Sustainable Ball Clay Mineral Extraction

A study of the impact of UK planning and environmental

law and policy

on the extraction of ball clay in the Wareham Basin

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Pauline Laurence Belloni – Sustainable Ball Clay Mineral Extraction

ABSTRACT

The purpose of this research is to analyse the impact planning and environmental law and policy has on access to ball clay mineral resources in the Wareham Basin, Dorset. Ball clay is a non-renewable resource and planning for its sustainable use involves a consideration of current and future exploitation needs to meet demand as well as the protection of the natural environment in which it is extracted. The Wareham basin is unique in that it combines rare deposits of valuable ball clay with endangered species and habitats. The working of ball clay in this area invariably leads to ecological damage to a fragile environment, conversely, the protection of the ecological resource leads to sterilisation of a mineral of national economic importance. It has been argued that the current legislative framework does not strike a fair balance between those conflicting interests.

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1. INTRODUCTION

1.1 Background to the research

The UK benefits from a complex geological makeup and important indigenous mineral resources which have been extracted for centuries. The importance of minerals extraction for economic growth and maintenance of the UK's high standards of living have been highlighted in a number of reports[1]. Their steady supply, whether indigenous or through imports, is essential for the manufacturing, construction, transportation, energy and agricultural sectors of the British economy[2]. Although the UK is rich in minerals, several factors determine whether those resources can be worked. Aside from the availability of minerals, their viable production depends on costs, quality and access[3]. The cost of production is determined by market prices, ease of extraction, processes used, transport requirements as well as the costs associated with obtaining planning permission, licences and consents[4]. The quality of a mineral will determine the price at which it can be sold[5]. Even when the above conditions are satisfied and a mineral is economically viable, restrictions on access may render production difficult[6].

Most minerals in the UK (with the exception of oil, gas, coal, precious metals and marine dredged sand and gravel which are owned by the Crown) are in private ownership. As a consequence, before a mineral can be extracted, the agreement of the minerals owner must be sought and an operator will generally enter into a contract with the land owner. In addition, due to the nature of minerals extraction, a licence may be required and planning and environmental

[1] D E Highley, G R Chapman and K A Bonel, *The Economic importance of minerals to the UK* (British Geological Survey 2004)
[2] Ibid
[3] Ibid, 16
[4] Ibid, 17
[5] Ibid, 18
[6] Ibid, 19

consents must be obtained. Continuity of indigenous supply therefore depends in part on the decisions of Mineral Planning Authorities (MPAs) whose role it is to balance the competing demands of development and environmental protection[7]. The European Union has recently highlighted that a stable and competitive supply of raw materials from EU sources is challenging due to reduced access to resources, public opposition, inconsistent minerals policies and disparate legislative frameworks[8]. Nature conservation law, identified by the minerals industry as a barrier to access to resources, has recently attracted the attention of policy makers concerned with ensuring that regulation is efficient and effective. This research is set within a trend towards de-regulation both in the UK (Cutting Red TApe)[9] and at EU level where the Regulatory Fitness and Performance Programme (REFIT)[10] seeks to identify opportunities to reduce regulatory burdens and simplify existing laws in order to ensure that the objectives of the legislation or policy can be reached in a more effective and efficient way[11]. In November 2011, Mr George Osborne declared in his autumn statement that the government would "make sure that gold-plating of EU rules on things like habitats aren't placing ridiculous costs on British businesses"[12]. Gold-plating means “exceeding the requirements of EU legislation when

[7] Ibid, 19
[8] Commission, ‘Optimizing the Minerals Policy Framework at EU and National Levels by 2020’ <>https://ec.europa.eu/growth/tools-databases/eip-raw-materials/en/content/optimizing-minerals-policy-framework-eu-and-national-levels-2020 accessed 02/09/2016
[9] HM Government, ‘Cutting Red Tape’ <>https://cutting-red- tape.cabinetoffice.gov.uk/ accessed 23 May 2016
[10] Commission, ‘Commission Decision of 19.05.2015 establishing the REFIT platform’, COM (2015) 3261 final
[11] Commission, ‘Better Regulation’, 13 April 2016 <http://ec.europa.eu/smart-regulation/index en.htm> accessed on 23 May 2016.
[12] BBC News, ‘Osborne made ‘unjustified attack' on EU habitat rules’ (22 March 2012) < http://www.bbc.co.uk/news/uk-politics-17479165> accessed on 07 May 2016

transposing Directives into national law"[13]. The UK's Red Tape Challenge led to a review of the Habitats and Wild Birds Directives[14] and changes in the law for major infrastructure projects[15]. Following on from this, the 'cutting red tape' programme, acknowledging the cumulative impacts of environmental and other regulation on the industry, started to engage in a review of the Minerals Sector[16].However, this appears to have stalled and the industry has renewed calls for the government to commit to an efficient mineral planning system[17].

[13] Commission, 'Review of the "Small Business Act" for Europe' COM (2011) 78 final
[14] Department for Environment, Food and Rural Affairs, *Report of the Habitats and Wild Birds Directives Implementation Review* (PB 13724, 2012)
[15] Growth and Infrastructure Act 2013
[16] HM Government, 'Cutting Red Tape, Sector Review, Mineral Extraction' < https://cutting-red-tape.cabinetoffice.gov.uk/mineral-extraction/> accessed on 23 May 2016
[17] https://www.politicshome.com/news/uk/economy/construction-industry/opinion/mineral-products-association/88765/weakening-mineral accessed on 13 January 2017

1.2. Methodology

The purpose of this research is to analyse how the European and English legal order affects the subjects of ball clay mineral extraction on the one hand and nature conservation on the other in a specific area of the UK. As such, the choice of methodology needs to reflect the project's multi-levelled, multidisciplinary and practical approach. Due to the complexity of the issues and multi-disciplinary nature of the research, whilst rule-based reasoning[18], which applies legal rules to a set of facts, is used to evaluate the application of statutory provisions and case law to ball clay mineral extraction and nature conservation, the research employs various other methodologies which departs from the purist black letter law approach. This is because the aim of the research is to evaluate the current framework in relation to a case study which calls for multi-disciplinary approaches to law. The traditional black letter law approach concentrates on an analysis of legal rules from primary sources such as statute and case law. The main objective of this approach is to formulate a set of rules deducted from primary sources (which can also be supplemented by opinion expressed in academic journals). Although this methodology is used at times in the dissertation, its inherent weakness is that it overlooks the scientific, sociological and political aspects of the law 'in action'. Academics have for some time called for the study of law to be more interdisciplinary[19], such as Oliver Wendell Holmes, Jr., who once stated:" *for the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics"*[20]*.* As such, the research takes account of published sociological, economic and scientific data in its legal

[18] R.K. Neumann, Jr, *Legal reasoning and Legal Writing: Structure, Strategy, and Style* (6th Ed Wolters Kluwer, 2009)

[19] Jack M. Balkin & Sanford Levinson, 'Law and the Humanities: an uneasy relationship' (2006) 18 YALE J.L & Human 155

[20] O. W. Holmes. Jr., 'The Path of the Law' (1897) 10 Harv. L. Rev 457, 469

analysis and it is also recognised that it makes assumptions based on this data. Where possible, weaknesses in those assumptions are highlighted. This research seeks to gain an understanding of how the law impacts on the minerals industry on the one hand and conservation interests on the other, it encompasses sociological and scientific approaches to legal reasoning which means that providing a single definition of the nature and scope of the research can be challenging. For example, whereas black letter law methodology is used when analysing statute and case law applicable to the subject of the research; sociological, political and scientific approaches are used when applying the analysis to the case study. In addition, policy based reasoning is applied when formulating arguments and recommendations based on the findings of the research.

This intertwining of black letter law methodology and other approaches to legal research is at the root of the writer's preference for predominantly using Environmental Law Methodology (ELM), which allows non-legal and external factors into legal reasoning[21] in preference to a positivist theory-based method. Environmental legal academic research draws upon economics, sociology, politics, science and other non-legal fields, this is particularly the case when, as with this research, it is directly relevant to industry, public authorities and government. Often, the evidential base for environmental cases includes documents written by scientists, technical experts, policy makers etc. and interdisciplinary research allows for broader perspectives, for example, drawing on scientific and economic research when arguing for government intervention in a particular environmental problem and developing environmental or planning policy[22]. Whilst ELM is used as a preferred research method, the writer

[21] Johannsdottir, A, *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law* (Uppsala University, Faculty of Law, 2009) 329

[22] D. Owen, C. Noblet, 'Interdisciplinary Research and Environmental Law' (2015) 41

acknowledges that reliance is placed on published data and that barriers exist in relation to the lack of commonality in language between different disciplines[23].

The first part of the research involves a desk-based study and black letter law analysis of EU and domestic legislation, case-law, policy documents and academic opinion applicable to minerals extraction and nature conservation. The research includes a review and synthesis of opinions issued by the European Commission under article 6.4 of the Habitats Directive. The research used resources at Bournemouth University's library and literature was searched for using Lexis Library, Westlaw UK, Ebsco ebooks and Europa.eu databases. Furthermore, policy documents and reports were found using web based searches. When analysing the legal framework, this research is not concerned with providing a textbook explanation of mineral planning procedures. The aim is to focus on the environmental constraints which may preclude access to the resource and establish whether such constraints can be justified under the principle of sustainable development and/or the national legal and policy framework.

For the second part of the research, the Wareham Basin has been selected as a case study due to the extensive nature conservation designations which surround existing ball clay mineral sites and lie directly above valuable resources which the industry aspires to work in the future. There are currently five working pits in the area, of which three were selected to conduct an analysis of past planning applications and environmental assessments. To this end, the author applies ELM to “demonstrate how law and legal systems - man-made linear instruments and structures - influence and affect the environment and its

Ecology L Q 887, 894
[23] Ibid, 896

components"[24]. In that sense, the author uses ELM to demonstrate that there is an inherent imbalance between economic and environmental objectives within the confines of and the vicinity of designated sites. The question that has to be answered is whether UK planning law and policy has gold-plated the Habitats Directive in removing sustainable development as a guiding principle for decision making when designated areas are concerned. This research does not seek to present a pro-development or pro-environment view as it can be argued, from either side of the fence, that both rare ball clay minerals and rare habitats and species should be preserved. Rather, the research seeks to demonstrate that, when two competing resources come head to head, as is the case in the Wareham Basin, the law as it stands fails to articulate a coherent framework which minimises conflict and allows both to co-exist. This theory is proved using Holme Heath Triangle as a test case. The test case has been selected due to its proximity to existing ball clay works, designated sites and presence of valuable grades of ball clay.

The synthesis of the European Commission's Opinions under article 6.4 and the analysis of past planning applications, employs a reasoning by analogy method to find similarities between the projects reviewed by the Commission, the planning applications approved by the MPA in the past and the test case of Holme Health Triangle. In applying this methodology, the writer acknowledges that the similarity of the facts of two cases is a question of degree[25]. Therefore, a balanced argument is also formulated by distinguishing cases. This method involves distinguishing facts of a precedent case from those of the case study.

Hypothesis concerning the test case and future planning applications are also formulated on the basis of general principles of law developed by the courts. In

[24] Johannsdottir, A, 2009, 57
[25] E. Scott Fruehwald, *Think Like a Lawyer: Legal Reasoning for law Students and Business Professionals* (American Bar Association, 2014)

order to reach conclusions as to the likely outcome of future applications, inductive reasoning is used. This methodology has the advantage of deriving general conclusions from specific findings without ascertaining their certainty. The conclusions reached through the process of inductive reasoning are therefore described as probable results based on the evidence.

Data collection focusses on secondary data from already published sources comprising planning documents obtained via the planning portal, official governmental and European reports and guidance, Ecological data published by Natural England, the Joint Nature Conservation Committee (JNCC), the International Union for Conservation of Nature (IUCN) red list of threatened species and NBN gateway, European Commission Opinions, academic journals, industry publications, public corporate data and documents provided by Imerys (the mineral rights owner for the selected sites). The analysis of past planning applications, environmental assessments and European Commission Opinions seeks to:

a. evaluate the local application of the European and national legal and policy framework and draw conclusions using inductive reasoning;
b. identify the environmental impacts of ball clay mineral extraction on selected habitats and species for the case study area;
c. using the above, provide a set of criteria which can be applied to the Holme Heath Triangle test case;
d. demonstrate that there is an inherent imbalance within the legal framework which could lead to the sterilization of ball clay resources; and
e. identify and suggest recommendations for resolving conflicts between conservation and minerals safeguarding interests.

1.3. Literature review

Analysis of the conflict between economic sustainability of ball clay mineral extraction and conservation objectives has been carried out by the industry[26]. It was then argued that the conservation case is flawed and that there is evidence that extraction can enhance conservation objectives[27]. Further, it was concluded that the planning authority was reluctant to adjust its policy[28]. However, the data relied upon dates from 1986 for the conservation of heathlands and ranges from 1995 to 2002, for economic and geological data.

Since the paper was published, there have been marked changes in planning policy and environmental law[29]. Also, the concept of 'mineral safeguarding' has become more prominent in recent years. The research project will therefore seek to update the current literature through analysis of the European, National and local planning and environmental policy framework. S.E kesler and A.C Simon emphasize the increasing role environmental factors and related environmental costs play on access to minerals[30]. Wrighton, Bee and Mankelow have provided a useful review of the development and implementation of mineral safeguarding policies in the UK[31]. In addition, the work completed so far on the Minatura 2020 project provides background information concerning approaches to Minerals Safeguarding. The Mineral Products Association

[26] D.E Highley, C.R. Bristow, J.F. Cowley and N.R. Webb, *Sustainable development issues for mineral extraction - the Wareham Basin of East Dorset* (CR/01/137N, British Geological Survey, 2002) and C.R. Bristow, D.E. Highley, C.M. Barton, J.F. Cowley, E.C. Freshney and N.R. Webb, *Mineral Resources of East Dorset* (CR/01/138N, British Geological Survey, 2002)
[27] Ibid
[28] Ibid

[29] Planning and Compulsory Purchase Act 2004, Natural Environmental and Rural Communities Act 2006, Planning Act 2008, Localism Act 2011, Growth and Infrastructure Act 2013, Conservation of Habitats and Species Regulations 2010, Environmental Damage Regulations 2015, National Planning Policy Framework (NPPF).
[30] S. E Kesler, A.C. Simon, *Mineral Resources, Economics and the Environment* (Cambridge University Press, 2015), 1.2.3 and 1.2.4
[31] See n13

recently published a report[32] which provides economic data highlighting the significance of the mineral extraction industry. The sources outlined above are predominantly industry led, as such, they provide data in support of the industry.

There is a wealth of academic opinion which analyses the principle of sustainable development from a legal perspective[33]. The principle has also been analysed in relation to the mining and minerals sectors[34]. However, there is very little literature which analyses the legal application of the principle to ball clay mineral extraction. The research reviews the literature and analyses the concept's impact on planning for sustainable ball clay mineral extraction in the Wareham Basin.

The Wareham Basin is affected by extensive national, European and international nature conservation designations including Special Areas of Conservation (SAC), Special Protected Areas (SPA), Ramsar, Special Sites of Scientific Importance (SSSI), Areas of Outstanding Natural Beauty (AONB). Provisions of the Habitats Directive have been extensively analysed by G. Jones QC[35], and others[36]. For J. Jans, "many accusations of environmental over-regulation are mistaken"[37], however, the study focusses on a high level

[32] Mineral Products Association, 'The UK Mineral Extraction Industry' (CBI 2016)
[33] W. Beckerman, 'Sustainable Development: Is it a useful concept?' (1994) 3 Environmental Values 191; N De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP Oxford , 2002), M.Redcliff, 'Sustainable development (1987-2005): an oxymoron comes of age' (2005) 13 Sustainable Development 212; A. Ross *Sustainable Development Law in the UK From rhetoric to reality?* (Routledge, 2012), V. Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23 EJIL 377.
[34] B. Kommadath, 'A Fuzzy Logic Based Approach to Assess Sustainable Development of the Mining and Minerals Sector' (2012) 20 Sustainable Development 386, M. Ericsson & P.Noras, 'Minerals-based sustainable development — One viable alternative' (2005) 150 P. Berg Huettenmaenn Monatsh 424, G.D. Corder, 'Insights from case studies into sustainable design approaches in the minerals industry' (2015) 76 Minerals Engineering 47.
[35] P. Stookes, 'The Habitats Directive, Nature and Law' in G.Jones QC, (ed), *The Habitats Directive, A Developer's Obstacle Course*? (Hart Publishing, 2012)
[36] C-H Born, A.Cliquet, H.Schoukens, D. Misonne and G. Van Hoorick, *The Habitats Directive in its EU Environmental Law Context* (2015, Routledge)
[37] Jan H Jans (ed) *The European Convention and the Future of European Environmental Law*; *Proceedings of the Avosetta Group of European Environmental*

analysis of Member States' approach to all EU Directives rather than specific implementing regulations or planning policies. The inherent conflict between habitat conservation on the one hand and the pursuit of projects on the other has been highlighted by Stookes[38] and discussed further by Waite[39] who concludes that the equilibrium principle requires that any environmental laws which do not achieve it should be changed to ensure equilibrium. For R. Clutten and I. Tafur[40], conservation interests can easily be overridden. Ludwig Kramer provides a useful overview of the Commission's Opinions in relation to the application of Article 6.4 of the Directive[41]. Similarly, The EC study on Article 6.3 permiting procedure of the Habitats Directive conducted by K. Sundseth and P. Roth contains references to some of the opinions. Whilst the above sources provide insights and analysis of the provisions of the Directive, EU Commission Opinions and case law of the CJEU, there is no analysis of the implications of the Directive and the article 6.4 derogation for the ball clay extraction industry.The framework for designation and management of SACs and SPAs in the UK is set out in the Conservation of Habitats and Species Regulations[42]. The Government's implementation review of the Directive concluded that in most cases the Directive was striking the right balance between conservation and economic objectives, however, its focus is on reducing delays for national infrastructure projects[43].

Lawyers (Europa Law Publishing 2003), 21

[38] P. Stookes, 2012

[39] A. Waite, 'The Principle of Equilibrium in Environmental Law: The Example of the Habitats Directive' in G.Jones QC (ed) *The Habitats Directive, A Developer's Obstacle Course?* (Hart Publishing, 2012)

[40] R. Clutten, I. Tafur, 'Are imperative Reasons Imperiling the Habitats Directive? An assessment of Article 6(4)' in G.Jones QC (ed) *The Habitats Directive, A Developer's Obstacle Course?* (Hart Publishing, 2012)

[41] L.Kramer, 'The European Commission's Opinions under Artcile 6(4) of the Habitats Directive' (2009) 21 JEL 59

[42] The Conservation of Habitats and Species Regulations 2010,

[43] HM Government, 'Report of the Habitats and Wild Birds Directives Implementation Review', March 2012

In relation to SSSIs, the Joint Nature Conservation Committee (JNCC) publishes guidelines for their selection. The current guidelines for lowland heathland habitats were published in 1989 by the Nature Conservancy Council[44] and based on literature and studies dated from 1936 to 1986. The scientific data underpinning site selection and conservation objectives may therefore in some circumstances be out of date. The research therefore draws from other sources such as the IUCN red list of threatened species and NBN gateway database to complement the guidelines. It is important to note however, that all guidelines are currently being updated.

1.4. Outline

The dissertation consists of three main parts. The first analyses the legal and policy framework applicable to ball clay mineral extraction concentrating on planning law and policy, sustainable development and conservation law (mainly the Habitats Directive). The second part sets out the local development framework, conservation interests and analyses past planning applications for selected mineral extraction sites in the Wareham Basin. The third part presents a case study, “Holme Heath”, which is tested against the findings of the research.

[44] http://jncc.defra.gov.uk/page-2303

2. PART I: ANALYSIS OF MINERAL EXTRACTION PLANNING LAW AND POLICY

2.1. Sustainable development

Sustainable Development originated from the 1960's in response to the environmental impacts of population growth and industrialisation[45]. The most widely accepted[46] definition of the principle is set out in the Brundtland report as development which "meets the needs of the present without compromising the ability of future generations to meet their own needs"[47]. Despite its apparent simplicity, Brundtland's formulation is not without difficulties as needs change over time and are difficult to identify. The assumption is made that societies are pursuing the same social and cultural goals[48] and it does not indicate how to resolve the conflicts which arise when balancing needs against resource conservation[49]. The Brundtland definition forms the basis of an ecological interpretation of sustainable development. However, sustainable development has also been articulated as a principle which seeks to reconcile the three pillars of economic development, social welfare and environmental protection. For example, the three pillar approach advocating the integration of environmental concerns into development activities is now at the core of the United Nations Conference on Environment and Development (UNCED)[50]. The United Nations General Assembly's 2030 Agenda for Sustainable Development[51] re-iterates a

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[45] A. Grainger, 'Introduction' in M.Purvis & A.Grainger (eds), *Exploring Sustainable Development: Geographical Perspective (*Earthscan, 2004) 3
[46] A. Ross, *Sustainable Development Law in the UK* (Earthscan, 2012) 180
[47] UNGA, A/42/427 Annex, 'Our Common Future' (Report of the World Commission on Environment and Development, 1987), [27]
[48] M. Redcliff, 'Sustainable Development (1987-2005): An Oxymoron Comes of Age' (2005)13 Sust Dev, 213 published online at <www.interscience.wiley.com>
[49] A. Ross, 2012, 180
[50] UNGA, A/RES/66/288, 'The future we want', Resolution adopted by the General Assembly on 27 July 2012 Rio Declaration on Environment and Development, Principle 3, <http://www.un.org/ga/search/view doc.asp?symbol=A/RES/66/288&Lang=E> accessed on 03 September 2016

commitment to “achieving sustainable development in its three dimensions - economic, social and environmental - in a balanced and integrated manner”[52]. As a soft law instrument, the resolution has no legal binding force and the status of the principle in customary international law is unclear. The malleability of the principle was illustrated in the *Gabcikovo-nagymaros* case[53] where both parties sought to rely on the principle to justify opposed positions, one based on environment, the other on development[54]. Although academic opinion on the issue is divided, the evidence from case law[55] tends to support Lowe's contention that sustainable development has not attained the status of a normative term capable of legal effects[56]. Likewise, Fievet considers that it is a political rather than a legal objective[57]. Sustainable development has been referred to by the International Court of Justice (ICJ) as a concept rather than a rule of law[58]. Although opinion is divided on the subject of whether the principle is capable of legal effect[59], it has to be noted that a principle of law differs from a legal rule in that it is not applicable in a strict fashion but must be taken into account as a guide for decision making[60].The 2030 Agenda for Sustainable Development reminds us that the principle's targets are

[51] UNGA, ‘ Transforming our world: The 2030 Agenda for Sustainable Development', Resolution adopted by the General Assembly on 25 September 2015, seventieth session, A/RES/70/1, 21 October 2015
[52] Ibid, 3

[53] *Gabcikovo-nagymaros Project (Hungary v Slovakia)*, Separate Opinion of vice-president Weeramantry [1997] ICJ rep 88
[54] P.Sands, ‘International Courts and the Application of the Concept of Sustainable Development' (1999) 3 Max Planck Yearbook of United Nations Law 389, 393-394
[55] *Gabcikovo-Nagymaros Project* (Hungary v Slovakia), Judgment [1997] ICJ Reports 7, at para. 140 *; Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment [2010] ICJ Rep 14
[56] V.Lowe, ‘Sustainable Development and Unsustainable Arguments' in Boyle & Freestone (eds), *International law and Sustainable Development: Past achievements and Future Challenges* (Oxford University Press, 1999) 24-25
[57] Fievet, ‘Reflexions sur le concept de developpement durable: pretentions economiques, principes strategiques et protection des droits fondamentaux', (RBDI 2001) 128, 143.
[58] *Gabcikovo-nagymaros Project (Hungary v Slovakia)*, Judgment [1997] ICJ Reports 7, 78: “*This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”*
[59] N. Schrijver & F. Weiss, ‘introducing the book’; V. Barrat, 398;
[60] R. Dworkin, *taking rights Seriously* (Harvard University Press, 1978)

aspirational, with each Government deciding how it should be incorporated into national planning processes, policies and strategies[61]. As Barrat points out, "the primary enforcers of international norms remain the states themselves"[62].

From a European law perspective, the Lisbon Treaty introduced a legal objective to "work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment"[63]. Thus, sustainable development is legally enshrined in the Treaty, and although it is not defined, the case law of the European Court of Justice (CJEU) refers to the objectives of the treaty and elements of sustainable development[64]. Whereas "European Union policy on the environment seeks to ensure a high level of protection in accordance with Article 191(2) TFEU"[65], sustainable development does not mean that: *"the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the community (...) On the contrary, it emphasizes the necessary balance between various interests which sometimes clash, but which must be reconciled"*[66].

To reconcile the diverse interests in the context of sustainable development,

[61] UNGA, 'Transforming our world: the 2030 Agenda for Sustainable Development'', A/RES/70/1,13
[62] V. Barrat, 398
[63] Article 3, TEU
[64] C-371/98 *R v Secretary of State for the Environment, Transport and the Regions ex parte First Corporate Shipping Ltd* [2000] ECR I-9235; C-284/95 *Safety Hi-Tech Srl* [1998] ECR I-4301; C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee & Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405;
[65] C-344/04 *IATA and ELFAA* [2006] ECR I-403, para 39; C-366/10 *Air Transport Association of America, American Airlines Inc, Continental Airlines Inc, United Airlines Inc v Secretary of State for Energy and Climate Change* [2011] ECR 0, para 128
[66] C-371/98 *R v Secretary of State for the Environment, Transport and the Regions ex parte First Corporate Shipping Ltd* [2000] ECR I-9235, Opinion of Advocate General Leger delivered on 7 March 2000, para 54

Advocate General Leger [67] explains that the Treaty on European Union introduced the principle of 'integration'. Integration, which has been established as a legally binding principle of EU law[68], requires the Union legislature "to conform with environmental protection requirements in the definition and implementation of other policies and actions"[69]. This means that to fulfil the requirements of sustainable development, industry should make a contribution by modifying harmful practices to take account of environmental concerns[70]. When planning activities, Integration therefore requires an assessment of whether the maintenance of human activity in a given area can be reconciled with the objective of conservation[71]. For some, the EU's approach provides a strong legal basis for promoting the principle whilst weakening "*true sustainable development (which) depends on maintaining the ecological base, elevating environmental protection over economic and social concerns*" [72] . Notwithstanding the definition adopted in the EU Treaty, at policy level, it is the Brundtland definition which has been adopted by the European Union in its strategy for sustainable development [73], making the EU's approach rather inconsistent and rendering interpretation of the principle by the CJEU difficult[74]. It is therefore not surprising that the consensus seems to be that whilst, for example, the precautionary principle and the principle of integration and are legally binding, that of sustainable development is not [75]. The relationship

[67] Ibid, 56
[68] C-62/88 *Greece v Council* [1990] ECR I-01527, para 20
[69] Ibid, 57
[70] Ibid
[71] Ibid, 58

[72] F.Aldson, 'EU law and sustainability in focus: will the Lisbon Treaty lead to 'the sustainable development of Europe?' (2011) 23 ELM 284
[73] Council of the European Union, 'Renewed EU Sustainable Development Strategy', Brussels, 26 June 2006, DOC 10917/06 available at <ec.europa.eu/environment/eussd/>
[74] F.Aldson, 292-293

[75] Jan H Jans (ed) *The European Convention and the Future of European Environmental Law. Proceedings of the Avosetta Group of European Environmental Lawyers* (Europa Law Publishing, 2003), 21

between European law and international law is complex and cannot be fully addressed here, save to explain that the EU benefits from separate legal personality[76] and can therefore enter into international agreements[77]. Together with principles of customary law, these agreements become binding on EU institutions and Member States[78]. Once principles such as those set out above have been recognised as legally binding on an international and EU level, through agreements or through customary law, the same principles become legally binding on the UK. The consensus is that Sustainable Development, however articulated at EU and international level, is not legally binding on the UK through those channels.

In England, the principle of sustainable development has acquired legal footing in section 39 (2) of the Planning and Compulsory Purchase Act 2004 where a planning authority "*must exercise the function with the objective of contributing to the achievement of sustainable development"*[79]*.* This legal duty applies where a planning authority or decision maker exercises any function in relation to local development documents[80]. Such authorities include local minerals and waste development schemes[81], such as the MPA. The MPA's legal duty to contribute to the achievement of sustainable development

[76] TEU, Art 47
[77] TFEU, Art 216; C 21-24/72*, International Fruit Co NV v Produktschap voor Groenren en Fruit (No 3)* [1972] ECR I-1219
[78] TFEU, Art 216 (2)7Q
[79] Planning and Compulsory Purchase Act 2004, s39 (2)
[80] Ibid, s 39 (1) (b)
[81] Ibid s 38 (3) (b), s 39 (1) (b) & s 16

means that it *"must have regard to national policies and advice contained in guidance issued by the Secretary of State"*[82].

The guidance and advice referred to above is limited to that issued in respect of development documents[83], which includes the National Planning Policy Framework (NPPF) and Planning Practice Guidance (PPG). It is important to note that the legal duty to contribute to the achievement of sustainable development only applies to an authority's plan-making function and not to its decision-making function[84]. This distinction is of significant importance for the ball clay industry in the Wareham Basin if it is to argue that a particular planning decision is flawed on the basis that it does not contribute to the achievement of sustainable development. Such arguments are likely to fail, unless it can be shown that decisions have been made on the basis of plans which do not contribute to the achievement of the principle. Even so, the lack of definition of the principle makes any such challenges difficult.

However, although the statutory duty only applies to an authority's plan making function, the NPPF applies the presumption in favour of sustainable development to both functions. This is because the NPPF applies as guidance in drawing up plans and as a material consideration in determining applications[85]. The effect is that the presumption is stronger in relation to plan-making and may be subject to judicial review (due to the statutory footing), whereas the absence of a legal duty to contribute to the achievement of sustainable development when determining applications makes any application for judicial review on the ground that an authority failed to apply the principle substantially weak. Conversely the principle of sustainable development has not been discussed in

[82] Ibid, s39 (3) (a)
[83] Ibid s39 (3) (a) & s39 (1) (a) & (b)
[84] Ibid s39 (1) (b)
[85] NPPF para 13

depth by the Courts[86].

The legislation does not define sustainable development, the implication is that the absence of a definition introduces a lack of consistency and continuity which risks resulting in confusion for those implementing the legislation and those subject to it[87]. Another criticism associated with the use of an imprecise term in legislation is that a public body may enjoy too much discretion as a result, making challenging decisions difficult[88]. Although the principle of sustainable development is defined in the NPPF, the courts have ruled that ministerial statements are not equal to the will of Parliament when it comes to statutory interpretation[89]. Instead of providing a definition, the Planning and Compulsory Purchase Act 2004 requires authorities to have regard to guidance issued by the Secretary of State. Referring to guidance in this way ensures that "*the content of the guidance itself then acts to limit the public body's discretion*"[90]. But it also acts as a significant hurdle to bringing a judicial review claim. The fact remains that the general consensus is that sustainable development has not attained the status of an enforceable legal principle[91] in England, and it should be noted that other jurisdictions have adopted a different approach by defining sustainable development in statute[92]. In England, a legal challenge on the basis that a decision does not adequately balance the three pillars of sustainable development is unlikely to succeed. The statute does not give a right of appeal for an MPA's failure to meet its sustainable development duty[93]. The only

[86] R. Moules, *Environmental Judicial Review* (Hart Publishing, 2011), 63
[87] A.Ross, 181
[88] Ibid
[89] *Wilso v First County Trust (No2)* [2003] UKHL 40
[90] A.Ross, 184
[91] De Sadeleer, 311

[92] Well-being of Future generations (Wales) Act 2015, s 2: "In this Act, "*sustainable development" means the process of improving the economic, social, environmental and cultural well-being of Wales by taking action, in accordance with the sustainable development principle (see section 5), aimed at achieving the well-being goals (see section 4)*."
[93] A. Ross, 198

recourse is then under the normal rules for judicial review.

In relation to ball clay mineral extraction, the statute which this paper is concerned with is primarily the PCPA 2004. The authority's discretion in terms of contributing to the achievement of sustainable development which is contained in the act is limited to the authority's development planning function, but does not cover its development control function[94].There is therefore a disconnect between the legislation and the NPPF: paragraph 14 of the latter clearly applies the presumption to decision-taking (development control function) as well as to the plan making function[95]. Having provided an overview of the concept of sustainable development and analysed its relationship with planning functions in England, we now turn to a more detailed analysis o English law and policy.

2.2. English planning law and policy

In England, the statutory rules which govern the determination of planning applications are set out in Section 70 (2) of the Town and Country Planning Act 1990 and Section 38 (6) of the Planning and Compulsory Purchase Act 2004. The modern regulation of mineral working through the planning system follows from the report of the Stevens Committee on Planning Control over Mineral Working in 1976. The report led to the enactment of the Town and Country Planning (Minerals) Act 1981 (now mainly incorporated in the Town and Country Planning Act 1990 referred to above) which established ‘mineral planning authorities' (MPAs). MPAs are responsible for the grant of planning permission for the winning and working of minerals, including the imposition of restoration and aftercare conditions, revocation or modification of planning permission and payment of compensation. Domestic mineral planning law has also been impacted by European nature conservation legislation, implemented by the

[94] PCPA 2004, 39 (4); A. Ross, 189
[95] NPPF, para 14

Conservation of Habitats and Species Regulations which amend the Town and Country Planning Act 1990 to ensure that any planning permissions[96] are subject to the provisions of the Habitats and Birds Directives.

The legislation provides that a decision-maker must have regards to the provisions of the Local Plan, and to any other material considerations. In practice, this means that the determination must be made in accordance with the provisions of the Local Plan unless material considerations indicate otherwise[97]. The National Planning Policy Framework (NPPF) [98] is a material consideration[99] when determining a planning application, but the starting point of decision making, by statute, is the Local Plan. MPAs are therefore not legally bound by the NPPF, which does not have the force of statutes, the only statutory obligation being to have regard to it as a material consideration. There is also a statutory obligation on MPAs to have regard to the NPPF when preparing Mineral Plans, which form part of the Local Plan. Local Plans are also subject to independent scrutiny by the Planning Inspectorate[100]. On reviewing the Local Plan, the Planning Inspectorate considers whether it is compliant with legal requirements and consistent with national policy (including the NPPF)[101]. As such, the provisions of the NPPF are also applied indirectly, at project level, through the Local Plan: the legal obligation on the MPA is to have regard to the provisions of the NPPF when preparing the Local Plan and subsequently to have regard to the Local Plan, as a starting point, and to any other material considerations when deciding on a planning application for a particular project.

[96] Including Applications and grants of planning permission, development orders, and other consents

[97] M. Dawson, "Power to the Local Plan" (July 2012) Estates Gazette, 78-79, available at: http://www.39essex.com/docs/articles/me-estatesgazettejuly12.pdf accessed on 12 November 2016.

[98] Communities and Local Government, National Planning Policy Framework, March 2012 (NPPF).

[99] NPPF para 196

[100] Section 20, Planning and Compulsory Purchase Act 2004

[101] The Planning Inspectorate, Bournemouth, Dorset and Poole Minerals Strategy, Inspector's Report, December 2013, page 2.

The NPPF sets out the Government's planning policies and how they are expected to be applied[102]. Where there is a conflict between national policy and local plan policy, the Local Plan forms part of the statutory development plan so that national policy will rarely have primacy over local plan policy. As long as the decision maker has regard to all the relevant policies and has carried out a balancing exercise of the issues, the courts will be reluctant to overturn that decision[103], particularly when such a claim would be akin to evaluating the merits of a decision which involves technical environmental [104] issues[104].

The application of the principle of sustainable development to mineral planning depends on the provisions of the NPPF, the Local Plan, national and local policy guidance. The House of Commons has recently confirmed that the definition of sustainable development "should stand on its own as a beacon informing the rest of the NPPF"[105]. At a high level, the NPPF states that "*the purpose of the planning system is to contribute to the achievement of*

[102] NPPF, paragraph 1.
[103] *Sea & Land Power & Energy Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (Admin)
[104] R. Moules, *Environmental Judicial Review* (Hart Publishing, 2011), 217: "*environmental decision-making often involves balancing difficult social, economic and scientific considerations that the courts are not institutionally or constitutionally equipped to evaluate*"
[105] Communities and Local Government Committee, *Operation of the National Planning Policy Framework* (Fourth Report of Session, HC 2014-15)

sustainable development"[107] and explains that "*there are three dimensions to sustainable development*"[108] which demand that the planning system performs an economic role which contributes to building a strong, responsive and competitive economy; a social role which supports the development of strong, vibrant and healthy communities; and an environmental role which contributes to improving biodiversity, uses natural resources prudently and moves to a low carbon economy. Further detail on how the principle is to be applied in practice is contained in the policies set out in paragraphs 18 to 219 of the NPPF. In relation to ball clay mineral extraction, chapter 11 entitled "Conserving and enhancing the natural environment" and chapter 13 on "Facilitating the sustainable use of minerals" are the most relevant.

At the heart of the NPPF is a presumption in favour of sustainable development which attempts to address the interconnected challenges of economic development, social wellbeing and environmental protection[109]. Social wellbeing applied to the extraction of ball clay includes the idea that the industry generates employment locally and further afield in associated markets. In addition, there is a strong cultural mining heritage on the Isle of Purbeck which creates a distinct sense of place and has the capacity to generate revenue for the tourism industry. However, the same industry is heavily reliant on the Isle of Purbeck's natural environment, in particular, on the presence of rare lowland heathland habitats and associated species. In addition, social wellbeing may be affected by the health risks associated with dust and noise generated from the extraction of the mineral. The economic importance, social benefits or detriments, environmental impacts or gains, landscape character enhancements or detriments are all impacts which a decision maker has to carefully balance when

[107] NPPF, paragraph 6

[108] Ibid, paragraph 7.

assessing applications.

For decision making at project level, the presumption in favour of sustainable development means that if a development proposal accords with the development plan, it should be approved without delay[110], unless material considerations indicate otherwise[111]. The development plan is therefore the starting point for decision making as a matter of law. The Court of Appeal has confirmed that the presumption in favour of sustainable development should only be treated as a material consideration in the limited circumstances set out in paragraph 14 of the NPPF[112]. This recent decision has brought some clarity to the interpretation and operation of the presumption and goes against an earlier decision in the *Wychavon District Council*[113] case which ruled that the presumption in favour of sustainable development should be treated as a "golden thread" running through the NPPF. The Court of Appeal's decision narrows the application of the presumption in favour of sustainable development and the implications for the ball clay minerals industry are detailed further when discussing the case study. In summary, if a local authority has an up-to-date local plan with which a development proposal does not comply, a reverse presumption - that the development should be refused - will apply. Applicants will need to present a compelling case for other material considerations to justify a decision otherwise than in accordance with the development. In the view of the author, this latest decision is in accordance with the statutory footing of the Local Plan, which,

[110] NPPF, para 14

[110] Section 38(6) of the Planning and Compulsory Purchase Act 2004 and Section 70(2) of the Town and Country Planning Act 1990

[112] *Barwood Strategic Land II LLP v (1) East Staffordshire Borough Council (2) Secretary of State for Communities and Local Government* [2017] EWCA Civ 893

[113] *Wychavon District Council v SSCLG* [2016] EWHC 592 (Admin)

having usually gone through extensive local consultation is best placed as the primary source for local decision making.

Material considerations which may be relevant to a decision include local, strategic and national policies, emerging new plans, pre-application consultation, Government and Planning Inspectorate circulars, statutory instruments, orders and guidance, previous appeal decisions, case law, highway issues, noise and disturbance, dust, adverse impacts on nature conservation[114]. As the current permitted ball clay sites in the Wareham Basin become exhausted, meeting society's needs may come at greater environmental cost: the area is subject to extensive nature conservation designations and it is likely that future applications will be made to extract ball clay in protected areas which do not accord with the Local Plan.

In addition to the narrow interpretation of the presumption in favour of sustainable development, although as a whole, "*the purpose of the planning system is to contribute to the achievement of sustainable development*"[115], the presumption does not apply where development requires an appropriate assessment under the Birds or Habitats Directives[116], that is when the development is proposed on or in the vicinity of an SPA or SAC. In addition, paragraph 118 of the NPPF affords potential SPAs, SACs and listed or proposed Ramsar sites the same level of protection as the designated sites[117] therefore widening the protection envisaged by the Directives. Appropriate Assessments (AA) should be distinguished from Environmental Impact Assessments (EIA) and Strategic Environmental Assessments (SEA) which have a broader remit. EIA is a process to identify and predict the potential

[114] Planning Aid England, Material Planning Considerations < http://www.rtpi.org.uk/media/686895/Material-Planning-Considerations.pdf> accessed on 6 May 2016

[115] NPPF

[116] NPPF, para 119

[117] NPPF, para 118

impact of major development proposals on the environment and human health, at project level, in the context of town and country planning in England, It is governed by the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and the Regulations apply to development which is given planning permission under Part III of the Town and Country Planning Act 1990. The Regulations apply the amended EU Environmental Impact Assessment Directive[118]. An EIA is usually required for ball clay mineral extraction in the Wareham Basin due to the particularly sensitive nature of the location. The conclusion of an EIA is the Environmental Statement (ES) which sets out the information about the development and informs decision makers about the environmental impacts of the proposed project. This usually includes impacts on population and human health, biodiversity, geology, hydrology, air quality and climate, landscape, archaeology, waste management and architectural heritage. A project may therefore be refused planning permission due to other significant environmental effects which are of a different nature to those identified in an AA. I addition to EIA, SEA covers strategic plans and programmes rather than specific projects. The requirements for SEAs are set out in The Strategic Environmental Assessment Directive[119] and implemented through the Environmental Assessment of Plans and Programmes Regulations 2004[120]. Where the Directive applies there are some specific requirements that must be complied with and which, in the case of Local Plans, should be addressed as an integral part of a sustainability appraisal process. SEAs are undertaken to inform decision making on adoption of Mineral Planning Policies and Local Development Plans. Sustainability appraisals inform the development

[118] Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L 124

[119] Directive 2001/42/EC of the European Parliament and the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment L 197/30 OJ L 197

[120] The Environmental Assessment of Plans and Programmes Regulations 2004, No 1633

of the Local Plan. Section 19 of the Planning and Compulsory Purchase Act 2004 requires a local planning authority to carry out a sustainability appraisal of each of the proposals in a Local Plan during its preparation and section 39 of the Act requires that the authority preparing a Local Plan must do so "with the objective of contributing to the achievement of sustainable development". Both EIA and SEA are subject to public participation requirements.

Where there is no development plan or if a local plan is out of date or silent on the issue to be decided, the MPA should grant planning permission unless "*any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in (the NPPF) taken as a whole*"[121] or if specific policies indicate development should be restricted[122]. Government guidance further states that in this case, paragraph 14 requires the application to be determined in accordance with the presumption in favour of sustainable development unless otherwise specified[123]. Whereas there may be scope for arguing that reviews of extant planning permissions such as the Povington Pit review are based upon an out of date or incomplete development plan, future applications for ball clay extraction in the Wareham Basin will be considered in light of a more recent Minerals Plan. The Dorset, Bournemouth and Poole Mineral Sites Plan PreSubmission Draft is currently undergoing a public consultation process[124].

The Plan will then be submitted to the Secretary of State and will be subject to a public examination with an independent planning inspector, likely to be late spring 2018. Although the Plan is a final draft, this has not yet been adopted and

[121] NPPF, para 14
[122] NPPF, para 14

[122] Planning Practice Guidance, Determining a Planning Application, 06/03/2014 < http://planningguidance.communities.gov.uk/blog/guidance/determining-a-planning-application/how-must-decisions-on-applications-for-planning-permission-be-made/ > accessed on 6 May 2016
[124] The public consultation closes on 31 January 2018: <https//www.dorsetforyou.gov.uk/minerals-sites> accessed on 30 January 2018

could change as a result of representations made during the public consultation or recommendations from the planning inspector's review. As such, conclusions drawn in this thesis on the basis of the current draft cannot be advanced with certainty. There is only one ball clay site proposed for allocation in the Plan (Trigon extension) and although proposals in respect of Holme Heath have been examined by the MPA, inclusion in the Plan has been rejected (this is discussed further in Part II). Despite the uncertainties which exist due to the Plan not having yet been adopted at the time of writing, it is unlikely that the Plan, once adopted, will feature any additional sites for the extraction of Ball Clay. It is therefore likely that as reserves become depleted, future applications will not coincide with the Plan. This means that any applications submitted other sites post-adoption will be subject to the reverse presumption of sustainable development, i.e. the MPA should refuse planning permission unless material considerations indicate otherwise.

2.3. The Habitats Directives

EU conservation law has been influenced by international and regional treaties such as the Ramsar Convention on Wetlands, the Bonn Convention on migratory species and the Bern Convention on the Conservation of European Wildlife and Natural Habitats.

The overarching aim of the Habitat's Directive is to “contribute towards ensuring biodiversity through the conservation of natural habitats and of wild flora and fauna”[125]. Article 6 “sets out the relationship between the site's

conservation requirements and the wider land use policies and spatial development activities in the area[126] Article 6 (3) of the Directive provides that

[125] Habitats Directive, Art 2(1)

[125] K. Sundseth, P. Roth, *EC Study on evaluating and improving permitting procedures related to Natura 2000 requirements under Article 6.3 of the Habitats Directive*

any plan or project likely to have a significant effect on a designated site shall be subject to an appropriate assessment of its implications for the site in view of its conservation objectives. Taking into account the conclusions of the assessment, the competent authority can only agree to the plan or project after having ascertained that it will not adversely affect the integrity of the site[127]. However, if it is found that a proposed development will adversely affect the integrity of a protected site, a derogation procedure is available under Article 6 (4). The exception provides that if an appropriate assessment is negative and there are no alternative solutions, the plan or project may be authorised for Imperative Reasons of Overriding Public Interest (IROPI), which may include those of a social or economic nature if there are no priority species on the site in question. In order to satisfy the exemption, all compensatory measures necessary to ensure the overall coherence of Natura 2000 must be taken. Where the site hosts priority natural habitat types and/or a priority species, the only IROPI considerations which may be raised are those relating to human health or public safety, or those of beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest. Developments on Natura 2000 sites are therefore possible provided they don't adversely affect the integrity of the site or they are required for imperative reasons of overriding public interest[128]. The Directive entered into force in 1994, since this time, only the annexes have been updated to take account of enlargement, however, a review of the Directive is ongoing as part of the Commission's REFIT programme. The main aim of the Directive is to:

"promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements". The preamble adds that the Directive

92/43/EEC (Ecosystems Ltd, 2013), 10
[127] Ibid, 11
[128] Ibid, 11

"*makes a contribution to the general objective of sustainable development".*

The Directive's third recital of the preamble sets out its objective is to 'promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements'. A G Leger explains that the intention behind this formulation is to comply with the objective of sustainable development now in Article 3 TEU[129]. It was argued in the case that Article 2(3) of the Directive imposes an obligation to take account of economic, social and cultural requirements when proposing sites for designation. The case for strict designation without considering the above requirements was being made based on *R v Secretary of State for the Environment ex Parte Royal Society for the Protection of Birds* decided which was concerned with the interpretation of the Birds Directive. The following question was therefore referred to the CJEU for preliminary ruling: 'Is a Member State entitled or obliged to take account of the considerations laid down in Article 2(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora[130], namely, economic, social and cultural requirements and regional and local characteristics, when deciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites?'[131]. Advocate general Leger considered that the Member State's discretion in relation to the choice of sites to propose to the commission is very limited[132]. The information which is required to be provided limited to ecological information although some information on impacts and activities in and around sites, including those connected with mining and the extraction of minerals can

[129] C-371/*98 R v Secretary of State for the Environment, Transport and the Regions ex parte First Corporate Shipping Ltd* [2000] ECR I-9235, Opinion of Advocate General Leger delivered on 7 March 2000, para 5

[130] OJ (1992) L 206, 7

[130] *First Corporation Shipping Ltd*, para 25

[132] Ibid, para 40

be included[133]. Member States are required to supply a list of all sites which host natural habitat types in Annex I and species in Annex II. This reasoning is to allow Member States and the Commission to assess the interests concerned as objectively as possible[134]. Decisions to designate sites are therefore made purely on the basis of scientific considerations.

When plan making and determining applications, the Directive requires the MPA, as a "Competent Authority" to assess the impact of plans and projects that may have a significant effect on European Designated Sites. The MPA cannot consent to a project if, following an Appropriate Assessment of the project's implications for the European Designated site in view of the site's conservation objectives, it determines that the project would adversely affect the integrity of the site concerned[135]. However, the Directive provides for a derogation which allows such projects to be approved if the following 3 part test is satisfied:

1. There are no feasible alternative solutions to the project;
2. There are imperative reasons of overriding public interest (IROPI) which justify the project to proceed despite the negative assessment; and
3. Compensatory measures are secured to ensure the overall coherence of Natura 2000.

The Directive has been implemented in UK law by the Conservation of Habitats and Species Regulations 2010[136]. Part 6 of the Regulations is of importance in relation to planning as it amends the Town and Country Planning Act 1990, making grants of planning permission, orders and consents subject to the Directive.

[133] Ibid, para 37

[134] Ibid, para 49

[135] Habitats Directive, Article 6.3

[136] SI 2010/490

The research analyses the impact of the above legislation on future mineral extraction in the Wareham Basin. The MS for the area refers to the use of IROPI as a potential option for the ball clay industry when submitting planning applications and the likelihood of future applications succeeding under IROPI is discussed in parts II and III.

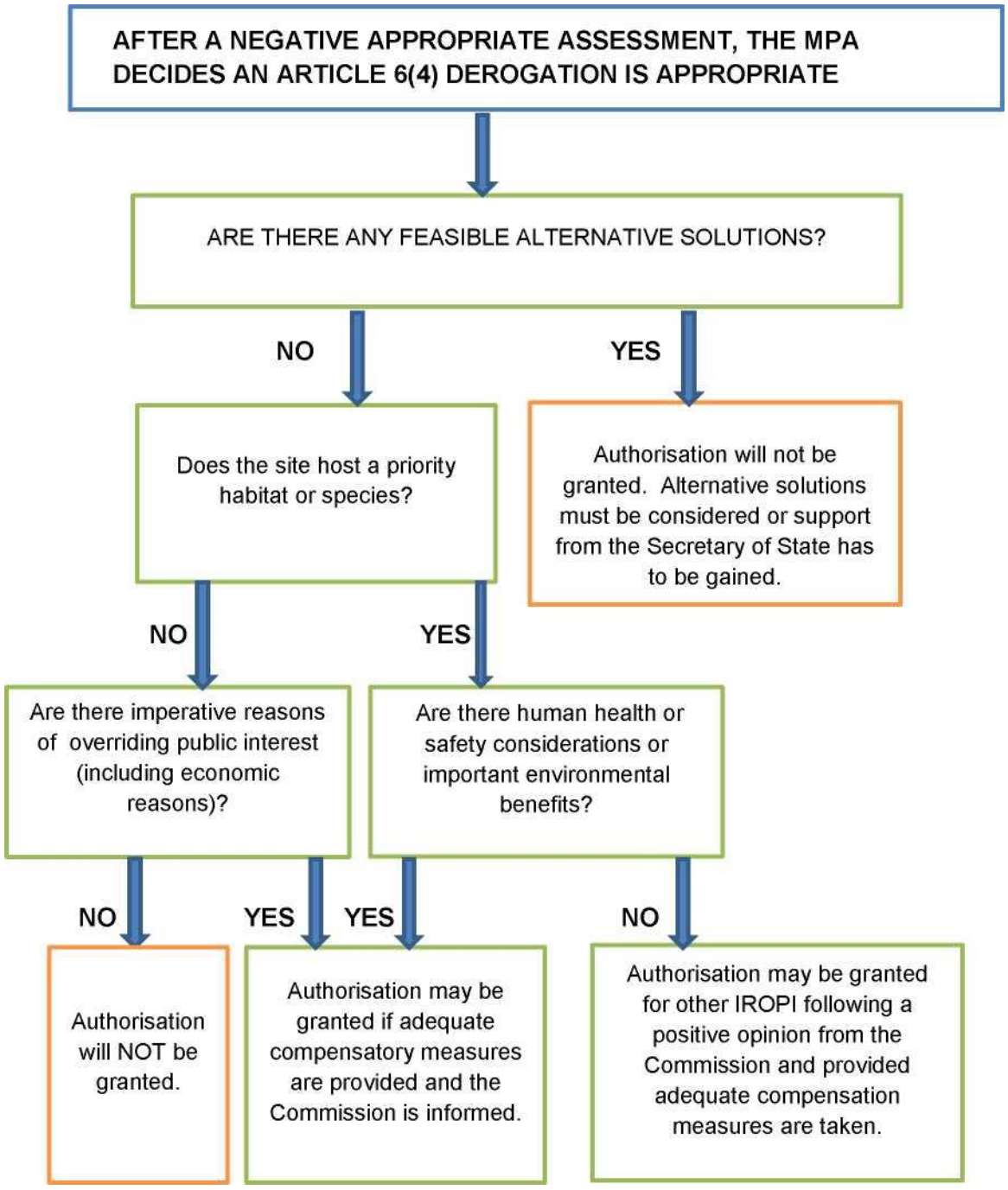
The judgments of the CJEU should be the first port of call when seeking to analyse the scope of the exemption contained in article 6(4), however, the courts have not directly addressed the interpretation of the whole of this provision and the analysis contained in this paper is based upon related case law where possible and secondary sources[137]. The IROPI derogation procedure is set out in a flow chart below, followed by an analysis of the three part test and a review of projects for which derogations have been sought in the past. The likelihood of the ball clay industry being able to obtain an IROPI derogation for sites in the Wareham Basin is discussed in parts II and III.

A number of parties are involved in the consideration of an article 6(4) derogation. Information must be supplied by applicants to the MPA to allow it to consider the potential for an IROPI derogation. It is the MPA who decides whether a derogation under article 6(4) is appropriate. If the MPA grants permission, it must inform the Secretary of State who has 21 days to review the MPA's decision. The Secretary of State can direct the MPA not to agree to the application. During the application process, statutory nature conservation bodies should be consulted on the likely impacts of alternative solutions and the

[136] Commission, 'Guidance document on Article 6(4) of the Habitats Directive' (92/43/EEC, 2007); Department for Environment, Food and Rural Affairs, 'Habitats Directive: guidance on the application of article 6(4), August 2012'; Ecosystems Ltd, 'Study on evaluating and improving the Article 6.3 permit procedure for Natura 2000 sites', (2013); L. Kramer, 'The European Commission's Opinions under Article 6 (4) of the Habitats Directive' (2009) Journal of Environmental Law 59; R.Clutten & I.Tafur, 'Are imperative reasons imperilling the Habitats Directive? An assessment of Article 6(4) and the IROPI exception in G. Jones QC (ed) *The Habitats Directive, a Developer's Obstacle Course?* (Hart Publishing, 2012), 167-182; Commission, 'EC Guidance on undertaking new non energy extractive activities in accordance with Natura 2000 requirements', (2010).

adequacy of compensatory measures. It is the role of the Secretary of state to request an opinion from the European Commission if an application is approved for “other” IROPI reasons where priority species are identified. The graph below summarises the key stages of the derogation procedure under article 6 (4).

Figure 1 : Derogation procedure under article 6 (4) Habitats Directive[137]



[137] Source: Commission guidance document on inland waterway transport and Natura 2000, 2012 and EC Study on Article 6.3 permit procedure of Habitats Directive, November 2013, carried out by Ecosystems Ltd

To satisfy the first part of the test, the MPA must be sure that there are no feasible alternative solutions to the project as proposed. If the MPA decides that there are feasible alternatives, the application cannot proceed as proposed. The MPA may consider a wide range of alternatives to be “feasible” which an applicant would not be in a position to deliver. For example, this can include options which would be delivered by other potential applicants, considering alternative locations, alternative processes or different scales or not implementing the project at all.

As shown in the graph above, the scope of the IROPI test depends on whether the site hosts priority habitats or species as defined in the Directive, where those habitats or species are affected. Any applicant should therefore be aware of the conservation objectives of the European Designated Sites which are likely to be affected. Knowledge of the priority and non-priority species or habitats the site contains as well as an assessment of which species are likely to be affected by the development is essential.

If the site does not host priority habitats or species, but is situated on or in close proximity to a designated area, applicants need to demonstrate that the development serves a public interest which overrides nature conservation interests (this is a high threshold and short term benefits will not fulfil this requirement). The public interest can be of an economic or social nature (this being the most likely argument to be advanced by the industry rather than on grounds of human health or public safety). However, it should be noted that an IROPI argument of an economic or social nature is unlikely to succeed unless it can be demonstrated that the development is indispensable within a framework of fundamental policies for the state and society.

If the site happens to host priority habitats or species, then an applicant would only be able to use the IROPI exemption if it relates to human health, public

safety or if it is of primary importance to the environment. It is unlikely that the ball clay industry would succeed under this test. The only other solution in this situation, would be for the MPA to recommend that the Secretary of State seeks an opinion from the European Commission on the matter. The European Commission has issued twenty opinions in response to requests for exemptions on the grounds of IROPI. So far, only one negative opinion has been returned. Analysis of those opinions reveals that the Commission has been largely supportive of projects provided compensatory measures are appropriate and the arguments for IROPI are sufficiently robust. Examples of positive opinions include the A20 motorway in Germany [138], enlargement of the port of Rotterdam[139] and extension of a coal mine in Germany[140]. However, there are no examples of ball clay extraction projects having been authorised using this mechanism. To ascertain the likelihood of a ball clay mineral extraction project being allowed to proceed under the IROPI exemption when priority habitats and species are present, it is necessary to evaluate the Commission's past Opinions and apply the various criteria drawn from this analysis to particular scenarios. This method is applied to the Holme Heath case study in part III.

2.4. Minerals safeguarding

Ball clay is a finite resource and its occurrence is confined to specific geological formations such as those encountered in the Wareham Basin. Whilst geology

[138] Commission, 'Opinion of 18 December 1995 on the intersection of the Peene Valley (Germany) by the planned A20 motorway pursuant to Article 6(4) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora' (1996) OJ L 6, 14

[139] Commission, 'Opinion of 24 April 2003 delivered pursuant to Article 6(4) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora concerning the request by the Netherlands for advice and exchange of information with the European Commission within the framework of the Birds and Habitats Directives in relation to the "Project Mainport Rotterdam" Development Plan'

[140] Commission, 'Opinion of 24 April 2003 delivered upon request of Germany acc) sub par 2 of Council Directive 92/43/EC of 21 May 1992 on the conservation of the natural habitats as well as the wild animals and plants, concerning the approval of an operational master plan of the Prosper Haniel Colliery operated by Deutsche Steinkohle AG (DSK), for the period 2001-2019.

restricts the occurrence of the mineral, other factors, such as environmental considerations can limit access[141]. The aim of minerals planning is to maintain the supply of minerals to support economic growth by facilitating the sustainable use of resources whilst mitigating environmental impacts[142]. The NPPF is clear in its stance that it is "important that there is a sufficient supply of material" but also stresses that their long term conservation should be secured[143]. Society's need for minerals and their essential role in supporting "*sustainable economic growth"*[144] is recognised. To this end, the NPPF requires MPAs to identify and include policies for the extraction of minerals of local and national importance. The NPPF does not define or provide a list of minerals of local or national importance, however, the Dorset MS recognises ball clay as such because of its special qualities and rare occurrence[145]. In planning for minerals extraction, MPAs "*should*" aim to source minerals supplies indigenously, define Minerals Safeguarding Areas and adopt policies which ensure that *"minerals resources of local and national importance are not needlessly sterilised by non-mineral development"*[146]. The use of the word "*should*" instead of "must" is of significant importance as it gives strength to the argument that the NPPF is not prescriptive, enabling MPAs to apply a certain amount of discretion when weighing competing objectives. For example, whilst sustainable minerals extraction should encourage MPAs to plan for sourcing indigenous supplies, unacceptable environmental impacts on conservation areas are likely to restrict an MPA's ability to consent to local extraction and justify an MPA's decision that alternative sites in other parts of the world could provide the supply required to

141 C.E.Wrighton, E.J. Bee, J.M Mankelow, 'The development and implementation of mineral safeguarding policies at national and local levels in the United Kingdom' (2014) 41 Resources Policy 160, 160

142 Ibid, 160

143 NPPF, 32

144 Ibid, para 142

145 Dorset County Council, Bournemouth Borough Council, Borough of Poole, Minerals Strategy (adopted 6 May 2014)

146 NPPF paragraph, 143

meet society's needs[147]. An additional caveat is that minerals safeguarding should not create a presumption that resources will be worked. It should also be noted that it is doubtful that the NPPF sought to include designated areas such as SPAs in a definition of "*non-mineral development*". This contention is supported by the fact that the NPPF encourages the extraction of minerals where environmentally feasible, by requiring MPAs to set out environmental criteria, within mineral plans, to ensure the extraction of minerals does not have "*unacceptable adverse impacts on the natural and historic environment*"[148], in line with other policies contained in the NPPF. Whilst the NPPF states that when determining planning applications, MPAs should *"give great weight to the benefits of the mineral extraction, including to the economy"*, MPAs should apply minerals safeguarding principles outside of Areas of Outstanding Natural Beauty and Conservation Areas. In relation to industrial minerals, although ball clay is not specifically mentioned in the NPPF, MPAs should plan for a steady and adequate supply by encouraging safeguarding and providing a stock of permitted reserves, the closest example to ball clay being 25 years for brick clay, taking account of the need for provision from a number of different sources to enable appropriate blends[149]. Whereas the minerals chapters of the NPPF appear to support the local and varied supply of minerals, with specific emphasis on facilitating blending, the case for minerals safeguarding imperatives to trump conservation objectives based on the NPPF is weak when considering the stronger environmental provisions contained within the framework and the references to environmental objectives contained within the minerals provisions themselves. The effect of the provisions of the NPPF for the ball clay industry in the Wareham Basin is analysed further in parts II and III below.

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147 See MPA's previous Appropriate Assessments for sites on the Wareham Basin

148 NPPF para 143

149 NPPF para 146

3. PART II: BALL CLAY EXTRACTION IN THE WAREHAM BASIN

3.1. Introduction

Ball clay operations in the Wareham Basin are currently managed by one company, Imerys Minerals Ltd, from surface workings. There are three large sites, two of which are situated within the AONB (Dorey's and Povington), the third (Trigon) being located north west of Wareham outside the AONB. Two smaller sites (Furzeyground and Hawkpost) are also situated within the AONB. A centralised storage and processing facility at Furzebrook, allows for blending of different grades of ball clay, producing in the region of 21 saleable blends.

The remainder of this research analyses past planning applications for ball clay extraction sites situated in the Wareham Basin in order to assess whether UK planning and conservation law and policy favours the environmental pillar of sustainable development over economic aspects. If it does, whether such an approach is legally sound is discussed in light of the national and local framework. Analysing past planning applications provides insights into the approach the MPA takes in relation to the Wareham Basin, an area which harbours species and habitats that are scarce in the UK and which are particularly sensitive to environmental damage, including changes in hydrological conditions which can result from mineral workings. The reasoning behind those past decisions can provide an insight into the potential outcomes of future planning applications. To this end, the area known as Holme Heath Triangle has been selected as a test case for applying the legal framework and the MPA's approach in part III. This deductive methodology aims to test the theory that for the Wareham Basin, environmental objectives are likely to trump other considerations. This does not necessarily mean that the legal and policy framework as a whole favours environmental objectives. After all, it could be

said that the principle of sustainable development often fails to integrate environmental protection into development because "there is no widely accepted scientific model that can formulate a standardized equation from such a multiplicity of interconnected variables whose informational quality varies considerably"[150]. This theory is supported by the reluctance of the CJEU and UK Courts to articulate a coherent interpretation of the principle that clearly defines the balancing between economic development and environmental protection. This research concentrates on establishing whether local statutory plans and planning policies have tipped the balance too far in favour of environmental objectives, to the detriment of an important economic resource. Whereas it may be argued that this is the case, the national and European context cannot be ignored, in particular, decisions to designate and protect certain areas are made on a larger scale and the scarcity of an environmental resource is not assessed on the basis of the principle of sustainable development. Rather, environmental protection has emerged as an imperative as a consequence of unrestricted economic development[151] and this is reflected in the NPPF which seeks to limit the applicability of the principle to sites which fall outside of designated areas[152].

3.2. The local planning framework

In 2008, Dorset County Council published a Minerals Site Allocations Document examining proposals for four ball clay extraction sites: Carrot Bank,

[150] Aviles, Luis A. 'Sustainable Development and the Legal Protection of the Environment in Europe' [2012] Sustainable Development Law & Policy 12

[151] World Commission on Environment and Development, 'Our Common Future: Report of the World Commission on Environment and Development' (A/42/427, UN,1987)

[152] NPPF

Dorey's, Povington and Trigon[153] . The sites contain proven resources of different grades of high quality clays which are needed to produce the blends which meet the specifications of the ceramics industry[154] . As the description of the proposed operation for Carrot Bank shows, the extraction of Ball clay requires the removal of soil using mechanical backhoe excavators and articulated dump trucks. This material is then used to create mounds to mitigate visual impact and noise. The excavated clay is transported on lorries to a local storage facility for processing.

Extracted from the Mineral Sites Allocation Documents, the potential environmental and landscape considerations and assessments required for ball clay mineral extraction sites in the Wareham Basin include as follows:

- assessment of the impact on surface and ground water.
- assessment of the potential impact on the adjacent SSSIs.
- surveys of biodiversity interests in the vicinity of watercourses.
- full bat surveys and evaluation of the site.
- assessment of the landscape and visual impact within the AONB.
- consideration of the loss of woodland and veteran trees, for example, for some sites, the implications of substantial woodland clearance for the Greater Horseshoe Bat colony at Creech Grange.
- The potential effect on the streams which then flow through the Dorset Heaths SAC would trigger the need for appropriate assessment under the Habitats Regulations.
- assessment of the impacts on hydrology and hydrogeology on adjacent SACs/SPAs
- nature conservation surveys due to the potential presence of remnant

[153] MSAD, DCC 2008
[154] Ibid, 8

heathland, invertebrates and bats.

- surveys of biodiversity interests in the vicinity of watercourses
- Potential cumulative landscape and visual impacts due to existing workings and adjacent MOD operations.
- Assessment of the impact on wildlife interests supported by Pond Plantation and Trigon Hill Plantation.

The above provides a flavour of the types of considerations which the MPA focus on when considering applications for the different sites within the study area.

As discussed above in Part I, the legislation provides that a decision-maker must have regards to the provisions of the Local Plan, and to any other material considerations when deciding on a planning application. In practice, this means that the determination must be made in accordance with the provisions of the Local Plan unless material considerations indicate otherwise. The Bournemouth, Dorset and Poole Minerals Strategy (the "MS") adopted on 6 May 2014, forms part of the Local Plan, together with the forthcoming Minerals Sites Plan ("MSP"), which it is anticipated will be adopted by the end of 2018, following independent scrutiny by the Planning Inspectorate in late spring 2018. This means that sites allocated in the MSP benefit from the presumption in favour of sustainable development (unless an AA is required - which is highly likely, in any event, for sites brought forward due to the presence of extensive designated areas within the Ball Clay Consultation Area).

The MS was prepared under the Planning and Compulsory Act 2004 (as amended). It sets out the spatial strategy for meeting minerals needs up to 2028 and supersedes some (but not all) of the policies of Bournemouth, Dorset and Poole Minerals and Waste Local Plan (1999) and Waste Local Plan (2006). The MS recognises ball clay is a mineral of national and international importance.

The key issues identified are the maintenance of a continued supply of ball clay and the need to access a range of clays at one time to produce the blends required. However, due to the Wareham Basin's extensive nature conservation designations, the area is described as containing “the most diverse range of potentially conflicting resource development and management pressures in England”. The MS was scrutinised by an independent inspector appointed by the Secretary of State for Communities and Local Government[155] and public hearings were held between 14 and 22 May 2013. The Inspector's Report concluded that the MS was sound, subject to a number of modifications which were incorporated into the adopted MS. To be sound, the MS must be consistent with national policy[156]. The Inspector's report reveals that a significant number of modifications, Main Modifications (MMs), were recommended to ensure the MS is legally compliant and sound. The Inspector's Report confirms that the MPA fulfilled its duty to cooperate and worked closely with statutory organisations as well as the minerals industry. Key issues, which led to MMs, were identified pre-adoption of the MS. The most relevant key issues for the purpose of this study, concerned (a) whether the Spatial Strategy and Site Selection Criteria were the most appropriate and (b) whether the most appropriate balance had been struck to provide sufficient opportunities for the supply of Ball Clay, whilst maintaining a suitable level of protection for sensitive receptors.

Whilst the MMs which ensued are historical since their incorporation in the adopted MS, they provide a useful insight into the approach of the MPA, together with a degree of support for the ball clay industry's claims that the way in which the principle of sustainable development was applied by the MPA in its

[155] Elizabeth C Ord , ‘Planning and Compulsory Purchase Act 2004 (as amended) section 20 report on the examination into the Bournemouth Dorset and Poole Minerals Strategy’ (pins/c1245/429/4, 2013)
[156] NPPF, para 182

plan making function at a local level was initially flawed. This perhaps stems from the fluidity and lack of definition of the principle of sustainable development argued in part I above. The recommendations also provide an insight into the government's interpretation of what sustainable development means in relation to balancing the needs for minerals and conservation interests in an area such as the Wareham Basin. It remains to be seen whether the substance of the MMs, incorporated into the MS, will impact on the forthcoming MSP and subsequent decisions on planning applications. It is therefore useful here to tease out the most relevant MMs for they provide a valuable insight into the types of considerations which escaped the MPA, particularly as they mostly relate to the MPA's compliance with national policy and interpretation of the Habitats Regulations. An analysis of the Inspector's Report identifies the following MMs as the most relevant (for ease of reference, the full list of MMs, from the Inspector's Report, are included at Appendix 1):

- three modifications were recommended to reflect the need for high quality restoration of sites due to the extensive number of minerals workings within or in close proximity to designated sites and timing of restoration works to comply with national policy (MM4, MM131 and MM7);

- concerns over the restriction of the extraction of ball clay to "*the least sensitive areas of the Wareham Basin"*, jeopardising deliverability of the required quantities and grades of ball clay: a modification, deleting references to "*least sensitive areas*" was recommended to render the MS effective (MM5);

- concerns in relation to levels of production of ball clay being undeliverable if supply is constrained to "Areas of Less Environmental Sensitivity" (ALES). The Inspector's Report states that the high economic value of Ball Clay might conceivably justify its extraction from deposits outside of ALES, thus recommending modification to extend potential extraction to the wider Ball Clay

Consultation Area (MM9);

- modifications were recommended to comply with the NPPF's requirement that local plans should actively support the presumption in favour of sustainable development, such that the MS should include a model policy (MM12, MM13, MM14);

- to support the adequate supply of minerals, including ball clay, the suitability of sites for allocation in the forthcoming Minerals Sites Plan ("MSP") is assessed using site selection criteria. The Inspector's Report recommended that Submission Plan Policy SS1 - Identification of sites in the MSP includes a reference to the site selection criteria, as this will form the basis upon which sites are selected. A further criticism was that unallocated sites were also likely to come forward, however, Submission Policy SS1 did not deal with unallocated sites in a sufficiently positive way which would allow for permissions to be granted for unallocated sites where the need arises (MM15 and MM188);

- It was further recommended that, in order to give proper direction to applicants, a clear explanation of how the criteria scoring are ranked is included (MM189 and MM190);

- A number of economic benefits of minerals development were not properly considered, modifications were recommended in order to comply with national policy and redress the balance (MM207 and MM208);

- The Inspector's Report notes the competing interests of the substantial contribution ball clay makes to the local economy and the area's extensive nature conservation designations. To better inform decision making, it recommended the MS includes a plan showing ball clay sites and ecological designations (MM52);

- The MPA's conclusion that further ball clay extraction would lead to severe and

adverse impacts on sensitive areas was based on a strategic level Landscape and Ecological Impact Assessment. The Inspector's recommendation is that the MPA sets out the intention that further detailed assessments would be required for allocation of sites in the MSP and for planning applications (MM56 and MM57);

- The MPA's estimates for future demand are based on historic trends and discussions with the industry, as such, the higher provision of 250,000 tpa should be justified on the basis that it provides flexibility to allow the industry to react to market fluctuations in accordance with the government's commitment to secure economic growth through planning (MM53);

- The MPA's stated reserve figure and projected lifespan was incorrect and the status of recent planning applications had not been taken into account. This leads to a revised figure of 2.5 mt for the overall additional demand for the Plan period rather than the original 3.05 mt stated. This means that the MPA had over-estimated the reserves required to meet demand. Notwithstanding this lower figure, the constraints identified nonetheless continue to present issues for meeting demand, such that the Inspector's recommendation is that meeting need becomes an aspiration rather than a requirement (MM54, MM55, MM58, MM59 and MM60). This means that it becomes more difficult for the ball clay industry to challenge the MPA on the basis that it is not meeting the delivery of the stated reserves, in accordance with the MS, if it refused to grant planning permission;

- The Inspector's Report notes the significant investment involved in identifying sites for allocation in the MSP. Consequently, it concludes insufficient sites will come forward to meet the 250,000 tpa the MS aspires to deliver, with a shortfall estimated to be of 1.63 mt overall. Although flexibility has been built in to allow for consideration of non-allocated sites, it was therefore recommended that the

MPA clarifies the mechanism for reviewing the MS should more achievable levels of provision be required (MM60, MM61, MM62 and MM64);

- Further modifications were required to address the circumstances where the economic benefits of extracting ball clay outweigh the harm to designated areas. The Inspector's Report refers to the IROPI exemption of the Habitats Directive, where in exceptional circumstances, where there are no alternative solutions, and imperative reasons of overriding public interest exist, development may be able to proceed, subject to compensatory measures being taken to maintain the overall coherence of Natura 2000. The Inspector's Report opines that where the international importance of ball clay can be demonstrated, development within designated areas might be considered to constitute IROPI. As the MS did not clearly reflect the IROPI potential for ball clay, modifications were recommended to acknowledge the application of the IROPI test and comply with national policy (MM63, MM68). Likewise, it was recommended that policy DM5 (Biodiversity and Geological Interest) be amended to reflect the possibility that, given their economic importance, ball clay sites might come forward which could affect the integrity of designated sites (MM152 and MM150).

- The above modifications, in particular those that acknowledge the IROPI potential for ball clay and those that strengthen the presumption in favour of sustainable development, serve to rebalance economic and conservation interests in favour of the industry. However, further modifications are more supportive of conservation interests. For example, the Inspector's Report notes that the extent of the ALES need to be redefined so as to omit Sites of Nature Conservation Interests (SNCIs) where "*extraction on any scale would be inappropriate*"[157] (MM65, MM66, MM67 and MM71); and

- However, the Inspector's Report does also clarify that future sites should also be permitted to come forward from outside the ALES after taking account of any impact on designated sites. The potential provision of sites was therefore extended to the Ball Clay Consultation Area, subject to specific criteria, rather than being limited to ALES (MM72, MM218, MM65, MM66 and MM70). This is because provision will need to come from the wider Ball Clay Consultation Area to meet the aspirational supply of 2.5 mt over the Plan period. In some cases, the IROPI exception may need to be tested[158].

In summary, the modifications recommended by the Inspector demonstrate that the MPA had not correctly applied the provisions of the NPPF when carrying out its plan making function. The modifications allow more flexibility for sites to be proposed for allocation, albeit that the IROPI exception may need to be tested on an application for development at project level. A more appropriate balance has therefore been struck, in accordance with the current legal and policy framework, recognising the economic importance of ball clay whilst retaining a suitable level of protection for designated areas. Subject to rectification of the MS, in accordance with the recommended MMs, the Inspector's Report concludes that:

- The site selection criteria will result in the most appropriate options being taken forward;
- The MS reflects the three dimensions of sustainable development in the NPPF; and
- The MS accommodates all reasonable and foreseeable eventualities, including sufficient guidance for determining planning applications.

At the same time, concerns over the January 2013 Habitats Regulations Screening Report (“HRSR”) for the MS led to its revision in July 2013. The

[157] Elizabeth C Ord, 18
[158] Ibid, 19.

HRSR sets out why an Appropriate Assessment (AA) under the Habitats Regulations is not necessary and NE confirmed its approval of the updated HRSR following modifications. However, it is surprising that the HRSR could possibly conclude that an AA in respect of the MS is not required, due to the simple fact that the Inspector's Report acknowledges that the IROPI exception may need to be tested for some sites in order to deliver the expected demand for ball clay. Since the MS specifically provides for the use of the IROPI exception, it is clearly anticipated that sites which come forward from the wider Ball Clay Consultation Area may adversely affect the integrity of Natura 2000. This is because the IROPI exception can only be engaged following a negative AA. It is therefore questionable whether the HRSR and by implication, the MS is sound in this respect. Had an AA been required, as is argued here, a more thorough understanding of the impacts of ball clay extraction within the Ball Clay Consultation Area may have better informed the forthcoming Minerals Site Allocation Plan and provided more certainty for the industry, in light of the Inspector's own acknowledgment of the real difficulties the industry encounters in providing ecological assessments which can properly inform decision making at such a high level and early stage. The consequence of this approach is that potential sites are being ruled out at an early stage, the presumption in favour of sustainable development is reversed at an early stage and a precautionary approach is taken when deciding whether sites should be included in the local development plan. As will be seen below, the MMs have made little difference in terms of supporting the aims of the MS to maintain a continued supply of ball clay and the need to access a range of clays at one time to produce the blends required. The MPA's assessment of sites brought forward for allocation is inconsistent and it is argued that the MPA's decision making process in relation to Holme Heath is flawed. This has led to the forthcoming Minerals Site Allocation Plan containing only one potential site for minerals extraction. One

could argue that the spirit of the MS would have been better served by including Holme Heath as an allocated site, subject to AA, which would be required in any case on an application for development. Whilst the presumption in favour of sustainable development means that as a general rule, an allocated site should be approved without delay, the NPPF (which does not apply the presumption where an AA is required) and the provisions of the Habitats Regulations provide sufficient safeguards as material considerations, to trump the presumption, should the proposal adversely affect the coherence of Natura 2000. As indicated above, the forthcoming MSP [159] will shortly be examined by an Independent Inspector and it remains to be seen whether MMS will be recommended which support the inclusion of Holme Heath. However, it should be noted that it is the MPA itself that finally determines what amendments it makes[160]. As such, the MPA may chose not to include MMS, notwithstanding the fact that they may more properly reflect national policy. An MPA, bowing to political pressure from local interest groups, may reject a proposed site allocation, notwithstanding it is in accordance with government advice and an Inspector's recommendations[161]. This leaves only two options for the minerals industry (1) challenge the MSP by way of judicial review and (2) submit an application (in the knowledge it will be refused for non-conformance with the MSP) and subsequently appeal to the Secretary of State. Those options are both lengthy and costly, but also undermine public confidence in the planning system.

A Conservation Regulations Assessment Screening Report ("HRA Screening Report") has been prepared to support the draft MSP[162] which, when adopted

[159] Public consultation ended on 31 January 2018

[160] J.F.Cowley, Q, G, Palmer, '2000 Years of History - What future for Ball Clay Extraction in the UK?' In *SP033: Proceedings of the 39th Forum on the Geology of Industrial Minerals* (Nevada Bureau of Mines and Geology, Special Publication 33, 2003), 87.

[161] Ibid

will complement the MS. The draft MSP, as indicated above is awaiting independent scrutiny by the Planning Inspectorate. Preparation of the MSP began in 2008 when the Minerals Sites Allocations Document referred to above was issued for public consultation, however, work stalled whilst the MS was completed and resumed in 2013 with further public consultation in December 2013 and July 2015. The HRA Screening Report determines whether any of the options being considered and any of the policies proposed are likely to have a significant effect on designated sites and as such whether a full AA is required, in accordance with Articles 6(3) and 6(4) of the Habitats Directive. Under the Directive, plans can only be taken forward if they will have no adverse effect on the integrity of designated sites (cases where plans may still be permitted under IROPI are rare)[163]. If the HRA Screening Report finds likely significant effects, the plan options must be subject to Appropriate Assessment to ascertain the effect on site integrity, in view of its conservation objectives. The HRA Screening Report for the draft MSP concludes that no likely significant effects are expected to result from the implementation of most of the policies contained in the draft MSP, including for ball clay, although effects on designated sites resulting from implementation cannot be ruled out. The justification for this is that the wording of the MSP aligns with the adopted MS and therefore safeguards designated sites. For the two policies which form part of the draft MSP, the HRA Screening Report concludes that likely significant effects are uncertain, recommendations have been made to be incorporated in the next revision of the draft MSP. Providing those changes are incorporated, the MPA is confident that allocated sites will not have an adverse effect on the integrity of the European sites and that the adoption of the MSP policies which either allocate specific sites for minerals development or facilitate mineral development and restoration

[162] DCC, Bournemouth, Dorset & Poole Draft Mineral Sites Plan Conservation Regulations Assessment Screening Report (2016)
[163] Ibid, 4.

generally will not allow sites to come forward which would be likely to adversely affect the integrity of the European sites.

Trigon Hill Extension, the only site allocated to meet the future need for ball clay within the MSP, will be preferred over non allocated sites. However, the MSP provides guidance for non-allocated or non-identified sites to be proposed as part of a planning application where there is a demonstrated need for an alternative site, such as where allocated sites do not contain the required grade of ball clay. From the review of past planning applications for Trigon, it is clear that the site supports predominantly the production of Parkstone Clay and does not contain the grades of clay required to support the aim of the MS to maintain a continued supply of ball clay and the need to access a range of clays at one time to produce the blends required. Whilst the MS purports to provide a mechanism to deal with this issue on an application for development, as discussed earlier, this approach is overly restrictive, particularly when it can be demonstrated that Holme Heath should be included in the draft MSP on the basis that Trigon Hill Extension has been allocated despite the fact that an AA will be required (further analysis is provided when discussing the Holme Heath case study). The HRA Screening Report for the draft MSP notes that Trigon Hill Extension would require an AA, however, consultation with Natural England has indicated that likely significant effect on the European sites could be eliminated through the inclusion of a site specific policy for each site, ensuring sufficient mitigation is included - this approach enables the conclusion that there are no likely significant effects at the mineral sites planning stage. It should be noted that this conclusion has been reached despite the exact wording of the policies still needing to be determined through consultation and on receipt of further ecological and hydrological assessments. This justification is somewhat disingenuous when one considers the reasons why the MPA decided against the inclusion of Holme Heath in the draft MSP: "*This result is based on probable*

effect - insufficient ecological evidence is currently available for a more rigorous assessment." - However, it appears the site may have been withdrawn from the local planning process in any case[164]. Before proceeding with the analysis of past planning applications for Doreys, Trigon and Povington and the Holme Heath case study, it is useful here to provide an overview of the conservation objectives of relevant European designated areas which are present in the Wareham Basin, together with a synthesis of the key factors which determine the likelihood of adverse effects of development on designated sites.

3.3. Conservation interests

Heathland is an important and unique ecosystem of the British landscape which has developed over 600 years and attracts considerable value as wildlife habitats165. Heathlands are habitats for rare species such as the Dartford Warbler, woodlark, nightjar, sand lizard and silver-studded blue butterfly166. Lowland Heathland is particularly important as 40% of the world's distribution is found in the UK but its area has reduced at an alarming rate mainly due to afforestation, agricultural and building development[167]. The decline of Lowland heaths has increased rapidly in the last 50 years with Dorset heaths reducing from 40,000 ha in 1750 to a quarter of that area by 1960, and today reduced again by about half[168]. As a consequence, heathland types which are restricted in their distribution are considered as a threatened habitat[169] of international

[164] Ibid, 9

[165] R. Therivel, E. Wilson, D. Heaney, S. Thompson, D. Pritchard, *Strategic Environmental Assessment* (Earthscan, 1992), 114
[166] Ibid; T.Bates & B. Copland, *The Natural History of Dorset* (The Dovecote Press Ltd, 1997), 245-246
[167] Strategic Environmental Assessment, 114
[168] JNCC, 'Guidelines for the selection of biological SSSI's. Part 2: Detailed guidelines for habitats and species groups' Chapter 4 Lowland Heathland para 1.3 http://jncc.defra.gov.uk/pdf/SSSIs Chapter04.pdf> accessed on 19 April 2016
[169]' Ibid, 1.4

importance[170]. Dorset heath (Purbeck and Wareham) is a Designated Special Area of Conservation due to the presence of Annex 1 priority habitats[171] and Annex II animal and plant species of community interest[172]. Aside from the major threats mentioned above[173], Dorset heath is also considered to be under threat from the impact of "another type of nationally scarce resource"[174]: the extraction of ball clay.

Natura 2000 comprises a network of 27,300 protected sites which cover 18% of the European land area[175]. The Royal Society for the Protection of Birds (RSPB) recently published a report which demonstrates the positive contribution the Birds and Habitats Directives make on meeting Aichi Biodiversity Targets[176] The study found that species listed in Annex 1 of the Birds Directive are recovering faster than those which are threatened but not listed, thus demonstrating the positive outcome the legislation has for threatened species. However, the report highlights challenges to full implementation including more effective planning, enforcement and monitoring[177]. The RSPB's report has been published in response to the European Commission's Regulatory Fitness and Performance Programme (REFIT) which seeks to assess the coherence of the Birds and

[170] Ibid, para 2.1

[171] JNCC, Dorset Heaths (Purbeck and Wareham) and Studland Dunes < https://sac.jncc.gov.uk/site/UK0030038> accessed on 23 May 2016: "Annex I habitats that are a primary reason for selection of this site include: "Northern Atlantic wet heaths with Erica Tetralix, Temperate Atlantic wet heaths with Erica ciliaria and Erica tetralix, European dry heaths"

[172] Ibid: "Annex II species that are a primary reason for selection of this site: Southern Damselfly Coenagrion mercurial" and "Annex II species present as a qualifying feature, but not a primary reason for site selection: Great Crested Newt, Triturus cristatus"

[173] Dorset Heath Policy; Strategic Environmental Assessment, 116

[174] R. Therivel, E. Wilson, D. Heaney, S. Thompson, D Pritchard, 'Strategic Environmental Assessment' (Routledge,1992), 166

[175] A. E. Beresford, G. M. Buchanan, F. J. Sanderson, R. Jefferson & P.F. Donald, 'The Contributions of the EU Nature Directives to the CBD and Other Multilateral Environmental Agreements' (2016) 9 Conservation Letters http://onlinelibrary.wiley.com/doi/10.1111/conl.12259/epdf> accessed on 23 May 2016, 3

[176] RSPB, 'Defend nature; How the EU nature directives help restore our environment' (undated) <http://ww2.rspb.org.uk/images/defendingnature_tcm9-406638.pdf> accessed 23 May 2016

[177] Ibid

Habitats Directives with international biodiversity targets. It highlights that although the "Directives have added a layer of protection for nature (...) above and beyond that provided in previous national legislation"[178], their contribution to halting biodiversity loss is difficult to assess[179]. The Habitats and Birds Directives impose a strict regime of protection for priority species and their habitats. The purpose of the Directives is to provide a common legislative framework for the protection and conservation of endangered rare habitats and species. Both Directives require Member States to designate and manage Special Protection Areas (SPA) and Sites of Community Interest (SCIs) to create a Natura 2000 Network of sites across Europe. However, the legislation has been criticised for placing "a major burden on Europe's economic development, causing substantial delays to permitting procedures and generating a high administrative and financial workload"[180], resulting in some cases in a total ban of developments in Natura 2000 areas[181]. In March 2012, the Department for the Environment, Food and Rural Affairs (DEFRA) published a review of the implementation of the Habitats and Wild Birds Directives[182]. The review recognised that those who are subject to the legislation have to spend a great deal of time and resource to satisfy the terms of the Directives[183], it therefore aimed to "reduce many of the administrative headaches (...) without watering down the ultimate objectives"[184] of the legislation. The review concluded that protecting the UK's most valuable species and habitats can be compatible with growth and progress[185]. However, the mineral extraction industry has voiced concerns that the UK government has gold-plated the EU Directives and submissions to this effect have been made to

[178] Institute for European Environmental Policy (2013)
[179] RSPB report
[180] Ibid
[181] Ibid
[182] DEFRA, 'Report of the Habitats and Wild Birds Directives Implementation Review' (PB 13724, 2012).
[183] Ibid, Foreword by the RT Hon Caroline Spelman MP, Secretary of State for the Environment, Food and Rural Affairs
[184] Ibid, 5
[185] Ibid,5

the Government's red tape challenge. The industry's point of view is that the Habitats and Birds Directives represent a considerable hurdle to the growth of the industry and are stifling sustainable development. The study area is subject to extensive national, European and international nature conservation designations. Whilst European designations are mostly considered for the purposes of this study, other national designations are also considered for each site where relevant. The overview provided here is limited to the following European designated sites:- Dorset Heaths (Purbeck & Wareham) & Studland Dunes SAC;

- Dorset Heaths SAC;
- Dorset Heathlands SPA; and
- Dorset Heathlands Ramsar Site.

The location of current operational ball clay sites in relation to Natura 2000 sites is shown on figure 2 below.

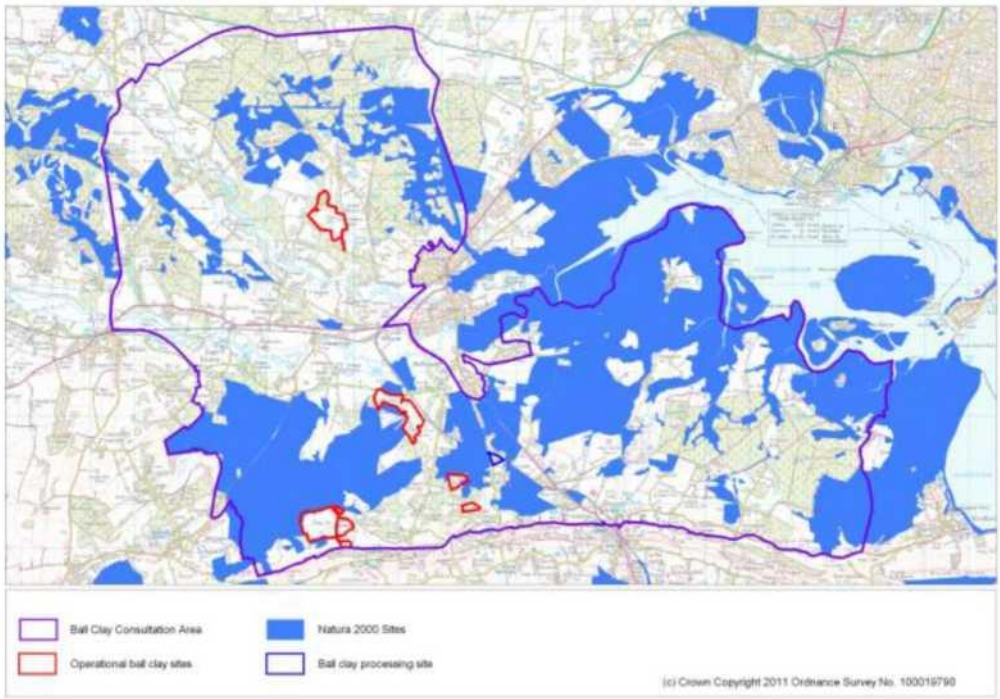


Figure 2: Current ball clay sites and designated sites from MS.

Although Dorset Heaths (Purbeck & Wareham) & Studland Dunes SAC is included for completeness, the Dorset Heaths SAC, Dorset Heathlands SPA and Dorset Heathlands Ramsar sites are those potentially affected by future development at Trigon Hill and Holme Heath (both put forward for inclusion in the MSP - although only one, Trigon Hill, has been retained for allocation).

The conservation interests of each site are as follows:

3.3.1. Dorset Heaths (Purbeck & Wareham) & Studland Dunes SAC

The site covers a large area of 2230.75 ha and contains qualifying features as listed below (not all of which are present on the allocated and non-allocated sites). Habitats and species include Embryonic shifting dunes, shifting dunes along the shoreline with Ammophila arenaria (‘white dunes'), Atlantic decalcified fixed dunes (Calluno-Ulicetea) (**priority feature**), humid dune slacks, oligotrophic waters containing very few minerals of sandy plains (Littorelletalia uniflorae), Northern Atlantic wet heaths with Erica tetralix, temperate Atlantic wet heaths with Erica tetralix (**priority feature**), European dry heaths, depressions on peat substrates of the Rhynchosporion and bog woodland (**priority feature**), Molinia meadows on calcareous, peaty of clayey-silt-laden soils (Molinion caeruleae), calcareous fens with Cladium mariscus and species of the Caricion davallianae (**priority feature**), alkaline fens, old acidophilous oak woods with Quercus robur on sandy plains, mudflats and sandflats not covered by seawater at low tide, annual vegetation of drift lines and fixed dunes with herbaceous vegetation (‘grey dunes'), Southern Damselfly - *Coenagrion mercuriale*., Great crested newt - *Triturus cristatus*.

Key vulnerabilities identified in the HRA Screening Report for the above habitats and species include physical damage causing fragmentation of habitat and

extant mineral extraction permissions.

3.3.2. Dorset Heaths SAC

The site covers a large area of 5719.54 ha and contains qualifying features as listed below (not all of which are present on the allocated and non-allocated sites). Habitats and species include Northern Atlantic wet heaths with Erica tetralix, European dry heaths, depressions on peat substrates of the Rhynchosporion, molinia meadows on calcareous, peaty or clayey-silt-laden soils (Molinion caeruleae), calcareous fens with Cladium mariscus and species of the Caricion davallianae (**Priority feature**), Alkaline fens, old acidophilous oak woods with Quercus robur on sandy plains, Southern damselfly *Coenagrion mercuriale* and Great crested newt *Triturus cristatus.*

Key vulnerabilities identified in the HRA Screening Report for the above habitats and species include fragmented heathland, unbalanced hydrological regime leading to the non-maintenance of wet heath, mires and pools, water and air pollution (nitrogen deposition).

3.3.3. Dorset Heathlands SPA

The site covers a large area of 8172.82 ha and contains qualifying features as listed below (not all of which are present on the allocated and non-allocated sites). Species include Dartford Warbler *Sylvia undata*, Nightjar *Caprimulgus europaeus*, Woodlark *Lullula arborea* and Hen Harrier *Circus cyaneus* and Merlin *Falco columbarius.*

Key vulnerabilities identified in the HRA Screening Report for the above species include air pollution (nitrogen deposition), water pollution and fragmented habitat.

3.3.4. Dorset Heathlands Ramsar Site

The site extends to 6671.28 ha and contains qualifying features as listed below (not all of which are present on the allocated and non-allocated sites). The site supports particularly good examples of Northern Atlantic wet heaths with cross-leaved heath Erica tetralix and acid mire with Rhynchosporion. The site contains the largest example in Britain of southern Atlantic wet heaths with Dorset heath Erica ciliaris and crossleaved heath Erica tetralix.

The site also supports 1 nationally rare and 13 nationally scarce wetland plant species, and at least 28 nationally rare wetland invertebrate species. The Dorset Heathlands Ramsar lies in one of the most biologically-rich wetland areas of lowland Britain. Relevant threats include development pressure, fragmentation and extant mineral permissions.

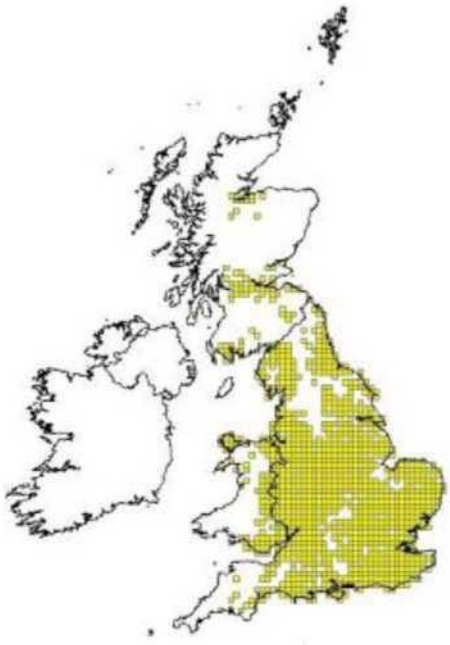
Every six years, EU Member States are required, under Article 17 of the Habitats Directive, to report on the implementation of the Directive. The Third UK Habitats Directive Report was submitted to the European Commission in 2013[186]. It evaluates the conservation status of all species listed under Annex II of the Directive for the period 2007-2012. A Fourth Report is therefore due this year and a call for data has been issued by the JNCC. As such, the data currently relied upon to assess the conservation status of designated areas is uncertain, however, new data is unlikely to be available before the adoption of the MSP. The Third Report identified the following in respect of the species identified above:

Great crested newt: a robust population estimate is difficult to obtain as the species is widespread but hard to survey, the distribution map below is based on species records considered representative of the range. Confidence intervals

[186] JNCC, 'Third Report by the United Kingdom under Article 17 on the implementation of the Directive from January 2007 to December 2012' (2013) < http://jncc.defra.gov.uk/page-6391> accessed on 31 January 2018.

are wide and the population estimate was obtained through modelling. The current population is thought to be high enough to be viable, however, the report concludes the overall assessment of conservation status is unknown. Mining and quarrying is reported as a medium importance pressure whereas threat from the same activities is ranked as High.

Figure 3:



© JNCC, Third Report by the United Kingdom under Article 17 on the implementation of the Directive from January 2007 to December 2012 Conservation status assessment for Species: S1166 - Great crested newt (Triturus cristatus)

Southern Damselfly: The habitat quality is assessed as good, using anecdotal evidence from habitat assessments on a selection of sites in the New Forest and Dorset, and more detailed survey work in Wales. As above for the great crested newt, the range of the species is considered large enough to provide a viable population and is assessed as favourable. However, there is insufficient information to give a precise estimate of population size, nonetheless, this is assessed as declining. The habitat, although described as good is assessed as declining. The overall conservation is described as declining. Main relevant pressures and threats include pollution to surface waters and human induced

changes in hydraulic conditions which are rated of medium importance. The highest risk to the species is from grazing pressures and prospects are dependent on appropriate habitat management.

Figure 4:

© JNCC, Third Report by the United Kingdom under Article 17 on the implementation of the Directive from January 2007 to December 2012 Conservation status assessment for Species: S1044 - Southern damselfly (Coenagrion mercuriale).

For Dorset Heathlands SPA species, JNCC carries out surveys and analyses data to support the selection and review of SPAs. The data published by JNCC for the five species of birds identified above dates from 1991 to 1994[187] and does not provide an assessment of the species conservation status. Human induced changes in hydraulic conditions is identified as threat together with grazing, changes in agricultural practices and recreational activities. A report from Footprint Ecology[188] provides more up to date information on trends for

[187] JNCC, 'UK Natura 2000 summary data spreadsheet', <http://jncc.defra.gov.uk/page-1409> accessed 31 January 2018 and Dorset Heathlands SPA Citation <http://publications.naturalengland.org.uk/publication/5808199001178112> accessed 31 January 2018.

[188] Liley D and Fearnley, H, 'Trends in Nightjar, Woodlark and Dartford Warbler on the

nightjar, woodlark and Dartford warbler over the period 1991-2013. The overall trend for nightjar indicates no significant increase or decrease since 1991, although an increase is noted for the Purbeck area. However, whilst trends appear stable over time, numbers fluctuated markedly during the same period. Woodlark data involved low counts with marked fluctuations between sites. The occurrence of woodlark on particular heathland sites seems to be linked to tree clearance, forestry management or other habitat management. Dartford warbler numbers suffered a marked decline since 2009 with numbers dropping below the baseline following a series of harsh winters. The report concludes that despite the challenges of increased development pressures, severe winters and very wet summers, the overall trend has not declined. In addition to the above European designated sites, the study area contains a large number of national designations. For example, the Dorset heathlands SPA alone includes more than 40 SSSIs. National designations are referred to where relevant in the analysis of planning permissions which follows, however, an in depth analysis is outside of the scope of this study. In addition to the species listed above, individual sites may also contain protected species such as Sand lizard and Smooth snake. Those are considered for each site when relevant.

In terms of the key factors which help determine whether development is likely to have adverse effects on designated sites and protected species, hydrology, proximity, species characteristics and pollution are the main considerations. The potential for mineral workings to affect local hydrology has to be properly assessed and mitigated as adverse impacts can result to the wetland interest features of the sites and the species which depend on those features. Proximity of a proposed minerals development to designated sites will also determine whether it can be approved or sufficiently mitigated with appropriate stand offs and angles of cut. Individual species characteristics also dictate whether a

particular proposal can be approved, particularly when a site is not located on, but near a designated site. A number of protected species such as nightjar, sand lizard and smooth snake from designated areas are found beyond their boundaries. Despite the impacts ball clay mineral extraction can have on the natural environment, the HRA Screening Report recognises that mineral workings can play an important role in providing long term gains through site restoration. The creation of a lagoon at Arne clay pit, a former ball clay site in the Wareham Basin, restored by Imerys in partnership with Dorset County Council, natural England and the RSPB, has provided net gains for nature[189], winning the Royal Town Planning Institute SW Award for Planning Excellence.

3.4. Analysis of planning applications

3.4.1. Doreys Pit

The last major planning application for this site was lodged with the MPA on 13 June 2013. The application was for a southerly extension to Doreys Pit to the East of New Hall Farm (South Doreys) and included amendments to part of the approved restoration details for areas within the existing ball clay works. The application was granted by Dorset County Council 27 February 2014 subject to a section 106 agreement with 28 conditions. This extension was in close proximity to the test case study, Holme Heath Triangle, which is clearly visible immediately to the North-West of the application site shown edged in red at Figure 5 below.

An ecological assessment for the proposed site extension was completed in September 2013[190]. The site surveyed was approximately 31 ha and adjacent to existing active consented workings. It comprised of cattle-grazed pasture,

[189] https://www.mineralandwasteplanning.co.uk/nature-minerals-update-clay-pit-home-sea-slugs/aggregates/article/1088287 ; http://ww2.rspb.org.uk/our-work/conservation/conservation-projects/details/354133-restore-restoring-mineral-sites-for-biodiversity-people-and-the-economy-across-north-west-europe

[190] Report to Imerys Minerals Ltd, 'Ecological Assessment of proposed Doreys south quarry extension, near Wareham, Purbeck, Dorset' (Andrews Ecology)

hedgerows, woodland, scrub, mire, a lake, a stream, ponds, grassland and buildings. It is situated 25 meters to the East and 360 meters to the North of Povington and Grange Heaths SSSI as well as 200 meters to the West of Stoborough and Creech Heaths SSSI. Those SSSIs are also part of the Dorset Heathlands Special Protection Area (SPA), the Dorset Heaths Special Area of Conservation (SAC) and Ramsar (together the “European Sites”). The SSSI's, as shown on figure 5 below, are notified for heathland which support six reptile species, Dartford warbler, hen harrier, merlin, sand lizard, smooth snake, nightjar, hobby and nightingale.

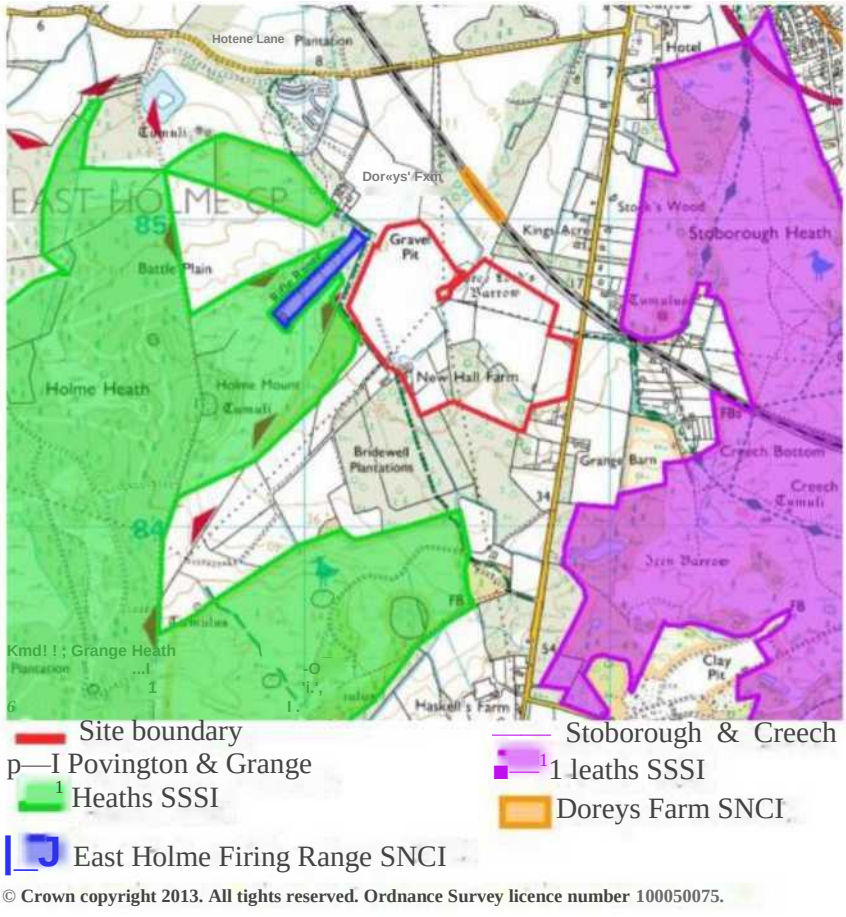


Figure 5: Doreys pit extension application site, SSSIs and SNCIs. Ecological assessment, 2013, figure 3, page 9

Two nationally scarce but locally not uncommon plant species: yellow bartsia Parentucellia viscosa and white beaked sedge Rhynchospora alba were noted and an area of mire which could qualify for SNCI status. There were low populations of slow-worm Anguis fragilis in parts of the site, together with common lizard Zootoca vivipara and grass snake Natrix natrix. It was reported that no uncommon birds likely to breed in the area and no evidence of presence of great crested newt or common dormouse was found. There was no badger set although evidence of foraging could be seen. Of note was an adjacent maternity roost of brown long-eared bats Plecotus auritus and roosts of whiskered/Brandt's bat Myotis mystacinus/brandtii and soprano pipistrelle pipistrellus but low activity was found within the site boundaries.

The site's hedgerows qualify as a Priority Habitat within UK Biodiversity Action Plan. And an area in the north of the site held UK BAP Priority Species of butterfly: Lassiomata megera, small heath Coenonympha pamphilus and grayling Hipparchia Semele.

The area of interest for the purpose of ascertaining the likelihood of a planning application succeeding for the case study is area A of the ecological assessment as shown in Figure 6 below, because it is adjacent on its western boundary to all four nature conservation designations. Nonetheless, the assessment concluded that there was no direct negative impact on the interest features of statutory nature conservation sites in the vicinity. Small part of the site may be used as foraging habitat by nightjars breeding in the SPA, but the loss will be insignificant in the context of the extent of foraging habitat in the locality.

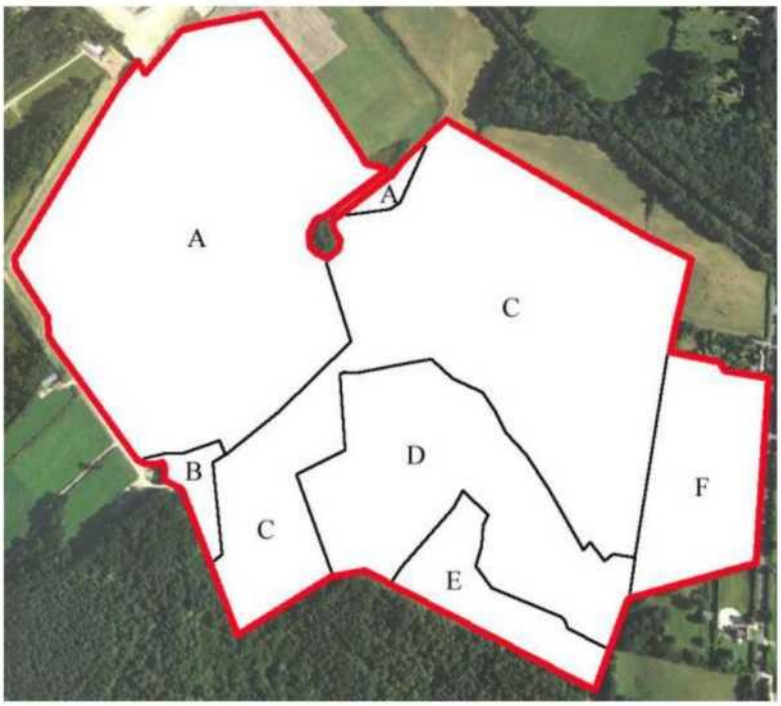


Figure 6: Ecological assessment areas

3.4.2. Trigon openpit

Trigon openpit is situated on the Trigon Estate, approximately 3 kilometres

north-west of Wareham, and is the main producing pit in Dorset. The site has been worked for over 50 years with the last planning permission granted in 2006 to extend existing Ball clay winning and working to the north. The extent of the permitted site, together with the 2006 extension is shown on figure 7 below. The dominant clay sequence is Parkstone Clay which contains commercial quality Ball clay in its very upper part. The Ball clay found at Trigon is predominantly used in tiles manufacture. Trigon Hill extension is included in the MSP as an allocated site and the potential impacts of the proposal are set out in further detail when considering the Holme Heath case study. There are a range of nature conservation designations in the vicinity of Trigon. The designated sites of interest are the Dorset Heathlands Ramsar, Dorset Heathlands SPA, Dorset Heaths SAC, Morden Bog and Hyde SSSI and Trigon Heaths SNCI. The site is located outside of the AONB. The nature conservation interests of Dorset Heathlands Ramsar, Dorset Heathlands SPA, and Dorset Heaths SAC have been already been set out above. Morden Bog and Hyde Heath SSSI lies predominantly to the north but also west and east of the extended permitted site. The SSI was designated in 1996 under section 28 of the WCA 1981 and is one of the major lowland heathland areas in Britain, designated for its plants and animal communities of international importance[191]. The variety of topography, together with heath and mire provides habitats for rare and scarce species, including rare heathland reptiles and birds. The combination of wet and dry heaths is nationally scarce as it is restricted to Dorset and the New Forest[192]. The site hosts 24 notified features and 48 reportable features. In summary, the SSSI is designated for its lowland dwarf shrub heath habitat, presence of breeding birds Dartford Warbler, Nightjar and Woodlark (also listed in Annex 1 of the Birds Directive), invertebrate fauna including nationally rare spiders,

[191] Natural England, 'Morden Bog and Hyde Heath SSSI citation' < https://designatedsites.naturalengland.org.uk/SiteDetail.aspx?SiteCode=S2000103&SiteName=&countyCode=12&responsiblePerson=> accessed on 22 January 2017

[192] Ibid

moths, dragonflies, damselflies and butterflies, rare heathland reptiles including Sand Lizard and Smooth Snake (also listed on Schedule 2 of the Habitats Directive).Over 50% of the SSSI has now been assessed as unfavourable - recovering[193]. The SSSI is divided into 42 units with the southern boundary of Unit 39 (Charlie Wight Heath, shown edged blue below on Figure 7) in close proximity to the northern tip of Trigon Hill (shown edged red). In 2002, prior to the extension of Trigon to the north, the unit was assessed as unfavourable-declining. An assessment on 4 June 2010 drew the same conclusion, however, a further review on 19 August 2010 classified the unit as unfavourable-recovering[194].

Figure 7: Trigon open pit and Morden Bog and Hyde heath SSSI

SNCIs are local sites which do not have statutory protection, however, local authorities are expected to take account of the need to protect them when deciding on planning applications. Consideration was given to Trigon Heaths SNCI in deciding on whether to grant the application for the last extension of

[193]Natural England, 'Designated Sites View, Summary Condition', <https://designatedsites.naturalengland.org.uk/ReportConditionSummary.aspx?SiteCode=S2000103&ReportTitle=Morden%20Bog%20and%20Hyde%20Heath%20SSSI> accessed on 22 January 2017

[194]Natural England, 'Designated Sites View, Morden Bog and Hyde Heath SSSI - Charlie Wight Heath (039)' <https://designatedsites.naturalengland.org.uk/UnitDetail.aspx?UnitId=1005208&SiteCode=S2000103&SiteName=&countyCode=12&responsiblePerson=> accessed on 22 January 2017

Trigon openpit with 3 conditions relating directly to minimizing the impact on the SNCI.

The proposals in respect of a further extension at Trigon are currently at the level of plan making, as such they lack detail and the draft MSP itself concludes further assessments will be required. The MSP and its associated HRA Screening Report, concentrates on possible impacts on European designated sites, as such it is difficult to ascertain, prior to an application for Trigon Hill Extension being submitted whether and to what extent any potential impacts on the SSSI or the SNCI will affect the grant of planning. The potential species affected are identified in the HRA Screening Report which supports the MSP as Annex 1 birds for which the site forms part of a functional unit with the SPA. The HRA Screening Report concludes Trigon Hill could have likely significant effects on the sites, however, mitigation has been identified which allows the site to be allocated in the MSP. This includes Restoration to heathland/acid grassland, a possible buffer zone at the northern end of the extension will mitigate any potential effects on Annex 1 birds or other species associated with the designated sites. In addition, the creation (through felling) of a more open woodland habitat would provide additional territory for Annex 1 bird species associated with the adjacent European sites. No in-combination effects were identified from this extension / proximity to existing works. As the analysis below of planning permissions for Povington shows, as Trigon Hill Extension has been allocated in the forthcoming MSP, it is likely to succeed in a planning application, notwithstanding the possibility of likely significant effects on designated sites.

3.4.3. Povington

Povington Pit is one of the largest ball clay pits in the country covering an area of nearly 6ha. The site is located 5km south-west of Wareham within the Dorset AONB. Planning permission, for an easterly extension to Povington Pit for the

purpose of winning and working ball clay and ancillary operations, was granted by Dorset County Council on 24 July 2012, subject to 22 conditions[195], including restoration suitable for nature conservation, agricultural and military use. The proposed extension increased the site area by 12ha and enables the extraction of 350,000 tonnes of ball clay over an eight year period. The site hosts valuable Creekmoor Clay which is a key component for blending with other clays for the production of tile, refractory and electro-porcelain. The grant recognises that "the need for an Appropriate Assessment removes the presumption in favour of sustainable development"[196] in accordance with the NPPF. However, as the Appropriate Assessment concluded that there would be no adverse effect on the integrity of the Dorset Heaths SAC, the Mineral Planning Authority (MPA) should take into account, as a material consideration, the presumption in favour of sustainable development which lies at the heart of the NPPF[197]. This means that, in taking its decision, the MPA should approve the proposal:

- if it accords with the development plan without delay; or
- where the plan is out of date, absent or silent on the matter, grant permission unless any adverse impacts of doing so would significantly outweigh the benefits or the NPPF indicates development should be restricted (for example under paragraph 119 relating to the Habitats and Birds Directive, AONBs, SSSIs)[198].

Despite significant hydrological issues, including the presence of a water

[195] Dorset County Council, Grant of Planning Permission, Application No 6/2011/0523, Povington Ball Clay Works, Steeple, Wareham, Dorset, 24 July 2012.
[196] See Annex II, 8
[197] NPPF, para 14

[198] Department for Communities and Local Government, 'Planning Practice Guidance Achieving Sustainable Development', < http://planningguidance.communities.gov.uk/blog/policy/achieving-sustainable-development/#paragraph 14> accessed on 26 April 2016; *Wynn-Williams v Secretary of State for Communities and Local Government* [2014] EWHC 3374.

course which feeds the mire system, the AA concluded there would be no adverse effects on the integrity of the Dorset Heaths SCA, subject to planning conditions. The grant of planning was decided in accordance with the Dorset Minerals and Waste Local Plan adopted April 1999 (DM&WLP). One of the conditions in respect of the hydrological issues included the construction of permanent drainage ditches and watercourses. A further requirement is that on cessation of pumping at the site, a regulating weir system that diverts excess flows from the water course that feeds the Southern Damselfly Mire will be installed. The proposal was deemed to be "*major development"* and would normally be refused within the AONB, however, the local and national importance of ball cay and its contribution to the economy led the MPA to conclude that exceptional circumstances apply and that it is in the public interest to approve the proposal. As the proposed extension had the benefit of being in accordance with the development plan and the AA concluded there would be no adverse impacts on the designated sites, the presumption in favour of sustainable development applied. Figures 8 and 9 below show the DM&WLP preferred area and the proximity of designated sites.

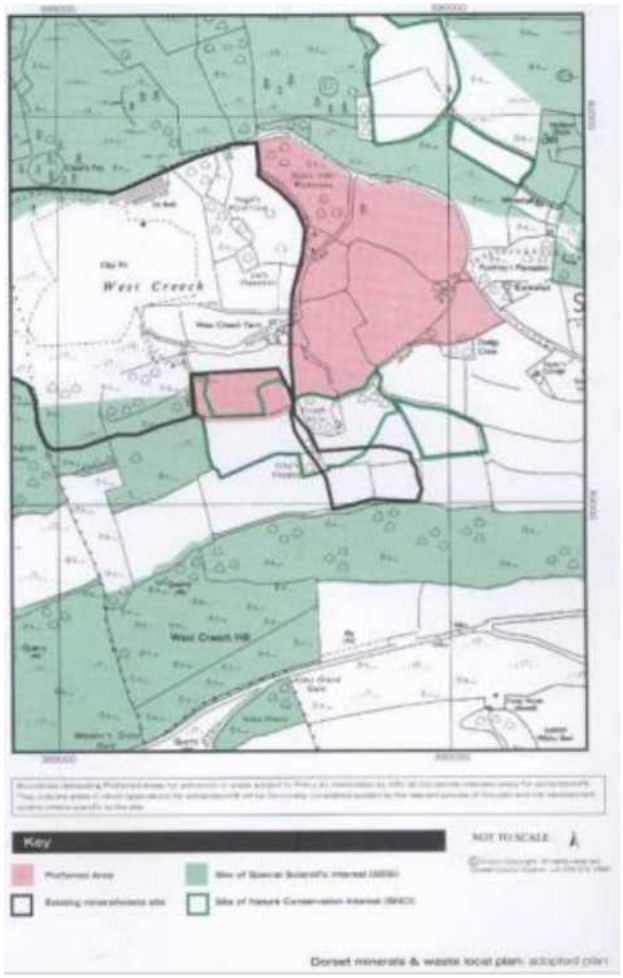


Figure 8: DM&WLP preferred area

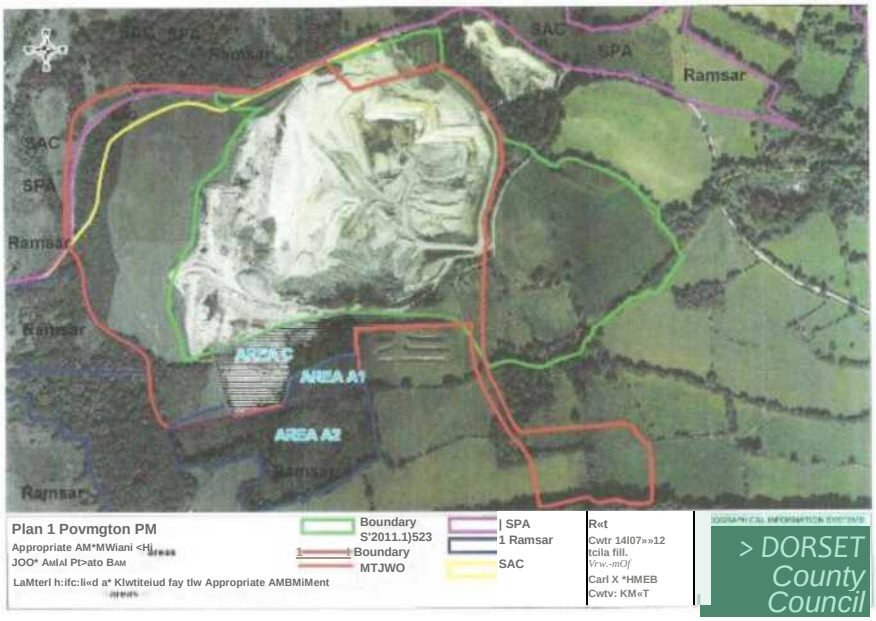


Figure 9: Povington Pit designated sites.

In May 2005 there were 70 Ramsar sites in England. Of these, only 3 were completely outside of Natura 2000 network of sites. Planning permission for winning and working ball clay at Povington Pit was first granted to Imerys Minerals Ltd in 1997, under permission 6/97/390. In 2011, the relevant Mineral Planning Authority (MPA) engaged in a review of the planning permission in question under regulation 63 of the Conservation of Habitats and Species Regulations 2010. The reason for the review was that a small area of the permitted development the site overlapped with a Ramsar designated area. An appropriate assessment concluded that the development would adversely affect the integrity of the site. Consequently, the MPA invited Imerys to consider voluntarily relinquishing its rights to win and work minerals in Area 1 of the plan found at Figure 9 above. In reaching its conclusion, the MPA argued that the Conservation of Habitats and Species Regulations 2010 (The Conservation Regs) implement the Habitats Directive and provide for Special Areas of Conservation (SAC) and Special Protection Areas (SPAs). Regulation 63 requires the MPA to review planning permissions for projects where further implementation is likely to have significant adverse effects on European sites. Regulation 62 provides that the authority may agree to the project notwithstanding a negative assessment if it is satisfied that, there being no alternative solution, the project must be carried out for imperative reasons of overriding public interest. The MPA cites paragraph 118 of the National Planning Policy Framework (NPPF) which states that listed Ramsar sites should be given the same protection as European sites. Paragraph 119 of the NPPF is then referred to, reminding the reader that the presumption in favour of sustainable development does not apply where development requiring appropriate assessment under the

Birds and Habitats Directive is being determined. The review moves on to Defra

Circular 01/2005 on Biodiversity and Geological Conservation which makes provisions for the review of permissions under the Habitats Regulations (1994).

Whilst the NPPF sets out government planning policies and how they are expected to be applied. Planning law requires that applications must be determined in accordance with the development plan unless material considerations indicate otherwise (section 38 (6) of the planning and compulsory purchase Act 2004 and section 70(2) of the Town and Country Planning Act 1990). The NPPF is a material consideration in planning decisions. The MPA justifies the application of the Habitats Regulations to Ramsar sites on the basis that "As a matter of policy, the government has chosen to apply the procedures described below, unless otherwise specified, in respect of Ramsar sites, even though these are not European sites as a matter of law. This will assist the UK government in fully meeting its obligations under the birds Directive and Ramsar Convention"[199]. The Circular states that "*Local authorities should consider all extant planning permissions that may affect european sites (...) th*is requirement applies to Ramsar sites as a matter of policy, but not to pSPAs". The local plan states that applications will be assessed in accordance with international wildlife nature conservation, but not specifically that the Habitats regulations will be applied to Ramsar. Circulars provide mere administrative guidelines and have no legal effect. Some circulars give effect to statutory requirements as they provide guidance to local planning authorities under the Town and Country Planning Act 1990 - such circulars may have legal effects depending on the interpretation of the legislation in terms of which it was issued[200], the question here is whether the Circular is capable of legal effect. Para 119 of the NPPF states that the presumption in favour of sustainable

[199] ODPM, 'ODPM Circular 06/2005 Biodiversity & Geological Conservation - Statutory obligations and their impact within the planning system' (2005)
[200] *Patchett v Leathem* [1949] 65 TLR; *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 (HL)

development does not apply where development requiring appropriate assessment under the birds or habitats directives is being considered. As a matter of law, the Habitats and Birds Directives do not apply to Ramsar sites and appropriate assessments of Ramsar sites are not required under the Directives, although as a matter of policy the government has decided to afford Ramsar sites the same level of protection as designated sites. As the Habitats Directive itself does not provide for this, the Circular and the relevant paragraphs of the NPPF are examples of gold plating of the EU Habitats Directive. The consequence is that the MPA has not applied the presumption in favour of sustainable development when reviewing this permission, it's understanding is that circular 06/2005 requires it to follow the procedure laid out in the Habitats Regulations in respect of the Ramsar site to conduct an AA. As part of the AA, the MPA has found that there are alternatives and has therefore not considered IROPI. However, the MPA's assessment of 'viable' alternatives is questionable. One such alternative includes a return to underground mining which has not taken place since 1999 and is not viable for the industry. The Commission has in the past issued positive opinions based on IROPI even when alternatives were available. In this case, it is submitted that IROPI should have been considered. It is also unclear whether priority habitats or species are present on the section of Ramsar concerned.

The concern here is that the MPA has applied regulations which as a matter of statutory interpretation do not apply to the site. The legislation which applies is the international Ramsar Convention, not the Habitats Directive. As a matter of law, the MPA is required to take decisions based on the local plan. The local plan does not set out clearly that the Habitats Regulations will be applied to Ramsar sites. The decision has been taken entirely based on policy (which is a material consideration) and has affected the operator's right to develop the land.

The study has so far analysed passed planning applications, including a review

of a planning permission for Povington Pit. This analysis informs the subsequent findings for the Holme Heath case study.

4. PART III: HOLME HEATH CASE STUDY

4.1. Introduction

Holme Heath had been proposed for inclusion in the MSP but has not been taken forward as an allocated site. The MPA having found that insufficient information had been provided to allow it to assess its suitability. Holme Heath has been selected as a case study due to its real potential for a future planning application. Because it is likely it will not become an allocated site as part of the adopted MSP, consideration of this site allows a comparison with sites, such as Trigon Hill Extension which are allocated. A comparison was made above between the povington pit extension and the proposed Trigon Hill extension, which concludes that Trigon Hill Extension is likely to succeed in obtaining a grant of planning. It is noted that an AA will be required for Trigon Hill, however, with appropriate mitigation, this is likely to conclude there are no adverse effects on designated sites. This would mean that the presumption in favour of sustainable development would apply. Holme Heath is shown edged red on the map below and is situated to the West of the current permitted working ball clay site known as Doreys Pit. The site is approximately 13 ha and comprises of four habitat types including grassland (7.5 ha), mire (4.5 ha), woodland (1 ha) and a pond. The land is bordered on three sides by designated sites comprising the Dorset Heaths SAC, Dorset Heathlands SPA , Ramsar, Povington and Grange Heaths SSSIs. The presence of East Holme Firing Range SNCI to the south should also be noted for its proximity, although this review is limited to assessing the effects of the presence of statutory sites for mineral works applications.

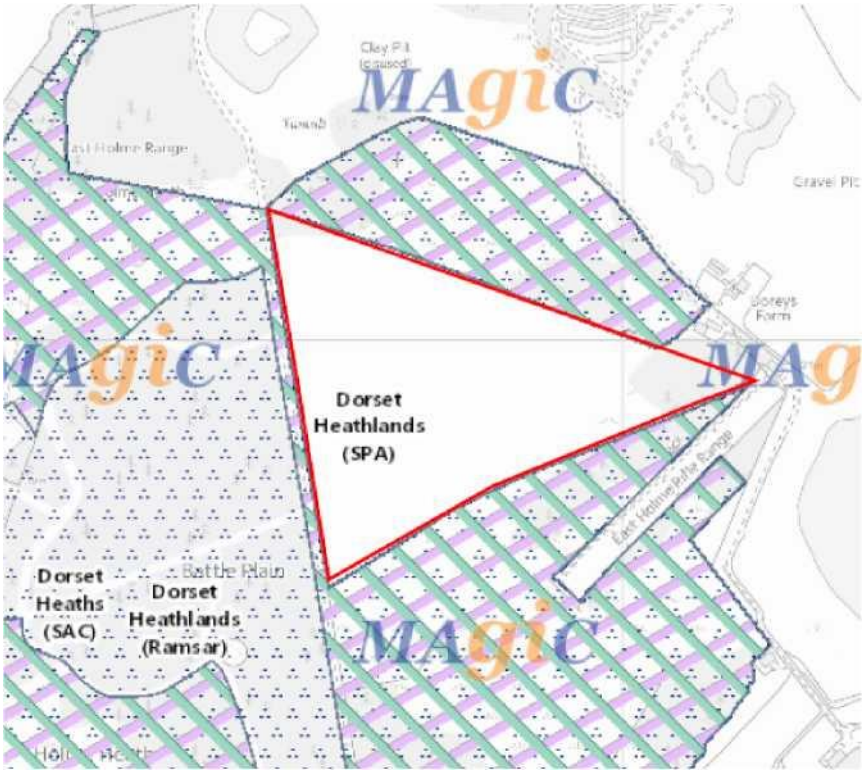


Figure 10: Holme Heath site boundaries

4.2. Site selection

The selection of the case study is based on the following criteria:

- site boundaries are not within a European designated area;
- site boundaries are in close proximity to designated areas;
- all four designations are present: SSSI, SAC, SPA, Ramsar;
- the site is economically viable; and
- the site is in proximity of existing working pits.

The first criterion ensures that the case study is not situated within a European designated site. This is because sites have so far been situated outside of designated areas, albeit in close proximity. The second criteria reflects the fact that, due to extensive nature conservation designations in the Wareham Basin, future sites are likely to be in close proximity to the boundaries of designated sites. The criteria fulfils the objective of the research to establish whether there are any prospects of success for mineral extraction near designated sites in the future. The

third rule ensures that the application of the legal framework in respect of each nature conservation designation can be assessed. The case study assumes that the site is economically viable as a detailed evaluation is outside of the remit of this dissertation. The fact the site was proposed for allocation would indicate economic viability. The last criterion reflects the probability that future applications will seek to extend existing sites as this would appear more acceptable both commercially and with regards to the landscape and environment.

4.3. Conservation interests

An Initial Ecological Assessment (the "Assessment") completed in July 2009 made the following findings:

- Presences of H2c *Calluna vulgaris, Ulex minor* heath, *Molinia caerulea* sub-community;
- Presence of M21a *Narthecium ossifragnum, Sphagnum papillosum* valley mire, *Rhynchospora alb, Sphagnum auriculatum* sub community;
- Presence of M25 *Molinia caerulea, Potentilla erecta mire*
- Invertebrate fauna: Grassland and mire areas predicted to support invertebrates
- Below average likelihood of great crested newts *Triturus cristatus;*
- Some vegetation structure suitable for reptiles: gorse scrub margins and south-facing grassland slopes may hold permanent populations of slow worm and viviparous lizard;
- Potential low numbers of sand lizard;
- Potential use by feeding nightjar *Caprimulgus europaeus* breeding in adjacent SPA;
- Potential foraging by Red List bird species song thrush *Turdus philomelos* and Amber List bird species barn owl *Tyto alba* and Kestrel *Falco tinnunculus;*
- Potential use by foraging brown long eared, pipistrelles, serotine, greater

horseshoe, noctule and Natterer's bats but no roosts on site;

- No dormouse *Muscardinus avellanarius;*

- No badger *Meles meles.*

The need to establish the use of the site by SPA bird species was identified and subject to this, the Assessment concludes that the potential negative effect of development of the site may be addressed within scheme design. This is on the basis that the mire is not included in the development and provision is made for dust suppression as well as ensuring hydrology is unaffected. As for the potential presence of great crested newts, mitigation should be included within the scheme.

4.4. Planning considerations

Since the draft MSP has not yet been adopted, should a planning application be submitted for the site, the application would be decided in accordance with the DM&WLP. Holme Heath is not within a preferred area under the DM&WLP and the presumption in favour of sustainable development would, on the face of it, be reversed. However, since the DM&WLP dates from 1999, there is an argument to say it is out of date and the application would be more likely to be granted on this basis, unless any adverse impacts of doing so would significantly outweigh the benefits or the NPPF indicates development should be restricted.

The preferred areas under this policy include Trigon, Binnegar, Squirrel Cottage (Dorey's site) and Povington. Trigon is currently the only site which has been allocated in the Minerals Plan and Povington has already been granted permission in accordance with the boundaries of the preferred area. Binnegar is not considered as part of this report.

Squirrel Cottage (Dorey's site) is of interest because it is in close proximity to Holme Heath. Whilst the MSP is still in draft form, policy 35 of the DM&WLP (Presumption in favour of applications within Preferred Areas) still applies. The boundary of this

preferred area must be compared with the boundaries of the currently unallocated Holme Heath site. This report concludes that Holme Heath is not situated within the boundaries of the preferred area and therefore it cannot rely on the presumption in policy 35, unless it can be demonstrated that the policy is out of date (this is unlikely as the policy has been retained as part of the MS).

The next policy to consider is policy 6 (Relating to Applications Outside the Preferred Areas). Because this policy still remains and forms part of the MS, the MPA must have regard to it when deciding on a planning application submitted before adoption of the MSP. Policy 6 sets out that any application which is within or which adversely affects an Area of Outstanding Natural Beauty; or a listed Ramsar Site, a Site of Special Scientific Interest (SSSI), a National Nature Reserve (NNR), a species specially protected under the Wildlife and Countryside Act 1981 shall be subject to the most rigorous examination. In addition, where a proposal would have significant effects on an SPA, SAC or Ramsar site and would adversely affect its integrity, the application for planning permission will be assessed in accordance with international wildlife conservation obligations and will have regard to possible alternative solutions and any imperative reasons of overriding public interest. This is in the main, no different to the requirements which are set out in the MS. It is therefore unlikely Policy 6 would assist an applicant unless it is considered to be out of date.

The Holme Heath Triangle site has not been accepted by the MPA for inclusion in the MS, the reason being that not enough information was supplied to enable the MPA to consider the site further. The only site which has been included is the Trigon Hill Extension. A table comparing both sites is set out below. The table sets out the reasons given by the MPA for not including Holme Heath in the Minerals Plan and the MPA's approach to assessing conservation issues for both sites. As the analysis reveals, there are some inconsistencies in the MPA's approach.

Table 1: Comparison of the Mineral Plan's allocated and unallocated sites:

DOCUMENT	HOLME HEATH TRIANGLE (Unallocated site)	TRIGON HILL EXTENSION (Allocated site)	COMMENTS
Sustainability Appraisal Report and Site Assessment Pro Forma			
To maintain, conserve and enhance biodiversity - European / International Designations	"*European designated heathland almost entirely surrounds the proposed area (...) mineral extraction would be likely to have adverse effects on the designated areas*." *"The site almost certainly contributes to supporting Annex 1 birds in the neighbouring designated areas and feeds the mire system within the designated area."*	*"Proposed area lies just to the south of an area of European heathland. Without detailed analysis of possible impacts, It is not clear whether there would be any likely significant effect on the designated area"* *"In order to be acceptable, the development proposal would have to pass the tests in the Habitats Regulations. In Principle it should be possible to avoid the effects*	Lack of evidence to support the statement that Holme Heath "*almost certainly supports Annex 1 birds*." The approach taken for Trigon Hill in this respect is much more relaxed. As there is a lack of detailed analysis for both sites, both should be rated as uncertain. For Holme Heath, there is an assumption that hydrological effects could not be mitigated and this is not substantiated by evidence. In addition, the Povington pit extension granted in 2012 successfully provided for mitigation of hydrological impacts and protection of the

	through an appropriate stand-off from the development."	mire system.
"It would be almost impossible to mitigate hydrological effects and certainly impossible to recreate the complex natural topography the site exhibits."		For Holme Heath, the MPA states it would be almost impossible to recreate the natural topography, however, the site itself is not designated and there is no legal requirement for it to be recreated on the basis of topographical considerations. The MPA is drawing conclusions yet it acknowledges it does not have sufficient information for assessment The correct approach would be to ask whether the topography could be recreated so as to continue to feed the mire.
"Following detailed study, it might be possible to demonstrate no adverse effect on integrity of very limited working in the easternmost part of the field where water drains away from the mire."		For Holme Heath, the MPA only considers detailed study for the easternmost part and does not engage in an assessment of possible detailed study and mitigation for the whole site. The *MPA's assumption is* unsubstantiated based on the documents reviewed. The hydrological report considers appropriate mitigation measures can be implemented.
Rating: strong negative impact.	Rating: uncertain	Based on the review of documents, both sites could be rated as uncertain and allocated
Mitigation: *"Ecological surveys and hydrological reports required, identifying likely impacts together with possible mitigation for any impacts."*	Mitigation: *"Ecological surveys and hydrological reports required with appropriate mitigation."*	The MPA recommends the same surveys for both sites but only allocates one site.
"Appropriate Assessment under the Habitat Regulations will be required."	*"Appropriate Assessment under the Habitat Regulations will be required."*	An Appropriate Assessment is required for both sites but only one is allocated.
	Heathland restoration and	The creation of heathland to increase the size of the

		public access could be created following working.	designated area after working is not explored for Holme Heath when the site may be suitable for this.
To maintain, conserve and enhance biodiversity - Annex I Bird Species	*European designated heathland almost entirely surrounds the proposed area (...) mineral extraction would be likely to have adverse effects on the designated areas.* *The site almost certainly contributes to supporting Annex 1 birds in the neighbouring designated areas and feeds the mire system within the designated area. It would be almost impossible to mitigate hydrological effects and certainly impossible to recreate the complex natural topography the site exhibits.* *Following detailed study, it might be possible to demonstrate no adverse effect on integrity of very limited working in the easternmost part of the field where water drains away from the mire.* Rating: strong negative impact.	*Area could support Annex I birds. Clearance of trees would be likely to result in heathland regeneration and the open habitat would rapidly become suitable for more Annex 1 birds.* *The site has the potential to be included in a revision to the Heathland SPA boundary.* Rating: Uncertain	The MPA considers Trigon Hill has the potential to rapidly create more Annex I birds habitat. However, the same could be said for Holme Heath but this possibility is not explored. The potential for Holme Heath to be included in a revision of the SPA boundary is not considered, whereas it is for Trigon Hill. This is perplexing given the fact that the site is surrounded by the European Designated Area. The potential for Holme Heath to contribute to net biodiversity gains as part of mitigation is not explored. A conclusion is reached by the MPA as to where limited workings may be permitted despite the earlier conclusion that it would be almost impossible to mitigate hydrological effects. As it may be possible to demonstrate no adverse effect for limited workings, this area should have been included in the plan. The fact that it is not included in the plan will prohibit development as the statutory position is that decisions should accord with the local plan. As no detailed study was undertaken before reaching the conclusion for Holme Heath, the rating should have been “uncertain”.

	Mitigation: Ecological surveys and hydrological reports required, identifying likely impacts together with possible mitigation for any impacts. Appropriate Assessment under the Habitat Regulations will be required.	Mitigation: Ecological surveys and hydrological reports required with appropriate mitigation. Appropriate Assessment under the Habitat Regulations will be required. Heathland restoration and public access could be created following working.	As above, both sites require further study, however, one site has been allocated but not the other. An Appropriate Assessment is required for both sites but only one is allocated. The creation of heathland to increase the size of the designated area after working is not explored for Holme Heath when the site may be suitable for this.
To maintain, conserve and enhance biodiversity - National designations	The above commentary is repeated for national designations although it applies only to European designated sites. The only addition which concerns national designations is that a rich invertebrate assemblage is likely to be present in the field which helps to support the adjacent SSSI. Rating: *strong negative impact*	*Proposed area lies just to the South of an area of Morden Bog and Hyde Heath SSSI. At this stage, without detailed analysis of possible impacts, it is not clear whether there would be any likely significant effect on the designated area.* *In principle it should be possible to avoid effects on the designated sites through an appropriate stand off from the development.* Rating: *uncertain*	In relation to the commentary for Holme Heath, the MPA states the site is likely to contain invertebrates which support the adjacent SSSI. However, the site itself is not designated as a SSSI and no explanation is given as to how the MPA concludes invertebrates on site may support the SSSI. The fact that the site may host invertebrates is a separate issue to the impact of the proposal on the adjacent SSSI. Although there is uncertainty on possible impacts for Trigon Hill, this site has been allocated. An appropriate stand off to mitigate potential impacts is not explored for Holme Heath. The commentary does not support the rating of strong negative impact. There is no more evidence for Holme Heath than there is for Trigon Hill. In addition, an initial ecological assessment (Lindsay Carrington Ecological Services Ltd,

	Mitigation: *Ecological surveys and hydrological reports required identifying likely impacts together with possible mitigation for any impacts.* *Appropriate assessment under the Habitats Regulations will be required.*	Mitigation: *Ecological surveys required with appropriate mitigation.* *Restoration to include creation of invertebrate habitat.*	September 2014) found that the likelihood of the site supporting invertebrate species protected under the Wildlife and Countryside Act 1981 is low. An Appropriate assessment under the Habitats Regulations cannot be required for a SSSI as the legislation only applies to European Designated Sites. On this basis, the rating of strong negative impact for Holme Heath is flawed. No restoration to include creation of invertebrate habitat is proposed for Holme Heath when this may be appropriate.
To maintain, conserve and enhance biodiversity - Protected species	*The site is likely to support common protected reptiles throughout and may support European protected reptiles, Sand Lizard and Smooth Snake* *The size of the population will determine how easy or difficult it is to achieve adequate mitigation and a disturbance licence from NE if required.* Rating: strong negative impact.	*Numerous bat records from Trigon Hill plantation.* *A large badger set is also known.* *Difficult to assess whether mitigation on bats or badgers would be acceptable without detailed study on population sizes and locations.* Rating: Uncertain	For Holme Heath, an initial ecological assessment (Lindsay Carrington Ecological Services Ltd, September 2014) found that whilst there are records for sand lizard, there are no records for Smooth Snake. The site is considered far from optimal for Smooth Snake habitat but parts of the site could hold low numbers of Sand Lizard which accords with the MPA's assessment that the site may support protected reptiles. For Trigon Hill, there is no mention of the presence of Nightjar, Dunnock and Song Thrush which have been noted in the most recent ecological survey. The presence of Nightjar affects both sites. An ecological survey undertaken in 2000 for an earlier extension at Trigon Hill noted Dartford Warbler and Stonechats may be breeding on the site. For Trigon Hill, the likelihood of protected reptiles being present on site is not addressed. The evidence does not support the MPA's rating for

	Mitigation: *Ecological surveys and hydrological reports required, identifying likely impacts together with possible mitigation for any impacts.* *Appropriate Assessment under the Habitats Regulations will be required.*	Mitigation: *Ecological surveys required with appropriate mitigation identified* *Restoration to include appropriate habitats for those species* *Further investigation into likelihood of grant of disturbance licences.*	Holme Heath when compared to Trigon Hill as both are described as difficult to assess. Some protected species have not been considered for Trigon Hill which puts into question the MPA's rating for both sites. There is a lack of consistency in the approach taken to decide whether a site should be allocated or not. On the basis of the uncertainties for both sites, the same decision (ie: whether the sites are allocated or not) should have made. Given the costs to developers of conducting ecological assessments, both sites should be allocated pending detailed assessments - this would align with the MPA's approach for Trigon Hill and enable further consideration of the issues and more transparent decision making.
Cumulative impacts	The proposed site is an extension. It is not clear when this site could commence working and whether it might operate at the same time as the current quarry. If that was to happen, this proposed site would have cumulative impacts which would need to be addressed.	The proposed site is an extension to existing mineral working/waste disposal. As an extension site, there will be no cumulative impact but this would represent an extension of time of working	The statements on cumulative impacts are contradictory. It is not clear how one extension can have cumulative impacts whilst the other does not.

The analysis above demonstrates that the decision making process of the MPA at the level of plan-making lacks consistency and is at times flawed. In particular, it is difficult to comprehend how one site can be considered to have cumulative impacts whilst the other is describe as a mere "*extension of time of working*". Whilst the ball clay industry could argue that this demonstrates that Holme Heath should be included in the plan, the opposite could be said: that on the basis of the precautionary principle, lack of full scientific certainty

should justify erring on the side of caution for both sites. In essence, this analysis demonstrates how the open ended nature of the principle can lead at best to inconsistent decision making and at worst, to unlimited discretion to impose restrictions[201], thus removing opportunities, at an early stage, to consider fully the issues and come to decisions based on sound scientific evidence. The precautionary approach taken by the MPA for Holme Heath is difficult to justify. In its Communication on the precautionary principle[202], the European Commission clarifies that the principle may only be invoked when three preliminary conditions are met:

- *"identification of potentially adverse effects;*
- *evaluation of the scientific data available;*
- *the extent of scientific uncertainty."*

In the case of Holme Heath, the last two preliminary conditions have not been fulfilled, the fullest possible scientific evaluation has not been carried out and the degree of scientific uncertainty has not been measured. There is little evidence that the measures taken (the non-inclusion of Holme Heath in the MSP) are proportionate to the chosen level of protection (which may be achieved through mitigation or even through a refusal of grant of planning after careful consideration of an Appropriate Assessment). In addition, the general principles of risk management, including "*non-discrimination in the application of the measures*"[203] and "*consistency of the measures with similar measures already taken in similar situations*"[204] do not appear to have been considered when comparing the MPA's approach to the two sites.

[201] Marchant G.E, Mossman KL, 'Arbitrary and Capricious: the precautionary principle in the European Union courts' (The AEI Press, 2004)
[202] Commission, 'Communication on the precautionary principle' COM (2000)1final
[203] Ibid
[204] Ibid

4.5. IROPI

The MS, following modifications recommended by the Inspector, includes a reference to the possibility of future application for non-allocated or non-identified sites. It also considers the possibility of grants of planning under the IROPI exemption of the Habitats Directive. This section considers the likelihood of an IROPI application succeeding for the Holme Heath if the MPA is not satisfied that the proposed development would not adversely affect the integrity of designated sites. An IROPI exemption can only be triggered if, on the evidence (for example ecological and hydrological surveys), an AA concludes that the integrity of the designated site would be adversely affected. If it can be shown that mitigation would adequately protect the integrity of the site, then the AA should conclude there are no adverse effects and the MPA should agree to the proposal if there are no other material considerations which would indicate otherwise. There is currently not enough information to ascertain whether the integrity of the designated sites would be adversely affected by the proposal and the following analysis is provided on the basis that an applicant has received a negative AA in respect of Holme Heath. In such circumstances, the IROPI three part test must be applied.

4.5.1. Feasible alternatives

Applying the MPA's approach to Holme Heath Triangle, the extent of possible alternative solutions depends on the grades of clay the applicant seeks to extract as the MPA's assessment of alternatives will vary depending on the site's grades of clay. Historically, the MPA has put forward a wide set of alternatives, including the presence of ball clay is other parts of the world, to justify a finding that there are alternatives available. To succeed under this first test, an applicant should be prepared to counter the MPA's arguments with robust evidence.

4.5.2. Imperative Reasons of Overriding Interest (IROPI)

The scope of this test depends on whether the site hosts priority habitats or

species. If the site does not host such habitats or species, an applicant will need to demonstrate that the development serves a public interest of an economic nature which overrides nature conservation interests. However, it is likely that the proposal would affect priority species and habitats. In particular, an ecological survey undertaken in September 2014 found that three nightjar pairs were breeding within the site. In addition, the effect of the development on the area of mire is of concern, particularly since Natural England have so far opined that it would be hard to see how the site could be progressed (for inclusion in the MS) without major detriment to biodiversity and the MPA has also expressed that it is unlikely impacts could be mitigated. In short, if an applicant sought to progress this site under the IROPI exemption, it is likely that an opinion would need to be sought from the European Commission. To date, the Commission has not issued opinions for ball clay sites, however, the case of the Haniel coal mine extension in Germany may provide an indication of the Commission's approach. In this case, the Commission acknowledged that the mine was not sustainable and would most probably have to close in the near future, however, the short term social and economic effects of the mine's closure were accepted in argument and the Commission issued a positive opinion, despite this being contrary to its own guidance (i.e. short term arguments are not normally accepted). Although this particular case is encouraging, the Holme Heath Triangle extension is much smaller and the area does not suffer from high levels of unemployment. The proposal is more likely to succeed if it benefits from support from the Government as a project which is of national or regional importance where there is a national interest in market competition[205].

[205] The Planning Inspectorate, 'Advice note ten: Habitats Regulations Assessment relevant to nationally significant infrastructure projects' (2017) <https://infrastructure.planninginspectorate.gov.uk/wp-content/uploads/2015/06/Advice-note-10v4.pdf> accessed on 30 November 2017

4.5.3. Compensatory measures are secured to ensure the overall coherence of Natura 2000

To benefit from an exemption under IROPI, an applicant also has to demonstrate that compensatory measures are in place. In respect of the mire system which may be affected, there is doubt as to whether restoration can be successfully achieved, however, adequate mitigation has been provided for in respect of Povington pit which could be replicated at Holme eath, depending on the site's particularities. Notwithstanding this, there are other compensatory measures, other than restoration, which may be acceptable. Compensatory measures are likely to be costly and the MPA may require them to be provided before extraction starts on the site. It should be noted, however, that there are no provisions in the legislation which requires the Commission to ensure that compensatory measures are actually taken.

4.5.4. Review of Commission Opinions

A project is more likely to receive a positive opinion if it is supported by the Government and the following elements can be demonstrated:

- There are no other alternative sites for the project

This is the biggest hurdle for the ball clay industry as the MPA has already indicated, in the case of Povington Pit, that it considers there are a number of alternatives for the extraction of ball clay, including underground mining and sourcing from other locations. In the absence of clear Government policy in support of mineral extraction in or near designated sites, applicants may find that it is not possible to fulfil this requirement. However, the Commission accepted arguments that no alternative existed for the project of extending a coal mine at Haniel. This was because no other favourable geological sites existed. This argument is one which applicants could formulate in relation to ball clay

operations in the Wareham Basin. Where alternatives exist, a positive opinion may still be granted if it can be demonstrated that there are no other ‘viable' alternatives. For example, in the construction of a railway in Sweden, the viability of alternatives was assessed on operational and economic grounds (reduced income for the railway industry). In relation to the ball clay industry, if the absence of alternative sites was to be questioned, there is scope to formulate similar arguments, particularly if the grade of ball clay on sites which do not affect Natura 2000 is of lower quality, thus leading to a reduction in income. However, the railway project did also demonstrate that alternatives would lead to significant operational difficulties affecting passengers - there is less scope for similar arguments for the ball clay industry therefore the geological constraints remain the strongest argument in favour of the absence of alternative sites.

- The project is situated in an area which suffers from high unemployment and low GDP

The rate of unemployment on the Isle of Purbeck is low: at around 1%, it is lower than the UK average. However, the area suffers from a relatively low wage economy and 14% of employment is on a part time and/or seasonal basis. The local economy is significantly reliant on tourism and concerns have been expressed in relation to the area's reliance on this industry. Applicants may refer to the Government's policies which seek to regenerate rural areas and provide local employment opportunities.

- The project is of benefit for the wider European Community

An analysis of the Commission's Opinions show that projects which have received positive opinions had wider economic benefits for the European Union. For example, the enlargement of an industrial plant for the production of Airbus A380 on a Ramsar and Habitats Directive designated area satisfied the IROPI exemption criteria because it was, amongst other reasons, considered to be of

outstanding importance for the European Aerospace Industry and its competitiveness. There is evidence that minerals are of importance to the European economy and the Commission is currently engaged in a project to define Minerals of public importance and the importance of minerals to economic growth has been discussed widely. As such, applicants should continue to raise awareness of the public importance of ball clay both at a national and European level.

- Regional competitiveness

Positive opinions have been granted on the basis that a project increases regional competitiveness. The ball clay industry would need to show that the extraction of the mineral has a wider regional impact in terms of competitiveness and eliminating regional imbalances.

In summary, to succeed with an IROPI argument, whether the site hosts priority or non-priority species, applicants will need to convince the MPA that there are no alternative solutions to the proposal. This means that applicants need to prepare robust arguments as to why the alternative solutions which the MPA has put forward in the past to justify a refusal of planning are not viable. The next hurdle for an applicant is to formulate economic arguments which have a public interest element and which override the nature conservation interests. This is a high threshold to meet and the economic argument can only be used if there are no priority species on site. If there are priority species on site, an Opinion will have to be sought by the European Commission as to whether the proposal can be authorised. The Commission's opinions are not legally binding. Under the exemption, the Company would also be required to provide compensatory measures which may be costly. Mitigation which is considered adequate to allow a project to proceed without engaging the IROPI procedure does not include compensatory measures . Compensation under the IROPI exemption is more

onerous than mitigation under an AA. It is not enough to compensate “after the event” for adverse effects on a European Designated Site. For example, in respect of the proposal for the Holme Heath Triangle site, the MPA has advised that part of the site in question feeds the mire system within the European Designated Site and that it would be almost impossible to adequately mitigate this hydrological effect. If an applicant was to propose to re-create this habitat elsewhere, this would constitute compensatory measures rather than mitigation and these compensatory measures can only be used where it is considered that a project must be carried out under the IROPI exemption, despite the adverse effects on the protected habitat, and where there is no alternative solution. It is also worth warning at this stage that the 3 part test must be interpreted strictly and that IROPI exemptions are rare, particularly where priority species or habitats are engaged.

An example where a derogation was refused by the Secretary of State was when an assessment of alternatives did not include the assessment of alternative facilities at other ports on the South and East coasts in relation to the proposed project in Dibden Bay. Knowledge of where mineral resources occur together with access, quality and feasibility for the extraction of ball clay is therefore essential to fully assess alternative sources. A review of the
MPA's assessment of alternatives in the case of Povington Pit in 2013 provides an indication of the MPA's current approach. The following were considered to be feasible and credible alternatives:

- production from existing reserves at the site;

- production from permitted reserves in Devon;

- potential production from resources at new sites within Dorset;

- underground mining (this is only specified for refractory and electroporcelain clays); and

- production from Europe and other parts of the world (this is only specified for clays suitable for sanitary ware, tile production or clays suitable for adding to blends of primary clays). The review concluded that it could not be excluded that there are no alternative solutions to the opencast extraction of the affected ball clay reserve.

It is not clear whether the Secretary of State is legally required to seek an opinion from the Commission if an applicant, having received a negative AA, argues that the project should be authorised for IROPI of an economic nature on a site which contains priority species. The European Court of Justice has not ruled on the issue, however, the Spanish Supreme Court has ruled that failure to obtain a positive opinion rendered a development illegal. This does not address the question whether failure of the authority to seek an opinion from the Commission renders their determination (that the project should not be authorised) unlawful and uncertainty remains in this regard.

6. CONCLUSION

This study concludes that, despite the Minerals Plan allocating only one site for ball clay mineral extraction, the MS provides sufficient flexibility to allow the Company to submit planning applications outside of the preferred areas, although applicants will need to demonstrate the need for the site and the particular grade of clay sought. Such applications will not benefit from the presumption in favour of sustainable development. In any case, an AA will most certainly be required and if this is negative, the only option for Holme Heath will be to be assessed under the IROPI exemption.

In relation to the potential for use of the IROPI exemption contained in article 6.4 of the Habitats Directive, it is likely that proposals brought forward, including Holme Heath Triangle, would have an impact on priority species. In this case, the

project could only be authorised following a positive opinion from the European Commission. Without sufficient backing from the Government, it is unlikely that an applicant would secure a positive opinion.

Having considered the MPA's approach in a review of the planning permission at Povington Pit and analysed the European Commission's opinions, the report concludes that applicants are unlikely to succeed under the exemption at the present time, unless the industry secures more Government support for mineral extraction in or near designated sites.

Aside from the "*Areas of Less Environmental Sensitivity*" identified in the MS, the applicants should consider the potential for sites within the "Creekmoor Clay Resource Area", which may have more chances of success than the Holme Heath site.

This research has highlighted the challenges for the ball clay industry in planning for future extraction in and around protected sites in the Wareham Basin. This research concludes that planning and environmental law and policy allows for local decision making to impact considerably on future access to ball clay mineral resources in the Wareham Basin. The Wareham basin is unique in that it combines rare deposits of valuable ball clay with endangered species and habitats. The working of ball clay in this area invariably leads to ecological damage to a fragile environment, conversely, the protection of the ecological resource leads to sterilisation of a mineral of national economic importance. The lack of a definition of sustainable development within the legislative framework may be partly responsible for the industry's perception that the concept, commonly known as a one which allows for a fair balance between economic, social and environmental interests is not being applied consistently by local decision makers. In practice, the reality is that local decision makers have a wide discretion when deciding on planning applications, as long as they are able to

demonstrate that they have had regard to the relevant plans, policies and guidance and there is limited recourse to IROPI unless a project has strong political support.

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List of abbreviations

MPA: Mineral Planning Authority

REFIT: Regulatory Fitness and Performance Programme

ELM: Environmental Law Methodology

JNCC: Joint Nature Conservation Committee

IUCN: International Union for Conservation of Nature

SAC: Special Areas of Conservation

SPA: Special Protection Areas

SSSI: Sites of Special Scientific Interest

AONB: Area of Outstanding Natural Beauty

UNCED: United Nations Conference on Environment and Development

ICJ: International Court of Justice

CJEU: Court of Justice of the European Union

TFEU: Treaty on the Functioning of the European Union

PPG: Planning Practice Guidance