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30<sup>th</sup> June 2023

Dear Minister,

**URGENT request concerning continued unlawful coaling at Ffos Y Fran Land Reclamation Scheme - East Of A4060 Slip Road, Merthyr Tydfil, Wales**

1. We wish to draw your attention to the continued unlawful coaling at Ffos Y Fran Land reclamation scheme in Merthyr Tydfil<sup>1</sup>, and to make an urgent request for action, namely the immediate issuing of a **stop notice**, given the significant harm being caused to the environment and to local communities.
2. For background context, the site has been used as a coal mine since 2005. On 6 September 2022, planning permission for the extraction of coal from the Site expired. Merthyr (South Wales) Limited ('MSWL') did not, however, bring its coaling operations to an end, continuing to extract coal from the Site in breach of planning control. No enforcement action was however taken by Merthyr Tydfil County Borough Council (the council) or the Welsh Ministers in relation to this breach for eight-and-a-half months; with the council's reasoning that a Section 73 application to extend extraction timeframes by varying planning conditions as - submitted by MSWL - was under their consideration. The continuing extraction of coal from the Site has not been approved by any democratically elected bodies or persons and - as the planning permission has expired - is **not** subject to any mitigations imposed by planning condition or legal obligation. The coal extraction operations remain wholly unauthorised and unconstrained and despite this, the Council and Welsh Minister's approach adopted to date - in not issuing a stop notice - means MSWL face no consequence for continued unauthorised mining activity, while no deterrent exists to dissuade future operators from acting in the same way.
3. The council has now (belatedly) served an enforcement notice on MSWL to cease ongoing unlawful mining operations at the site. However, MSWL has also appealed the enforcement notice - meaning it will "be of no effect" pending the final determination or the withdrawal of the appeal<sup>2</sup> (NB appeal reference is CAS-02826-H3L1W0).

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<sup>1</sup> With local community members having informed us of further coaling this week (ie Laden coal lorries one behind the other going into the Coal Disposal Point (CDP)/railhead).

<sup>2</sup> [Section 175\(4\) Town and Country Planning Act 1990](#)

4. As you will know, the appeals process is already protracted, with decision making timeframes extending up to 9 months, if not longer. In addition, there are delays in the appeal validation procedure of up to 24 weeks, also<sup>3</sup> – meaning we might be in the position of being without an appeal decision for another year, possibly longer. This in turn means unlawful coal extraction is therefore expected to continue at the site until mid-2024, or even until 2025, unless further enforcement action is taken now, either by the council **or by yourselves**.
5. The course of action taken by MSWL, in appealing the notice, has a range of impacts, not just for them as the operator; but also on those living near the site, the council, and yourselves as Welsh Ministers with planning enforcement powers:
  - For MSWL, the appeal route appears to represent a further attempt to ‘game’ the planning system to its own financial advantage: enabling it to continue to unlawfully extract coal from the site **without** facing criminal sanction, despite the flagrant breach of planning rules. This is because the enforcement notice cannot now “take effect” until the appeal has run its course<sup>4</sup>.
  - For the community, such an apparently overt abuse of the system – especially given the lack of adequate action by the local council - will undoubtedly weaken trust in the planning system’s ability to protect against unlawful and climate-wrecking development; especially as the mine has no legitimacy in the public’s eyes. Failure to issue a stop notice would also run contrary to PPW11, and the Chief Planner’s 2018 Letter’s advice on “proportionate and timely enforcement action to maintain public confidence in the planning system”
  - The council could serve a **stop notice** but has so far failed to do this; The effect of a stop notice is to prohibit activities on land that are in breach of planning rules. Here that would mean an end to the continued coaling at Ffos y Fran.
  - **You – as Welsh Ministers - also have power to serve a stop notice (once you have first consulted with the council). Given the council’s unjustifiable failure to act, it is imperative you take this action immediately to stop any further extraction and to limit any further, irrevocable, harm to the climate. As you will know we are in a worsening climate emergency. The continued coaling will only add to this, to the detriment of current and future generations. It will also send a terrible signal that unlawful coaling is tolerated in Wales, despite your climate policies to the contrary. The climate does not respond to policies, it only responds to their implementation through real-world cuts in emissions.**
6. As public debate around the legitimacy of ongoing coal extraction<sup>5</sup> from the site continues<sup>6</sup>, we note the Coal Action Network’s [legal opinion](#) – as published last week – is clear that the issuing of a stop notice – either by yourselves or the council - is now the **only** logical and reasonable interim remedy that can cease further unlawful coaling at Ffos Y Fran – at least until an appeal decision is either reached or it’s withdrawn. That advice, given by respected barristers James Maurici KC and Toby Fisher, states at para 83 that:

“We consider that the underlying rationale in the *Ardagh Glass* and *Friends of the Earth* cases is that enforcement authorities **must not**, through their inaction pending the determination of a planning application for unauthorised development or an appeal against an enforcement

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<sup>3</sup> Email from Planning and Environment Decisions Wales 28/6/23: “We estimate the delay in completing validation checks and starting new appeals to be in the order of 24 weeks. Please note that this is an average, and some cases have been with us for longer.”

<sup>4</sup>Section 183(3) of the 1990 Act provides that a stop notice may not be served where the related enforcement notice has taken effect. However, where an appeal against the enforcement notice is made (which must be done before the enforcement notice takes effect), section 175(4) suspends the effect of the enforcement notice until the appeal is finally determined or withdrawn.

<sup>5</sup> which relates equally to its transportation off the site via train and HGVs as to its digging out of the ground

<sup>6</sup> BBC: <https://www.bbc.co.uk/news/uk-wales-66040752>; Guardian: <https://www.theguardian.com/commentisfree/2023/jun/01/fossil-fuel-toxic-legacy-coal-wales-mining>;

notice, **deprive themselves of the ability to take effective enforcement action should the development be found to be unacceptable in planning terms**” [our emphasis]

7. In the context of the Friends of the Earth Northern Ireland case referred to above<sup>7</sup>, and relevant to this case, “effective enforcement action” includes consideration of a stop notice to “hold the ring” and “prevent irremediable harm to the environment pending the outcome of an appeal against an enforcement notice”. It is necessary to also hold the ring here. If a house is put up on breach of planning rules that is one thing – it can always be taken down later on. But with the ongoing extraction of coal, the breach can never be remedied: the coal cannot be put back into the ground; the greenhouse gas emissions can never be un-emitted (para 68). The legal opinion also states that such consideration should also take on “greater force” where it is likely to be considered EIA level development; and you will be aware that this was most definitely our view when we submitted a screening direction request to yourselves earlier this year<sup>8</sup>.
8. We support CAN’s legal opinion that any failure to undertake the “urgent and decisive enforcement action” against further possible breaches of planning control would, in this case, constitute a form of “maladministration” and would also set the “terrible precedent” cited in the aforementioned advice - namely:

“It sends a message to all mine operators in Wales that there is no need to bring operations to an end when planning permission expires because the planning system can be ‘gamed’ to enable continued operations for an extended period beyond that date with no consequence.”
9. Circular 24/97<sup>9</sup> includes more information on the importance of stop notices, with section 3.21 even specifying the procedure for issuing such notices when an enforcement appeal is lodged:

*‘...when there is an appeal against the related enforcement notice, the LPA may serve a stop notice at any time during the currency of the enforcement appeal, including any further appeal, under section 289 [1990 Act], to the High Court, unless the enforcement notice was quashed by the Secretary of State on appeal’.*
10. In conclusion, we urge you to consult the council and consider whether to serve a stop notice. In our view following such consideration, there can be only one rational outcome – **the Welsh Government must serve a stop notice without delay**. Only that way will the harms set out in this letter be stopped once and for all.
11. It is clear the council accepts those harms are present, given it has (albeit belatedly) refused planning permission and served an enforcement notice. Unfortunately, however, despite having ample time to do so, the council has failed to take this necessary step.
12. Unless ministers rise to the challenge and serve the stop notice it seems inevitable that the unlawful mining will continue over the coming months and even years. You must urgently consult with the Council and consider, independently, whether to serve a stop notice.

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<sup>7</sup> An Application by Friends of the Earth Limited for Judicial Review [2017] NICA 41

<sup>8</sup> Our Screening Direction Request to Ministers submitted in response to MTCBC’s own Screening Opinion echoed many of the same points made in the CAN/Landmark Legal Opinion on the point of climate change harm potentially being a likely significant effect.

<sup>9</sup> <https://www.gov.wales/enforcing-planning-control-legislative-provisions-and-procedural-requirements-circular-2497>

13. Ministers must act now to protect the climate and to demonstrate to other mineral operators that 'gaming' of the planning system will no longer be tolerated.

Yours sincerely,

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