

## **UKELA (UK ENVIRONMENTAL LAW ASSOCIATION) RESPONSE TO THE CALL FOR EVIDENCE ON THE DISUSED MINE AND QUARRY TIPS (WALES) BILL**

### **INTRODUCTION**

1. UKELA (UK Environmental Law Association) comprises over 2,000 academics, barristers, solicitors and consultants, in the public and private sectors, involved in the practice, study and formulation of environmental law. Its primary purpose is to make better law for the environment.
2. This paper responds to the call for evidence by the Senedd's Climate Change, Environment, and Infrastructure Committee (the Committee) which is undertaking Stage 1 scrutiny of the general principles of The Disused Mine and Quarry Tips (Wales) Bill (the Bill). It has been prepared by the UKELA Wales Group in consultation with other UKELA groups. It does not seek to represent the views and opinions of all UKELA members but has been drawn together from a range of its members.
3. This response provides some background and then answers the specific questions raised by the call for evidence.

### **Background<sup>1</sup>**

4. The Welsh Government White Paper: *Coal Tip Safety (Wales) White Paper* (May 2022) noted that the legacy of the Welsh coal mining industry is that nearly 2,500 coal tips remain, predominantly in South Wales. It referred to the tragedy of October 1966 when a massive coal spoil heap on the hillside above Aberfan became unstable and collapsed after prolonged and heavy rainfall engulfing

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<sup>1</sup> This background is to provide some context to readers. It does not form part of the formal response to the questions raised and submitted.

Pantglas Junior School and killing 144 people in the village, 116 of whom were children. It also referred to the damage and trauma that climate change can cause, with intense rainfall from Storms Ciara, Dennis and Jorge leading to substantial flooding across Wales in February 2020 and where the heavy rainfall across South Wales led to a major landslide of a disused coal tip in Tylorstown, which resulted in over 60,000 tonnes of debris falling into the Rhondda Fach River. And while there were no injuries nor major damage to property and infrastructure, the resulting silt deposits impacted on river habitats and created a significant flood risk. Finally, it noted that the Met Office has published analysis demonstrating how our climate is continuing to warm, resulting in significant climate impacts now being felt across the UK. The latest independent Climate Change Risk Assessment for Wales (CCRA3) recognised the potential for climate impacts to increase the risk of future landslips, landslides and subsidence linked to historic mining activities also.

5. The Welsh Government explains that the overarching aim of the Bill is to reduce the likelihood of landslides on disused coal and non-coal tips. Its statement of policy intent sent to the Committee on 9 December 2024 notes, in summary, that the Bill:
  - establishes the Disused Tips Authority for Wales (the Authority) as a body corporate. Its main objective in carrying out its functions under the Bill is to ensure that disused tips do not threaten human welfare by reason of their instability;
  - makes provision for the assessment, registration and monitoring of disused tips;
  - contains provisions that enable the Authority to deal with tip instability and threats to tip instability. This includes powers to require a landowner to carry out operations and for the Authority to carry out operations itself, and related provisions in respect of payments in connection with such operations;
  - contains supplementary provisions including powers of entry for the Authority, information sharing provisions and powers to require information; and,
  - creates related offences to support the enforcement of the regime.
6. The Committee call for evidence asks whether the Bill's provisions are workable and will deliver the stated policy intention including the need for assessment,

registration and monitoring of discussed tips, addressing tip instability, whether there are any potential barriers to implementation of the Bill and the appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation. Finally it asks whether there are any unintended consequences arising from the Bill; and the financial implications.

## **THE CALL FOR EVIDENCE QUESTIONS**

### **1. Views on the general principles of the Bill and the need for legislation to deliver the stated policy intention**

7. UKELA welcomes the proposals and the general principles in the Bill which establishes the Authority on a statutory basis as an independent body.
8. As an important preliminary point, the recital and main objective refers to the threat to human welfare, which is very important. However, it is also critical that the threat to biodiversity, habitats, landscape, the environment and infrastructure more generally should be included in as a key objective. This concern was evident in the White Paper and the discussion of the Tylorstown land which noted in the foreword that:

The resulting silt deposits impacted on river habitats however and created a significant flood risk until repair work was completed. The Tylorstown landslide was a stark reminder of the potential risks for our communities, environment and infrastructure still posed by Wales' past mining industry.

9. Importantly, threats to habitats, biodiversity, landscapes, watercourses etc. while exhibiting indirect effects on individuals and communities, may not be caught by the definition of 'threat to human welfare' contained in Clause 82. For this reason, the extent and scope of the threats arising from the disused tips should be wide and go beyond direct human threats. Similarly, all other provisions that relate to threats (e.g. Clause 24 on categories of disused tips, and Clauses 33 and 36 on notice to owners) should include reference to the threat of environmental harm. By way of example, the UK Climate Change Act 2008 defines 'environmental harm' as harm to the health of humans and other living organisms and goes on

to include; harm to the quality of the environment, including the environment taken as a whole, and harm to the quality of the air, water or land, and other impairment of, or interference with, the ecological systems of which any living organisms form part (Schedule 6, Part 1, para. 4B)

10. It is helpful that the Bill sets out in broad terms the Authority's remit and its responsibility for the assessment, registration, monitoring, maintenance and oversight of disused tips. This is appropriate and necessary though its remit will need to be subject to further guidance (see below). Removing those functions placed on local authorities under Mines and Quarries (Tips) Act 1969 (MQTA 1969) and the responsibility for their continued safety is also welcome. The reasons for this include:

- 1) It avoids any potential conflict of interest in having the responsibility for disused tips placed on local authorities which may own land on which tips are situated (estimated at up to 20% of disused tips; Figure 2 of Explanatory Memorandum). Local authorities discharge other potentially competing functions such as ensuring that there is sufficient land for development, supporting the local economy and businesses and carrying out land use planning functions.
- 2) The MQTA 1969 was introduced, post Aberfan, at a time when many tips remained under active management.
- 3) The Disused Tips Authority will have an exclusive focus which are those functions within the Bill, and as noted in the Law Commission Report there has been a loss of expertise in management of coal tips, which can be re-established, hopefully, in a single body.

11. There are a number of reasons why it is beneficial to have a legislative basis for establishing the new Authority:

- 1) As a matter of formality, the current provisions are found in primary legislation (i.e. the MQTA 1969) and that will need to be amended in any event.
- 2) There is value in having a degree of permanence and certainty in the new Authority, the need for which is unlikely to diminish in the foreseeable future.

12. Any decision to materially alter the functions or operations of the new Authority will require legislative change, providing an opportunity for review and public consultation.

**2. Views on the Bill's provisions, including whether they are workable and will deliver the stated policy intention.**

13. Subject to the specific points raised in this submission, the provisions in the Bill appear clear and workable although one critical factor will be to ensure that the new Authority is properly funded and supported in the short, medium and long term. While grateful for the assurance of the First Minister (in Senedd on 9 July 2024) that a Bill would be brought before Senedd to establish an environmental governance body for Wales, and noting the work of the current Interim Environmental Protection Assessor for Wales (IEPAW), it remains the case that Wales has still not established a permanent environmental regulator with full authority to consider and determine complaints about environmental law. The absence of environmental oversight, previously provided by the EU Commission, for what is now a five year period, is a serious concern and there remains a significant gap in the environmental protection and enhancement provisions in Wales compared to the rest of the UK.
14. A second issue concerns a lack of detail in relation to many provisions of the legislation. The Explanatory Memorandum makes extensive promises of guidance to fill out missing detail in areas such as:
  - (a) the content of both preliminary and full assessments of tips under Clauses 12 and 15 of the Bill;
  - (b) the operation of the Authority in tip monitoring and inspection and in relation to site specific constraints such as that caused by the proximity of habitats;
  - (c) aspects of the appeals process;
  - (d) the charging structure;
  - (e) the Authority's interaction with other public bodies (such as Natural Resources Wales);
  - (f) incident preparedness and emergency response; and
  - (g) biodiversity action on the part of the Authority.

15. As the UK Environmental Law Association, we are concerned especially with questions of habitat protection and biodiversity (see further below) but there is a wider point. We accept that not all guidance will be statutory guidance and that issuance of guidance is an ancillary Executive Ministerial Function in accordance with s.58A Government of Wales Act 2006. Guidance will be subject to consultation and post-implementation review. Nonetheless, the rule of law requires that legislation should be clear and complete, not leaving gaps to be filled by soft law guidance when hard law, statutory provision is more appropriate. We raise the question of whether greater clarity is needed in the Bill itself or in secondary legislation in relation to some of the concerns about the environment and environmental regulation, which we raise below.

### **3. Views on the assessment, registration and monitoring of disused tips (Part 2 sections 6 to 32 and Schedule 2)**

16. Section 9 of the Bill provides for public access to the register and properly provides for online or electronic access by members of the public at all reasonable times. All matters related to disused tips will fall within the scope of the Environmental Information Regulations 2004 SI 2004/3391 and Articles 4 and 5 of the Aarhus Convention 1998<sup>2</sup> and, in the circumstances, public access to all environmental information should be made available unless there are specific and justified exceptions as to why the information should not be made available. Similarly, Article 5 of the Convention requires that environmental information should be progressively made available by electronic means. This being the case, it is not clear why information specified by regulations made by the Welsh Ministers under Clause 8(2)(f) might be excluded from the publicly available information, which the Explanatory Note suggests that it might. This feeds into concerns expressed above regarding the extent of delegated power contained in the Bill.
17. Section 32 of the Bill refers to penalties for obstructing monitoring activities or assessments which appears reasonable. However, it is important to be clear and certain under s. 32(2) concerning any maximum penalty that a person may be

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<sup>2</sup> Full title: Convention on access to information, public participation in decision making and access to justice in environmental matters done at Aarhus, Denmark 25.6.1998.

exposed to if someone is found liable on summary conviction. If it is the case that conviction should be subject to an unlimited fine then this should be stated in s. 32(2). We recognise that since the introduction of s. 85(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in March 2015 most environmental crimes are subject to unlimited fines in the magistrates' court. However, given the potentially significant consequences and threats that could arise from intentionally obstructing an Authority's activity, UKELA suggests that the penalty on conviction should be clear such that there is no doubt as to the potential consequences of committing an offence.

#### **4. Views on dealing with tip instability and threats to tip stability (Part 3 sections 33 to 54 and Schedule 3).**

18. The Explanatory Memorandum describes the regime as 'proactive rather than reactive'. Intervention to prevent tip failure is greatly welcome, but it is rather surprising that the Bill does not cover action to address the aftermath of a tip failure. It is understood that with regard to the emergency intervention at Tylorstown certain planning consent was applied for retrospectively, including for the receptor sites which were in the ownership of the planning authority, Rhondda Cynon Taf Council. In such an incident there will be significant volumes of waste material, the movement, storage and treatment of which will require environmental permits. The Bill might make some effort to address how emergency interventions in the aftermath of a tip failure might be handled with a view to the role of the new Authority, which will be the repository of relevant expertise in Wales.
19. This approach also means that the position and responsibilities of an owner of a tip that has failed remain unclear. The power to serve a notice requiring owners to carry out operations is limited to those necessary to pursue the objectives of Section 33(2), namely, to prevent or deal with threats of tip instability or to stabilise a disused tip. Note in this regard, there is no provision in the draft legislation for stop notices or other forms of civil sanction which might assist the new Authority. Such regulatory enforcement mechanisms might be helpful to deal with other issues, beyond instability, of causing potential harm to human health or the environment, such as the leaching of mine waters from a tip. Most significantly, it is possible that there may be a need for further stabilisation work following a tip failure, but on the face of it, this is not a power to serve notice on

an owner requiring work in the aftermath of a landslip. As such it reduces the incentives for owners to carry out adequate care of and operations upon a tip. For these reasons, the almost exclusive emphasis on a proactive approach, without consideration of remediation, appears surprising.

20. Section 36 provides for a right of appeal against notices under Sections 33 and 35. However, the provisions refer to an application to vary or cancel the notice rather than a formal appeal process and Clause 37 simply says that the appeal will be determined by a person appointed by the Welsh Ministers. And while it is noted that Clause 38 requires the Welsh Ministers to make regulations in this regard, it is submitted that the appeal systems and structures should preferably be in place within the primary legislation. Further, it is noted that the Explanatory Memorandum anticipates that the person appointed is likely to be someone such as an Inspector from the Planning and Environment Decisions Wales (PEDW). However, there should be more certainty and clarity to the appeal system. UKELA considers that a PEDW Inspector is likely to be best placed to determine the appeals that may arise. It will be important to ensure that any role that is conferred by the regulation will have sufficient independence. Contrast this provision with the certainty and clarity of Section 50 and the right of appeal to a court for an order to vary a contribution order made under section 49(4).
21. Section 39(2) on the penalty for failure to comply with a notice again simply refers to a fine when this could appropriately state that the offender is liable on summary conviction to an unlimited fine.
22. Section 50 refers to a right of appeal by a 'contributory' given a demand under section 49(4). The section does not state to which court a 'contributory' may appeal although it is understood from section 85 that reference to a court is to a High Court or a county court. Given the different route of appeals it would be preferable for the relevant clauses to be specific as to which court or appellate body is dealing with any particular appeal. Similarly, section 52 should specify that the court is either the High Court or a county court. This is key, filing an appeal in the incorrect court may be fatal to an application where strict time limits for making applications apply: see e.g. the 6 week appeal time limit in section 52(2).



## **5. Views on the supplementary sections (Part 4 sections 55 to 70)**

23. The ownership of land upon which disused tips are located is understood to be a matter of great complexity in practice so that provisions such as those on Section 58 are necessary and supported.
24. The powers of entry on to land and associated rights, for example taking equipment on to land and sampling, seem unextraordinary when compared to similar regulatory powers contained in similar environmental regulation, especially given provisions relating to notices and warrants. Entry onto land without a warrant and in some cases without service of notice if exercised in a careful and proportionate manner by the Authority is unlikely to offend human rights to property under Article 1 of Protocol 1 of the European Convention on Human Rights given the threats posed by coal tip collapse and the provisions in that Article relating to the wider public interest and the conditions imposed by law in the form of this legislation.
25. Section 69 states that in discharging its function the Authority must have regard to guidance given to it by Welsh Ministers. The width of the guidance envisaged in the Explanatory Memorandum is considered above. It is possible to envisage guidance which might go beyond that to the Authority, such as guidance on appeals or guidance on interaction with other public bodies where guidance may need to be given to those other public bodies, e.g. to NRW, in facilitating the work of the Authority or to other public bodies dealing with emergency responses. This Clause might be drafted wider to apply to the Authority but also extend to other relevant public bodies.

## **6. General (Part 5 sections 71 to 88)**

26. We have drawn attention above to the limitations in the use and definition of 'threat to human welfare' in Section 82. Presumably, the definition of tip includes mine tailings under water even though an accumulation underground is excluded from the definition. This seems sensible as the failure of a mine tailings dam could certainly pose a threat to human welfare (though again it could also cause significant harm to the wider environment).

## **7. Any potential barriers to the implementation of the Bill's provisions and whether the Bill takes account of them**

27. The Bill allows for the possibility of compensation for the loss of enjoyment of property, and this provision is not confined only to tip owners and could extend to anyone suffering a nuisance caused by the operations undertaken. However, this gives rise to a possible clash of remedies. Neighbouring owners of land suffering from (say) volumes of coal dust that are reaching their land have an available remedy for statutory nuisance under Part 3 of the Environmental Protection Act 1990. This would take the form of an abatement notice rather than compensation, served by a local authority but available also in summary proceedings brought by the person aggrieved by the statutory nuisance (s.82 EPA 1990). Abatement might halt crucially important works, but the remedy of 'entitlement' to compensation does not appear to provide an exclusive remedy and there is nothing in the Bill to prevent such action under Part 3 of the EPA 1990.
28. Other potential barriers to implementation, include the constraints imposed on land owners, and others including the Authority itself, by need for compliance with existing planning and environmental legislation. The Law Commission Report and the final Chapter of the White paper discuss some of these constraints, which could render tip safety operations unlawful if not accompanied by permits the granting of which could delay and complicate emergency interventions. In cases in which notices are served on owners, quite significant burdens may be placed on those owners under planning and environmental law. These are not clear on the face of this legislation but might include, by way of example:
- a) Gaining planning consent;
  - b) Undertaking environmental impact assessment as part of the planning process;
  - c) Obtaining environmental permits and associated waste law requirements such as a waste carrier's licence;
  - d) Undertaking an ecological HRA (Habitats Regulation Assessment);
  - e) Dealing with constraints posed by legislation which confers specific protection to certain species e.g. under the Protection of Badgers Act 1992 such as (in that case) obtaining a licence from NRW; and
  - f) Obtaining other site licences such as a tree felling licence.

29. None of these obligations are impossible to meet, but they are time consuming, expensive and subject to practical limitations (such as seasonality requirements for an appropriate HRA). In allowing the Authority to serve notices on owners of land to carry out operations under the legislation, the Bill does not dispense with these regulatory requirements which presumably will remain with the owner. It will certainly be necessary to ensure that the period set to conclude the operations, in accordance with cl.33(4), will allow for the delays taken up by planning and permitting. This may trigger the need for more operational intervention by the Authority than envisaged as the owner lags well behind the time schedule allowed or the need for immediate intervention becomes pressing over time.
30. Presumably where the Authority invokes its powers under Clause 42 to itself carry out operations on land, the regulatory burdens considered above pass to the Authority, but there appears to be no express provision for this in the Bill. This is unless section 42 is seen as conferring some form of statutory authority upon the Disused Tips Authority that overrides the need for (e.g.) planning consent for the development. Similarly, cl. 43 allows the Authority to remove 'property' (not defined according to the Table 1 index) which could include the removal of coal tip debris, including coal. But this is nonetheless waste, and its storage and removal should be governed by waste regulation, in accordance with the environmental permitting regime. Greater clarity on the regulatory burdens falling on the Authority when intervening using Chapter 2 powers would be most welcome.

**8. The appropriateness of the powers in the Bill for Welsh Ministers to make subordinate legislation (set out in Chapter 5 of Part 1 of the Explanatory Memorandum).**

31. Please refer to comments above about the wide number of issues left to future regulation and, in particular, to guidance.

## **9. Whether there are any unintended consequences arising from the Bill**

32. Over time following the major closure of coal mines in the 1970s and 1980s, the South Wales Valleys have become a much greener environment. Coal tips have often become re-wilded when left alone. We know from the background documents to the legislation that many have become at least part of protected environments. Without disputing the need for the powers in this legislation, it is important that they are exercised in conformity with the duties contained in the Environment Act (Wales) 2016, placed on public bodies in Wales to maintain and enhance biodiversity. Proactive action to curb threats to human welfare ought not to override considerations of environmental sustainability which are poorly iterated in the Bill as it stands.
33. This submission is not merely concerned with what is in the Bill but also with what is not there. If there is a conflict between the powers in this Bill and those already on the statute book, there is a danger that, rather than action to ensure the safety of coal tips, the unintended consequence of such conflict is one of stasis in the face of competing regulatory requirements which have not been fully addressed in the legislation and which ought properly to be the subject of that legislation rather than left for later guidance.

## **10. Views on the financial implications of the Bill (as set out in Part 2 of the Explanatory Memorandum)**

34. The only comment is that made above concerning the need for longer term funding should funding via the coal tip safety grant not be continued beyond 2026.

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