highlighted the need to include information relevant to environmental protection in tip management plans to allow tip ecology and wildlife to be managed alongside safety considerations:

The issues of environment and its protection must be uppermost and under constant review. We are not doing enough to combat climate change. We should increase our capacity to protect it and enhance it with improved monitoring of wildlife activity and policies to improve and increase wildlife habitats. There should be an environment report on every tip setting out its characteristics, causes of poor wildlife habits, usually from poor care and lack of planting [as well as] destruction from off road motor bikes and lack of maintenance of existing flora and fauna.

- 4.48 Neal Carhart commented on the need to include control of off-road motorbikes and quad bikes in the management of tips. In his experience, near his home in Cefnpennar/Mountain Ash, vehicles on the tip were destroying the trees and vegetation helping to stabilise it and possibly disturbing the path of the streams running under it.

Prescribing the matters to be included in a risk assessment and tip management plan by statutory instrument

- 4.49 As with the proposal considered above to stipulate the contents of the tip register by statutory instrument, those agreeing supported prescription as a means of ensuring a consistent approach.⁹¹ Some respondents stressed the need to rely on the advice of those with appropriate expertise in deciding the matters to be included in a risk assessment and tip management plan.
- 4.50 Huw Williams thought that a better approach would be for the supervisory authority to draw up guidance for approval by Welsh Ministers. This would offer greater flexibility than a statutory instrument in dealing with advances in knowledge of risks and management techniques. Professor Thomas Watkin agreed with our proposal for a statutory instrument, but warned that developments over time should not be hampered by an overly rigid approach. He thought that the supervisory authority should develop best practice and be empowered to recommend additions and amendments to Welsh Ministers. Welsh Ministers should be under a duty to have due regard to such recommendations when periodically reviewing the matters to be included.
- 4.51 CLA Cymru thought that there should be consultation on any new regulations prior to their implementation, and that a statutory instrument did not offer sufficient

⁹¹ For discussion of prescription of the contents of the tip register by statutory instrument, see paras 3.25 to 3.41 above.

transparency. The Law Society agreed with the use of a statutory instrument if it was subject to Senedd scrutiny via the affirmative procedure.

- 4.52 Caerphilly was concerned that prescription by statutory instrument should be treated only as setting a minimum standard, as each tip is unique and it is important that additional matters can be added if needed.
- 4.53 The Mineral Products Association agreed with prescription, but thought that the list should be drawn up in parallel with governments across the UK.

Discussion

- 4.54 A strong majority of respondents agreed that the supervisory authority should be under a duty to arrange for the compilation of risk assessments and tip management plans. We agree with reasons given for supporting the proposal, including the need for a consistent approach to risk assessment and tip management plans, and consider that oversight by the supervisory authority is the best way to ensure this.
- 4.55 The need to prioritise tip inspections has been discussed above. We agree with respondents that the same considerations apply to risk assessments and tip management plans. We think all tips should have a risk assessment and a tip management plan, but what will be required for each will vary widely depending on the attributes of the tip. It may be that in practice the tip management plan for lower risk tips is a very standardised document setting out the frequency of inspections and any basic provisions for tip maintenance. It may amount to little more than a checklist which will inform the content of a tip maintenance agreement (a topic discussed in chapter 5). The agreement will make it clear to the owner exactly what needs to be done on the tip and operate as a form of information and guidance.
- 4.56 The suggestion that owners, rather than the supervisory authority, should take responsibility for the risk assessment and the tip management plan mirrors the suggestion discussed above in relation to inspections. As we explained in relation to inspections, we think that the supervisory authority should have the power to adopt a flexible approach which reflects the risk level of the tip. The supervisory authority could decide to delegate the preparation of the risk assessment and tip management plan for lower risk tips to tip owners, provided they employ an approved specialist to do the work and complete it within a stipulated time frame.⁹²
- 4.57 This should in our view be subject to a requirement that the draft plan, together with the inspection and risk assessment, be submitted to the supervisory authority for approval. We regard it as important in the interests of consistency of approach that the inspection report and risk assessment of each tip be scrutinised, and the risk classification assigned, by the supervisory authority on the basis of the report and risk assessment. The risk classification assigns broad categories to allow decisions to be taken as to priorities and where responsibility to undertake the work indicated by the tip management plan, which may range from minor maintenance matters to complex remedial operations, will fall. We also consider that subsequent inspection reports, prepared as a result of inspections conducted at intervals stipulated by the tip management plan, should be submitted to the supervisory authority. Where the

⁹² See our discussion of how best to provide for appropriate coal tip safety specialism in ch 10.

reports indicate that the risk classification might require alteration, this would need to be brought to the attention of the authority.

- 4.58 The virtue of this approach would be that the supervisory authority could maintain a consistent approach to the assessment of all tips, while taking on a greater operational role in relation to tips requiring prioritisation.⁹³ This system could also offer consistency as well as flexibility in dealing with tips in multiple ownership and groups of tips with closely interrelated safety requirements. A flexible power to delegate would give the option to the authority of retaining the preparation of composite risk assessments and management plans for such tips.
- 4.59 The specific content of risk assessments and tip management plans is a technical matter, and is not for us to determine. But we see force in the suggestions put forward by respondents that historic tip records be considered, as well as information from the Coal Authority on mine workings, and that information on both tip ecology and receptors of environmental importance be included.
- 4.60 Respondents were largely in favour of the prescription of content by statutory instrument. The reasons given were similar to those supporting prescription of tip register content.⁹⁴ We agree that prescription would promote clarity and consistency, and recommend that a power to do so by statutory instrument be created in the new legislation. We envisage any statutory instrument would set out matters to be included at a general level and would be supplemented by guidance.
- 4.61 As this is a Wales-only project, and we are not aware of any plans for similar legislation by other governments across the UK, we do not think it will be feasible to coordinate the list across the UK.
- 4.62 We recommend accordingly that the supervisory authority should be under a duty to arrange for the compilation of a risk assessment and management plan for any tip included on the register. As in the case of the duty to inspect, it will be important in the legislative formulation of this duty to recognise that the authority will need flexibility as to how it fulfils these requirements. We also recommend that the supervisory authority should be under a duty to approve the tip management plan and allocate a risk classification to each tip based on the inspection report and risk assessment. Secondly, we recommend that the Welsh Ministers should have power to prescribe the matters to be included in a risk assessment and management plan by statutory instrument, to be supplemented by guidance.

⁹³ We discuss the designation of higher risk tips in ch 6.

⁹⁴ See paras 3.25 to 3.41 above.

Recommendation 17.

4.63 We recommend that

- (1) the supervisory authority should be under a duty to arrange for the compilation of a risk assessment and management plan for any tip included on the register;
- (2) the supervisory authority should be under a duty to approve the tip management plan; and
- (3) the supervisory authority should allocate a risk classification to each tip based on the inspection report and risk assessment.

Recommendation 18.

4.64 We recommend that the Welsh Ministers should have power to prescribe the matters to be included in a risk assessment and tip management plan by statutory instrument.

APPROACHES TO RISK CLASSIFICATION

4.65 Our consultation paper looked briefly at the various approaches to classification that have been adopted historically by local authorities and the provisional classification system employed since February 2020 by the Coal Authority in the coal tip safety work commissioned by the Welsh Government. This provisional system broadly classified tips by reference to the risk and the consequences of movement.⁹⁵

4.66 Our next two consultation questions asked for views on the risks to be taken into consideration in the tip classification system to be adopted by the supervisory authority. We asked first for views on our provisional proposal that the classification should have regard to the risk of instability and the consequences of a tip slide. While we recognised that stability was the most pressing and serious of the risks posed by coal tips, we also asked whether classification should also have regard to other hazards such as pollution, combustion and flooding.

Consultation Question 16: We provisionally propose that the risk classification of coal tips should have regard to the risk of instability of a tip and the consequences of a slide of spoil. Do you agree?

4.67 Of the 49 respondents who answered this question, 45 (92%) agreed. Two respondents (4%) disagreed and two answered “other”.

⁹⁵ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 8.4, 8.7 and 8.8.

Reasons for agreeing

4.68 Howard Siddle explained that risk is informed by the likelihood and consequences of a damaging process such as instability, so that likelihood and consequences should both inform a risk categorisation. Professor David Petley defined the determinants of risk as hazard, vulnerability and consequences. ICE Wales Cymru agreed:

It is reasonable to base a classification system on the potential magnitude of consequences from any perceived risk at a disused coal tip combined with an assessment of the likelihood or probability that such a risk will become manifest.

4.69 Paul Connolly noted that “developing a scoring matrix based on likelihood versus impact” was fundamental to the risk assessment process. It would allow characterisation of tips into risk groups and the ability to prioritise higher risk tips. Stephen Smith said that “instability has historically been regarded as a fundamental threat and will continue to be so”.

4.70 While agreeing with our proposal, some respondents suggested that the terms used in our question were not sufficiently accurate. ICE Wales Cymru explained that instability risks are not confined to movement on sloping valley sides. For example, lagoon waste on relatively level ground could present a risk of subsidence even under relatively low loading. NRW questioned reference to a “slide of spoil” and preferred broader reference to “slope movement or failure”. Jacobs explained that there are a range of slope instability failure mechanisms that might apply to a tip and require management. Howard Siddle recommended referring to the “likelihood of instability of a tip and the consequences of such failure”.

4.71 Howard Siddle and Chris Seddon were both of the view that the risk of instability was the only risk which should be covered in a risk classification system. Chris Seddon observed that this was the risk “with greatest consequence associated with coal tips in Wales. As such, the risk of instability should not be 'diluted' by secondary risks”. These views are considered further below.⁹⁶

4.72 In Kim Moreton's view, safeguarding against loss of life should be the overriding priority. Ove Arup and Partners warned of the need to keep definitions simpler than in the reservoirs regime, which assigns risk categorisations which differentiate between reservoirs based on the numbers of people at risk in the event of a failure.⁹⁷

4.73 The Mineral Products Association agreed with the proposed approach to tip categorisation, but thought that there should be a right of appeal for tip owners.

Reasons for disagreeing and alternative approaches

4.74 Most of those expressing disagreement did so because they thought that risk classification should have regard to types of risk other than instability. These views are considered in the next consultation question.

⁹⁶ See paras 4.93 and 4.96 below.

⁹⁷ This is discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 9.22.

Discussion

- 4.75 We are grateful to experts in the field for pointing out flaws in the terminology used in our consultation paper, and in particular for explaining that both the likelihood and consequences of a damaging event should inform a risk categorisation. The terms we used in our original proposal are reformulated accordingly in our recommendation below.
- 4.76 We do not think that a right of appeal against an assigned classification is required. We see risk classification as a technical matter for development by experts, based on detailed consideration of the attributes of a tip and its location, and unsuitable for determination by a judicial body. It serves as a signal to the public of the broad category of approach to be taken to a tip's management. It is also important internally in order for the supervisory authority to steer decision-making and the allocation of resources. While the risk level assigned to a tip may indirectly affect the terms of agreements or orders made in relation to the management of a tip, we recommend later in this report that such orders should be subject to a right of appeal. We consider that the right of appeal should be directed at tip orders to which objection is raised, rather than arising at the prior stage of risk classification.⁹⁸

Recommendation 19.

- 4.77 We recommend that the risk classification of coal tips should have regard to the risk of instability of a tip and the consequences of a stability failure.

Consultation Question 17: Should coal tip classification also have regard to the risk the tip presents of pollution, combustion or flooding?

- 4.78 Of the 50 respondents who answered this question, 45 (90%) agreed. Two (4%) disagreed and three answered "other".
- 4.79 Reasons given for agreeing that classification should have regard to these risks as well as to the risk of instability included the need to ensure that all relevant associated risks form part of the classification system. As Merthyr Tydfil put it: "anything that presents a risk to the public should be included in the classification". Sir Wyn Williams thought that there was "a clear public interest" in taking these matters into account. Graham Hathaway cited the importance of recognising the additional uncertainty and threat brought by climate change, particularly in relation to flooding.
- 4.80 Keith Bush QC considered the focus of the 1969 Act on danger to people as a weakness in the system. He saw advantages in adopting a wider range of risk factors as this would permit risks to property and to the environment to be part of the assessment. NRW thought that inclusion of the additional risk factors aligned well with legislative drivers such as the Environment (Wales) Act 2016 and the Well-being of

⁹⁸ We take a similar approach to appeals against the designation of tips as higher risk: see paras 6.72 to 6.89 below.

Future Generations Act 2015. Wrexham saw economic advantages in addressing risk factors together in a single assessment:

It is possible remedial works for any one of these risks could at the same time deal with another risk, so it is likely that tackling risks simultaneously could be more cost effective, less disruptive and use less resources.

- 4.81 Some of those who agreed that these risks should be included, for example ICE Wales Cymru, recognised that the primary risk to be considered was instability, but that this did not mean that the other risks should be excluded. Jacobs agreed that classification should take into account all the hazards presented by a tip, but noted that “some of these can at most sites be written out early”:

Tip fires in Wales are relatively rare and generally result from a third party having unwittingly started to burn on the tip. The risk of wildfires to ignite a tip may be something that could occur particularly with the drier summers experienced. Tip pollution in Wales is relatively rare and is usually associated with mine water.

Interaction of risk factors

- 4.82 Agreement led some respondents to consider how such multiple risks could be assessed and combined in determining overall risk. Steve Harford thought that the risk factors all needed to be part of a matrix. Paul Connolly thought that these additional categories should be presented alongside tip instability to give an overall combined risk rating as well as detailing each individual risk.

- 4.83 Chris Seddon thought that the challenge would be to find a suitable framework for assessing the risks:

As is common with geo-hazards risk factors can often combine. An obvious example would be a tip which poses an instability hazard, the consequences of which are release of pollutants and flooding. How will this compare with a tip with independent instability, pollution and flooding hazards?

- 4.84 ICE Wales Cymru also considered the complex ways in which risk factors can interact:

Combustion can change the risk profile of a tip as the nature of the tip waste (for example geotechnical characteristics) can change due to combustion
Additionally, whilst a tip may impact on the local risk of flooding in its original location, it may also create a secondary flood risk should instability cause it to block a watercourse.

- 4.85 Kim Moreton thought that classification capturing the complexity of these interactions would enhance the accuracy of risk modelling:

Combustion represents a risk of a significant source of greenhouse gas emissions. Pollution from coal tips can be a complex mix, and the tip itself a diffuse source through air and water; classification would enable near-area risks to be modelled with more confidence.

- 4.86 He saw in particular an opportunity for improved interaction of tip data with flood maps:

Flood maps are evolving in complexity; omission of tips would impact on wider efforts to map and model flood risk.

- 4.87 NRW recognised the importance of including flooding, but warned that care needs to be taken with the definition of flooding risk, as risk of flooding due to failure of the drainage or as a result of rapid tip drainage need to be distinguished. Caerphilly warned that the mix of risk factors could lead to confusion unless a system was adopted to distinguish the factors which led to the overall rating. They suggested using a suffix:

The classification risk could also include a suffix that denotes the risk type (instability, flooding, pollution, combustion etc) otherwise people will be concerned all category D tips are susceptible to instability which may not be the case. It could be a tip is a category D tip due to flood risk for example.

- 4.88 Paul Connolly suggested that individual thresholds of risk could be set for each category that could automatically trigger remediation strategies where deemed to be sufficiently serious.

Alternative approaches

- 4.89 Howard Siddle and Jacobs both emphasised the importance of drainage in assessing risk. Jacobs explained:

Drainage (surface carrying run-off and sub-surface carrying watercourses and regulating groundwater levels and springs) presents a significant hazard at many tips. Blockage of a surface channel or collapse of a culvert will result in a washout of the tip material, with possible risk of damming of watercourses and flooding. Drainage needs particular consideration.

- 4.90 Howard Siddle proposed drainage failure as a relevant hazard:

A much more relevant hazard which needs to be included in risk assessment is that of the failure of drainage systems, either natural (stream or watercourse) or engineered (lined channels, culverts, pipelines, baffled channels, attenuation ponds, groundwater drainage systems etc) which are present in many tips constructed or remediated in the post Aberfan era. Failure of these systems can cause rapid erosion of spoil and its deposition elsewhere and can also trigger various forms of tip slides and flows, as we have seen at Tredegar Comprehensive School and Llanwonno. The probability of such an event would be difficult to quantify as it depends on the resilience and maintenance of the systems and their design standards but a suitable ranking of hazard could be produced from, for example, the existence, orientation, age and type of drainage structure.

Reasons for qualified agreement or disagreement

- 4.91 Some respondents gave qualified agreement, agreeing with some but not all of the proposed hazards. Bob Leeming thought that combustion should be included, but was not convinced of the merits of including flooding and pollution. Dr Peter Brabham would include flooding as a risk of the first order because tip failure into rivers was a high risk, but saw the others as a second order level of risk.

- 4.92 Professor Bob Lee considered it crucial to have regard to hazards and nuisances caused by combustion and other impacts of coal waste on the environment and biodiversity, but thought that this could be achieved by measures beyond the initial risk assessment. He was minded to keep the initial risk classification simple and based on stability alone.
- 4.93 Some respondents disagreed outright with the inclusion of certain factors. Howard Siddle and Stephen Smith did not consider that there was sufficient evidence to include risks of pollution from tip waste or flooding. Howard Siddle thought that combustion from wildfires could become an increasing hazard, but thought that information on which to base a risk assessment might not be cost effective to obtain.
- 4.94 Ove Arup and Partners agreed that the consequences of tip failure could relate to future pollution or flood risk, but thought that this should be excluded as it was covered by other legislation. In their view, tip regulation and inspection should be confined to public safety.

Discussion

- 4.95 There was strong majority support for including pollution, combustion and flooding risks as factors for consideration in reaching a risk classification.
- 4.96 It is clear from expert responses that the risk of instability will be the most weighty of the hazards considered. We acknowledge disagreement amongst experts as to the likelihood of hazards other than instability, but prefer to take a cautious approach and include all those risks for which there is a body of support. These risks, even if in most cases they may be dismissed early, may be present and can interact with instability. We also agree that there may be economic advantages in addressing risk factors together in a single assessment.⁹⁹
- 4.97 With regard to suggested additional factors for consideration in the development of a new risk classification system, for example the risk of drainage failure, and alternative approaches, such as redefining the category definitions, we convey these for further consideration by technical experts advising the Welsh Government.

Recommendation 20.

- 4.98 We recommend that the risk classification of coal tips should also have regard to the risk the tip presents of pollution, combustion or flooding.

Suggested approaches to risk classification

- 4.99 In responding to the two questions considered above concerning the factors to be taken into consideration in deciding a risk classification, some respondents with expertise in the field set out their views on the best approach to risk classification.

⁹⁹ The possibility of extending the regulatory regime to non-coal tips is discussed in ch 12. Non-coal tips present additional hazards, for example heavy metal pollution: see paras 12.46 and 12.48 below.

General concerns

4.100 Jacobs warned of the care needed to ensure that the classification system adopted is fit for purpose and does not have unintended consequences. To establish the degree of risk (the likelihood of a hazard combined with its consequences), the hazards associated with a tip need to be individually identified and assessed. Category definitions such as “potential to cause risk to life or property”, as provisionally used since February 2020 for category C and D tips, were overly broad and did not take into account the degree of risk.

4.101 In general, Jacobs thought it best to avoid having too many categories and to redefine categories within the overall context of the new tip management system to be adopted in Wales. This would ensure that the management plan derived from the risk assessment is appropriate to the specific tip. They also warned against including a category R “tip fully restored/reclaimed but kept in a database as a record with nothing to inspect”. They justified this in the following terms:

Virtually all stabilisation/reclamation schemes comprise a combination of earthworks and drainage - both surface drainage to carry run-off and shallow (up to 5m depth) sub-surface drainage to control groundwater levels and springs. It is essential all tips are inspected on a consistent and regular basis, the frequency of which will depend on the risks. Surface drainage needs to be maintained and kept clear to ensure its correct function and avoid erosion and potential flooding incidents.

Jacobs is aware that the stability of some tips is maintained solely by deep sub-surface drainage Deep sub-surface drainage requires specialist maintenance. In time it is to be expected that sub-surface drainage (shallow and deep) will require replacement. With rising groundwater levels owing to cessation of minewater pumping and/or climate change, the emergence of new springs on a stabilised/remediated tip needs to be identified and assessment of the need for drainage. Regular inspection of a tip will ensure that this is actioned in a timely manner.

4.102 NRW observed that the design categories for reservoirs run from A to D, with A denoting the highest hazard and more detailed design requirements, and D the least. They thought that there was value in aligning tip safety categories to the same system, rather than running them from D to A, with D denoting the highest hazard.¹⁰⁰

4.103 Stephen Smith warned against designing legislation before risk categorisation work was complete:

At the present time, the Coal Authority work on categorising risk from the former coal estate has not been completed and thus the ‘solutions’ cannot be informed by the assessed risks. It would seem premature to draw conclusions on legislative matters until the technical work has been completed.

The essential need for technical expertise is acknowledged in the more recent legislation on mine safety – the Mines Regulations 2014 – and the guidance on this

¹⁰⁰ The design categories for reservoirs are discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 9.22.

issued by the Health and Safety Executive. The latter includes specific topics to be included in tip inspections for active tips and could provide a useful template for disused tips.¹⁰¹

Specific guidance

4.104 Howard Siddle stressed the need to ensure that an assessment of the likelihood of instability is based on something measurable or observable. He explained that relative degrees of instability can be portrayed quantitatively by factors of safety, but this is only possible where tip slopes have been designed and records exist of the engineering calculations.¹⁰²

4.105 He suggested that an approach to the classification of slopes could be as follows:

- actively unstable (evidence based) with inferred factor of safety no more than unity
- unremediated slopes with evidence of previous movement (where factor of safety would be around unity)
- tipped slopes with no previous movement (factor of safety at or slightly above unity)
- engineered slopes (factor of safety could be minimum of 1.2 or as high as 1.5 depending on their design)

He added that these “might be combined with elements at risk in a 2-D matrix to portray relative degrees of risk for instability hazard. A similar methodology would be required if other hazards (pollution, burning or flooding) were to be included in a risk assessment”.

4.106 Dr Peter Brabham suggested deciding risk based on:

- volume of spoil
- slope angles
- nature of spoil
- water pathways
- angle of foundation slope (hillsides)
- potential run-off areas

¹⁰¹ Stephen Smith also noted that the Richards, Moorehead and Laing work from 1993, discussed below at para 12.34, includes valuable guidance on tip management.

¹⁰² The factor of safety of a tip is equal to the ratio of resisting forces to disturbing forces: the higher the factor, the safer the tip. If the factor is below one, in other words less than unity, the disturbing forces are stronger than the resisting forces. See *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, para 2.16.

- infrastructure within run-off area zone

Discussion

- 4.107 We do not have the technical expertise to comment on specific suggestions, but are grateful for these contributions and are relaying them to the Welsh Government in case they are of assistance in drawing up a risk classification system.
- 4.108 We agree with the broader observation that it will be important to keep categorisations as simple as possible. As discussed earlier in this chapter, risk classifications act as a signal to the public as to the level of intervention required on the tip, and as a steer for the authority in planning and prioritising tip work.¹⁰³ The greater level of detail required to reach decisions about the measures to be taken on each individual tip will be included in the inspection reports, risk assessment and tip management plan.
- 4.109 We also agree that it is important that each individual tip should have a tip management plan, even if the frequency of inspection recommended is low.

CONSEQUENCES OF CLASSIFICATION: AGREEMENTS AND ORDERS

- 4.110 Once the tip inspection, risk assessment and tip management plan have been concluded and a risk classification assigned, the supervisory authority will need to make decisions as to how the work identified in the tip management plan is to be carried out. We envisage that the supervisory authority will have a toolkit of agreements and orders with which to organise tip safety work.¹⁰⁴ The agreement or order will specify who will be responsible for carrying out the work on the tip and who will pay for it. It will also be open to the authority to specify the level of specialism required for the work. The approach taken by the supervisory authority will be influenced by the level of risk posed by the tip and the type of safety operation required.
- 4.111 Our next chapter looks at agreements and orders for lower risk tips in need of maintenance. Other chapters also contain discussion relevant to the use of agreements and orders as a mechanism for carrying out the work identified in the tip management plan. Chapter 6 considers prioritisation of work on higher risk tips through a process we have termed designation. Chapter 9 looks at the financial terms which may be included in agreements and orders. Chapter 10 considers how to use agreements and orders to ensure the correct level of specialism for the work to be undertaken.¹⁰⁵

¹⁰³ See para 4.57 above.

¹⁰⁴ In including agreements and orders in our scheme, we have looked to the species control regime contained in sch 9A to the Wildlife and Countryside Act 2015, as inserted by the Infrastructure Act 2015, ss 23 to 25. The 2015 Act followed recommendations made by the Law Commission in *Wildlife Law: Control of Invasive Non-Native Species* (2014) Law Com No 342. These recommendations drew on the Wildlife and Natural Environment (Scotland) Act 2011, which introduced a system of species control agreements and orders.

¹⁰⁵ A diagram illustrating the way in which we envisage that the new regulatory framework will work is provided in app 3 to this report.

Chapter 5: Securing the maintenance of lower risk tips

- 5.1 Our consultation paper observed that the vast majority of tips on the register are unlikely to require complex remedial operations. We had been told by local authorities that the primary problem with this group of tips was the need for regular maintenance work to prevent the tips from becoming a hazard. We also heard that the absence of a power under the Mines and Quarries (Tips) Act 1969 to ensure that this proactive work was carried out by tip owners was a major gap in the legislation. We referred to this group of tips as “lower risk tips”.¹⁰⁶
- 5.2 We recognised that imposing responsibility on a single authority for all the ongoing maintenance requirements and any remediation work identified in the tip management plans for this group of tips was likely to be unworkable. We provisionally proposed that, following inspection and the preparation of the tip management plan, the authority with responsibility for these tips could be given a power to reach what we termed a tip maintenance agreement with the tip owner. This could be backed with a power to make a tip maintenance order in the event of non-compliance, and a power to allow the authority to carry out the work itself if it concluded that this was necessary or more cost effective.¹⁰⁷
- 5.3 We envisaged that tip maintenance agreements could take a highly prescriptive approach, in order to assist tip owners with low levels of tip safety knowledge. We thought that the agreements could cover matters such as duties to check drainage systems at stipulated intervals and after heavy rainfall, to maintain and improve drainage systems, or to install and check monitoring equipment. The agreements could also stipulate remediation work required and provide a timescale for completion. Depending on the complexity of the work, the agreement could specify that the work must be done by a suitably qualified professional. In cases of basic unskilled maintenance, owners could carry out the work themselves. We suggested that Welsh Ministers could issue a code of practice to provide practical guidance on the use of agreements and orders to provide information and direction.¹⁰⁸
- 5.4 We provisionally proposed that the authority with responsibility for this group of tips would be under a duty to inspect a tip subject to a tip maintenance agreement at appropriate intervals to ensure compliance with the agreement. These intervals would be specified in the agreement. The inspection record would be added to the tip register.¹⁰⁹

¹⁰⁶ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 7.17, 7.18 and 10.70.

¹⁰⁷ Above, paras 10.71 and 10.72

¹⁰⁸ Above, paras 10.77 and 10.78. For further discussion of how to ensure that work is carried out by suitably qualified professionals, see ch 10 of this report.

¹⁰⁹ Above, para 10.79.

- 5.5 We provisionally proposed that if the owner failed to comply with the agreement or refused to enter into an agreement, the authority could make an order for the owner to carry out the works or provide for the authority to carry out the works itself. We suggested that the orders could include provision for payment by the authority to the owner in respect of the reasonable costs of operations to be carried out by the order, or for payment by an owner in respect of the reasonable costs of operations to be carried out by the authority. Save in an emergency, we provisionally proposed that the owner should be given a right of appeal against such an order.¹¹⁰
- 5.6 We were unsure whether responsibility for the oversight of tip maintenance agreements and orders and the requisite inspections should fall to the new supervisory authority or to local authorities. We could see arguments both ways, with local authorities well placed to integrate the work with other drainage and flood risk management work, but with the risk of reproducing the tendency of the current structure towards inconsistency and fragmentation.¹¹¹ We recognised that the work involved was likely to be intensive, and we were mindful of the warning given to us by local authorities with responsibilities for significant numbers of tips that, without additional resources, they could not take on additional burdens.¹¹²
- 5.7 For this reason, we thought that the decision as to which authority would be better placed to oversee tip maintenance would depend on the size of the group of tips falling under this type of regulation. We foresaw that this would in turn depend on the criteria selected to determine whether a tip is designated.¹¹³ We were also mindful of the warning by stakeholders that, in order to be effective, any system which imposes a maintenance requirement on private landowners must be accompanied by a rigorous system of inspections.¹¹⁴ On balance, we concluded that we could not make a provisional proposal as to the choice of responsible authority, but instead asked an open question asking for views on the issue.
- 5.8 These proposals were accompanied by proposals relating to tips assessed as presenting a higher level of risk. Higher risk tips are discussed in chapter 6.
- 5.9 This chapter looks at responses to the questions we asked in our consultation paper about our proposed system for managing lower risk tips. We look first at agreements, including how to monitor compliance, then at orders and finally at where responsibility for making and supervising both agreements and orders should fall. Our consultation questions concerned our provisional proposals for tip maintenance agreements and orders. As we envisage that agreements and orders will be the mechanism to govern tip safety operations on all tips, whether carried out by the owner or by the supervisory authority, we have extended our discussion where appropriate to encompass the application of such agreements and orders to all tips.

¹¹⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.74.

¹¹¹ Above, para 10.88.

¹¹² Above, paras 7.5 to 7.8.

¹¹³ Above, paras 10.89 and 10.90.

¹¹⁴ Above, para 10.91.

TIP MAINTENANCE AGREEMENTS

Consultation Question 22: We provisionally propose that an authority should be empowered to enter into a tip maintenance agreement with the owner of land registered in the tip register, providing for the carrying out by the owner of the operations specified in the tip management plan. Do you agree?

5.10 Of the 47 who answered this question, 36 (77%) agreed. Five (11%) disagreed and six responded “other”.

Reasons for agreeing

5.11 Graham Hathaway saw the proposals as providing the “proactive part that has been so lacking” and a “big step forward in professionalising the requirements needed for tip safety”. Sir Wyn Williams commented that the proposals make “practical and commercial sense”.

5.12 Some respondents added conditions to their agreement. Chris Seddon pointed out that the authority would need to exercise due diligence to ensure that the owner was competent to carry out the operations in the agreement. Kim Moreton thought that clear definitions of actions and responsibilities would be essential. Lee Jones observed that the code of practice would need to be clear as to the level of engineering and/or environmental competence required for each maintenance task.

5.13 CLA Cymru and Richard Arnold agreed with the proposal on the condition that the work was paid for by the authority. CLA pointed out that this would incentivise the owner to comply. Richard Arnold thought that management of a problem which was effectively industrial waste should fall to government, and highlighted that the National Coal Board, which had once owned so many of the tips, had been a nationalised industry. Neath Port Talbot Plaid Cymru Group distinguished once again between smaller owners who are unlikely to be able to pay for the work needed and large operators such as Celtic Energy and large landowners who would have sufficient resources to do so.

5.14 CLA Cymru also thought that there should be an appeal process, save in an emergency, in the event that agreement between the authority and the tip owner could not be reached. “Emergency” would need to be clearly defined.

5.15 Howard Siddle supported the proposal but foresaw problems with compliance due to a lack of resources “either actual or manufactured”. Stephen Smith also had concerns about incentivising private tip owners to comply.

5.16 Jane Iwanicki thought that the scheme could work in some circumstances but not all. She thought it important to allow for the involvement of other stakeholders such as NRW, local authorities or the Coal Authority depending on the operations. In some cases work might be beyond the capacity of owners. She also pointed out that it might need consents or licences from other regulators.

Need for adequate powers of entry and enforcement

5.17 ICE Wales Cymru emphasised that the authority would need a power to access the tip and complete maintenance works not completed by the owner, with an additional

power to cover costs incurred. NRW also thought that costs recovery would be important, as well as considering penalties for non-compliance. Graham Hathaway thought that there should be fixed penalty fines for non-compliance backed up by imprisonment.

- 5.18 Professor Bob Lee observed that the regime would be toothless unless the authority had adequate powers of access. If, as he has proposed, NRW were to undertake an enforcement role, the provisions for access in the Environment Act 1995 could be extended to allow NRW to undertake the supervision of site maintenance. He thought that there were similarities between this type of site inspection and that undertaken by NRW for a variety of other regulated facilities and activities.¹¹⁵

Need for compulsory purchase powers

- 5.19 WLGA (Bridgend and Torfaen agreeing), Neath Port Talbot, Blaenau Gwent, Rhondda Cynon Taf Plaid Cymru Group and Sioned Williams MS all thought that the supervisory authority would need compulsory purchase powers to take tips into public ownership where necessary. This could be, for example, where the tip could become an “orphan asset”, such as where the owner is insolvent or where the works are beyond the means of the owner. Philip Thomas opposed the agreements as cumbersome and time-consuming. He proposed that if no agreement had been reached within a month, compulsory purchase powers should be exercised and work commenced without further delay.

Transfer of an agreement

- 5.20 WLGA (Bridgend and Torfaen agreeing), Neath Port Talbot, Blaenau Gwent and Merthyr Tydfil envisaged that maintenance agreements would need to transfer with any change of ownership of the tip.
- 5.21 The Home Builders Federation drew attention to the complexities which could arise with the transfer of responsibility in the case of a new development on land subject to a tip maintenance agreement. They explained that it was very unusual for a housing developer to retain ownership of a site, with individual plots being sold to the occupiers and any other land such as roads or parks either being passed to the local authority through adoption agreements or managed by a management company. This suggested a need for careful thought and flexibility “to allow for different ownership models”. They also suggested that a tip maintenance agreement could be aligned with the adoption of a sustainable drainage plan, as there was likely to be a strong link between the two.¹¹⁶

Alternative approaches

- 5.22 Some respondents did not agree with the proposal for agreements negotiated with individual tip owners. They thought that the supervisory authority should have

¹¹⁵ For discussion of a possible enforcement role for Natural Resources Wales, see paras 2.34, 2.35 and 2.63 above. The Environment Act 1995, s 108 allows access to an enforcing authority at any reasonable time to exercise specified pollution control powers. Enforcement powers are considered further in ch 8.

¹¹⁶ The system of sustainable drainage system maintenance plans for new developments introduced by the Flood and Water Management Act 2010, sch 1 is discussed in *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, paras 9.73 to 9.77 and 10.75.

responsibility for the work needed on all tips, including maintenance work. Wrexham drew attention to the high percentage of tips in private ownership, and the numbers owned by small farmers who would not have the skills or resources to maintain tips.¹¹⁷

- 5.23 ICE Wales Cymru and Rhondda Cynon Taf also disagreed with any fracturing of responsibility for tips, but agreed with the proposal for maintenance agreements as long as these were between the supervisory authority and the tip owner.¹¹⁸
- 5.24 NRW thought that an alternative approach would be to allow owners to make their own arrangements first. The authority could step in with a tip maintenance agreement if these arrangements were not satisfactory. Paul Connolly suggested that landowners could be allowed to input into the design of remedial work in creative ways that might benefit them.
- 5.25 Sue Jordan disagreed entirely with the agreements, on the basis that removal and complete restoration was the only acceptable option for disused tips.

Multiple ownership

- 5.26 In consultation events, stakeholders asked about the problem of reaching agreements where there were multiple owners of a tip.

Discussion

- 5.27 A substantial majority of respondents supported a system of tip maintenance agreements for lower risk tips. The need for a proactive approach to prevent tip safety problems developing was recognised. We think that the agreements could act to motivate and facilitate maintenance. Their content and supporting guidance could have an educational function in increasing tip owner knowledge. Content could include provisions regulating activities or developments on the tip which could be detrimental to tip safety.
- 5.28 We envisage that tip maintenance agreements will be capable of being made with both owners and occupiers of land containing a tip. The person in occupation of the land will be directly affected by tip safety intervention and may be the person best placed to carry out routine maintenance tasks. For reasons that we discuss more fully in chapters 7 and 9, we see financial provision in respect of tip work as a separate issue from who performs it, potentially involving a variety of people with interests in the land or in tip material situated on it.¹¹⁹ The agreements could also require tip owners and occupiers to report on their compliance with the agreement as well as to report any changes to a tip which could impact on safety. Where there are multiple owners of a tip, a form of joint tip maintenance agreement could be developed.

¹¹⁷ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 7.21 and 10.77, and our Impact Assessment available on the Coal Tip Safety project page: <https://www.lawcom.gov.uk/project/regulating-coal-tip-safety-in-wales/>. The Welsh Government estimates, based on the provisional tip figures published in October 2021, that 65% of disused tips are in private ownership.

¹¹⁸ The issue of which authority should be responsible for making and supervising the agreements is considered at the end of this chapter at paras 5.92 to 5.123.

¹¹⁹ See paras 7.60 to 7.70 and 9.69 to 9.83 below.

- 5.29 While leaving the legislative drafting to Legislative Counsel, we envisage that the recommended agreement and order-making powers will be drafted so as to enable more than one authority to be a party to an agreement or to be referred to in an order (we discuss orders later this chapter). We also envisage that the definition of an owner will be wide enough to cover any person with a freehold or leasehold interest in the relevant land. This will enable any duties to carry out work to be directed to the most suitable person and will also be helpful in the context of allocating financial liabilities, a topic that we discuss more fully in chapter 9.
- 5.30 We should point out that this approach will include tenants under statutory agricultural holdings or farm business tenancies, to which our attention was drawn by Dr Nerys Llewellyn-Jones.¹²⁰ These, which may in practice endure for many years, exist from year to year and are not in our view caught by the definition of an owner in the 1969 Act, though we consider that contribution proceedings under section 19 of the Act could be brought against them.¹²¹ We think that it should be possible to include such tenants in agreements and orders; it is a matter for the Welsh Government whether and how to include them in any principles it lays down as regards the financing of works.
- 5.31 As regards the reservations expressed, we agree that clarity around responsibilities will be essential. Problems with compliance will need to be addressed by ensuring that there are sufficient resources to carry out inspections and adequate powers of entry and enforcement. We also think it likely that there will be cases where owners are unable, for example through age or disability, to carry out the work themselves. The agreement may need to provide in such cases for an authority to do the work. This is discussed further in chapter 8.¹²² Issues of funding of work required on tips lie outside our terms of reference.
- 5.32 We agree that powers of compulsory purchase may be needed, but we think these are more likely to be needed for designated tips as discussed in the next chapter.¹²³ The tips subject to tip maintenance agreements will by their nature be lower risk tips.
- 5.33 We are concerned that the suggestion of an alternative approach allowing owners to design their own arrangements could lead to a proliferation of different agreements. This could lead ultimately to significant additional work for the enforcing authority. We envisage that the agreement will follow on from the tip management plan. In the most straightforward cases, it might be possible for the two documents to be very similar in content and fairly standard in form. The recent independent review of reservoir safety which followed the Toddbrook incident warned of the need for consistency in the quality of work undertaken by reservoir undertakers, and the importance of oversight

¹²⁰ See para 7.48 below.

¹²¹ Mines and Quarries (Tips) Act 1969, s 36(3). An agricultural holdings or farm business tenancy could be subject to a contribution order under s 19 of the Act, as it constitutes an “estate or interest ... in the land on which the tip is situated”. A lease of any length is an estate in land under the general definition of “term of years absolute” in s 205(1)(xxvii) of the Law of Property Act 1925. This provides that a “term of years” includes a term for less than a year, or for a year or years and a fraction of a year or from year to year.

¹²² See para 8.46 below.

¹²³ See para 6.115 below.

by the regulatory authority of owner compliance with requirements.¹²⁴ Varying approaches to tip maintenance agreements would make this all the more difficult to achieve.

- 5.34 There is also a possibility that tip maintenance agreements could be rolled together with other land management agreements. These may already be in place in relation to, for example, watercourses or environmental protection under farm sustainable land management schemes.¹²⁵ It was suggested at a number of consultation events that cooperation could be incentivised by the payment of a small subsidy. This is once again a policy issue for the Welsh Government to decide.
- 5.35 We envisage that tip maintenance agreements would mainly cover those lower risk tips that require basic maintenance or fairly straightforward remediation measures capable of being undertaken or commissioned by an owner or occupier.¹²⁶ Where more substantial remedial work is needed, it may be more appropriate for the agreement to provide for the commissioning or carrying out of work by the supervisory authority, giving the authority a role in negotiating terms and in deciding who would do the work. This would invite consideration of a tip agreement in a form that in whole or part authorised the performance of work by an authority rather than the owner or occupier.
- 5.36 We continue to consider that provision for entry into tip maintenance agreements should be accompanied by a power to make a tip maintenance order, a topic we discuss later in this chapter.
- 5.37 By way of illustration of potential scale, it seems to us possible that basic tip maintenance agreements requiring maintenance by the owner or occupier could be suitable for most of the tips in categories A, B and R under the current provisional risk classification system.¹²⁷ On that basis, these agreements would apply to just under 90% of disused coal tips in Wales.¹²⁸
- 5.38 We recognise that the making and supervision of a large number of agreements will be resource-intensive, as well as recognising the importance of prioritising work on tips presenting more immediate safety concerns. For this reason, dealing with higher risk tips may need to take priority over maintenance agreements for lower risk tips.

¹²⁴ See D Balmforth, *Independent Reservoir Safety Review Report (2021)* <https://www.gov.uk/government/publications/reservoir-review-part-b-2020> and para 4.30 above.

¹²⁵ See, for example, the Glastir scheme, a Welsh Government sustainable land management scheme through which financial support is offered to farmers and land managers: <https://gov.wales/glastir>.

¹²⁶ The hierarchy of remediation measures developed by the Coal Authority is set out in *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, para 8.25. Routine maintenance of, for examples, ditches and screens, is at the bottom of the hierarchy. Weather response programmes and measures such as grassing and planting are towards the middle of the list. Major engineering works such as building new ditching infrastructure appear towards the top.

¹²⁷ See the tip figures published by the Welsh Government in October 2021: <https://gov.wales/coal-tip-safety#section-72291>. A and B-category tips are defined under the current provisional system of classification as A: Minor tip/restored tip and B: Unlikely to cause risk due to size or location. An R tip is a reclaimed tip.

¹²⁸ Out of a total of 2,456 tips, there are 678 B-ranked tips (28% of total), 1155 A-ranked tips (48% of total) and 296 R-ranked tips (12%).

We agree too that effective enforcement will be essential. We consider how compliance can be monitored in the next section of this chapter. We consider issues of enforcement as part of our discussion of tip maintenance orders in the section which follows and also in chapter 8.

- 5.39 We discuss the issue of which authorities should be responsible for the making and supervision of tip maintenance agreements in the final section of this chapter.

Recommendation 21.

- 5.40 We recommend that coal tip safety legislation should provide for the making of agreements between authorities and the owners or occupiers of land registered in the tip register, providing for the carrying out of operations specified in the tip management plan.

MONITORING COMPLIANCE WITH TIP MAINTENANCE AGREEMENTS

- 5.41 Our next consultation question looked at the issue of how to ensure compliance with the agreements, asking if an authority should be under a duty to inspect compliance.

Consultation Question 23: Do you agree that a duty of inspection should fall to an authority to ensure compliance with the tip maintenance agreement?

- 5.42 Of the 48 respondents who answered the question, 41 (85%) agreed with the duty of inspection. Four respondents (8%) disagreed and three answered “other”.
- 5.43 Those agreeing observed that compliance with the agreements was crucial to ensuring continuing tip safety, and so checking compliance was essential. WLGA (Bridgend and Torfaen agreeing) emphasised that tip owners are unlikely to have a continuing economic interest in the tip, and so will lack an independent incentive to comply with the agreement. Lee Jones noted that the record of inspection would also stand as evidence in the event of any litigation connected with tip safety.

Who should carry out the inspection?

- 5.44 Some respondents who agreed with this proposal went on to consider who should be responsible for carrying out the inspection itself. Chris Seddon thought that it could be delegated to a competent third party. NRW also stressed the need for the inspector to be independent of the owner. Kim Moreton commented on the need for the inspector to possess sufficient skills. He pointed to the numerous examples of “specialist compliance auditors” getting it wrong, and cited the disaster at Brumadinho as the worst such case.¹²⁹ He thought that there was a “window of opportunity to retain skills

¹²⁹ The Brumadinho disaster in 2019, one of the worst environmental disasters in Brazil’s history, killed 270 people when a disused tailings dam at an iron ore mine suffered a catastrophic failure despite undergoing bi-weekly inspections. Civil proceedings have been brought in Germany against the company contracted to carry out the inspections.

from the former mining workforce and to build a new skill base with early-career engineers”.

- 5.45 Some responses made their agreement conditional upon the funding arrangements in place. Monmouthshire agreed as long as adequate resources were available to the authority. CLA Cymru thought that the work should be entirely funded by the authority. Philip Thomas in contrast thought that the cost should be borne by the landowner.
- 5.46 Those disagreeing included Wrexham and Paul Connolly, both of them on the grounds that the duty to inspect should fall to a centralised authority. Wrexham said that “it should be the supervisory body, not local authorities. Checks on compliance are vital”.

Discussion

- 5.47 A substantial majority of respondents supported a duty to inspect to ensure compliance with the tip maintenance agreement.
- 5.48 Some of those responding also considered who should be responsible for carrying out the inspection. This is considered in more detail in the final section of this chapter, which looks at which authority should take responsibility for the agreements. We agree that it is essential that the inspector should have the necessary skills; we discuss how specialism can be ensured in chapter 10. We also agree that the inspector must be independent of the owner, save where the owner itself is a public authority with required expertise. Subject to these conditions, and in order to ensure that inspection duties are workable, we think that the duty to inspect should include a power to contract out inspections to suitably qualified third parties. It needs to be borne in mind that tips suitable for a tip maintenance agreement will be owned by a wide range of types of owners, including local authorities.
- 5.49 We recommend that a duty to arrange for compliance inspections should fall to an authority to ensure compliance with the tip maintenance agreement, with a power to delegate, including to suitably qualified third parties independent of the tip owner.

Recommendation 22.

- 5.50 We recommend that an authority should be under a duty to arrange for inspections to ensure compliance with a tip maintenance agreement, with a power to delegate inspections to suitably qualified third parties.

TIP MAINTENANCE ORDERS

- 5.51 This section looks at our provisional proposals for the steps that might be taken in the event of non-compliance with an agreement, or of a refusal to enter into an agreement.

Consultation Question 24: We provisionally propose that an authority should be able to make a tip maintenance order where

(1) the owner has failed to comply with an agreement entered into and has been given appropriate notice of that failure and reasonable opportunity to rectify it;

(2) the owner has been offered an agreement and has refused to enter into an agreement on suitable terms or has failed to respond within 42 days, and the authority thinks it unlikely that the owner will agree;

(3) the authority considers the work specified in the order to be urgently necessary; or

(4) it has been impossible to identify the owner despite having taken specified steps to do so.

The authority must be satisfied that the measures proposed are proportionate to the objective to be achieved.

The order must either require the owner to carry out the operations or provide for the authority to carry them out.

The owner should have a right of appeal against the imposition of a maintenance order.

Save in the case of an emergency order, the order must provide sufficient time within which to appeal.

Do you agree?

5.52 Forty-five respondents answered this question. Thirty-six (80%) agreed with our provisional proposals. Five (11%) disagreed and four answered "other".

Reasons for agreeing

5.53 Keith Bush QC thought that the proposals appeared to be effective and relatively straightforward to implement. Kim Moreton described the proposed sequence leading to an order as "easily recognisable and robust". WLGA (Bridgend and Torfaen agreeing) and Neath Port Talbot thought that this would resolve the problem of owners proving to be unable or unwilling to carry out necessary work under an agreement.

5.54 Jacobs UK Ltd (formerly Halcrow) thought it essential to have provision for timely intervention in order to reduce the risk of a major accident:

Jacobs is aware of several tips where defects/problems and associated risks of failure were identified but delay in implementing action/remediation measures resulted in a major event that has required a greater level of assessment and remediation at much higher economic and social cost than would have been the case had action been taken early.

5.55 Some respondents had comments on the proposed circumstances in which the authority could make an order (numbered (1) to (4) in our consultation question).

Comments on (1): the owner has failed to comply with an agreement entered into and has been given appropriate notice of that failure and reasonable opportunity to rectify it; and (2): the owner has been offered an agreement and has refused to enter into an agreement on suitable terms or has failed to respond within 42 days, and the authority think it unlikely that the owner will agree

5.56 NRW suggested that a magistrate’s warrant might be needed in these circumstances unless the situation was urgent. In relation to (2), Professor Bob Lee suggested that it would be more effective to provide that “the absence of any response within 42 days is deemed a refusal to enter into an agreement” rather than “the authority think it unlikely that the owner will agree”.

Comments on (3): the authority considers the work specified in the order to be urgently necessary

5.57 NRW suggested that “urgency” would need to be clearly defined alongside “emergency” , or a decision should be taken to use only one of these terms.

Comments on (4): it has been impossible to identify the owner despite having taken specified steps to do so

5.58 NRW again suggested that in a non-urgent case a magistrate’s warrant should be required.

Additional proposed ground

5.59 WLGA (Bridgend and Torfaen agreeing) suggested a fifth ground for making an order. This would apply where an owner had failed to seek necessary permits to undertake works. They gave the example of the need for sustainable drainage system (SUDs) approval or watercourse consents for a discharge.¹³⁰

Third party interests

5.60 Network Rail and Transport for Wales both flagged up the interests of third parties in a tip maintenance orders. Network Rail saw a need for a proactive duty on the authority to inform any potentially affected landowners of any issues with the management of a tip which could lead to an adverse impact – for example on a railway. This should include a duty on the part of the authority to notify such landowners of the making of a tip maintenance order. Transport for Wales thought that it should be open to third parties to instigate tip orders where a tip was considered to pose a safety or environmental risk. They also urged that in such circumstances there must be sufficient power for the authority to undertake the work itself if the landowner has insufficient means to do so.

5.61 Neath Port Talbot suggested that there should be a grant-aided scheme for landowners who are put at risk through no fault of their own by a tip owner’s conduct.

Proportionality

5.62 Professor Bob Lee commented on our proposal that the authority must be satisfied that the measures proposed are proportionate to the objective to be achieved. While

¹³⁰ Sustainable drainage systems, including the need for approval before construction can start, are discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 9.70.

he agreed with the proposal, he thought that this type of provision should be set out in guidance rather than in legislation.

- 5.63 NRW thought that what would be proportionate would depend on the objectives of the order. These could simply to make the tip safe, or to protect the environment. They suggested that proportionality might be best assessed by a qualified civil engineer.

Right of appeal

- 5.64 NRW agreed that, where it had not been possible to reach agreement with a tip owner and the imposition of a tip maintenance order was required, it was right in principle for there to be a right of appeal. They suggested that a timescale for appeal could be set by a UKAS approved accreditation certification service and act as a statutory maximum. They thought that there could be provision for amended timescales with the agreement of the accreditation service if investigations revealed that more substantial works were required than previously thought.¹³¹
- 5.65 NRW also agreed that, where work was required urgently, an appeal should not delay works needed to make the tip safe. Huw Williams thought that an emergency tip order should come into force immediately, but should still be subject to appeal once in force. He suggested that the stop notices procedure in planning legislation provided a useful precedent. Professor Bob Lee thought that in emergency cases the authority should carry out the work itself and the owner could appeal the imposition of any charges for the work. He noted that the need for an emergency order should be very rare for undesignated tips.

Termination

- 5.66 NRW thought it important to provide for the order to be “closed” on certification of the work by a qualified civil engineer.

Funding

- 5.67 Some respondents once again emphasised that their support for the proposal depended in part on decisions yet to be taken as to who would pay for the works. CLA Cymru pointed out that in most cases the tip owner was totally unconnected with the original mining operation which created the tip. They thought that, if the authority did not take on the burden of paying for the works, there were likely to be instances where ownership may become “less than transparent in an attempt to avoid ongoing liability”.
- 5.68 NRW thought that the tip owner should pay the costs, but clarity was needed on how funding could be acquired if the owner was unable to pay. Philip Thomas thought that it was wrong in principle for the landowner to benefit from public investment in their land. He thought the better solution was for the land to be compulsorily purchased so that it could be used for the benefit of the community.

¹³¹ UKAS is the National Accreditation Body for the United Kingdom appointed by government to assess and accredit organisations that provide services including certification, testing, inspection and calibration.

Transfers of ownership

5.69 In a consultation event, Wrexham suggested that a tip maintenance order should be treated as a local land charge. It would then appear on the local land charges register at the time of a conveyance.

Discussion

5.70 Our proposals for tip maintenance orders were supported by a strong majority of respondents. There were a number of helpful suggestions for additions or variations to the preconditions for the issue of an order.

- (1) In the case of a failure by an owner to respond, we agree with a variation of our proposed wording to remove “and the authority think it unlikely that the owner will agree”. In this way, the absence of a response within 42 days triggers the power to make an order. Rather than require the authority to consider that the owner is unlikely to agree to an order in these circumstances, which could give rise to disputes, we think that the authority can be relied on not to act precipitately. For example, if there is an indication that the owner’s response is likely to be given within a short period of time after the expiry of 42 days, it would be a matter of good sense not to impose an order immediately.
- (2) We agree that it would be clearer to refer to “urgently necessary” work rather than combining the terms “urgently” and “emergency” without further definition.¹³² Where “emergency” is used, it will require definition. This is discussed further in chapter 11.¹³³
- (3) We are not persuaded that a failure to apply for necessary permits needs to stand as an additional ground. We think that it would be best for the agreement itself to include information about the permits that will be needed. If the tip owner fails to obtain these permits, this would fall to be treated as a failure to comply with the agreement.

5.71 We doubt that a duty to inform third party landowners of the making of an order, or of the potential adverse impact of an order, would be workable. The duty could be very broad, and it might be difficult to define which landowners should be informed. We have recommended that the making of an order would be entered on the tip register. This should provide reassurance that the required maintenance or remedial works will be undertaken. Similarly, we do not favour a formal process for third parties to apply for tip orders. We think that a better approach would be for third parties to approach the supervisory authority informally where there are concerns.¹³⁴

5.72 We agree that it would not be appropriate for statutory provision to contain all the detail about how the tip order system would work. It will be important to provide

¹³² The Wildlife and Countryside Act 1981, sch 9A, para 10(2)(c) provides that a species control order may be made where “the environmental authority considers that the making of the order is urgently necessary”. “Urgently necessary” is not otherwise defined.

¹³³ See paras 11.36, 11.37 and 11.44 below.

¹³⁴ See paras 3.77, 3.78 and 3.94 above for a discussion of the role of third parties who suspect the presence of an unregistered tip, and our suggestion that the supervisory authority should design an accessible process, such as an online form, to allow third parties to raise concerns.

supporting guidance to assist authorities in deciding whether circumstances are appropriate for an order. But we think provision for works to be proportionate to their objective can remain in legislative provision as a useful statement of general principle which will be important in the event of a challenge to whether the order has been lawfully made.

- 5.73 We agree that the exercise of a right of appeal should not prevent emergency work being carried out. Such situations should be rare, as tip maintenance orders will cover tips that are unlikely to give rise to emergencies. In the event that an emergency arose, we think it more likely that an order would authorise work by an authority than require work by an owner.
- 5.74 The stop notice procedure in planning legislation could, as suggested, provide a model. Where an appeal is brought against an enforcement notice issued under the Town and Country Planning Act 1990, the notice ceases to have any effect until the appeal is determined or withdrawn unless a “stop notice” is also served. The local planning authority can issue a stop notice alongside or after service of an enforcement notice if they “consider it expedient that any relevant activity should cease before the expiry of the period for compliance with an enforcement notice”.¹³⁵ Contravening a stop notice is an offence and there is no right of appeal against it. If this approach were applied to a tip maintenance order, and an activity on the tip needed to be halted, a notice to that effect could be served at the same time as the tip order.
- 5.75 We agree that it will be sensible to have provision for establishing that works have been satisfactorily concluded. But even where remedial works stipulated in an order have been completed, it is likely that maintenance requirements will remain. The order may need to continue to allow enforcement of these obligations unless replaced by an agreement.
- 5.76 In some cases, support for our proposal depended on decisions yet to be made as to who would pay for the works. While funding issues are a matter of policy for the Welsh Government, it is important to highlight that our proposal concerns provision for low risk tips. The work required under a tip maintenance order will principally comprise routine maintenance tasks and minor remedial measures which should not be very costly. But we acknowledge the risk that landowners may have an incentive to evade liability if they are responsible for the cost of the work.
- 5.77 We note the suggestion that a tip order could be treated as a form of land charge. This, however, raises some difficult issues. There are two possible mechanisms that allow agreements between a public body and a landowner to be binding on successors in title and notified to purchasers of the land. If the agreement creates an interest in land, then it may continue to bind the property following a transfer to a new owner provided registration requirements are met. If the land is unregistered, the interest may be able to be protected by entry as a land charge in the register of land charges. If the land is registered, it may be protected by the entry of a notice in the Land Register.¹³⁶ Registration also serves to notify purchasers of the existence of the

¹³⁵ Town and Country Planning Act 1990, s 183(1).

¹³⁶ Under the Land Charges Act 1972, the failure to register an interest that is registrable as a land charge renders the interest void against certain categories of purchaser. Under the Land Registration Act 2002,

interests. Alternatively, the agreement can be made into a statutory burden on the land registrable as a local land charge. Local land charges are, in general, obligations on landowners with a public flavour that benefit public authorities and are created under specific statutory powers.¹³⁷ These obligations must be registered by the local authority in the Local Land Charges Register.¹³⁸ Local land charges apply equally to registered and unregistered land.¹³⁹ As with registration of an interest in land as a land charge or by entry of a notice, registration as a local land charge serves to notify purchasers of the existence of a burden on the land. However, local land charges will generally bind a purchaser by operation of statute regardless of registration.¹⁴⁰

5.78 The Law Commission's report on conservation covenants (agreements between a landowner and a "responsible body") concluded that the local land charge approach was preferable for agreements of this kind.¹⁴¹ The report found that local land charges better reflected a scheme combining private initiative and public interest. The use of the local land charges register reflects the fact that conservation covenants are not interests in land. As the Law Commission explained in its report, they are "statutory burdens, with their own rules for binding successors, for transferability, for registration and for discharge or modification and so on". The report concluded that they should not be created as a new interest in land as they did not fit well into the traditional mechanisms of land law and their creation as an interest in land would add to the complexity of the land registration and land charges registration systems. For the same reasons, we consider that a tip order would fit more naturally into the local land charges framework.

5.79 Treatment of a tip order as a form of land charge also raises questions of legislative competence. Under schedule 7A to the Government of Wales Act 2006, protection of the environment is not a reserved matter and is within the legislative competence of the Senedd. Under section M1 of the schedule, however, registration of land is reserved; this is subject to an exception for fees for the registration of local land charges, which indicates to us that the creation of local land charges falls within the reservation. Schedule 7B paragraph 2 permits the enactment of a provision relating to a reserved matter where it is ancillary to provisions otherwise within the Senedd's

certain interests of land may be entered on the register by a notice. The entry of a notice does not guarantee that the interest that it protects is valid or even that it exists, but only ensures that the interest protected is given priority on the registration of a subsequent registrable disposition for value, if the interest is valid: <https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register>.

¹³⁷ See Conservation Covenants (2014) Law Com No 349. For example, Sites of Special Scientific Interest are listed as local land charges.

¹³⁸ The Local Land Charges Register was originally a number of registers managed by each local authority separately and is now in the process of being transferred to HM Land Registry as a single unified register.

¹³⁹ Local Land Charges Act 1975. A local land charge is defined by s 1 of the Act.

¹⁴⁰ If they are not registered, a purchaser may be entitled to compensation from the local authority.

¹⁴¹ The Law Commission's report has been implemented in pt 7 of the Environment Act 2021. Under s 119 of the Act, responsible bodies are bodies designated by the Secretary of State, some of whose main purposes, functions or activities must relate to conservation. Responsible bodies may be local authorities, charities or private bodies. The Secretary of State is also a responsible body.

subject-matter competence and with no greater effect on reserved matters than is necessary to give effect to the purpose of the provision within competence.

- 5.80 An example of the creation of a land charge by Senedd legislation exists in respect of land management agreements created by section 16 of the Environment (Wales) Act 2016. These are voluntary agreements which impose obligations in respect of the use of land, restrict the exercise of rights over land or provide for the carrying out of works. The Act provides for the agreements to be treated as creating interests in land. Section 17 provides for their registration as land charges if the land is unregistered,¹⁴² or for entry of a notice in the register of title under the Land Registration Act 2002 if the land is registered. In both cases, subject to certain conditions, the agreement is binding on a successor in title.¹⁴³ Land management agreements and tip orders arguably share an environmental purpose, but one which in our view would be more appropriately protected by the local charges scheme than under the Land Charges Act or Land Registration Act.
- 5.81 If there are concerns as to competence to create a form of local land charge, another possibility is to invite the Secretary of State to make an order under section 150 of the Government of Wales Act 2006. This section provides a broad power for the Secretary of State by order to “make such provision as the Secretary of State considers appropriate” in consequence of any provision made by an Act of the Senedd.
- 5.82 There may be other mechanisms available to enforce an order against a successor in title. A Glastir-type scheme might assist, although the scheme involves voluntary agreements rather than orders. Glastir is a five-year farm sustainable land management scheme. Agreements made under it are governed by the Rural Development Programmes (Wales) Regulations 2014.¹⁴⁴ Regulation 16 requires a transferee of land subject to such an agreement to inform the Welsh Ministers of a transfer of ownership within 30 days. The transferee becomes liable under the agreement, including for any breaches identified following the transfer and resultant penalties, even if the cause of the breach occurred prior to the transfer. In other words, liability under the scheme may be transferred, although the Government cannot block the sale.
- 5.83 Provision for transferring liability under a tip order is not in our view essential. Unlike a conservation covenant, a land management agreement or an agreement under the Glastir scheme, which are voluntary arrangements, a tip order can be made afresh following a transfer of land if the condition of the tip continues to warrant one. We have already suggested that agreements and orders should include obligations to notify the supervisory authority of a change of ownership or occupation.¹⁴⁵
- 5.84 We recognise that none of these approaches would resolve the problem of an owner evading liability through transfer of ownership to an overseas shell company. It might, however, be possible to alleviate the consequent burden on public funds through

¹⁴² They are treated as if they were restrictive covenants under Class D, para (ii).

¹⁴³ See Land Charges Act 1972, s 4 and Land Registration Act 2002, ss 28 to 30.

¹⁴⁴ SI 2014 No 3222 (W 327).

¹⁴⁵ See para 3.96 above.

compulsory purchase. The land might have low value because of the work required. This would not avoid public expense in undertaking the remediation work required, but would at least ensure that the remediation work was carried out on publicly owned land.¹⁴⁶ The benefits of this course would depend on the relationship between the cost of the remediation work and the utility and value of the land once remediated. We leave it to the Welsh Government to decide the most suitable approach to adopt.

5.85 Finally, we have concluded that, as with tip agreements, the order-making power should be exercisable against both owners and occupiers. We have given an indication in paragraph 5.29 above as to how an owner might be defined.

5.86 Our recommendations as to the circumstances in which a tip order may be made and enforced are set out below.

Recommendation 23.

5.87 We recommend that an authority should be able to make a tip order where

- (1) the owner or occupier of land has failed to comply with a tip agreement entered into by them and has been given appropriate notice of that failure and reasonable opportunity to rectify it;
- (2) the owner or occupier has been offered an agreement and has refused to enter into an agreement on suitable terms or has failed to respond within 42 days;
- (3) the authority considers the work specified in the order to be urgently necessary; or
- (4) it has been impossible to identify the owner or occupier despite having taken specified steps to do so.

5.88 The authority must be satisfied that the measures proposed are proportionate to the objective to be achieved.

5.89 The order must either require the owner or occupier to carry out operations or provide for an authority to carry them out.

5.90 The owner or occupier should have a right of appeal against the imposition of an order, but the exercise of the right of appeal should not operate to prevent work which is urgently necessary.

5.91 Save in the case of an order made where work is urgently necessary, the order must provide sufficient time within which to appeal.

¹⁴⁶ Compulsory purchase is considered further at paras 6.115 and 12.25 below.

RESPONSIBILITY FOR TIP MAINTENANCE AGREEMENTS AND ORDERS

5.92 The remaining issue to determine in designing a system of tip maintenance agreements and orders is where responsibility for making and supervising them should fall. We asked in the next consultation question whether in the case of maintenance agreements for lower risk tips the duties should be given entirely to the supervisory authority or to local authorities or divided between the two, with the supervisory authority given the responsibility to make the agreement.

Consultation Question 25: Do you think that responsibility for tip maintenance agreements for lower risk tips should fall to the supervisory authority or lie with local authorities? If you think that responsibility should lie with the local authority, should this include both making and supervising the agreements, or should the supervisory authority be given the duty to make the agreement?

5.93 Forty-four respondents answered this question. Thirty-six (82%) were in favour of the supervisory authority taking responsibility for tip maintenance agreements entirely. Three (7%) respondents favoured local authorities. Five respondents answered “other”.

Supervisory authority responsibility

5.94 Respondents relied on a number of reasons for favouring the supervisory authority as the body to take responsibility for tip maintenance agreements. The predominant theme in responses was a preference for a single body to take responsibility for all disused coal tips, regardless of risk level. WLGA (Bridgend and Torfaen agreeing) reported that local authority officers in areas with significant numbers of tips reached a broad consensus in favour of this view after considerable discussion. Wrexham gave the main reasons for preferring the supervisory authority as the ability to offer “consistency, expertise and resilience”. Neath Port Talbot explained:

It would be better if there is one supervisory body responsible for ALL tip maintenance agreements, irrespective of the risk level to maintain a consistent approach and to not unduly burden local authorities with a higher number of tips within their boundary.

5.95 The value of a consistent approach was emphasised by Jacobs. In their view it was better to avoid any split in responsibility in order to ensure consistency. Jane Iwanicki thought that a two-tier system risked blurring responsibilities and providing uneven levels of technical expertise and experience. CLA Cymru thought that a single body would “avoid any confusion as to who is responsible for what and where”.

5.96 NRW emphasised the need to foster technical skills as a reason for preferring responsibility to fall entirely to the supervisory authority:

This not only ensures a consistent approach but also provides more certainty and strength ... to maintain experienced and qualified experts. Splitting responsibility across organisations would dilute this and prevent sufficient strength ... resilience and career progression for staff.

5.97 Rhondda Cynon Taf also focused on the need to maintain skill levels, arguing that the supervisory authority could “develop a centre of excellence to sustain the appropriate

skills". Vikki Howells MS spoke of the greater capacity of the supervisory authority to develop expertise and best practice. Wrexham also thought that the expertise developed by a single authority would provide an opportunity for better analysis and research and lead to improved and independent evidence-based policy making.

- 5.98 Network Rail thought it would be better for authorities such as themselves to work in conjunction with a single regulatory body.
- 5.99 Some respondents doubted the ability of the local authorities to manage the work. Dr John Perry and Dr Peter Brabham thought that local authorities throughout Wales did not have the necessary levels of expertise. Wrexham echoed this view, observing that many local authorities, including themselves, had no officers with the necessary geotechnical specialism.
- 5.100 Graham Hathaway pointed to the many competing priorities in local authority work. While accepting that this was inevitable in the provision of many services, he did not think it appropriate for a service which dealt with potentially life-threatening levels of risk:
- The business of local politics is governed by so many competing impacts of running a complex web of services. Priority setting is often difficult and the quality of staff is fundamentally varied. I cannot see building up the capacity and drive to achieve a good management plan and implementation with be effective everywhere. It must by definition be piecemeal and divergent.
- 5.101 Ove Arup and Partners and the Mineral Products Association also emphasised the risks posed by conflicting local authority priorities and the demands on their budgets. In the Mineral Products Association's view, "the seriousness of the issue justifies a funded non-politicised technical body".
- 5.102 A number of respondents noted the potential for conflicts of interest as local authorities are themselves owners of tips. Lee Jones thought that the local authority should not be able to make an agreement with or supervise itself. The supervisory authority would not be a tip owner and would for this reason be impartial. Steve Harford thought it important that local authorities were treated in the same way as other landowners.
- 5.103 Chris Seddon warned that split responsibility could undermine the objectivity of the supervisory authority, as it would provide an incentive for the supervisory authority to reduce the risk rating on tips to manage their workload. Pontypool Park Estate Office questioned the practicality of switching between administrative regimes where the risk classification of a tip changed.
- 5.104 Professor Bob Lee provided examples of regulatory approaches where responsibility has been shared according to risk, citing air pollution under Part 1 and contaminated land under Part 2A of the Environmental Protection Act 1990. He acknowledged that this could spread the cost of administration, but thought that this was at the expense of a more coherent system.
- 5.105 Some responses emphasised funding as a reason to prefer the supervisory authority. In Merthyr Tydfil's view, local authorities did not have sufficient resources to undertake

additional work such as tip maintenance agreements. Wrexham warned that, even if additional funding was provided at the outset, this could diminish over the years and leave local authorities unable to fulfil their responsibilities. This had been the experience of many local authorities after the advent of the Part 2A contaminated land regime. Disparities in the funding of different local authorities had also developed.¹⁴⁷

Local authority responsibility

5.106 A small minority of respondents preferred that the local authority should take responsibility for tip maintenance agreements. Professor David Petley thought this was the most pragmatic option:

In non-urgent cases the local authority will have the understanding of the local situation required to undertake this work on a day to day basis. Replicating this at the level of the supervisory authority will be inefficient and ineffective.

5.107 Huw Williams thought that tip safety should remain “primarily a function managed at local authority level”. He relied on the views he had expressed as to the form that the supervisory authority should take. He thought that a supervisory authority based on the statutory joint committee offered the potential to recreate a “centre of excellence” model for engineers and other professions with an interest in soil mechanics and ground instability.¹⁴⁸

Division of roles between the supervisory authority and local authorities

5.108 Steve Jones of the Emergency Planning Department at Pembrokeshire County Council preferred local authority responsibility, but thought that the supervisory authority should retain oversight. He thought that the supervisory authority should not be in a position to supervise its own works.

5.109 Keith Bush QC preferred that the supervisory authority take responsibility for all disused coal tips, and highlighted that responsibility should not be split between authorities. But he observed that this did not prevent the delegation of relevant powers to local authorities by agreement in appropriate cases. He suggested that this might apply in the case of smaller or lower risk tips.

5.110 Caerphilly thought that the supervisory authority should have overall responsibility, but that the system should be sufficiently flexible to allow individual local authorities to reach agreement with the authority if they want to assist. They thought that this would be of interest to authorities owning their own tips with their own experienced staff. It would be open to local authorities who did not have the requisite level of skill, knowledge and experience to leave the supervisory authority to do the work, or alternatively to reach agreement with another local authority willing to take on the work. They recommended that maintenance agreements could be standardised, with the content overseen by the supervisory authority.

¹⁴⁷ For a similar point raised in relation to the funding of the supervisory authority, see paras 2.9 and 2.18 above.

¹⁴⁸ See also para 2.55 above.

5.111 Howard Siddle also saw scope for an allocation of roles between the supervisory authority and local authorities, as long as maintenance agreements were standardised by the supervisory authority:

It seems to me that consistency would dictate the supervisory authority might be the preferred body to make and supervise maintenance agreements. However, if wording and format could be standardised by the supervisory authority for commonly occurring maintenance works on lower risk tips, local authorities could issue maintenance agreements on behalf of the supervisory authority, [and] inspect the satisfactory completion of the works for the supervisory authority to record on the Register.

5.112 Stephen Smith observed that the balance of responsibility would be difficult to achieve, but thought that, for consistency, the supervisory authority should take the lead in developing all tip management plans, with local authorities possibly taking a delivery role for tips assessed as lower risk. Robust guidance would be needed if responsibility were divided to ensure consistency.

5.113 NRW thought that it should fall to the supervisory authority to make the agreement, as they would have the expertise to do so, but that local authorities could work closely with the supervisory authority. A protocol could be drawn up to decide a “joined up approach to working and delivering outcomes”. They gave the example of current collaboration between local authorities, the Coal Authority, NRW and the Welsh Government as a model of what could be achieved.¹⁴⁹

5.114 The Law Society wanted the supervisory authority to take responsibility for all tips “in the interest of administrative neatness and completeness”, but thought that local authorities should be classified as statutory consultees in the agreement-making process.

Additional features

5.115 Finally, Howard Siddle had regard to the position of the tip owner regardless of where responsibility was allocated. He thought that a guidance note for tip owners was required to explain “responsibilities, sanctions, good maintenance practice and their benefits”.

Discussion

5.116 A substantial majority of respondents were in favour of the supervisory authority taking on responsibility for tip maintenance agreements entirely. Some of the reasons given for this position were very persuasive, particularly with regard to the need to maintain a consistent approach.

5.117 This raises issues of resourcing. Although responses were strongly in favour of allocating responsibility for the agreements to the supervisory authority, there is scope for efficiency in a division of tasks between the supervisory authority and local authorities. It is also important to bear in mind that our proposal for tip maintenance

¹⁴⁹ Efforts to ensure that all authorities involved in a coal tip emergency are able to coordinate their response, agree the best approach and keep an audit trail of their actions are described in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.127.

agreements relates to lower risk tips. The need for consistency of approach, which favours allocation of responsibility to the supervisory authority, needs to be balanced against the efficiencies which may be gained by keeping functions at a local level.

- 5.118 We suggest that an effective division of roles could be for the supervisory authority to enter formally into agreements and for the local authorities, who could be parties to the agreements, to supervise and possibly in some cases to negotiate them. Supervision would include inspections. In this way, the supervisory authority could control the content of the agreements, to ensure that local practices do not diverge. The local authority would have the advantage of proximity to the tips subject to agreements. Local authorities also have other related land management responsibilities. It might be possible for the agreements to be combined with land management agreements with landowners, for example in relation to habitats, biodiversity or watercourses. Inspection outcomes would need to be reported back to the supervisory authority, who would record compliance. In this way, the supervisory authority could have a limited operational role in relation to lower risk tips, and would act more as a regulator.
- 5.119 We have already considered the way in which the supervisory authority will be involved in arranging for tip inspections, risk assessments and tip management plans in chapter 4. We envisaged that the supervisory authority would be empowered to delegate responsibility for some of these functions but should approve the tip management plan itself. We also explained that we expect the content of a tip management plan and a tip maintenance agreement to be very similar for lower risk tips. Tip maintenance agreements could be supported by guidance in a standard form. The making of a tip maintenance agreement would be a straightforward matter in the majority of cases.
- 5.120 If this approach were taken, the regulatory framework would need to provide for the supervisory authority to make tip maintenance agreements and for local authorities to supervise them. It seems to us sensible that the division of responsibility should be the same for tip orders as for tip agreements. We consider that the order-making power should lie with the supervisory authority, but that the considerations that favour local authority supervision do not necessarily change because it has been necessary to resort to an order.
- 5.121 We appreciate that this will require the supervisory authority to make around 2,500 agreements or orders. It will be important to establish priorities. It may be several years before the arrangements for lower risk tips can be put in place.
- 5.122 We therefore recommend that responsibility for making tip agreements and orders for lower risk tips should lie with the supervisory authority, and a duty to supervise agreements and orders, including to carry out inspections, should fall to local authorities unless a particular agreement or order provides otherwise. To assist with the performance of these responsibilities, we suggest that the supervisory authority produce detailed guidance for local authorities and tip owners to provide a consistent approach to commonly occurring maintenance tasks.

Recommendation 24.

5.123 We recommend that power to enter into tip agreements and to make tip orders for lower risk tips should fall to the supervisory authority, and a duty to supervise the agreements and orders, including to carry out inspections, should fall to local authorities.

Chapter 6: Prioritising work on higher risk tips

- 6.1 We discussed in our consultation paper the need for a regulatory framework which is capable of distinguishing and prioritising tips in need of more rigorous intervention. We noted that other regulatory regimes contain powers to designate a higher risk structure or site. A power to designate can be found in the regulation of reservoirs, in the provisions for tips associated with operational mines and quarries, in flood risk management and in contaminated land legislation. In the case of contaminated land, this is accompanied by a power to transfer responsibility for the contaminated site from the local authority to NRW. The flood risk management model in the Flood and Water Management Act 2010 includes imposing a duty on the owner not to alter a designated structure without the consent of the responsible authority.
- 6.2 We provisionally proposed that the new regulatory framework should provide for the designation of a coal tip by the supervisory authority as “higher risk”. We envisaged that once a certain threshold was met, for example a “significant hazard” test, as applied to tips related to operational mines and quarries, designated status would apply an enhanced safety regime to the tip with increased involvement of the supervisory authority.¹⁵⁰
- 6.3 We also considered how tips could be selected for designation. One approach would be to apply the enhanced safety regime solely to those tips viewed as requiring the most immediate attention. Alternatively, designation could be extended further to cover tips currently assigned a lower risk rating where appropriate to the type of work needed. For example, designation might be justified where a tip required less urgent but more intensive remedial work. The consequences of a tip failure could be a significant factor in deciding whether the tip required designation. We also noted that designation could be brought to an end where the tip was judged to have been returned to a state where it no longer required designation.¹⁵¹
- 6.4 As we thought that designation was likely to add to burdens on the landowner, we provisionally proposed a right of appeal against designation.¹⁵²
- 6.5 We asked for views on whether the new regulatory framework should provide for designation where the tip met criteria prescribed by Welsh Ministers by statutory instrument. We went on to ask for views as to what these criteria should be. We also asked for views on our provisional proposal for a right of appeal against designation.

¹⁵⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.54 and 10.55. For discussion of the regime applied to tips associated with operational mines and quarries, see paras 9.46 and 9.48. If a tip is deemed a “significant hazard”, thus becoming a “notifiable” tip, specific duties arise. These include a duty to have a geotechnical assessment by a “geotechnical specialist” repeated every two years. The assessment must include the specialist’s view on safety and stability, whether remedial work is required, the time frame within which this should be completed, and the date by which the next assessment must take place.

¹⁵¹ Above, paras 10.56, 10.57 and 10.68.

¹⁵² Above, para 10.57.

- 6.6 Finally, we looked at where responsibility for the work required on designated tips would fall. One option was for the supervisory authority to take over all the work. This would ensure a consistent and proactive approach, would keep all the relevant documentation in one place, and allow systematic prioritisation according to risk. An alternative would be to place the tip owner under a duty to carry out the work, possibly under the supervision of suitably qualified engineers, with a duty placed on the supervisory authority to inspect at intervals to ensure compliance, update records and review the designation.
- 6.7 In line with our view that consistency and prevention of harm should guide the design of the regulatory framework, we inclined towards that view that the supervisory authority should normally be responsible for carrying out the work specified in the tip management plan for a designated tip. We acknowledged that there were, however, likely to be cases where the tip owner would prefer and would be better placed to carry out the work itself. This might be the case, for example, where the owner or manager of the tip was a public authority. In such cases, we provisionally favoured an approach based on the drawing up of an agreement between the supervisory authority and the tip owner, backed by a power of last resort to make an order. An agreement to carry out work could include a stipulation for the work to be conducted or supervised by a suitably qualified professional.¹⁵³
- 6.8 We explained that we did not consider it appropriate to follow the reservoirs model by imposing a duty to inspect on the owner. We thought that there were significant differences between tip owners and reservoir undertakers in that owners have no continuing economic interest in the tip. For this reason, we thought it was justified to place a greater burden on the supervisory authority itself to monitor the tip.¹⁵⁴
- 6.9 In this chapter we consider first the responses to our consultation questions concerning a system of designation of tips as “higher risk” and the criteria for such designation. We conclude this part of the discussion by recommending a system of designation based on criteria which we leave to the Welsh Government to finalise with the assistance of experts. We then turn to the question of a right of appeal against designation, which we have decided not to recommend, and finally to the issue of where responsibility for work on designated tips should fall.

TIP DESIGNATION AS A WAY OF PRIORITISING TIPS

Consultation Question 18: We provisionally propose that the coal tips safety legislation should provide for the designation of a coal tip by the safety authority as “higher risk” where the tip meets criteria prescribed by the Welsh Ministers by statutory instrument. Do you agree?

- 6.10 Of the 45 respondents who answered the question, 39 (87%) agreed. Three (7%) disagreed and three answered “other”.

¹⁵³ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.62 to 10.65.

¹⁵⁴ Above, para 10.7. See also paras 9.29 to 9.31 of the consultation paper for a comparison of reservoirs and disused coal tips.

Reasons for agreeing

- 6.11 The importance of prioritising work and a systematic approach to the allocation of resources was emphasised by respondents such as WLGA and Blaenau Gwent. Professor Bob Lee said:

Ranking is a vital factor in risk-based regulation in order to deploy resources to their most protective end use.

- 6.12 Bob Leeming noted with approval that the proposed system mirrors the “classified tip” model used in the regulation of tips associated with operational mines in order to identify more hazardous tips. He thought that this alignment would help to provide for “a smooth transition from a working tip to a disused tip”.
- 6.13 NRW agreed with the approach, but advised that it was better to designate a tip as “high hazard” rather than “higher risk”, as this properly reflects consequence-based criteria. Howard Siddle and Jacobs UK Ltd (formerly Halcrow) also agreed with the proposal, but thought that “higher risk” was an emotive term. Howard Siddle preferred a system of “regulated” or “designated” tips where the tips meet certain physical criteria.
- 6.14 Huw Williams looked at how designation would fit in with inspection, and thought that, as the formal inspection process would take time, there was a case for provisional classification based on current information pending initial inspection under the new regime. This would allow their immediate prioritisation.

Reservations and reasons for disagreeing

- 6.15 WLGA and Blaenau Gwent both pointed to the possibility that designation would affect land and property values. They considered that it would be difficult to argue, in relation to freedom of information requests to disclose designation, that information about designation was not in the public interest.
- 6.16 Keith Bush QC disagreed with a designation system based on simple categories. He argued that, as every tip is different and the authority would need to carry out an individual assessment of the work needed on each tip:

the authority’s response should not be bound by the need to place tips in artificial categories, creating an expectation that priority should be given to the treatment or restoration of tips based on the category in which they are placed.¹⁵⁵

Setting criteria for designation by statutory instrument

- 6.17 Wrexham saw clear benefits in defining the criteria for each risk category in legislation. In their view, this “would ensure consistency and would avoid ambiguity”. They also observed that this was the approach taken to contaminated land sites under Part 2A of the Environmental Protection Act 1990.

¹⁵⁵ Keith Bush QC’s response has been translated from the Welsh original.

- 6.18 ICE Wales Cymru repeated that, as in the case of the contents of the tip register and matters to be included in a risk assessment and tip management plan, the criteria need to be based on the advice of competent professionals in the field. The Mineral Products Association thought it essential to base the legislation on sound technical and geotechnical advice and to avoid “political expediency”.
- 6.19 The Law Society supported a statutory instrument if it were subject to the affirmative procedure in the Senedd.
- 6.20 Objections to the use of a statutory instrument mirrored those raised above in relation to the contents of the tip register and the matters to be considered in risk assessment and tip management plans. CLA Cymru opposed secondary legislation as lacking in transparency. They repeated their request for consultation. Jane Iwanicki questioned whether regulation was the best means of defining the criteria by which tips were prioritised.
- 6.21 Stephen Smith thought that guidance would be more appropriate than a statutory instrument, on the assumption that this was not an area of regulation that would give rise to a breach of requirements. Lee Jones agreed with a statutory instrument, but thought that accompanying guidance would assist both the authority and tip owners.
- 6.22 Owen Jordan disagreed outright with the designation proposal, arguing that any categorisations would provide an opportunity to avoid responsibility. Sue Jordan also opposed the proposal on the ground that all tips should be removed.

CRITERIA FOR DESIGNATION

- 6.23 Our next consultation question dealt with the criteria for designation.

Consultation Question 19: We seek views on whether the designation of a tip should be by reference to any of the following, or other, criteria:

- (1) the tip shows signs or has a recent history of movement or instability;**
- (2) a slide of spoil from the tip would be likely to impact or affect**
 - (a) buildings or areas designed for human habitation or occupation;**
 - (b) a road, railway, canal or other infrastructure; or**
 - (c) a watercourse;**
- (3) there is a substantial risk of the tip releasing dangerous pollution into the environment;**
- (4) there is a substantial risk of the tip causing flooding;**
- (5) there is a substantial risk of material in the tip spontaneously igniting;**
- (6) the tip requires engineering work.**

6.24 Of the 46 respondents who answered this question, 24 (52%) agreed with all the proposed criteria, 7 (15%) agreed with some, two (4%) disagreed with all, and 13 (28%) responses were treated as “other” as making observations which did not involve either expressly agreeing or disagreeing with the proposed criteria.

Reasons for agreeing

6.25 Many respondents expressed agreement with the categories. Rhondda Cynon Taf, for example, thought that the suggested criteria would cover stability, public safety and environmental issues. Wrexham agreed, but thought that the criteria should be weighted to ensure that tips posing a risk to life are given the highest priority. Where multiple factors formed part of the risk assessment, the existence of a single supervisory body applying one methodology would ensure that tips “are ultimately designated in order of priority”.

6.26 Some respondents, such as Professor Bob Lee, agreed in general terms but left comment on the criteria to those with expertise in the area.

6.27 A number of respondents expressed agreement with particular criteria. Dŵr Cymru/Welsh Water agreed that potential impact on watercourses feeding drinking water supplies justified designation. Network Rail supported including impact on active rail infrastructure.

Reasons for disagreeing with individual criteria

6.28 Others disagreed with particular criteria.

Signs or a recent history of instability

6.29 Ove Arup and Partners thought that signs of historical movement should not be a governing factor as these are not necessarily an indication that a tip will fail in the future.

Substantial risks of pollution, flooding or spontaneous ignition

6.30 Howard Siddle disagreed with including pollution and flooding risks. His objections have already been canvassed above in the discussion of responses to consultation question 17, which examined whether coal tip classification should have regard to the risk the tip presents of pollution, combustion or flooding. In his view, the risk of pollution from tips is low.¹⁵⁶ Bob Leeming also thought that the risk of releasing pollution should not be included, as it would be covered by other environmental legislation enforced by NRW.

6.31 Howard Siddle thought that reference to flooding should be replaced by reference to a substantial risk of failure of a natural or engineered drainage system which would impact on its security. He agreed with including spontaneous combustion, but sounded a note of caution about the usefulness or cost effectiveness of its inclusion.

6.32 ICE Wales Cymru agreed with including pollution and flooding risks, but thought that spontaneous combustion was now less likely to occur as most tips with high coal content will now have been reclaimed or have self-combusted in the past. They

¹⁵⁶ These views are set out at paras 2.86 and 4.93 above.

thought that further data would be needed on the coal content of a tip to assess this risk.

- 6.33 Ove Arup agreed with including pollution, flooding and combustion risks, but only if they also presented an immediate risk to the public.
- 6.34 Huw Williams questioned the concept of “substantial risk” in these categories. He thought it created scope for uncertainty and argument. He suggested that it should be sufficient to identify a risk and a route of causation. He thought that the flooding category should differentiate between flooding of land and flooding of buildings or premises occupied as dwellings or for business.

The tip requires engineering work

- 6.35 Steve Jones of the Emergency Planning Department at Pembrokeshire County Council and CLA Cymru both rejected the inclusion of a need for engineering work as a separate heading, as a need for engineering work would arise as a result of an assessment under the other headings on the list. ICE Wales Cymru had the same objection: “engineering works may be required as a result of risk assessment and it is the risk assessments that would inform classification”. Howard Siddle concurred, observing that the need for engineering work was the conclusion of a risk assessment and should not be a factor in designation. Stephen Smith noted that this category was a consequence of risk, not a factor related to tip characteristics.
- 6.36 In contrast, Caerphilly thought that the engineering work category was useful, as it was quite open and could cover, for example, tips with drainage infrastructure at or beyond its end of life. They queried whether maintenance work could also fall within the category, noting that some tips are “maintenance hungry” and require regular maintenance to prevent rapid deterioration.
- 6.37 Professor David Petley queried the term “requires” in this category, asking whether there should be a time frame to accompany the term. He found it unclear whether the term meant that the tip currently requires the work, or was likely to require it within a given period.

Additional criteria

- 6.38 ICE Wales Cymru, while agreeing with the proposed criteria, suggested areas where they could be amplified. In relation to the risk of impact on areas designed for human habitation or occupation (subcategory 2(b) in the consultation question), they added areas of temporary habitation such as campsites. In relation to risk of flooding (category 4), they added the need to consider the risk of secondary flooding associated with the release of impounded water following a tip failure.
- 6.39 Caerphilly described the suggested criteria as “a good starting point” but thought there was a need for more openly-worded categories. This could include maintenance work on tips where this was critical to safety, as mentioned above. They also pointed to other issues such as protection of ecology, wildlife, water run-off, and vegetation die-back and replacement, and suggested that a need for landscaping would be a criterion. This would allow for the re-planting of areas to minimise run-off or scour. This in turn acts to prevent other maintenance issues.

- 6.40 Lee Jones also wanted to expand provision for environmental impact. He suggested including potential impact on protected species or environments such as Sites of Special Scientific Interest (SSSI's), nature reserves or areas of outstanding natural beauty, either physically, chemically or biologically. The need to consider the environmental importance of potential receptor areas was also raised by Elisabeth Jones QC in a consultation event for Legal Wales.
- 6.41 Professor David Petley agreed with our list, but suggested adding additional subcategories to category 2, to cover cases where a slide would be likely to impact on an area with significant economic value or significant ecological value. He also proposed a catch all category of tips "causing any other type of substantial risk" to be added to the end of the list. Neath Port Talbot proposed adding potential to cause instability to adjoining land.
- 6.42 Transport for Wales thought that the categories should include impact on public services, for example transport, health care and education and impact on natural landscapes and designated sites such as those of historical importance. They added that the assessment of potential impact should include future forecasts, such as those affected by climate change, to ensure that risk methodologies are fit for the future.
- 6.43 Paul Connolly suggested a non-safety based classification where a tip had been identified as a potential source of engineering or landscaping fill.
- 6.44 ICE Wales Cymru provided a list of proposed additional criteria:
- Tip is underlain by a landslide or marginally stable natural ground
 - Other adverse underlying ground conditions
 - For washery/lagoon waste – potential risk of subsidence and failure on loading
 - Nature of the waste in the tip. Different waste materials will have different geotechnical properties and hence different influences on tip instability
 - Mine entries in the vicinity and particularly immediate upslope of hillside tips that could present a risk of mine water outbursts that could trigger instability
- 6.45 Philip Thomas also identified additional criteria. He suggested that landowner failure to maintain land or actions in undertaking development should be included where these increase risk. In relation to a failure to maintain land, he gave the example of erosion of a public bridleway by a stream which was diverted as a result of tip remediation in the 1970s, saying that the erosion of the bridleway impedes access to the tip which will limit the ability of the authorities to respond to an incident such as a fire. In relation to developments which increase risk, he gave the example of the installation of wind turbines on top of coal tips, where the trackway, foundations and construction of the turbine could increase the risk of tip instability. He pointed to the

Meenbog peat landslide in November 2020, which occurred at a time when a wind farm was under development on a peat bog, as evidence of this risk.¹⁵⁷

Terminology

6.46 The British Geological Survey observed that the terminology used in this question needed clarification. Tip stability should be regarded as a scale of hazard, with risk being defined by likelihood of the various impacts such as impact on buildings or of pollution set out in the list that follows. Similarly, spontaneous ignition is a separate hazard that could be subject to scaling and risk assessment.

Alternative approaches

6.47 A number of respondents suggested alternative approaches to designation. In the view of Jacobs, the designation of a tip needs to come from a risk-based assessment that considers all the hazards at a tip and establishes their associated risk rating. Where hazards are identified as having a “high” risk rating, this should result in the designation of the tip without a need for further classification.

6.48 Keith Bush QC also disagreed with the idea of designation based on narrow categories. As with his response to the previous question, he thought that the authority’s response should not be constrained by a need to place tips in artificial categories, but should instead be led by an individual assessment of what work is needed.

6.49 NRW was broadly supportive of all the criteria identified in our list, but thought that greater consideration was needed as to how designations would be used to categorise one tip over another. They also thought that any designation should be based on consequence.

6.50 Transport for Wales suggested that bodies such as themselves with responsibility for infrastructure should be consulted as part of the development of the new regulatory framework and tip risk assessment process. This would ensure that potential impacts on their infrastructure were fully considered. They also asked that risks should be reassessed in response to changes to their infrastructure or their use of it, and that they should be notified of future changes to risk ratings or designations of tips if these might affect their interests.

Changes in designation status

6.51 Howard Siddle was of the view that designation was a label that should remain with the tip even after works are carried out as it remains a potential risk. This would ensure that the correct level of inspection and maintenance is provided. In other words, it is the management of the tip which changes after remedial works are carried out, not the designation.

¹⁵⁷ For further detail, see Philip Thomas’s full response to consultation question 19 in the consultation analysis available on our Coal Tip Safety project website: <https://www.lawcom.gov.uk/project/regulating-coal-tip-safety-in-wales/>.

6.52 NRW, in contrast, thought that designation should be capable of alteration in response to good practice by a tip owner. The authority could produce Good Tip Management guidance to help them to do this.

Discussion

A system of designation

6.53 A substantial majority of respondents were in agreement with our proposal for a system of designation. We agree that it is essential to have a system which enables work to be prioritised in a systematic way. As discussed in chapter 4 in relation to tip inspections, the importance of prioritising and the need to target resources were emphasised in the independent review of reservoir safety which followed the Toddbrook incident. It also seems appropriate to draw upon the notifiable tip approach applying to active tips, originally contained in Regulations under Part 1 of the Mines and Quarries (Tips) Act 1969 and now in the Quarries Regulations 1999 and Mines Regulations 2014. This requires the appraisal of tips to determine whether a tip is a “significant hazard by reason of instability or movement”.¹⁵⁸ A mechanism of this kind would signal a recognition that the approach underlying Part 2 of the 1969 Act, that disused tips were unlikely to pose risks and did not require systematic appraisal and prioritisation, is not appropriate for present day circumstances in Wales.

6.54 In the final section of this chapter we explore further what such a system would mean. We envisage that designation would be an outcome of the risk classification process discussed in chapter 4. It would signal that priority is to be accorded to the work needing to be done on the tip. It would have implications as regards the level of skill required of those undertaking the work and on whom responsibility for carrying out the operations will fall; we consider that this should normally be the supervisory authority itself.

6.55 It is important to emphasise that designation does not replace the processes that we recommend be taken following the registration of a tip, outlined in the previous chapter. A tip inspection, risk assessment and tip management plan will be required for each tip. The plan will cover matters such as maintenance and remedial works needed and the frequency of inspection. We envisage that the risk classification which follows these steps will include the designation of certain tips as having a higher priority.

6.56 It is also important to bear in mind that our recommended scheme would come into being in the context of the significant work undertaken since the Tylorstown slide in February 2020 to identify, prioritise and commence work on tips in greatest need. Such tips are likely to have been the subject of a recent and thorough inspection, so that designation of them and work on them need not await a first inspection under the new scheme.

6.57 We agree that care is needed with regard to the terminology applied. Reference to a “higher risk” tip or to a “hazard” can be misleading as well as alarming. A tip will be designated because it meets certain criteria, discussed further below. As with other risk classifications, we envisage designation as indicating a recognition that a tip

¹⁵⁸ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 9.45 to 9.48.

deserves priority attention rather than suggesting that people in its vicinity are in danger. This should provide reassurance and avoid blight.

Criteria for designation

- 6.58 Respondents put forward varied views on our proposed criteria. A significant proportion neither agreed nor disagreed with them and responded “other”. We agree with the observation that the designation of a tip should derive from its risk assessment, which should consider all the hazards presented by a tip and establish the risk classification.
- 6.59 The inclusion or exclusion of risks relating to pollution, combustion and flooding is a topic discussed earlier in this report in considering the approach to be taken to risk classification.¹⁵⁹ If the Welsh Government accepts our recommendation that the risk classification should have regard to these factors, we think it sensible that they should also be included among the risks that can lead to designation. While there may not be any tips currently assessed as presenting risks other than those related to instability, such risks may be identified in future and could lead to a need for priority attention. It would be unfortunate if the legal mechanisms for addressing those risks were to be omitted from the legislation.
- 6.60 Respondents correctly observed that our final criterion in consultation question 19, referring to a need for engineering work, approached the issue of designation from the opposite direction to the other criteria, and that the need for work is the consequence of the identification of a risk. We tend to the view that elements of both approaches can be appropriate in designing a set of criteria for designation. The drawing up of a set of criteria for designation is a technical matter, not suitable for determination by us. We must leave it to the Welsh Government, in consultation with experts, to decide the criteria to be applied. We are grateful for the contributions made concerning the individual criteria we have proposed. We expect that the Welsh Government will find them a helpful starting point for further discussions. The most that we are qualified to suggest is that designation, as we envisage it, will derive from a weighing in the balance of three broad factors which we identify as
- (1) the degree of risk of any of the four hazards (instability, pollution, combustion and flooding) materialising;
 - (2) the seriousness of the consequences (the nature of the “receptors” that would be affected; our consultation question identified areas of human habitation, and certain types of infrastructure as sensitive receptors and respondents have suggested others);
 - (3) the scale or sophistication of the work required to address the risk.
- 6.61 The factors are, self-evidently, interrelated. The more sensitive the receptors, the lower is the acceptable degree of risk of a hazard materialising. The third factor is relevant because of the consequence that we envisage designation as having, which is that the work required to address the hazard will normally be carried out by the supervisory authority itself. Hazards that can be met, for example, by routine

¹⁵⁹ See paras 4.95 to 4.98 above.

maintenance of drainage channels will not be a ground for designation in the same way as hazards that require to be met by careful reprofiling of the contours of a tip.

- 6.62 We therefore suggest that, in deciding the criteria, regard should be had to the consequences of designation. This, as discussed in the final section of this chapter, will require assigning priority to the tip, the conduct of works by specialists, and recognition that the work will normally be carried out by the supervisory authority. This leads us to the conclusion that an important factor may, depending on the approach that is taken to the performance of work on undesignated tips, be to weigh the complexity of the work required against the ability of the owner to undertake it. For tips requiring the most complex work, it is likely that the scale of the works required would be beyond the capacity of a tip owner to undertake.
- 6.63 Beyond drawing attention to the comments of respondents, that is the most we are qualified to say on the technical aspects of criteria for designation. As the Welsh Government develops its approach to risk classification, it may be able to identify appropriate thresholds for designation arising from the “scoring” of hazards and receptors.¹⁶⁰ The approach to be applied will depend both on technical matters and policy choices.
- 6.64 We have only a limited number of observations on specific aspects of respondents’ contributions:
- (1) Legislative policy has already determined that lagoons fall under the tip safety rather than the reservoirs regime. We do not think it appropriate to interfere with this.¹⁶¹
 - (2) A longstanding failure to maintain, combined with a need for high level maintenance, could justify designation. But we do not think that the urgency of maintenance work alone would be sufficient. We think that the better approach to cases where urgent but relatively low level maintenance is required would be to ensure that maintenance work provided for in the tip management plan is carried out. The previous chapter, on tip maintenance agreements and orders, set out how this could be achieved for tips posing a lower risk.
 - (3) We agree with the proposition that a criterion related to environmental protection should include potential impact on an area of significant ecological value.
 - (4) Use of a tip as a source of engineering or landscaping fill relates to questions of reclamation, discussed in the final chapter of this report, rather than to an indication of risk. The possibility that tip material could be profitably removed could be an important factor in the development of a longer-term strategies to find a beneficial use for disused tips.

¹⁶⁰ See the discussion of risk classification in paras 4.65 to 4.109 above.

¹⁶¹ See discussion of the treatment of lagoons in *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, paras 4.31 and 9.56 to 9.60. See also ch 7 below, which considers the definition of a tip.

- (5) The decision as to whether to include a “catch all” category such as “any other substantial risk” will be influenced by decisions taken as to the other criteria to be adopted. We are not aware of any substantial risks other than instability, pollution, flooding and combustion.
- (6) We think that imposing a specific requirement that a tip currently requires work, or is likely to require it within a given period, might be too restrictive an approach, but consideration of how urgently operations were required would be important in deciding priorities.

6.65 We have also considered the question of whether tips should remain designated after works are completed. The purpose of designation is to allow prioritisation of tips where safety work is required, so it would be logical for the tip, once work is completed, to move into a lesser category. We think that the answer will depend on technical matters. For example, if no further work is needed save routine maintenance, there would appear to be no purpose in continued designation. The tip might be considered suitable for a tip maintenance agreement with the owner, as discussed in the previous chapter. Alternatively, if the tip was considered to be no longer suitable for designation, but also not appropriate for an owner-led maintenance approach, it might need to fall into a distinct non-designated category.¹⁶²

6.66 Alternatively, it is possible that a tip which is not considered in need of designation at the time of first inspection could change status following a subsequent inspection (conducted at the intervals stipulated by the tip management plan). Changes in a tip, for example due to heavy rain, or an event such as a cavitation collapse, might alter its risk assessment and justify designation. As we explained in chapter 4, it would be the responsibility of the supervisory authority to receive inspection reports and to sign off risk classifications.¹⁶³

6.67 We recommend accordingly that designation should arise from the risk assessment process, and that the criteria for designation should be developed by the Welsh Government in consultation with experts.

Prescribing criteria by statutory instrument

6.68 In consultation question 18 we provisionally proposed that the criteria for designation be prescribed by statutory instrument; there was majority support for this proposal. We agree with respondents that setting criteria for designation by statutory instrument promotes clarity and consistency. The benefits of this approach have already been examined in relation to the contents of the tip register and matters to be considered in the subsequent risk assessment and tip management plan. In relation to the designation decision, setting criteria by statutory instrument would help to ensure that decision-making conforms to an objective standard. This will be important for decisions affecting the workstream of the supervisory authority, as inevitably, where there are resource constraints, there will be pressures to control workload.

6.69 Given that the criteria for designation have not yet been devised, it is difficult to predict how easily they will lend themselves to prescription by a statutory instrument. Only

¹⁶² See para 5.35 above.

¹⁶³ See paras 4.57 and 4.63 above.

once they have been determined will it be possible to know whether they would be better set out in more open-textured guidance. We have decided to make a recommendation in favour of prescription by statutory instrument on account of its advantages of transparency, clarity and consistency; the prescribed criteria which could be accompanied by more detailed guidance. It will be open to the Welsh Government to reject this aspect of our recommendations if it feels justified in doing so in the light of the nature of the criteria that emerge. We agree that, if a statutory instrument is made, the affirmative procedure should be used to ensure scrutiny by the Senedd.

Recommendation 25.

- 6.70 We recommend that coal tip safety legislation should provide for the designation by the supervisory authority of tips that meet criteria prescribed by the Welsh Ministers by statutory instrument.

Recommendation 26.

- 6.71 We recommend that the criteria for designation should be developed by the Welsh Government in consultation with experts.

RIGHT OF APPEAL AGAINST DESIGNATION

- 6.72 Our next question asked for views on our proposal that a person aggrieved by the designation of a tip should have a right of appeal.

Consultation Question 20: We provisionally propose that a person aggrieved by a designation of a coal tip as higher risk should have a right of appeal. Do you agree?

- 6.73 Forty-eight respondents answered this question. Of these, 39 (81%) agreed. Eight (17%) disagreed and one answered "other".

Reasons for agreeing

- 6.74 Sir Wyn Williams thought that "fairness demands a mechanism whereby a designation can be challenged". Chris Seddon noted that "all legislation is open to interpretation and so decisions should be open to review". Howard Siddle also agreed but expressed a need for well-crafted designation criteria to limit the number of appeals.
- 6.75 NRW also warned that the methodology used should be kept under regular review, and care would be needed "if we are to avoid continual questioning of the designation process". They suggested using the Reservoirs Act 1975 as a model for adopting a staged approach to the designation process. This provides for a provisional designation based on information initially held by the regulator, a period for representations so that the owner can correct errors or provide further evidence, and a

final designation based on all evidence gathered. The final designation may be appealed.¹⁶⁴

“Person aggrieved”

- 6.76 Several respondents raised questions about who would be provided with the right of appeal. WLGA and Neath Port Talbot wondered if the right should be available not only to tip owner but also to owners of adjacent land and property owners who might be affected.
- 6.77 Professor Thomas Watkin thought that all persons with a legitimate interest in a tip’s safety should also have a right of appeal against a decision not to designate a tip. This might include local residents, businesses, transport and utility companies who could be adversely affected as a result of an incorrect decision.
- 6.78 Transport for Wales warned of the need to adopt a method and process of appeal that ensures that spurious appeals are dealt with appropriately and dismissed.

Avenue of appeal

- 6.79 A number of respondents emphasised the need for the appeal to be heard by an independent body with appropriate expertise. Huw Williams thought that the right of appeal should be to the Planning Inspectorate. ICE Wales Cymru thought that a competent person with expertise in coal tip classification should be engaged to inform the appeal process.

Effect of appeal

- 6.80 Joel James MS and Lee Jones pointed out the importance of maintaining designated status while an appeal is heard. WLGA and Neath Port Talbot urged that a right of appeal should not be permitted to delay safety work identified as necessary. Professor David Petley and CLA Cymru thought that the right of appeal should not be able to impede action in a situation of imminent risk.
- 6.81 Kim Moreton commented on the possibility that court delays and the larger budgets of large corporations could present significant obstacles to the resolution of disputes. He suggested a time limit for an appeal “window” of 18 months from the time of designation.

Reasons for disagreeing

- 6.82 Many of those disagreeing with the proposal highlighted the specialist knowledge which will inform the designation. In Merthyr Tydfil’s view:

The supervisory authority will have specialist knowledge and understanding of tip safety to designate a tip correctly and should not be challenged by non-qualified people.

¹⁶⁴ Reservoirs Act 1975, ss 2A(2) and (3), 2B.

6.83 Keith Bush QC referred to his reasons, discussed above, for opposing a system of formal categorisation and thought that the impact on the system of a right of appeal was an additional reason to reject this approach:

The possibility of creating a complex appeals procedure in relation to a system of formal categorisation highlights the risks of adopting such a system.¹⁶⁵

6.84 Stephen Smith, who answered “other”, commented that a right of appeal would be appropriate for defined categories such as landowners, to protect their interests, but asked whether such a provision would not result in similar problems as those identified in our consultation paper as arising under the 1969 Act.

Discussion

6.85 A substantial majority agreed with a right of appeal against designation. The reasons for doing so were focused on fairness and an understanding that designation might involve additional burdens on landowner. Our discussion in the previous two sections of this chapter has set out a different approach to designation from that originally envisaged in our consultation paper. We now see designation as arising directly from risk assessment and classification. We think that this impacts on the need for a right of appeal against designation. We are not able to say whether designation, in the scheme eventually adopted by the Welsh Government, will be detrimental to the interests of the landowner.

6.86 We explained in chapter 4 that risk classification is a technical decision drawn from detailed consideration of the attributes of a tip and its location, and serving as a signal to the public of the broad category of approach to be taken to its management.¹⁶⁶ It is also important as a way to steer decision-making and resource allocation by the supervisory authority. We recommend a right of appeal against a tip order, which will directly impose obligations as to works, payment and so on. For these reasons, we have concluded that a right of appeal against a risk classification is not appropriate. In our view, the same applies to a designation.

6.87 Comparison with other regimes which use designation to indicate a higher level of risk is instructive. Whether they afford a right of appeal appears to depend on whether designation directly produces adverse or onerous effects. The right of appeal provided to the undertaker under the Reservoirs Act 1975 against designation arises as a result of the imposition on the undertaker of obligations in respect of the reservoir which are clearly more onerous than for an undesignated reservoir.¹⁶⁷ Similarly, designation under the Flood and Water Management Act 2010, which also attracts a right of appeal, imposes a duty on the owner not to alter, remove or replace the designated structure.¹⁶⁸ In contrast, the contaminated land regime does not provide the landowner with a right of appeal against the designation of contaminated land as a “special site”. The result of such a designation is to place the land in question under the control of Natural Resources Wales in place of the local authority, presumably on the ground

¹⁶⁵ Keith Bush QC’s response has been translated from the Welsh original.

¹⁶⁶ See para 4.76 above.

¹⁶⁷ Reservoirs Act 1975, s 2E.

¹⁶⁸ Flood and Water Management Act, sch 1, para 15(1).

that the complexity of the issues posed by the particular contamination would be better dealt with by a more specialist organisation, but does not involve immediately detrimental consequences for the owner. However, NRW may refer a special site decision to Welsh Minister if it disagrees with the local authority.¹⁶⁹ There is no right of appeal against a determination that a tip associated with an operational mine is a “notifiable tip”.¹⁷⁰

- 6.88 For reasons similar to those that led us not to recommend a right of appeal against risk classification, we do not recommend a right of appeal against designation. As has been seen from the discussion of agreements and orders for tip safety work in chapter 5, the owner or occupier of land containing a tip will have the protection of a right of appeal against the terms of the order in cases where agreement has not been reached and an order is imposed.¹⁷¹ Judicial review will also be available as a remedy.
- 6.89 We agree in any event that exercise of any appeal right should not delay urgent work. We invite the Welsh Government to consider whether a system of provisional designation followed by period for representations would be a worthwhile addition to the scheme.

RESPONSIBILITY FOR WORK ON DESIGNATED TIPS

6.90 This section considers who should be responsible for carrying out the work required on designated tips. As explained at the beginning of this chapter, the provisional view expressed in our consultation paper was that the supervisory authority should normally be responsible for carrying out the work. But we recognised that there might be circumstances in which the tip owner would prefer and would be better placed to carry out the work itself. In such cases we suggested an approach based on agreement between the supervisory authority and the tip owner, backed by a power to make an order.

6.91 In this section we consider views on our provisional proposal.

Consultation Question 21: We provisionally propose that in the case of a designated tip the supervisory authority itself should normally be under a duty to carry out the operations specified in the tip management plan for the tip. Do you agree?

6.92 Of the 50 respondents who answered this question, 40 (80%) agreed. Three (6%) disagreed and seven answered “other”. While most respondents agreed with our proposal, some qualified their support. The reasons given in support indicated a

¹⁶⁹ Environmental Protection Act 1990, s 78C and D. Once land has been designated as a special site, or determined to be contaminated land, the enforcing authority serves a remediation notice on the appropriate persons. There is a right of appeal against the remediation notice: s 78E and L.

¹⁷⁰ Under the Mines Regulations 2014, reg 63(1) a tip is determined to be a notifiable tip if a geotechnical specialist concludes that a tip represents a “significant hazard by way of instability or movement”. A mine operator can only challenge the determination of the specialist if there is “any reason to doubt the validity of the conclusion of the current assessment”, in which case a further assessment by a geotechnical specialist is required.

¹⁷¹ See para 5.90 above. Avenues of appeal are also discussed at paras 8.51 to 8.60 below.

significant level of support for the view that the owner should be responsible for doing the work itself in most cases.

The supervisory authority should do the work

6.93 Those respondents supporting the proposal that the supervisory authority should be responsible for carrying out the operations specified in the tip management plan did so primarily because this would be the best way to bring about a timely, consistent and reliable approach in respect of those tips most in need of immediate attention. It was also viewed as a way of ensuring that work above a certain level of complexity was carried out by suitably qualified professionals and appropriate documentation maintained. Kim Moreton commented:

As a practitioner in mineral land management I have often seen generic construction/earthwork contractors creating more problems when working on mineral sites due their lack of knowledge or accountability under the contract specification.

6.94 CLA Wales agreed with the proposal, provided that the work was at the authority's own expense. In contrast, Philip Thomas agreed as long as the landowner paid the cost of the works. He noted that in many cases land containing tips had been acquired from the National Coal Board prior to privatisation for a nominal sum with knowledge of the safety work required.

6.95 Jane Iwanicki agreed with the proposed duty, but suggested that the supervisory authority could use suitably qualified contractors rather than doing the work itself. She thought that this would ensure that there was sufficient transparency to justify operations and that the authority was "not creating a work stream for itself".

6.96 Caerphilly considered the issue of responsibility for inspections of the work, in line with their view that the supervisory authority should be able to delegate its functions to local authorities where appropriate.¹⁷² It favoured a flexible approach, with local authorities given the option of undertaking the inspections themselves rather than leaving it to the supervisory authority:

Assistance could be agreed on an authority by authority basis. Some authorities have local knowledge and experience built up over years of inspections and are normally the first point of call from residents if an issue is raised. Local authorities have out of hours services to react to any issues or concerns raised.

The owner should do the work

6.97 Respondents such as WLGA, Neath Port Talbot, Blaenau Gwent, Merthyr Tydfil and Professor Bob Lee expressed the contrary view that the owner of the tip should do the work, in some cases stipulating that the owner should bear the cost of doing so. Some qualified their view to add that the authority should step in as a last resort if the owner was unable or unwilling to do the work. Most of those who adopted this approach thought that the supervisory authority should be under a duty to conduct inspections. WLGA, in a response also shared by Neath Port Talbot and Blaenau Gwent, thought

¹⁷² See para 2.19 above.

that the proposed duty on the supervisory authority would otherwise be unworkable. They reasoned as follows:

The owner of the land on which a designated tip is situated should be engaged in the development of the management plan and encouraged, wherever possible, to take the actions identified in that plan themselves. The landowner should be responsible for meeting the cost of these actions and the supervisory body should have the necessary powers to take the landowner to court. If the landowner remains unwilling or unable to act, then the supervisory authority should be under a duty to step in and reclaim costs. Otherwise, knowing the supervisory authority is under a duty to act may deter some landowners from taking necessary steps.

- 6.98 Howard Siddle agreed with the duty in principle, but thought that in practice it could become onerous and expensive. He suggested that duty should be “to ensure that the operations specified in the tip management plan are carried out” with the onus left mainly on the owners. The authority would only intervene if the owner did not have the means to carry out the works.
- 6.99 Monmouthshire agreed with the proposed duty as long as the supervisory authority was adequately resourced and the work was only conducted on behalf of those tip owners who were not best placed or possessed of adequate means to do the works themselves.
- 6.100 Neath Port Talbot Plaid Cymru Group thought that a distinction should be drawn between smaller tip owners, for whom responsibility would not be viable, large landowners, and large current operators who had recently closed mines.
- 6.101 Merthyr Tydfil thought that operations involving only maintenance should be left to the tip owner, with inspection by the supervisory authority to ensure compliance with the tip management plan. NRW suggested a similar approach, proposing that measures within the “reasonable capability” of the owner, supported by guidance, should be carried out by the owner. As an example of work in this category, they thought that responsibility for routine monitoring and the provision of monitoring records could be placed on tip owners.
- 6.102 Professor Bob Lee preferred an approach based on management agreements, along the lines of those used in environmental law to commit a site owner to agreed activity, for example as used for SSSI’s under the Wildlife and Countryside Act 1981. The owner could be charged with fulfilling the requirements of the agreement under supervision. The authority would assume the conduct of the work in the event that the owner did not wish to do the work, or in default of any agreement. He thought that this could be a more conciliatory approach.
- 6.103 Keith Bush QC, who also thought that the duty to ensure the safety of the land should fall on the owners, with reserve powers given to the supervisory authority to be used to conduct operations only where the owners were “not willing and competent” to carry out the works, noted that in many cases the operations would increase the value of the land.

6.104 Stephen Smith thought it premature to give a view without knowledge of the numbers of tips which would be designated: “If 200 tips need work, then this is a huge task for one body. If only (say) 10 tips, then this is more manageable”.

Ownership problems

6.105 WLGA noted that in some cases tips are in multiple ownership. If the duty to undertake operations were placed on the owner, care would need to be taken as to where responsibility lay.

6.106 WLGA also highlighted problems which could arise if the land were to be sold. They questioned whether any financial responsibility would pass to the new owner, and suggested that there may need to be provision to prohibit the sale of land subject to enforcement or legal dispute:

Any loopholes will need to be avoided. For example, a private owner may sell the land post-remediation works. The question of financial responsibility then needs to be clear – does it rest with the owner at the time the works were undertaken, or would any liabilities pass to the new owner? It may be worth considering the new legislation prohibiting the sale of any land subject to enforcement or court cases (existing provisions may already be in place for this).

Compulsory purchase

6.107 Rhondda Cynon Taf Plaid Cymru Group and Sioned Williams MS both considered the situation where the cost of remedial works far exceeded the means of a private tip owner to pay for them. They suggested a system of compulsory purchase to enable the work to be done at public expense to ensure public safety. Philip Thomas thought it important that the land should be returned to public ownership to ensure that it could benefit the community as a whole.

6.108 NRW noted that compulsory powers would enable the supervisory authority to carry out work required on a tip in the absence of an identifiable owner, rather than having to wait to rely on emergency powers to intervene.

Discussion

6.109 There was strong support for our proposal that, in the case of a designated tip, the supervisory authority itself should normally be under a duty to carry out the operations specified in the tip management plan. But the reasons for qualified support or for disagreeing need careful consideration. They form part of the wider issue of “who does the work” under the new regime. This issue also arises in discussing the duty to inspect, conduct a risk assessment and draw up a tip management plan.¹⁷³

6.110 We agree that, if the supervisory authority does the work, this will promote a timely, consistent and reliable approach. These are factors which increase in importance as the risk posed by the tip increases. So we think this is the best approach for tips in most immediate need of attention, and that it may become less appropriate as the risk level decreases. For this reason, if the criteria for designation select those tips which pose the greatest risk or are in need of the kind of complex remedial operation that

¹⁷³ See ch 4 above.

would be beyond the capacity of the owner, we are of the view that this work should normally be done by the supervisory authority itself.

6.111 Funding issues, including the liability of owners to pay for works and any assessment of a tip owner's ability to pay, strongly influenced some of the responses but fall outside scope of this project. It is correct that tips acquired after privatisation may have been conveyed together with a covenant to keep the tip in good condition, or have been sold at a price that took into consideration the cost of safety work.¹⁷⁴ This may, as suggested in responses, be a factor to be taken into consideration in deciding how the work is to be funded.

6.112 We envisage that, where the supervisory authority determines that it needs to carry out works or to require work to be done on a tip, it would in the first instance seek to reach a tip agreement with the tip owner, occupier and other relevant parties. This would be backed up by the power to make a tip order in the event that agreement is not reached or an agreement not performed. In the case of a designated tip, the agreement would be likely to provide for the supervisory authority to do the work. The supervisory authority's agreement and order-making powers have been examined in more detail in chapter 5.

6.113 While the presumption would be that the supervisory authority should undertake work of the degree of complexity likely to be involved in a designated tip, it would also be possible for the agreement to provide for the work to be contracted out to suitable bodies, or for the owner, or multiple owners to do the work themselves. This might be appropriate, for example, where the Coal Authority or local authorities own the tip. In chapter 9 we consider the potential for such agreements to offer a more flexible approach than the current legislation provides to matters such as contribution to the cost of tip safety work. In addition to stipulating the works to be carried out, the agreements could include provisions regulating activities or developments on the tip which could be detrimental to tip safety. They could also require tip owners and occupiers to report any changes to a tip which could impact on safety.¹⁷⁵

6.114 We do not agree with an approach which places the primary duty to do work on designated tips on the owner, with the supervisory authority taking on responsibility only where the owner is in default. We acknowledge that an unmanageable volume of work could be created for the authority, but only if the category of designated tips is unmanageably large. If the group covers only those tips in most immediate need of work, we think the burden could be manageable, particularly in combination with powers to contract out the work and reach agreement with suitable owners. Even if designation were to cover all the currently D-rated tips (71, or roughly 3% of all tips) we think that this could be a manageable workload for the new authority.¹⁷⁶

6.115 We note the concerns expressed about problems which could arise if land containing a designated tip were sold. We discuss the transfer of liabilities under tip agreements

¹⁷⁴ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.17 to 3.23.

¹⁷⁵ See para 5.28 above.

¹⁷⁶ These figures are drawn from the data published by the Welsh Government in October 2021, and are based on a total of 2,456 recorded tips: see <https://gov.wales/coal-tip-safety#section-72291>.

and orders in chapter 5.¹⁷⁷ We also discuss compulsory purchase in chapters 5 and 12.¹⁷⁸

6.116 We recommend accordingly that, in the case of a designated tip, the supervisory authority itself should normally be under a duty to carry out the operations specified in the tip management plan for the tip. While this should be the presumption where a tip is designated, the supervisory authority should also have powers to contract out this work or to reach agreement where appropriate for the tip owner or occupier to carry out the work.

Recommendation 27.

6.117 We recommend that in the case of a designated tip the supervisory authority itself should normally be under a duty to carry out the operations specified in the tip management plan.

6.118 We recommend that the supervisory authority should have power to contract out this work or to provide in a tip agreement for the tip owner or occupier to carry out the work where it is appropriate to do so.

Recommendation 28.

6.119 We recommend that provision for the carrying out of work on designated tips, whether by the supervisory authority or a tip owner or occupier, should be made by way of a tip agreement or order.

¹⁷⁷ See paras 5.77 to 5.84 above.

¹⁷⁸ See paras 5.19, 5.32 and 5.84 above and para 12.25 below. For an account of compulsory purchase powers available to acquiring authorities (bodies authorised by statute to acquire land by compulsion for a specific purpose), for example under the Welsh Development Agency Act 1975 and the Land Acquisition Act 1981, see Welsh Government, *Compulsory Purchase in Wales and 'The Criche! Down Rules (Wales Version, 2020)*', circular 003/2019 (October 2020) https://gov.wales/sites/default/files/publications/2020-10/compulsory-purchase-in-wales-and-the-criche!-down-rules-wales-version-2020-circular-0032019_0.pdf. See also Senedd Research, *The Planning Series: 15 – Compulsory Purchase Orders* (March 2021) <https://senedd.wales/media/ehepcjme/the-planning-series-15-compulsory-purchase-orders.pdf>

Chapter 7: Definitions

- 7.1 The principal elements of a new regulatory regime have been set out in the preceding chapters. Their scope and impact cannot be fully understood without examining how the regime will define two important concepts: a “tip” and a “tip owner”. This chapter will consider both definitions under the new regulatory framework.

DEFINITION OF A TIP

- 7.2 A tip is defined in Part 2 of the Mines and Quarries (Tips) Act 1969 as:

an accumulation or deposit of refuse from a mine or quarry (whether in a solid state or in solution or suspension) other than an accumulation or deposit situated underground, and where any wall or other structure retains or confines a tip then, whether or not that wall or structure is itself composed of refuse, it shall be deemed to form part of the tip for the purposes of this Part.¹⁷⁹

- 7.3 This definition applies to disused tips. Under Part 2, a disused tip is one associated with a mine or quarry that has been abandoned.¹⁸⁰

- 7.4 As we explained in the consultation paper, the regime for tips associated with active mines and quarries originally contained in the 1969 Act was replaced by the Quarries Regulations 1999 and the Mines Regulations 2014. The definitions of a tip used in these Regulations differ from the 1969 Act definition in including express references to refuse in “a liquid state” and to overburden dumps, backfill, spoil heaps, stock piles and lagoons.¹⁸¹ The 2014 Regulations define a tip as:

an accumulation or deposit of any refuse from a mine (whether in a solid or liquid state or in solution or suspension) other than an accumulation or deposit situated underground, and includes, but is not limited to (a) overburden dumps, backfill, spoil heaps, stock piles and lagoons, and (b) any wall or other structure that retains or confines a tip.¹⁸²

- 7.5 We have recommended in this report that the regimes in the 1999 and 2014 Regulations should continue to apply to coal tips associated with active mines.¹⁸³ For

¹⁷⁹ The definition was originally contained in Mines and Quarries (Tips) Act 1969, s 2, but was moved into s 11 when s 2 was repealed by the Mines Regulations 2014. See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 4.31 and 10.9.

¹⁸⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 4.36.

¹⁸¹ Quarries Regulations 1999, reg 2(1) and Mines Regulations 2014, reg 2. See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 4.64, 4.74 and 10.9.

¹⁸² The definition in the Quarries Regulations 1999 is the same apart from reference to an accumulation or deposit of “any substance at a quarry” and some differences in layout. The definition of a quarry covers opencast mines.

¹⁸³ See para 1.69 above.

this reason we have also recommended that, as at present, the new legislation should be expressed not to apply to tips to which the 1999 and 2014 Regulations apply.¹⁸⁴

- 7.6 Our consultation paper explained that, unless any legislation that results from this project were to be extended to all types of mine and quarry waste, the legislation would require a definition of a coal tip. We acknowledged that the detail of the drafting would be for Legislative Counsel, but we recognised that legislation of this sort will use terminology more familiar to those in the mining industry than to lawyers. We asked for views on whether a satisfactory definition could be framed by replacing the reference to “refuse from a mine or quarry” in section 11 of the 1969 Act with wording such as “waste from coal mining”. We also asked whether a regime for disused tips needed to include reference to overburden dumps, backfill, spoil heaps, stock piles and lagoons.¹⁸⁵

Consultation Question 2: We seek views on whether a satisfactory definition of a disused coal tip could refer to waste from coal mining and whether it should include express reference to overburden dumps, backfill, spoil heaps, stock piles and lagoons.

- 7.7 Forty-seven respondents answered this question. Almost all (45 or 96%) were in favour of an extended version of the definition which included all or most of the express references. Different reasons were given. Some had suggestions for additional elements. Two respondents were not in favour of adding the express references, although they agreed with amending the definition to refer to “waste from coal mining”. Some respondents took the opportunity to state the case for extending the proposed regulatory regime beyond coal tips to other types of mining and quarrying waste. These comments will be considered in chapter 12 below.

Reasons to add detail to the definition

- 7.8 Respondents such as the British Geological Society, WLGA (Bridgend and Torfaen agreeing) and many local authorities argued that including the proposed detail to the definition would add clarity and promote safety. The British Geological Society explained:

The better the clarity around mine waste types the greater the potential to assess the implications for stability, for example by guiding the hydrology in the waste.

- 7.9 Monmouthshire thought that including wider features in the definition might help to ensure that the features were considered in future inspection and maintenance plans.
- 7.10 Other responses focused on the need for a robust definition to minimise disputes and ensure that landowners are not able to avoid responsibility. Paul Connolly observed that the definition:

¹⁸⁴ See para 1.70 above.

¹⁸⁵ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.11.

should be as prescriptive as possible to incorporate as many scenarios and types of tip as possible. This will help to clarify exactly what types of legacy tips are referred to in legislation and in turn who is responsible for their safety.

- 7.11 Professor Bob Lee noted that the expanded definition in the 1999 and 2014 Regulations includes a statement that the definition “is not limited” to these features. He saw the inclusion of the term as worthwhile:

Arguably the statement that the definition is not limited to particular sorts of infrastructure ... is not necessary though actually the effect of this is to put aside any arguments that overburden dumps, backfill, spoil heaps, stock piles and lagoons are somehow excluded and given for example the water impacts of backfilling, spoil heap run-off and lagoons, in the interests of the wider environment, it may make sense to retain this formulation.

- 7.12 Keith Bush QC questioned whether there was any evidence that the definition in Part 2 of the 1969 Act was inadequate, or any substantive difference between that definition and the expanded definition in the 2014 Regulations. He thought that, in the absence of technical advice that a distinction was needed between the two regimes, the most compelling reason for adopting the expanded definition was that it would bring the regulatory regime for disused tips into line with that applied to tips associated with active mines:

There is an obvious argument in favour of adopting the same definition, as found in the 2014 Regulations, for new legislation. As things currently stand, it can appear that the types of tips regulated when a mine is operational change when the mine ceases to operate, and unless that impression is intentional it should be removed.¹⁸⁶

Concerns about the proposed definition

- 7.13 Jane Iwanicki warned that care must be taken in including specific references, as this “may result in a definition that is not exhaustive or inadvertently includes features that are not potential liabilities”. She explained, for example, that:

Historically "coal waste" has been used as a readily available construction material, for example to make road embankments and mineral railway beds. Also "coal mining" often included the extraction of other commercial minerals (for example fireclay and brick clay) that would have contributed to the spoil.

- 7.14 Howard Siddle also provided information on types of tip which are visually indistinguishable from tips from just coal mining “composed of predominantly shaley material ... formed from widespread mining of ironstone nodules for early ironworks and lesser workings of seatearth for brickmaking”.¹⁸⁷ He explained that such tips are widespread along the northern part of the South Wales coalfield (especially in areas like Blaenavon, Merthyr and Aberdare) where they are intermingled with colliery waste tips. He thought it might require extensive research to prove unequivocally that the

¹⁸⁶ Keith Bush QC’s response has been translated from the Welsh original.

¹⁸⁷ Seatearth is the layer of rock underlying a coal seam.

source of the spoil in these tips is from coal mining, although the tips have the same safety issues. He suggested an alternative definition for a disused tip:

A deposit formed by the above-ground disposal of waste materials derived from the extraction of coal and associated minerals including ironstone and seatearth but excluding sandstone.

He explained that using the term “extraction” would encompass patchworkings and “excluding sandstone” would exclude Pennant sandstone quarries.

- 7.15 Jacobs UK Ltd (formerly Halcrow) also noted that many tips in South Wales relate to ironstone mining or a combination of coal and ironstone. Steve Harford referred to the many small drift mines in South Wales that could have worked red ash or iron ore in addition to coal.
- 7.16 Stephen Smith thought that “waste from coal mining” should be clarified, and suggested adding reference to a “mine” being “an underground operation served by a shaft or adit”.
- 7.17 The Mineral Products Association thought it more appropriate to align the definition with the Mining Waste Directive definition, under which coal tips are coal mining waste facilities. As the Mining Waste Directive defines a mining waste facility as “any area designated for the accumulation or deposit of extractive waste”, they suggested that an appropriate definition could be “any area designated for the accumulation or deposit of coal mine extractive waste”.
- 7.18 Lee Jones suggested including a definition of “mining”. This could extend to mine exploration in order to encompass the spoil generated by this activity, if, following exploration, coal production did not proceed.
- 7.19 Ove Arup and Partners Ltd thought that the definition, for completeness, should include reference to the different types of waste a tip may incorporate. This includes solid coal waste, shale and other natural soils and rocks, as well as fines from, for example, washery plant and lagoons. Dr Tom St John suggested sub-categorising where possible to differentiate the composition of the tip.
- 7.20 NRW suggested that the definition of a tip should be subject to a specified spatial size or depth. This point was also made by Professor Bob Lee when discussing inclusion on the register. He thought it important to specify whether *de minimis* deposits of coal waste would be included in the definition. Dr Peter Brabham, in connection with the proposed duty of a landowner to notify the supervisory authority of the presence of a tip, drew attention to the thousands of small tips associated with individual mine adits in South Wales. He, along with Philip Thomas, suggested that tips below a certain size should be excluded.¹⁸⁸
- 7.21 Dr Peter Brabham thought that the term “tip” was too generic and should be broken down into categories of: “relict tip as created / relict but at some time remediated tip / stock piles / tailings dams / lagoons”.

¹⁸⁸ See paras 3.57, 3.62, 3.79 and 3.95 above.

Extension of regime to other remnants of abandoned coal mines

7.22 Some respondents, including Rhondda Cynon Taf Plaid Cymru Group, thought that the regulatory regime should apply not just to tips but to other aspects of abandoned coal mines. The Plaid Cymru Group noted that tip instability risks also arise from instability of underground working and quarries, often in proximity to the tips.

7.23 The Coal Action Network described the risks posed by abandoned unrestored or partially restored opencast coal mines, for example Margam and East Pit, to explain why they should be included in the regime:

Exposed craters are a safety hazard in ways that are not captured under that definition of coal tips. For example, exposed coal seams can cause coal dust to be carried in the wind and the steep sides can also be a safety hazard for animals and people with signage and poor fencing an ineffective deterrence - but that wouldn't fit within this definition of coal tips.

7.24 Dr John Perry suggested including 'disused coal mine workings'. He noted that one of the impacts of climate change is that old workings are at greater risk of flooding and causing community damage.

7.25 The Law Society thought that it would be useful to use any change in the law as an opportunity to clarify the Coal Authority's liability "to inspect and take action in respect of underground workings and shafts". Professor Thomas Watkin noted the limitations on the remit of the present project, but urged that there was a need to go further by extending the liability of the Coal Authority in these areas.¹⁸⁹

Elements which should not be included in the definition

7.26 Bob Leeming pointed out that stock piles are usually not waste, and will be associated with a working mine or quarry, as they are under the current regulations for tips associated with active mines and quarries. In contrast, Dr Tom St John thought that the definition should include stockpiling any geological products of the coal mining process.

7.27 CLA Cymru thought that lagoons should not be included, as they are distinct and present their own issues. They suggested placing them under the reservoirs regime or a bespoke set of rules. They questioned how many defunct lagoons there are still in existence. Dr John Perry, however, stressed the need to include lagoons:

Lagoons are extremely dangerous as they are prone to failure and release large quantities of contaminated water and silt.

¹⁸⁹ There are approximately 173,500 mine entries in Great Britain recorded in the Coal Authority's archive. The Coal Authority estimates that abandoned underground coal mine workings and tunnels cover 26,000 square kilometres. Coal Authority duties under the Coal Industry Act 1994 to control the discharge of water from mines, and duties under the Coal Mining Subsidence Act 1991 to take remedial action in respect of subsidence damage caused by the withdrawal of support from land as a result of coal mining, are discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 9.104 and 9.105.

Collaboration

- 7.28 ALGAO pointed to the existing work on site terminology undertaken by organisations responsible for maintaining archaeological records in the UK to ensure consistency:

These include terms for individual industrial feature types and overarching terms for complexes or group sites. Whilst this work has not been done with a view to informing legislation, it may be possible to utilise an existing glossary of bilingual terms and definitions. The National Monuments Record of Wales and regional Historic Environment Records officers may be able to advise on the suitability of these terms for use in the new framework.

Discussion

- 7.29 Strong arguments were offered by respondents in support of an expanded definition of a tip. We found Keith Bush QC's argument that the definition should be kept in line with tips associated with operational mines particularly compelling. We agree that the expanded definition should be adopted, and that it should include a provision that the definition is "not limited to" the listed features. This will ensure that the features listed are not treated as exhaustive.
- 7.30 We are not persuaded that any elements of the expanded definition should be excluded. We understand that stock piles are associated with active mines, but there remains a possibility that some could be left behind at the time that a mine is closed. We have also been told by experts in the field that lagoons remain a risk. The consultation paper considers the view that including them within the tip definition is preferable to including them in the reservoirs regime.¹⁹⁰ We do not have the technical expertise to comment further.
- 7.31 We think that reference in the existing definition to "an accumulation or deposit of refuse" will not naturally encompass situations where tip waste has been re-deployed as a construction material, but that there might be merit in spelling this out.
- 7.32 It will be important to ensure that the tip definition encompasses waste from opencast mines. For this reason "waste from coal mining" may need better definition. A "mine" as defined in the 2014 Regulations refers to underground working. Opencast mines fall under the 1999 Regulations, as opencast mines do not involve persons working below ground.¹⁹¹ One possible solution would be to use the Mining Waste Directive approach, which covers waste "resulting from the prospecting, extraction, treatment and storage of mineral resources".¹⁹² This could be adjusted to refer to "coal" rather than "mineral resources".
- 7.33 We agree with the suggestion that "associated minerals" should be also be included, defined to include ironstone and seatearth but exclude sandstone, for the reasons given in the responses of Howard Siddle and Jacobs. This would ensure that where

¹⁹⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 9.56 to 9.60.

¹⁹¹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 4.74.

¹⁹² Directive 2006/21/EC of the European Parliament and Council of 15 March 2006, art 2. See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 5.4.

coal is mixed with these minerals, the tip is not excluded on a technicality if a sample reveals the presence of the other minerals rather than the coal.¹⁹³ Otherwise we do not think that it is necessary, for the purposes of the legal definition of a tip, to list the other types of waste that a coal tip might incorporate, or that tips should be further categorised into types of tip. We think that this would add an unnecessary level of complexity.

- 7.34 We acknowledge the concerns expressed about the need for a size threshold in order to exclude trivial accumulations of waste from the definition of a tip under the regulatory regime. We understand that the Welsh Government is working on the development of a technologically acceptable threshold. We do not have the technical expertise to offer a view on the different options. Our primary concern is that, as size specifications will be a technical matter, a threshold could be difficult for a disused tip owner to apply. We consider that, failing a more precise definition, “an accumulation or deposit” will not extend to insignificant quantities of coal waste.¹⁹⁴
- 7.35 We note concerns about risks posed by other aspects of abandoned coal mines, and suggestions that the new regulatory regime should be extended beyond tips to encompass these. These are outside the scope of our project. In some cases, the regulation of these features will be covered by other legislation, for example the contaminated land regime, or fall under the responsibility of the Coal Authority.¹⁹⁵ Any extension or alteration of the duties of the Coal Authority, as a reserved authority, will raise difficult issues of Senedd competence.¹⁹⁶ In addition, while in our view coal tip safety falls under devolved competence, coal itself, including the ownership and exploitation of coal, deep and opencast coal mining, coal mining related subsidence, and water discharge from coal mines, is a reserved matter.¹⁹⁷
- 7.36 When drafting the definition to be applied by the new regulatory regime, drafters may find it useful to consider the definitions applied by National Monuments Record of Wales and Historic Environment Records officers for consistency.¹⁹⁸

¹⁹³ We understand from the Welsh Government that, for the purposes of the data gathering undertaken since February 2020, tips containing a combination of colliery waste and other associated mining activity are being recorded as coal tips. This approach has been adopted because there are a number of tips containing spoil material which is not exclusively coal, usually due to a complicated site history. The approach is only applied where there is evidence to support the likely potential of material being derived from coal mining activities, and so would exclude, for example, tips where the only mineral known to have been mined is ironstone.

¹⁹⁴ At para 3.95 above, we discuss the duty of a landowner to notify the existence of a tip in the case of an insignificant deposit. A size threshold was used in the Mines and Quarries (Tips) Regulations SI 1971 No 1377 (no longer in force) to identify “classified” tips associated with operational mines in need of an enhanced safety regime: see *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, para 4.33.

¹⁹⁵ See *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, para 5.32.

¹⁹⁶ See paras 2.58 to 2.60 above.

¹⁹⁷ See *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, para 5.73. Government of Wales Act 2006, sch 7A. Section D3 specifically reserves coal, including: (1) the ownership and exploitation of coal; (2) deep and opencast coal mining; (3) subsidence relating to coal mining; and (4) water discharge from coal mines. Land restoration is specifically excluded from the reservation.

¹⁹⁸ The preferred term for a coal tip (or spoil tip) in the *Thesaurus of Monument Types in Wales* is a spoil heap, defined as “a conical or flat-topped tip of waste discarded from a mine or similar site”:

7.37 We do not make a formal recommendation on a matter of legislative drafting but are of the view that a satisfactory definition of a disused coal tip could refer to waste resulting from the prospecting, extraction, treatment and storage of coal and associated minerals, including, but not limited to, overburden dumps, backfill, spoil heaps, stock piles and lagoons.

DEFINITION OF A TIP OWNER

7.38 The definition of an owner for the purposes of the 1969 Act encompasses: a freeholder who has not granted a lease; a tenant who has been granted a tenancy for a term of any length, provided that, at the relevant date, the term has at least a year to run; and a freeholder who holds the reversion of a lease which, at the relevant date, has less than year to run.¹⁹⁹ We explained in our consultation paper that the impact of this provision on short leaseholders is mitigated by the court's power to order contribution. But this power is discretionary, leaving leaseholders uncertain as to the extent of their liabilities unless they have covered them in an agreement.²⁰⁰

7.39 Our provisional view was that the law should provide a greater degree of certainty by directing liability to the person who is in economic terms the owner of the land containing a tip. We thought that this would be important to ensure that people who acquire interests in land containing a tip were aware of their liabilities both under the new scheme and generally, and were able to take out appropriate insurance.²⁰¹ Our consultation paper canvassed the possibility that liability could arise in relation to the duty to notify the existence of an unregistered tip. It also considered possible liability in relation to powers to enter into an agreement with or impose an order on an owner or to charge expenses to an owner.²⁰²

7.40 We considered first how to determine whether someone holds a lease of land as an owner rather than a renter. We noted that there was no definitive view. One indicator is whether a person has a financial stake in the land as a capital asset, or is merely paying a periodic sum for the occupation or use of the land, with the capital value remaining with the freeholder. In any individual case the terms of the lease may illuminate the issue: a lease at a full market rent does not generally have a capital value; on the other hand, a lease granted for a premium together with a low ground

<https://heritagedata.org/live/schemes/10/concepts/69386.html>. This is consistent with the terminology used in England and defined by Historic England/the Forum for Information Standards in Heritage (FISH): https://heritagedata.org/live/schemes/eh_tmt2/concepts/69386.html. The Thesaurus is managed by the Royal Commission on the Ancient and Historical Monuments of Wales (RCAHMW) under the auspices of the Strategic Framework for Records Relating to the Historic Environment in Wales, and on behalf of the Strategic Framework Partners. These include Cadw, RCAHMW, the four Welsh Archaeological Trusts, and the National Museum of Wales. The Partner organisations all use the terminology in their datasets.

¹⁹⁹ Mines and Quarries (Tips) Act 1969, s 36(3)(a). The term "reversion" refers to control of the land reverting to the freeholder when a lease expires. For simplicity, this assumes that there are no intermediate leases. An intermediate leaseholder could be the "owner" where their lease had more than a year to run and a sub-lease had less. See *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 4.42 and 10.15. Our provisional view was that our proposals would be equally appropriate for intermediate leases.

²⁰⁰ *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 4.55 and 10.15.

²⁰¹ Above, paras 10.14 and 10.15.

²⁰² Above, paras 10.34, 10.101 and 10.105.

rent will often be a saleable asset, more akin to ownership. The longer such a lease is, the greater is its capital value and the stronger is the leaseholder's connection to the land.²⁰³

- 7.41 In a regulatory scheme a bright line rule is necessary. We thought that the length of the lease may be the clearest marker. Leases granted for a term of more than 21 years are often seen as crossing a dividing line. We recognised that the fact a particular lease length is used in one context does not mean that it is necessarily appropriate in another. But we thought it would be unusual to suggest that a person granted a lease for 21 years or less would be an owner; and the shorter their lease the less likely it is that they would have a financial interest in the capital asset. Insofar as liability for a coal tip could arise, it seemed to us to be undesirable as a matter of policy to provide that, for example, the tenant under a five-year agricultural lease was primarily liable rather than the freeholder. For these reasons, we provisionally proposed to include as owners a leaseholder with a lease of 21 or more years. The exception to this would be where their interest is in reversion upon a term of 21 or more years.²⁰⁴
- 7.42 We did not propose to continue the current rule that shifts liability back to a freeholder once a lease has less than a year to run. If the total length of a lease is used to determine whether the leaseholder should bear a burden of ownership, we thought it more symmetrical for the burden to apply throughout the duration of the lease.²⁰⁵

Consultation Question 4: To the extent that liability under the new regulatory framework rests with the owner of land containing a tip, we provisionally propose that the owner should be defined as the freeholder or a leaseholder under a lease of 21 or more years, except where their interest is in reversion upon a term of 21 or more years. Do you agree?

- 7.43 Of the 41 respondents who answered this question, 31 (76%) agreed with our proposed definition of an owner. Seven (17%) disagreed and three answered "other".

Reasons for agreeing

- 7.44 Dŵr Cymru/Welsh Water noted the importance of certainty over ownership and liability of tips in order that responsibilities for maintenance and remediation are clear for all parties. Professor Bob Lee thought it sensible that only longer leases with some capital value were included. He noted that any cut-off was somewhat arbitrary, but 21 years was "fairly customary". He thought that the formulation should not include shorter leases, which might be, for example, for forestry or rough grazing. Dŵr Cymru/Welsh Water also thought it would be unreasonable for an agricultural tenant on a short-term grazing tenancy to be liable.
- 7.45 Transport for Wales agreed that the term of the leasehold interest, as opposed to the residual term on the lease, should be the deciding factor.

²⁰³ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.16.

²⁰⁴ Above, para 10.17.

²⁰⁵ Above, para 10.18.

Reasons for disagreeing

Leases of more than seven years

- 7.46 Keith Bush QC thought it important to distinguish between the person who benefits from the ownership of the land, and the person with legal control of the land. In his view, the current approach, which focuses on the person with legal control over the land, was logical. The person with legal control is the only person who can allow access to it and, subject to the nature of the tenancy, carry out work on it. Where it is not fair for the tenant to bear the cost of the work, the 1969 Act enables the tenant to claim a contribution from another person such as the freeholder, who benefits from the ownership of the land. If the definition of an owner attempts to reflect the extent of the economic benefit of the tenant and freeholder in the land, rather than the simple fact of current ownership, he thought that it was more difficult to decide where to draw the line.
- 7.47 He suggested that the “cut off” could be based on the fact that a tenancy of more than seven years is a registrable interest under the Land Registration Act 2002. This would mean that the supervisory authority could see from the register with whom to correspond. He thought it not unreasonable to expect such a tenant to take an interest in the condition of the land and to be responsible for claiming a contribution from the freeholder towards the cost of carrying out substantial works.

Agricultural tenancies

- 7.48 In a consultation event held during the consultation period, the Agricultural Law Association noted that our proposed definition did not include reference to leaseholders under agricultural tenancies. Dr Nerys Llewellyn-Jones explained that agricultural holdings tenancies run from year to year but can last lifetimes or generations. Tenancies granted since 1995 will usually be farm business tenancies. These also run from year to year if initially granted for a term of more than two years, although succession rights are more limited and the landlord has more extensive rights to bring the tenancy to an end.²⁰⁶ There are provisions in both types of tenancies for the tenant to be compensated on the termination of the tenancy for any major long-term or short-term improvements made to the holding.²⁰⁷

Defining the owner in terms of the tip material

- 7.49 A number of respondents objected to defining the owner of the tip in terms of the current owner of the land. Jane Iwanicki observed:

²⁰⁶ There are two main types of agricultural tenancies, those subject to the Agricultural Holdings Act 1986 and those subject to the Agricultural Tenancies Act 1995. A tenancy of an agricultural holding under the Agricultural Holdings Act 1986 proceeds as a tenancy from year to year if originally granted for a period of more than two years. On the death of the tenant (if the tenancy was granted before 12 July 1984 or under other prescribed circumstances) the wife, husband, civil partner, sibling or child (or child who is treated as a child of the family) can apply to a Tribunal for a direction entitling them to a tenancy of the holding. These year to year tenancies can therefore span lifetimes, though only two tenancies by succession can be granted. Farm business tenancies granted under the Agricultural Tenancies Act 1995 for a term of more than two years continue as a tenancy from year to year. Tenancies beginning before 1 September 1995 cannot be farm business tenancies. Tenancies beginning on or after that date may still not be farm business tenancies if the Agricultural Holdings Act 1986 applies to them.

²⁰⁷ Agricultural Holdings Act 1986, s 64; Agricultural Tenancies Act 1995, ss 15 to 27.

Ownership of land containing a coal tip may have passed to another through various means and they would not necessarily have any connection to the tipping activities that have created the potential liability (for example, during the years that the coal industry was nationalised it would have been the NCB or British Coal that created the tips as owner/ operator). It is correct that owners should be involved in terms of access and future proposals but "liability" should not necessarily attach to the owner.

- 7.50 She also noted that "the Coal Authority are obliged to deal with the legacy of mining subsidence but not the placement of the mine waste arisings deposited at surface".
- 7.51 The Mineral Products Association thought that ownership of a tip could be separate from ownership of the land on which it was situated, as the coal owner might be the owner of the tipped material. For this reason, "one should consider whether or not the owner of the coal should [take the] burden [of] some of the responsibility as they undoubtedly benefitted from its extraction". They also suggested that the owner of the coal could be the Coal Authority.²⁰⁸
- 7.52 Richard Arnold, Owen Jordan and Sue Jordan all took the view that responsibility should lie with those responsible for creating the tip. Owen Jordan argued that the tip owner is the person who created the tip, and argued that it should not be possible to transfer responsibility to the current owner of the land. Sue Jordan thought there should be an obligation on the part of the Coal Authority or the government to pursue those responsible for creating the tip or residual shareholders.
- 7.53 NRW noted that, if the regulatory regime were to be extended to cover non-coal tips, the proposed definition would create a dilemma. Safety would be the responsibility of the landowner, but the mineral rights owner would retain ownership of the non-coal spoil heap unless their interest had been bequeathed to the landowner.

Other factors to consider

Preventing owners finding ways to default

- 7.54 CLA Cymru approved the proposed approach as logical, but warned that owners could take measures to make their ownership less straightforward:

If owners see considerable liabilities likely to come their way as a result of owning a coal tip on their land, they will do everything to try and absolve themselves of any ongoing and potentially costly liability associated with the ongoing management and remedial works relating to said tip. Shell offshore companies may start to pop up, with unclear ownership, thus making the liability for remedial works unclear. For our members (however few) this could be a financially crippling prospect in having to tidy up a long ago liability, which in some cases has come back to cause them problems through no fault of their own.

²⁰⁸ The Coal Industry Act, s 7(3) provided for the transfer of ownership of coal reserves from the British Coal Corporation to the Coal Authority at the time of the privatisation of the coal industry. It provided that "on the restructuring date the Corporation's interests in unworked coal and coal mines, including its interests in any coal that, notwithstanding having been worked at some time, is so attached to or incorporated in any coal mine or other land as to be, in law, a part of it, shall vest without further assurance in the Authority".

7.55 Graham Hathaway also warned that there are cases where identification of an owner is unclear, and referred to the Celtic Energy case mentioned in our consultation paper. This was an instance of the sale of land rights and liabilities associated with opencast mines to foreign-owned shell companies where tips had been abandoned without compliance with any of the duties set out in the mining licence, planning consents and environmental permits. Enforcement of the duties against the shell company has not been possible.²⁰⁹ He also gave examples of difficulties in holding owners to account for damage caused to tips with safety implications under current law and suggested that compulsory purchase should be an option.²¹⁰

Default ownership, contributions and covenants

7.56 NRW suggested that the definition should provide for default liability in the same way as reservoirs legislation. The Reservoirs Act 1975 takes a sequential approach in attributing liability. An undertaker is liable if the reservoir is used or intended to be used for the purposes of the undertaking, or the owner or lessee becomes liable if there is no use of it or intention to use it for the purposes of an undertaking.²¹¹ NRW thought that, in the context of a coal tip, the default position as a last resort could be for liability to fall on the owner or lessees of the land on which the tip is situated. This would avoid argument that ownership of the tip is in some way separate from ownership of the land it is on.

7.57 NRW also thought that more consideration was needed as to whether the default position should be that both owners and lessees are liable, or one or the other. If there is to be a process for apportionment of liability between the two, they also asked whether contributions should be set by civil agreement or a more clearly defined sliding scale to account for the end of lease period.²¹² They also noted that at the time of the privatisation of the coal industry, some tips were sold with covenants which provide expressly for liability, and liabilities may arise out of British Coal's former ownership.²¹³

Absent landlords

7.58 Rhondda Cynon Taf and Vikki Howells MS suggested that the proposals need to consider how ownership is approached in the case of an absent landlord. This could be, for example, where the freehold is owned by a company which has been dissolved.²¹⁴

²⁰⁹ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.65 and 3.66.

²¹⁰ For examples of damage caused to a privately owned tip by contractors at the Ffrwd tip in Mountain Ash and difficulties of enforcement action under current law, see the full consultation response available on the Coal Tip Safety project page: <https://www.lawcom.gov.uk/project/regulating-coal-tip-safety-in-wales/>.

²¹¹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 9.9.

²¹² Provision for contributions is considered in ch 9.

²¹³ Transfers under restructuring schemes at the time of privatisation and Coal Authority responsibility for the liabilities of British Coal arising from its former ownership are discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.20 to 3.23.

²¹⁴ The problem of tips with unknown ownership is discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.36 and 3.37.

Multiple owners

7.59 In consultation events, stakeholders asked about how the question of ownership, and thus potential liability, would be dealt with where a housing estate had been built on a restored tip. In some cases, this could involve several hundred different owners.

Discussion

7.60 There was majority support for our proposed definition, but some strong reasons were given for disagreeing. We were particularly impressed by the argument distinguishing legal ownership from legal control. The concept of legal control focuses on the person in occupation irrespective of the nature of their interest in the land, because they will be the most impacted by tip safety intervention. Issues around who is the owner of the land in economic terms only really come into play when the expectation is that they should pay for the works. In accordance with the premise of our consultation question, many of the responses addressed the issue of who should pay for tip safety work. A number objected to defining an owner in terms of the owner of the land; their comments related primarily to charging policy.

7.61 We have come to the conclusion that it is not helpful, in the context of our recommended scheme, to have a single, exclusive definition of “the owner”. Various people having a connection to land containing a tip will need to have rights, duties or obligations under our recommended scheme. Who they are will depend on the pattern of interests in the land and the purpose of the particular right or duty in question.

7.62 Thus we recommend that there should be power to make a tip agreement with both an owner and an occupier of land containing a coal tip. We have also recommended that the power to make a tip order should be exercisable against both an owner and an occupier.²¹⁵ For these purposes we have suggested a broad concept of an owner, to include the owner of a freehold or leasehold interest in the land.²¹⁶ This enables a broad approach to be taken to those with whom it is appropriate for the supervisory authority to make a tip agreement, or against whom to make an order; this also impacts on the exercise of enforcement powers.²¹⁷ The possible parties to the agreement or order include in this way both those with both legal ownership and legal control of the land.²¹⁸

7.63 For reasons that we discuss in chapter 9 we do not think it would be satisfactory to continue the present system of proceedings between private parties for contributions to the cost of tip operations. We recommend instead that the power to make

²¹⁵ See paras 5.85 and 5.87 above.

²¹⁶ See para 5.29 above.

²¹⁷ The power to make tip agreements and orders is discussed in ch 5. Charges, contribution and compensation are discussed in ch 9.

²¹⁸ This approach aligns well with the approach taken to land management agreements under Environment (Wales) Act 2016, s 16. This permits Natural Resources Wales to make an agreement “with a person who has an interest in land ... about the management or use of the land”. An “interest in land” is defined as “any estate in land and any right over land, whether the right is exercisable by virtue of ownership of an interest in land or by virtue of a licence or agreement”. The common law treats any party who exercises an element of control over premises as an “occupier”: see *Wheat v E Lacon & Co Ltd* [1966] AC 552, [1966] 2 WLR. 581. As long as there is a sufficient element of control, this recognises that there might be multiple concurrent occupiers.

agreements and orders should include power to provide for payments by members of a group of people broadly corresponding to those who can be liable for contributions under the present regime.²¹⁹ This will include an owner of tip material who is not also an owner of the land.

- 7.64 Involving all those with interests in land containing a coal tip in an agreement or order should also assist in dealing with situations such as where a housing estate has been built on a tip, or material is spread across land owned in small sections by many different owners. Tip agreements could be reached with the owners and occupiers. Decisions on contribution to the cost of works would be dealt with within the agreement or order.
- 7.65 In chapter 3 we recommend the creation of a duty to notify the supervisory authority of the presence on land of an unregistered coal tip.²²⁰ We concluded that it would be unduly onerous to impose this duty on a person merely in occupation of land, with only a short-term interest. We therefore recommended that the duty should be imposed on an owner of the freehold or of a leasehold of more than seven years, a threshold which has the advantage of corresponding with the obligation to register a leasehold interest under the Land Registration Act 2002.²²¹
- 7.66 Our present consultation question was focused on identifying economic ownership of tip land for the purpose of, in particular, financial liabilities under our new scheme. Consultation responses have fortified us in the view that owning the freehold or a lease of a length of 21 years or more is a marker of ownership of land in economic terms. We think that this is the case unless the ownership is subject to (in legal terminology, “in reversion upon”) a lease granted to someone else for 21 or more years, in which case that person will be the owner in economic terms. This is a factor that the Welsh Government may wish to take into account in devising a set of principles regarding payment of the cost of works.²²²
- 7.67 We have noted in chapter 5 that our approach to the definition of an owner for the purposes of agreement and order-making powers will include tenants under agricultural holdings or farm business tenancies, which may in practice endure for many years. Such tenancies, being from year to year, are not caught by the current

²¹⁹ See paras 9.69, 9.74, 9.75 and 9.82 below.

²²⁰ See para 3.102 above.

²²¹ Some unregistered land will not appear on the Land Register. All unregistered land is subject to compulsory first registration of title on the happening of any event listed in the Land Registration Act 2002, s 4. Those events include the grant of a lease of more than seven years out of a “qualifying estate”. “Qualifying estate” is defined in section 4(2) as a freehold or “a leasehold estate in land for a term which, at the time of the transfer, grant or creation, has more than seven years to run”. For this reason, where a lease of more than seven years is granted out of an unregistered freehold estate, the lease must be registered, but the freehold would not be registered. Similarly, the lease of more than seven years could be granted out of an unregistered lease of 21 years or 99 years, in which case the lease granted would be subject to compulsory first registration, but not the head lease out of which it has been created.

²²² See paras 9.79, 9.80 and 9.83 below. Other factors, such as the terms upon which land was acquired, will also be relevant.

definition.²²³ It is a matter for the Welsh Government whether and how to include them in any arrangements it makes as regards the financing of works.

7.68 We acknowledge the views of respondents who object to defining the tip owner in terms of the owner of the land. These comments relate primarily to Welsh Government charging policy.²²⁴ The problem of owners finding ways to evade liability is discussed in chapter 5 in relation to tip orders.²²⁵ Ownership of minerals in the tip in the context of non-coal tips is discussed further in chapter 12.²²⁶

7.69 Where an owner cannot be traced, a tip order is likely to be appropriate. Our recommendations as to the circumstances in which a tip order may be made provide for the imposition of an order in these circumstances.²²⁷ We think that this could also be a ground for compulsory purchase where urgent work is required.

Recommendation 29.

7.70 We recommend that, to the extent that liability under our recommended scheme rests with the owner, in economic terms, of land containing a coal tip, that owner should be regarded as the owner of the freehold estate or the owner of a leasehold estate of 21 or more years, save where the freehold or leasehold estate is in reversion on a leasehold estate of 21 or more years.

²²³ Mines and Quarries (Tips) Act 1969, s 36(3). An agricultural holdings or farm business tenancy could be subject to a contribution order under s 19 of the Act, as it constitutes an “estate or interest ... in the land on which the tip is situated”. A lease of any length is an estate in land under the general definition of “term of years absolute” in s 205(1)(xxvii) of the Law of Property Act 1925. This provides that a “term of years” includes a term for less than a year, or for a year or years and a fraction of a year or from year to year. See also para 5.30 above.

²²⁴ Powers to charge and to require contributions from owners and occupiers are discussed in ch 9.

²²⁵ See paras 5.67 and 5.76 above.

²²⁶ See para 12.43 below.

²²⁸ Mines and Quarries (Tips) Act 1969, ss 12, 13, 17 and 18.

Chapter 8: Enforcement powers, offences and appeals

8.1 This chapter considers the enforcement powers and offences of non-compliance needed to ensure that the new regulatory framework is effective. It will also look at options for avenues of appeal where we signal in other chapters that a right of appeal is required.

ENFORCEMENT POWERS AND OFFENCES

8.2 We recognised in our consultation paper that the regulatory regime would need adequate enforcement powers to ensure that it is effective. We noted that the Mines and Quarries (Tips) Act 1969 gave local authorities the power to (a) require information from tip owners and others and (b) enter upon land to carry out exploratory tests, remedial operations and works of reinstatement.²²⁸ We also noted that the exercise of these powers is limited to cases where a tip is known or suspected to be unstable. Failure to provide information and obstruction of a person entitled to enter upon land under these provisions are criminal offences, as are obstructing the tests and works or damaging or interfering with works.²²⁹

8.3 We provisionally proposed a wider power of entry onto land containing a registered or suspected disused coal tip for prescribed purposes. These purposes would need to include investigation, maintenance and repair. We looked at possible models for such powers from other regulatory regimes and appropriate procedural guarantees to provide a balance between the public interest and the rights of the landowner.²³⁰

8.4 We also provisionally proposed the creation of an offence of non-compliance and again looked at possible models from other regulatory regimes.²³¹

Power of entry and offence of obstruction

8.5 We look first at views on our provisional proposals for a wider power of entry and an offence of obstruction.

²²⁸ Mines and Quarries (Tips) Act 1969, ss 12, 13, 17 and 18.

²²⁹ Mines and Quarries (Tips) Act 1969, ss 12(2), 13(6), 18(6) and 26. See further Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.95. See para 4.33 above for our recommendations for duties on the part of other authorities and tip owners to share information with the supervisory authority.

²³⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.96 and 10.97.

²³¹ Above, paras 10.98 and 10.99.

Consultation Question 26: We provisionally propose that

- (1) **persons authorised in writing by the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have a power of entry upon land for the purposes of**
 - (a) **inspecting or carrying out tests upon a known or suspected coal tip; and**
 - (b) **performing, supervising or inspecting works of maintenance or remedial operations upon a coal tip;**
- (2) **the power of entry should be exercisable upon 48 hours' written notice to the owner and any other person known to be in occupation of the land or in an emergency;**
- (3) **the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have power to apply to a justice of the peace authorising entry by force;**
- (4) **persons authorised to enter land under these provisions should have power to take with them other persons or equipment as necessary; and**
- (5) **obstruction of any authorised person or of an inspection, test or works should be a summary offence.**

Do you agree?

- 8.6 Of the 44 respondents who answered this question, 36 (82%) agreed, two (5%) disagreed and six answered "other".

Reasons for agreeing

- 8.7 Sir Wyn Williams observed that the proposed powers were "necessary and proportionate" for a regulatory regime of this kind. Keith Bush QC found them to be "fairly standard" provisions, and approved an approach that was not dependent, as with the current regime, on the need to demonstrate that the tip posed a danger to the public. Howard Siddle also saw the proposed provisions as a way of countering this problem. Vikki Howells MS saw them as "vital to ensure compliance and public safety".
- 8.8 Bob Leeming noted that the proposals followed the same pattern as the provisions for Health and Safety Executive (HSE) inspectors under the Health and Safety at Work Act 1974.
- 8.9 Rhondda Cynon Taf Plaid Cymru Group added that it was important that landowners should be made aware of their legal duties to allow authorised individuals access to tips.

Conditions of agreement

- 8.10 Some respondents expressed conditional agreement. CLA Cymru agreed with the proposed powers as a last resort or in an emergency, but expressed the hope that

sensible dialogue with the landowner would allow agreement as to entry to be reached. Jane Iwanicki thought that owners should be provided with a full indemnity. This would ensure that they could not be held liable for any operations or works carried out by others or any harm or damage arising as a direct or indirect consequence of such operations or in gaining access to the tip.

- 8.11 Stephen Smith agreed that extended powers of entry would resolve problems with constraints on entry under the 1969 Act. But he warned that the problems discussed in the consultation paper which also constrained local authorities in the exercise of the existing powers, such as lack of technical expertise and limited resources, would remain unless these were addressed by the new regulatory regime.

Comments on (1): power of entry

- 8.12 Howard Siddle thought that there should be provision for the full range of activities for which entry is required to ensure that the power covers all scenarios. He suggested:

inspection, carrying out surface or subsurface tests, installation and monitoring of instrumentation and sampling upon or around a known or suspected disused tip.

- 8.13 ICE Wales Cymru thought that “remedial operations” should be defined.

Comments on (2): notice of entry save in an emergency

- 8.14 Many respondents concurred that there should be no written notice requirement in the event of an emergency. Lee Jones and the Mineral Products Association thought that even in an emergency a warrant or court order should be required, unless the emergency required instantaneous action. Lee Jones suggested in the alternative that the authority’s inspectors could be given warranted status to enter without notice (as provided for HSE inspectors).
- 8.15 Some respondents, such as Jane Iwanicki and Professor Thomas Watkin, thought that the 48 hour notice period proposed for non-emergency situations was too short. Jane Iwanicki pointed out that in some cases there might be occupiers using the land who would need to be contacted by the owners.²³² The Mineral Products Association suggested a minimum of 21 days where inspections were routine. Wrexham, in contrast, thought that 24 hours was sufficient, following the example of section 287 of the Public Health Act 1936.²³³

Comments on (3): power of entry by force

- 8.16 Lee Jones thought that the reference to “any other public body” other than the supervisory authority should include a police constable, as this would be necessary in the event that authorised persons are being prevented from entering.

²³² The definition of a tip owner applied under the new regulatory regime is discussed in ch 7.

²³³ S 287 of the Public Health Act 1936 provides a right to enter any premises “at all reasonable hours” on 24 hours’ notice for purposes which include ascertaining whether there has been any contravention of the provisions of the Act and taking any action or undertaking work authorised or required by the Act.

Comments on (4): power to take persons or equipment

8.17 Professor Thomas Watkin thought that if heavy machinery is to be taken onto the land, express notice of this should be given in the written notice, including a description of the equipment.

Additional comments

8.18 Network Rail raised the issue of third party rights to ask the supervisory authority, at short notice in an emergency, to exercise its powers, or to step in to exercise them on behalf of the authority. It gave the example of a situation in which a tip posed a risk to a railway.

8.19 Lee Jones thought that the proposed powers should provide for the situation in which there is no identifiable owner.

8.20 Philip Thomas warned that provision needs to be made for access routes to tips. He pointed to the risk of landowner failure to maintain an access route which would frustrate local authority attempts to enter under the provisions.

Other useful power of entry provisions

8.21 Professor Bob Lee saw an advantage in placing enforcement in the hands of NRW as this would enable the enforcement powers provided by the Environment Act 1995 to apply.²³⁴ In addition, existing NRW regulatory guidance could be amended to include enforcement duties arising under new coal tip safety legislation.²³⁵

8.22 NRW, however, commented that their experience of using their enforcement powers under section 108 of the 1995 Act has been mixed. Although these provisions allow access at any reasonable time (or, in an emergency, at any time and, if need be, by force), they have found that the exercise of entry powers involves a slow and burdensome procedure that has had negative reactions from landowners. NRW were also unsure of the application of these powers where long-term works are required. In comments made to us since the conclusion of the consultation, they pointed to the powers of entry available under section 172 of the Water Resources Act 1991 as providing a preferable approach. This is because, where work requires repeated visits to a site, they do not need to go through the notice procedure required by section 108 of the 1995 Act for every visit.

8.23 Huw Williams suggested that sections 172 to 179 of the Housing and Planning Act 2016, relating to entry to survey and value land for compulsory purchase purposes, were a good example of an up-to-date code.

8.24 Wrexham drew our attention to the provisions of the Housing Act 2004 that provide a power to take remedial action to deal with imminent risks to the public. This is followed

²³⁴ See also paras 2.34, 2.35, 2.63 and 5.18 above.

²³⁵ Natural Resources Wales, *Guidance on Enforcement and Sanctions* (2013) sets out the different enforcement options open to Natural Resources Wales and provides guidance as to how they are to be applied: see <https://naturalresources.wales/about-us/what-we-do/how-we-regulate-you/our-regulatory-responsibilities/regulatory-responsibilities/?lang=en>.

by service of a statutory notice of works carried out. The notice is sent to persons with an interest in the land or property with provision for recovery of costs.²³⁶

Discussion

- 8.25 There was strong majority support for all our proposals. We agree that policies to promote landowner cooperation and awareness of their new duties will be an important corollary to enforcement powers under the new regime, and that dialogue is preferable to enforcement measures wherever possible.
- 8.26 We also agree with the warning that some of the problems with the existing regime relate to technical restraints and limitations on resources rather than solely to the limitations placed on local authority powers by the 1969 Act. These issues must also be addressed. Chapter 10 considers ways in which to foster specialist skills. We are not able to address funding issues, but can relay concerns raised by respondents to the Welsh Government.
- 8.27 Our observations in response to concerns raised as to specific aspects of the proposed provisions are set out below.
- (1) We agree that the list of proposed activities should be expanded to include installation and monitoring of instrumentation, and sampling.
 - (2) We agree that express notice should be given if heavy machinery is to be used.
 - (3) We agree that the power of entry needs to encompass access routes to the tip. This was implicit in our proposal but we make it clearer in the recommendation set out below by adding provision for “gaining access to a tip” to the purposes for which land may be entered.
 - (4) We agree that specific provision is needed for entry where there is no identifiable owner. We suggest amending the provision for the power to be exercised on notice to the owner to stipulate that this applies only where the owner is identifiable. As in the case of the test for imposing a tip order, this should provide for a power of entry without notice where it has been impossible to identify the owner despite taking steps to do so.
 - (5) We think that 48 hours’ notice is a reasonable period. Entry to inspect or carry out tests may have significantly less impact on an occupier of the land than the performance of remedial operations. A requirement to serve notice on all identified owners and occupiers would help to ensure that occupiers of the land were not taken by surprise. We agree that notice should be dispensed with in an emergency.
 - (6) We do not consider that provision for persons entering to be accompanied by a police officer is required except in cases where resistance or the need to use force are anticipated; we think it unlikely that police forces would make officers available except in such cases. We consider, however, that provision should be

²³⁶ Housing Act 2004, s 239.

made for entry under a magistrate's warrant, given that local authority officers have encountered resistance in the past.²³⁷

- (7) Existing regimes differ as to whether they require those entering land under a warrant to be accompanied by a police officer. For example, warrants to enter land for species control purposes under schedule 9A to the Wildlife and Countryside Act 1981 may authorise entry by force, but only if accompanied by a constable.²³⁸ Warrants to enter land for the purposes of compulsory purchase under the Housing and Planning Act 2016 authorise the use of force without requiring the presence of a constable.²³⁹ We recommend that it be left to the discretion of the issuing magistrate whether a warrant authorising forcible entry on land for coal tip safety purposes requires the presence of constable. This will permit magistrates to differentiate between cases where it is merely necessary to force a locked gate and those where resistance by the occupier in person is foreseeable.
- (8) We do not think that there is any need for a formal right for third parties to ask the supervisory authority to exercise its powers. As suggested above in relation to notification of the existence of a tip and the imposition of a tip order, it will be important for the authority to provide an accessible process to allow third parties to raise concerns.²⁴⁰

8.28 We note the suggestion that powers of entry currently used by NRW could be extended if NRW were to take over the enforcement role of the new supervisory authority. As discussed in chapter 2, we have concluded that the supervisory authority should be a newly created body. We do not think it would be sensible to split powers of entry between NRW and the new authority. We also note the mixed views on how well enforcement powers under section 108 of the Environment Act 1995 are working.

8.29 The powers of entry provided by schedule 9A to the Wildlife and Countryside Act 1981, section 95 of the Building Act 1984, section 172 of the Water Resources Act 1991, section 108 of the Environment Act 1995, section 239 of the Housing Act 2004 and sections 172 to 179 of the Planning and Housing Act 2016 are all useful models of powers which strike a balance between the public interest and the rights of the owner or occupier.²⁴¹ Their provisions illustrate that the power of entry will need a number of essential components. These include: a requirement to set out the purposes for which entry may be sought; requirements for written authorisation or formal identification of specified persons; a period of notice; power for a justice of the peace to authorise entry by force where entry is obstructed; specification of the activities which may be carried out after entry and the persons, equipment or material which may accompany the person exercising the power of entry.

²³⁷ See Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 7.14.

²³⁸ Wildlife and Countryside Act 1981, sch 9A, para 22(4).

²³⁹ Planning and Housing Act 2016, s 173.

²⁴⁰ See paras 3.94 and 5.71 above.

²⁴¹ For the provisions in the Wildlife and Countryside Act 1981, sch 9A, see Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 9.97 to 9.100.

8.30 We make the following recommendation.

Recommendation 30.

- 8.31 We recommend that persons authorised in writing by the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have a power of entry upon land for the purposes of
- (1) inspecting, carrying out tests or sampling upon a known or suspected coal tip;
 - (2) performing, supervising or inspecting works of maintenance or remedial operations or installing and monitoring instrumentation upon a coal tip; and
 - (3) gaining access to a coal tip for the above purposes.
- 8.32 We recommend that the power of entry should be exercisable upon 48 hours' written notice to the owner if identifiable and any other person known to be in occupation of the land or without notice in an emergency.
- 8.33 We recommend that the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have power to apply to a justice of the peace for a warrant authorising entry by force where a person has prevented or is likely to prevent the exercise of the power of entry, and it is reasonable to use force in the exercise of that power; the warrant may require those entering pursuant to it to be accompanied by a constable.
- 8.34 We recommend that persons authorised to enter land under these provisions should have power to take with them necessary equipment, provided that notice includes a description of any heavy machinery to be taken onto the land.
- 8.35 We recommend that obstruction of any authorised person or of an inspection, test or works should be a summary offence.

Offence of non-compliance with a tip order

8.36 Next we consider responses to our provisional proposal that failure to comply with a tip maintenance order should be a summary offence. In our consultation paper, we explained that we did not think it appropriate for non-compliance with a tip maintenance agreement to constitute an offence, as the sanction for non-compliance would be its replacement with a tip maintenance order.²⁴² As we envisage that tip orders would be used to empower tip safety work on all types of tip, our discussion of an offence of non-compliance relates not only to tip maintenance orders but to tip orders in general.

²⁴² Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.99 and see para 5.2 above.

Consultation Question 27: We provisionally propose that failure, without reasonable excuse, to comply with a tip maintenance order should be a summary offence. Do you agree?

8.37 Forty respondents answered this question. Thirty-six (90%) agreed. Two (5%) disagreed and two answered “other”.

Views on the proposed offence

- 8.38 Respondents expressing agreement referred to the need for a penalty to provide an incentive to comply with a tip maintenance order. Bob Leeming said that the system “has to have some teeth, and an encouragement to comply”. Sir Wyn Williams described this as a “necessary safeguard against the irresponsible”.
- 8.39 Huw Williams suggested that trial on indictment should also be available, as “the history of the consequences of tip slides would indicate that non-compliance can have the most serious consequences”. He pointed to precedents in environmental and historic buildings legislation.
- 8.40 The Mineral Products Association thought that any offence should be “reasonable and proportionate” and that the detail should be the subject of consultation.
- 8.41 CLA Cymru thought that the offence should be available as a last resort where an appeal hearing had found in the authority’s favour and urgent works were required to remedy issues of major concern or imminent failure.
- 8.42 Lee Jones suggested that a fixed penalty fine should be given in the first instance, followed by prosecution should the failure to comply with the order continue. This would have the advantage of easing pressure on the court system and the costs of enforcement.

Exemptions

- 8.43 NRW thought that, in the interests of fairness, exemptions would be needed to cover, for example, instances of hardship where a hardship assessment had been carried out. They also thought it would be harsh to include the owner of an ordinary domestic property constructed with local authority or National House Building Council (NHBC) approval.

Alternative approaches

- 8.44 Professor Bob Lee looked once again at the enforcement powers that would be available if NRW were given the role of enforcing the new regulatory regime: failure to comply with a notice served by NRW would open up the possibility of prosecution. There would also be the possibility of civil sanctions under the Environmental Civil Sanctions (Wales) Order 2010 and the use of NRW Guidance on Enforcement and Sanctions.

Discussion

- 8.45 There was almost unanimous support for our proposal, indicating a consensus that some kind of penalty is required for failure to comply with a tip order. There were differing views as to the appropriate penalty to be imposed. Our recommendation is

that the maximum penalty should be the maximum term of imprisonment that may generally be imposed for a summary-only offence, or a fine, or both.²⁴³ This is the model followed by the Wildlife and Countryside Act 1981 in respect of non-compliance with a species control order.²⁴⁴ We would expect the typical penalty to be a fine. This might be applied, for example, in cases of a breach of an order addressing fairly minor maintenance matters. But including imprisonment might be necessary in more serious cases where, for example, sustained or repeated breaches of an order create a serious risk to public safety. We do not think it necessary to create an indictable offence; the maximum term of imprisonment for a summary-only offence, currently 6 months, is a serious sanction and we anticipate that the most dangerous tips will be designated and dealt with by the supervisory authority.²⁴⁵

- 8.46 We do not consider that there should be a defence of hardship as such; the remedy where an order is considered to be disproportionate should be to appeal rather than to disobey it. Hardship should already have been assessed at the time that the order was made. In our discussion of tip maintenance agreements in chapter 5, we explained that where a tip owner was unable to carry out works, for example due to age or disability, it might be necessary to provide in the agreement for the work to be done by the authority.²⁴⁶ We also explain, in discussing a charging power for the new regulatory regime, that an agreement could make provision for payment either by or to the owner.²⁴⁷ An assessment of financial hardship could also be made at this stage.
- 8.47 For these reasons, we envisage that the agreement itself will in effect, save in cases of supervening difficulties, provide for hardship, so that an exemption from a penalty for non-compliance should not be necessary. Nonetheless, we recommend that the offence of failure to comply should be “without reasonable excuse”, and recognise that supervening hardship could constitute a reasonable excuse. Statutory guidance could be provided to ensure that relevant factors are taken into consideration.
- 8.48 We have also considered the possibility of civil sanctions for breach of an order. Civil sanctions under the Environmental Civil Sanctions (Wales) Order 2010 include the imposition of fixed and variable monetary penalties, compliance, restoration and stop notices and enforcement and third party undertakings.²⁴⁸ We can see a role for such sanctions in cases of, for example, persistent failure to carry out minor maintenance operations such as clearance of drainage channels, but consider that there should in any event be a criminal sanction and confine ourselves to recommending that at this stage. We suggest that the Welsh Government consider bringing more minor

²⁴³ In other words, one that can only be tried by magistrates.

²⁴⁴ Wildlife and Countryside Act 1981, sch 9A, para 19(3).

²⁴⁵ Currently this is 6 months, pending the coming into force of section 281(5) of the Criminal Justice Act 2003, but there are indications that it will be raised to one year: see <https://www.gov.uk/government/news/magistrates-courts-given-more-power-to-tackle-backlog>.

²⁴⁶ See para 5.31.

²⁴⁷ See para 9.25 below.

²⁴⁸ Environmental Civil Sanctions (Wales) Order SI 2010 No 1821 (W 178), art 3. These sanctions apply to a range of offences in environmental legislation, including the Environmental Protection Act 1990 and the Water Drainage Act 1991.

breaches of tip orders into the civil sanctions regime in the light of their experience of the use of such sanctions.

Recommendation 31.

- 8.49 We recommend that failure, without reasonable excuse, to comply with a tip order should be a summary offence punishable by imprisonment for a term not exceeding the maximum penalty for a summary-only offence, or by a fine, or both.
- 8.50 We recommend that the Welsh Government give consideration to the use of civil sanctions in respect of infringements of a tip maintenance order.

AVENUES OF APPEAL

- 8.51 The current regime provides a right of appeal to the county court or to the High Court in respect of notices to carry out works and claims for payment of expenses by a local authority.²⁴⁹ The rights to compensation and contribution provided by the Act also give rise to the possibility of multiple applications to the court. In our consultation paper we expressed the view that a single application to a court or tribunal to resolve all issues of compensation or contribution would be preferable to multiple applications.²⁵⁰
- 8.52 In addition, we proposed new rights of appeal under the new regulatory regime. We have recommended in this report that a right of appeal arise against entry on the tip register on the ground that there is no tip situated on the land, and against the imposition of a tip order.²⁵¹ In the next chapter, we explain that we do not consider that there is a need for the new regime to provide a system of applications to resolve issues of compensation or contribution.
- 8.53 The issue arises of the appropriate body to hear appeals under a new scheme. We explained in our consultation paper that under the current law these fall into two categories: proceedings between private parties, such as applications for contribution, and proceedings between a private party, usually the tip owner, and the local authority.²⁵² We suggested that legislation could provide for applications and appeals to be made to Welsh Ministers and remitted to an appointed person, to the Planning Inspectorate, or to the First-tier Tribunal General Regulatory Chamber (Environment). Other possibilities were the Upper Tribunal (Lands Chamber) or a devolved tribunal such as the Residential Property Tribunal for Wales, Agricultural Land Tribunal for Wales, or the Valuation Tribunal for Wales. We also suggested that appeals could be heard by a new devolved tribunal, and referred to the provisional proposals for a

²⁴⁹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.107 and 10.111.

²⁵⁰ Above, para 10.109.

²⁵¹ See paras 3.65 and 5.90 above.

²⁵² Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.110.

tribunal system for Wales in the Law Commission's consultation paper on Devolved Tribunals in Wales.²⁵³

- 8.54 We noted that the precise appeal mechanism was outside our terms of reference, and should be left to the Welsh Government. But we suggested that, as the grounds of appeal may require distinct areas of expertise, for example in relation to identification of an area as a tip, it will be important to provide for the appeal to be heard by a person with appropriate expertise. We did not ask a specific consultation question on the point, but asked for views.²⁵⁴

Views on appeal jurisdiction

- 8.55 WLGA (Bridgend and Torfaen agreeing) and Blaenau Gwent agreed with the need to ensure that appeals are heard by a person with appropriate experience, and indicated their willingness to discuss the issues further with the Welsh Government.

- 8.56 Both Sir Wyn Williams and Huw Williams cited the recommendation made by the Commission on Justice in Wales that "Welsh tribunals should be used for dispute resolution relating to future Welsh legislation".²⁵⁵ Huw Williams suggested that compensation disputes could go either to a devolved tribunal or to the Upper Tribunal (Lands Chamber). Sir Wyn Williams was of the view that:

Disputes and appeals arising by virtue of Welsh only legislation relating to tips should be heard in a forum or tribunal which is specific to Wales. That militates against directing disputes or appeals to the existing courts of England and Wales.

- 8.57 Given the diverse nature of the expertise which might be required to cover the types of dispute identified in the consultation paper, Sir Wyn Williams concluded that he could not provide a definitive view as to the precise appeal mechanism required. He pointed to the need for further work, including consideration of the Law Commission's recommendations for a new tribunal system for Wales.²⁵⁶ He suggested that:

The Welsh Government should conduct an in depth analysis of the existing Welsh tribunals (residential property and agricultural land) so as to make a judgment about whether their jurisdiction can be extended to accommodate disputes. Further, if a First-tier Tribunal and/or an Appeal Tribunal for Wales is recommended by the Law Commission and in due course created by Welsh Government, the Government should assess whether a new body should be created to fit into those structures to deal with dispute resolution relating to tips.

²⁵³ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.111 and 112. See also Devolved Tribunals in Wales (2020) Law Commission Consultation Paper No 251.

²⁵⁴ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.113 and 114.

²⁵⁵ Recommendation 27, Justice in Wales for the People of Wales, The Commission on Justice in Wales Report (October 2019) <https://gov.wales/commission-justice-wales-report>. Sir Wyn Williams, President of Welsh Tribunals, was a member of the Commission.

²⁵⁶ At the time that Sir Wyn Williams submitted his response, the Law Commission's report had not yet been published. Our report, Devolved Tribunals in Wales (2021) Law Commission Report No 403, was published on 8 December 2021.

- 8.58 Professor Bob Lee supported a move from the court to the tribunal system, proposing the First-tier Tribunal General Regulatory Chamber (Environment) as the appropriate venue. He referred to discussions in Wales in the Environmental Governance Stakeholder Group of the possible pursuit by the proposed Environment Commission for Wales of environmental review before the Upper Tribunal where there is an alleged failure by a public body in Wales to comply with environmental law.
- 8.59 Keith Bush QC was of the view that any appeals under the new system should, in the first instance, go to a devolved tribunal. This would ensure the accessibility of any remedies.

Discussion

- 8.60 As noted above, the precise appeal mechanism to be applied by the new regulatory regime is outside our terms of reference, and a matter for the Welsh Government. For this reason, we make no recommendation in this regard. However, if the Welsh Government accepts our recommendation of a new First-tier Tribunal and Appeal Tribunal for Wales, it may wish to consider Sir Wyn William's suggestion that it assess whether a new body to deal with disputes relating to tips should be created to fit into these structures.

Chapter 9: Financial terms of agreements and orders

CHARGING POWER

- 9.1 Our consultation paper explained that it was outside our terms of reference to consider who should pay for coal tip safety operations. Under the current system, primary financial responsibility for tip safety work falls to the owner.²⁵⁷ This is subject to claims for contribution against others and the power of the Welsh Ministers to make grants to fund remedial operations carried out by local authorities.²⁵⁸ We explained that contribution orders acted to soften the impact of the rigid definition of an owner under the Mines and Quarries (Tips) Act 1969. The definition could produce unfairness, for example to a tenant on a short lease.²⁵⁹ At times public funds have been available for regeneration, but only under particular schemes.²⁶⁰
- 9.2 We reported that local authorities have found it difficult to recoup funds from owners. In addition, there is a gap in the provisions, in that there is no power to charge for maintenance work or for exploratory tests which do not lead to remedial works being carried out. Some local authorities found it more cost effective to carry out preventive maintenance work on tips than to check up on and enforce the carrying out of the works by a landowner.²⁶¹
- 9.3 Our consultation paper looked at possible charging models. We suggest that one approach would be to follow the reservoirs charging regime by imposing a fee on a tip owner at the time of registration, possibly to cover the cost of the inspection, and an annual fee on the owner of a designated tip. Alternatively, the fee could be tailored to the work required. We explained that these are policy choices for the Welsh Government, and provisionally proposed a general power to charge in order to allow these choices to be made.²⁶²

Consultation Question 28: We provisionally propose that the supervisory authority and any other public bodies having functions under the coal tip safety scheme should have a general power to charge fees and expenses to the owner of land containing a tip, which could include periodic charges. Do you agree?

²⁵⁷ Mines and Quarries (Tips) Act 1969, ss 23(1) and (2); Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 4.51. The owner is defined in s 36.

²⁵⁸ Mines and Quarries (Tips) Act 1969, ss 19, 21 to 25; see Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 4.52 to 4.57.

²⁵⁹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 4.42, 4.54 and 4.55.

²⁶⁰ Above, paras 3.25 to 3.27 and 10.102.

²⁶¹ Above, para 10.103.

²⁶² Above, para 10.105.

- 9.4 Of the 41 respondents who answered this question, 28 (68%) agreed. Eleven (27%) disagreed and two answered “other”.

Reasons for agreeing

- 9.5 NRW thought that finding ways for the new regime to be self-funding through the services provided would be a way to secure its long-term sustainability. Rhondda Cynon Taf were keen for fees to be charged to landowners. Graham Hathaway thought it essential to offset public expenditure in this way. Sir Wyn Williams supported financial contributions from landowners where “practicable and proportionate”.
- 9.6 Professor Bob Lee noted that charging regimes for regulatory activities have changed a good deal since 1969, and thought that the proposed power would not be out of line with those levied in other areas of environmental regulation. In his view “a tiered charge for annual registration which takes into account classification and risk” would provide a simple model based on the regulatory licensing system.

Reservations

- 9.7 Howard Siddle warned that recovery of fees in respect of “an otherwise useless, decades old, perhaps innocuous tip” might not be realistic.
- 9.8 NRW asked about the position of public body owners who might be placed in the position of charging fees to themselves. Howard Siddle also recognised this problem. NRW also noted the problem of tips for which no owner can be identified.
- 9.9 Neath Port Talbot Plaid Cymru Group questioned what they felt could be an arbitrary allocation of responsibility, given the history of the coal industry and the pattern of tip ownership this had produced:

The spread of owners reflects historic background, operational practice and the flawed privatisation of the coal industry. This is a huge legacy from Wales’s industrial past which continues to pose a risk to communities that have also suffered economic decline after the demise of the coal industry. These valleys were the cradle of the industrial revolution. They have been exploited for their mineral wealth, but the vast profits of those industries were never invested or re-invested for the benefit of our communities

For many smaller owners responsibility for tip inspections and maintenance are unviable, on the other hand large current operators such as Celtic Energy should meet their responsibilities and some large wealthy landowners have made profits for generations which gives them an obligation.

Approaches to charging

- 9.10 NRW and WLGA (Bridgend and Torfaen agreeing) agreed that, while the detail of charging policy required further discussion, the fees must be “fair, proportionate, transparent and consistent across Wales”.
- 9.11 Huw Williams suggested that further consideration would need to be given as to whether charges should be determined on a case by case basis with a view to full costs recovery, or on a fixed scale similar to planning fees. In the former case, a

mechanism would in his view be required to dispute fees considered to be excessive. Kim Moreton thought that the best model would be a sliding scale of charges according to risk level and predicted maintenance costs. Lee Jones noted the importance of recognising differences in the level of inspection required. Non-intrusive observational inspection is much less costly than intrusive ground investigations.

- 9.12 Transport for Wales noted the need for a mechanism to ensure that the scheme is sufficiently funded if the landowner was unable to afford the payments. In a worst case scenario, the authority might need powers to take ownership of the tip in the interests of safety.
- 9.13 NRW pointed out that works carried out on a tip could enhance the value of the land on which it is situated. As the owner would be the principal beneficiary of this, any cost of works carried out by a supervisory authority “should be recoverable in tune with the enhanced value created by the works”.

Alternative funding models

- 9.14 Several respondents questioned the principle of charging tip owners who were in most cases not responsible for having created the tip. Jane Iwanicki thought that fairness and proportionality required consideration of past ownership of coal interests and the associated tips. She noted that many of the operations which created the tips were carried out in the days of the nationalised coal industry. Howard Siddle thought that the “polluter pays” principle should apply; this suggested that the coal industry should be responsible for the legacy of tip instability and the cost of operations on disused tips. He also suggested placing levies on the use of old tips for new uses to generate additional funding streams.

Enforcement

- 9.15 WLGA (Bridgend and Torfaen agreeing), Neath Port Talbot, Merthyr Tydfil and NRW all pointed out the need for mechanisms to pursue non-payment of fees. WLGA and Neath Port Talbot also warned against creating a system for pursuing non-payers that ends up being more expensive and slower than undertaking preventive maintenance work directly.
- 9.16 Wrexham also thought that where the land in question had no identifiable owner at the time that works were carried out, it would be useful to have a provision for land charge registration in order to make it possible for the supervisory authority to recover costs incurred.

Reasons for disagreeing

- 9.17 Some of those disagreeing relied on reasons of fairness to support their view that the supervisory authority should cover the costs of tip work itself. Jane Iwanicki, as mentioned above, looked to the history of the coal mining industry to argue that current owners should not have to pay the cost of the work. Paul Connolly thought that it would cause conflict if tip owners were charged as “it is unlikely that the landowner has gained financial reward from the mining activity that produced the waste”. Joel James MS said simply that “landowners should not have to pay fees or expenses for simply owning land that contains a coal tip”. The exception to this should, in his view,

be liability to pay the costs of emergency work needed because the owner has failed to keep the tip safe.

- 9.18 Others relied on reasons of practicality. CLA Cymru thought that requiring the authority to cover its own costs would result in a better outcome, reduce appeals and allow the authority to concentrate on the work to be done. They also warned of the risk that the landowner “may disappear”:

It would be far better for the authority to pick up the bill in which it can be assured of the work being done and to a suitable standard, so there is a degree of confidence in that the tips are in a safe condition going forward.

- 9.19 Dr John Perry doubted that the system would work, as it would involve chasing local authorities and private owners, who “will probably not have enough funds”, and would detract from other high priority services such as health and education.

- 9.20 Keith Bush QC opposed the proposal on grounds of both fairness and practicality, particularly in levying a charge on tips which do not pose a risk:

It does not seem fair that the owner of land that does not pose a danger to people or property may have to pay towards the cost of carrying out the general inspection work of the supervisory authority. Even if such a procedure was acceptable in principle, very complex practical questions would arise in terms of determining the amount of the charges and tailoring the procedure to reflect the fact that the nature of owners’ interests in land will vary so much.²⁶³

- 9.21 He disputed whether the reservoirs regime should be used as a model:

The procedure in relation to reservoirs is not equivalent. The owner of a reservoir receives profits from the reservoir and if no statutory inspections took place the owner would need to incur expenditure on inspections in any case. The situation of the owner of a tip that poses no threat at present to anyone and does not require any practical intervention by the owner is different.

- 9.22 Pontypool Estate Park Office opposed the proposal on the ground that the public would have no control over the way in which the supervisory authority was run, and that it would be unfair to pass the cost of maladministration to owners without redress.

- 9.23 Stephen Smith, who answered “other”, thought that it would be unfair to have a blanket scheme to impose charges on tip owners who had simply inherited the tips on their land and derived no benefit from them. He pointed out that the tip owner would have no exit route from the obligation to pay the charge save by removing the tip. This would be an expensive and possibly unjustified operation and might be prevented by other environmental legislation.

²⁶³ Keith Bush QC’s response has been translated from the Welsh original.

Discussion

- 9.24 A majority of respondents supported our proposal for a general power to charge fees and expenses to the owner of land containing a tip, but the level of support was lower than our other provisional proposals received. We agree with those supporting the proposal that the long-term sustainability of the supervisory authority is likely to rely on some ability to charge for services, and agree that the charging regime under the 1969 Act is outdated.
- 9.25 We have explained in earlier chapters that we favour a flexible approach to the management of tips not classified as designated under the new regime. We have recommended that the supervisory authority should have discretion in deciding who should carry out functions such as inspections and risk assessments. A new charging power would need to cater for situations where tip owners, both public and private, were doing their own work. We suggest that, in order to enable flexibility, there should be a power to impose charges or make payments, as for species control operations.²⁶⁴
- 9.26 We agree that careful thought will need to be given as to whether, where charges are levied, they are determined on a case by case basis, or on a fixed scale. We also agree that a possible model could be a sliding scale of charges based on risk level and predicted maintenance costs. A mechanism will be needed to deal with disputes over charges if levied on a case by case basis, and care will be needed to ensure that the mechanism is able to pursue non-payment of fees with efficiency. The charging power may also need to be combined with compulsory purchase powers, as discussed in previous chapters.²⁶⁵
- 9.27 The varied pattern of tip ownership will also be an important consideration in developing charging policy. Tip owners include public authorities and different types of private landowners, including farmers and modern housing and commercial developments. Some landowners bought the land containing the tip subject to a covenant to keep the tip in good condition or for a low purchase price in recognition of the work needed on the tip. In addition, a single tip may be owned by a combination of types of owners. These factors are also likely to be relevant to both charging policy and consideration of allocation of liability, discussed in the next section.
- 9.28 Many of the points raised in responses reflect a debate as to whether the cost of the scheme should be borne by private owners or by the public purse. We also note the view of some respondents that a “polluter pays” principle should be applied in order to make the coal mining industry responsible for the tips it has left behind. These respondents consider it unfair to charge current owners who are not responsible for

²⁶⁴ Under the non-native species control regime, the agreement or order may contain provisions for “payment to be made by either party to the other, or to another person, in respect of the species control operations to be carried out”. See *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 9.89 and 9.91 and *Wildlife and Countryside Act 2015*, sch 9A, paras 7(3)(b) and 13(2)(b) and (c).

²⁶⁵ See paras 5.84 and 6.115 above. Compulsory purchase powers are also discussed in paras 12.25 below.

the creation of the waste. These considerations are matters of policy for the Welsh Government in deciding their charging policy.²⁶⁶

9.29 We agree that the reservoirs regime is not analogous to the regulation of disused coal tips. Reservoir owners, in the main, derive economic benefit from a reservoir. If not wanted, a reservoir can be drained. Removing a tip is a very different operation, and generally impracticable.²⁶⁷

9.30 We recommend accordingly that there should be a charging power in the terms set out at the end of the next section. We also consider it appropriate, in order to provide flexibility, for there to be power to pay the cost of work undertaken by the owner or occupier.

CLAIMS FOR COMPENSATION OR CONTRIBUTION

9.31 The current regime for claiming expenses from landowners is subject to a complex system of claims for compensation or contribution.²⁶⁸ These include:

- (1) a duty to account for the proceeds of sale of material not belonging to the tip owner that is removed by the owner from a tip in the course of remedial work;
- (2) a duty to account to the owner of the material for the proceeds of sale of material removed by the local authority from a tip in the course of remedial work, subject to a power to set off the proceeds of sale against any sum which the local authority is entitled to recover from the owner;²⁶⁹ in this context, the owner of the material may or may not be the owner of the tip;
- (3) provision for compensation where an order to carry out remedial works is revoked;²⁷⁰
- (4) a duty to compensate third parties for damage or disturbance in consequence of tests or remedial operations;²⁷¹ and
- (5) provision for financial contribution to the liability of the owner by certain categories of person.²⁷²

²⁶⁶ The application of the “polluter pays” principle, one of the four overarching environmental principles in EU law, and the Welsh Government consultation and subsequent policy development concerning how to deal with gaps in environmental principles and governance following EU exit, are discussed in *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 5.56 to 5.67.

²⁶⁷ See *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 9.29 to 9.31 for further discussion of the distinctions between reservoirs and coal tips which could justify differences in policy.

²⁶⁸ These provisions are discussed in *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 4.52 to 4.57.

²⁶⁹ *Mines and Quarries (Tips) Act 1969*, ss 14(7) and 17(6).

²⁷⁰ *Mines and Quarries (Tips) Act 1969*, s 16(4) and sch 4.

²⁷¹ *Mines and Quarries (Tips) Act 1969*, s 20.

²⁷² *Mines and Quarries (Tips) Act 1969*, ss 19, 21 and 22. Under s 19(1), the categories of person are: any person who has tipped mine or quarry waste onto the tip in the previous 12 years; any person who within

9.32 We explained in our consultation paper that the provisions appeared cumbersome, and that we were unsure of the extent to which there remained any need for them. This was particularly the case in the light of our proposed revised approach to the definition of an owner and the fact that the tipping of coal waste is becoming increasingly rare. We asked for views on whether the provisions should be retained, and for any practical experience of their application.²⁷³

Consultation Question 29: Is it appropriate for legislation underpinning a new coal tip safety regime to include

a power to sell material not belonging to the owner of a coal tip that is removed from a tip in the course of remedial work on the tip; if so, should it be accompanied by a duty to account to the owner for the proceeds of sale?

provision for compensation where an order to carry out remedial works is revoked?

a duty to compensate persons other than the owner of a tip for damage to or disturbance of enjoyment of land in consequence of tests or remedial operations?

provision for the discretionary award of financial contributions to the liability of an owner?

If so, should the categories of person liable be as set out in section 19(1) of the Mines and Quarries (Tips) Act 1969 and the circumstances to be taken into consideration be as set out in section 19(4) of the Act? If they should not be, what alternative provision should be made?

9.33 Thirty-four respondents answered this question or parts of it. In response to subparagraph (1), 25 respondents answered, with 18 (72%) agreeing, four (16%) disagreeing and three responding “other”. In response to (2), 23 respondents answered, with 14 (61%) agreeing, four (17%) disagreeing and five answering “other”. In response to (3), 25 answered, with 16 (64%) agreeing, five (20%) disagreeing and four responding “other”. In response to (4), 21 answered, with 12 (57%) agreeing, four (19%) disagreeing, and five responding “other”.

Reasons for agreeing

9.34 Keith Bush QC supported all the measures set out in the above question as “appropriate to establish a fair and effective regime”. Dr John Perry noted that a “win-win mechanism” for both the authority and the owner provided a good incentive to the owner to comply.

those 12 years has, by act or unreasonable omission, contributed to the instability of the tip; any person who at the date of the service of the notice under s 14 or s 17 had an estate or interest, otherwise than as a mortgagee, in the land on which the tip is situated; and any person who had such an estate or interest at any time within the period of 12 years immediately preceding that date.

²⁷³ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.108.

The need for simplicity

- 9.35 WLGA (Bridgend and Torfaen agreeing), Neath Port Talbot and Blaenau Gwent recognised the need for adequate protection for the interests of landowners, but noted the need for simplicity:

It is important that, in refreshing the legislation, a priority is to simplify arrangements as far as possible and limit the opportunities for expensive and time-consuming court cases.

- 9.36 Professor Bob Lee found the provisions “over-elaborate and cumbersome”. He suggested that agreements for works negotiated between landowner and authority could include the type of provisions covered by the legislation. He also thought that it was worth investigating whether there were alternative remedies available in some of the instances covered by the provisions. These might remove the need for specific provision within the regulatory framework. Huw Williams agreed that the 1969 Act provisions were outdated and cumbersome and needed replacing. Stephen Smith questioned whether retaining the provisions would risk re-creating the problems experienced by local authorities in operating the 1969 Act.
- 9.37 Network Rail suggested a requirement for owners to obtain specific insurance or be part of a compulsory insurance scheme, possibly with some kind of joint funding arrangement which could be drawn upon in the event of an incident. Under such a scheme, all parties could be subject to an agreed claims process, which would, in their view, bring clarity and save costs.
- 9.38 Caerphilly thought that there should be no provisions of this kind in respect of minor or general maintenance matters.

Comments on (1): power to sell material removed and duty to account

- 9.39 Jane Iwanicki pointed out that, in the case of a coal tip, the removal and sale of material containing coal is unlikely to fit with the Welsh Government’s carbon reduction strategy, under which the extraction and combustion of fossil fuels is to be avoided.²⁷⁴
- 9.40 NRW noted that not all tips would contain a saleable product, but where they did a power to sell would help to offset remediation costs and enable reuse of materials instead of treating them as waste. They also thought that a duty to account to the owner for proceeds, after suitable recovery of remediation costs, could incentivise the owner to maintain interest in the asset. They suggested that a market might develop for the reuse of spoil which could help the supervisory authority to become more sustainable. ICE Wales Cymru was more doubtful that there could be material other than coal in the tip which would not be the property of the owner.

²⁷⁴ This policy is discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper, para 3.5. In addition, Welsh Planning Policy does not permit the mining of coal for energy production, although it may be extracted for non-energy purposes.

- 9.41 Paul Connolly cited the sale of coal in the Ffos y Fran land reclamation scheme as an example of a contribution to the costs of remediation.²⁷⁵
- 9.42 Huw Williams thought that the position of a third party owner of material removed during remedial work should be covered by a general provision to pay compensation for loss. In his view, the extent to which the owner of such material could make such a claim would depend in part on whether they were also a party potentially liable for clean-up costs.

Comments on (2): compensation where order is revoked

- 9.43 CLA Cymru thought that a provision for compensation would be reasonable if owners could show that they had incurred costs following service of the order. Kim Moreton warned that any disruption must be quantified and proven. Lee Jones thought that the owner should have to show proof that the order had had financial impact by fully or partially preventing use of the land to which it relates. Huw Williams was of the view that such compensation should be strictly limited and linked only to the costs of leaving the land in a tidy and stable condition no worse than the position before the notice. Transport for Wales observed that an appropriate compensation mechanism and method of calculation would be needed.
- 9.44 Huw Williams also suggested that the possibility should be considered that the work carried out notwithstanding the revocation might have improved the land. He noted that it was important, so far as is consistent with Human Rights Act obligations, that the provision should not act as a disincentive to the supervisory authority to take action.
- 9.45 Bob Leeming questioned how likely it was in practice that an order to carry out remedial works would be revoked.
- 9.46 Some disagreed with this provision outright. NRW thought that all remedial works identified in the tip management plan would improve the safety of the tip, and so it was impossible to have unnecessary works. In practice the revocation of works identified as necessary in the tip management plan was unlikely.

Comments on (3): compensation to third parties

- 9.47 CLA Cymru thought the provision was equitable as long as loss could be proved. Others were more cautious and stressed that further definition was needed. Huw Williams approved the measure in principle, but emphasised that it should relate to actual loss rather than a figure based on reduction in value of a third party's land. ICE Wales Cymru thought that the provision should apply only where an operation extends or requires access beyond the land occupied by the tip itself. Transport for Wales noted the need to define "persons other than the owner of a tip". They questioned whether this would include the costs of those facilitating access. This could include third parties such as themselves.

²⁷⁵ This is discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 3.9(3).

- 9.48 Caerphilly noted that compensation rights in respect of highways work were similar to the 1969 Act provisions for compensation.²⁷⁶ In their view, compensation should be available only in the case of major work, and account should be taken of the benefit to the owners of the improvements made to the land after work is completed.
- 9.49 Network Rail noted that losses to the railway network as a result of operations were likely to be far greater than for most landowners. They pointed out that the normal level of public liability coverage recommended for operations that could potentially damage the railway network is £155 million. Once again, they recommended that there should be a requirement for tip owners to obtain specific insurance or be part of a compulsory insurance scheme.²⁷⁷
- 9.50 Some opposed the provision outright. Kim Moreton thought that the possibility of multiple claimants, for example in a densely populated residential area, might make the operation prohibitively expensive. Steve Jones of the Emergency Planning Department at Pembrokeshire County Council opposed the measure in robust terms:
- What is the world coming to? If a tip needs fixing it must be fixed, end of. I don't get compensated if a road I use gets dug up for repairs, so why should a tip "user"?
- 9.51 NRW explained that it was quite normal for NRW to compensate where access to a site was gained through third party land, even where the land was left in equivalent state. But they warned that compensation for disturbance of enjoyment may be difficult to define, and that assessment of the scale of impact needs careful consideration. In their experience, care is needed to ensure that such claims are reasonable and justified, and the positive impact of works should also be taken into account.²⁷⁸

Comments on (4): contributions to the liability of an owner as between private parties

- 9.52 CLA Cymru approved the principle behind the provision, although their position, discussed above, is that the authority should cover the costs of the work.²⁷⁹ They noted that the harm caused by third party trespass such as motorcycles was a common problem and allowance needed to be made for it.
- 9.53 Kim Moreton described the 1969 Act provision for contributions to liability as "proven and understood within the legal and land management /investment communities".

²⁷⁶ The Highways Act 1980 has a number of compensation provisions applied to specific types of works. For example, s 292 provides for compensation for damage to land or disturbance to the enjoyment of land caused to a person with an interest in that land in the exercise of the powers of entry conferred by ss 289 and 291 (powers of entry for the purpose of a survey and of maintaining certain structures and works). Compensation under the Land Compensation Act 1973, which covers loss caused by some types of highways work, is considered below at para 9.64.

²⁷⁷ See para 9.37 above.

²⁷⁸ As an example of their approach to a claim for third party damage and disturbance, Natural Resources Wales have described to us what would happen where a vehicle has crossed third party land leaving tyre ruts and damaging a gate post. Once the landowner had made a written, evidenced claim, a fair price would be agreed to remedy the damage, reflecting the area affected, the cost of treating the land (for example subsoiling, ploughing and re-seeding) and the cost of a new gate post and its installation. Annual guides are produced by land agents with industry costings as guidelines in determining a fair price.

²⁷⁹ See para 9.18 above.

NRW thought that contribution orders and the classes of parties who could benefit were fair.

- 9.54 Philip Thomas opposed the retention of the measure. He objected to the provision of any benefit to landowners who had bought tips at the time of privatisation of the coal mining industry for nominal sums as an acknowledgement of continuing coal tip safety obligations.
- 9.55 Graham Hathaway thought the need for safety should override consideration of contributions, but did agree with the operation of a scheme on a discretionary basis.
- 9.56 Huw Williams pointed to the Contaminated Land Statutory Guidance (Wales) 2012, and in particular the treatment of class B owners in section 7, as a good basis for devising new arrangements for apportioning liability for coal tip safety work.²⁸⁰ The Guidance, which concerns the determination of liability for remediation work on contaminated land, offers, in his view, a “modernised approach to determining contribution liability”.²⁸¹

Discussion

- 9.57 A majority of respondents broadly agreed with retention of the provisions listed in our consultation question, but with a wide range of reasons and qualifications. Many responses agreed with compensation or contribution in principle, but indicated a need to streamline or simplify the arrangements. No respondent offered any instances of experience in applying the provisions.
- 9.58 We agree that there is a need to keep the provisions simple and to avoid reproducing the cumbersomeness of the 1969 Act mechanisms. We also agree that it would be preferable to wrap up compensation for loss into one simpler and more general provision. We think that provision for compensation and/or contributions in tip agreements and orders could provide the solution.
- 9.59 We begin with the following observations made in relation to comments on individual provisions.

(1) power to sell material and duty to account

- 9.60 The power to sell tip material and duty to account to the owner of the material for the proceeds of sale can arise in two situations under the 1969 Act. The first is where the owner is undertaking remedial work and sells material belonging to a third party. The second is when the local authority is carrying out the work and sells material from the tip which may belong to the landowner or a third party.²⁸²
- 9.61 We agree with respondents that any material sold is unlikely to be coal in the light of Welsh Government energy policy. There may be some value in tip material sold as aggregate. Under the new regulatory regime, if a public authority were to carry out

²⁸⁰ The Welsh Government’s Contaminated Land Statutory Guidance (Wales) 2012 is made pursuant to pt 2A of the Environmental Protection Act 1990.

²⁸¹ For more detail on this, see paras 9.77 and 9.78 below.

²⁸² See Mines and Quarries (Tips) Act 1969, ss 14(7) and 17(6).

work on the tip, and sell material removed as part of the works, the duty to account for the proceeds should in our view be influenced by who is paying for the works. Provision for this could be incorporated into the agreement or order governing the works.

- 9.62 We are doubtful whether situations would arise now in which material in a tip would belong to a third party. We had no responses indicating that this situation occurs. We are sceptical as to the need for provision in relation to it in the new scheme but, in view of respondents' support for its retention, we propose to cater for it in our recommendations below.

(2) compensation where order revoked

- 9.63 We do not see need for a specific provision for compensation where an order is revoked. We envisage that the agreement or order under which the works are conducted would provide for contingencies such as this if they were likely. It could also provide for other contingencies such as delays or supervening events which prevent the works progressing. More broadly, although responses showed that respondents wished to see the provision kept, we cannot readily envisage any circumstances in which cancellation of an order would make it just for the owner to receive compensation.

(3) compensation of third party landowners for damage or disturbance

- 9.64 We agree that only actual loss, not the reduced value of land, should be covered by provisions for compensation to third parties; a landowner is not generally under any duty to keep their own land in a state that maintains the value of neighbouring land. An example of an approach to compensation for loss is Part 1 of the Land Compensation Act 1973. This provides for compensation where the value of an interest in land has depreciated due to physical factors caused by the use of public works. The physical factors covered are "noise, vibration, smell, fumes, smoke and artificial lighting and the discharge on to the land in respect of which the claim is made of any solid or liquid substance". The types of public works covered include works to any highway and other works or land provided or used in the exercise of statutory powers.²⁸³
- 9.65 To the extent that works covered by an agreement or order involved entry onto neighbouring land, or otherwise affected that land, we would expect the supervisory authority to be aware of that fact and to make its own efforts to engage with the relevant landowner. We anticipate that major impacts on, or risk to, neighbouring land would only be likely to arise in cases of major works on designated tips, which we would expect to be undertaken by the supervisory authority itself. Provision for restricting the impact of the works on land or infrastructure could be incorporated into the tip agreement or order under which the work was done. The power to make an order in the absence of an agreement would also help to deter exaggerated claims.
- 9.66 Third parties who might qualify for compensation could be quite a wide group. These parties could range from neighbouring owners facilitating access to owners of affected infrastructure such as railways. We agree with the need for mechanisms allowing a

²⁸³ Land Compensation Act 1973, s 1(2) and (3).

careful evidence-based quantification of loss and a clear method of calculation of any compensation.

(4) contributions to the owner's liability for the cost of works

- 9.67 A majority of respondents considered that, if owners are to pay charges under the power to charge discussed above (a position which some of them disputed), contribution between private parties should be possible on a discretionary basis.
- 9.68 We think that the need for contribution could be reduced if the person primarily liable for the cost of works were more closely allied than under the present law with the person having an economic interest in the land as an asset. Even if so, the circumstances of individual tip sites are likely to vary to an extent that makes it impossible to achieve a fair outcome through a legal formula that attaches liability to a single person.

Conclusion

- 9.69 We regard the creation of statutory causes of action, involving litigation in the county court or High Court, as a cumbersome feature of the present legislation. We consider that, in cases where there are multiple owners of the land containing the tip or the works impinge on the rights of neighbouring landowners or third party owners of tip material, a more efficient approach to the issue is to provide for them by agreement in a tip agreement or, failing that, in the consequent tip order.
- 9.70 We regard a number of our recommendations in relation to a regime for the control of invasive non-native species as being transposable to the current context.²⁸⁴ In our report on that topic we envisaged that the relevant supervisory body would use best endeavours to include all relevant parties in the negotiation of the agreement, but considered that relevant bodies should not be required to conduct detailed investigations into complicated patterns of interests. We envisaged that the relevant body's first point of contact would be with the occupier of land and envisaged that, as a matter of good administrative practice, the body would ask that person what the nature of their interest in the land is and what other interests they know of. The relevant body should, we thought, make contact with any others with interests whom they discovered.²⁸⁵
- 9.71 We concluded that the legislation should provide that nothing done in accordance with a species control agreement should give rise to any liability of the relevant body to any person. If, for example, an occupier of land entered into a species control agreement authorising the relevant body to perform operations that interfered with the proprietary rights of a third party whose existence the relevant body had not discovered, the relevant body should be immune from any liability (such as liability in trespass) to that third party.²⁸⁶ The other party should not, however, be given immunity from any liability to that third party: the regime should not enable the other party to the agreement to

²⁸⁴ See *Wildlife Law: Control of Invasive Non-Native Species* (2014) Law Com No 342. The non-native species regime was considered in *Regulating Coal Tip Safety in Wales* (2021) Law Commission Consultation Paper No 255, paras 9.87 to 9.102.

²⁸⁵ *Wildlife Law: Control of Invasive Non-Native Species* (2014) Law Com No 342, para 3.15.

²⁸⁶ Above, para 3.16.

obtain immunity from their pre-existing legal obligations by virtue of a species control agreement voluntarily entered into by them. It would be open to that party to decline to enter into an agreement if they feared that this would result in their being liable to a third party.²⁸⁷

- 9.72 We recommended that the legislation should, however, provide that nothing done in accordance with a species control order should be actionable by any person. This would confer immunity from suit pursuant to (for example) a covenant in a lease where a landlord or tenant was acting pursuant to an order.²⁸⁸
- 9.73 We consider that that model could work satisfactorily in the present context also, as regards parties with interests in the land on which a coal tip is situated or (if still relevant today) in tip material contained on the land. We recognise that the species control regime is distinct from a tip safety regime in a number of ways. But there is a risk in both regimes that constructive dialogue between the authority and a person with an interest in the land containing a tip could be hindered by complex land holding structures. This could in turn hinder the work needed on the tip. The suggested approach would leave the authority with flexible powers to deal with cases where tip ownership is complex.
- 9.74 We have already concluded earlier in this chapter that the power to make a tip order should include a power to impose charges for works or, conversely, to pay the cost of them. We envisage that that power should extend to imposing charges on a person with an interest in the land even if not in actual occupation. This would enable the imposition of charges to accord with economic interests in the land and any other relevant matter such as covenants in a lease apportioning responsibility for coal tip management. The breadth of the power would provide encouragement to occupiers of land to identify their lessor if (for example, in the case of unregistered land) the lessor's identity was not otherwise known.
- 9.75 We further recommend that a tip agreement or order should be able to make provision for the sale of material removed in the course of tip works and the disposition of any proceeds of sale. We foresee a risk that third party owners of such material might not be identified in the course of the agreement or order-making process, since the occupier of the land would have no obvious interest in drawing attention to their existence. We regard this as an acceptable risk, given that we have not received any examples of the provisions being invoked, and that it is unlikely that tip material will have substantial value. We also regard the likelihood of there being a third party owner of the material as very low. It will nevertheless be necessary to frame the agreement and order-making powers to encompass owners of tip material who are not owners of the land to the extent that it is thought necessary to include them.
- 9.76 In short, we regard appropriate allocation of costs, charges and compensation as preferable to separate litigation between private parties. We appreciate that our recommendations leave a considerable margin of discretion to the supervisory authority, but our recommendation that there should be a right of appeal against a tip

²⁸⁷ Wildlife Law: Control of Invasive Non-Native Species (2014) Law Com No 342, para 3.17.

²⁸⁸ Above, para 3.18.

order will provide a remedy if the terms of the order are considered to be unfair.²⁸⁹ We nevertheless acknowledge that the discretionary power that we are recommending is a broad one and that more structured principles than the general principles of fairness and proportionality will be required in order to foster consistent and predictable outcomes.

- 9.77 The approach already adopted for assessing liability for remediation costs arising from contaminated land set out in the Contaminated Land Statutory Guidance (Wales) 2012 could provide a useful model for coal tip agreements and orders.²⁹⁰ The Guidance looks at the situation where two or more persons are liable to bear the responsibility for remediation works. It deals with the question of who should be excluded from liability, and how the cost of each remediation action should be apportioned between those who remain liable after any such exclusion.
- 9.78 Under the contaminated land regime provided by Part 2A of the Environmental Protection Act 1990, liability rests in the first instance with the person who caused or knowingly permitting the contamination. If such a person cannot be found, the Act turns to the owner or occupier of the land. The Guidance, which defines the owner or occupier as the Class B person, sets out principles for excluding and apportioning liability where there is more than one Class B person. Categories of those excluded include those occupying the land under a licence or agreement with no marketable value. Liability is apportioned between members of a liability group in proportion to the capital values of their interests in the land in question. There are further provisions for principles to be applied in any cost recovery decision. These include the need to reach a fair and equitable result, to avoid any undue hardship and to consider whether the Class B person took reasonable steps at the time of acquiring the land to establish the presence of contaminants.²⁹¹
- 9.79 While we are not qualified to make recommendations as to the allocation of the cost of the coal tip safety regime, we recognise the importance of a clear statement of the applicable principles which would guide the supervisory authority in framing tip agreements. In our view, the imposition of charges should accord with economic interests in the land. We have already concluded that a lease of a length of 21 years or more is a marker of ownership of land in economic terms and a factor that the Welsh Government may wish to take into consideration when devising the principles.²⁹²
- 9.80 We consider that the legislation establishing the new regulatory framework should require the Welsh Ministers to set out the principles to be applied in determining the

²⁸⁹ See para 5.90 above.

²⁹⁰ The Environmental Protection Act 1990, s 78F sets out the main provisions for establishing liability for remediation works on contaminated land. The Guidance issued pursuant to s 78F(6) looks more closely at the exclusion or apportionment of liability where two or more persons are liable to bear responsibility for remediation works: Welsh Government, Contaminated Land Statutory Guidance 2012, No WG15450, <https://gov.wales/sites/default/files/publications/2019-08/contaminated-land-statutory-guidance-2012.pdf>, s 7.

²⁹¹ Welsh Government, Contaminated Land Statutory Guidance 2012, No WG15450, <https://gov.wales/sites/default/files/publications/2019-08/contaminated-land-statutory-guidance-2012.pdf>, s 8.

²⁹² See paras 7.66 and 7.70 above.

financial provisions of tip agreements and orders. We therefore recommend that principles governing the allocation of costs, payments and compensation between categories of private individuals should be laid down by the Welsh Ministers by statutory instrument which, in order to provide for parliamentary scrutiny, should be subject to the affirmative resolution procedure.

9.81 The powers set out in the recommendation below are broadly expressed with a view to catering for all eventualities. In the case of charges by the supervisory authority for works, for example, we think it preferable that the charges be levied upon those who ought to bear them rather than replicating the current provision for contributions between those liable. In certain circumstances, such as the sale of recovered material by a private party carrying out works, it may be necessary for the order to direct payments between them.

Recommendation 32.

9.82 We recommend that the provision that can be made in a tip agreement or order should include provision

- (1) for the making of payments by a person named in the agreement or order;
- (2) for the making of payments to a person named in the agreement or order;
- (3) for the sale of any materials recovered from a coal tip;
- (4) for the payment of the proceeds of sale of such materials to a person named in the agreement or order; and
- (5) for the payment of compensation by a person named in the agreement or order to another person named in the agreement or order.

Recommendation 33.

9.83 We recommend that principles governing the allocation of financial responsibility for tip safety work between persons or entities in the public and private sectors should be laid down by the Welsh Ministers by statutory instrument.

Chapter 10: Specialist skills

- 10.1 Our consultation paper suggested that an approved panel of engineers with specialist qualifications to inspect coal tips and supervise operations upon them could be a good way to ensure both consistency and safety. We followed the reservoirs model in suggesting that the Institution of Civil Engineers (ICE) could take on the role of professional accreditation, with recommendations made to Welsh Ministers for approval.²⁹³
- 10.2 We thought that it would be straightforward for a public authority with a duty to inspect and maintain tips to ensure that the engineers employed to carry out this work were from a panel approved at an appropriate level. Similarly, the requirement was unlikely to cause difficulties for tip owners such as local authorities, NRW and the Coal Authority operating under a maintenance agreement for their own tips. But an obligation to employ an engineer from the panel for certain types of work might prove more problematic for private tip owners charged with implementing a tip maintenance agreement. Stakeholders told us that one of the problems encountered by local authorities in the operation of the Mines and Quarries (Tips) Act 1969 was the occurrence of disputes with tip owners over the need for works to ensure stability. A panel of engineers might add to the expense of carrying out tip maintenance work, but could help to ensure a consistent approach.²⁹⁴
- 10.3 We noted that the need for a specialist panel of engineers was appreciated by the Aberfan Disaster Tribunal in 1966, at a time when there was still an active mining industry and fewer disused tips. We thought that the argument in favour of a panel appeared even stronger in light of the loss of mining specialism and the decline of the industry since that time.²⁹⁵
- 10.4 We asked for views on a specialist panel. The section below considers responses to our question.

Consultation Question 30: Do you think that a panel of engineers with specialist qualifications to inspect and supervise prescribed types of work on coal tips is a good way to ensure consistency and safety?

- 10.5 Of the 44 respondents who answered this question, 38 (86%) agreed that a specialist panel would be a good idea. Three (7%) disagreed, and three answered “other”.

²⁹³ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 9.18 and 10.117. The Reservoirs Act 1975, s 4 requires the establishment of a panel of engineers to carry out the reservoir safety work stipulated in the Act. Four panels were established to allow for the selection of an appropriately qualified engineer to meet the different requirements of the Act.

²⁹⁴ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.63 and 10.118.

²⁹⁵ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.119.

Reasons for agreeing

- 10.6 Jacobs UK Ltd (formerly Halcrow) considered a panel of technical professionals with appropriate qualifications and experience to be a good way to ensure “consistency, accuracy/quality of assessment and ultimately safety”. Merthyr Tydfil, Neath Port Talbot, Rhondda Cynon Taf and Blaenau Gwent saw the panel as an opportunity to set a standard and ensure consistency in decision-making and safety. Dr John Perry endorsed the proposal to set the standard of expertise required at the level set for the reservoirs panel. WLGA (Bridgend and Torfaen agreeing) thought this would be a good way to ensure that relevant expertise was “on tap”.
- 10.7 Rhondda Cynon Taf also saw the panel as an opportunity to develop new engineering expertise. They noted that experts were currently being brought out of retirement to conduct inspections.

Qualifications needed

- 10.8 A number of respondents with expertise in the tip safety field had suggestions about the qualifications needed for appointment to the panel, and many made the point that the panel would require other professionals in addition to engineers.
- 10.9 ICE Wales Cymru proposed that appointment to the panel should be by peer reviewed evidence of competence. Appropriate qualifications and experience should be required, especially in respect of health, safety and/or environmental aspects of coal tips. They suggested that different grades could apply for different activities, and reference could be made to the UK Register of Ground Engineering Professionals (RoGEP), although they noted that this register only relates to ground engineering and does not include specific competence in coal tips.²⁹⁶
- 10.10 ICE Wales Cymru also explained that other professionals have relevant skills, and gave the example of engineering geologists’ expertise in respect of issues of instability:
- Professionals with other specialisms may have competence suitable for inclusion on a “panel of competent professionals” to provide services in respect of the issues being considered by this consultation, for example environmental matters.
- 10.11 Jacobs identified “ability and experience in the ground engineering aspects of colliery tip and slope/landslide investigation and assessment” as important. Key professional registrations would, in their view, include chartered civil engineers (CEng), chartered geologists (CGeol) and also the UK Register of Ground Engineering Professionals administered through those professional institutions.
- 10.12 Dr John Perry also mentioned the Register of Ground Engineers, which had been specifically set up to ensure proper input and expertise for general ground engineering, including, for example, highways, railways and buildings. In his view, it was not by any means specialised enough for coal tip works. He supported the creation of a specialist register specifically for coal tip safety in the same way that a specialist panel had been established for reservoirs. The specialist register should, in his view, require experience as well as qualifications. Chris Seddon stressed the need

²⁹⁶ See the RoGEP guidance available at ice.org.uk.

for experience to be current, rather than relating only to the number of years spent in the industry.

10.13 Jane Iwanicki, the Mineral Products Association and Dr Peter Brabham all emphasised that the scope of the panel would need to extend beyond engineers. Dr Peter Brabham thought that “chartered civil engineers, chartered engineering geologists and chartered hydrologists who understand soil mechanics and hydrology” should be included. The Mineral Products Association identified the experts required as “geotechnical engineers, hydrologists, hydrogeologists, ecologists, archaeologists, air quality specialists (noise and dust) and transport specialists”. Input from landscape architects might also be required. Jane Iwanicki also cast the net widely:

The panel could potentially include mining engineers, health and safety advisers, geotechnical engineers, mineral surveyors and others. Other specialists may be required in connection with drainage, water quality, ecology, industrial archaeology etc.

10.14 Dŵr Cymru/Welsh Water added that there should be appropriate awareness of issues relating to drinking water supplies and the impacts of specific contaminants and flow disruption.

10.15 NRW thought it important that the panel should have a clear code of practice and a supporting forum, such as that provided by the Register of Ground Engineering Professionals. This would allow second opinions, referrals, peer review and agreement on best available technology and techniques.

10.16 Neath Port Talbot warned that the qualifications required should not be too onerous, or the panel would “limit the availability of staff and the system could grind to a halt”.

The role of a panel in tip maintenance agreements

10.17 Huw Williams thought that a specialist panel would be essential for the effective operation of our proposed system of tip maintenance agreements with private tip owners. He suggested that the agreements should include a condition that works would be designed and supervised by a panel engineer.

10.18 In contrast, Professor Bob Lee had reservations about requiring private owners to instruct an engineer from the panel. He thought that a better role for the panel expert would be to resolve disputes about the assessment of stability and related issues, and that the model agreements could include a provision to this effect.

Alternative approaches

10.19 Some respondents suggested alternative approaches. Stephen Smith thought that a scheme for qualified professionals along the lines of the register used in the contaminated land regime would be more appropriate than a reservoirs panel approach. This model demonstrates specialist skills through the SiLC (Specialist in Land Condition) registration scheme.²⁹⁷

²⁹⁷ The Specialist in Land Condition (SiLC) Register scheme was launched by the Urban Task Force in 1999 to recognise the skills of those working in the broader land condition sector. The scheme is administered by

10.20 Howard Siddle was in favour of a “competent person” classification as used in legislation including the Mines Regulations 2014 and other health and safety provisions.²⁹⁸ This would require both qualifications and experience. The competent person would not carry out all tasks but would oversee and be responsible for activities specified in the legislation. In his view, the range of activities to be covered include:

- routine inspection and reporting
- major inspection and reporting (equivalent to the 10 year inspection report adopted by the Coal Authority)
- reporting of a dangerous occurrence
- investigation and stability analysis
- design of maintenance works
- design of a remediation scheme (including earthworks and drainage)
- supervision of construction/maintenance works.

10.21 Keith Bush QC opposed the idea of a panel outright. In his view, it should be left to the supervisory authority to ensure that they employ qualified engineers. He distinguished the reservoirs regime, as reservoir engineers are appointed by owners and it is necessary to ensure that an owner has employed a competent engineer.

10.22 Professor Bob Lee, who answered “other”, took a similar view. While recognising the need to retain expertise in the area, he saw no need to provide for a panel within a statutory framework:

These objectives could be pursued with the assistance of professional bodies (such as the ICE) and by supervisory authorities using appropriately qualified persons on a consultancy basis as necessary.

Training and development

10.23 Jacobs noted the problem of loss of specialism in the field, and that, with many experienced inspectors now retired or nearing retirement, the shortage of experienced professionals was likely to worsen. They stressed the need to capture the knowledge and experience of these inspectors and for a programme to mentor new inspectors.

CL:AIRE (Contaminated Land: Applications in Real Environments), a not-for-profit organisation which aims to stimulate the regeneration of contaminated land in the UK through the use of sustainable remediation technologies. Entry to SiLC is gained through examination, which is held bi-annually. See <https://www.silc.org.uk/>.

²⁹⁸ The Mines Regulations 2014, reg 2 defines “competent” in relation to a person as meaning “a person with sufficient training and experience, or knowledge and other qualities, to enable that person properly to undertake the duties assigned to that person”. Reg 62 defines a “geotechnical specialist” as a person who is suitably qualified and competent to perform a geotechnical analysis to determine the hazard and risk arising from a tip. The requirements are considered in *Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255*, paras 4.67 and 4.68.

- 10.24 Chris Seddon observed that the panel would need to provide for succession planning, with places available on the panel for trainee and junior engineers under supervision. He suggested that there should also be a requirement to audit continuing professional development applied to all engineers on the panel.
- 10.25 Dr John Perry suggested that universities, particularly those in South Wales, could be encouraged to provide appropriate undergraduate and postgraduate courses to provide the qualifications needed to join the panel. He thought that these studies should be followed by a period of “buddying” with a panel member before registration.
- 10.26 WLGA (Bridgend and Torfaen agreeing) noted that funding would be needed to develop and train members of the panel. They suggested that a subsidised training programme could be developed with funding from the Welsh Government.

Discussion

- 10.27 There was strong majority support for a specialist panel, with compelling reasons given, including the professional development opportunities a panel would offer. We accept that our reference to a “panel of engineers” in the consultation paper was unduly narrow, and that we should instead have included reference to all relevant tip specialists, not just engineers.
- 10.28 In terms of the scope for prescription of specialism under the new regulatory regime, we agree that tip agreements and orders could specify the use of appropriately qualified specialists where work requires a particular skill level. Where a tip is suitable for a tip maintenance agreement, guidance could specify the level of competence needed for particular tasks, since tip safety work requires a range of skills. Where a tip is not suitable for a tip maintenance agreement, and a tip agreement or order provides for work to be done by a party to the agreement or order other than the supervisory authority, its terms could ensure that the correct level of specialist qualification is stipulated. We also think that there could be a role for experts in the resolution of disputes concerning tip safety work.
- 10.29 The responses to our consultation question have caused us to question whether a formal panel is the best approach to securing the correct level of specialism for coal tip safety tasks. We agree that it is important to distinguish the reservoirs regime, which operates on the basis that the reservoir undertaker engages the specialist directly. Reservoirs are mostly still in use, and owners in the main derive economic benefit from them. Coal tips are almost entirely disused, and are not associated with income generation. In general, disused coal tip owners have no knowledge of tip safety work arising from operational control.²⁹⁹
- 10.30 In the new regulatory regime, we are recommending highly prescriptive tip maintenance agreements for lower risk tips. The tasks required will include basic maintenance which can be undertaken without specified qualifications. For more complex tasks, including remedial work, the need for specialist qualifications could be specified in the agreement unless the work is to be carried out by the supervisory

²⁹⁹ These differences are discussed more fully in *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, paras 9.29 to 9.31. The Reservoirs Act 1975, s 1(4) defines an undertaker. See also para 9.9 of the consultation paper.

authority itself. The supervisory authority could ensure that the correct level of specialist qualification is stipulated in agreements for such operations.

- 10.31 This suggests that a less formal system than a panel system could be appropriate. Responses indicate that a register could work more effectively and flexibly. As in the case of the SiLC register, a coal tip safety specialist register could assess the range of skills needed for different coal tip safety tasks, and provide different grades of registration depending on professional qualifications. It could also devise a code of practice to define competences in terms of knowledge, skills and experience and establish a supporting forum. The body administering the register would need sufficient specialist knowledge to assess competence. It could be empowered to bestow recognition of levels of competence for the purposes of the regulatory regime.³⁰⁰
- 10.32 We think this approach would be preferable to a requirement simply to secure a competent person, as in the regime regulating tips associated with active mines. Mine operators will have a level of familiarity with the industry which is lacking amongst disused tip owners.
- 10.33 A register could be developed by professional bodies in coordination with the supervisory authority without the need for a statutory footing. It could be administered by a suitable body such as the ICE. Until it is developed, tip maintenance agreements and orders would need to refer to the particular level of qualification needed – for example, by referring to existing professional registrations such as chartered civil engineers or chartered geologists – and specify the level of experience required.³⁰¹
- 10.34 It is important that a register should have a role in training and development. Responses have highlighted existing skill shortages, and these were also described in our consultation paper. There are lessons to be learned from the independent review of reservoir safety which followed the Toddbrook incident. This examined shortcomings in the panel of engineers system established by the Reservoirs Act 1975.³⁰² There were a number of reasons why the panel was not working well. One factor which parallels skill shortages in the tip safety sector is a decline in the supply of engineers to the panel, and a predicted further decline in the near future as significant numbers of panel members reach retirement age. Problems were also identified with recruitment to the panel and career progression.³⁰³

³⁰⁰ The Specialist in Land Condition (SiLC) Register is nominated as the awarding body for the National Quality Mark Scheme for Land Contamination Management. The scheme bestows recognition on a land condition specialist as a Suitably Qualified and experienced Person (SQP) able to provide site investigation information, including risks arising from natural hazards or former activities such as mining, to inform an assessment of whether land is suitable for its proposed use. This assessment is required for all relevant planning policies and decisions (National Planning Policy Framework, clause 183): see <https://www.claire.co.uk/projects-and-initiatives/nqms>.

³⁰¹ The register could in due course make use of Distributed Ledger Technology, as mentioned in para 3.20 above.

³⁰² See D Balmforth, *Independent Reservoir Safety Review Report* (2021) <https://www.gov.uk/government/publications/reservoir-review-part-b-2020>.

³⁰³ The report recorded that there are currently 143 supervising engineers and 30 inspecting engineers on the four panels of engineers. These engineers are responsible for 2892 reservoirs: above, p 25.

10.35 We endorse the suggestions made for provision for training and development to form part of a professional accreditation scheme. New courses to provide the qualifications needed for tip safety work, apprenticeships and facilitating career progression for trainees and more junior professionals will be particularly important.

10.36 For these reasons, we do not recommend the establishment of a formal panel. We recommend instead that the Welsh Government enters into discussions with academic institutions and professional and industry bodies in the field of tip safety work with a view to securing compilation of a register of professionals competent to undertake tip safety work. Until the register is developed, the authority will need to use its discretion as to the specialism to be stipulated in tip agreements and orders.

Recommendation 34.

10.37 We recommend that the Welsh Government enters into discussions with academic institutions and professional and industry bodies in the field of tip safety work with a view to securing compilation of a register of professionals competent to undertake tip safety work.

Chapter 11: Tip safety and environmental legislation

- 11.1 We explained in our consultation paper that local authorities have encountered conflicts between their tip safety responsibilities and their obligations under environmental legislation. The Mines and Quarries (Tips) Act 1969 is not designed to interact with modern environmental protection. It prioritises public safety, while environmental legislation imposes requirements that can obstruct remediation and clean-up works.
- 11.2 The problem arises when the material on a tip moves. Once separated from the tip, the material is likely to fall within the definition of waste for the purposes of the Environmental Permitting (England and Wales) Regulations 2016.³⁰⁴ This means that a permit will be required to do anything with it. The process of obtaining a permit can be lengthy, and may involve a need to undertake environmental impact assessments and to design works in a way which protects the ecology of a site. It also makes the works more expensive. A similar problem also arises when tip material enters water.³⁰⁵
- 11.3 One problem is the limited provision for an “emergency” under the Environmental Permitting Regulations. Regulation 40 provides a defence to a person charged with the offence of acting without a permit where the acts in question were done in an emergency to avoid danger to human health, all reasonable steps were taken to minimise pollution, and the regulator was informed promptly.³⁰⁶ This is limited to urgent action necessary to protect human health.
- 11.4 The reality for most incidents of tip movement is that clean-up work will take a long time, and will progress through stages of recovery and remediation. A more efficient regulatory framework will help to ensure that tip emergencies do not occur, but it is still important that the law should not act as a barrier to a solution if such an event does occur. For this reason, it is important that there are legal solutions for the disposal of tip material if it threatens to slide, slides or is otherwise displaced. There are also non-urgent instances when environmental legislation clashes with tip maintenance.³⁰⁷
- 11.5 We looked at a number of ways to resolve these problems and canvassed views. This chapter considers possible approaches.

A POWER OF DIRECTION

- 11.6 The first possibility we considered was to provide a power, along the lines of powers under the Civil Contingencies Act 2004, for Welsh Ministers to give a direction to

³⁰⁴ SI 2016 No 1154.

³⁰⁵ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 5.18 and 7.27.

³⁰⁶ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 5.20.

³⁰⁷ Above, para 10.121. See paras 7.32 to 7.34 of the consultation paper for examples of non-urgent work clashing with environmental legislation.

require a Category 1 responder to perform a function to control, mitigate or respond to a coal tip emergency or threatened emergency.³⁰⁸

- 11.7 We explained in our consultation paper that the 2004 Act enables public authorities to prepare for and respond to emergencies. Part 1 is designed to deal with preparations by local responders for localised emergencies. An emergency is defined to include events or situations which threaten serious damage to human welfare or to the environment at a location in the UK. Category 1 responders are those at the core of the emergency response. In Wales these include local authorities, the emergency services and NRW. The responders form multi-agency partnerships known as Local Resilience Forums to carry out planning and preparation duties.³⁰⁹
- 11.8 Welsh Ministers have powers to make an order to require a Category 1 responder to perform a function for preventing, controlling, mitigating or responding to an emergency. Where the situation is urgent and there is insufficient time to make an order or regulation, the Minister may act by direction. The threat to human welfare and to the environment of an unstable coal tip may fall within the definition of a Part 1 emergency.³¹⁰ But a specific power might be needed to allow action in a broader range of circumstances, beyond those falling under the definition of an emergency in the 2004 Act. Urgent action might be needed, for example, to stabilise a tip before it becomes an imminent threat.
- 11.9 We suggested that, if a power of direction were to be given to Welsh Ministers along these lines, the definition of a Category 1 responder would need to be extended to include the new supervisory authority.³¹¹ The power could enable action to avoid danger to human health and safety while also requiring consideration of the need to minimise harm to the environment. Directions could require the supervisory authority to give an undertaking to seek the necessary permits and planning permission when this becomes feasible. We thought that this might provide sufficient flexibility to ensure that the actions taken at the time of the emergency were lawful.³¹²

³⁰⁸ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.123. Civil Contingencies Act 2004, s 1 defines an emergency.

³⁰⁹ Above, paras 5.41 to 5.44; Civil Contingencies Act 2004, ss 1, 2 and sch 1. Pt 2A lists Category 1 responders in Wales.

³¹⁰ Above, paras 5.44 and 5.45; Civil Contingencies Act 2004, ss 5(1) and (2A), 7 and 8A. The Civil Contingencies Act 2004 is reviewed every five years. The next report is due in 2022. A Cabinet Office consultation which ran from July to September 2021 called for submissions on a number of aspects of the Act, including as to whether the definition of an emergency provided by s 1 reflected stakeholders' understanding of an emergency, and, if not, how the definition needed to be expanded: See National Resilience Strategy: a Call for Evidence, Annex A, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001404/Resilience_Strategy_-_Call_for_Evidence.pdf.

³¹¹ The summary of responses to the National Resilience Strategy's Call for Evidence indicates that there are likely to be amendments to the organisations given Category 1 status under the Civil Contingencies Act 2004. A strong majority of respondents recommended that additional organisations should be given Category 1 or 2 status to strengthen their involvement in emergency preparedness, with 68.9% of respondents agreeing that there are critical gaps in the representation of responder organisations within the Act: <https://www.gov.uk/government/consultations/national-resilience-strategy-call-for-evidence/outcome/public-response-to-resilience-strategy-call-for-evidence>.

³¹² Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.123.

Consultation Question 31: Do you think that the Welsh Ministers should be able to give directions to the supervisory authority and other relevant parties regarding actions to be taken in response to a coal tip emergency?

11.10 Forty-one respondents answered this question. Thirty-two (78%) agreed. Five (12%) disagreed and four answered “other”.

Reasons for agreeing

11.11 WLGA (Bridgend and Torfaen agreeing), Neath Port Talbot and Blaenau Gwent agreed with a power of direction along the lines of the Civil Contingency Act powers. In their view, this “would give the flexibility needed to ensure that actions taken at the time of an emergency are lawful”. They thought it essential that local authority officers were protected from prosecution when taking urgent actions to avert an emergency. Howard Siddle thought that the measure would be “a pragmatic solution”.

11.12 Huw Williams characterised the proposed measure as “a power vested in the Ministers to declare a tip emergency to provide lawful cover for non-compliance with other regulatory regimes, subject to undertakings or conditions to seek required consents as soon as circumstances permit”. He thought that such a provision would help to ensure that action “was not delayed due to hesitancy about the lawfulness of taking necessary steps to preserve life or property”.

11.13 Jane Iwanicki saw the proposal as a way of ensuring that health and safety and hazard management were “the overriding consideration in high risk situations”.

11.14 Sir Wyn Williams thought it right that there should be a clear “chain of command” in an emergency, and that the government should sit at its head.

Reservations

11.15 ICE Wales Cymru qualified their agreement by adding that any direction should be given on the advice of a competent professional. If specialisms were graded by levels of competence under the new system (as discussed in chapter 10), the advice in their view should come from a professional appointed to the highest level. NRW, Dr John Perry and Transport for Wales also thought it important that the Ministers act on expert advice. NRW thought that this should include the advice not only of the supervisory authority and panel experts but also of environmental advisors such as themselves.

11.16 Graham Hathaway saw the need for such a power, but emphasised that collaborative working should be the norm.

Application to planning legislation

11.17 Huw Williams suggested that a power of direction could be useful in relation to clashes between the tip safety regime and planning legislation. A new “permitted development right” could give permission for emergency action specified in an emergency tip safety direction from Ministers. The permitted development could be made subject to conditions about follow-up applications. This would cover the situation described in our consultation paper when a local authority had to undertake urgent

works without planning permission, and applied retrospectively for the permissions required.³¹³

Reasons for disagreeing

11.18 Keith Bush QC disagreed with a power of direction. He thought that this would interfere with the role of the supervisory authority. He preferred to exempt the urgent works from planning or environmental legislation:

If the intention is to deal with situations where the need to take urgent action means not complying with the requirements of planning or environmental legislation, the solution is to exempt emergency works in response to a significant risk to people or property from those requirements, but ... the exemption should be temporary. Once the emergency has been resolved, a licence application should be made and if the emergency works are not acceptable in the long term a permanent solution compatible with the regulations should be found.³¹⁴

11.19 Others who disagreed with a power of direction or answered “other” did so because they preferred the emergency direction to be given by tip safety specialists and to avoid the response becoming a political issue. The Mineral Products Association thought that it might be appropriate for Ministers to have input into overall broader strategy, but that detailed decision-making would need to be influenced by technical input and consultation with tip owners. Rhondda Cynon Taf and Wrexham both thought it important that the supervisory authority should have sufficient expertise to take urgent action, and that it should have the powers needed to do so.

Discussion

11.20 There was strong majority support for a Welsh Ministers’ power to give directions in a tip emergency. We agree that it is desirable, where circumstances permit, for the power of direction to be used after consultation with the supervisory authority and other relevant authorities such as NRW as to the actions necessary. We also agree that the direction could be subject to a requirement to seek required consents when circumstances permit. The formulation proposed by Huw Williams covers this well.

11.21 The power of direction could be created by way of an order of the Welsh Ministers making the supervisory authority a Category 1 responder under the 2004 Act.³¹⁵ But there is no express provision in the 2004 Act to allow Welsh Ministers to override legal requirements applying to Category 1 responder functions in the exercise of their power of direction. For example, a direction may not make it lawful for the Category 1 responder to perform a function without an environmental permit or planning permission. In addition, the list of actions allowed by an order or direction are limited and may not cover all the situations arising in a coal tip emergency.

³¹³ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 7.30.

³¹⁴ Keith Bush QC’s response has been translated from the Welsh original.

³¹⁵ The Civil Contingencies Act 2004, s 13(2A) empowers the Welsh Ministers by order to add a devolved Welsh authority to pt 2A of sch 1. A devolved Welsh authority is defined by s 157A of the Government of Wales Act 2006. Existing devolved authorities are listed in sch 9A.

- 11.22 One way to resolve the risk that a direction could involve a breach of planning and environmental regulations would be the introduction of a “permitted development right” in planning legislation and an equivalent provision in environmental legislation. This would apply to actions taken pursuant to a Civil Contingencies Act direction issued to the supervisory authority, and act as a mechanism to ensure that emergency action specified in a Welsh Minister emergency direction was lawful. It would in effect give the permissions required by planning and environmental legislation for the action specified. This would remove the need to apply for retrospective permissions, but could be made subject to conditions about follow-up applications.
- 11.23 The “permitted development” approach is adopted in conducting certain watercourse and land drainage improvement works under the Land Drainage Act 1991. The Town and Country Planning (General Permitted Development) Order 1995 provides that such development is permitted development and does not require a planning application.³¹⁶ However, the works are subject to the Environmental Impact Assessment (Land Drainage Improvement Works) Regulations 1999, which set out certain restrictions, including, where the works are likely to have a significant effect on the environment, a requirement to prepare an environmental statement.³¹⁷
- 11.24 An alternative approach would be to incorporate a power of direction into the legislation creating the new tip safety regulatory regime. This could set out a bespoke list of actions which might be directed by Welsh Ministers in a coal tip emergency. It could also provide that the direction would override specified environmental permitting or planning requirements.
- 11.25 We favour a power of direction as the primary means to resolve the problem of clashes between tip safety responsibilities and other regulatory requirements in an emergency. We think that this could offer a framework for contingency planning as well as action, and a “chain of command” and coordination between agencies in an emergency situation which an exemption from environmental legislation would not provide. We leave it to the Welsh Government to decide whether it prefers to add the supervisory authority to the 2004 Act, with the limitations we have indicated, or to create a power of direction specific to coal tip emergencies within the legislation establishing the new regulatory regime.
- 11.26 A power of direction does not rule out adopting other approaches as well, particularly once the early stages of an emergency have passed, or where there is a clash which does not arise in the context of an emergency. We discuss next the possibility of a tailored exemption to the Environmental Permitting Regulations to cover movements of disused tip material. We discuss broader concepts to assist with resolving tensions between tip safety operations and other regulatory regimes in the section which follows.

³¹⁶ The Town and Country Planning (General Permitted Development) Order SI 1995 No 418, sch 2, pts 14 and 15.

³¹⁷ The Environmental Impact Assessment (Land Drainage Improvement Works) Regulations SI 1999 No 1783 and Environmental Impact Assessment (Land Drainage Improvement Works) (Amendment) Regulations SI 2017 No 585. The 2017 Regulations provide for the exemption of improvement works from these requirements in certain circumstances, including, at reg 3A, where the works have “the response to a civil emergency as their sole purpose”.

Recommendation 35.

- 11.27 We recommend that the Welsh Ministers should have power to give directions to the supervisory authority regarding actions to be taken in response to a coal tip emergency.
- 11.28 We recommend that the power be subject to a requirement, where possible, to consult the supervisory authority and other relevant authorities as to the terms of such directions.
- 11.29 We recommend that the Welsh Government give consideration to the desirability of providing, in the legislation creating the power or in environmental and planning legislation, an exemption from any requirement to seek advance consent under planning or environmental legislation. Any such exemption should be subject to a duty to seek required consents retrospectively.

A WIDER EMERGENCY POWER UNDER THE ENVIRONMENTAL PERMITTING REGULATIONS

11.30 The second approach we considered to resolve the problem of clashes between tip safety work and environmental legislation was to extend the defences available to those conducting urgent tip safety work. We suggested an amendment to the existing defence to the commission of a criminal offence provided by regulation 40 of the Environmental Permitting Regulations. Regulation 38 makes it an offence to operate a “regulated facility” without an environmental permit. A “mining waste operation” is one category of regulated facility. Another category of regulated facility is a “waste operation”. Any recovery or disposal of waste from such a facility will require an environmental permit.³¹⁸ As mentioned above, the defence applies to acts done in an emergency to avoid danger to human health We asked for views.

Consultation Question 32: Do you think that the power of the supervisory authority to take action in an emergency pursuant to regulation 40 of the Environmental Permitting Regulations (England and Wales) 2016 should be widened? If so, in what way?

11.31 Of the 32 respondents who answered this question, 23 (72%) agreed that the power to take action should be widened. Eight (25%) disagreed, and one answered “other”.

Reasons for agreeing

11.32 Many of those agreeing, including Bob Leeming, Howard Siddle and Dr John Perry, responded in general terms that it was appropriate to ensure that longer-term work needed to assure tip safety could be carried out in a timely manner without impediment. Rhondda Cynon Taf thought that the requirement to take reasonable steps to minimise pollution and to furnish the regulator with details as soon as

³¹⁸ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 5.18 and 5.20.

possible would provide sufficient protection for the environment even if the provision were widened.

11.33 Caerphilly noted the need for an extended provision to permit action to prevent an emergency, and the difficulties caused by the need to consider the time frames imposed by requirements to obtain permits and draw up impact assessments. Wrexham also mentioned the need to provide for preventive emergency work, and gave as an example the need to move a section of a coal tip to avoid an imminent collapse into a watercourse. They noted that such a collapse could cause significant harm to public health or pollution.

11.34 Keith Bush QC emphasised the need to make any exemption temporary. As discussed in relation to a power of direction, a requirement to obtain permission to carry out the works should apply once the emergency has been resolved.³¹⁹ In his view, a permanent solution compatible with the regulations should be found.

11.35 NRW thought that the defence could be widened to include reference to “catastrophic environmental damage” in addition to human health. But they warned that this would need to be defined carefully and could be open to abuse.

Definition of an emergency

11.36 Both NRW and Rhondda Cynon Taf urged that “emergency” and “emergency works” require better definition. NRW noted that the time frames for tip safety work might not match how an emergency has been defined in other situations or sections. They questioned whether “the whole scenario” beyond the incident or unplanned event should be wrapped up as long-term “emergency management”:

Emergency action should continue to be those activities needed to bring events under control and to make safe. If the emergency continues to be a significant risk a degree of short/medium term latitude is reasonable. Consideration should be given perhaps for a separate clause to account for the longer-term “mop up” operations.

In their view, COMAH safety reports were a good example of a balanced approach to human health and the environment and wider emergency planning.³²⁰

11.37 Rhondda Cynon Taf, in contrast, saw “emergency works” as encompassing “the actions to prevent an emergency developing – emergency works may not necessarily be short duration and could potentially be proactive but would not fall under current timescales for permits”. They suggested a “fast track” option for “urgent” works that have a lead-in time of weeks or months but less time than that available to obtain permits for activities. But there would still be a need for “emergency” works where work has to commence within hours, days or weeks. This might include, for example, clearing out drainage ditches or creating discharge points to remove water from tips. They also suggested provision for retrospective consent where there is insufficient

³¹⁹ See paras 11.18 and 11.22 above.

³²⁰ The Control of Major Accident Hazards Regulations SI 2015 No 483 ensure that businesses take necessary measures to prevent major accidents involving dangerous substances and limit the consequences to people and the environment of any major accidents which do occur: <https://www.hse.gov.uk/comah/>. The Competent Authority established by the regulation manages both health and safety and environmental risk.

time to obtain a permit. A “fast track “ as well as an “urgent” option, and a provision for retrospective consent, were also endorsed by Vikki Howells MS.

Reasons for disagreeing

- 11.38 While endorsing the need for measures to resolve the conflict between tip safety work and environmental legislation, some respondents gave compelling reasons why amendment to regulation 40 was not an appropriate solution. Professor Bob Lee observed that the supervisory authority “ought not to need to invoke a defence in order to take urgent action”. In his view, it would be important to have some form of independent oversight of emergency activity, particularly if NRW were to take on the role of the enforcement authority as he has suggested.³²¹ He thought a Ministerial direction was a better solution to the problem. A direction could stipulate a date by which permits were to be obtained.
- 11.39 The Law Society also saw the proposal as problematic. As regulation 40 is a statutory defence to regulation 38 offences of operating without a permit, breaching an environmental permit condition or failing to comply with a notice, it was incorrect to view regulation 40 as “allowing” emergency action. The provision was properly viewed as providing a defence for emergency action which would otherwise be an offence. If the objective was to allow the authority to take certain action in an emergency, it would in their view be better to do so by way of a specific exemption.
- 11.40 The Law Society also identified other problems with relying on a defence to permit the action. It would be “quite an unreliable way of securing that outcome as the onus would be on the supervisory authority to prove it”. It would also create a range of broader issues of coherence across the Regulations. They also thought that there was no need for the regulation to be amended to make provision for protecting an authority in the aftermath of an emergency until such time as they are able to apply for permits to cover the longer-term solution. They thought that the provision as currently worded would cover this, and that in any event it would be “very risky for any prosecuting authority to prosecute for a failure to follow up emergency action with a permit application unless the actions were reckless or deliberate”.
- 11.41 Huw Williams agreed that it was not appropriate to provide an emergency power by way of a defence to an action that carries criminal penalties. In his view, a better course would be “to consider specific legislative derogations where tip safety is concerned and the supervisory authority is working in conjunction with other regulators”. He observed that the type of engineering work that may be necessary in such cases, such as removing or spreading material to dry out or to put out combustion, were largely well understood. Specific derogations could be tailored to these engineering needs.

Discussion

- 11.42 There was majority support for our proposal to widen the available defence under the Environmental Permitting Regulations. Reasons for support focused on the need to ensure that longer-term work could be carried out lawfully and without undue delay.

³²¹ See paras 2.34 and 2.35 above.

There was appreciation of the need to ensure work could be carried out quickly to prevent an emergency as well as to clear up in the aftermath of a tip slide.

- 11.43 We think that our recommendation set out above for a power of direction will provide a solution for most emergency situations in which a breach of environmental regulations might otherwise occur. We also agree with the observations made that widening the defence to offences under the Regulations is not the best way to resolve the tension between tip safety requirements and environmental protection. But the defence may still be relevant in those situations where very urgent action is needed or where the situation is not sufficiently serious to warrant ministerial intervention. It is important for this reason to ensure that the defence functions effectively.
- 11.44 In order to ensure an effective defence, we think that what constitutes action in a coal emergency could be defined more broadly in the Regulations. It could, for example, refer to pre-emptive action to avert such an emergency and work required in the aftermath of a tip slide. This would, in effect, expand the defence by ensuring that it covers a wider range of events expressly. It could cover actions taken for a wider range of purposes than protecting human health. We agree that time frames for tip safety work may not fit well with the definition of an emergency applied in other contexts. For example, the Environmental Permitting Regulations provide a distinct definition of an emergency in relation to flooding.³²² As suggested in responses, a “fast track” procedure for permits could also be helpful to cover work required on an accelerated timetable which could not be classed as being taken “in” an emergency.
- 11.45 Even with an expanded definition of a coal tip emergency, we do not think that the existence of the defence would provide sufficient resolution of the tensions between tip safety duties and environmental legislation. It would remain for the court to decide whether the defence was proven in a particular case. Other regimes provide considerable latitude to public authorities in deciding whether the exercise of emergency powers is justified. The Wildlife and Countryside Act 1981, schedule 9A, leaves it to the enforcing body to determine whether a species control order is “urgently necessary”.³²³ The Reservoirs Act 1975 provides emergency powers to the enforcing authority “to take such measures as they consider proper” where it considers that a reservoir is unsafe and immediate action is needed.³²⁴ The Housing Act 2004 allows a housing authority to take urgent remedial action where satisfied that a defined hazard exists and involves imminent risk of serious harm. Urgent remedial action is defined as the action the authority considers immediately necessary to remove the imminent risk.³²⁵

³²² Sch 25, para 2 defines “emergency” in relation to the control of flood risk activity as “an occurrence which presents a risk of (a) serious flooding; (b) serious detrimental impact on drainage; (c) serious harm to the environment.

³²³ Wildlife and Countryside Act 1981, sch 9A, para 10(2)(c).

³²⁴ Reservoirs Act 1975, s 16.

³²⁵ Housing Act 2004, s 40.

Recommendation 36.

11.46 We recommend that the Environmental Permitting (England and Wales) Regulations 2016 be amended to define an emergency in the context of tip material.

OTHER APPROACHES

11.47 It is clear from the experience of the Tylorstown slide that even after steps are taken in the aftermath of an event, further work is likely to be needed on an accelerated timetable, for example to clear large volumes of tip material. Currently the Environmental Permitting Regulations can potentially require the material to be transported over large distances.³²⁶ These further steps could be covered by ministerial direction, as recommended earlier in this chapter.³²⁷ As also discussed earlier, both planning and environmental legislation could provide that actions taken under ministerial direction are permitted without requiring planning consent or an environmental permit. But we think that further consideration is needed as to how to manage tensions between tip safety and environmental legislation in the subsequent, less urgent, stages of a clean-up operation. This section considers possible approaches.

11.48 Our consultation paper looked at broader strategies to improve responses to tip emergencies as well as longer-term solutions for tip material displaced by remedial works. We considered the potential offered by a more collaborative approach between parties responding to a coal tip emergency. Better collaboration helps to ensure that the authorities involved in a coal tip emergency are able to coordinate their response, agree the best approach in the circumstances and keep an audit trail of their actions. We envisaged that following agreed guidance would help to ensure that all parties consider the possibilities, and weigh the public safety and environmental harms of each course. Acting in pursuance of relevant guidance would be a relevant consideration in considering whether the steps taken by an authority to avert environmental harm were reasonable.³²⁸

11.49 We also looked at suggestions that contingency planning could include provision for contingency infrastructure to allow tip material to be stored in the event of a slide. This could be provided in areas with a high density of tips. In practice, the volume of material can be immense, and we thought it unlikely that this could be the solution in every case, but it could contribute to a solution in some cases.³²⁹

11.50 Finally, we explored the potential for bespoke storage solutions for tip material. We suggested that this could be achieved by amending the Environmental Permitting

³²⁶ Difficulties in finding the least environmentally harmful longer-term solutions in dealing with displaced tip material are discussed in the context of the Tylorstown slide in *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, para 7.28.

³²⁷ See para 11.27 above.

³²⁸ *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, para 10.127.

³²⁹ Above, para 10.128.

Regulations in order to define tip material as engineering material rather than as waste without requiring a process that constitutes treatment and thus requires a permit. We thought that it might be possible to do this at the level of guidance.³³⁰

11.51 We concluded that it was beyond the scope of the consultation to consider the form that these changes could take, but we asked a broadly-worded question to canvass views on possible approaches beyond the specific proposals considered in the previous two sections.

Consultation Question 33: Do you suggest any other approaches to deal with clashes between environmental legislation and tip safety? If so, please set them out.

Setting priorities – safety comes first

11.52 A number of respondents, including ICE Wales Cymru, Bob Leeming, CLA Cymru, Paul Connolly and Dr Peter Brabham, thought that any new legislative provision should make it clear that, where there was potential for loss of life, tip safety work must be given priority over environmental legislation. Steve Jones of the Emergency Planning Department at Pembrokeshire County Council referred to a need for a “hierarchy of priorities”. Saving lives came first, followed by preventing harm to humans, such as displacement from their homes, followed by preventing harm to the environment. In contrast, NRW thought that there should be no presumption that one form of legislation trumps any other.

Exemption of waste

11.53 Professor Bob Lee did not agree with our suggestion that waste definitions could be amended so that tip material was no longer considered to be waste requiring a permit. He thought it would work better to create a specific exemption from the Regulations to allow storage of coal waste without a permit in the course of or pending re-engineering. Limits could be set on time and volume.

11.54 Caerphilly gave the example of major schemes (involving retaining structures) where colliery spoil has been used as an engineering fill.³³¹ They thought it was possible to have material reclassified so that it is no longer deemed a waste material. But they pointed out that there were many other requirements which could delay works other than permission to use the waste material. There are also, for example, requirements protecting habitat, ecology and commoner rights, and environmental impact assessment legislation. They thought that more discussion was needed in this area.

11.55 In consultation events, Rhondda Cynon Taf officials also suggested that guidelines could be drawn up under the Environmental Permitting Regulations to say that waste created during tip remedial works was not waste within the meaning of the Regulations. They also suggested that provisions in the tip management plans could operate to exempt material from the Regulations. They pointed to the provisions in the Land Drainage Act which allow the local authority to carry out “permitted development” without requiring planning permission, and that the Land Drainage (EIA) Regulations

³³⁰ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.130.

³³¹ They described it as similar to 6l material, which is selected well-graded granular material used as fill for reinforced soil structures and anchored earth structures: see Series 600, Earthworks, Standards for Highways, <https://www.standardsforhighways.co.uk/ha/standards/mchw/vol1/index.htm>.

permit the works as long as there is environmental screening.³³² They suggested that there could be equivalent “Tip Remediation (EIA) Regulations” to allow the required tip remedial works to be carried out with provision for the degree of environmental screening needed.

Revised forms of consent

11.56 Rhondda Cynon Taf suggested a “one stop shop” consent, which they described as similar to development consent for nationally significant infrastructure projects.³³³ They explained that the consent could authorise and regularise all activities in respect of tip works, for example waste management, environmental permits, planning and land drainage works.

11.57 Professor Bob Lee looked at a form of deemed consent under which coal tips on the register are deemed to have the necessary planning and permitting status to store coal waste. This could be incorporated into the tip maintenance agreements. Remediation work could be treated as a variation of the existing approval.

Collaboration and best practice

11.58 The need for collaboration between different authorities was emphasised in a number of responses. Transport for Wales thought that this would permit the benefits of remediation to be weighed up against the environmental costs of remediation. CLA Cymru recognised that in an emergency coal tip safety needed to take priority, but called for a “proper dialogue” between the relevant authorities in order to protect and mitigate any harmful activities which are likely to affect the environment.

11.59 ICE Wales Cymru thought that emergency action should be carried out by Local Resilience Forums (LRF) in line with the Civil Contingencies Act 2004, with the supervisory authority being designated as a Category 1 responder in respect of emergencies associated with coal tips.³³⁴ The LRF already include NRW as the regulator under the Environmental Permitting Regulations. LRF involvement would ensure that NRW knew what actions were being undertaken in any emergency response and were part of associated decision-making.

11.60 NRW gave the example of the joint management of health and safety and environmental risks under the Control of Major Accident Hazards (COMAH) Regulations as a well-established model of collaboration.³³⁵ The Health and Safety Executive and the appropriate environmental agency work in partnership as the Competent Authority to enforce the regulations.

³³² See para 11.23 above.

³³³ Under the Planning Act 2008 nationally significant infrastructure projects can receive “development consent”, a form of statutory consent authorising the whole of the proposed project. Development consent overrides the need for any other consent or permission which would otherwise be required: Planning Act 2008, s 33. See further Planning Law in Wales (2017) Law Commission Consultation Paper No 233, para 9.12.

³³⁴ See our recommendation at para 11.27 above.

³³⁵ See para 11.36 above.

11.61 Stephen Smith suggested that a code of practice could be developed specifically for coal tips to ensure that environmental legislation did not act as a barrier to effective remediation or reclamation of a tip where works were needed for safety reasons. He gave as an example the code of practice developed by CL:AIRE to cover the definition of waste for materials arising from regeneration or engineering works:

Whilst the objectives of the Environmental Permitting Regulations are well founded, I feel this should not act as a barrier to effective remediation/reclamation of a tip deemed to be in need of remedial operations for safety reasons. This applies to management of a tip as well as to the recovery of an emergency situation. Perhaps a Code of Practice is required specifically for coal spoil tips, in the same way as CL:AIRE developed a generic Definition of Waste Code of Practice for materials arising from regeneration or engineering works.

11.62 Rhondda Cynon Taf and Vikki Howells MS also urged the production of “easily accessible and understandable best practice” in relation to tip maintenance and management. Rhondda Cynon Taf suggested that this could cover procedural flow charts, including matters such as legislative process, permitting requirements and timescales, as well as representative examples.

Varying the procedural requirements according to the scale of the task

11.63 Rhondda Cynon Taf suggested that the approach taken should vary according to whether the works were major maintenance and reclamation projects or more minor maintenance tasks. In their view, major work on tip sites must take into consideration existing and future environmental legislation, but minor maintenance work should not become so bureaucratic that the work does not get done, particularly on privately owned tips. This work was particularly important to prevent more major works from becoming necessary. They gave an example of their proposed approach:

- (1) Small scale works – (identified either by cost or scope) – no/minimal requirements
- (2) Minor maintenance works – (identified either by cost or scope) – no/minimal requirements or ecological watching brief
- (3) Major maintenance – (identified either by cost or scope) – ecological watching brief or permitting
- (4) Major maintenance / Reclamation – (identified either by cost or scope) – all required permits

Contingency planning

11.64 Lee Jones thought that tip inspection provided an opportunity for contingency planning. He suggested the risk assessment should include planning for emergencies such as tip slides. This assessment would then form part of an emergency response plan and would include designated reception areas for waste.

11.65 He also thought that the tip inspection was an opportunity to analyse the composition of the waste. In some cases, the waste might be classed as chemically inert, and this in turn would determine the suitability of the waste for a temporary holding site.

Emergency holding sites could, in his view, be brownfield sites under Welsh Government or local authority ownership or existing waste sites such as landfill sites which might already have the necessary permit or require only minor changes.

Discussion

- 11.66 We welcome these very helpful proposals for improving responses to tip emergencies as well as longer-term solutions for tip material displaced by remedial works. It is clear that more work is needed in this area. It is beyond the scope of the project to make broader recommendations in relation, for example, to storage solutions and redefinition of tip material as engineering material.³³⁶ But we think it would be helpful to draw out useful themes from the above responses.
- 11.67 For the less urgent stages of a clean-up operation, we think that a tailored exemption to the Environmental Permitting Regulations for tip material could be the answer. At present, any recovery or disposal of waste falling under the Regulations, which includes tip material, will be a waste operation requiring an environmental permit. But the Regulations are targeted at people who create waste, in accordance with the “polluter pays” principle. It seems to us that they do not fit well in controlling the activities of those who are effectively stewards of waste created by past generations. We think that this justifies the temporary exemption of activities seeking to deal with this waste when it moves for reasons beyond the control of the authority. We do not envisage that this would operate as a blanket exemption. It may be that it is best expressed as providing varying levels of exemption depending on the scale of the work required.
- 11.68 It may be possible to devise a specific exemption for storage of coal tip waste during remedial works, or to reclassify tip material, possibly at the level of guidance, so that it falls outside the definition of waste.³³⁷ But we are concerned, unless carefully limited by time, and possibly by the scale of works, that important environmental protection could be lost unnecessarily if these approaches were to be too widely drawn. Permanent storage sites would still need evaluation from an environmental and planning perspective to ensure that all relevant factors were taken into consideration.
- 11.69 Similarly, we have considered the idea of a “permitted development right” in relation to emergencies earlier in this chapter.³³⁸ There may be scope to extend this to a broader range of activities involving tip material in order to permit the authority to carry out “permitted development” without the need for planning permission, but with environmental screening. Our consultation paper gave the example of the clearance of accumulated sediment from an attenuation pond to illustrate the difficulties that can arise with minor movements of tip material in non-urgent situations.³³⁹ We think the proposal to create regulations for tip remediation which define certain activities as

³³⁶ See *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, para 10.130.

³³⁷ An example of such an approach is given in *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, para 10.130, fn 660.

³³⁸ See para 11.22 above.

³³⁹ See in *Regulating Coal Tip Safety in Wales (2021)* Law Commission Consultation Paper No 255, para 7.32.

“permitted development” along the lines of existing land drainage regulations could work well.³⁴⁰

- 11.70 The suggestion that the approach taken could vary according to whether the works were major maintenance and reclamation projects or more minor maintenance tasks could help to resolve the problem of time-consuming, bureaucratic and sometimes illogical obstacles to minor maintenance matters. As Rhondda Cynon Taf explained, it is important that environmental legislation is followed for major works, but it may not be necessary to apply permitting requirements to minor maintenance tasks. It is this work that is so important in preventing more major works from becoming necessary.
- 11.71 We are also drawn to the suggestion of a “one stop shop” consent as way to streamline and rationalise the permissions needed for remedial works. This could operate, as suggested, in a similar way to development consent for nationally significant infrastructure projects.
- 11.72 Collaboration between different authorities and the development of guidance to allow advance planning with knowledge of a specific tip and its location would both be very valuable. The example given of the COMAH model is useful, as it indicates the potential for cooperation between those charged with tip safety and those working to prevent environmental damage. Contingency planning could also enhance the speed and effectiveness of an emergency tip response by preparing information in advance on those higher risk tips with attributes likely to trigger environmental legislation if work is needed on the tip. Such attributes would include rivers, Sites of Special Scientific Interest, heritage sites, or local or national nature reserves.
- 11.73 We do not make recommendations as to these broader strategies. We relay the suggestions made to the Welsh Government with our observations in the hope that they will assist with policy development.

³⁴⁰ As discussed above at paras 11.23 and 11.55.

Chapter 12: Reclamation projects and non-coal tips

RECLAMATION PROJECTS

- 12.1 We explained in our consultation paper that the increased rainfall brought by climate change created an increased risk of drainage failure in some tips, effectively hastening the end of their design life. Stakeholders had suggested to us that in these circumstances a fresh round of tip reclamation was needed. Reclamation differs from remediation work in that an additional objective of the work is to bring the tip back into a specified beneficial use.³⁴¹
- 12.2 We suggested that it might be possible to combine our proposed regime for designated tips with a longer-term strategic development approach to identify tips for larger reclamation projects. The designation process could include consideration of the suitability of the tip for a project of this kind. This could form part of a wider regional rehabilitation strategy, run, for example, by a corporate joint committee. Sustainable development principles under the Well-being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016 could guide policy choices. These principles include consideration of public good. They also allow consideration of wider concepts of economic value which incorporate the potential of coal tips to provide benefits such as the protection of biodiversity and carbon capture.³⁴²
- 12.3 We noted that traditionally reclamation projects have relied on compulsory purchase of sites, and mentioned the compulsory purchase powers under the Coal Industry Act 1994 for the control of the discharge of water from mines. An alternative approach would be a licensing approach, which permitted the licensing of land to the supervisory authority for the period within which the works are carried out, while ownership is retained by the landowner. We also noted the use of voluntary agreements by NRW in a major metal mine remediation project which involved granting the authority a licence to carry out the work during a fixed period, together with a Deed of Grant and a later Maintenance Access period. The agreement included rights and covenants to prevent damage to the constructed features in perpetuity. Powers under section 16 of the Environment (Wales) Act 2016 allow statutory land management agreements to be made.³⁴³
- 12.4 This discussion went beyond our terms of reference, but we felt it appropriate to offer the opportunity in our consultation to hear stakeholder views on provision for tip reclamation in the new regulatory regime for tip safety. We were aware both of stakeholder and Welsh Government interest in the issue, and thought that consideration of broader reclamation objectives would help to future-proof the new regulatory regime and would be in keeping with the wider norms governing

³⁴¹ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 10.132 and 10.133.

³⁴² Above, paras 10.134 to 10.136.

³⁴³ Above, paras 10.137 and 10.138.

environmental decision-making in Wales.³⁴⁴ Accordingly, we asked a broadly-worded question asking for views on combining tip safety legislation with consideration of tip reclamation.

- 12.5 This first section of this chapter considers responses to this question. The second section looks at views on how workable and desirable it would be to extend the new regulatory regime for disused coal tips to non-coal tips.

Consultation Question 34: Do you think that new tip safety legislation should be combined with provision for the consideration of tip reclamation? If so, do you favour any particular model?

- 12.6 Of the 43 respondents who answered this question, 30 (70%) agreed that the new regime should be combined with consideration of tip reclamation. Four (9%) disagreed and nine answered “other”.

Reasons for agreeing

- 12.7 Respondents gave a range of reasons for supporting consideration of tip reclamation. Professor Bob Lee supported “imaginative solutions” in harmony with Welsh legislation on sustainability rather than accepting that coal tips are simply a hazard to be managed. NRW defined the ultimate aim of tip safety work as repurposing the land so that it could be used for the benefit of people of Wales. In their view, there should be “a presumption that a disused tip should be managed to continually reduce risk it poses and ultimately to reclaim the land for a sustainable purpose”. WLGA (Bridgend and Torfaen agreeing), Blaenau Gwent and Neath Port Talbot endorsed radical action beyond remediation in order to address climate change impacts.

Legislative provision

- 12.8 Some respondents supported combining tip reclamation with tip safety work but disputed whether any new legislation was needed to do so. Huw Williams thought that the powers provided in Part VI of the Planning Act 1990 were sufficient. Keith Bush QC pointed to existing extensive local authority and ministerial powers to fund projects for tip reclamation. He thought it important that the supervisory authority’s powers should be sufficiently broad to allow it to recommend reclamation rather than continued maintenance of a particular tip, but thought there was no need for new legislation:

There is no obvious reason for creating new legal functions in order to carry out such work. Establishing and implementing reclamation projects is a matter of prioritising financial resources, by whoever is responsible for managing those resources, rather than a legal matter.³⁴⁵

Reclamation models

- 12.9 Other respondents focused more on appropriate reclamation models regardless of whether these were introduced by new legislation. Stephen Smith explained that the Land Reclamation Programme had been integral to improvements in tip safety for a

³⁴⁴ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 10.139

³⁴⁵ This response has been translated from the Welsh original.

period of fifty years.³⁴⁶ The programme had stability and public safety as key objectives, and funding was allocated to address many safety issues, either directly or as a by-product of securing a beneficial new use. A “rolling programme” of works with five years of work identified allowed projects to be prioritised and deferred if delivery problems, such as problems with land ownership or acquisition, arose. The management of the programme by the Welsh Development Agency offered a model for reclamation, whether existing powers are used or under new legislation:

The Welsh Development Agency had always managed the programme with a complement of technical staff providing advice to local authorities and undertaking detailed reviews of proposed works. In my view, such a model remains critical for any future mechanism for tip safety either through a supervisory body with enhanced legislation or by adopting a reclamation approach.

In his view, these options should be considered before any commitment was given to new legislation. He thought that the model could work alongside enhanced guidance and possibly enhanced powers under the 1969 Act.

12.10 ICE Wales Cymru suggested that risk assessments conducted under the new tip safety legislation, addressing matters such as health, safety and environmental risks, would inform the need for a reclamation scheme.³⁴⁷ These factors could be considered alongside legislation such as the Well-being of Future Generations (Wales) Act 2015 and Environment (Wales) Act 2016 and target social outcomes to benefit the people of Wales. Jacobs UK Ltd (formerly Halcrow) thought that reclamation work should only be carried out where there is a need for engineering works identified in the risk-based assessment process.

12.11 Caerphilly highlighted the importance of flexibility, as each potential reclamation site varies. They identified important factors in any assessment as location, ecology, consultation to gauge public opinion, environmental impact and funding. In their view the improvement of remediation techniques over recent years gave better after-use options than in the past. Rhondda Cynon Taf pointed to the issues which may be generated by disturbing the surface of a tip, including the generation of silt and the need for pollution control, and issues beyond the tip itself such as the identification of sites to relocate waste. Graham Hathaway agreed that there was no “fit for all” model of reclamation.

12.12 Rhondda Cynon Taf thought that the list of factors to consider in assessing the best reclamation options was so long and complex that any legislation or guidance on reclamation would need an agreed process. They thought that this would sit best with an overseeing body and an expert panel.

12.13 NRW saw a role for the supervisory authority in longer-term research, development and innovation alongside delivery. This would permit a progression from short-term

³⁴⁶ The Land Reclamation Programme is discussed in Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, paras 3.25 to 3.28 in the context of its role in transferring a number of tips into local authority ownership.

³⁴⁷ Risk assessments are considered above in ch 4.

business towards a role in developing sustainable uses for tips for the benefit of communities or as habitats.

- 12.14 The Law Society endorsed our suggestion that a corporate joint committee would be an appropriate model.

Heritage value of sites

- 12.15 Cadw and ALGAO provided a reminder that some tips have heritage value and that reclamation work would need to take this into consideration. The coal tips within the Blaenavon Industrial Landscape, for example, have been designated by UNESCO's World Heritage Committee as a World Heritage Site.³⁴⁸ Many historic coal tips are recorded as historic environment features on the Historic Environment Records maintained by the Welsh Archaeological Trusts, where their presence is treated as a material consideration in the planning process. In ALGAO's words:

Wales's industrial history is internationally renowned and of pivotal importance in the country's development. The transformative 18th and 19th century coal industry shaped the environment and culture of south Wales, its structures, settlements, infrastructure and landscapes standing as a permanent testament to human exploitation of natural resources and the Industrial Revolution. The impressive tips are almost synonymous with this heritage, retaining a defining presence despite historic and recent forestry plantation. In addition, the industry has left an intangible legacy of living communities, communal memory and is now valued as a tourism resource

Whilst no coal tips are currently afforded individual statutory protection, they form part of statutorily designated sites Hundreds of tips are recorded on the regional Historic Environment Records and National Monuments Record of Wales, both individually and as part of mine complexes, and are primarily protected through the planning process.

- 12.16 Cadw explained that in many cases colliery surface buildings have gone, and tips are often the sole remaining physical manifestation of this mining past. They considered it important to preserve this legacy and history, in keeping with the Well-being of Future Generations (Wales) Act 2015. Reclamation altered the physical appearance and character of a coal tip, and would impact on its heritage value. In their view, the assessment process should include consideration of this heritage value. They asked that Cadw be made a statutory consultee in the assessment process, and that the Welsh Archaeological Trusts should also be consulted on proposals for individual tips, so that they have an opportunity to offer historic environment management advice, particularly with regard to physical civil engineering interventions and to habitat development proposals.

³⁴⁸ World heritage sites are nominated by the government of the country in which they are located. They must meet one or more of ten criteria set by the UNESCO World Heritage Committee. The criteria are used to assess the Outstanding Universal Value of a site and identify whether it may be regarded as having made a unique contribution to a shared global heritage. See <https://www.peoplescollection.wales/content/world-heritage-sites-wales> and <https://whc.unesco.org/en/list/984/>.

12.17 Torfaen added that the coal tips at the Blaenavon site contribute to its “outstanding universal value”, and were of the view that the preservation of tips in such circumstances should be considered in the formation of any new regulations.

Protecting tip biodiversity

12.18 Similarly, Buglife emphasised the need to consider the protection of existing tip biodiversity in considering reclamation plans for any individual tip.³⁴⁹ They explained that at least 1,000 invertebrate species have been found on disused coal tips in South Wales, including some of the rarest and most threatened invertebrates in the UK. Twenty percent of the species found are of “conservation importance”. Two species have been discovered on tips which are not known anywhere else in the world.³⁵⁰ The tip habitats also support amphibians, reptiles, birds, and a diversity of flora. In their view, reclamation, if needed at all, should adopt techniques which protect biodiversity on the tip:

It is recommended that reclamation of old coal tips is avoided wherever possible due to the negative impacts this will have on habitats and species considered a priority for conservation in Wales under section 7 of the Environment (Wales) Act 2016. Reclamation should be seen as a ‘last resort’ solution and if deemed essential, reclamation should consider the ecological needs of the species currently present on site in order to maximise the biodiversity output of this reclamation. It is important that reclamation and remediation schemes avoid the use of fertile topsoil (as this is not conducive with a successful biodiversity reclamation), promote natural succession as much as possible, and aim to replicate the varied topographical, hydrological and chemical complexity of old coal tips that are responsible for their high biodiversity value.

Coal washing and tip removal

12.19 A number of respondents specified that coal washing (the extraction of saleable coal from tip material) should not be available as a means of financing reclamation work. CLA Cymru noted that coal washing had been used in reclamation schemes in the past:

However ... in more recent times coal is considered a dirty high carbon fuel which is detrimental to the current climate change agenda, it is very questionable whether it would be considered environmentally sustainable to look to using the coal.

They also questioned whether there would any longer be a market for the coal to make its extraction economically viable.

12.20 Transport for Wales asserted that reclamation needs to be “beneficial and not for the benefit of extraction for future usage”.

³⁴⁹ For discussion of the need to incorporate tip biodiversity, and the biodiversity of any areas potentially impacted by a tip slide, in tip management plans, see paras 4.46, 4.47 and 4.59 above.

³⁵⁰ For further detail, see the full response to the consultation from Buglife, available on the Coal Tip Safety project page: <https://www.lawcom.gov.uk/project/regulating-coal-tip-safety-in-wales/>, and L Olds, *Invertebrate conservation value of colliery spoil habitats in South Wales*, April 2019, https://8372dda3-3bb8-46f5-bf93-fc46ad68ff06.filesusr.com/ugd/dccabd_bb278c9d887f433fb0af9e6dd285df8e.pdf.

- 12.21 Some respondents, including Bob Leeming, thought that tip removal should be the ultimate objective of reclamation. Sue Jordan wanted “complete restoration” and for land to be returned to “common land and open to leisure facilities”.
- 12.22 Cadw, in contrast, agreed with the view of the Coal Authority that removal of a tip is in most cases not an option.³⁵¹ They drew attention to the potential harmful impact of even lesser interventions such as major and minor civil engineering schemes on the heritage value of historic coal tips. They also asked for Cadw to have a role in the assessment process and to be consulted on proposals for particularly historically significant or well-preserved coal tips.
- 12.23 Rhondda Cynon Taf also warned against removal or reclamation works unless driven by risk to people, property or the environment, and emphasised growing recognition that some tips are unique and important ecological habitats in their own right.
- 12.24 Jacobs were also concerned that environmental and industrial heritage considerations should be part of the process of identifying suitable sites for reclamation.

Compulsory acquisition of sites and approaches to compensation

- 12.25 Some respondents considered the position of landowners affected by a reclamation scheme. Huw Williams identified a need for a specific power compulsorily to acquire a tip and any associated rights, for example for spreading and storage of material, if this was necessary to secure its safety and management. He also suggested an approach to valuation:

While it is unlikely that a hazardous tip will have a positive value given the disappearance of the market for reclaimed coal, ideally a procedure equivalent to the nil valuation provision in listed building legislation should be considered where a landowner's neglect has resulted in an unsafe situation. However, I recognise that land compensation is currently a reserved matter.

- 12.26 NRW looked at the issue from the perspective of compensation for landowners. They suggested that powers under section 16 of the Environment (Wales) Act 2016 to make land management agreements could be used to support owners in repurposing sites for environmental gain.
- 12.27 Jane Iwanicki thought that, in the absence of a compensation regime, landowner participation in reclamation would have to be on a voluntary basis or driven by the regulator or Welsh Government with financial support. She observed that, depending upon the reclamation scheme, owners and communities could be left with long-term land management obligations or restrictions on land use.
- 12.28 Lee Jones looked at the issue of tip management following reclamation work. He suggested joint management ventures between the regulator and community groups could be a sustainable route for future use for the benefit of the local environment and community.

³⁵¹ See para 2.24 above and Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 8.25.

Reasons for disagreeing

12.29 In Wrexham's view, the regulatory legislation should be focused on "tip safety first and foremost" and also mitigate risks from pollution, flooding and combustion. Huw Williams and Keith Bush QC disagreed with our suggestion that tip safety legislation should be combined with provision for reclamation, but, as described above (at paragraph 12.8), thought there were alternative powers available to enable reclamation projects.

Ideas for tip uses

12.30 Some respondents commenting on the scope for combining tip safety work with reclamation also had ideas about beneficial uses for tips. NRW stressed the need to use reclaimed land in a sustainable way and to combat climate change:

We are currently dealing with climate and biodiversity emergencies and we should be looking at ways we can use our land to address these. Planting woodland or using the land for renewable energy could be the end goal. This is not just about how to make a spoil tip safe; we should be striving to reuse the land for the benefit of the people of Wales.

12.31 Lee Jones also saw the importance of environmental gains in assessing benefit:

Future models for reclamation should not only include economic viability but include and place more emphasis on carbon capture and not only the protection of biodiversity but its promotion. Greater emphasis should also be placed on renewable energy as part of future reclamations.

12.32 Jane Iwanicki saw potential in considering net biodiversity gain or carbon offsetting as a way to help finance reclamation projects.

12.33 Professor Bob Lee wondered if the gasification of coal waste with carbon capture could provide a basis for the production of blue hydrogen.³⁵² He was not able to provide information as to whether technically coal waste would be a suitable feedstock, but made the suggestion as a possible way "to turn a liability into an asset".

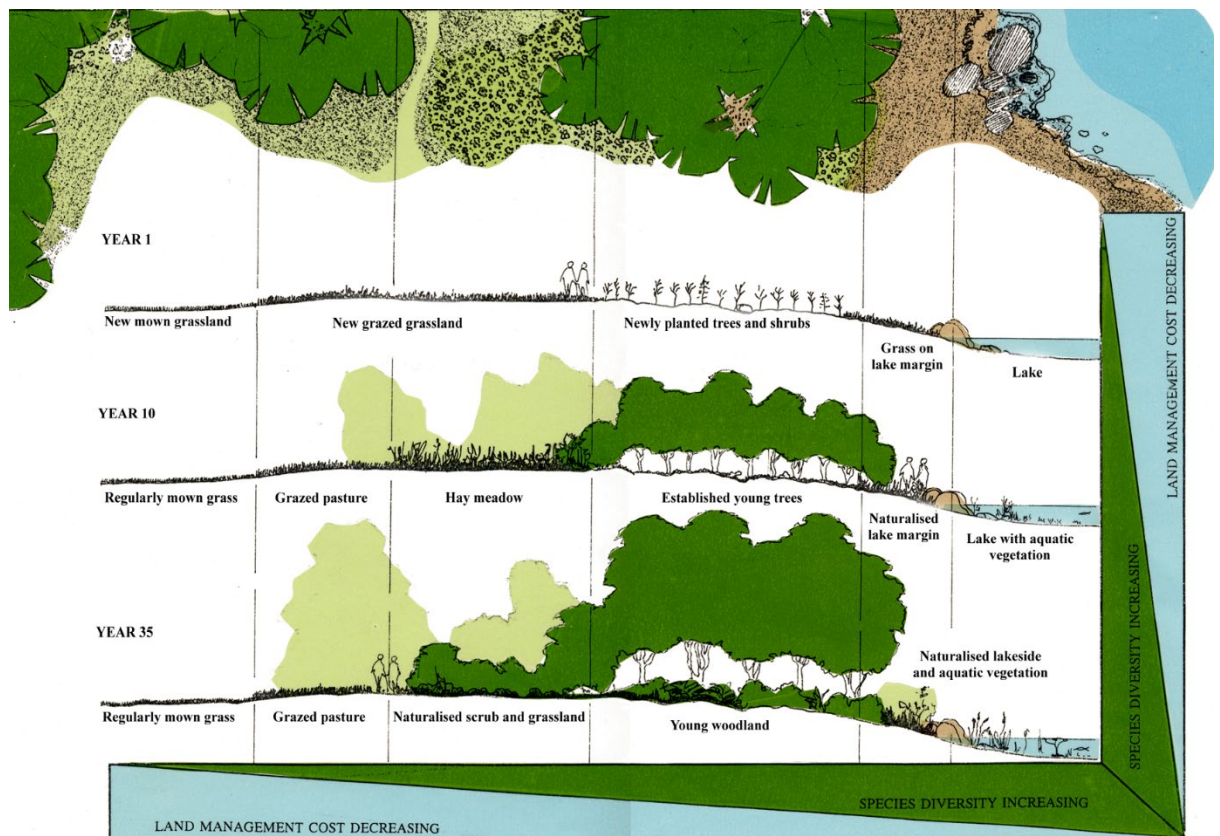
12.34 Richards, Moorehead and Laing Ltd, a company involved in coordinating and supervising the environmental aspects of a wide range of construction projects,

³⁵² "Green" hydrogen is produced by the electrolysis of water (by breaking down water molecules into the individual elements hydrogen and oxygen). This process is carbon free. Brown or grey hydrogen is produced when coal ("brown") or natural gas ("grey") reacts with steam under pressure and, with the help of a catalyst, produces hydrogen. This process releases carbon dioxide into the atmosphere. Blue hydrogen is produced by capturing and storing the carbon released in the production process for grey hydrogen. It is also possible that the gasification of coal waste with carbon capture could be used directly for energy generation. BEIS has recently launched a Bioenergy with Carbon Capture initiative (BECCS) based on a report by Ricardo Energy and Environment, Analysing the potential of bioenergy with carbon capture in the UK to 2050, 2020:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/911268/potential-of-bioenergy-with-carbon-capture.pdf

including, in the past, mineral waste rehabilitation, have specialised in using vegetation in land reclamation.³⁵³

Vegetation is the key element in enhancing biodiversity following construction work. Public access is important too so that communities can draw benefit from this diversity and new green spaces in general Management of both the vegetation and access by the public are important aspects of any long-term plans. Planning and operating on a long-term basis are essential if design intent and objectives are to be achieved.

Their approach, showing the relationship between biodiversity and land management costs, is illustrated in the following diagram:



Principles of Landscape Management

Discussion

12.35 We do not think it appropriate to make any recommendations in relation to whether new tip safety legislation should be combined with provision for tip reclamation as this falls outside our terms of reference. We invite the Welsh Government to consider the views set out above as to whether any legislative provision is necessary to support a tip reclamation programme. We also draw their attention to views on the most

³⁵³ These ideas were expressed in a report by the Welsh Development Agency, *Working with Nature - a low-cost approach to land reclamation*, first published in 1982 in the form of work commissioned from Robinson, Jones Partnership Ltd and revised and updated in 1993 by Richards, Moorehead and Laing Ltd.

appropriate reclamation models, the heritage and biodiversity value of tips, and ideas for beneficial uses for reclaimed tips.

12.36 One factor which the Welsh Government will need to examine in designing a tip reclamation strategy is the possibility that a reclamation project could bring a tip within the definition of an active quarry for the purposes of the Quarries Regulations 1999. Under regulation 3(1)(b), the definition of a quarry includes “any reclamation site (and for this purpose “reclamation site” means a site where the extraction of minerals forms part of the process whereby that site is restored for agricultural, industrial or domestic use) from which minerals are being extracted for sale or further use”. If a tip reclamation site were to fall within this definition, the application of the 1999 Regulations would alter the duty holder and the enforcing authority. As explained in our consultation paper, under the 1999 Regulations the duty to ensure safety falls to the quarry operator, and the enforcing authority is the Health and Safety Executive.³⁵⁴

PROPOSALS FOR NON-COAL TIPS

12.37 Our consultation paper looked briefly at the issue of whether the regulatory framework which is adopted for disused coal tips should be expanded to cover waste from other types of mine found in Wales. We explained that, although our terms of reference were confined to identifying a legal framework that addressed safety issues in coal tips only, we were aware that our recommendations could be extended to other types of mining waste. The Welsh Government had indicated to us that it would welcome views on how workable and desirable this might be.³⁵⁵

Support for the inclusion of non-coal tips

12.38 A number of respondents took up the invitation to offer views. All who commented on the issue were in favour of extending the framework to include non-coal tips. Huw Williams said simply that “the legislation should be designed to be extended to all tipping of mined and quarried material above ground and not just coal”. NRW also thought that the new legislation should cover “all spoil tips from mines, quarries and/or other activities”. Jacobs thought that a “tip” should be defined to include waste from all mining, not just coal mining. Steve Harford called for the new independent body to cover all tips, as “a tip regardless of how or when formed could still pose a danger”. Professor Thomas Watkin thought that the Welsh Government should be encouraged “to consider the need for a more holistic approach to mitigating risks from land stability hazards”. Cadw said:

We are aware that other types of historic metal mining and mineral quarrying produced significant tangible remains, including tips of waste that may now be regarded as hazardous by local communities. We are in favour of your proposed approach being extended to apply to these other forms of waste from other types of historic mine.

12.39 Keith Bush QC looked more closely at the implications of amending the Mines and Quarries (Tips) Act 1969 solely in relation to disused coal tips and foresaw problems

³⁵⁴ Regulating Coal Tip Safety in Wales (2021) Law Commission Consultation Paper No 255, para 4.73.

³⁵⁵ Above, para 10.2.

of both principle and practicality if two distinct regimes for disused tips were in operation:

The relevant legislation - Mines and Quarries (Tips) Act 1969 - currently applies not only to coal tips created when working deep mines which are now disused but to all the tips created when working any mine or quarry. The subject matter of the current project is limited to coal tips. It does not, therefore, affect tips created by other mines, including the lead and copper mines that are quite common in Wales, or the many tips created by slate and stone quarries. It is possible that these tips do not pose the same hazards as some coal tips. But that should not be taken for granted. It is only by including them in the scope of the new legislation that the public can be confident that their safety is safeguarded.

... Amending the 1969 Act in a way that made separate provision for coal tips would mean that the 1969 Act would still apply but only in relation to tips other than coal tips and quarry tips. Creating two separate regimes based on the nature of the mineral originally worked would be contrary to principle, it would be illogical and it would probably deprive local councils of the little expertise regarding tips that they still retain, making the task of applying the 1969 Act to the tips that are not included within the remit of the new Act far more difficult. Any new legislation should therefore include provision that is applicable to the same range of tips as the current legislation.³⁵⁶

12.40 There was also support for a broader remit for the legislation from a regional perspective. Steve Jones of the Emergency Planning Department at Pembrokeshire County Council thought that the focus on coal tips to the exclusion of other types of tip produced an over-emphasis on the needs of the South Wales coal valleys:

Unstable spoil from any form of quarrying or mining, including metal mines, can be no less hazardous. Although metal mines in mid Wales have been the subject of extensive treatment over recent years, the proposed legislation should be consistent There are [also] some huge steep waste tips around some of the old slate mines in mid to north Wales, some of these above inhabited areas.

A Government minister would be severely criticised if an incident occurred outside the coalfield and the subsequent enquiry was told that this workstream was to concentrate solely on coal.

12.41 WLGA and Neath Port Talbot specifically mentioned the need to cover slate mines and quarries. WLGA explained that this issue had been raised by local authorities in North Wales. Dr John Perry thought there was a case for including quarries in the new regime as a “second step” as long as it did not hold up coal tip legislation. He noted that:

although coal tips are a small percentage by number of all tips in Wales they are the ones nearest communities. Quarry tips (the majority of tips) tend to be away from populated areas but not in all cases. So coal tips are the most critical at the moment.

³⁵⁶ Keith Bush QC's response has been translated from the Welsh original.

12.42 Some respondents used the debate over the definition of a tip set out in chapter 7 above to include argument that a coal tip should be defined more widely to include associated minerals such as ironstone and seatearth.³⁵⁷

Additional considerations

12.43 NRW noted that ownership of any mineral assets in the tip could be a greater issue for non-coal tips. The owner of the mineral rights in the tip might not be the owner of the land on which the tip was situated.³⁵⁸ One implication of this was that it might be unfair to place responsibility for tip safety in the landowner. Another was the possibility of higher economic value in the tip, particularly if the spoil contained “metal in nano particulate form” or some rare earth elements content.³⁵⁹

12.44 NRW also noted that extension of the framework to other types of tip could produce a need to balance new duties with duties arising under other regulatory regimes such as the Water Framework Directive and contaminated land legislation. In some cases, particularly for developed urban areas, these issues might be better suited to being assessed under the Contaminated Land Regulations. Care would be needed in developing a definition, but they would welcome the greater flexibility offered by an extended definition of “tip” under the proposed new framework.

12.45 Consideration of an extension of the regime to non-coal tips also gave NRW the opportunity to comment on the gaps they encounter in current legislation. They gave the following examples:

NRW has also received hazard incidents and stakeholder/consultant commentary on Penmaenmawr granite quarry, Cambrian slate mine, Parc/Crafnant lead mines and Moelwyn slate mine. We have no legal responsibility or rights to access to land that isn't a metal mine, unless directed to do so from the emergency services. Flexibility could help with these non-coal sites.

Ideas for non-coal tip reclamation work

12.46 Richards, Moorehead and Laing Ltd, who supported the extension of the framework to non-coal tips for safety reasons, also commented on the potential for reclamation projects on metal mines:

Our most recent reclamation projects, which were completed about 20 years ago, involved abandoned lead mines where the surface waste deposits were serious sources of heavy metal pollution. Vegetation played a key role in these projects by

³⁵⁷ See paras 7.14, 7.15 and 7.33 above.

³⁵⁸ Mineral rights in Great Britain vest in landowners, with the exception of oil, gas, coal, gold and silver rights. Oil, gas, gold and silver are owned by the Crown. Coal reserves are owned by the Coal Authority. See <https://www.gov.uk/government/publications/extractive-industries-transparency-initiative-payments-report-2018/mining-and-quarrying-in-the-uk#fn:7> and <https://www2.bgs.ac.uk/mineralsuk/planning/legislation/mineralOwnership.html>.

³⁵⁹ Rare earth elements are a group of 17 chemically similar metallic elements, including the 15 lanthanides, scandium and yttrium. They are used in the widest range of consumer products of any group of elements, and are indispensable in electronic, optical, magnetic and catalytic applications. They have a vital role in environmental protection, improving energy efficiency, and in many carbon reducing technologies: https://www2.bgs.ac.uk/mineralsuk/download/mineralProfiles/rare_earth_elements_profile.pdf.

successfully stabilising surfaces against rainfall erosion. At Minera lead mine, near Wrexham, we used coal mine waste as a capping material over the lead waste before sowing grass seed on the prepared surface.

Discussion

- 12.47 Once again, this is not an area where we can make recommendations, as the discussion falls outside our terms of reference. But in our view good arguments have been given in favour of extending a new regulatory regime to other types of tip. We also agree that replacement of the 1969 Act in respect of coal tips only will create awkward distinctions. Expansion of the regulatory regime could be introduced over a number of years so that coal tip safety reforms are not delayed.
- 12.48 It is clear that additional research is required before deciding whether expansion is viable. This would need to consider the different range of hazards posed by non-coal tips and possible differences in ownership of metal mine tips.³⁶⁰ The location of non-coal tips would need to be mapped. The British Geological Society has a database called “Britpits” which has information relating to surface and underground mineral workings, including mineral occurrences, active and inactive mines and quarries, slate waste and (in Wales only) metallic minerals.³⁶¹ However, there is no specific dataset for waste tips, other than for slate waste.
- 12.49 Further research will also be needed to determine how the regulatory framework would need to be adapted if it were to be used for all disused tips. It might prove to be unnecessary to apply the whole of our proposed regime. Work will be needed to establish, for example, whether it would be appropriate to require all such tips to be inspected. It might be that only certain elements of the new regime, such as the provisions for tip agreements and orders, would be needed. Further work will also be needed to determine how an extended regime could be phased in, as it is likely that there will be large numbers of tips affected.

³⁶⁰ See paras 4.78 to 4.98 above for a discussion of risks such as pollution which would have increased relevance to non-coal tips.

³⁶¹ Britpits, BGS datasets, <https://www.bgs.ac.uk/datasets/britpits/>.

Chapter 13: Recommendations

Recommendation 1.

13.1 We recommend that the existing regulatory regime for tips associated with operational mines should not be altered.

Paragraph 1.69

Recommendation 2.

13.2 We recommend that any new legislation should not apply to a tip to which the Quarries Regulations 1999 or the Mines Regulations 2014 apply.

Paragraph 1.70

Recommendation 3.

13.3 We recommend that a supervisory authority with responsibility for the safety of all disused coal tips should be established.

Paragraph 2.26

Recommendation 4.

13.4 We recommend that the supervisory authority should be a new body.

Paragraph 2.65

Recommendation 5.

13.5 We recommend that the supervisory authority should be a central public body.

Paragraph 2.74

Recommendation 6.

13.6 We recommend that the supervisory authority should be subject to a general duty to perform its functions so as to ensure the safety of coal tips, without limitation to specified risks.

Paragraph 2.98

Recommendation 7.

13.7 We recommend that a central tip register should be compiled and maintained by the supervisory authority.

Paragraph 3.23

Recommendation 8.

13.8 We recommend that the contents of the tip register should be prescribed by the Welsh Ministers by statutory instrument.

Paragraph 3.41

Recommendation 9.

13.9 We recommend that the supervisory authority should be under a duty to include on the register any tip of which it is aware.

Paragraph 3.49

Recommendation 10.

13.10 We recommend that an owner or occupier of all or part of land identified in an entry on the tip register should have a right of appeal on the ground that there is no tip situated on the land.

13.11 We recommend the exercise of the right of appeal should not be permitted to delay urgent work.

Paragraph 3.65

Recommendation 11.

13.12 We recommend that it should be a summary offence, punishable by a fine, to fail to notify the supervisory authority, within a prescribed time limit, of the existence of a coal tip particulars of which are not included on the tip register.

13.13 We recommend that the offence should be capable of being committed by

- (1) a freehold owner of land containing the whole or part of such a coal tip; and
- (2) the owner of a leasehold interest in such land originally granted for a term of more than seven years

who has reasonable grounds to believe that the land contains all or part of a coal tip.

Paragraph 3.101

Recommendation 12.

13.14 We recommend that the prescribed content of the tip register should be governed by whether it is in the public interest for particular information concerning coal tips to be publicly available.

Paragraph 3.136

Recommendation 13.

13.15 We recommend that there should be public access to the tip register, providing an accessible summary of relevant information.

Paragraph 3.137

Recommendation 14.

13.16 We recommend that the Welsh Government engages with the Law Society, the Coal Authority and local authorities in Wales with a view to establishing a search of the tip register as part of a standard conveyancing search in relation to property in Wales.

Paragraph 3.138

Recommendation 15.

13.17 We recommend that, upon the entry of a tip onto the register, the supervisory authority should be under a duty to arrange an inspection of the tip unless it considers that a sufficiently recent and thorough inspection has been conducted.

Paragraph 4.32

Recommendation 16.

13.18 We recommend that, at the time of inspection, there should be a duty on tip owners and occupiers to provide to the supervisory authority documents in their possession of relevance to the tip or the land on which it is situated.

Paragraph 4.33

Recommendation 17.

13.19 We recommend that

- (1) the supervisory authority should be under a duty to arrange for the compilation of a risk assessment and management plan for any tip included on the register;
- (2) the supervisory authority should be under a duty to approve the tip management plan; and
- (3) the supervisory authority should allocate a risk classification to each tip based on the inspection report and risk assessment.

Paragraph 4.63

Recommendation 18.

13.20 We recommend that the Welsh Ministers should have power to prescribe the matters to be included in a risk assessment and tip management plan by statutory instrument.

Paragraph 4.64

Recommendation 19.

13.21 We recommend that the risk classification of coal tips should have regard to the risk of instability of a tip and the consequences of a stability failure.

Paragraph 4.77

Recommendation 20.

13.22 We recommend that the risk classification of coal tips should also have regard to the risk the tip presents of pollution, combustion or flooding.

Paragraph 4.98

Recommendation 21.

13.23 We recommend that coal tip safety legislation should provide for the making of agreements between authorities and the owners or occupiers of land registered in the tip register, providing for the carrying out of operations specified in the tip management plan.

Paragraph 5.40

Recommendation 22.

13.24 We recommend that an authority should be under a duty to arrange for inspections to ensure compliance with a tip maintenance agreement, with a power to delegate inspections to suitably qualified third parties.

Paragraph 5.50

Recommendation 23.

13.25 We recommend that an authority should be able to make a tip order where

- (1) the owner or occupier of land has failed to comply with a tip agreement entered into by them and has been given appropriate notice of that failure and reasonable opportunity to rectify it;
- (2) the owner or occupier has been offered an agreement and has refused to enter into an agreement on suitable terms or has failed to respond within 42 days;
- (3) the authority considers the work specified in the order to be urgently necessary; or
- (4) it has been impossible to identify the owner or occupier despite having taken specified steps to do so.

13.26 The authority must be satisfied that the measures proposed are proportionate to the objective to be achieved.

13.27 The order must either require the owner or occupier to carry out operations or provide for an authority to carry them out.

13.28 The owner or occupier should have a right of appeal against the imposition of an order, but the exercise of the right of appeal should not operate to prevent work which is urgently necessary.

13.29 Save in the case of an order made where work is urgently necessary, the order must provide sufficient time within which to appeal.

Paragraph 5.87

Recommendation 24.

13.30 We recommend that power to enter into tip agreements and to make tip orders for lower risk tips should fall to the supervisory authority, and a duty to supervise the agreements and orders, including to carry out inspections, should fall to local authorities.

Paragraph 5.123

Recommendation 25.

13.31 We recommend that coal tip safety legislation should provide for the designation by the supervisory authority of tips that meet criteria prescribed by the Welsh Ministers by statutory instrument.

Paragraph 6.70

Recommendation 26.

13.32 We recommend that the criteria for designation should be developed by the Welsh Government in consultation with experts.

Paragraph 6.71

Recommendation 27.

13.33 We recommend that in the case of a designated tip the supervisory authority itself should normally be under a duty to carry out the operations specified in the tip management plan.

13.34 We recommend that the supervisory authority should have power to contract out this work or to provide in a tip agreement for the tip owner or occupier to carry out the work where it is appropriate to do so.

Paragraph 6.117

Recommendation 28.

13.35 We recommend that provision for the carrying out of work on designated tips, whether by the supervisory authority or a tip owner or occupier, should be made by way of a tip agreement or order.

Paragraph 6.119

Recommendation 29.

13.36 We recommend that, to the extent that liability under our recommended scheme rests with the owner, in economic terms, of land containing a coal tip, that owner should be regarded as the owner of the freehold estate or the owner of a leasehold estate of 21 or more years, save where the freehold or leasehold estate is in reversion on a leasehold estate of 21 or more years.

Paragraph 7.70

Recommendation 30.

13.37 We recommend that persons authorised in writing by the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have a power of entry upon land for the purposes of

- (1) inspecting, carrying out tests or sampling upon a known or suspected coal tip;
- (2) performing, supervising or inspecting works of maintenance or remedial operations or installing and monitoring instrumentation upon a coal tip; and
- (3) gaining access to a coal tip for the above purposes.

13.38 We recommend that the power of entry should be exercisable upon 48 hours' written notice to the owner if identifiable and any other person known to be in occupation of the land or without notice in an emergency.

13.39 We recommend that the supervisory authority or any other public body charged with functions under the coal tip safety scheme should have power to apply to a justice of the peace for a warrant authorising entry by force where a person has prevented or is likely to prevent the exercise of the power of entry, and it is reasonable to use force in the exercise of that power; the warrant may require those entering pursuant to it to be accompanied by a constable.

13.40 We recommend that persons authorised to enter land under these provisions should have power to take with them necessary equipment, provided that notice includes a description of any heavy machinery to be taken onto the land.

13.41 We recommend that obstruction of any authorised person or of an inspection, test or works should be a summary offence.

Paragraph 8.31

Recommendation 31.

13.42 We recommend that failure, without reasonable excuse, to comply with a tip order should be a summary offence punishable by imprisonment for a term not exceeding the maximum penalty for a summary-only offence, or by a fine, or both.

13.43 We recommend that the Welsh Government give consideration to the use of civil sanctions in respect of infringements of a tip maintenance order.

Paragraph 8.49

Recommendation 32.

13.44 We recommend that the provision that can be made in a tip agreement or order should include provision

- (1) for the making of payments by a person named in the agreement or order;
- (2) for the making of payments to a person named in the agreement or order;
- (3) for the sale of any materials recovered from a coal tip;
- (4) for the payment of the proceeds of sale of such materials to a person named in the agreement or order; and
- (5) for the payment of compensation by a person named in the agreement or order to another person named in the agreement or order.

Paragraph 9.82

Recommendation 33.

13.45 We recommend that principles governing the allocation of financial responsibility for tip safety work between persons or entities in the public and private sectors should be laid down by the Welsh Ministers by statutory instrument.

Paragraph 9.83

Recommendation 34.

13.46 We recommend that the Welsh Government enters into discussions with academic institutions and professional and industry bodies in the field of tip safety work with a view to securing compilation of a register of professionals competent to undertake tip safety work.

Paragraph 10.37

Recommendation 35.

13.47 We recommend that the Welsh Ministers should have power to give directions to the supervisory authority regarding actions to be taken in response to a coal tip emergency.

13.48 We recommend that the power be subject to a requirement, where possible, to consult the supervisory authority and other relevant authorities as to the terms of such directions.

13.49 We recommend that the Welsh Government give consideration to the desirability of providing, in the legislation creating the power or in environmental and planning legislation, an exemption from any requirement to seek advance consent under planning or environmental legislation. Any such exemption should be subject to a duty to seek required consents retrospectively.

Paragraph 11.27

Recommendation 36.

13.50 We recommend that the Environmental Permitting (England and Wales) Regulations 2016 be amended to define an emergency in the context of tip material.

Paragraph 11.46

Appendix 1: List of consultation events

1. Institution of Civil Engineers (ICE) event, 21 June 2021.
2. Presentation to the Welsh Government's Technical Group, 23 June 2021.
3. Rhondda Cynon Taf County Borough Council (CBC) Cabinet Committee, 5 July 2021.
4. Welsh Government's Technical Group Workshop 1, 7 July 2021.
5. Meeting with Neal Rushton and Natalie Sheldon, Network Rail, 11 July 2021.
6. Presentation to the Law Commission's Wales Advisory Committee, 12 July 2021.
7. Public event, 20 July 2021.
8. Welsh Government's Technical Group Workshop 2, 21 July 2021.
9. UK Environmental Lawyers Association (UKELA) Wales event, 26 July 2021.
10. Legal Wales event, 28 July 2021.
11. Meeting with Liam Olds and Clare Dinham, 2 August 2021.
12. Meeting (call) with Richard Arnold, Consultant - Head of Operations, Rhydycar West (proposed sport and leisure development), 2 August 2021.
13. Welsh Government's Technical Group Workshop 3, 4 August 2021.
14. Meeting with Agricultural Law Association, 5 August 2021.
15. Meeting with Roger Waters and Andrew Stone, Rhondda Cynon Taf CBC, 6 August 2021.
16. Meeting with Simon Humphreys, Rhondda Cynon Taf CBC, 23 August 2021.
17. Meeting with Wrexham CBC, 25 August 2021.
18. Meeting with Merthyr Tydfil CBC, 1 September 2021.

Appendix 2: List of respondents to the consultation

NAME	DESCRIPTION	SECTOR
ALGAO:Cymru	The Association of Local Government Archaeological Officers (ALGAO) body for Wales. The membership of ALGAO:Cymru comprises archaeologists who work in a curatorial capacity within the four Welsh Archaeological Trusts as well as archaeologists working for local authorities and Wales's three national parks.	Heritage/history
Arnold, Richard	Consultant Head of Operations, Rhydyar West, Marvel (Guernsey) Ltd.	Landowner interest
Blaenau Gwent County Borough Council		Local Government
Brabham, Dr Peter	Senior Lecturer in Applied Geology and Geophysics, School of Earth and Environmental Sciences, Cardiff University.	Engineering/geoscience/mining
Bridgend County Borough Council		Local Government

NAME	DESCRIPTION	SECTOR
British Geological Survey	A geological survey and global geoscience organisation, focused on public-good science for government and research to understand earth and environmental processes.	Engineering/geoscience/mining
Buglife	A charity dedicated to the conservation of all invertebrates.	Environment
Bush QC, Keith	Fellow in Welsh Law at the Wales Governance Centre, Cardiff University. Director of the annual Legal Wales Conference. Chief Legal Adviser to the Senedd between 2007 and 2012. Former President of the Welsh Language Tribunal.	Legal
Cadw	The Welsh Government's historic environment service.	Heritage/history
Caerphilly County Borough Council		Local Government
Carhart, Neal		Private individual
CLA Cymru – Country Land and Business Association	A membership organisation for owners of land, property and businesses. CLA Cymru provides advice and rural representation as well as a range of social and professional benefits for members in Wales and also members outside Wales with business interests in Wales.	Landowner interest

NAME	DESCRIPTION	SECTOR
Coal Action Network	A non-governmental organisation working for an end to coal use in power generation and steel production, coal extraction and coal imports in the UK, and for justice for communities affected by the UK's current and historical coal consumption and mining.	Environment
Colliery Spoil Biodiversity Initiative	A project working to raise awareness of the important biodiversity of colliery spoil sites.	Environment
Connolly, Paul	Principal Engineering Geologist at Mott MacDonald.	Engineering/geoscience/mining
Curtis, Dr Ben	Honorary Research Fellow in Labour and Social History at the University of Wolverhampton.	Heritage/history
David MS, Hefin	Welsh Labour Member of the Senedd for Caerphilly.	Elected representative
Dinham, Clare		Private individual
Dŵr Cymru/Welsh Water	A regulated not-for-profit water and sewerage company.	Infrastructure
Edwards, Cllr Julie	Labour Councillor for Rhondda Cynon Taf CBC.	Elected Representative
Elmore MP, Chris and Irranca-Davies MS, Huw	Welsh Labour MP and MS for Ogmere.	Elected Representatives

NAME	DESCRIPTION	SECTOR
Flood and Coastal Erosion Committee	A committee established by section 81 of the Environment (Wales) Act 2016. Its purpose is to advise the Welsh Ministers on matters relating to flood and coastal erosion risk management.	Environment
Funk, Paul	Background in mining and tip management. Twenty years' experience in the pump industry and the design, build and commission of mining process plant.	Engineering/geoscience/mining
Fychan MS, Heledd	Plaid Cymru Member of the Senedd for South Wales Central.	Elected Representative
Hathaway, Graham		Private individual
Harford, Steve		Private individual
Health and Safety Executive		Engineering/geoscience/mining
Home Builders Federation	Representative body of the home building industry in England and Wales.	Landowner interest
Howells MS, Vikki	Welsh Labour Member of the Senedd for Cynon Valley.	Elected Representative

NAME	DESCRIPTION	SECTOR
ICE (Institution of Civil Engineers) Wales Cymru	A professional body supporting and representing more than 3,500 civil engineers working and living in Wales. It aims to influence public infrastructure policy, promote the civil engineering profession and provide support, training and networking opportunities for ICE members. Part of a global organisation of more than 95,000 members.	Engineering/geoscience/mining
Iwanicki, Jane	Chartered Minerals Surveyor and Director of Wardell Armstrong LLP, Member of the Royal Institute of Chartered Surveyors and Fellow of the Institute of Quarrying.	Engineering/geoscience/mining
Jacobs UK Ltd (formerly Halcrow Group Ltd)	A company providing technical, professional and construction services, with 55 years' extensive experience in the assessment and management of colliery spoil tips in South Wales together with their investigation and remediation/reclamation.	Engineering/geoscience/mining
James MS, Joel	Conservative Member of the Senedd for South Wales Central.	Elected Representative
Jones, Steve	Emergency Planning Unit, Pembrokeshire County Council.	Local Government

NAME	DESCRIPTION	SECTOR
Jones, Lee		Private individual
Jordan, Owen		Private individual
Jordan, Sue		Private individual
Lee, Professor Robert	Professor of Law, University of Birmingham.	Legal
Leeming, Bob	HM Chief Inspector of Mines, Health and Safety Executive.	Engineering/geoscience/mining
Merthyr Tydfil County Borough Council		Local Government
Mineral Products Association Wales/Cymru	Part of the Mineral Products Association, the trade association for the aggregates, asphalt, cement, concrete, dimension stone, lime, mortar, and silica sand industries.	Engineering/geoscience/mining
Monmouthshire County Council		Local Government
Moreton, Kim	Chartered surveyor in land and resources and Chair of the Board of Directors of Camborne School of Mines Association. Camborne School of Mines at the University of Exeter is a combined geoscience and mining department.	Engineering/geoscience/mining

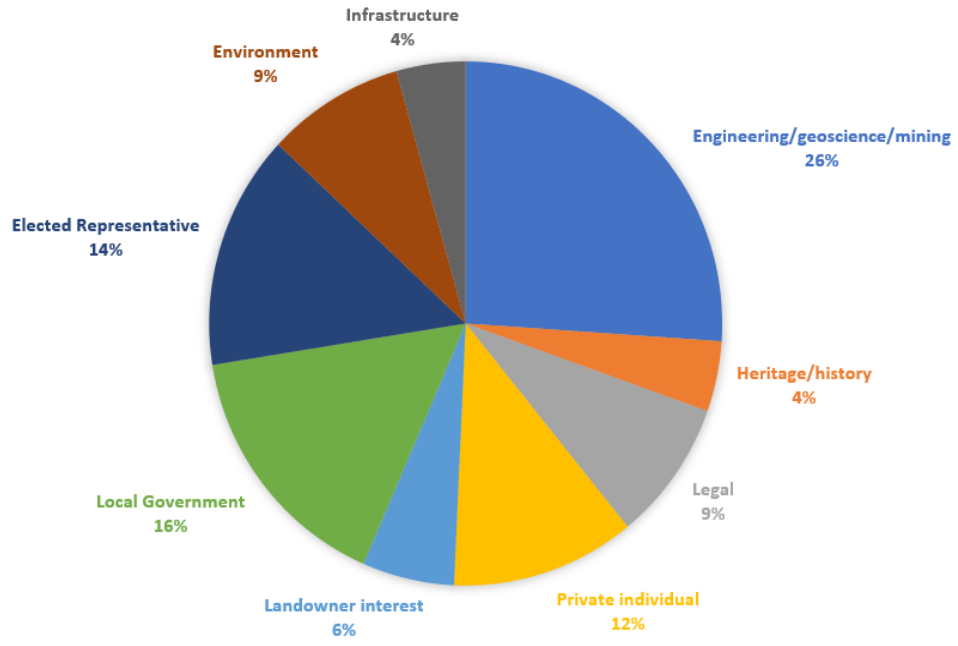
NAME	DESCRIPTION	SECTOR
Natural Resources Wales (NRW)	A Welsh Government sponsored body. NRW's purpose is to ensure that the natural resources of Wales are sustainably managed, enhanced and used.	Environment
Neath Port Talbot County Borough Council		Local Government
Network Rail	Owns and operates Great Britain's railway network. Has a statutory obligation to protect the rail infrastructure and procure the availability of safe train paths.	Infrastructure
Ove Arup and Partners Ltd	A professional services firm providing design, engineering, architecture, planning and advisory services.	Engineering/geoscience/mining
Petley, Professor David	Professor of Geography and Vice President for Innovation at the University of Sheffield. Research focuses on landslides. Sits on the Slope Safety Technical Review Board of the Hong Kong Government.	Engineering/geoscience/mining

NAME	DESCRIPTION	SECTOR
Perry, Dr John	Independent ground engineer and geologist, Chartered Engineer, fellow of the ICE, Chartered Geologist, fellow of the Geological Society of London, fellow of the Institute of Materials, Minerals and Mining.	Engineering/geoscience/mining
Plaid Cymru Group, Neath Port Talbot	A group of Plaid Cymru Councillors in Neath Port Talbot CBC.	Elected Representatives
Plaid Cymru Group, Rhondda Cynon Taf	A group of Plaid Cymru Councillors in Rhondda Cynon Taf CBC.	Elected Representatives
Pontypool Park Estate Office	An estate in the Pontypool area which owns or has owned several coal tips around Pontypool, Abertillery and Bargoed.	Landowner interest
Rhondda Cynon Taf County Borough Council		Local Government
Richards, Moorehead and Laing Ltd	Environmental, landscape and planning consultants.	Environment
Seddon, Chris	Senior geotechnical engineer at Amey Consulting. Member of the ICE, Chartered Engineer, UK Registered Ground Engineering Professional, Vice Chair of the ICE Wales/Cymru Ground Engineering Group Committee.	Engineering/geoscience/mining

NAME	DESCRIPTION	SECTOR
Siddle, Howard	Retired Chartered engineering geologist, formerly of CH2M HILL and Halcrow Group.	Engineering/geoscience/mining
Smith, Stephen	Chartered Engineer and member of the ICE. Former Head of Land Reclamation at the Welsh Development Agency and for Welsh Government.	Engineering/geoscience/mining
St John, Dr Tom	Senior geotechnical engineer at Mott MacDonald. Chartered engineer and member of ICE.	Engineering/geoscience/mining
The Law Society of England and Wales	An independent professional body for solicitors in England and Wales.	Legal
Hunt, Cllr Nigel Thomas	Plaid Cymru Councillor for Aberafan and Baglan Moors.	Elected representative
Thomas, Philip		Private individual
Torfaen County Borough Council		Local Government
Transport for Wales	Established by the Welsh Government in 2016 to oversee public transport in Wales.	Infrastructure

NAME	DESCRIPTION	SECTOR
Watkin QC, Professor Thomas	Former Professor of Law, Cardiff University (2001-2004) and Bangor University (2004-2007). First Welsh Legislative Counsel (2007-2010).	Legal
Welsh Local Government Association (WLGA)	Represents the interests of local government in Wales.	Local Government
Williams, Huw	Chief Legal Advisor to the Senedd. Previously an administrative and public lawyer in private practice and local government, specialising in planning, environment, compulsory purchase, devolution, local government and State aid.	Legal.
Williams MS, Sioned	Plaid Cymru Member of the Senedd for South Wales West.	Elected Representative
Williams, Sir Wyn	President of Welsh Tribunals.	Legal
Wrexham County Borough Council		Local Government

SECTORS



Appendix 3: Flow chart

