

**HEREFORDSHIRE MINERALS AND WASTE LOCAL PLAN 2022**  
**COUNSEL'S NOTE**

1. This Note considers a number of issues raised by the Herefordshire MWLP EIP in respect of Matter 6 concerning Policy M2 of the Plan in relation to the following:
  - Infrastructure :Should the Plan provide safeguarding policy to infrastructure (rail heads, concrete batching sites etc)
  - Should the plan provide safeguarding policy to include buffer areas and Mineral Consultation Areas?
  - Does the “Agent of Change principle in para 187 of the NPPF apply to (i) future; and (ii) existing mineral sites;

**Infrastructure**

2. In the 1996 revision of MPG 1 the prevention of the unnecessary sterilisation of mineral resources was emphasised. This also included the requirement that *“MPAs should include policies in their plans to safeguard existing rail head and wharfage facilities.”*
3. Minerals Policy Statement 1 (MPS1), published in November 2006, sought to reduce similar problems in the future by providing a stronger national policy for safeguarding minerals. MPS1 introduces an obligation on all Mineral Planning Authorities (MPAs) to define Mineral Safeguarding Areas (MSAs).
4. The present guidance in the PPG endorses the guidance in MPS1

**Buffers and Mineral Consultation Areas [“MCAs”]**

5. Detailed advice on mineral safeguarding may be found in the British Geological Survey report *“Mineral safeguarding in England: good practice advice”* published in 2011. The is endorsed in the PPGs.
6. The BGS advises that the advice in MPS 1 2006 should be followed. It also advises that MWA’s should: *“Decide whether Mineral Consultation Areas (MCAs) should be defined in addition to MSAs to ensure that mineral interests are taken into account when considering proposals for non-minerals development.”*
7. The definition of MCAs is not obligatory but consultation within a defined MCA is.
8. The BGS report recommends *“extending the MSA to avoid sterilisation from development near the mineral resource”* and states *“it may therefore often be appropriate to extend the MSA beyond the resource boundary.”*
9. Current PPG advises that preparation of safeguarding policy should set out Minerals Safeguarding Areas on the policies map that accompanies the local plan and define Mineral Consultation Areas.
10. Annex A below refers to two appeal decisions where otherwise acceptable development was refused due to their effect on buffer areas at the edge of an MSA.
11. Cornwall Minerals Safeguarding DPD [ December 2018] includes buffer zones but there is no explanation or justification given for them in the Plan, nor any justification for the size of the buffer zones. Dorset County Council utilises a 250m

Mineral Consultation Area around minerals sites, with Devon taking a similar approach.

12. Officers at Herefordshire considered that it was not necessary to do so. Safeguarded buffer areas coincide with flood zones. See Kevin

13.

### **Agent of Change**

14. NPPF para 187 states:

“187. Planning policies and decisions should ensure that new development can be integrated effectively with existing businesses and community facilities (such as places of worship, pubs, music venues and sports clubs). Existing businesses and facilities should not have unreasonable restrictions placed on them as a result of development permitted after they were established. Where the operation of an existing business or community facility could have a significant adverse effect on new development (including changes of use) in its vicinity, the applicant (or ‘agent of change’) should be required to provide suitable mitigation before the development has been completed.”

15. There is nothing on the face of the policy that indicates it would not apply to mineral sites. The principle of Agent of Change stems from case law<sup>1</sup> concerning nuisance but the inclusion of the principle in planning policy clarifies the position.

16. Minerals Safeguarding Practice Guidance published by The Mineral Products Association And The Planning Officers’ Society in 2019 states:

“1.8 Sterilisation of mineral resources and loss or constraint of minerals infrastructure can be both direct and indirect:

- Direct: Built development constructed on land bearing a mineral resource preventing its current or future extraction. Development on minerals infrastructure sites results in loss of capacity to supply materials from that site.
- Indirect: Development in proximity to an existing quarry and/or mineral resource or minerals infrastructure site may be sensitive to impacts, especially noise, and lead to constraints on extraction or operation. It can also constrain accessibility of sites and constrain productivity.”

17. 6.3.6 of MPA POS Minerals Safeguarding Guidance April 2019 states “The PPG also advises that: Planning authorities should safeguard existing, planned and potential storage, handling and transport sites to:

- ensure that sites for these purposes are available should they be needed; and
- prevent sensitive or inappropriate development that would conflict with the use of sites identified for these purposes.....

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<sup>1</sup> In *Coventry v Lawrence* [2014] UKSC 13 the Supreme Court confirmed that where a claimant in nuisance uses their property for essentially the same purpose as that for which it has been used by their predecessors since before the alleged nuisance started, the defence of coming to the nuisance must fail. However, Lord Neuberger considered that there was "much more room for argument" where the claimant builds on, or changes the use of the property after the defendant has started the activity. The then President of the UK Supreme Court considered that it "may well be a defence" in some circumstances for a defendant to contend that a claimant should not be able to succeed in a claim where a defendant's activity can be argued to be a nuisance only because of a change made by a claimant at their property. The Supreme Court did not need to rule on that point, but in any future case in which the same point is considered the Supreme Court judgement and the agent of change principle may provide greater support for the existing land use.

6 3.7 considers the guidance in paragraph 182 [now 187] of the NPPF that introduces the ‘agent of change principle’ is of relevance to safeguarding of minerals.”

Conclusions

18. There is no requirement in national policy or practice guidance to provide buffer areas or MCAs . Whether to do so is a matter of judgement for the mineral planning authority.
19. There is long standing and consistent advice that minerals associated infrastructure such as rail heads and wharfs should be safeguarded.
20. The Agent of Change policy in NPPF 187 applies to existing mineral safeguarding areas.

Annex A Extract from **Minerals Safeguarding – Pushing the boundaries**

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It is nearly 50 years since the Committee of Inquiry into Planning Control Over Surface Mineral Working chaired by Sir Roger Stevens recommended that *“for each county mineral consultation maps should be prepared”* due to their concern that the lack of detailed geological knowledge should not lead to unnecessary sterilisation of mineral deposits by other development.

Since that recommendation, the principle of consultation areas has been expanded by subsequent guidance to safeguard both mineral resources and mineral infrastructure.

In the 1996 revision of MPG 1 the prevention of the unnecessary sterilisation of mineral resources was emphasised. This also included the requirement that *“MPAs should include policies in their plans to safeguard existing rail head and wharfage facilities.”*

Safeguarding was also recommended in MPS 1 in 2006 (and its accompanying Practice Guide), requiring that there should be consultation where an application is made for non-minerals development within a Minerals Consultation Area (‘MCA’). MPS 1 and its Practice Guide both referred to the possibility of development near or close to an MSA being refused due to the potential for sterilisation.

The British Geological Survey's 'Mineral Safeguarding in England: good practice advice' (which is referred to in the PPG) picks up on the points made in MPS 1 and its Practice Guide about proximal sterilisation. The BGS report recommends "*extending the MSA to avoid sterilisation from development near the mineral resource*" and states "*it may therefore often be appropriate to extend the MSA beyond the resource boundary.*"

The NPPF also refers to the need for Minerals Safeguarding Areas ('MSAs') (including infrastructure) [Para 204], (although the definition in the NPPF – "*an area designated by Minerals Planning Authorities which covers known deposits of minerals which are desired to be kept safeguarded from unnecessary sterilisation by non-mineral development*" – does not accurately reflect the true extent of the safeguarding required). The PPG also picks up on the theme of development in Mineral Safeguarding Areas.

Two appeal decisions in Cornwall shed light on the approach taken by the Planning Inspectorate.

The first appeal relates to a proposal to build three houses close to Delabole Quarry [APP/D0840/W/14/3001768]. The area of land subject to the planning application was not owned by the quarry but was within both the mineral permission boundary and the MCA. The most recent ROMP had identified extraction in areas away from the appeal site and the Inspector concluded that it was unlikely that the application site itself would be used for mineral extraction, but that this did not preclude its potential for use for future ancillary operations. He therefore found that the proposal was contrary to the Local Plan and the NPPF because of the potential for future use and so refused permission.

The second appeal relates to a proposal to build 44 houses close to mineral infrastructure at Par [APP/D0840/A/14/2225653]. In this case the land was not within the boundary MCA, but had acted as a buffer zone (for the past 175 years). Whilst the experts agreed that there would be no adverse impact on the new dwellings from the current infrastructure at Par, there was no certainty that future development of infrastructure (or removal of existing infrastructure which screens noise from existing development) would mean that the situation remained acceptable for the new dwellings.

Para 206 of the NPPF refers to not normally "*permitting other development proposals in mineral safeguarding areas where they might constrain potential future use.*" As the proposed site was outside the MCA, the Inspector did not consider that this applied (unlike Conservation Areas and AONBs which are protected from development outside their area) and the appeal was allowed.

Whilst the operator had previously raised the prospect of extending the MCA (which dated from 1998), the MPA had not taken any action to amend the boundary. It is clear from the Inspector's decision that whilst the policy remains that mineral resources and minerals infrastructure should be protected, that protection will only extend to the boundary of the MCA/MSA.