



**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
Environment**

Tribunal Reference: NV/2015/0002
Appellant: Forager Limited
Respondent: Natural England

Judge: Peter Lane
Member: Brian McCaughey

DECISION

Introduction

1. Areas of Dungeness, Rye Bay and Romney Marsh were designated in 2006 as a Site of Special Scientific Interest under the Wildlife Countryside Act 1981. The site was notified because a number of important habitats are present in it, together with significant geomorphological features. The SSSI contains the largest and most diverse area of shingle beach in Britain. The habitats in the site are of European significance, which has caused it also to be designated as a Special Area of Conservation under the EU Habitats Directive and as a Special Protection Area under the EU Birds Directive. The area of exposed shingle on Dungeness Point has been designated as a National Nature Reserve, having been identified as amongst England's finest sites for wildlife and/or geology. Consideration is currently being given to designating the site as a Wetland of International Importance under the Ramsar Convention.

2. Dungeness and Rye Harbour comprise the largest cusped foreland in Britain. It provides habitat for annual vegetation of drift lines, which occurs on naturally functioning shingle beaches. It is considered to be one of the scarcest habitats in the United Kingdom. The frontage at Rye Harbour and Dungeness is also considered to be one of the most important areas in the country for shingle

habitat, which grades into the more stable perennial vegetation of stony banks that grow on ridges inland from the beach.

3. The coastline is accreting, in that shingle is thrown up onto the foreshore by wave action, forming shingle ridges running parallel to the foreshore. Each ridge represents a period of growth, with its flora reflecting the age and stability of each ridge.

4. The habitat is important for the plant known as sea kale (*crambe maritima*). The older more permanent shingle ridges support plants that are well established, whilst the younger ridges present an opportunity for younger plants to start to colonise.

The appellant and its foraging activities at Dungeness

5. Forager Limited is a commercial company, which forages wild plants and fruits, for supply to restaurants. Its director, Mr Miles Irving, is a passionate advocate for foraging, believing that it is an environmentally friendly activity, which (amongst other things) helps to re-connect present day humans with their ancient counterparts.

6. According to the respondent, Natural England, which has statutory responsibility for the SSSI, on a number of occasions Mr Irving and the appellant have been spoken or written to, regarding the harvesting of sea kale at Dungeness. The respondent considered that the appellant's activities were damaging the site and constituted a criminal offence. The appellant declined to cease its sea kale harvesting operations at Dungeness. However, in 2009 and 2012, the respondent states that the appellant approached it, seeking consent to harvest sea kale at the site. Consent was refused, on the basis that it was considered that the activities would be damaging.

7. On 17 July 2013, a number of men visited the site, according to the respondent stripping the seed heads from all sea kale plants along a length of the coast between 0.5 and 1 kilometre. The men were using a white VW refrigerated van, registered to the appellant. On 3 December 2013, the respondent wrote to the appellant warning that these activities, in its view, constituted a criminal offence.

8. On 5 June 2014 members of the public at Dungeness reported sea kale harvesting activities being carried out at the site by men using a white VW refrigerated van. A further report from members of the public was made about similar activities on 6 June 2014. The van was registered to the appellant.

9. On 11 June 2014 two men were apprehended by the police carrying out sea kale harvesting. They were using the white van and had apparently collected

around 50 kilograms of sea kale leaves from a large number of plants. The men informed the police that they were employed by the appellant to undertake the harvesting activities.

10. On 10 October 2014, the respondent wrote to the appellant, with a further warning and a request for a written assurance that the appellant would not undertake any further such activities. No such assurance was forthcoming.

The Stop Notice

11. On 30 April 2015, the respondent issued the appellant with a Stop Notice under the Environment Civil Sanctions (England) Order 2010. It stated that the respondent reasonably believes that an activity likely to be carried on by the appellant

- will cause or will present a significant risk of causing, serious harm to the environment (including the health of animals and plants); and
- will involve or will be likely to involve the commission of a relevant offence.

The notice stated that sea kale is part of the “supra littoral sediment community, a notified interest feature of the SSSI”. The notice also stated that sea kale was an early successional species that colonises shingle ridges lying close to the coastline and that it “acts as a keystone species, in that it is associated with a particular stage of shingle ridge colonisation, and can be the dominant vegetation. Once sea kale is established it provides opportunities for a range of other specialised coastal plants to form the successional communities. This is particularly well demonstrated at Dungeness”.

12. The notice asserted that the appellant’s activities had been targeted “where sea kale grows on the accreting shoreline on the east coastline particularly on the most seaward ridges. This is where the youngest plants occur. It takes four – five years for sea kale to flower and so this targeting increases the scale of the damage. However, commercial harvesting of sea kale anywhere in the SSSI is an activity which could in turn lead to damage and/or destruction of existing shingle vegetation, or preventing plants from colonising the open shingle, through trampling and possible vehicular access”.

13. The taking of sea kale was also said by the notice to reduce the plant’s fitness, as it produces large seeds which are not plentiful. “As the plant puts a lot of reproductive effort into this, taking seeds significantly reduces the plant’s ability to spread”.

14. The relevant offence, stated in the notice, is section 28P(6) of the 1981 Act, which provides that:-

“ Any person who without reasonable excuse intentionally or recklessly destroys or damages any of the flora, fauna or geological or physiographical features by reason of which land is of special interest or intentionally or recklessly disturbs any of those fauna and knew that what he destroyed, damaged or disturbed was within a SSSI will be guilty of an offence and is liable on summary conviction to a maximum fine of £20,000 or on conviction on indictment to a fine”.

15. The notice said that the respondent had decided to stop the appellant from carrying out these activities, with immediate effect. Schedule 1 set out the “activities to be stopped” as “sea kale harvesting; including the cutting of sea kale plants, and the collection of parts of sea kale plants including leaves and seeds”.

16. Failure to comply with the Stop Notice is an offence under paragraph 6 of Schedule 3 to the 2010 Order. A person guilty of an offence is liable on summary conviction to a fine not exceeding £20,000 or imprisonment for a term not exceeding twelve months or both or, on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.

The appeal

17. The appellant appealed against the Stop Notice to the Tribunal. A hearing took place at Field House, London on 21 July 2015. Directions were given for the closing submissions of the parties to be set out in writing. In the event, that process took until late September.

18. At the hearing, the Tribunal had before it a hearing bundle in three parts. Following the hearing, Mr Irving supplied a large further bundle, dealing with the extraction of shingle at a place known as the Borrow Pit, Dungeness. The respondent objected to this (and, indeed, any other) evidence being submitted following the hearing, given that any such evidence could, and should, have been put forward earlier and that the only directions of the Tribunal related to the filing of written submissions on the evidence which had been adduced in connection with the hearing on 21 July. We shall return to this matter in due course. The appellant’s grounds of appeal can be described as follows. The appellant contends that the Stop Notice contains errors of fact; that it is wrong in law; that it is unreasonable; that the appellant has not committed any offences and would not do so in the future, regardless of the Stop Notice; and that it would have available a defence to any charge brought as a result of such activities.

19. At the hearing, the Tribunal heard oral evidence from the respondent’s witnesses, Jo Dear; Owen Leyshon; Sue Rees and Jonathan Cox. Oral evidence for the appellant was given by Miles Irving, Ross Evans; Carl May-Smith; Edward Blain; Will Tebbutt; Vlad Ghioria, and Oissine Boushel-Payne.

The witnesses

(1) Jo Dear

20. Ms Dear is the lead advisor – land management for Natural England. The role involves advising land managers on how to manage land to conserve and enhance its biodiversity. When land is damaged she is required to visit the area, collect evidence and liaise with the land manager on appropriate restoration. She has been involved with Dungeness, Romney Marsh and Rye Bay SSSI since 2001 and states that she has a thorough understanding of its wildlife value. She has a degree in zoology and a diploma in horticulture.

21. Ms Dear exhibits the reasons for notification of the SSSI. In this document under the heading “vegetated shingle” it is recorded that the shingle beaches at Dungeness and Rye support a range of vegetated shingle communities and transitions between them. The communities reflect the geomorphological patterns of the shingle structure, reflecting both the time since deposition and the particle size and matrix of finer material present:-

“ One of the most unusual pioneer species is prostrate broom ... which is an important component of the vegetation just inland of the pioneering driftline and false oat-grass grassland communities. On older shingle ridges the broom is eventually replaced by other species such as sweet vernal-grass ... wood sage ... and common sorrel ... and a rich lichen sward and ‘thin heath’ develops with natural variation occurring where the shingle grades into grazing marsh ... even the areas of apparently bare shingle are in fact ‘vegetated’ by encrusting lichens, including the near-thread and species *rinodina aspersa*.

On naturally bare shingle ridges near the coast at Rye Harbour, soil development is limited and only a few specialised pioneer plant species can colonise, such as sea-kale ... sea pea ... sea campion and curled dock ... after several centuries, a thin, well-drained soil develops on the oldest shingle ridges and a variety of grassland species occur ...”.

22. Ms Dear states that the shingle ridges support species of plant that are adapted to the harsh conditions found on the coast. The plants are deep rooted, low growing, leathery or hairy leafed plants that can withstand salty, dry and windy conditions. Shingle beaches support a particular community of such plants and in turn they are often located growing in a linear pattern near a top of the shingle ridges. The key management task is to prevent disturbance to the shingle through damaging activities such as trampling, vehicles driving across and onto the shingle and excavation and removal of the shingle. Both the shingle ridges and the shingle vegetation are vulnerable to these types of activity, which results in damage to plants and the flattening of the shingle ridge formations.

23. Ms Dear states that the area of the SSSI which is of concern is Unit 33, which runs from the seaward edge of coast drive down to the tide line from the sand dunes at Greatstone in the north down to the Pilot Inn in the south. Unit 33 was recorded as being in “unfavourable recovering condition”. This was based on the last condition assessment on 9 March 2010, which recorded that the unit suffered from invasive species on the shingle (valerian and silver ragwort). These invasive species are being addressed through an agri-environmental agreement.

24. On 11 April 2014 Ms Dear visited the site in order to focus on the shingle plants and in particular the sea kale which had been the focus of attention from foraging activities. She walked the foreshore north and south taking particular interest in the newly growing sea kale plants. She saw plants in full spring growth with no missing leaves or damage from cutting. The flower heads were developing well. She took photographs of two of the plants which were later damaged.

25. On 11 June 2014, Ms Dear and Mr Leyshon met with police, who were questioning two men. Ms Dear decided to go over to the site and gather evidence of any damage that had occurred. The police showed her the van, which was open with boxes and bags of sea kale in the back. There were also knives suitable for cutting leaves in the van. Ms Dear photographed each plant that was damaged in order to show the extent of the amount taken from the shingle vegetation. Five to ten leaves had been cut at the base of the stem from a total of 48 to 50 plants. Each of the plants had had leaves removed. The younger leaves had been removed from one half or side of the plant. Many of the plants that had had leaves removed were at a relatively young stage of growth. Older plants had also had their leaves removed; these were displaying flowering heads that were starting to go to seed following flowering. Ms Dear considered that the younger, smaller plants could have been targeted as they offered up smaller, more tender leaves. She noted that the collectors had gathered leaves from one particular shingle ridge, which was on the most seaward side displaying sea kale. She considered that these would be the younger plants because the ridge, being the most seaward, would have formed after the ridges lying landwards. The line of plants started at the boardwalk at Lade Car Park and ran south to the private access route crossing the shingle opposite Williamson Road. This was a line of some 280 to 300 metres of sea kale plants.

26. The leaves removed were a mixture of younger plants not in seed and older plants that had flowered and were now starting seed formation. One side of the plant was cut leaving leaves on the other side of the plant. Ms Dear considered that this could cause a reduction in the ability of the plants to store food reserves for the winter and possibly growth next year. Photographs showed the consequences of cutting by illustrating difference in growth pattern in the plants that had been cut, compared with those that had not. The plants that had been cut would continue to grow as they are able to withstand salt spray, wind and

sometimes storm damage. However, removal of the leaves “may add stress to the plants in these harsh conditions by reducing their ability to store reserves to survive through winter. In winter the upper, leafy part of the sea kale plant reduces back to a main root but below the surface of the shingle. Growth next year in spring is seen as young leaves emerging from the single growing from this main underground tap root under the shingle”. Ms Dear exhibited the photographs referred to in her statement.

27. Ms Dear told the Tribunal that she regarded the site as a particularly sensitive area. She was there on average one or two times a week. New ridges were forming, as part of a process going back five or six thousand years and no other site in the United Kingdom demonstrated this as well as Dungeness. Pioneer species would establish themselves on the shingle, followed by other colonising species.

28. The lichen community was also very important on the shingle. Ms Dear repeated that the more seaward ridge of sea kale had been targeted in the June 2014 incident.

29. Cross-examined by Mr Irving, Ms Dear said that the assessment of harm was undertaken on a case-by-case basis. A judgment was taken by the respondent. The cutting that took place on 11 June was not an isolated incident; the appellant had been written to before about the matter.

30. Ms Dear, when challenged by Mr Irving, said that she was familiar with the life cycle of sea kale. She drew on her own knowledge, including having studied at Kew Gardens, and on the experience of colleagues.

31. Ms Dear was asked whether she regarded the activity of cutting the sea kale as akin to the pruning of a garden plant. Ms Dear said she did not. Furthermore, targeting the sea kale harmed the succession of species. The sea kale provided shelter and shade.

32. Asked whether the colonisation process did not in fact take hundreds of years, Ms Dear said that the shingle community took a long time to establish and so if it were damaged, it would take a long time to recover. Taking leaves removed material that would otherwise rot into the shingle.

33. Trampling by feet at Dungeness disturbed the natural setting down of the shingle. The respondent was trying to introduce measures to control footfall in the area. A boardwalk had been constructed. Around the boardwalk, where the trampling pressure had been relieved, the shingle was starting to recover.

34. Mr Irving put to Ms Dear that the appellant did not target the younger plants. Ms Dear disagreed, based on the photographic evidence and what she had seen. One young plant had had all but one of its leaves removed. Other

young plants, being less than four or five years old, had also been cut. She had seen this evidence.

35. Ms Dear said that there was a risk to the wider vegetative community if the appellant's activities continued. She could not be confident that harm would not occur.

36. Re-examined, Ms Dear said the cut plants tended to show a dome only on one side, rather than a large dome on the head of the plant. Pruning could have a positive effect on roses by encouraging growth but there was no evidence that harvesting sea kale was beneficial to the plant. It was not possible to permit or otherwise license the activity on the site.

37. In answer to a question from the Tribunal, Ms Dear said that taking of the seed from the plant reduced its effectiveness. Taking seed removed that year's production. She assumed that the appellant had taken seeds in order to attempt to propagate sea kale. This was confirmed by Mr Irving. He also said that they had sold seeds for culinary use. They had not, however, harvested seeds in 2015. The appellant would not do so in the future. Mr Irving said that the appellant had "backed off" selling sea kale seeds because of the controversial nature of that activity.

(2) Owen Leyshon

38. Mr Leyshon is the Project Officer for the Romney Marsh Countryside Partnership and the site manager/warden of the Dungeness National Nature Reserve. He has 22 years' experience of managing nature reserves across Britain and has been involved in Dungeness for eighteen years. He first encountered Mr Irving collecting sea kale in the nature reserve over ten years ago. Mr Leyshon told Mr Irving that he had no land owner permission or SSSI consent and asked him to stop harvesting the kale and leave. Mr Leyshon also received information from the public regarding the incidents on 5 and 6 June 2014 and was present with the police when employees of the appellant were encountered on 11 June 2014. 50 kilograms of kale had been cut on 11 June. Mr Leyshon considered that all the younger looking plants had been cut. Since the plants had not been dug up, he considered that in the next season they "should recover".

39. On 11 June 2014, Mr Irving phoned Mr Leyshon and said at first that he did not know that the men were down at Dungeness collecting sea kale. According to Mr Leyshon, in a conversation with Mr Irving that took place on 13 June 2014, Mr Irving "accepted that what his company was doing by collecting sea kale across the Dungeness area was illegal, but he now wanted to do things properly".

40. Cross-examined, Mr Leyshon said that he considered the plants had been damaged by the cutting of leaves. He denied telling Mr Irving that there was no

harm done to the sea kale. As for the comment that the plants would recover the next year, Mr Leyshon said this did not mean that the plants had not been harmed by the cutting.

(3) Jonathan Cox

41. Dr Cox is a Plants Specialist working for the respondent. His role covers vascular plants (higher plants), bryophytes and stoneworts (large aquatic algae) and includes providing advice regarding their ecology, licensing, SSSI casework, proposed SSSIs and conservation objectives. Dr Cox is a member of the Chartered Institute of Ecology and Environmental Management and is a chartered environmentalist. He has 24 years' experience working for government nature conservation agencies. During that time he has carried out more than a thousand condition assessments within SSSI, the majority of them involving the assessment of vegetation and plants. He has led many botanical training events and has written eight botanical publications as well as many botanical reports. He has been assessed as having excellent identification skills by the Botanical Society of the British Isles and has a full Natural History Museum qualification to the identification of vascular plants. Dr Cox also has a PhD in marine biology and a BSc in zoology.

42. Dr Cox said that he is very familiar with sea kale (*crambe maritima*) having carried out many condition assessments on SSSI units where this species is an important part of a vegetated shingle interest feature. He visited Dungeness on 8 June 2015 for the purposes of this appeal. He examined three sites where sea kale grows at Dungeness; the beach near Lade Car Park, the beach near the train terminal and old lighthouse and the beach immediately west of the MOD firing range. The purpose of this visit was to observe the effects of sea kale harvesting at the site and assess the potential for such activities to cause serious environmental harm.

43. Dr Cox said that the removal of a large number of leaves from sea kale plants, such as he had seen in the photographs following 11 June 2014 incident at Dungeness, would in his opinion have some detrimental effect on the plants involved. Plants require their leaves to carry out photosynthesis in order to survive. It is that process which provides the plant's energy. In normal circumstances a plant would use the energy produced and energy it has stored in order to grow, including growing additional leaves. Where leaves have been removed, not only will the plant have less energy available but it will need to use some of that energy to replace the leaves taken. The effect would be that a plant may not grow as large or have as many leaves as it otherwise would have done. If the effect was too great, the plant may not survive at all.

44. Dr Cox said he could not be precise about the level of harm that would be caused to any individual plant as he was not aware of scientific evidence

regarding the effects of removal of leaves of sea kale. This meant it was impossible to determine the level of leaf harvesting which, if exceeded, could cause serious harm to the plants. The removal of flower heads or seed heads from sea kale would reduce the ability of the plant to reproduce and spread. Replacing those seeds would therefore require a plant to expend a significant amount of energy.

45. In Dr Cox's opinion, continued repeated harvesting on the scale seen in 11 June 2014 incident posed a significant risk of serious harm to the population of sea kale at Dungeness being caused at a future stage. Again, Dr Cox could not be precise as to when this might occur, and he was not aware of scientific evidence regarding the effects of removal of leaves and/or flowering shoots from sea kale. There was, however, a risk that if harvesting went beyond a certain level or persisted over too long a period, the impact of the activity might be to cause a "tipping point" to be reached, when the population of sea kale may decline rapidly.

46. Dr Cox's reasons for this opinion were that the unregulated nature of harvesting could result in damaging amounts of sea kale being removed. Furthermore, if one such large scale harvesting project was allowed to continue at Dungeness, then others could subsequently follow, which would be seriously damaging to the SSSI, National Nature Reserve and Special Area of Conservation.

47. Historical information suggested to Dr Cox that uncontrolled large scale harvesting of sea kale has caused declines in populations in the past. Griggs (1958) considered that collection of sea kale "must have reduced it greatly, at any rate on the south coast". Mabey (1972) said that, following a pamphlet written in 1799 about the culinary merits of sea kale, "demand for the naturally growing shoots increased greatly. This extensive collection was to have the effect of substantially reducing the population of wild sea kale". Sanyal & Decocq (2015) state that sea kale is much more common now on Chesil Beach than in the 1940s, when it was collected for culinary use. Good (1948) noted the very uncommon status of sea kale in Dorset in the 1940s. Bowen (2000) recorded that sea kale had recovered to a fairly frequent status in Dorset. Bowles Barrett (1905) referred to the population status of sea kale on Chesil Beach in 1905. Drawing on an earlier reference, Bowles Barrett recorded sea kale as being almost all destroyed on Chesil Beach in 1803 and extinct in 1905. Bowen in 2000 records sea kale as being locally fairly frequent on shingle beaches in Dorset. These references suggested to Dr Cox that excessive harvesting of sea kale was likely to have been a factor in the decline of the species on Chesil Beach as recorded in 1803 and 1905, although it was possible that grazing by livestock on shingle beaches in the past might also have reduced sea kale populations. However, given the configuration of Chesil Beach, being isolated from the mainland by a brackish Fleet lagoon, Dr Cox thought it was unlikely that livestock would have been allowed to roam in the area, lacking access to fresh water. If historic grazing by livestock alone was the

cause of decline in sea kale on Chesil Beach as recorded in 1905, it would appear likely that populations would have persisted in the most isolated central areas of this nine mile stretch of beach. Accordingly, there was serious cause for concern that unregulated large scale harvesting of sea kale at Dungeness could lead to future serious damage to the population of sea kale in that highly sensitive area.

48. In answer to questions from Mr May-Smith, Dr Cox said that the cutting of leaves would reduce the size of the sea kale plant at the end of the season, to some extent. The leaves would die back at the end of the year, depending on the weather, with energy going into the stem and buried roots, which would be used to produce more leaves, flowers and shoots. If the leaves were cut, there would be less energy to re-grow as effectively the following year. Dr Cox said that the photographs at 339, 344 and 345 of cut sea kale plants demonstrated poor growth in those plants. Although the cut plant had the potential to re-grow, it was going to be somewhat reduced.

49. Cross-examined, Dr Cox was asked about the comment by David Pearman, who in his Atlas entry for sea kale had alluded to decline in harvesting as a possible reason for its increase in some areas. Mr Pearman had stated in an e-mail to Mr Irving of 12 June 2015 that he did not now think that collecting was a problem and that grazing might have been. Reasons for recent successes in sea kale in Dorset was, according to Dr Pearman, to do with the frequency of storms which broke up fragments and spread sea kale to new areas along with seed.

50. Dr Cox said that he did not agree with this view, and as he had stated in his statement, it was difficult to regard grazing by livestock as a factor at Chesil Beach. Dr Cox considered that excessive culinary use could well be a factor in the previous decline in sea kale. The historical evidence suggested that, if a lot of people got in on the act, then harm could occur.

51. Dr Cox accepted that there might be some inaccuracies in Richard Mabey's book "Food for Free". Nevertheless, Dr Cox considered that there was cause for concern.

52. It was put to Dr Cox that no forager would wish to deplete the population of the plant being harvested, since the forager would wish to return the following year. Dr Cox said that certain elements would not behave responsibly and if there were profit involved, people would come for the big money.

53. As for the SSSI notification, Dr Cox said that sea kale was covered by the reference to vegetated shingle. He disagreed with Mr Irving that all that reference meant was that the shingle itself was a designated feature. Other plants had been mentioned individually because they were nationally scarce.

(4) Sue Rees

54. Ms Rees is a Senior Environmental Specialist for Coastal Habitats with the respondent, a role she has held since 2011. From 1998 to 2011 she was an environmental specialist in coastal issues with the respondent and its predecessor, specialising (as she still does) in coastal sand dune, shingle, salt marsh and sea cliff habitats, their vegetation, plant communities and supporting processes. She is responsible for bringing together and applying evidence and technical advice about these habitats, so that colleagues can deliver Natural England's objectives. Advice on activities within protected sites to ensure their conservation is a further part of her work. Ms Rees is a founder member of the Chartered Institute for Ecology and Environmental Management as well as a chartered environmentalist with the Society for the Environment. She has a BSc degree in natural environmental science.

55. Coastal shingle and its vegetation is one of the habitats that Ms Rees covers in her role. She was closely involved in the selection and designation and Special Areas of Conservation to Annex 1 habitats with shingle features. This required her to understand and apply information about the extent and types of vegetated shingle habitat, management needs and the relationship to coastal processes and geomorphology. She was part of the team managing the "Living with the Sea" LIFE project from 1999 to 2003, which addressed management and restoration of European sites on dynamic coasts, including Dungeness as a pilot study area. She has managed survey and mapping projects focused on shingle habitats and has a lead role for the development of United Kingdom guidance for shingle habitat condition assessment used by Natural England.

56. Ms Rees has been a regular site visitor to Dungeness since 1998. Visits are undertaken for a range of purposes, including site condition assessments, habitat restoration, strategic and scheme-level flood risk management, training of staff, casework and development proposals. She has also undertaken a study of the research on this "well-studied site". She uses the successional vegetation stages on Dungeness as the benchmark for condition assessment guidance and is able to recognise variations on site.

57. Dungeness comprises by far the largest site for coastal vegetated shingle resource in England. In fact, at about 2,000 hectares, it comprises almost half the resource in England. The habitat type is complex, being composed of several different individual elements reflecting sediment size variation, available organic matter, moisture conditions and also time. As a site evolves, pioneer plant communities should be able to establish on newly-formed ridges to the seaward as well as developing into more diverse plant communities to landward. Sea kale is one of the pioneer species on shingle beach ridges. Coarse sediment with some element of fine fraction is needed to maintain adequate water balance. Changes in the fine fractional nutrient status can shift the species' composition or prevent the full range of plants establishing. A lack of disturbance by waves

during the growing season is required for the vegetation to develop. Winter storm waves can push shingle up the beach which can cover sea kale but it is noted that this promotes shoot growth from the buried stem. Such re-growth requires the use of stored starch reserves within the stem, described as an “emergency source of food”. Other species have to establish from seed after winter storms. The natural sorting of shingle deposited by waves leaves a mix of sediment sizes, seed and nutrients available for plant colonisation to occur.

58. Trampling of the habitat is identified as a risk to shingle vegetation in a number of reports, including the Guide to the Management and Restoration of Coastal Vegetated Shingle (Doody & Randall 2003).

59. Perry and Others (1990) established that the first few ridges of the beach were formed of coarse shingle, with negligible amounts of fine humus or mineral particles except for small amounts immediately around the sea kale plants. The plant community dominated by sea kale occurs only on a limited part of Dungeness. Scott & Randall (1976) described requirements for establishment and growth of sea kale. The paper highlights that parts of the Dungeness system are strongholds but elsewhere between the 1960s and 1970s colonies declined, with trampling considered as a primary cause. Sea kale plants are large and provide a windbreak that allows finer wind-blown material and plant seeds to be trapped by the plant’s physical structure. In addition, the breakdown of dead leaves from the sea kale plant itself are also trapped, helping to build up fine material beneath it and which provides more hospitable conditions for the other plant species to grow.

60. Studies of germination of shingle beach plants, including sea kale, have indicated that sea kale seed demonstrated dormancy when stored in laboratory conditions, but viability decreases over time. Walmsley, Davy and others, studying sea kale in Suffolk, did not consider that the seed bank alone on shingle beaches could provide enough seed to establish a range of characteristic shingle-beach species to restore damage after a seven year period of disturbance. Germination requirements for sea kale are particularly stringent, with substrate composition being important. There is a need for some fine material to be present for a successful seedling establishment after germination. Sea kale was amongst the species which was found to be capable of being successfully raised using horticultural techniques.

61. Ms Rees considered that removing seed heads from a large number of sea kale plants would reduce the potential seed bank and reduce the ability of that element of the plant community to re-colonise new areas. Removal of the leaves of sea kale plants would require these to use the store of nutrients in the stem or root to grow new leaves, thereby inhibiting their overall growth. It was unclear how long it would take for cut leaves to be replaced by new growth and it was also unclear whether the plant would return to its previous size within the same growing season. Importantly, removing leaves would reduce the cover offered to

the overall vegetation community. Trampling would disturb the shingle process, again damaging the overall vegetation community. Unlike sea kale, many other plant species have only shallow roots. Trampling also affected the surface morphology of the site by changing the position of wave-sorted shingle up to several centimetres deep. The action of walking over shingle leaves individual footprints and a visible “pock-mark surface” which prevents plants from establishing. This in itself constituted damage to an important notified feature at the site.

62. Repeated harvesting of sea kale, especially of younger plants at the levels already seen, has the potential to weaken the sea kale by reducing the store of nutrients in the buried stem and root system, thus reducing the ability of the plant to survive, as well as restricting the extent of its growth and the number of leaves it holds. It could also reduce the ability of the plant to photosynthesise and store enough nutrients before dying down for the winter, thereby weakening its ability rapidly to re-grow in the following spring or if there was a natural storm which buried it later in the same growing season, after it had been cut.

63. Smaller sea kale plants were also more vulnerable to trampling by other people using the beach. Larger sea kale plants provide shelter to the sediment under the leaves, trapping blown material and seeds that help to sustain the overall plant community. Smaller plants will be less effective at doing this.

64. Activities that mix or compact the shingle at inappropriate times, such as trampling or artificial movement of beach sediments, is damaging as it destroys interstitial spaces and microhabitats important for seed dispersal in the underlying substrate. This could cause any existing seed bank to move more deeply into the shingle, thus reducing their ability to germinate or establish new plants. It also disturbs any young seedlings at the surface that have not developed a strong root system.

65. Disturbance associated with sea kale harvesting would also have a detrimental impact on encrusting lichens that rely upon a very specific shingle condition in terms of both size and orientation, in order to survive.

66. Removal of seed heads, if repeated, reduces the available seed produced in that year and reduces the seed bank for the sea kale species. As seeds are moved by the sea or by wind blowing the ball-like seed heads, this can have impacts beyond the area where seed heads are removed.

67. For all these reasons, Ms Rees was of the opinion that the appellant’s activities pose “a significant risk of serious environmental harm”. They do this collectively and individually.

68. Cross-examined, Ms Rees said she would have expected to see other species along with sea kale in the area that had been subject to harvesting. Even if the

sea kale leaves did not drop into the soil at or around the base of the plant, they had the potential (if not harvested) to be blown by the wind to some other part of the site, where they would probably end up being trapped. As the Perry report (page 460) indicated, this fine material was important and it would go somewhere.

69. Trampling stopped the shingle from acting as mulch. Trampling could disturb the ground enough for vegetation to be destroyed or not to be able to establish itself.

70. Asked about the position at Dunwich, Ms Rees said that Natural England was troubled by the effects of walking at Dunwich and was fencing off certain areas.

71. It was not possible to assume that the seed bank would replace itself after damage. Intervention was needed in order to restore it. Ms Rees considered it would take a long time for the restoration process to occur. In fact, one would never get back to what the position had been originally.

72. The analogy with coppicing a wood was, according to Ms Rees, misconceived. There, one was dealing with a much richer soil. In poor soil, such as the shingle, a plant had to rely on what it had in its store.

73. Ms Rees was asked how it was that cattle could graze in SSSIs. She said grazing was different in that it could in some circumstances increase biodiversity and also reduce scrub encroachment. This was not, however, the position with sea kale. Mr Irving commented that sea kale could, in his view, be grazed.

74. Ms Rees said that she was concerned about the overall damage to the community, given that sea kale was a facilitating plant. Over time and if cutting was repeated, there will be a decline in quality.

75. Mr Irving said that he was willing to work with the respondent, if they were willing.

(5) *Ross Evans*

76. Mr Evans is the General Manager of the appellant. He has been employed in that capacity since 2013. He had worked with Mr Irving between 2005 and 2008, prior to the formation of Forager. He has ten years' experience in the harvesting of wild plants.

77. His activities with the appellant include planning and co-ordinating harvesting activities on a daily basis as well as monitoring and ensuring the profitability of their activities. Mr Evans states that "we are not going to harvest

something which is not profitable”, which he considers goes “a long way to ensuring sustainability of our activities”. This means that generally they will go to areas with a very high concentration of the required plant. The sites also need to be the most fertile ones, producing plants of the highest quality. The sites also need to be “capable of regenerating at a reasonable rate”. For customers of the appellant “a key consideration for them is that the supply is going to be reliable so that they can feature it on their menu and rely upon it”. This requires identifying a sustainable level of harvest for the whole season of a plant. They therefore strive for a balance between meeting the demands of the market and ensuring a steady supply. This means that the appellant has a number of sites for every plant, which they rotate according to availability and profitability of picking.

78. Mr Evans says that he has developed systems to monitor the rate at which they pick an item and that this system “is now providing us with a very detailed data set”. He considers the goals of the appellant to be “wholly benign”.

79. Mr Evans said that they harvest 200 species in the course of a year and he had not seen any detrimental effects on the plants that were harvested. The contrary had been true. An hourly target is set for picking a certain value per hour. They log the start and finish and keep a record of GPS co-ordinates.

80. Cross-examined, Mr Evans said that he was not a botanist or an ecologist. He did however have a high level of knowledge having spent ten years at 40 hours a week engaged with plants. He read books in order to understand the chemistry of plants. He had not however read about shingle habitat. He did not know about the historic concerns regarding sea kale; just what he had learnt at the hearing. Mr Evans denied that conservation was a secondary concern to profit, although the appellant needed to be profitable. The number of leaves they would take would be dictated by profitability.

81. Mr Evans acknowledged that in June 2014, all but one leaf of a plant had been taken. So that the standards for which they strived had not been met, in some instances. He also agreed that employees would be sent to sites where there was no permission to harvest and that they had had warnings that they were acting illegally.

82. Mr Evans also accepted that there was some merit in Mr May-Smith’s suggestion that the appellant’s harvesters tried to get in and out before they were caught. There had been some small instances when plants had not been properly harvested but Mr Evans thought that most had been sensitively harvested.

83. Mr Evans thought that the 2013 removal of a large amount of seed from the sea kale was sustainable but he had not been engaged in attempts to discuss sustainability issues of sea kale with the respondent.

(6) Edward Blain

84. Edward Blain is an employee of the appellant, having started work there in August 2011. The appellant has a “flat rule for the sustainable harvest” of sea kale and many other plants that they collect: “30% or less may be harvested to ensure re-growth. A team of two or three people need to collect between 10 and 50 kilograms of leaf per visit ‘and in order to do this we need to work quickly’”. With that in mind, Mr Blain said that they did not harvest from plants with a small number of leaves; nor did they harvest leaves under a specific size. They would only harvest from plants that were able to produce a large number of leaves and leaves over a certain size. They collected attractive, tender leaves which were between ten and fifteen inches long, including the leaf stalk. As the season progresses through June and July fewer of the leaves meet that criteria. For most of the season they would harvest three to five leaves from each plant, comprising approximately 10% of the total mass per plant.

85. Mr Blain said that he wished to make it clear that the policy he had described had not always necessarily been followed by the appellant. He also wanted to make it clear that they would never harvest the root of the plant. He believed that in the 19th and 20th century, there had been recipes for sea kale that had involved cooking the root, which might explain the decline described around 1905 in Dorset.

86. Mr Blain was keen on his job and happy doing it. He embraced wild food as his diet; it did him good. If he thought that the appellant was damaging the plants, then he would “kick up a fuss”.

87. Cross-examined, Mr Blain accepted that he knew that the appellant did not have the permission of the land owners to harvest sea kale at Dungeness. He accepted that that factor might affect the way in which the company went about its harvesting at the site. It was possible that employees “might rush it”. He agreed that certain of the photographs suggested that the appellant’s policy had not been followed. That included the position with seeds. The appellant’s customers set the demand for product.

88. Mr Blain admitted that the policy of taking more than 30% of a plant was “just a guess”, based on respect for the plant. The 30% figure applied irrespective of the age of the plant. Mr Blain accepted that the appellant had no potential for knowing what harm its employees might be doing to a particular plant. If their activities reduced the abundance of sea kale, then he would consider that might be damaging; but he did not think this was the position.

(7) Will Tebbutt

89. Mr Tebbutt had worked for the appellant since October 2012. His motivation for joining at the time was that he needed a job but the appellant had taught him to have a relationship with his environment. It was a unique place to work. Asked if he thought the appellant was causing serious harm, Mr Tebbutt said he did not think so and that they were “building an evidence base”.

90. Cross-examined, Mr Tebbutt said that he was involved in sales and packaging although he also did some harvesting. He had not picked sea kale at Dungeness. He had no background in sea kale.

(8) Miles Irving

91. Mr Irving presented himself for cross-examination by Mr May-Smith. He considered that he was “pretty good” with plants. He thought that the issue of lichen might be outside his expertise. He considered that he worked in tune with the Special Area of Conservation legislation and that biodiversity accorded with his world view. Mr Irving said that Leander Wolstenholme worked for the appellant. He was not able to be at the Tribunal to give oral evidence but he had produced a letter dated 19 July 2015.

92. Mr Irving said it was not necessarily the case that the appellant did not have prior proper scientific evidence for its assertion that its activities would not cause serious harm in the long run. He knew that the appellant did not have permission from the relevant land owner. Mr Irving had an evidence base in that he had been taking sea kale for ten years. No-one had ever been arrested for gathering plants illegally. Asked if he was operating a clandestine operation at Dungeness, Mr Irving said that he had a business to run but that he could be more clandestine if he wanted to be.

93. It was put to Mr Irving that he had not told the Tribunal how much had been harvested over the entire periods. Mr Irving said that the appellant had offered to undertake a test. When it was pointed out that this would require land owner consent, Mr Irving said he did not know who the land owner was until recently. He denied that taking the leaves from sea kale had any effect whatsoever on the plant. He considered that his analogies of grazing and coppicing were sound. Jo Dear’s photographs had been misleading. Everything remained to be documented. He was, however, absolutely certain that harvesting would not have an adverse effect.

(9) Vlad Ghioria

94. Mr Ghioria is an employee of the appellant. He was attracted by the appellant's mentality; and he does not like bureaucracy. He did not consider that the appellant harmed the environment. After he saw the photographs of the June 2014 harvesting, he told Mr Irving that "I expected to get a hard time from you guys". Someone called John had been with Mr Ghioria during that harvesting. This person was not with the company anymore.

95. Mr Ghioria considered that the appellant had three other sites from which it could collect sea kale. Although they were not as large as the Dungeness site, they were "large enough to cover our demand for sea kale over the year". The appellant did not therefore financially depend on Dungeness in any way "but we feel that our presence and goals need to start being regarded by larger organisations such as Natural England". He appreciated that Natural England was protecting the environment but did not appreciate the unnecessarily restrictive manner in which it was doing so. Although he did not consider that the sea kale harvesting at Dungeness was damaging, if it were, hypothetically, then it "is because we have been doing our jobs in distress, while not giving up on our original intention of trying to make a point. Distress caused by the morally incorrect situation" (sic).

96. Mr Ghioria accepted that it was possible that on a few of the plants "we might have taken more leaves than we would have normally only because we were in a hurry as a result of being worried that someone would come to 'tell us off'". The person named John had a "gung-ho approach" but employees were more careful now.

97. Cross-examined, Mr Ghioria was asked about the information arising from the June 2014 harvesting about shingle being piled up around sea kale plants. Mr Ghioria said he had never done it but John had said at some point that it was something "we would have done". Mr Ghioria had not been made aware by the appellant of the status of the site. He had, however, been told it was important "in a bureaucratic way". At the time, Mr Ghioria had no knowledge of shingle habitat. Asked if he had had training to tell whether certain plants were hardy enough to withstand being cut, Mr Ghioria said that he was "just the muscle". He was aware of the "30% rule" and tried to follow it but he was sure that he did step out of line on a couple of occasions as he was afraid that someone would come and "kick me off". There was a "clash of mentality" between the appellant and the respondent.

(10) Oissine Boushel-Payne

98. Mr Boushel-Payne is an employee of the appellant. He had previously been a gardener, having moved to the United Kingdom from Ireland. He had been

with Forager Limited for two years and considered that the job was “great” and that he was “working with great guys”. There were health benefits to eating wild plants.

99. Cross-examined, Mr Boushel-Payne said that his role was harvesting. He quickly started doing this after he had joined. He had no knowledge of sea kale nor of any knowledge of the vegetated shingle community of plants at Dungeness. He did not think he needed this.

(11) Leander Wolstenholme

100. Reference has already been made to Dr Wolstenholme. His letter of 19 July sets out his experience, working in the fields of botany and ecology. He holds a degree and PhD in botany and plant genetics from the University of Aberystwyth. He has twenty years’ experience working as a field botanist in Britain and Ireland. He has worked at the University of Liverpool’s Ness Botanic Gardens and was curator of botany at the Manchester Museum and head of botany at the World Museum, Liverpool. He now lives in an “eco-village in West Wales where, with my family, I am aiming to live within a ‘one planet footprint’ building a house using low-impact materials and living off the land”. As part of this activity he forages.

101. Dr Wolstenholme considers that the Stop Notice “affects people’s livelihoods”. Any decision that affects the ability of people to make a living should be fully informed and scientifically based. It was “very unfortunate” that there is a lack of scientific literature available with regard to the impact of commercial harvesting of wild plants. A forager is, however, well equipped to assess the abundance of such plants, being more in tune with the seasonality of a particular plant species.

102. Dr Wolstenholme considers that the key issue in the appeal is whether or not sea kale is damaged by the annual harvesting of leaves. The fact that sea kale harvesting has continued at Dungeness for many years “speaks volumes. If the harvesting was damaging the plants then it would be expected that the yield would gradually diminish over time. This is clearly not happening”. The only quantifiable evidence available indicated that damage was not occurring. Dr Wolstenholme has known Mr Irving for some years, considering him to be “a man of great integrity and is absolutely passionate about the use of edible wild plants as a sustainable resource”.

(12) Jennifer Lane Lee

103. Dr Lee works at the University of Liverpool. She has produced a written document stating that “the precautionary principle should not be invoked to

impose a blanket ban on Forager Limited; that a determination of ‘serious harm’ to plant life must be evidence based and specific to sea kale; that the Tribunal’s decision should serve to encourage co-operation and collaboration in the protection of sea kale and its ecosystem”.

104. The precautionary principle, according to Dr Lane Lee, is to be used broadly to structure protective outcomes, even where there is merely a risk of serious harm, and serves to shift the burden of proof in certain legal settings. Stop Notices under the 2010 Order “rely upon this valuable principle to prevent serious harm to the environment and as such is a friend to this Tribunal and to all who stand before it today”. However, the precautionary principle is not a blunt prohibitive instrument. Its usage requires a marshalling of evidence and an application to the particular facts of each case. The definition of “serious harm” is, according to her, unclear in the common law and legislative history, at least as it relates to foraging. The Tribunal’s decision would therefore be extremely important to those who aim to forage responsibly. She hoped that the outcome might be that there would be a negotiated agreement between the parties, whereby the respondent would grant a time constraint, limited licence to harvest sea kale from Dungeness in a sustainable way, subject to continuous (negotiated) research and reporting requirements.

Relevant legislation

105. Schedule 3 to the 2010 Order deals with Stop Notices. Paragraph 1 provides as follows:

“(1) The regulator may serve a stop notice on any person in accordance with this Schedule in relation to an offence under a provision specified in Schedule 5 if the table in that Schedule indicates that such notice is possible for that offence.

(2) A “stop notice” is a notice prohibiting a person from carrying on an activity specified in the notice until the person has taken the steps specified in the notice.

(3) A stop notice may only be served in a case falling within sub-paragraph (4) or (5).

(4) A case falling within this sub-paragraph is a case where-

(a) the person is carrying on the activity,

(b) the regulator reasonably believes that the activity as carried on by that person is causing, or presents a significant risk of causing, serious harm to any of the matters referred to in sub-paragraph (6), and

(c) the regulator reasonably believes that the activity as carried on by that person involves or is likely to involve the commission of an offence under a provision specified in Schedule 5 by that person.

- (5) A case falling within this sub-paragraph is a case where the regulator reasonably believes that-
- (a) the person is likely to carry on the activity,
 - (b) the activity as likely to be carried on by that person will cause, or will present a significant risk of causing, serious harm to any of the matters referred to in sub-paragraph (6), and
 - (c) the activity as likely to be carried on by that person will involve or be likely to involve the commission of an offence under a provision specified in Schedule 5 by that person.
- (6) The matters referred to in sub-paragraphs (4)(b) and (5)(b) are-
- (a) human health,
 - (b) the environment (including the health of animals and plants).
- (7) The steps referred to in sub-paragraph (2) must be steps to remove or reduce the harm or risk of harm referred to in sub-paragraph (4)(b) or (5)(b)."

In the table in Schedule 5, one of the offences in respect of which a Stop Notice may be served is that created by section 28P(6) of the 1981 Act (see paragraph 14 above).

106. It is plain from the legislation that the concept of the environment is not limited to the health of flora and fauna. In particular, it necessarily extends to the protection of those features by reason of which a site has been notified as one of special scientific interest. In this case, that includes the vegetated shingle. The appellant is wrong in its contention that only the shingle itself is relevant, rather than the vegetation living in it.

107. The expression "cause" does not require the activities concerned to be the sole or principal cause of the potential serious harm; only that they should constitute a substantial cause. This means one having more than a *de minimis* contribution (R v Cato (1976) 62 Cr App R 41, 46). Nor do the activities have to be the immediate cause of the potential serious harm (Environment Agency v Empress Car Co (Abertillery) Ltd (2 AC 22, per Lord Hoffman).

108. Importantly, the expression "significant risk" does not mean that the serious harm must be shown to be more likely than not to occur. A "significant risk" is demonstrated if the evidence discloses a risk that is more than trivial, fanciful or hypothetical (Balfour Beatty Infrastructure Services Ltd, Enterprise (AOL) Ltd v Health and Safety Executive [2014] EWCA Crim 2684, paragraph 46).

109. We consider that the expression “serious harm” falls to be given its ordinary meaning. In deciding whether there is a significant risk of serious harm, it is plainly relevant to have regard to the nature of the object which is contended would be so harmed. The greater the importance of the object (as recognised by both domestic and international legislative criteria), the greater will be the scope for applying the “precautionary principle” in determining whether activities should be regarded as posing a material or significant risk of serious harm. Thus, in Sweetman v An Bord Pleanála [2014] PTSR 1092, the Court of Justice of the European Union found that the loss of 0.54% of limestone pavement constituted an adverse affect on the integrity of a European Site.

Legislation and guidance cited by the appellant

110. The appellant contends that definitions found in other legislation should be used to inform the meaning of “serious harm” in the legislation governing the issue of the Stop Notice. Relying on the Civil Contingencies Act 2004, the appellant submits that “serious harm” should be read as equivalent to an emergency. The 2004 Act, however, is about allowing regulations to be created urgently, where it is necessary to do so. That is far removed from the present case. By the same token, the appellant’s reliance on a DEFRA consultation paper on the Water Act 2003 carries its case no further. The consultation paper gives examples of what constitute “serious damage”. It is to be noted that, in the present case, the first of the two conditions to be met for imposing the Stop Notice is not “serious damage” but “serious harm to the environment”. So far as section 28P(6) is concerned, the relevant word is “damages”, not “seriously damages”. The 2003 Act is thus beside the point.

111. The appellant also relies upon the Environmental Damage (Prevention and Remediation) Regulations 2009. Again, these Regulations are concerned with different policy issues and relate to “environmental damage” rather than “harm”. The Tribunal finds there is force in the respondent’s submission that concepts in the 2009 Regulations cannot be read across to the present case, particularly since regulation 7 states that they are “without prejudice to any other enactment concerning damage to the environment”. In any event, the Environmental Damage (Prevention and Remediation) 2009 Guidance for England and Wales makes it clear that the Regulations require actions in response to the most significant cases, covering “less than 1% of the total number of cases of damage in England and Wales” (paragraph 1.8). It is therefore axiomatic that some types of damage fall outside the definition used in the 2009 Regulations. Indeed, paragraph 2.3 of the guidance states, in terms, that the Regulations do not cover all types of damage to the environment. Insofar as the guidance has anything relevant to say, it tends to support the respondent’s case, rather than the appellant’s. The guidance points out that what might constitute a significant conservation status effect is more than simply a measurable one. The importance of the effect, rather than its magnitude, is to be considered. This underscores the

point already made, that the importance of the thing which is the object of the operation under scrutiny plays a part in determining if that operation constitutes “serious harm”.

112. The appellant’s reliance on the Environmental Protection Act 1990 appears to concern the provisions in that legislation for dealing with contaminated land. Section 78A deals with definitions of “harm”, “significant harm” and “significant possibility of harm” in connection with such land. Section 78A(4) defines “harm” as “harm to the health of living organisms or other interference with the ecological systems of which they form part ...”. What constitutes “significant harm” is required by section 78A(5) to be determined in accordance with the guidance issued by the Secretary of State for that particular purpose. The guidance may make provision for different degrees of importance to be assigned to different descriptions of living organisms, ecological systems, places, etc. We do not consider that any case has been shown for equating the concept of “significant harm” in the contaminated land regime with the concept of “serious harm” in the 2010 Order.

113. We have accordingly adopted the approach in paragraph 109 above. We shall, however, have more to say about the issue at paragraph 157 below.

Post-hearing evidence: the Dungeness Shingle Borrow Pit

114. After the hearing and during the period when the parties were preparing their written closing submissions, Mr Irving submitted several hundred pages of material relating to two applications made by the Environment Agency for planning permission for the removal of shingle at Dungeness for recycling, in order to maintain sea defences. The respondent objected to the late introduction of this evidence. The Tribunal understands the respondent’s concerns. We have, nevertheless, had regard to this material and to the submissions made by the parties regarding it.

115. Having done so, we do not consider that it advances the appellant’s case in any way or that it requires the Tribunal to place less weight than it otherwise would be minded to do on the respondent’s evidence; in particular that of Jo Dear. The appellant has put forward no evidence to persuade us on balance that the area known as the Borrow Pit contains any (or any significant) vegetated shingle, unlike the area with which the Stop Notice is concerned. It is also relevant that shingle extraction in the Borrow Pit area has a long history, extending back before designation of the site as an SSSI. The shingle, as is plain from the material, was required for flood defence work, in an area in which both residential dwellings and Dungeness Nuclear Power Station are situated. Part of the rationale for the respondent’s stance in relation to the Borrow Pit applications (where its opposition to the proposal was subsequently withdrawn) was that the majority of the shingle removed would, eventually, return to the area from which

it had been taken, owing to natural processes of the sea. The operations were also subject to monitoring.

116. In all the circumstances, we do not give the Borrow Pit material any significant weight in reaching our conclusions. It also follows that we do not regard Ms Dear's involvement in connection with the Borrow Pit applications as detracting from the weight which would otherwise be given to her evidence in the present proceedings. The same is true of Ms Rees.

The Tribunal's analysis of the evidence

117. In reaching a decision in this appeal, the Tribunal has considered all the material contained in the three hearing bundles, the photographs, Dr Wolstenholme's statement and (as we have indicated) the Borrow Pit material. We have also, of course, had regard to the oral evidence given at the hearing. We have considered this evidence as a totality. The fact that we do not, in this decision, mention any specific element of the evidence is not to be taken as indicating that we have not considered it.

118. Mr Irving makes the point that the employees of the respondent who gave evidence are not independent experts. That is, of course, true but it does not mean that their evidence should, on that account, be afforded little weight. We agree with Mr May-Smith that the views of scientifically qualified professionals, who have a considerable knowledge of the variegated shingle at Dungeness, are of relevance in determining the outcome of this appeal. By the same token, we have not discounted the evidence of Mr Irving and the employees of the appellant because of their connection with the latter.

119. Despite the challenges mounted against her evidence by Mr Irving, we find that Ms Dear's account of what she saw had happened to sea kale plants in June 2014 is more likely than not to be correct. The younger leaves of the plants had been removed from one half or side of the plant. Although older plants had had leaves removed, we consider it is more likely than not that smaller sea kale plants had been targeted by the appellant's employees, for the reason that these are more likely to have a greater proportion of smaller, tenderer leaves, which the appellant's customers want.

120. There was much debate between the parties regarding the effect on the sea kale plant itself of having leaves cut away. No scientific study has been undertaken of what the effects of cutting might be on a sea kale plant. It is, however, not fanciful that the removal of leaves could have an adverse effect upon the energy stored within the plant, which it uses to sustain itself and grow. The fact that the parties may disagree about the precise mechanism involved is immaterial. The fact that sea kale is, in many respects, a sturdy plant, able to colonise newly exposed shingle ridges in what is often a harsh environment, does

not mean that the deliberate removal of its leaves and the consequent reduction in its energy store fall to be regarded as immaterial for the purposes of determining whether there is a significant risk of serious harm to the sea kale colony.

121. We also accept Ms Dear's evidence that the cutting and removal of the sea kale's leaves from the site interfere with the plant's ability to offer shelter and shade, which may lead to the establishment of other plant life. The evidence demonstrates that this is one of the ways in which sea kale acts as a "pioneer" species. Even if Mr Irving has not seen any other such species present so far in the places where the appellant has been harvesting at Dungeness, this is not a reason to assume that that situation is likely to continue indefinitely, whether or not the appellant carries on its harvesting activities.

122. There is the further point that the removal of leaves, as opposed to their falling or naturally decaying on site, means that the removed leaves are unable to provide nutrient material within the shingle, whether at the site of the plant or (owing to the action of wind and water) elsewhere within the SSSI.

123. The Tribunal is not persuaded by Mr Irving's suggestion in cross-examination of Ms Dear (and elsewhere) that the process of establishing a plant community on shingle can take a very long time (possibly hundreds of years). It is the very fact that this process is happening (albeit slowly) that is one of the reasons for the site's designation. We also accept Ms Dear's evidence that, by the same token, damage to the vegetated shingle may well also take a long time to recover, if at all. The natural process has suffered man-made interference.

124. Ms Dear also referred to the damage caused by trampling of shingle. The Tribunal is satisfied that the respondent has good reason to be seriously concerned about the effect of trampling in distorting the shingle ridges, which are a feature of the site. In this regard, it is significant that the shingle pattern, according to Ms Dear, is beginning to recover, following the construction of a pedestrian boardwalk on the site.

125. The appellant appears to acknowledge that trampling may be problematic. At paragraph 49 of his closing written submissions, Mr Irving refers to the possibility of his working with Natural England to design research models that would identify the "beneficial effects of the right kind of trampling".

126. The appellant seeks to draw a parallel between the effects of the footfall of its employees in harvesting sea kale leaves and of people walking on shingle with, say, their dogs. There is, however, likely to be a significant difference in the effect on the shingle between a person with a dog and a number of sea kale harvesters working intensely along a particular ridge. In any event, the appellant's stance on this issue pays no regard to the cumulative matters, which led to the issue of the Stop Notice.

127. Both Ms Dear and other witnesses were asked by Mr Irving whether the taking of sea kale leaves was not the equivalent of pruning a rose, cutting a lawn or coppicing a wood. None of them regarded it as appropriate to draw such a comparison. Mr Irving undoubtedly thinks differently. However, whilst the long-term effects of pruning, mowing and coppicing are well-known, there is, as we have already noted, an absence of similar evidence regarding the effects of harvesting sea kale on the shingle ridges at Dungeness and other comparable sites. Whilst we acknowledge Mr Irving's strongly held views and his experience, we do not find that these are such as to demonstrate that the respondent's concerns fall to be categorised as fanciful or otherwise of no material weight.

128. So far as the taking of seeds is concerned, this plainly removes from the site a potential for further sea kale plants to form. Given the international significance of the site, we do not consider that the appellant's previous activities in taking seeds can be regarded as *de minimis*. Indeed, Mr Irving said, during cross-examination of Ms Dear, that the appellant had stopped taking seeds because of the "controversial" nature of that activity.

129. Dr Cox's qualifications are such that he is, in the Tribunal's view, entitled to hold his views on the effect on the removal of sea kale leaves on the plant's ability to re-grow and recover. Mr Irving mounts a spirited attack on Dr Cox's views, at paragraphs 94 *et seq* of his written closing submissions. Mr Irving suggests that, if what Dr Cox considers is true, then there would be no plants or herbivores on earth because humans and animals eating plants would mean that there would be no plants left. Again, that submission plainly goes too far. It all depends on the plant and/or the extent of the grazing or harvesting. The reality, we find, is that (a) it is not fanciful for the respondent's witnesses to conclude that removing leaves from the sea kale plant is likely to have an adverse effect on that plant; (b) the potential seriousness of that effect has to be viewed by reference to the international importance of the site; and (c) in the absence of any scientific study which shows that harvesting sea kale leaves is equivalent to pruning, coppicing, etc., a precautionary approach is necessary.

130. Dr Cox was strongly challenged by Mr Irving regarding the evidence on sea kale in the 19th and 20th centuries. We take further account of what Mr Irving says on this matter at paragraphs 126 to 140 of his closing written submissions. It is fair to say that there is a difference of opinion about the effect to which harvesting of sea kale for culinary use (and the subsequent disappearance of that practice) might have affected sea kale populations in England and Wales. Various factors may have been at work, including (on the negative side) cattle grazing and (on the positive side) more frequent storms, which have spread sea kale seeds, etc. more widely. However, the appellant has, in our view, failed to show that the respondent is being irrational or, at best, fanciful in being concerned at the potential for harm, which commercial foraging may have on sea

kale at the SSSI in Dungeness. Dr Cox makes the valid point that it is difficult to see how the reduction in sea kale at Chesil Beach in Dorset could have been caused by cattle grazing, given the existence of the brackish Fleet between most of the beach and the mainland. Mr Irving sought to rely upon a late piece of evidence from Mr Martin Sanford of Suffolk, regarding sea kale in that county. However, the e-mail of 6 July 2015 says:-

“I wish I could say more about the factors influencing this change [the increase in sea kale] but it would be conjecture with little hard evidence to back it up. Although it has been suggested that collecting (of both leaves and whole plants) may have influenced population levels, I have not seen any hard evidence to support this view”.

131. Mr Sanford is at pains to adopt a cautious approach. His comments do not support the appellant’s contention that harvesting for culinary use cannot possibly have had any material effect on sea kale populations.

132. Mr Irving’s cross-examination of Dr Cox identified a further matter, which the Tribunal finds significant. What the appellant appears to desire is for the respondent to license its commercial sea kale activities, which could then be monitored according to an agreed programme. Other potential harvesters of sea kale, however, would be denied such a licence or granted one only if the combined effect of the licensed operations would not be harmful.

133. As the respondent has, however, made plain, there is no mechanism for bringing about such a state of affairs. The landowner of the shingle will not, it seems, permit the use of the land for such activities. If the respondent were unable to impose a Stop Notice in respect of the appellant’s activities, it considers that it would not be able to impose such a notice upon any other operator seeking to harvest sea kale. At this point, an issue highlighted in the case of Sweetman (see above) has force; namely, that there is a need to prevent the “death by a thousand cuts” phenomenon, whereby there is cumulative habitat loss as a result of multiple projects being allowed to proceed on the same site.

134. The Tribunal considers these considerations of the respondent to be valid. They inform the correct approach to be taken to the determination of “significant risk” and “serious harm”.

135. The respondent’s evidence regarding the harm caused by trampling of the shingle was reinforced by the evidence of Sue Rees. As with Jo Dear, Mr Irving has sought to cast doubt on the evidence of Ms Rees, owing to her involvement in the Borrow Pit planning issue. As we have explained, however, there is no valid reason to diminish the weight to be accorded the evidence of these witnesses, owing to their involvement with the Borrow Pit.

136. At paragraphs 146 to 155 of his closing written submissions, Mr Irving takes issue with Ms Rees’ evidence (and, by extension, that of the other witnesses)

regarding the potential of sea kale to provide a suitable environment for other plant species to appear. In particular, Mr Irving now seeks to challenge Ms Rees' contention that other plants, which once grew on the seaward shingle ridges where harvesting has taken place, are no longer there. Certain of the statements in these paragraphs of the written submissions constitute evidence, with which the respondent has had no opportunity to deal. In any event, Mr Irving's submissions are predicated on the basis that the respondent's case is that disturbance through harvesting has prevented other species from becoming established on the seaward ridges. But the respondent's essential concern is that the adverse effects of commercial sea kale harvesting pose a significant risk to the future establishment of other species. Nothing in the written submissions casts doubt on this concern. Furthermore, at paragraph 153, Mr Irving appears to accept that curly dock (*rumex crispus*) is a plant which requires fine fraction organic material and that it is beneath sea kale plants that one might find such material. Accordingly, whether or not the beach in question has significant amounts of seaweed thrown up would not appear to be determinative of whether curly dock could establish itself, owing to the presence of sea kale.

137. Ms Rees' evidence also reinforces the point that, even if sea kale leaves do not fall and form organic material near the plant from which they come, they would be likely to be blown elsewhere on the site, so as to provide that function elsewhere. It is axiomatic that, if the leaves are taken away from the site, they cannot provide that function.

138. Ms Rees also confirmed that trampling prevents the shingle from acting as mulch and that such trampling may be sufficient to prevent vegetation from establishing itself. At paragraph 155 of his closing submissions, Mr Irving acknowledges that trampling is identified as a risk to shingle vegetation in reports such as Doody & Randall, 2003. The fact that the only plant cited in that report is the sea pea does not, in the Tribunal's view, render fanciful the respondent's concerns as to the effects of trampling.

139. Ms Rees referred to the adverse effects of trampling upon the lichen community. Mr Irving contends that no lichens on the shingle can be detected at the harvesting site. He said this is demonstrated from the photographic evidence. The Tribunal is not satisfied that the photographs before it, which were taken for a different purpose, show that there is no lichen community on the site, for reasons unconnected with trampling; let alone that (without any sea kale harvesting) lichen would not appear in the future. The Doody & Randall report supports Ms Rees' view of the deleterious effect of trampling on encrusting lichens.

140. Mr Irving says that the species of lichen, *rinodina aspersa*, mentioned in the notification document is a lichen of later succession on well-established stable shingle and is not an early coloniser. Again, if this is evidence, it was not adduced at the proper time so as to enable the respondent to deal with it.

141. Whilst the Tribunal acknowledges the on-the-ground experience of Mr Irving and others who gave evidence for the appellant – and without underestimating Mr Irving’s ability to grapple with scientific information – it is nevertheless the case that the appellant’s witnesses, unlike the respondent’s, are not relevantly scientifically qualified. Their primary interest is in the plant that is being foraged.

142. The appellant’s witnesses also, candidly, accepted that previous harvesting by the appellant at Dungeness had been problematic, to say the least. Mr Evans did not dispute the evidence which showed that, in the 2014 harvesting, one sea kale plant had been stripped of all but one of its leaves. There was also acknowledgment that harvesting activities had been undertaken at speed, owing to their unauthorised nature.

143. Mr Blain volunteered the fact that what he described as the appellant’s “policy” of not taking more than 30% of a plant had not always been followed. The policy was, Mr Blain accepted, in any case just a guess on the part of the appellant, not based on any scientific evidence. Nor did the 30% figure bear a correlation with the age of the plant being picked. Mr Blain candidly acknowledged that the appellant had no potential for knowing what harm it might be doing.

144. Mr Ghioria accepted that, on a previous occasion, shingle had been piled up around sea kale plants by the appellant. It was also clear from Mr Ghioria’s evidence that, apart from apparently being made aware of the 30% rule, no other advice or training on harvesting sea kale was provided by the appellant. This point was reinforced by the evidence of Mr Boushel-Payne.

145. Dr Wolstenholme’s evidence is based on the premise, disavowed by Mr Irving, that the appellant needs to harvest sea kale at the Dungeness site, as a matter of commercial necessity. Dr Wolstenholme also directs his attention only to the sea kale plant, rather than the larger environment of which it is a part. Whilst the Tribunal would very much agree with him that Mr Irving is sincerely passionate about the use of edible wild plants as a sustainable resource, this is not determinate of the issues we must decide.

146. The Tribunal agrees with Dr Lee regarding the importance of the precautionary principle and that it should not be used as a blunt instrument but needs to be applied by reference to the evidence in a particular case. That is what the Tribunal has sought to do.

Conclusions

147. We have already noted the extreme importance of the site with which this appeal is concerned. Sea kale itself (*crambe maritima*) is said to have declined “notably in South Wales, possibly due to human trampling” (Sanyal & Decocq). That report quotes Mahony (2000) as describing sea kale as “very vulnerable to destruction from both natural and human threats”. Vegetated shingle is said by the authors to be “one of the scarcest habitats within the British Isles, Europe and indeed the world; it is largely restricted to Northern Europe, Japan and New Zealand”.

148. The Tribunal must re-take the decision in this case. This means that a Stop Notice will not be appropriate unless we find that the activity in question, set out in Schedule 1 to the Stop Notice, will cause, or will present a significant risk of causing, serious harm to the environment; and will involve or be likely to involve the commission of an offence under section 28P(6) of the 1981 Act.

149. It is also possible for the Tribunal to amend the Stop Notice, so as to substitute other activities for those set out in Schedule 1.

150. On the totality of the evidence before us, we find that the harvesting of sea kale, including the cutting of plants and the collection of parts of sea kale plants including leaves and seeds, presents a significant risk of causing serious harm to the vegetated shingle within the SSSI at Dungeness. In the absence of any relevant scientific study, the respondent was, we find, correct to take the view that the commercial removal of sea kale leaves, as undertaken by the appellant, is likely to have a deleterious effect upon the sea kale plant itself. Removal of leaves has a deleterious effect upon the provision within the site of the organic material derived from the composting of the leaves, which is conducive to the growth of other species, whether adjacent to the sea kale plant or otherwise within the site. The removal of seeds, likewise, reduces the reproductive capacity of the sea kale population within the site. The trampling occasioned by commercial harvesting not only disturbs the organic material around the sea kale plant but also damages the shingle ridges, which form a distinctive element of the site. On the evidence, there is also a significant risk of trampling having an adverse effect on lichens. Even if this were not so, however, the other harm occasioned by the appellant’s activities is such as to necessitate the Stop Notice.

151. In coming to the conclusion that a significant risk of serious harm has been demonstrated, the Tribunal has had regard to the rarity and international importance of the vegetated shingle habitat at Dungeness. Whilst there may be room for legitimate disagreement as to whether, for example, a particular species is or is not present in a particular place or whether it is more likely than not to have been present in the past, in determining whether a risk is significant, regard must be had to the importance of the environment which is said to be threatened. Accordingly, if there is legitimate doubt about any matter, then the benefit of that

doubt should be given to the protection of the site. Notwithstanding his contentions to the contrary, nowhere has Mr Irving shown the respondent's evidence to be irrational, fanciful or otherwise to be disregarded.

152. Turning to section 28P(6), it is important to observe that this Tribunal is not required to decide whether any future carrying out of the activities proscribed by the Stop Notice will necessarily involve the commission of the relevant offence. It is sufficient if we find that it will be likely to involve the commission of such an offence. We have approached the matter on that basis.

153. If the appellant were to repeat the activities carried out in June 2014, we are in no doubt that it would be likely to commit an offence under section 28P(6). The appellant would plainly be intentionally removing leaves and it would necessarily require its employees to trample the shingle ridges as they worked the line of sea kale plants, which are on them. For the reasons we have given, these activities, viewed cumulatively, would undoubtedly constitute damage to the notified features; that is to say, the vegetated shingle. The appellant would not have a reasonable excuse. In particular, we note the evidence of the appellant that there are alternative sources of sea kale, apart from those on the SSSI at Dungeness.

154. The appellant contends that, in some respects, what happened in 2014 would not be repeated. The damage to at least one of the sea kale plants, and the piling up of shingle around the plants, were said to be due to the activity of somebody called "John", who is no longer with the appellant.

155. We do not find that this submission makes it appropriate to allow the appeal or to modify the activities described in the Schedule to the Stop Notice. It is quite apparent from the evidence that the appellant's current management systems are incapable of providing any requisite reassurance in this regard. Employees are sent to harvest sea kale with inadequate training and supervision. They would be highly likely to be working at speed, whether because (according to Mr Irving) they would not wish to encounter the site warden or (more likely) because they would be engaging in trespassary activities. The appellant is, in short, reasonably likely to carry on the activities described in the Stop Notice.

156. This includes the harvesting of sea kale seeds. Although the appellant asserts that it no longer intends to take seeds, the findings in the previous paragraph give cause for concern that any such policy may very well not be adhered to on the ground, even if it were not likely to yield in the face of economic factors making future seed collection attractive. The taking of seeds is seriously harmful, for the reasons we have given.

157. We said we would return to the various pieces of legislation and guidance referred to by Mr Irving. Even if the Tribunal is wrong in its primary finding that these have no material bearing on the present appeal, we agree with the

respondent that, if regard could be had to those materials, a significant risk of serious harm exists. It is plain that “harm”, as defined in section 78A(4) of the 1990 Act for the purposes of the contaminated land legislation, has been caused to the Dungeness site, and that there is a significant risk of such harm being caused in the future, unless the Stop Notice is upheld. It is also noteworthy that the statutory guidance requires local authorities to “have regard to the advice of Natural England” in determining whether significant harm has been caused to a European site, such as Dungeness. So far as the issue of the “integrity” of the site is concerned, we have seen how even the loss of less than 1% of a relevant feature has been held by the Court of Justice to have an adverse effect on the site’s integrity (paragraph 109 above). Given the extreme importance of the site with which we are concerned, including the rarity of the vegetated shingle, we find the evidence demonstrates that the prospect of commercial harvesting of sea kale poses a significant risk to the integrity of that shingle.

Decision

158. The appeal is accordingly dismissed.

Judge Peter Lane

Chamber President

Dated 25 November 2015