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TITLE AN ANALYSIS OF COUNCIL DIRECTIVE
85/337 ON THE ASSESSMENT OF THE
EFFECTS OF CERTAIN PUBLIC AND
PRIVATE PROJECTS ON THE
ENVIRONMENT AND THE DEVELOPMENT OF
ENVIRONMENTAL LAW IN THE UNITED
KINGDOM

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An Analysis of Council Directive 85/337 on the Assessment of
the Effects of Certain Public and Private Projects
on the Environment and the Development of Environmental Law
in the United Kingdom

Jane Holder LLB

Submitted for the degree of Doctor of Philosophy
University of Warwick

June 1995

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List of Abbreviations

BATNEEC	Best Available Techniques Not Entailing Excessive Cost
BPEO	Best Practicable Environmental Option
BPM	Best Practicable Means
EA	Environmental Assessment
EC	European Community
EIA	Environmental Impact Assessment
EPA	Environmental Protection Act
EU	European Union
HMIP	Her Majesty's Inspectorate of Pollution
IEA	Institute of Environmental Assessment
IPC	Integrated Pollution Control
NEPA	National Environmental Policy Act (United States)
OJ	Official Journal of the European Communities
OECD	Organisation for Economic Cooperation and Development
PPG	Planning Policy Guidance
SEA	Strategic Environmental Assessment
RCEP	Royal Commission on Environmental Pollution
TCPA	Town and Country Planning Act
UKELA	United Kingdom Environmental Law Association
UNEP	United Nations Environment Programme
WHO	World Health Organisation

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Preface

From an historical perspective, environmental law is an assembly of common law principles and regulatory techniques derived from public health and planning legislation. Until recently, it lacked a distinct, recognisable identity, and status. A separate discipline of 'environmental law' now exists which appears to have an internal coherence and to operate within a settled conceptual framework, anchored by a number of guiding principles. This development is not, though, a one-way process. There is an equally dynamic contraflow of legal disciplines claiming environmental concerns as their own, notably property and tort, company and insurance law. In a similar vein, at both European Union and national levels of government, there is a sense that the very nature of environmental problems means that environmental protection must form part of a wider range of policies and law.

This thesis takes account of these recent developments by considering the contribution of environmental assessment to the development of environmental law. It examines the implementation of Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment¹ in the United Kingdom and thus the integration of a European Community method of environmental assessment alongside 'indigenous' methods of environmental appraisal in the planning system. Some explanation is required, both as to the choice of subject matter, and to the methodology chosen to write this thesis.

¹ OJ L 175, 5.7.1985, p. 40. See A. Gilpin, Environmental Impact Assessment (EIA) (Cambridge, Cambridge University Press, 1995).

The choice of subject was directed by a number of influences. The primary influence was a debate about the adequacy of regulatory techniques available for environmental protection within the United Kingdom. Regulatory strategies for environmental protection are generally confined to variants of two approaches: administratively enforced standards ('command and control') and, less commonly, economic incentives. By setting certain procedural requirements for considering environmental information in decision making, environmental assessment offers a further regulatory strategy and responds to some of the inadequacies of a regulatory tradition that has traditionally concentrated on correcting specific environmental abuses of discrete environmental media. In this thesis I evaluate environmental assessment as a prime example of a procedural technique of environmental law.

The subject of the thesis was also influenced by a number of recent policy and legislative changes which have occurred in planning, aimed at giving a greater priority to environmental considerations. I therefore review the impacts of this 'greening' of planning on law and practice and examine the closer links between environmental and planning law which appear to have been made as a result. Finally, the subject of this thesis, Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, was chosen also to take account of the growing influence of European Community environmental law on United Kingdom environmental law and policy.

The thesis is divided into four parts, In Part I, I set the scene of the development of environmental assessment in the United Kingdom. In chapter 1, I give an overview of environmental assessment in the context of environmental law and, in chapter 2, I examine

the influences and ideas in environmental assessment in more detail and from a theoretical perspective. In chapter 3, I analyse broadly the development of integrated techniques of pollution control in environmental law. I adopt an historical approach which reveals considerable continuity between the early and more recent forms of control in the United Kingdom; in particular it becomes apparent that assessment of environmental effects has long been a feature of environmental law.

Part II of the thesis is concerned with the law and procedure of environmental assessment. In chapter 4, I analyse the legal form of environmental assessment taken in Council Directive 85/337 and locate this in European Community environmental law. I examine the implementation of Directive 85/337 in the town and country planning system in England and Wales in chapter 5: I first outline the planning system and then examine the measures taken to fulfil obligations under European Community law, setting out the resulting legislative framework of environmental assessment.

The subject of Part III is the practical application of Directive 85/337 in five case studies. I explain the case study method I used to study the application of environmental assessment rules in chapter 6. In chapter 7, I give an account of the case studies which describe five proposed projects in which environmental assessment rules were invoked. The choice of projects allows essential features which characterise the projects to be analysed. The first case study, the Thanet Way bypass project, was proposed by Kent County Council highways and transport department, and determined by the planning department of the same Council. The project was subject to environmental assessment and, on appeal, went to inquiry. The second case study is a combined heat and power station on the site of a disused

electricity generating plant in the Smithfield area of the City of London. The third is a proposed waste disposal site in Warwickshire, the environmental assessment of which contributed to local planning authority's decision to recommend that the developer's application for planning permission be refused. The fourth and fifth case studies are a minerals extraction application and an incinerator plant in Essex and South Yorkshire respectively. In the analysis of the case studies in chapter 8, I make a number of specific points about the operation of environmental assessment, focussing upon the contribution of statutory environmental assessment to identifying and mitigating adverse environmental effects, the scope of administrative discretion on the part of planning officers, and the integration of European, and preventative legal procedures with those already existing in the planning system.

In Part IV I make some general conclusions about the implementation of environmental assessment in the planning system. In light of the case studies and specific analysis of the environmental assessment procedure, I consider more generally the implementation of environmental assessment as a technique of environmental law in the planning system in chapter 9. One question which I attempt to answer is does environmental assessment contribute to environmental protection in the planning system? In addressing this question, I argue that the prevailing property and developmental interests in planning law influenced the manner of implementation of Directive 85/337 and its practical application in the town and country planning system in England and Wales. By way of conclusion, in chapter 10 I summarise the current state of environmental assessment and advance a number of propositions about its future development as a technique of environmental law, primarily that environmental assessment is capable of development as both a sui generis form of law

and as a practical bridge between the traditional legal boundaries of planning and environmental law. I conclude, however, that environmental assessment is likely to continue to develop as a self-regulatory system of control, overlaid upon existing environmental and planning procedures.

Finally, the thesis is primarily focused on the law in England and Wales. Scotland and Northern Ireland have planning systems unique to their jurisdictions. However it is hoped that the analysis offered in the thesis may prove relevant to both jurisdictions.

PART I ENVIRONMENTAL LAW: AN INTRODUCTION AND OVERVIEW

Part I is intended to set the scene of the development of environmental assessment in the United Kingdom. This Part consists of three chapters. In chapter 1, I provide a basic definition and explanation of environmental assessment. I give an overview of environmental assessment in the context of environmental law and examine also how environmental law has come under the influences of Integrated Pollution Control. In this chapter, I address the challenges facing planning law brought by advances in environmental law and the implementation of Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment in the town and country planning system in England and Wales. I also identify the connections between environmental law, planning law, and European Community environmental law made throughout the thesis.

Chapter 2 is intended to examine the ideas and influences arising from adopting environmental assessment in environmental law. From a theoretical perspective, I critically appraise environmental assessment as a technique of environmental law. The focus of this chapter is the novel use of procedural requirements in environmental assessment which contrasts with the more traditional technique of setting substantive environmental standards. In chapter 3 there is an historical account of the development of integrated techniques of environmental law. I begin with statutory pollution controls in the nineteenth century, paying attention to the types of pollution and public health problems which arose from increased industrial activity, and the limitations of the common law of nuisance to control these. I use two major enactments concerned with air and water pollution as examples of the development of sectoral statutory controls: the Alkali Act 1863 and the Rivers (Pollution Prevention) Act

1876. I then trace the development of integrated techniques of environmental law, most notably the establishment of a system of Integrated Pollution Control in Part I of the Environmental Protection Act 1990. Integrated Pollution Control and environmental assessment are discussed as parallel developments; both represent the significant departure from sectoral techniques of environmental law and the acceptance of more integrated or 'cross media' methods of control. The primary theme of chapter 3 is therefore the evolution from the use of sectoral controls to protect discrete environmental media or to control a particular industrial sector with correspondingly fragmented administrative arrangements, to the use of more integrated methods in an attempt to achieve a closer fit to the nature of environmental problems.

Chapter One: An Introduction and Overview of Environmental Assessment

This thesis analyses Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment,¹ hereinafter environmental assessment, in the context of the development of environmental law in the United Kingdom. As a procedural technique in environmental law, environmental assessment² represents a marked departure from a traditional legal approach of environmental regulation which centred upon specific, substantive and remedial measures to protect discrete environmental media or to regulate a single industrial sector. In this thesis, this aspect of environmental assessment is considered to reflect the development of a conceptually coherent discipline of environmental law in the United Kingdom.

This introductory chapter gives an overview of environmental assessment law in the United Kingdom. I explain also the methodology of the research and discuss how this contributes to research on environmental assessment and environmental law literature. It is first necessary to set out a definition of environmental assessment and explain how environmental assessment operates.

¹ OJ L 175, 5.7.1985, p. 40.

² This term is used synonymously with 'environmental impact assessment' throughout the thesis. It should be noted that the United Kingdom adopted the term 'environmental assessment' for the environmental impact assessment process and 'environmental statement' for the document setting out the developers' assessment of the projects likely environmental effects and which is submitted with an application for development consent.

(a) Environmental Assessment: Definition and Operation

Environmental assessment was first introduced in the United States in 1969³ as a requirement for assessing the environmental impact of major actions significantly affecting the quality of the human environment. It is a technique for drawing together expert analysis and public opinion of a project or policy's environmental effects.⁴ The primary aim of environmental assessment is to ensure that information on the environment is assessed as part of development projects: environmental assessment enables the significance of the predicted effects, and the scope for mitigating them, to be properly evaluated and taken into account by decision makers before a decision is made.⁵ Environmental assessment is thus central to planning procedures.⁶ It may be undertaken by both public authorities, such as a local planning authority, and in the private sector, for example by a developer applying for planning permission.

The conceptual premise of environmental assessment is that the introduction of information about the effects of development into a decision making process encourages an informed choice to be made between environmental and other objectives, possibly resulting in less environmentally harmful decisions, and that changing the rules governing the

³ A system of environmental assessment was established by section 102(2)(c) of the National Environmental Policy Act (NEPA) 1969, 42 U.S.C. 4321-4361.

⁴ See section 102(2)(c) of the United States' National Environmental Policy Act (NEPA) 1969, 42 U.S.C. 4321-4361; see also J. McEldowney and S. McEldowney, Environmental Science and Law (London, Longman, 1996), chapter 6; see also A. Kiss and D. Shelton, Manual of European Environmental Law (Cambridge, Cambridge University Press, 1993), p. 58.

⁵ Department of the Environment, Circular 15/88 (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988) para. 7.

⁶ McEldowney and McEldowney, Op.cit., p. 4.

generation and application of knowledge is thought also to change the intellectual and political context of decision making.⁷ This conceptual basis relies upon a set of presumptions that the causes and effects of harm can be predicted and that the significance of these effects can be measured; both of which may, at times, prove unsupportable.

The Development of Environmental Assessment in European Community Law

As noted above, environmental assessment originated in the United States. It has been developed by a number of international organisations, most fully by the European Community. In 1985, Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment⁸ was adopted by the Council of the European Community. It is this Directive which is the subject of this thesis. The primary objectives of Directive 85/337 are to ensure that the likely effects of development on the environment are taken into account at the planning stage of a development and to introduce general and uniform principles of assessment throughout the European Community.⁹ The Directive therefore closely relates environmental assessment with development consent procedures in the planning system. In relating to the planning stages of development projects, Directive 85/337 places an emphasis upon the guiding principle of prevention of environmental harm and also embodies the precautionary principle¹⁰ of European

⁷ On assumptions made about scientific knowledge, particularly modelling, see S. Taylor *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform* (Stanford, Stanford University Press, 1984).

⁸ OJ L 175, 5.7.1985.

⁹ First and fifth recital, Preamble to Directive 85/337.

¹⁰ The principle is now contained in Article 130r(2) Treaty of Rome, as amended.

Community environmental law. These aspects of Directive 85/337 were interpreted and confirmed by the European Court of Justice in Case C-396/92, Bund Naturshchutz in Bayern Ev and Others, Richard Stahnsdorf and Others v. Freistaat Bayern.¹¹ its first ruling on environmental assessment. In adopting a strict approach to Germany's failure to comply with the Directive, the European Court of Justice approved 'the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes' and that 'projects belonging to certain types have significant effects on the environment and...must as a rule be subject to systematic assessment.'¹²

Directive 85/337: Procedures and Practice

Major projects listed in Annex I of the Directive, including developments such as power stations, refineries, motorways and major roads, thermal power stations, radioactive waste disposal sites and toxic waste sites must always be subject to prior environmental assessment.¹³ For those projects listed under Annex II, including pig or poultry farming units, mineral extraction, food manufacture, tanneries and paper manufacturing, mining and energy projects, and infrastructure projects there must be an environmental assessment only 'where Member States consider that their characteristics so require'.¹⁴ A project listed

¹¹ C-396/92, Bund Naturshchutz in Bayern Ev and Others, Richard Stahnsdorf and Others v. Freistaat Bayern (1994) ENDS Report No. 237, 43.

¹² C-396/92, Bund Naturshchutz in Bayern Ev and Others, Richard Stahnsdorf and Others v. Freistaat Bayern. Court transcript, judgment 9 August 1994, para. 3.

¹³ Article 4(1).

¹⁴ Article 4(2). In England and Wales, the number of projects listed under Schedule 2 (which approximates to Annex II of Directive 85/337) was extended by the Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1994 (SI 1994, No. 677); see 'Environmental Assessment and Planning Law in the United Kingdom' below.

under Annex II does not automatically have to have an environmental assessment. The question of whether an assessment is required or not depends on whether a project is judged to have 'significant environmental effects' by virtue of its size, location and characteristics.¹⁵ Member States may prescribe thresholds and criteria to determine which of the projects falling under Annex II are to be subject to an assessment.¹⁶ This grants considerable discretion to Member States to determine whether an environmental assessment is necessary.

Directive 85/337 envisages an environmental assessment procedure divided into three stages. In the first stage, the public or private developer must provide the 'competent authority' with written information outlining the effects on the environment of a particular development. In most Member States the 'competent authority' is the local planning authority. This information must include 'at least' a description of the nature of the project, an assessment of the main environment effects of the project, the measures envisaged 'in order to, and if possible, remedy significant adverse effects', and a non-technical summary of the information provided.¹⁷ Following the list provided in Article 4 of Directive 85/337, the developer must identify, describe and assess the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate, and landscape, the interaction between the above factors, and the effects on material assets and the cultural heritage. The Directive does not explicitly set out the format of the developer's information, commonly referred to as an 'environmental statement'. The developer might also supply additional

¹⁵ Article 2.

¹⁶ Article 4(2).

¹⁷ Article 5(2).

information specified in Annex III of the Directive.¹⁸ This includes a more comprehensive description of the project and forecasting methods used to assess the effects of the project on the environment. This additional information is required in so far as it is considered by the Member States to be 'relevant to a given stage in the consent procedure'.¹⁹ Should any authority have relevant information in their possession, they must make this available to the developer.²⁰

The second stage of the assessment procedure involves consultation by the 'competent authority' with 'public bodies likely to be concerned by the projects by reason of their specific environmental responsibilities'.²¹ This focuses upon information supplied by the developer. The environmental statement must be made available to the 'public concerned' and they must be given an opportunity to express their opinion on it.²² Member States are given discretion to determine who are the 'public concerned', the details of the consultation arrangements, and the way in which the public are to be informed.²³

At the final stage of the environmental assessment process, the 'competent authority' is obliged to take account of the environmental statement compiled by the developer and

¹⁸ Article 5(1).

¹⁹ Article 5(1).

²⁰ Article 5(3).

²¹ Article 6(1).

²² Article 6(2).

²³ Article 6(3).

information arising from consultation in the development consent process.²⁴ Article 4 of the Directive requires that projects should be made subject to an assessment in accordance with Articles 5-10 of the Directive. These Articles cover a range of procedures including the production of information by the developer, and information arising from public consultation with other statutory bodies. The Directive implicitly places a duty on the local planning authority to conduct an assessment. The preamble supports this interpretation: '...this (environmental) assessment must be conducted by the 'competent authority' on the basis of the appropriate information supplied by the developer'.²⁵ As conceived by the Directive, environmental assessment is a process of decision making; it is not focused solely on the production of a single written document such as the environmental statement. However, Directive 85/337 does not set out the form that this 'assessment' should take, for example whether it should be a written report or a mental exercise. The Directive sets out rules by which environmental information enters the decision making process; it does not specify the manner in which that information is to be balanced against any other information, typically that relating to the economic significance of a project.

(b) Recent Developments

Environmental assessment is not static. Proposals for the future revision of Council Directive 85/337 have been issued by the European Commission²⁶ and are expected to come

²⁴ Article 8.

²⁵ Ninth recital, Preamble to Directive 85/337; to be read in conjunction with Article 5 and Article 8.

²⁶ Commission of the European Communities, Proposal for a Council Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European

into force by June 1996. Since the Directive has been in force, the European Commission has had time to assess its impact. A number of concerns about the environmental assessment procedure and problems with enforcement were expressed by the European Commission in its review of the Directive's operation in the Member States.²⁷ The Commission concluded that Directive 85/337 was applied unevenly across the Community. The number of environmental assessments has varied between Member States: these ranged from a dozen or fewer in Denmark and Portugal, a couple of hundred in the United Kingdom, 1,000 in Germany, to 5,500 in France.²⁸ Such concerns formed the basis of the European Commission proposal to amend the Directive.²⁹

In terms of departing from usual administrative practice in the United Kingdom, the most significant amendments proposed by the Commission are that competent authorities would be obliged to take account of the information on environmental impacts obtained in the course of the procedures and to publish not only their decisions on development consent, but also to give the 'reason and considerations' on which they based a decision to refuse

Communities, 1994).

²⁷ Commission of the European Communities, Report from the Commission on the Implementation of Directive 85/337 COM(93) 28, 2.4.1993 Vol. 12 Annex for United Kingdom, Vol. 13 Annex for all Member States (Brussels, Commission of the European Communities, 1993); see also European Commission, Ninth Annual Report to the European Parliament on Commission Monitoring and Application of Community Law OJ C 250/6, 28.9.1992 (Brussels, Commission of the European Communities, 1992) at p. 150.

²⁸ Commission of the European Communities, Report from the Commission on the Implementation of Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment COM(93) 28 final, 2.4.1993 (Brussels, Commission of the European Communities, 1993) pp. 37-8.

²⁹ The Commission has also issued guidance on the review of environmental statements, European Commission, Environmental Impact Assessment Review Checklist (Brussels, European Commission, 1994) in an attempt to address the inconsistent application of Directive 85/337.

consent or, alternatively, to grant consent 'despite receiving unfavourable opinions from statutory consultees or the public'.³⁰ This is significant because currently planners exercise considerable discretion to take account of a large number of often conflicting considerations; this amendment would implicitly require planners to give weight to information arising from the environmental assessment process.

The Commission proposes also to clarify the circumstances under which Annex II projects (which require environmental assessment only where the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location) should be subject to an assessment by introducing a 'screening' procedure. A new Annex IIa would give details of the selection criteria of projects which might require environmental assessment: these criteria include the characteristics of the project itself, for example, its size, the use of natural resources, waste and nuisance generation and impact on cultural and historical heritage. Authorities would also take account of the sensitivity of the environment liable to be affected by the project, for instance if it was an area where any European Community environmental quality standards were already being exceeded.³¹ An Annex II proposed project would always require environmental assessment if it is liable to have a significant effect on special protection areas designated by Member States pursuant to Community law.³² This would include those areas designated under Directive 79/409 on

³⁰ Article 10 of Proposal for a Council Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

³¹ See on this point McEldowney and McEldowney, Op. cit., chapter 6, p. 8.

³² Article 1 Proposed Council Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

the Protection of Wild Birds³³ and Directive 92/43 on the Conservation of Habitats and of Wild Fauna and Flora.³⁴ For all other Annex II projects, the 'competent authority' would have to determine the applicability of environmental assessment rules and therefore whether the environmental impact is likely to be 'significant' on the basis of thresholds set by the Member States and selection criteria laid down in the new Annex IIa discussed above. The rationale of these proposed reforms is to bring greater awareness to the planning authority of the need for an environmental assessment. The duty on all planning authorities to consider information arising from the environmental assessment process and to publish their decisions is intended to provide a more systematic approach to environmental assessment throughout the Community.³⁵

Deficiencies in the degree of adequate consultation have led the Commission to propose the imposition of a duty on the competent authority to define in advance which of the information in Annex III of Directive 85/337 should be provided by the developer.³⁶ This proposed amendment introduces a 'scoping' requirement to permit interested parties, the local planning authority and other statutory parties to ascertain the scope of environmental assessment and the degree of investigation required. This might be achieved through agreement with statutory consultees, the developer, planning consultants and industry,

³³ EC Directive 79/409 on the Conservation of Wild Birds, OJ L 103, 27.4.1979.

³⁴ EC Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206, 22.7. 1992: Article 6 requires an environmental assessment to be conducted of any plan or project likely to have a significant effect on a 'protected site'.

³⁵ McEldowney and McEldowney, Op.cit. p. 9.

³⁶ Article 3 Proposed Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

following consultation. A new duty of consultation seeks also to ensure that both the public and statutory body are consulted about the project. This extends proposals for better consultation between Member States over projects that give rise to 'significant adverse effects' in the environment in another Member State.³⁷ This latter proposal is part of the Treaty signed at Espoo, Finland, on transboundary environmental assessment.³⁸

Environmental Assessment and Planning Law in the United Kingdom

Environmental assessment is an important part of planning law in the United Kingdom.³⁹ The aims of Directive 85/337 are incorporated into the existing planning procedures. This enables relevant information about the effects of development on the environment to be considered as part of the planning process.⁴⁰ In projects where environmental assessment is required to be carried out, planning permission may not be granted unless the assessment has been taken into consideration. Unlike the law on the control of pollution, which is subject specific, environmental assessment takes account of a wide range of issues associated with the environment. In terms of priority, the assessment

³⁷ Article 7 Proposed Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

³⁸ United Nations Economic Commission for Europe, Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, Finland, 30 I.L.M. 800, 25.2.1991. This requires notification of any party affected by any transboundary activity to be informed as early as possible and to participate in the environmental assessment.

³⁹ McEldowney and McEldowney, Op.cit., chapter 6, p. 1; on the state of environmental statements in other countries, see A. Gilpin, Environmental Impact Assessment (Cambridge, Cambridge University Press, 1995).

⁴⁰ Ibid., chapter 6, pp. 4-5

is not the most influential consideration in the final decision to grant planning permission; it is one factor that must be taken into account among many others.⁴¹

Council Directive 85/337 was first implemented in the town and country planning system in England and Wales by the Town and Country Planning (Assessment of Environmental Effects) Regulations ('the 1988 Environmental Effects Regulations')⁴² on 15 July 1988 under powers contained in section 2(2) European Communities Act 1972.⁴³ These Regulations were accompanied by Circular 15/88⁴⁴ and further guidance issued by the Department of the Environment in 1989 and 1994.⁴⁵ The 1988 Environmental Effects Regulations were amended in 1990,⁴⁶ 1992,⁴⁷ and in 1994.⁴⁸ The most notable

⁴¹ Id.

⁴² Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No. 1199).

⁴³ See generally J. Alder, 'Environmental Impact Assessment: The Inadequacies of English Law', (1993) JEL Vol. 5, No. 2, 203-221.

⁴⁴ Department of the Environment, Circular 15/88 (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988).

⁴⁵ Department of the Environment/Welsh Office, Environmental Assessment: A Guide to the Procedures (London, HMSO, 1989) and Department of the Environment, Good Practice on the Evaluation of Environmental Information for Planning Projects. (London, HMSO, 1994) and Department of the Environment, Draft Guidance on Preparing Environmental Statements of Projects (London, HMSO, 1994).

⁴⁶ Town and Country Planning (Assessment of Environmental Effects) Regulations 1990 (SI 1990, No. 367). These Regulations amend the thresholds for projects in Schedule 1 para. 1(2).

⁴⁷ Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1992 (SI 1992 No. 1494) ('the 1992 Environmental Effects Regulations'); these Regulations introduced new requirements for publicising planning applications accompanied by an environmental statement as explained in paragraphs 15 and 16 of Circular 15/92 (Welsh Office 32/92), Publicity for Planning Applications (London, HMSO, 1992) and new requirements for planning applications where the local planning authority is also the applicant, as explained in paragraphs 36-40 of Circular 19/92 (Welsh Office 39/92), Town and Country Planning General Regulations 1992; Town and Country Planning (Development Plans and Consultation) Directions 1992 (London, HMSO, 1992).

development is that the scope of environmental assessment in the town and country planning system has been extended by a number of legislative changes. First, powers have been granted to the Secretary of State for the Environment to extend environmental assessment to projects which are not included in Council Directive 85/337.⁴⁹ Second, permitted developments rights have been removed in the case of projects requiring an environmental assessment.⁵⁰ Third, certain developments approved by Private Acts of Parliament are no longer excluded from environmental assessment procedures.⁵¹

To fully implement Directive 85/337, at least to date nineteen further sets of regulations have been enacted. This means that there are a number of 'competent authorities' in addition to the local planning authority.⁵² The application of the appropriate legislation is determined by the nature of the project (for example an afforestation project is covered by different regulations than a harbour project) and the geographical location of the project: different regulations apply in Scotland to those in Northern Ireland or England and Wales.

⁴⁸ Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1994 (SI 1994 No. 677) ('the 1994 Environmental Effects Regulations'); this set of Regulations is accompanied by guidance from the Department of the Environment in Circular 7/94 (Welsh Office, 20/94), Environmental Assessment: Amendment of Regulations (London, HMSO, 1994).

⁴⁹ The 1994 Environmental Effects Regulations (made under powers contained in section 15 Planning and Compensation Act 1991) amend the 1988 Environmental Effects Regulations to include water treatment plants, wind generators and motorway service areas. This is explained in Circular 7/94 (Welsh Office 29/94, Environmental Assessment: Amendment of the Regulations (London, HMSO, 1994) para. 3.

⁵⁰ Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 No. 418) and Town and Country Planning (Environmental Assessment and Permitted Development) Regulations 1995 (SI 1995 No. 417); see Circular 3/95, Permitted Development and Environmental Assessment (London, HMSO, 1995) for guidance.

⁵¹ Under the provisions of the Transport and Works Act 1992.

⁵² For example, the Forestry Commission and Crown Estate Commissioners.

Nevertheless, the requirements of the regulations are broadly similar. In cases where there is a dispute as to whether an assessment should be carried out then there is an appeal procedure to the Secretary of State for the Environment. The courts appear reluctant to intervene in the actual merits of the decision reached by the planning authority on this point.⁵³

To date, approximately 200 statutory environmental assessments have been conducted in the United Kingdom since 1988;⁵⁴ however, when combined with the number of environmental statements submitted voluntarily to planning authorities with applications for planning permission, this increases to approximately 1650.⁵⁵ There is some difficulty in assessing accurately the number and type of environmental assessments conducted. This is because some 'mixed development' projects fall under a number of the environmental assessment regulations and therefore may be counted more than once; in addition, some authorities and developers are unwilling to provide information on the statements conducted. There is also some variance in the assessment of what constitutes a statutory or voluntary statement.⁵⁶ Evaluating the number of environmental assessments conducted in the United

⁵³ See R v. Swale Borough Council and Medway Ports Authority ex parte The Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135; and R v. Poole Borough Council ex parte Beebee and Others [1991] JPEL 643.

⁵⁴ "Screening" and "Scoping" Proposed for Environmental Assessment', ENDS Report No. 232, May 1994, 38.

⁵⁵ Institute of Environmental Assessment, Digest of Environmental Statements (London, Sweet and Maxwell, 1993); see also R. Therivel, J. Melton, and C. McKenzie, Directory of Environmental Statements July 1988-September 1993 (Oxford, Oxford Brookes University, 1993).

⁵⁶ Regulation 4 1988 Environmental Effects Regulations states that, on submission by the applicant of an environmental statement expressed to be for the purposes of these Regulations, the application is deemed to be a Schedule 1 or a Schedule 2 application; a voluntary submission of an environmental statement is therefore deemed to fall within the statutory

Kingdom therefore requires subjective judgments to be made about the nature of the project and applicability of the regulations. An approximate guide to the number of environmental statements published in the United Kingdom, classified according to the relevant regulations, is given in Appendix I. The main categories of Annex I developments for which environmental statements are prepared are roads, waste disposal installations and power stations while for Annex II, infrastructure projects, and extractive industry projects are the main sectors, with a relatively small number being prepared for industrial projects. Most environmental statements were prepared under the planning regulations for England and Wales.

There are a number of drawbacks in the present arrangements for environmental assessment in the United Kingdom.⁵⁷ Developers are given a great deal of discretion in drawing up the environmental statement. The developer may chose their own environmental consultant as well as set their own requirements and criteria which form the basis of the environmental assessment. Developers' environmental assessments are not scrutinised by an independent verifier; claims made in the environmental assessment are therefore impossible to verify. As McEldowney and McEldowney state: 'environmental assessments may favour the wealthy investor who is able to choose the most skilled advisors and present the most favourably written assessment'.⁵⁸ These characteristics of environmental assessment have the effect of introducing a large element of self assessment in the process. This aspect was the subject of criticism by the European Commission on opening proceedings against the

provisions.

⁵⁷ McEldowney and McEldowney, Op.cit. chapter 6, pp. 11-12.

⁵⁸ Id.

United Kingdom government for failure to comply with Directive 85/337.⁵⁹ Although environmental assessment would appear to reverse the presumption in favour of development on environmental grounds, McEldowney and McEldowney suggest that these aspects provide a presumption in favour of development if the environmental assessment is written in a favourable form.⁶⁰ The Department of Environment has responded to criticism of the adequacy of adequacy of the environmental assessment process in the United Kingdom's planning system and the European Commission's proposed amendments to Directive 85/337 by issuing a Draft Guide on Preparing Environmental Statements For Planning Projects (1994).⁶¹ This is intended to encourage a more systematic and carefully constructed statement than statements that are currently prepared. The Guide envisages a five stage process beginning with a base-line survey and culminating in an outline of proposals to modify the project so as to reduce its environmental impact. The 'best practicable techniques' are to be adopted when calculating and predicting the effects of a proposal.⁶²

⁵⁹ Commission of the European Communities, Ref. IP/91/928, 17 October 1991.

⁶⁰ Id.

⁶¹ Department of the Environment, Draft Guide on Preparing Environmental Statements for Planning Projects Consultation Paper (London, HMSO, 1994).

⁶² McEldowney and McEldowney, Op.cit., chapter 6.

The Study of Environmental Assessment: Objectives, Contribution and Methodology of the Thesis

(a) Objectives and Contribution of the Thesis

The aim of this thesis is to research the application of environmental assessment rules arising from Directive 85/337 in the context of a number of case studies. A primary objective is to study how planning and environmental law interrelate in a practical way. I address questions about how environmental assessment procedures work, the manner in which environmental assessment is integrated in the planning consent system, the relevance of environmental assessment as a method of pollution control, the impact of European Community procedures on the planning consent procedures, and the effect of environmental assessment on the local planning authority's decision making processes and the local public planning inquiry. In analysing five case studies, I make a number of conclusions about the development of environmental assessment as a procedural technique of environmental law. The term 'procedural' refers to established methods of acting or progressing, in this context, those methods by which information enters the decision making processes of the planning system.

The research undertaken for this thesis builds upon the published work of a number of researchers: Miller and Wood⁶³ on the role of planning in controlling pollution, Jowell⁶⁴

⁶³ C. Miller and C. Wood, Planning and Pollution: An Examination of the Role of Land Use Planning in the Protection of Environmental Quality (Oxford. Oxford University Press, 1983).

⁶⁴ J. Jowell, 'The Legal Control of Administrative Discretion', [1973] Public Law 178-220; and J. Jowell, 'Bargaining in Development Control', [1977] JPL 414-433.

on administrative discretion and bargaining in the planning system, and a number of socio-legal empirical studies on the enforcement of water pollution controls.⁶⁵ Much of the previous legal research on environmental assessment in the town and country planning system has been carried out in disciplines other than law, the most comprehensive by Wathern,⁶⁶ Wood and Jones⁶⁷ and Glasson et al.⁶⁸ Naturally, this research does not examine the legal effects of combining different techniques of environmental protection, nor the implications and significance of environmental assessment for the development of legal techniques of environmental law in the United Kingdom. From within law, a narrow view has typified legal research on environmental assessment; this has focused almost exclusively on the

⁶⁵ The parallel studies by K. Hawkins, Environment and Enforcement: Regulation and the Social Definition of Pollution (Oxford, Oxford University Press, 1982) and G. Richardson, A. Ogus and P. Burrows, Policing Pollution - A Study of Regulation and Enforcement (Oxford, Clarendon, 1983) on enforcement of water pollution law by regional water authorities; T. Burton, Participation - Principles and Practice: the Legal Regulation of Water Pollution (Unpublished PhD thesis, University of Hull, 1991) on the use made of water registers by the public; and S. Elworthy, Farming for Drinking Water: Nitrate Pollution of Water - An Assessment of a Regulatory Regime (Avebury, Aldershot, 1994) on the designation of Nitrate Sensitive Areas.

⁶⁶ P. Wathern, Environmental Impact Assessment: Theory and Practice (London, Routledge, 1988); see also E. Gouge, 'The UK Implementation of Environmental Assessment (EA): Organisational and Political Implications', [1989] Local Government Policy Making 55-63; and C. Wood and C. Jones, 'The Impact of Environmental Assessment on Local Planning Authorities', (1992) Journal of Environmental Planning and Management Vol. 35, No. 2, 115-128.

⁶⁷ C. Wood and C. Jones, Monitoring Environmental Assessment and Planning (Manchester, Environmental Impact Assessment Centre, 1990); and C. Wood and C. Jones, 'The Impact of Environmental Assessment on Local Planning Authorities', (1992) Journal of Environmental Planning and Management Vol. 35, No. 2, 115-127.

⁶⁸ R. Glasson, R. Therivel, and A. Chadwick, Environmental Impact Assessment (London, University College Press, 1995).

implementation of Directive 85/337 into United Kingdom planning law by legislative measures.⁶⁹

In light of the existing literature on environmental assessment and the development of environmental law in the United Kingdom, the primary contribution of this study lies in its examination of the practice of environmental assessment as an integrated and procedural technique of environmental law and the theoretical issues it raises about the use of procedural techniques in planning and environmental law. A further contribution to environmental law literature is made by examining the application and legal impact of a European Community directive. Since European Community environmental policy is itself barely twenty years old and a specific legal base for environmental measures was only provided in 1986,⁷⁰ the influence of the European Community has not been represented fully in environmental law literature, the exception being Kiss and Shelton's⁷¹ work on the genesis and development of European environmental law.⁷² In relation to the outcomes of developments in European

⁶⁹ For example, J. Salter, 'The Challenge From Brussels', [1992] *JPEL* 14-20 and 'The Question of Implementation', [1992] *JPEL* 313-318; R. Macrory, 'Environmental Assessment: Critical Legal Issues in Implementation', in D. Vaughan, *EC Environmental and Planning Law* (London, Butterworths, 1986); M. Grant, 'The Implementation of the EC Directive on Environmental Assessment', (1988) *Connecticut Journal of International Law* Vol. 4, 436-477. The neglect of the legal and theoretical aspects of environmental assessment is addressed by J. Alder, 'Environmental Impact Assessment: The Inadequacies of English Law', (1993) *JEL* Vol. 5, No. 2, 203-221; A. Ward also examines this case law, but from a different perspective - the effectiveness of remedies in Community law, in 'The Right to an Effective Remedy in European Community Law: A Case Study of UK Decisions Concerning the Environmental Assessment Directive', (1993) *JEL* Vol. 5, No. 2, 221-244.

⁷⁰ Title VII on the Environment consisting of Articles 130r, 130s and 130t was inserted into the Treaty of Rome by section 25 Single European Act 1986.

⁷¹ Kiss and Shelton, *Op.cit.*, see in particular, pp. 35-49.

⁷² See also L. Krämer, *Focus on European Environmental Law* (London, Sweet and Maxwell, 1992) in which specific features of European Union environmental law are highlighted and his collection of European Court of Justice case law on environmental matters in L. Krämer,

Community environmental law and the extent to which these developments change environmental law in the United Kingdom, the most comprehensive work remains Haigh's survey of European Community environmental laws and their implementation.⁷³ However, as is the case with other work in this area, this tends to portray the influence of European Community environmental law narrowly; most commonly with respect to specific laws promulgated to comply with European Community obligations,⁷⁴ and less so as part of a broader picture of the codifying and general development of environmental law. This narrow approach has meant that the practical effects of European Community environmental law on the work of local planning authorities, developers and environmental consultants, and in terms of actions brought, have often been ignored.⁷⁵ In this thesis, I aim to steer a middle course. I concentrate upon a specific area of environmental law - the implementation of Directive 85/337 - but relate this to wider questions about the development of environmental law, the connections between environmental and planning law and the challenges confronting planning law brought by European Community environmental law and, more broadly, the environmental agenda. In summary, using a case study approach, this research on the practical application of environmental assessment as a regulatory technique of environmental

European Environmental Law Casebook (London, Sweet and Maxwell, 1994).

⁷³ See also D. Freestone, Environmental Protection in EC Law (London, Athlone Press, 1992).

⁷⁴ For example, the influence of EC environmental law has been tirelessly explored in the context of the 'emission versus ambient standards' debate precipitated by the politically difficult implementation of EC Directive 76/464 on Pollution Caused by Certain Hazardous Substances in Water (OJ L 129, 18.5.76) and generally accompanied by much discussion about the United Kingdom's fast and furious flowing rivers and the competitive advantage which this confers.

⁷⁵ A notable exception is W. Howarth's work on the broad effects of EC water quality standards in the United Kingdom: "'Poisonous, Noxious or Polluting': Contrasting Approaches to Environmental Regulation', (1993) MLR Vol. 56, No. 2, 171-187.

law in the planning system is intended to partially redress the imbalance in legal literature towards researching the legislative implementation of Directive 85/337.

A number of issues are raised by the research which straddle the disciplinary boundaries between environmental law, planning law, and European Community environmental law. These are: the effect of statutory assessment rules on the planning authority's deliberations about whether to grant planning permission and on the planning inquiry; the scope of administrative discretion on the part of planners; and the integration of European (and preventative) legal techniques with those already existing in the planning system. In relation to these issues, a fundamental question is whether Directive 85/337 represents a radical change in approaches to planning decisions, or no more than a restructuring of current practices?

Drawing on the five case studies, my principal conclusion is that the existence of private property rights and rights of development in planning law plays a key role in understanding the operation of environmental assessment in the United Kingdom, in particular, the uses to which the environmental assessment process is put by developers. The practice of developers producing environmental statements when not required to do so by law because they considered that the voluntary submission of a statement would facilitate a grant of planning permission is of significance here. The 'privatisation' of the planning process may also be influential: voluntary environmental assessment allows the private sector to become more actively involved in the planning process.⁷⁶

⁷⁶ For a discussion of the process of 'privatisation' in the planning system through developers' contributions see Tesco Stores Ltd v. Secretary of State for the Environment (1995) 2 All ER 636 (HL), per Lord Hoffman at 659.

Under Directive 85/337, the developer is obliged to provide information to assist the local planning authority in making a decision about whether to grant planning permission. As mentioned, the Directive envisages that the planning authority carry out an assessment on the basis of the information provided by the developer. The manner of implementation of the Directive in the United Kingdom was such that the developer (in practice, the environmental consultant) conducts a de facto 'environmental assessment' of the proposed development. The result is a potential conflict between the roles the developer performs: as a proponent of a particular development with a property interest in a specific parcel of land, and as the assessor of the effects of that development on the wider 'environment'; the identification of which is likely to have adverse consequences for that property interest. Within the developer's environmental statement it is therefore possible to see a contradiction and tension between private property interests in a specific parcel of land and broader communitarian⁷⁷ interests in environmental protection.⁷⁸ In the majority of the case studies, this tension was mediated by the developer's identification in the environmental statement of mitigating measures or environmental 'gains' likely to accrue from the project. Of relevance here is the unequal resources possessed by the public and private sectors. Whilst private developers can afford to secure environmental consultants to compile a favourable environmental statement, few planning authorities can do the same for an expert evaluation

⁷⁷ For a discussion of theories of communitarianism (in a different context) see N. Lacey, 'Punishment: A Communitarian Approach', in R. M. Andrews, Punishment: Meanings, Purposes, Practices (New York, Peter Lang, 1993).

⁷⁸ F. Ost, 'A Game Without Rules: Ecological Self-Organisation of Firms', in G. Teubner, Environmental Law and Ecological Responsibility (Chichester, John Wiley, 1994) at p. 351, similarly describes this tension as between the public logic of publicity, freedom of information, and the carrying out of a 'public service' with a prevailing private logic of the promoter's freedom of enterprise.

of the statement; such evaluations are therefore often conducted 'in house' and with little expert assistance.

Analysis of the five case studies suggests that, by bearing primary responsibility for providing information about the environmental effects of development and their mitigation in the environmental assessment process, the developer acquires partial responsibility for environmental protection. However, the significance of information provided by the developer in the development consent system is disproportionate to the developer's traditional constitutional status in the planning process. As previously identified with other aspects of the planning system, the developer's property interest in a parcel of land provides a receptive base for the advancement of environmental interests; but only to an extent determined by the developer.⁷⁹ Environmental assessment procedures do not therefore provide an enforceable or positive means by which the grant of planning permission and environmental resources to developers may be prevented. In certain circumstances, environmental assessment procedures are capable also of advancing and legitimating a development project. The relevance of this conclusion to the theoretical issues raised by the thesis is that, as an example of procedural law, environmental assessment may not be characterised accurately as a neutral, 'restrained', legal form. In the context of the case studies, the potential for environmental assessment as a technique of environmental law, to bring about fundamental changes in the culture of decision making in the development consent system are not realised; rather, in practice, environmental assessment operates as a self-regulatory mechanism.

⁷⁹ P. McAuslan, Ideologies of Planning Law (Oxford, Pergamon Press, 1980), p. 47 considers this to be the case with the progressive public participation agenda in the late 1970s; see also M. Grant, Urban Planning Law (London, Sweet and Maxwell, 1982) chapter 1.

(b) Methodology

The thesis draws from five case studies of development projects which were subject to environmental assessment rules. The first is the Thanet Way Bypass scheme, a public sector project proposed by Kent County Council highways and transport department, and determined by the planning department of the same Council and which was the subject of a planning inquiry. The second is a combined heat and power station on the site of a disused electricity generating plant in the City of London. The third is a proposed waste disposal site in Warwickshire. The fourth and fifth case studies are a minerals extraction application and an incinerator plant in Essex and South Yorkshire respectively. In the context of these five case studies, I draw a number of specific conclusions about how environmental assessment has developed, how the system works and how environmental assessment rules are applied and more general conclusions about the contribution of the technique of environmental assessment to environmental law in the United Kingdom and the implementation in the town and country planning system in England and Wales. I discuss the research methods in more detail in chapter 7. Here, I explain briefly why I used a case study approach and describe the sources of material and my analysis of the case studies.

The Case Study Approach

The case study method, which allows a detailed picture of procedures and processes and is capable of eliciting information about decision making and discretion, was the most appropriate research method to adopt to achieve the primary objectives of the research: to understand how the environmental assessment process works and its impacts on decision

making. In this research, relevant information included planners' evaluation of the ways in which statutory environmental assessment rules affected their decisions about whether to grant development consent; the significance of information about the environmental effects of development in the planning system; and the influences of European Community environmental law on the development consent process.

In selecting the case studies, I first wrote to those local planning authorities in England and Wales which had experience of three or more environmental assessments, as listed in research on environmental statements by Wood, Jones and Lee.⁸⁰ Following pilot interviews, I conducted an initial interview with a planner in each planning authority. I asked those questions listed in Appendix II, and requested that they describe those projects subject to environmental assessment procedures with which they had some familiarity. I then studied most of the projects mentioned at the initial interview by reading planning files and interviewing other officers in the planning authority. The case studies presented in chapter 8 are chosen from these.

I carried out informal interviews at twenty planning authorities, generally with planning department managers and, where possible, with planning officers at both county and district level in one area, over a period of two years from May 1992. This provided the core of material for the case studies. I also conducted interviews with statutory consultees

⁸⁰ C. Wood, C. Jones and N. Lee, Environmental Statements 1988-1990: An Analysis (Manchester, University of Manchester, 1990); I sought initial interviews with those authorities listed as having experience of three or more environmental statements on the grounds that C. Wood and C. Jones, Monitoring Environmental Assessment and Planning (London, HMSO, 1990) had already carried out an in-depth study of those planning authorities with little or no experience of environmental assessment.

(representatives from Her Majesty's Inspectorate of Pollution (HMIP), the National Rivers Authority, English Heritage and environmental health departments), Members of the European Parliament and local action groups, environment and planning lawyers, planning inspectors and councillors. In the course of the research forty-five interviews took place; most taped and transcribed verbatim. In addition to interviewing planners and other individuals, material for the case studies was drawn from development plans, planning decision letters, and environmental statements. Together with planning committee reports, correspondence, minutes, and consultation papers in the planning file, these texts offered an official history of a project and also served to fill in many of the details of the decision making process described at interview.

The very nature of the case study method means that there is no generally accepted or formal way of setting criteria for analysing case studies.⁸¹ For this reason, I used a combination of techniques.⁸² I fixed codes to the field notes and interview transcripts. This meant that I was able to compare planners' evaluations of the procedures, different situations and procedures. In particular I noted the use of similar phrases and examples by the planners and in development plans, decision letters and environmental statements, and any patterns in the use of environmental information. Also of importance were the points in the planning process at which there was scope for the integration of pollution control and planning procedures, for example during consultation with statutory consultees, when formulating conditions on a grant of planning permission, and during the planning inquiry. I assessed

⁸¹ See A. Bryman and R. Burgess, (eds.) Analysing Qualitative Data (London, Routledge, 1994).

⁸² In doing this, I followed some of the methods described in M. B. Miles and A. M. Huberman, Qualitative Data Analysis (London, Sage, 2nd ed: 1994).

the extent of integration at these junctures. Each assertion made on the basis of the case studies was compared with previous research conducted on the impact of environmental assessment in the planning system. I compiled a matrix of the essential characteristics of each project and the use of environmental assessment in each case study.

Themes and Legal Disciplines

As mentioned above, the focus on environmental assessment in this thesis draws together three areas of law and their literatures: environmental law, planning law and European Community environmental law. That the traditional boundaries between these disciplines have become less rigid, makes for a broader scope to the thesis than might at first appear necessary in carrying out research on the implementation and application of Directive 85/337. For this reason, I here briefly discuss the relevance of these three areas of law to environmental assessment. In doing so, I introduce a number of guiding themes to which I return in later chapters. First is the development of techniques of environmental law. Environmental assessment is taken to represent the development of procedural and integrated techniques. These are compared with more traditional substantive and sectoral techniques of environmental protection. Second is the interrelation of environmental law and planning law. This theme addresses the extent to which development control procedures, traditionally focused on a particular site, are capable of analysing broader environmental issues. This question has particular relevance in the light of recent uncertainty about the legitimacy of using planning powers to control polluting activities which might encroach upon the

jurisdiction of pollution control authorities.⁸³ Also considered is the integration of technical and scientific information about the environmental effects of development in essentially political planning procedures. The third theme is the prevalence of private property rights in environmental and planning law: the issue here is the outcomes of tension between private property interests in a specific parcel of land and the protection of public health and the environment.⁸⁴ Fourth is the nature of developments in European Community environmental law, and the extent to which future developments will change the shape and content of environmental and planning law in the United Kingdom.

(a) Environmental Assessment and Environmental Law: Old Values and New Directions

In the nineteenth century laws relating to the environment were developed within a conceptual framework that the law should be used to protect property and provide reasonable enjoyment from environmental harm according to ideas about the ownership and use of land.⁸⁵ This is seen most clearly in the tort of private nuisance in which an action will lie in the case of unreasonable interference with the reasonable use and enjoyment of land.⁸⁶

Although influenced by doctrines and techniques of private property, environmental law also developed according to a contrasting framework that the law exists and should be used by

⁸³ As highlighted in Gateshead Metropolitan Borough Council v. Secretary of State for the Environment and Northumbrian Water Group plc [1995] EnvLR 36 (CA) see confirmation in Planning Policy Guidance Note 23, Planning and Pollution Control (London, HMSO, 1994), para 3.2.

⁸⁴ J. McEldowney, Public Law (London, Sweet and Maxwell, 1994), at p. 221, explores this distinction.

⁸⁵ See Grant, Op.cit., pp. 2-5.

⁸⁶ See St Helen's Smelting Company v. Tipping (1865) 11 ER 1483, 11 HL Cas. 642.

public officers to advance the public interest, in particular by securing public health by controlling land uses and pollution.⁸⁷ Environmental law therefore has 'communitarian' elements; it fosters recognition of human, societal and ecological interdependence and focuses on public goods and their collective use. Within this conceptual framework, controls over pollution have developed in a pragmatic and piecemeal way; the legislature and public officers dealing with new environmental problems as they arose. The predominant approach has been sectoral, in the sense of regulating individual industrial sectors or protecting a single environmental medium. As a consequence, laws relating to the environment are still to be found in an array of statutes and statutory instruments and responsibility for controlling discharges to air, water and land is presently exercised by a number of central government departments, local authorities and other bodies.⁸⁸

There has, however, been a slow acceptance of the need to develop more integrated controls to achieve a closer fit to the nature of the environment and the connections between environmental problems. The first explicit articulation of an integrated approach to pollution control occurs in the Fifth Report of the Royal Commission on Environmental Pollution (1976) which reviewed the efficacy of methods of air pollution controls from industrial and domestic sources. This is discussed more fully in chapter 3.⁸⁹ The Commission's recommendations were, belatedly, given legal effect in the Environmental Protection Act 1990. Part I of the 1990 Act establishes a system of Integrated Pollution Control. This

⁸⁷ McAuslan, *Op.cit.*, p. 2.

⁸⁸ See the list of environmental protection agencies in S. Ball and S. Bell, *Environmental Law: The Law and Policy Relating to the Environment* (London, Blackstone Press, 2nd ed: 1994) chapter 3.

⁸⁹ Royal Commission on Environmental Pollution, Fifth Report, *Air Pollution Control: An Integrated Approach*. Cmnd. 6371 (London, HMSO, 1976).

brings about the combination and consolidation of previously separate controls relating to air and water pollution and land contamination. The Secretary of State designates by regulations those industrial processes that have the potential for significant release of harmful substances to more than one environmental medium. These processes are then subject to centralised regulation by Her Majesty's Inspectorate of Pollution. In deciding what discharges and what levels of pollutants are allowed in which medium, the Inspectorate takes account of the effect of the discharge on all environmental media according to the principle of best practicable environmental option. Authorisations are granted by Her Majesty's Inspectorate of Pollution with an implied condition that the best available techniques not entailing excessive cost are to be used. However, fulfilment of an entirely integrated system of pollution control remains hampered by the present disparate state of bodies responsible for regulating discharges to the environment,⁹⁰ the legal principle of integrated pollution control having been developed in advance of institutional arrangements for its administration.

Early works on environmental law in the 1950s to 1970s concentrated upon the control of pollution in a single environmental medium, most commonly air⁹¹ and water.⁹² This reflected the traditional sectoral nature of pollution controls and the correspondingly fragmented institutional and administrative structure. The establishment of a system of

⁹⁰ For example, local authorities administer air pollution controls under Part I of the Environmental Protection Act 1990 and the National Rivers Authority are responsible for controlling processes which discharge into controlled waters (other than processes controlled under Integrated Pollution Control) under Part III of the Water Resources Act 1991.

⁹¹ E. Ashby and M. Anderson, The Politics of Clean Air (Oxford, Clarendon, 1981); A. Blowers, Something in the Air (London, Harper and Row, 1984).

⁹² J. F. Garner The Law of Sewers and Drains (Crayford, Shaw, 7th ed: 1991); a similarly sectoral approach was later adopted by W. Howarth, The Common Law of Water Pollution (London, Shaw and Sones, 1987); similarly, research on enforcement was concerned with water pollution, for example, Hawkins, Op.cit., and Richardson, Ogus and Burrows, Op.cit.

Integrated Pollution Control confirmed a legal appreciation of the environment as an integrated and interdependent system, rather than as a sum of environmental media and elements, as acknowledged by Guruswamy and Tromans⁹³ and Purdue.⁹⁴ The development of the system of Integrated Pollution Control further encouraged the recognition of environmental law as an identifiable, conceptually coherent, albeit developing, discipline within which previously disparate laws could be organised and studied. In examining the influences and issues shaping environmental law and by giving a statement of its progress and boundaries at the time of the enactment of the Environmental Protection Act 1990, Lomas and McEldowney⁹⁵ marked the existence of the subject as a discrete legal area. Ball and Bell⁹⁶ and Hughes⁹⁷ have since performed a similar task by giving a comprehensive account of the state of environmental law.

Lying on the border of planning and pollution control, environmental assessment is a prime example of an integrated, 'horizontal', or cross sectoral measure which cuts across traditional legal and administrative boundaries. The key technique of environmental assessment - the setting of certain procedural requirements for considering environmental information in decision making - differs from the primary technique of Integrated Pollution

⁹³ L. Guruswamy and S. Tromans, 'British Environmental Policy: Towards the Best Practicable Environmental Option', (1987) Anglo-American Law Review Vol. 16, 76-89, analyse the conceptual basis of the key principles of integrated pollution control.

⁹⁴ M. Purdue, 'Integrated Pollution Control in the Environmental Protection Act 1990 - A Coming of Age of Environmental Law?', (1991) MLR Vol. 54, No. 4, 534-551.

⁹⁵ O. Lomas and J. McEldowney, (eds.) Frontiers of Environmental Law (London, Chancery, 1991).

⁹⁶ Ball and Bell, Op.cit.

⁹⁷ D. Hughes, Environmental Law (London, Butterworths, 1992); see also R. Malcolm, A Guide to Environmental Law (London, Sweet and Maxwell, 1994).

Control, that of setting and applying substantive emission and environmental quality standards to control the operation of a project. Nevertheless, similarities between environmental assessment and Integrated Pollution Control exist in the requirement that an assessment is made of the environmental effects of development across all environmental media. For processes regulated under Integrated Pollution Control, an assessment of the 'best practicable environmental option' must be made of the process and abatement equipment.⁹⁸ The provision in Annex III of Directive 85/337 that information in the environmental assessment process should describe measures to 'prevent, reduce and where possible offset any significant adverse effects on the environment' closely mirrors the key objective of Integrated Pollution Control authorisation: to prevent, reduce to a minimum, and render harmless the release of prescribed substances. Similarly to Integrated Pollution Control, environmental assessment encourages an integrated approach to environmental protection by recognising that environmental pollutants are capable of being transferred across environmental media and by assessing the potential interaction and cumulation of pollutants. Since applications for planning permission may trigger not only environmental assessment, but also an assessment of the best practicable environmental option for purposes of Integrated Pollution Control authorisation, concerns have been expressed that unnecessary duplication occurs. One recommendation is that a single document serve the 1988 Environmental Effects Regulations and the best practicable environmental option assessment for the purposes of Integrated Pollution Control authorisation, thus integrating more closely pollution control and development consent procedures.⁹⁹

⁹⁸ Section 7(7) Environmental Protection Act 1990.

⁹⁹ United Kingdom Environmental Law Association and Institute of Environmental Assessment, Overlaps in the Requirement for Environmental Assessment. (London, UKELA, 1993); this is supported by W. Sheate, Making an Impact: A Guide to EIA Law and Policy (London,

As the establishment of the Integrated Pollution Control system represents the development of a conceptually coherent and integrated body of environmental law, so the parallel development of environmental assessment highlights the part to be played by planning controls in protecting the environment. In turn, the proposal to link environmental assessment and Integrated Pollution Control procedures contributes to more general questions about the interrelation of environmental law and planning procedures. As both a technique of environmental law and important part of planning law in the United Kingdom, environmental assessment provides a conceptual and practical 'bridge' between the two disciplines. This gives rise to interesting questions about the future of planning law in the United Kingdom: will it be driven increasingly by environmental concerns or continue to adopt a market style approach to policy development?¹⁰⁰

In summary, environmental assessment is a novel technique of environmental law by reason of its procedural and integrated nature. Environmental assessment contributes further to the development of techniques of environmental law by representing a departure from reactive and curative techniques of environmental protection. Environmental assessment forecasts likely pollutants and identifies those areas most susceptible to adverse impacts at the stage at which development consent is sought by the developer. This may encourage pollutants to be mitigated at their source, rather than subsequently trying to counteract their effects. Within certain limits, land use controls such as planning conditions and planning obligations arising from environmental assessment may therefore constrain pollution from

Cameron May, 1994) chapter 13; see also S. Tromans, 'Land Use and Best Practicable Environmental Option', in S. Tromans, (ed.) Best Practicable Environmental Option - A New Jerusalem? (London, UKELA, 1987).

¹⁰⁰ On this question, see McEldowney and McEldowney, Op.cit.

new development from the outset. As I conclude from my analysis of the case studies, environmental assessment operates primarily as a self-regulatory mechanism. This represents broader trends in the development of techniques of environmental law: of responsibility or 'stewardship' of the environment; of deregulation, and, most clearly, the replacement of substantive standards and binding regulations with procedures or frameworks for self-organisation and 'environmental contracts'.¹⁰¹ These trends, as identified in environmental assessment, are common also to the Regulations establishing the Eco-Management and Auditing Scheme¹⁰² and Eco-Labeling schemes¹⁰³ and the Directive on Access to Freedom of Information on the Environment.¹⁰⁴ The development of procedural instruments in environmental law forms part of a wider and radical development in legislation, which, for example, extends to social policy¹⁰⁵ and reflects political and economic concerns of subsidiarity and decentralisation.¹⁰⁶

¹⁰¹ Ost, *supra*, at 346-349; see generally G. Teubner, (ed.) Environmental Law and Ecological Responsibility (Chichester, John Wiley, 1994).

¹⁰² Regulation on Eco-Management and Auditing Scheme (93/1836) OJ L 168, 10.7.93.

¹⁰³ Regulation on a Community Eco-Labeling Scheme (92/880) OJ L 99, 11.4.92.

¹⁰⁴ Directive on Freedom of Access to Information on the Environment (90/313) OJ L 158, 23.6.90.

¹⁰⁵ B. Hepple, 'Social Values and the European Union', (1995) CLP Vol. 48 identifies this trend in social policy of the European Union, as seen by the central position which the Agreement of 14, attached to the Maastricht Social Protocol, gives to the 'social dialogue' between management and labour in place of traditional forms of labour regulation; at national level, while legislation sometimes fixes flexible standards, the actual determination of legality is left to independent social actors.

¹⁰⁶ On this trend, see C. D. Stone, Where the Law Ends: The Social Control of Corporate Behaviour (New York, Harper and Row, 1976) and P. Yeager, The Limits of Law: The Public Regulation of Private Pollution (Cambridge, Cambridge University Press, 1991).

(b) Environmental Assessment and the 'Greening' of Planning

The roots of planning law lie predominantly in the public health movement of the nineteenth century with its concerns of health, the removal of nuisances, and sanitation in urban areas. Early planning legislation had as at least one of its goals the provision of a healthier environment.¹⁰⁷ The public health movement challenged the prevailing ethos of proprietary and contractual freedom but enjoyed little success in terms of wielding statutory controls. In the midst of the post war nationalisation programmes and attempts to rebuild devastated areas, the Town and Country Planning Act 1947 considerably strengthened the state's control over the use and development of privately owned land by making all development subject to prior authorisation. The 1947 Act provided an interventionist planning framework for balancing the interests of private property and the public interest in land use. Its main provisions have been re-enacted in the Town and Country Planning Acts of 1968, 1971 and 1990. The Town and Country Planning Act 1990 was amended by the Planning and Compensation Act 1991. The Town and Country Planning Act 1990, as amended, provides a system of statutory controls for regulating development within a policy framework provided by development plans and guidance notes issued by the Department of the Environment.¹⁰⁸ The modern system of land use planning embraces a more diverse range of objectives than environmental protection, including urban regeneration, affordable housing, and industrial and commercial development.¹⁰⁹

¹⁰⁷ See the description of the dual roots of planning law in the public health and garden city movements in M. Grant Urban Planning Law (London, Sweet and Maxwell, 1982) at pp. 8-10.

¹⁰⁸ Also of relevance to the development consent system is the Planning (Listed Buildings and Conservation Areas) Act 1990.

¹⁰⁹ Tromans, Op.cit., p. 106.

Development controls operate within a prevailing ideology of the private ownership of property.¹¹⁰ One expression of this ideology is that a right to develop land and be involved in planning decisions is linked closely to the possession of a specific legal interest in land. For this reason, the physical basis of land use planning is the parcel or plot of land, which encourages a preoccupation with the environmental qualities of a particular site.¹¹¹ This has important implications for environmental assessment which, by its very nature, extends the evaluation of effects of development beyond an individual site. A further effect of aligning property rights with rights of development in planning law is that third parties and objectors are given few rights to parallel those conferred on developers, for example to appeal to the Secretary of State against a grant of permission, or to challenge a decision of the planning authority in the ordinary courts,¹¹² although objectors may make use of inquiries and the media to discuss public issues involved in planning developments. There are also restrictions on the scope of environmentally beneficial conditions with the courts adopting the attitude that conditions that take away private property rights and which are not compensated are ultra vires.¹¹³ Significantly, no reasons need be given for a grant of

¹¹⁰ McAuslan, Op.cit.

¹¹¹ R. Burrige and K. Foster, 'Law's Territory: Locating the Place of Law', (forthcoming) discuss the regulation of physical space by parcelling and plotting land.

¹¹² This is the consequence of restrictive rules of locus standi, for example, R v. Secretary of State for the Environment ex parte Rose Theatre Trust [1990] 1 QB 504; this case might be compared with R v. Poole BC ex parte Beebee [1991] JPEL 643 in which a local environmental interest group was granted standing to oppose a grant of planning permission; see also R v. Her Majesty's Inspectorate of Pollution and the Minister of Agriculture Fisheries and Food ex parte Greenpeace Ltd (1994) JEL Vol. 6, No. 2, 297, at 312.

¹¹³ See Hall v. Shoreham Urban Development Corporation [1964] 1 WLR 240; affirmed in Bradford Metropolitan Borough Council v. Secretary of State for the Environment [1986] JPL 598; however policy guidance in Circular 1/85, The Use of Conditions in Planning Permission (London, HMSO, 1985) para. 59 (development of contaminated sites) and Planning Policy Guidance Note 23, Planning and Pollution Control (London, HMSO, 1994) paras 3.23-3.27 tends to be more amenable to the use of environmentally beneficial conditions.

development consent, but the local planning authority must furnish a potential developer with reasons for the refusal of planning permission. This allows planners considerable discretion as to what considerations they take into account and the weight they attribute to the various factors.

In recent years the planning system has been the object of a 'greening' process following explicit recognition that in granting planning permission for any new development, the planning authority is in effect sanctioning a new source of waste and potentially a source of pollution.¹¹⁴ This process has also been motivated to some extent by debate about the principle of sustainable development which accompanied the Report of the World Commission on Environment and Development in 1987.¹¹⁵ The United Kingdom's commitment to the idea of sustainable development was contained in a 1990 White Paper on the environment.¹¹⁶ This identified the planning system as a particularly suitable forum for 'implementing' the principle of sustainable development, and triggered more detailed policy initiatives. For example, Planning Policy Guidance Note 1, which sets out the key elements of the government's philosophy on the planning system, charges planning with 'the objective of ensuring that development and growth are sustainable'.¹¹⁷ In practical terms, Planning

¹¹⁴ Miller and Wood, Op.cit.

¹¹⁵ World Commission on Environment and Development, Our Common Future (Oxford, Oxford University Press, 1987).

¹¹⁶ HM Government, This Common Inheritance Cm 1200 (London, HMSO, 1990).

¹¹⁷ Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1993), para 3; see also Department of the Environment, The UK Strategy on Sustainable Development (London, HMSO, 1994).

Policy Guidance Note 12¹¹⁸ requires planning authorities to include environmental policies in their unitary development plans or district-wide development plans. According to this guidance, environmental considerations might constitute legitimate reasons for refusing development consent.¹¹⁹ More specifically, Planning Policy Guidance Note 9 details the role of planning controls in nature conservation.¹²⁰ In addition, academics as well as professional planning bodies have considered techniques for 'implementing' sustainable development in the planning system, of which environmental assessment is one.¹²¹

These various policy statements and guidance notes strengthen the finding of earlier research that planning has central relevance to environmental protection.¹²² Planning controls are ad hoc in relation to environmental protection and are directed by a number of conflicting policy demands; nevertheless, the planning system is well appointed to prevent environmental harm by controlling the location of activities damaging to the environment - waste disposal, mineral extraction and emission of pollutants. Environmental assessment accords with this role of protecting the environment by ensuring that the location of environmentally harmful activities is taken into account in the decision making process; in

¹¹⁸ Planning Policy Guidance Note 12, Development Plans and Regional Planning Guidance (London, HMSO, 1992).

¹¹⁹ Ibid. para 3.1 and chapter 6 of the guidance note.

¹²⁰ Planning Policy Guidance Note 9, Nature Conservation. (London, HMSO, 1994); this elaborates the legal framework set out in Regulations 48-54 Conservation (Natural Habitats &c.) Regulations 1994 which inter alia charges local planning authorities with assessing the effects of development in certain protected areas.

¹²¹ For example A. Blowers, (ed.) Planning for a Sustainable Future (London, Earthscan, 1990).

¹²² Wood and Miller, Op.cit.; see also C. Wood, Planning Pollution Prevention: A Comparison of the Siting Controls Over Air Pollution in Britain and the United States (Oxford, Heineman Newnes, 1983).

addition, environmental assessment extends this consideration by encouraging the significance of the activities themselves to be evaluated when a decision to confer or deny planning permission is taken.¹²³

Although the positive role of planning in controlling pollution is accepted, the exact nature of the connections between planning law and environmental law remain unclear. Some describe planning controls as 'techniques' of environmental law;¹²⁴ others portray environmental law as a subset of planning law.¹²⁵ These different perspectives arise because the implications of integrating progressive environmental assessment procedures in the planning system have yet to be articulated.¹²⁶ For example, there has been no major reappraisal of the role of planning law in environmental protection to parallel McAuslan's¹²⁷ study of the integration of public participation requirements in planning, or Grant's¹²⁸ consolidating work on urban planning law. This tends to be the case even in those works which categorically refer to both planning and environmental law.¹²⁹ This oversight is remarkable when one considers that the positive role of planning law in

¹²³ See fifth recital, preamble to Directive 85/337.

¹²⁴ For example, Kiss and Shelton, Op.cit., pp. 464-466; a similar approach is adopted by Ball and Bell, Op.cit., chapter 9.

¹²⁵ For example, Grant, Op.cit., pp. 430-36; see also D. Millichap, 'Sustainability: A Long-Established Concern of Planning', [1993] JPEL 1111-1119.

¹²⁶ W. Birtles and R. Stein, Planning and Environmental Law (London, Longman, 1994) begin this process.

¹²⁷ McAuslan, Op.cit.

¹²⁸ Grant, Op.cit.

¹²⁹ For example, Vaughan, Op.cit.

environmental protection is manifested in environmental assessment rules and case law,¹³⁰ affirmed in official guidance¹³¹ and has, for some time now, been a subject of research in disciplines other than law.¹³² This point may reflect the problems of developing the cognitive skills to analyse and interpret environmental law given that the subject is currently too diverse and disparate to have intellectual coherence.

As stated above, this thesis attempts to close this gap by examining the relationship between planning and environmental law in the context of environmental assessment.¹³³ Using a case study approach, the thesis addresses the debate about what opportunities exist for a practical synthesis between planning and environmental law, for example through local planning authorities considering the effects of development on the environment before granting or refusing planning permission.

(c) Environmental Assessment and European Community Environmental Law

Acceptance of the positive role of planning controls in protecting the environment, as seen in statutory environmental assessment, has developed in a context of European Community environmental law. Environmental policy did not constitute a fundamental article

¹³⁰ For example, Gateshead Metropolitan Borough Council v. Secretary of State for the Environment and Northumbrian Water Group plc [1995] EnvLR 36 (CA).

¹³¹ Department of the Environment, Planning Policy Guidance Note 23, Planning and Pollution Control (London, HMSO, 1994).

¹³² Miller and Wood, Op.cit.; M. Clark and J. Herington, The Role of Environmental Impact Assessment in the Planning Process (London, Mansell, 1988); P. Selman, Environmental Planning: The Conservation and Development of Biophysical Resources (London, Paul Chapman, 1992).

¹³³ Grant, Op.cit., pp. 430-436, began this process.

of the Treaty of Rome. However, an environmental policy was first declared by the Council of Ministers in 1972 and the first Environmental Action Programme adopted in 1973.¹³⁴ At first, the primary objective of European Community environmental law and policy was to ensure that competition within the Community was not distorted; later this became combined with objectives of enhancing living and working conditions in the Community.

The principal characteristic of European Community environmental law from the early 1970s until the mid 1980s was its predominantly sectoral nature. Directives focused upon controlling pollution to water and air, or controlling industrial sectors by establishing emission and environmental quality standards. The European Community has recently developed more integrated environmental laws which rely on the freedom of information and the use of procedural mechanisms, less so on prescriptive and uniform standards. The European Community's commitment to an integrated approach to pollution control is contained in the Fourth Action Programme on the Environment¹³⁵ and is manifested in a proposed Directive on Integrated Pollution Prevention and Control.¹³⁶ A further defining characteristic of European Community environmental law is its premise upon the related principles of anticipating and preventing environmental pollution problems, rather than trying to deal with problems as they arise.¹³⁷

¹³⁴ European Economic Community, First Environmental Action Programme OJ C 112/1, 20.12.1973 (Brussels, Commission of the European Communities, 1972).

¹³⁵ European Economic Community, Fourth Environmental Action Programme OJ C 328, 19.10.87 (Brussels, Commission of the European Communities, 1987).

¹³⁶ Commission of the European Communities, Draft Directive on Integrated Pollution Prevention and Control COM(93) 423 (Brussels, Commission of the European Communities, 1993).

¹³⁷ Ball and Bell, Op.cit., chapter 4.

The current framework of European Community environmental law is provided by the Fifth Environmental Action Programme,¹³⁸ a non-binding, political declaration issued by the European Commission in 1992. This departs from previous Action Programmes by focusing on activities - industry, energy, transport, agriculture and tourism - rather than environmental media and in its concern with sources rather than receptors of pollution.¹³⁹ The Action Programme stresses the need for integration of environmental protection requirements into other policy areas, for example transport; a first step being environmental assessment of these areas.¹⁴⁰

European Community environmental law, through various Community directives, bears upon land use in the United Kingdom.¹⁴¹ However, the relatively recent legal competence of the European Community in matters of town and country planning,¹⁴² and a continuing perception of this area as reserved for Member States' exclusive control has contributed to a general failure in planning literature to account for the influence of the European Community in the process of gaining acceptance of environmental issues in

¹³⁸ European Economic Community, Fifth Environmental Action Programme: Towards Sustainability - A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development COM(92) 23 final (Brussels, Commission of the European Communities, 1992).

¹³⁹ Ibid., Vol. II, at 6.

¹⁴⁰ Ibid., at 7-8.

¹⁴¹ Most notably, EC Directive 92/43 on Conservation of Natural Habitats and of Wild Flora and Fauna, OJ L 206, 22.06.92 and EC Directive 79/409 on Conservation of Wild Birds, OJ L 103, 27.05.79.

¹⁴² Article 130s(2) on voting requirements in the Council of Ministers in matters of town and country planning gives a legal base of sorts.

planning.¹⁴³ The study of environmental assessment rules in this thesis addresses this issue.

The primary contribution of environmental assessment lies in its representing the development of preventative and integrated techniques of environmental law. Having given a broad overview of environmental assessment in the context of environmental law, in the following chapter I examine the ideas and influences in environmental assessment in more detail and from a theoretical perspective.

¹⁴³ A start was made by Grant, Op.cit., pp. 66-69; this has since been followed by R. Williams, 'EC Environmental Policy, Land Use Planning and Pollution Control', (1986) Policy and Politics 93-106; N. Haigh, 'The EC and Land Use - An Incoming Tide', Paper No. 16 [1990] JPEL 58; and, more recently, M. Redman, 'European Community Planning Law', [1993] JPEL 999-1011; D. Rose, 'The Impact of EC on Land Use Planning', (1992) The Planner Vol. 78, No. 14, 8, and Birtles and Stein, Op.cit., chapter 2.

Chapter Two Environmental Assessment: Ideas and Influences

Introduction

This chapter is intended to explain and define environmental assessment as a technique of environmental law. The chapter has three sections. I first outline the origins of environmental assessment in the United States' National Environmental Policy Act (NEPA) 1969 and the development of environmental assessment by international organisations, and by countries in Europe. In the second section, I define environmental assessment from a theoretical perspective, and discuss guiding concepts, ideas and influences. In the third section, I critically appraise environmental assessment as a technique of environmental law which represents a radical departure from a narrow and reactive regulatory approach to the control of environmentally harmful activities and the acceptance of preventative and integrated methods.

Origins and Development of Environmental Assessment

Environmental assessment originated in the United States' National Environmental Policy Act (NEPA) 1969. This required federal agencies to document the manner in which they considered the environment in making decisions. Agencies are required to include a detailed environmental impact statement in every recommendation or report on proposals for legislation and other major actions 'significantly' affecting the quality of the human

environment alongside more traditional considerations such as economic impact.¹ This requirement only applies to public projects. A 'record of decision', indicating exactly how the environmental impact statement was used in arriving at a decision is also to be compiled and made public. The 1969 Act ensured that decisions on major federal activities can only be taken with foreknowledge of their likely environmental consequences. A Council of Environmental Quality was established by the 1969 Act² to administer the provisions on environmental assessment. This published guidelines on environmental assessment in 1971 and 1973. The operation of environmental assessment in the United States has been researched by Caldwell³ and Taylor.⁴ Both have consistently argued that the environmental assessment process created by the 1969 Act significantly altered federal decision making. In the United States environmental statements have been the subject of much litigation: many decisions not to produce an environmental statement for a particular development and the adequacy of many statements have been challenged successfully by environmental groups.⁵ Many other countries followed the United States lead in introducing environmental assessment regimes, often by separate legislation.⁶

¹ Section 102(2)(c) United States' National Environmental Policy Act (NEPA) 1969, 42 U.S.C. 4321-4361.

² Section 202 National Environmental Policy Act (NEPA) 1969, 42 U.S.C. 4321-4361.

³ L. K. Caldwell, Science and the National Environmental Policy Act: Redirecting Policy Through Procedural Reform (Alabama, Alabama University Press, 1982).

⁴ S. Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform (Stanford, Stanford University Press, 1984).

⁵ See D. R. Mandelker, NEPA Law and Litigation (Callaghan, Clark Boardman, 2nd ed: 1993).

⁶ A. Gilpin, Environmental Impact Assessment (Cambridge, Cambridge University Press, 1995) surveys these countries in chapters 8 and 9.

In parallel to the United States legislation, environmental assessment was also developed by a number of international organisations. In the mid 1970s the Organisation for Economic Cooperation and Development convened an Environment Committee to discuss the international economic implications of environmental problems. The Committee's main recommendations were that member countries establish procedures for assessing environmental impacts of 'significant' public and private projects and for exchanging information on forecasting environmental effects.⁷ Similarly, the United Nations Environment Programme produced guidelines on conducting environmental assessment which stressed also the evaluation of possible social and economic effects.⁸

As a body specifically concerned with environmental and economic change giving rise to health hazards, the World Health Organisation passed a resolution in 1982 recommending that environmental health impact assessment studies be carried out prior to the implementation of all major economic development projects, particularly dams, and offered guidance to member countries to encourage them to undertake environmental health

⁷ Organisation for Economic Cooperation and Development, Analysis of the Environmental Consequences of Significant Public and Private Projects C(74)216 (Paris, OECD, 1974); Coordinated Methods of Assessing the Potential Environmental Effects of Chemical Compounds C(74)215, 14.11.74 (Paris, OECD, 1974); Coordination Guidelines in Respect of Procedures and Requirements for Anticipating the Effects of Chemicals on Man and the Environment C(77)97 final, 7.6.77 (Paris, OECD, 1977); The Assessment of Projects with Significant Impact on the Environment C(79)116 (Paris, OECD, 1979).

⁸ United Nations Environment Programme, Guidelines for Assessing Industrial Environmental Impact and Criteria for the Siting of Industry (Paris, UNEP, 1980); see M. N. Htun, 'Development of United Nations Environment Programme Guidelines for Assessing Industrial Criteria for the Siting of Industry', in B. D. Clark et al, (eds.) Perspectives on Environmental Impact Assessment (New York, Reidel, 1984), pp. 253-263.

assessments at national level.⁹ In line with these initiatives, environmental appraisal was also developed in various development assistance programmes.¹⁰ For example, the Organisation for Economic Cooperation and Development issues guidelines for the assessment of such assistance projects¹¹ and the World Bank also categorises development assistance requiring full-scale environmental assessment.¹²

The operation of environmental assessment procedures in the United States, and the use of the technique by international organisations such as the Organisation for Economic Cooperation and Development stimulated interest in environmental assessment in Europe and, given the costs of litigation in the United States, a warning to European countries engaged in introducing similar legislation. However, the American and European contexts were essentially different: the provisions on environmental assessment in the United States' National Environmental Policy Act (NEPA) 1969 were imposed upon a land use planning system in which there were few existing procedures for predicting a proposed development's environmental impacts;¹³ in contrast, on the adoption of Council Directive 85/337 on the

⁹ World Health Organisation, Rapid Assessment of Sources of Air, Water and Land Pollution Resolution WHO/35.17, (Geneva, World Health Organisation, 1982); see also E. Giroult, 'World Health Organisation Interest in Environmental Health Impact Assessment', in P. Wathern, Environmental Impact Assessment: Theory and Practice (London, Routledge, 1988) pp. 258-271, at 258.

¹⁰ W. V. Kennedy, 'Environmental Impact Assessment and Bilateral Development Aid: An Overview', in Wathern, Op.cit., pp. 272-285, at 272.

¹¹ Organisation for Economic Cooperation and Development, Recommendation of the Council on Measures Required to Facilitate the Environmental Assessment of Development Assistance Projects and Programmes, C(86)26 (Paris, OECD, 1986).

¹² World Bank, The World Bank and the Environment: First Annual Report (Washington, World Bank, 1990).

¹³ K. von Moltke, 'Environmental Impact Assessment in the United States and Europe', in Clarke et al, Op.cit., at 28.

Assessment of the Effects of Certain Public and Private Projects on the Environment,¹⁴ most Member States had established land use laws including, in some cases, procedures for predicting environmental effects of development proposals. One of the most comprehensive European environmental assessment systems was established in France under its law on the Protection de la Nature 1978. This mandated the preparation of environmental assessments for all major public or private development projects requiring authorisation. The role of environmental assessment in other European countries varied considerably.¹⁵ Initially, Britain, the Federal Republic of Germany and the Nordic countries adapted their already well-developed land use planning systems to take account of the effects of development on the environment. Britain, Germany and Denmark were obliged to introduce specific legislation on environmental assessment following the adoption of Council Directive 85/337. The provision of environmental assessment in the United Kingdom both before and after the implementation of Directive 85/337 is discussed in more detail in chapters 7 and 8.

Generally speaking, environmental assessment evolved in response to the increasing recognition of harmful environmental impacts of post-war development schemes such as dams and motorways, and an upsurge in public environmental activism.¹⁶ Other stimuli included an acknowledgement of the inadequacy of existing appraisal techniques such as cost-benefit analysis which effectively ignored environmental and social costs. In the United Kingdom,

¹⁴ OJ L 175, 5.7.1985, p. 40.

¹⁵ See the review of European responses to environmental assessment in Gilpin, *Op.cit.* chapter 6; P. Wathern, 'The EIA Directive of the European Community' in Wathern, *Op.cit.*, at pp. 194-200 also describes the position in France and other Member States prior to the adoption of Directive 85/337.

¹⁶ B. D. Clark, 'Environmental Impact Assessment: Scope and Objectives', in Clark et al, *Op.cit.* pp. 3-13.

the introduction of environmental assessment may be seen also against a background of growing disillusionment with the public planning inquiry system; in particular the difficulty of combining national policy and local issues in its single procedure and the limited scope for effective public participation that it appeared to offer.¹⁷

Garner and O'Riordan trace broad stages in the development of environmental assessment.¹⁸ They suggest that a first step is formal accounting of a project's viability: at this stage, decisions are made on the basis of engineering feasibility and the primary emphasis is economic. A second stage is conventional cost-benefit analysis in which emphasis is placed upon efficiency within a broad concern of economic development. At the next stage of so-called 'innovative' cost-benefit analysis, pricing mechanisms are used in which economic development becomes just one of a number of objectives. Finally, at the stage of environmental assessment, concern lies with describing the impact of proposals on the biological and physical systems in the environment. Further stages might include assessment of environmental impacts on communities and human health.

¹⁷ N. Hutton, Lay Participation in a Public Inquiry: A Sociological Case Study (London, Gower, 1986); see also J. Herington, 'Environmental Values in a Changing Planning System', in M. Clark and J. Herington, (eds.) The Role of Environmental Impact Assessment in the Planning Process (London, Mansell, 1988) p. 145.

¹⁸ J. Garner and T. O'Riordan, 'Environmental Impact Assessment in the Context of Economic Recession', (1982) Geographical Journal. Vol. 148, No. 3, 343-361.

Environmental Assessment: A Theoretical Perspective

(a) Defining Environmental Assessment

There is no general and universally accepted definition of environmental assessment. A starting point is the definition of environmental assessment in the United States' National Environmental Policy Act 1969: 'a systematic interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in the decision making which may have an impact on the environment'.¹⁹ United Kingdom policy guidance defines environmental assessment as: 'essentially a technique for drawing together in a systematic way expert quantitative analysis and qualitative assessment of a project's environmental effects, and presenting the results in a way which enables the importance of the predicted effects, and the scope for modifying or mitigating them, to be properly evaluated by the relevant decision making body before a decision is given.'²⁰ Munn, a scientist who worked on the practical aspects of environmental assessment defines environmental assessment as 'a process for identifying the likely consequences for the biological, geological and physical environment, as well as human health and welfare of implementing particular activities; and for conveying this information to those responsible for sanctioning the proposal at a stage when it can materially affect their decision'.²¹ The process may be extended to consider social and economic effects and the impact of legislation

¹⁹ Section 102(a) National Environmental Policy Act (NEPA) 1969, 42 U.S.C. 4321-4361.

²⁰ Department of the Environment, Circular 15/88 (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988), para. 7.

²¹ R. E. Munn, (ed.) Environmental Impact Assessment: Principles and Procedures (New York, John Wiley, 1979).

and plans on the environment. The significance of this latter all-embracing description is two-fold. First, the definition encourages an understanding of environmental assessment which concentrates less on the most spectacular decision point, authorisation, but instead recognises environmental assessment to be a process with several stages - negotiation, participation, and monitoring.²² Second, describing the social and economic effects of environmental assessment implicitly recognises that both qualitative and quantitative approaches might be adopted to predict changes in the environment and to assess the significance of those changes. As in other areas, it might be argued that throughout the environmental impact process value judgments are, and should be engaged in, identifying and selecting techniques for predicting impacts and preparing documentation.²³

In the context of environmental assessment, the term 'impact' may be understood as the environmental consequences of a particular activity compared with what might otherwise have occurred. An impact may have both spatial and temporal components. Although traditional methods of assessment often fail to include social and economic impacts, it is increasingly recognised that impacts on human health, employment structure, and land use patterns may be inseparable from impacts on the physical environment.²⁴

The definition of environmental assessment are wide-ranging and varied. It is therefore perhaps more fruitful to refer to the essential characteristics of environmental

²² Wathern, Op.cit. p. 6.

²³ See P. McAuslan, Ideologies of Planning Law (Oxford, Pergamon Press, 1980).

²⁴ On the evaluation of social impacts of development, see N. Lichfield, Community Impact Evaluation (London, University College London Press, 1995).

assessment. A principal characteristic is that environmental assessment relies upon accurate prediction of the likelihood and significance of impacts upon the environment. Scientific techniques, particularly environmental modelling, are used to predict these likely effects and thus provide an acceptable basis for making decisions. In this respect, environmental assessment highlights the claims of scientific inquiry to predict outcomes, dealing 'with events which have not yet occurred, may not occur, and whose chance of occurrence may be changed by the very statement that they may occur'.²⁵ However, it is inevitable that uncertainty enters the assessment process because the prediction of impacts in often unpredictable, non-linear, ecological systems is difficult, sometimes impossible.²⁶ Coupled with this, there is evidence that some systems are inherently unpredictable.²⁷

Notwithstanding the predominant use of 'scientific' techniques, environmental assessment has an affinity with interdisciplinary research since the methodologies of social as well as physical sciences are engaged in predicting environmental harm. The assessment of impacts across different environmental media further encourages connections to be made between disciplines. Caldwell describes environmental assessment as requiring a synthesis of the 'natural' sciences and engineering, social and behavioural sciences, economics, law

²⁵ E. Ashby, 'Background to Environmental Impact Assessment', in T. O'Riordan and R. D. Hey, (eds.) Environmental Impact Assessment (Farnborough, Saxon House, 1976) at pp. 3-4.

²⁶ R. B. Gibson, 'Respecting Ignorance and Uncertainty' in E. Lykke (ed.) Achieving Environmental Goals: The Concept and Practice of Environmental Performance Review (London, Belhaven, 1992) pp. 170-171; see also P. de Jongh, 'Uncertainty in Environmental Impact Assessment', in Wathern, Op.cit.

²⁷ As expounded in chaos theory, see I. Stewart, Does God Play Dice?: The Mathematics of Chaos (London, Penguin, 1989).

and ethics.²⁸ The nature of environmental assessment as 'science' was discussed by the House of Commons Select Committee on the European Communities in their deliberations about whether social and economic impacts might be included within the scope of environmental assessment. While accepting that on many occasions 'complete objectivity may be difficult to attain and value judgments will have to be made',²⁹ the Committee was of the opinion that value judgments in environmental assessments about social and economic impacts should be restricted. The tenor of the Committee's recommendation was such as to treat environmental assessment as an objective exercise. More accurately, the 'scientific' parts of the process, such as the assessment of impacts, are combined with qualitative and subjective components including the choice of impacts and selection of alternatives to be studied.

A second characteristic element of environmental assessment is that it provides a forum for negotiation and bargaining about the design of a project and mitigating measures between interest groups within and between agencies.³⁰ A combination of political resources and circumstances empower some to negotiate and bargain more effectively than others in the environmental assessment process.³¹ Environmental assessment procedures also characteristically offer an opportunity for public participation by consultation or, at the

²⁸ L. K. Caldwell, Between Two Worlds: Science, The Environmental Movement and Policy Choice (Cambridge, Cambridge University Press, 1992), p. 8.

²⁹ House of Lords Select Committee on the European Communities, Eleventh Report, Environmental Assessment of Projects. Session 1980-81, (London, HMSO, para 45.

³⁰ Taylor, Op.cit., at p. 208; see also B. Sadler, The Place of Negotiation in Environmental Assessment (Quebec, Canadian Environmental Assessment Research Council, 1987).

³¹ G. Wandesforde-Smith and J. Kerbavaz, 'The Co-evolution of Politics and Policy: Elections, Entrepreneurship and EIA in the United States', in Wathern, Op.cit., pp. 161-191, at 161-2.

very least, public scrutiny. Public participation in environmental assessment procedures has been considered to democratise the development consent decision making process by allowing conflicting views about the relevance and adequacy of environmental information to be expressed.³²

The conceptual basis of environmental assessment is that the introduction of environmental information into a decision making process encourages an informed choice between environmental and other objectives, possibly resulting in less environmentally harmful decisions. The underlying assumption is that changing the rules governing the generation and application of knowledge will change the intellectual and political context of decision making.³³ Parallels may be drawn with the legal concept of 'due process' which is regarded as a desirable component of public decision making because it allows a proper regard for all affected interests and ensures that decisions are based upon a reliable assessment of fact, thus affirming 'reason'.³⁴

This conceptual basis of environmental assessment relies upon a presumption that environmental harm will occur and that the effects of harm can be objectively predicted and their significance measured. From this perspective, environmental assessment has been commonly perceived as a 'one-way system' in which information flows in a single direction

³² L. K. Caldwell, Between Two Worlds: Science, The Environmental Movement and Policy Choice (Cambridge, Cambridge University Press, 1992), p. 72.

³³ Taylor, Op.cit.

³⁴ J. Jowell, 'The Legal Control of Administrative Discretion', [1977] Public Law 178-220, at 219, following P. Selznick, Law, Society and Industrial Justice (New York, Russell Sage, 1969).

towards a decision maker.³⁵ As mentioned above, it is undeniably more complex than that because environmental assessment makes use of a set of subjective assumptions about environmental harm, the prediction of harm by using scientific methods, and the nature of causes and effects of harm, all of which are subject to different interpretations and may, at times, prove unsupportable. There is, however, an appearance of objectivity which legitimates expertise, priorities and policy considerations. This appearance of objectivity is derived in the main from the use of scientific methodologies and language. Whilst scientific methods underpin environmental assessment, the use of such methods might also serve to legitimate a project which is the subject of environmental assessment. In addition, the public participation and consultation requirements contribute to the perception that the environmental assessment procedure is distinct and apart from the proponent of a particular project. Rather than operating as a 'one-way' flow of information, environmental assessment accommodates flows of information from different directions. For example, the procedure is influenced by the needs of the decision maker or the proponent of the project to secure development consent; either might choose methods for eliciting, selecting, and presenting information on the basis of subjective factors.

(b) Ideas and Influences in Environmental Assessment

It is clear that environmental assessment permits a wide range of disciplines to interact in the planning process. This has meant that environmental assessment has developed according to a number of different influences which are best represented by the existing

³⁵ P. de Jongh, 'Uncertainty in Environmental Impact Assessment', in Wathern, *Op.cit.*, pp. 62-84, at 64-67.

literature on environmental assessment. This may be divided broadly between technical and scientific literature on such matters as the identification of impacts, modelling, and scoping³⁶ (the 'science' as Wathern classifies the area) and literature on the legal and political framework of decision making in pollution control and development consent systems.³⁷ This division reflects two main issues in studying environmental assessment: the evaluation of the environmental impact of a given project, and the consideration of environmental information in a legal framework, both of which are of central importance to this thesis.

Research on Environmental Assessment in the United Kingdom

In the United Kingdom, research on environmental assessment began in earnest in the late 1970s. Much of the early literature offers guidance on the methods of environmental assessment,³⁸ although this was also combined with a theoretical appraisal of assessment as a regulatory technique.³⁹ In the early to mid 1980s, work on environmental assessment began to overlap with that on the role of the planning system in controlling pollution. This

³⁶ For example, C. S. Holling, (ed.) Adaptive Environmental Assessment and Management (Chichester, John Wiley, 1978); see also Wathern, Op.cit.

³⁷ For example, O'Riordan and Hey, Op.cit.; M. Clark and J. Herington, (eds.) The Role of Environmental Impact Assessment in the Planning Process (London, Mansell, 1988); B. D. Clark et al, Perspectives on Environmental Impact Assessment (New York, Reidel, 1984).

³⁸ Munn, Op.cit.; B. D. Clark et al 'Methods of Environmental Analysis', (1978) Built Environment, Vol. 4, No. 2, 111-121. For a more recent analysis of methods, see P. Morris and R. Therivel, Methods of Environmental Impact Assessment (London, University College London Press, 1995).

³⁹ O'Riordan and Hey, Op.cit.

was led by Miller and Wood⁴⁰ who predicted that the use of environmental assessment might lead to more explicit decisions about the siting of industry and waste operations and fuller account to be taken of the effects of development on local populations. Research such as this anchored environmental assessment to planning issues. Indeed, following the implementation of Council Directive 85/337 in the town and country planning system in England and Wales, environmental assessment became a central part of the planning system.⁴¹ Therefore, although environmental assessment might be applied to a wide range of policy issues and to a number of contexts - development assistance, assessment of legislation, and more recently, nature conservation⁴² - it has developed most fully in the planning system.

The adoption of Directive 85/337 by the European Community in 1985 led to a flurry of research on its implementation in the United Kingdom; its legal implications,⁴³ as well

⁴⁰ C. Miller and C. Wood, Planning and Pollution: An Examination of the Role of Land Use Planning in the Protection of the Environmental Quality (Oxford, Oxford University Press, 1983) pp. 216-219; see also M. J. Ledger, An Assessment of the Effectiveness of Land Use Planning Powers to Control Pollution. Unpublished PhD thesis, (University of Manchester, 1982); and C. Wood, Planning Pollution Prevention: A Comparison of the Siting Controls over Air Pollution in Great Britain and the USA (Oxford, Heineman Newnes, 1989).

⁴¹ For example, see Herington, supra, at 159, on the role of environmental assessment in the United Kingdom's town and country planning system.

⁴² For example, environmental assessment is required under regulation 48, Conservation (Natural Habitats &c.) Regulations 1994 (SI 1994, No. 2716) which was enacted with the aim of implementing Article 6, Council Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora (OJ L 206, 21.5.1992).

⁴³ N. Haigh, 'The EEC Directive on Environmental Assessment of Development Projects', [1983] JPEL 585-595; R. Macrory, 'Environmental Assessment: Critical Legal Issues in Implementation', in D. Vaughan, EC Environmental and Planning Law (London, Butterworths, 1986); M. Grant, 'Implementation of the EC Directive on Environmental Impact Assessment', (1989) Connecticut Journal of International Law Vol. 4, 463-477; J. Salter 'The Question of Implementation', [1992] JPEL 313-318.

as more practical concerns about its administration.⁴⁴ This was because Directive 85/337 represented the first incursion of European Community environmental law into the United Kingdom's planning system and because of the opportunity the Directive offered for a formalised account of the effects of development on the environment to be taken. Since the Directive's implementation in 1988, research has been conducted on the state of environmental assessment in the United Kingdom by environmental campaign groups,⁴⁵ professional bodies,⁴⁶ academics,⁴⁷ and the European Commission.⁴⁸ In light of these numerous and diverse research projects, Wathern's comprehensive and consolidating work

⁴⁴ E. Gouge, 'The UK Implementation of Environmental Assessment: Organisational and Political Implications', (1989) Local Government Policy Making 55-63; and B. Turnball and P. Aitken, A Review of the Directive on Environmental Impact Assessment (Glasgow, Planning Exchange, 1985).

⁴⁵ W. Sheate, The Environmental Assessment Directive - Five Years On (London, Council for the Protection of Rural England, 1991).

⁴⁶ Institute of Environmental Assessment, Practical Experience of Environmental Assessment in the United Kingdom (East Kirkby, Institute of Environmental Assessment, 1993) and Digest of Environmental Statements (London, Sweet and Maxwell, 1993); Royal Institute of Chartered Surveyors, Environmental Assessments (London, RICS, 1989); Bedfordshire County Council Planning Department, Environmental Assessment: A Survey for the County Planning Officers Society (Bedford, Bedfordshire County Council, 1990); Essex Planning Officers' Association, Environmental Assessment: The Way Forward (Chelmsford, Essex County Council, 1995).

⁴⁷ C. Wood, C. Jones and N. Lee, Environmental Statements 1988-1990: An Analysis (Manchester, University of Manchester, 1990); C. Wood and C. Jones, Monitoring Environmental Assessment and Planning (London, HMSO, 1990); R. Therivel, Directory of Environmental Statements 1988-1991; C. Wood and C. Jones, 'The Impact of Environmental Assessment on Local Planning Authorities', (1992) JEPM Vol. 35, No. 2, 115-127; C. Wood, 'Five Years of British Environmental Assessment', in D. Cross and C. Whitehead, (eds.) Development and Planning (Cambridge, Cambridge University Press, 1994).

⁴⁸ Commission of the European Communities, Report from the Commission on the Implementation of Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment COM(93) 28, 2.4.1993 (Brussels, Commission of the European Communities, 1993); Commission of the European Communities, Eleventh Annual Report to the European Parliament on Commission Monitoring and Application of Community Law OJ C 154, 6.6.1994, Vols. 12 for the United Kingdom and Vol. 13 for all Member States (Brussels, Commission of the European Communities, 1994).

proved particularly timely.⁴⁹ The relative neglect of legal aspects of environmental assessment is now partially remedied by Alder's research on the 'inadequacies of English law' in accommodating the aims and methods of Directive 85/337 which arose from his review of case law on environmental assessment.⁵⁰

Environmental Assessment: An Appraisal

The development of environmental assessment has contributed to a debate about the effectiveness of regulatory instruments to protect the environment. The choice of regulatory mechanisms has traditionally been confined to variants of two general approaches: administratively enforced standards ('command and control') and economic incentives. Environmental assessment has become a third distinctive strategy,⁵¹ proving particularly responsive to inadequacies of the regulatory 'command and control' tradition that concentrated narrowly upon correcting specific environmental abuses. The distinctiveness of environmental assessment has been attributed to the procedural, anticipatory and integrated control that it offers.

⁴⁹ Wathern, Op.cit.: see also 'Implementing Supranational Policy: Environmental Impact Assessment in the United Kingdom, in R. V. Bartlett, Policy Through Impact Assessment: Institutionalised Analysis as a Policy Strategy (New York, Greenwood Press, 1989).

⁵⁰ J. Alder, 'Environmental Impact Assessment: The Inadequacies of English Law', (1993) JEL Vol. 5, No. 2, 203-221; A. Ward, 'The Right to an Effective Remedy in European Community Law: A Case Study of UK Decisions Concerning the Environmental Assessment Directive', (1993) JEL Vol. 5, No. 2, 221-244, also examines this case law, but from a different perspective - the effectiveness of remedies in Community law.

⁵¹ Taylor, Op.cit., p. 295.

(a) Procedural Control

Environmental assessment has been described by Caldwell as a 'procedural invention' of environmental law.⁵² By this it is meant that the setting of certain procedural requirements for decision making in environmental assessment is a novel technique. Before analysing the exact nature of the procedural control offered by environmental assessment, it is necessary to refer briefly to the key distinction made in legal theory between formal rationality (which has been used to describe procedural laws such as environmental assessment) and substantive rationality. Following Weber,⁵³ the essence of formal rationality is law that is autonomous, rational and positive. Formal rationality is closely related to concepts of analytical rationality in public decision making and the perspective of positivism in social sciences. Those who view law as a relatively formal, autonomous social phenomenon tend to ascribe legal change to internal forces; the legal order reproduces itself. In contrast, substantive rationality, which describes material or purposive law, is regarded by some as a more accurate description of law.⁵⁴ This perspective challenges theories of legal autonomy. Autopoiesis theory takes a middle position. This asserts that legal structures reinterpret themselves in the light of external needs, so encompassing the internal dynamics of the legal order and the impact of social or external change.⁵⁵ This suggests

⁵² Caldwell, Science and the National Environmental Policy Act: Reflecting Policy Through Procedural Reform (Alabama, Alabama University Press, 1982), p. 1.

⁵³ M. Weber, 'Power and Bureaucracy' in K. Thompson and J. Turnstall (eds.) Sociological Perspectives (London, Harmondsworth, 1971).

⁵⁴ G. Teubner, 'Regulatory Law: A Chronicle of a Death Foretold' in Lenoble (ed.) The Crisis of the Welfare State (Berlin, Walter de Gruyter, 1984), p. 54 et seq.

⁵⁵ G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) Law and Society Review Vol. 17, No. 2, 241-281, at 255.

also that whilst law is not merely an expression of economic structures and interests, it may remain influenced by conditions and factors external to the legal system.

The formal and rational nature of environmental assessment is expounded in Taylor's work on the impacts of the National Environmental Policy Act (NEPA) 1969 in the United States.⁵⁶ Taylor finds the procedural form of environmental assessment capable of changing the culture of decision making in a number of federal agencies. He distinguishes rigidly between procedure and substance in law: in his view, procedural duties have an indirect effect on decision making and relate to essential procedural measures or 'due process'; on the other hand, substantive duties or rules have a direct effect on decision making and generally relate to essential principles of law, such as equality and fairness:

Procedural rules do not speak as directly to the shape of the final decision as 'substantive' rules and are less powerful and efficient in influencing policy outcomes but they have greater generality.⁵⁷

Applying this distinction, regulating for environmental protection by direct and centrally set standards - substantive rules - typically involves setting parameters of technology or behaviour and detecting deviations from these standards. The promulgation of set standards, or regulation by 'command and control' means that 'in the ideal case it is clear what the regulatory organisation should be doing and when they are complying'.⁵⁸ In contrast, environmental assessment replaces substantive standards with centrally set procedures for eliciting and analysing information about specific projects at a local level. As a procedure

⁵⁶ Taylor, Op.cit.

⁵⁷ Ibid., p. 230.

⁵⁸ Ibid., p. 296.

intended to enable decision makers to make informed choices between environmental protection and other objectives (and for the public to be informed about these), environmental assessment does not appear to contain substantive or positive goals. Rather, by setting out common and abstract procedural requirements and establishing programmes of administration governing decision makers, environmental assessment rules relate to the style and structure of decision making. Environmental assessment does not control future action according to specific standards but by a presumption that environmental harm might occur, in particular by setting rules by which information about the effects of development on the environment is to be gathered and taken into account in decision making.

Environmental assessment accords with many of the characteristics of what has been labelled 'reflexive' or 'post-regulatory' law.⁵⁹ 'Reflexive law' relies upon norms that regulate processes, organisations, and the distribution of rights and competencies; the element of legal control is indirect, providing an arena into which information will enter, but within the limits of which 'the parties are free to strike whatever bargain they will...unlike substantive law it does not hold that certain outcomes are desirable'.⁶⁰ Environmental assessment similarly determines the organisational and procedural premises of decision making but, in theory at least, not the outcomes of such procedures. The significance of identifying environmental assessment as procedural or 'reflexive' law lies in the assertion that this is an emerging kind of law which offers an alternative to substantive⁶¹ or purposive⁶²

⁵⁹ Teubner, 'Reflexive and Substantive Elements in Modern Law', *supra.* at 256.

⁶⁰ *Id.*

⁶¹ See G. Teubner, 'After Legal Instrumentalism? Strategic Models of Post-Regulatory Law' in G. Teubner, (ed.) Dilemmas of Law in the Welfare State (Berlin, Walter de Gruyter, 1986), pp. 299-325, at 299.

law. This raises questions about how far procedural, 'restrained' law is a realistic interpretation of the practical application of environmental assessment and, therefore, to what extent procedural rules affect the quality and substance of the decision reached?

The portrayal of environmental assessment as a procedural technique of environmental law relies upon a view that procedural arrangements may be separated from the substance of decision making. Taylor adheres to this.⁶³ However, it is possible to consider 'procedure' and 'substance' as mutually reinforcing sides of the same coin. For example, a finer distinction between 'substantive due process' (affecting the quality of the decision reached) and 'procedural due process' (affecting the propriety of the procedure involved in reaching a decision) is drawn by Jowell.⁶⁴ In making this distinction, he stresses that, although not positive or substantive measures, procedural rules have a number of important functions which bear upon the substance of the decision arrived at in a decision making process. Following Nonet, one such function of procedural rules is to gain recognition of substantive rights in administration: once a decision maker becomes accountable to a procedural rule, the content of the decision arrived at also becomes an issue for debate.⁶⁵ Selznick similarly describes how new (procedural) rules create a critical spirit which entails a scrutiny of both the integrity of the rules' administration and the quality of the rules themselves; in other words, the rules are assessed 'in the light of the substantive ends'.⁶⁶

⁶² R. M. Unger, Law in Modern Society: Towards a Criticism of Social Theory (New York, Free Press, 1976).

⁶³ Op.cit.

⁶⁴ Jowell, supra. at 216.

⁶⁵ P. Nonet, Administrative Justice (New York, Russell Sage Foundation, 1969), at p. 170.

⁶⁶ Selznick, Op.cit., p. 30.

Procedural rules might therefore serve a function of achieving congruence between officially determined ends (for example environmental protection) and official decision making, particularly by excluding or reducing the possibility of arbitrary decisions.⁶⁷ Upholding environmental assessment as a procedural form of law, unrelated to the substance or outcome of decisions, is to draw on an artificial distinction between procedural and substantive rules. Taking Taylor to task, therefore, procedural rules are capable of 'speaking' very clearly to the shape of the final decision by ensuring participation by those interested in the result; decision makers might therefore recognise a spectrum of interests via the style and structure of the decision making procedures.

In the context of the five case studies discussed in chapters 7 and 8, it is also possible to argue that procedural rules are not entirely abstract, formal, and immune from partisanship: in several of the cases, the environmental assessment procedures were used by the developer as a means to secure the passage of an application for planning permission through the planning system. This use of environmental assessment rules is seen particularly clearly in those cases in which the developers voluntarily submitted an environmental statement.

(b) Anticipatory control

The distinctiveness of environmental assessment as a technique of environmental law derives also from the anticipatory control it offers. Providing information about potential impacts at an early stage in decision making processes (most commonly the development

⁶⁷ Jowell, *supra*. at 185.

consent stage of planning procedures) lends a possibility of imposing conditions about the siting of development and the mitigation of harmful environmental effects prior to harm occurring: environmental harm might therefore be controlled at its source. In the event that such anticipatory measures are not taken, enforcement action may be taken even though harm may not have occurred.⁶⁸ This type of control compares markedly with retrospective regulation which specifies a form or quantity of pollution, environmental harm, or nuisance which may not be allowed to arise. Such controls might only be enforced after the occurrence of the harmful incident and are reliant upon proof of harm.

The anticipatory control exercised by environmental assessment also differs from remedial actions such as civil liability which generally requires that damage has occurred or harm has been done to something. This relies, not on a presumption that harm might occur (as in environmental assessment) but on proof beyond all reasonable doubt or on a balance of probabilities of a causal link between the acts of a person and the harm that has occurred. This causal link is particularly difficult to prove when there are multiple sources of harm, the harm arises from a cumulative effect, or the harmful action is indirect which is often the case with environmental damage.

The anticipatory control exercised by environmental assessment relies upon its imposing a 'burden of proof' on the developer to demonstrate that a proposed project is acceptable in environmental terms at the planning stage of development and that adverse effects may be mitigated. This imposes a duty on the developer to take account of

⁶⁸ Miller and Wood, Op.cit., p. 11; S. Elworthy, Farming for Drinking Water (Aldershot, Avebury, 1994) labels such preventative, ex ante, forms of regulation, 'innovative' law in her study of the designation of Nitrate Sensitive Areas in England and Wales.

environmental protection when proposing development and amounts to an interference with rights of development. In the United Kingdom, the imposition of this 'burden of proof' reverses the presumption in favour of development which has long prevailed in planning policy and encourages a general perception of development as potentially environmentally harmful.

(c) Integrated Control

Environmental assessment encourages an assessment of the transfers of pollution between environmental media. The capability of recognising and assessing transfers of pollution was novel to the United Kingdom's regulatory approach until the establishment of the Integrated Pollution Control system under Part I of the Environmental Protection Act 1990. The general approach was to control pollution sector by sector, for example, by industrial sector as with the Alkali Acts, or by environmental media, as in the River Pollution Prevention Act 1876 and the subsequent Rivers Act 1951 and Water Acts 1991. The sectoral nature of pollution controls was exacerbated by the fact that environmental policy was treated as a discrete policy area which was often overlaid upon other concerns.⁶⁹ Little attention was given to devising integrated and coordinated institutions which would allow environmental considerations to affect a wide range of policy concerns. Environmental assessment works against this trend by establishing procedures for integrated policy making rather than substantive and sectoral controls. Environmental assessment therefore provides

⁶⁹ A. Weale, The New Politics of Pollution (Manchester, Manchester University Press, 1992), p. 20.

a model of how environmental concerns might be integrated into a broader sweep of policy concerns.

The integrated nature of environmental assessment reinforces the element of anticipatory control. When pollution problems are approached predominantly as problems of air, water, or waste, the solution is usually to move the pollutant to the least protected parts of the environment. Integrated systems of pollution control allow alternative processes and products to be judged in the light of all the possible paths or cycles of pollutants in the environment. Environmental harm might therefore be prevented by identifying possible changes to be made to the products or processes at an early stage in the authorisation process. Recognising the extent of damage caused by transfers of pollutants between media also provides an incentive to prevent pollution in the first place.

(d) Environmental Assessment: An Evaluation

Two main theories exist about the role of environmental assessment as a regulatory technique. First, environmental assessment might be regarded as a means of informing decision makers of the possible environmental consequences of a proposed project or action; it ensures that planners and developers consider environmental values or interests when making a decision which may have adverse environmental effects (information theory). A second 'culture' theory espouses that, more fundamentally, environmental assessment inculcates 'environmental values' amongst those taking decisions: 'it brings about changes

in attitude toward the need for and design of new development.⁷⁰ Environmental assessment thus contributes to the development of a 'new administrative logic'.⁷¹

Information theory

With regard to the first theory, environmental assessment offers an opportunity for environmental considerations to be taken into account in decision making processes, most commonly development consent systems. This it does by forecasting likely pollutants, and identifying those areas most susceptible to adverse impacts.⁷² Environmental assessment might also allow values to be expressed which are difficult to quantify in substantive environmental standards, for example the quality of a landscape. Early literature on environmental assessment identified the technique almost exclusively as a means of controlling the harmful effects of pollution by providing information which might influence the siting of industrial activities. The thrust of Miller and Wood's research was that unjust social distribution of environmental harm, which ensued after planning permission was granted for a number of industrial projects, might have been identified and possibly remedied had environmental assessment taken place.⁷³ In recent years environmental assessment has been acknowledged as having a far broader role in 'implementing' the principle of sustainable development by assisting decision makers to take account of the quality of development - its

⁷⁰ Herington, *supra*. at p. 159.

⁷¹ F. Ost, 'A Game Without Rules: The Ecological Self-Organisation of Firms', in G. Teubner, (ed.) *Environmental Law and Ecological Responsibility* (Chichester, John Wiley, 1994), at 352.

⁷² Clark, *Op.cit.*, p. 8.

⁷³ Miller and Wood, *Op.cit.*, p. 221-2.

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⁷² Clark, Op.cit., p. 8.

⁷³ Miller and Wood, Op.cit., p. 221-2.

effects upon the conservation of natural resources - as well as its location and quantity. For example, the Brundtland Report identifies environmental assessment of projects and policies as offering a strategy for sustainable industrial development, alongside the use of economic instruments.⁷⁴ The role of environmental assessment in adopting sustainable development objectives is acknowledged in the Rio Declaration (1992).⁷⁵ The application of environmental assessment to sustainable development has been followed by, amongst others,⁷⁶ Pearce in his 'blueprint' for 'implementing' sustainable development⁷⁷ and by Jacobs who welcomes environmental assessment as 'a reasonably considered and open approach to mediating conflict within the sustainability framework by allowing those most likely to be affected by a project's environmental effects to communicate their views to decision makers'.⁷⁸

⁷⁴ World Commission on Environment and Development, Our Common Future. (Oxford, Oxford University Press, 1987) pp. 221-4; environmental assessment was confirmed as a legal principle of sustainable development by the World Commission on Environment and Development's Experts Group on Environmental Law, Legal Principles for Environmental Protection and Sustainable Development (Dordrecht, Martinus Nijhoff, 1987).

⁷⁵ Principle No. 17 of the Rio Declaration (1992) states: 'Environmental Impact Assessment as a national instrument shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority'. See also Agenda 21: chapter 8 is devoted to integrating environmental protection and development in decision making.

⁷⁶ For example, P. Jacobs et al, Sustainable Development and Environmental Assessment: Perspectives on Planning for a Common Future. (Canadian Environmental Research Council, 1980); A. Blowers Planning for a Sustainable Future (London, Earthscan, 1993) p. 23; Council for the Protection of Rural England, Sense and Sustainability: Land Use Planning and Environmental Sustainable Development (London, CPRE, 1993) p. 15; and T. Clarke, 'Environmental Assessment and Sustainable Development', (1991) Environmental Impact Assessment No. 6, at 2-3.

⁷⁷ D. W. Pearce, Blueprint for a Green Economy (London, Earthscan, 1989) pp. 120-130.

⁷⁸ M. Jacobs, The Green Economy (London, Pluto Press, 1993) pp. 220-221;

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⁷⁸ M. Jacobs, The Green Economy (London, Pluto Press, 1993) pp. 220-221;

The consideration of environmental information in decision making might also extend beyond the assessment of individual, local projects, to the appraisal of national policies. This extension to strategic environmental assessment or 'forward planning' is logical, given that individual development consents for projects at a local level are inevitably decided in the context of wider, national objectives set out in energy, highways, and land use policies⁷⁹ and decisions taken at a higher level can hamper environmentally sound decision making at the project level. Lee and Wood foresee a tiered environmental assessment structure in which assessments of 'higher order' policy or plans would be conducted first at national or regional level; 'lower order' programme and project assessments would then be implemented locally.⁸⁰ To date environmental assessment processes have proved insufficient in this respect because they have generally focused on individual projects and have failed to address the cumulative effects of policy choices.

Notwithstanding the potential for environmental assessment to assist decision making by contributing environmental information, questions have arisen about the type and quality of information elicited by the procedures and the use to which the information might be put. One concern is that the environmental assessment process constitutes no more than a 'balancing act'; the absence of clear, positive, environmental standards means that, understandably, the ultimate decision whether or not to proceed with a development project will depend on economic judgments and political perspectives as well as environmental

⁷⁹ R. Therivel and E. Wilson et al, Strategic Environmental Assessment (London, Routledge, 1993); Department of the Environment, Policy Appraisal and the Environment (London, HMSO, 1992).

⁸⁰ N. Lee and C. Wood, 'Environmental Impact Assessment - A European Perspective', (1978) Built Environment Vol. 4, No. 2, 101-110.

factors.⁸¹ Whilst an expectation does exist that information about environmental effects will influence the substance of decision making, its contribution to environmental protection by means of arresting environmentally harmful development is entirely unenforceable; this suggests that a negative assessment will not necessarily mean that a project will fail to gain development consent.

Following this assertion, it is significant that environmental assessment contributes to an idea of analytically rational planning decisions. This idea may be conferred in two main ways. First, as Sandbach argues in his work on the use of scientific evidence in the environmental debate, the reliance on scientific techniques in the environmental assessment process lends an air of neutrality to decision making in planning. Whilst Caldwell and Taylor see the enlistment of science by decision makers as central to the effectiveness of environmental assessment, Sandbach argues that environmental assessment might be used to convert political and normative issues into bogus scientific and technical ones. His view is that developers are amply capable of ensuring that the evaluation of environmental impacts operates in their favour. Furthermore, environmental assessment lends approval to a belief that the state of the environment may be measured and predictions made about its future state.⁸² Implicitly, environmental values might therefore be 'traded off' against other criteria. A second means by which environmental assessment contributes to an idea of neutral and rational planning decisions is discussed by Parkin in his analysis of language in development plans and texts such as environmental statements. He argues that the use of the

⁸¹ Herington, *supra*. p. 154; J. Parkin, Judging Plans and Projects (Aldershot, Avebury, 1993) p. 6, concurs.

⁸² F. Sandbach, Environment, Ideology and Policy (Oxford, Basil Blackwell, 1980) pp. 96-100.

language of environmental discourse, in particular 'public interest' terminology, contributes to an appearance of rationality.⁸³ Bregmann and Jacobsen similarly describe the manner in which environmental assessment embeds an idea of the public interest in a self-regulatory system of the market so as to make the project appear more attractive.⁸⁴

A liberal use of references to 'ecology', 'environment' and 'nature' in environmental statements might also lend legitimacy to development projects. Applying Myerson and Rydin's typology of the use of environmental terms in planning, environmental statements tend to refer to the visual quality of a project, the character of a local area and collective practices, such as the recreational and cultural opportunities created by the proposed project.⁸⁵ These references might be such that the positive meanings of 'environment' and 'nature' become combined with the proposed project. This promotion is clearly evident in cases in which the environmental statement outlines environmental 'gains' likely to accrue from a project. These seek to compensate for the loss of environmental resources arising from a development and may assuage concern that the proposed development will adversely affect the environment. Similarly to 'planning gain', this information might form the basis of planning obligations negotiated by the developer and planning authority. The inclusion of 'environmental gain' is positively encouraged by the Department of the Environment in Circular 16/91. This lends support to activities designed to:

⁸³ Parkin, Op.cit.

⁸⁴ E. Bregmann and A. Jacobson, 'Environmental Performance Review: Self Regulation in Environmental Law', in G. Teubner (ed.), Environmental Law and Ecological Responsibility (Chichester, John Wiley, 1994), at p. 231.

⁸⁵ G. Myerson and Y. Rydin, 'Environment and Planning: A Tale of the Mundane and Sublime', (1994) Environment and Development: Society and Space Vol. 12, 437-452; see also chapter 8 on the use of images of nature by developers in environmental statements.

...offset the loss of or impact on any amenity on the site prior to development, for example in the interests of nature conservation. The Department welcomes the initiatives taken by some developers in creating nature reserves, planting trees, establishing wildlife ponds and providing other nature conservation benefits.⁸⁶

Boucher and Whatmore consider that environmental gain juxtaposes two contradictory value systems: the ethics of the market and environmental ethics.⁸⁷ In their view, 'environmental gain' is inimical to the protection of natural environmental systems: the interdependent, and often irreplaceable properties of ecological systems run counter to a view that natural resources might be interchanged and compensated.⁸⁸

An emphasis upon the mitigation of harmful environmental impacts in environmental statements performs similar functions to securing environmental 'gain'. Mitigation allows some environmental impacts to be regarded as 'side-effects' or inconvenient intrusions which might be minimised by the use of suitable techniques; projects might be rendered acceptable as a consequence of the application of such techniques. In identifying mitigating measures there is a tacit expectation that environmental management will allow the development to proceed.⁸⁹ The tendency to consider development proposals in terms of their environmental effects, and to negotiate measures to compensate or mitigate for those effects in the environmental assessment process is in line with a technical idea of environmental protection.

⁸⁶ Department of the Environment, Circular 16/91, Planning and Compensation Act: Planning Obligations (London, HMSO, 1991).

⁸⁷ S. Boucher and S. Whatmore, 'Green Gains? Planning by Agreement and Nature Conservation', (1993) Journal of Environmental Planning and Management Vol. 36, No 1, 33-51, at 38.

⁸⁸ A similar critique is made by M. Redclift, Sustainable Development: Exploring the Contradictions (London, Routledge, 1992) chapter 6.

⁸⁹ N. Evernden, The Social Creation of Nature (Baltimore, John Hopkins University Press, 1993) p. 9.

This centres upon the rational and instrumental identification and valuation of stocks of environmental assets. In contrast, calls for the establishment of more precise standards and thresholds for the environmental effects of development represent a move away from a notion of 'balance' to a more absolute sense of environmental quality as something to be protected and which emphasises constraints in the capacity of ecological systems to absorb pollutants.

A concern related to the identification of mitigating measures and environmental gains is that the very procedural nature of the environmental assessment process confers an idea of 'due process' which may legitimate decisions favouring developmental interests, and thereby encourage the acceptance of projects. Jowell submits that 'symbolic reassurance', whereby the myths and symbols of law are invoked in order to achieve quiescence to a decision, might result from submitting decisions to 'procedural due process' where 'substantive due process' is not possible.⁹⁰ In relation to environmental assessment, this danger is increased when environmental statements are compiled solely by the proposed developer or sponsoring agency since there is a possibility that they may become 'propagandist documents', as suggested by Brookes.⁹¹ The acceptance of a project might be secured through public participation requirements in the environmental assessment process because differing views may be registered. However, decisions might still be taken with little regard to them. The vital role environmental impact assessment could play in securing greater public support for proposed developments was foreseen by the Royal Town Planning Institute in its memorandum to the House of Lords Select Committee on the European

⁹⁰ *Op.cit.*, at 217.

⁹¹ E. Brookes, 'On Putting the Environment in its Place: A Critique of Environmental Impact Assessment', in O'Riordan and Hey, *Op.cit.*, pp. 167-177, at p. 172.

Institute in its memorandum to the House of Lords Select Committee on the European Communities on the draft European Community Directive on environmental assessment.⁹¹ More critically, public participation in the assessment process might have the effect of granting tacit approval to projects and, furthermore, dissipating environmental interests by engaging the public in challenging complex documents.⁹²

A final point is that most assessment procedures do not require post assessment monitoring. Instead, an ecological 'snap-shot' is produced. In such cases, environmental assessment fails to appreciate the dynamics of ecological systems.⁹³ This factor, combined with the emphasis upon mitigating measures in many statements and the opportunity for securing environmental gains that this confers as described above, has meant that environmental assessment might be used to obtain development consent.⁹⁴ Certain features of environmental assessment might therefore encourage acceptance of projects. In representing the 'procedural safeguard' that environmental factors have been considered, environmental assessment might also lend legitimacy to decision making processes in planning.

⁹¹ House of Lords Select Committee on the European Communities, Eleventh Report, Environmental Assessment of Projects. Session 1980-81, (London, HMSO, 1981) p. 107.

⁹² S. K. Fairfax, 'A Disaster in the Environmental Movement', (1978) 99 Science 743-8.

⁹³ Holling, Op.cit., foreword.

⁹⁴ R. Bissett and P. Tomlinson, 'Monitoring and Auditing of Impacts', in Wathern, Op.cit., pp. 117-128, at 126.

Culture theory

The 'culture theory' suggests that environmental assessment might inculcate 'environmental values' amongst decision makers. For Taylor, environmental assessment is capable of reforming administrative decision in local planning authorities and government departments by increasing an administration's knowledge about environmental effects, or fostering 'social learning' about policy and projects which are less environmentally harmful than others. This characteristic of environmental assessment is combined with competition between conflicting internal and external interests taking part in the environmental assessment process. Taylor considers that these characteristics approximate to those of the science community - continuous improvements in knowledge by empirical testing within an environment of detection of error, referred to as 'social learning'. He concludes that environmental assessment imports scientific norms and procedures into a political setting.⁹⁵ This process of 'social learning' is governed by informal social rules and expectations shared by those involved in the environmental assessment process. This introduces an element of self-regulation which makes environmental assessment particularly appropriate in cases in which public bodies might cause or facilitate environmental damage but where they are not subject to traditional regulatory structures. Some remain sceptical about this second theory of environmental assessment, that the process might contribute to changing the culture in which planners make decisions, citing the political and economic realities which constrain planners' decisions and the ethos of strong support for development. Herington, in particular,

⁹⁵ Taylor, Op.cit., p.7; see critique by Wandesforde-Smith and Kerbavaz, in Wathern, Op.cit. pp. 161-191, at p. 165.

considers planners incorporate developmental interests in their evaluation of environmental information.⁹⁶

Conclusion: The Potential of Environmental Assessment in Environmental Law

In conceptual terms, environmental assessment represents a method of regulation which is not restricted to protecting a particular sector or site. Environmental assessment stresses the interdependence of ecological systems by a presumption that the effects of environmental harm will be felt beyond its immediate source. As an integrated method of regulation, environmental assessment represents a more preventative approach to environmental protection than that found in the more traditional techniques of environmental law. These characteristics reflect the legal acceptance of integrated methods of pollution control and the precautionary principle in environmental law and a departure from the use of substantive and prescriptive standards.

Environmental assessment might be applied to a number of different contexts. However, it has developed most fully in the planning system and is now closely tied to planning procedures and objectives. Within planning, environmental assessment has also survived a substantial expansion of its remit: in early literature it was identified almost exclusively as a means of controlling the harmful effects of pollution by influencing the siting of industry; in recent years it has been acknowledged as a means by which the principle of sustainable development might be 'implemented'. The development of environmental assessment may therefore be seen in light of its use as a mechanism for integrating

⁹⁶ Herington, *supra*, pp. 150-152.

environmental concerns into policy making in response to growing pressure from international organisations and the public that such concerns be given greater prominence.⁹⁷ As a technique of environmental law, environmental assessment has been regarded by some as a panacea of environmental planning; by others, as a legitimating device.⁹⁸ A single theme links these differing views: the capacity of environmental assessment to resolve conflict between environmental and developmental interests. Its proponents view this as the key to its effectiveness; its critics regard this as its failing since it might serve to disguise or contain conflict and thereby unduly sanction development.

Environmental assessment is expected to perform manifold functions, even just within the planning system: provide the public with information about the effects of development on the environment; operate as a self-regulatory mechanism for developers, elicit expert and public opinion; and enhance decision making by planners. The diversity of these functions contribute to the complexity of environmental assessment as a concept and also its practice. The essential function of environmental assessment - to supply scientific information in political decision making process - is complicated by the myriad interests, perspectives, and interpretations which are brought to bear on the planning process via environmental assessment.

Having examined some of the key ideas and influences in environmental assessment, in the following chapter I expand upon a central focus of the thesis discussed in this chapter, the development of integrated techniques of pollution control in environmental law.

⁹⁷ Myerson and Rydin, supra. at 3.

⁹⁸ Sandbach, Op.cit and Evernden, Op.cit.

Chapter Three The Development of Integrated Techniques of Pollution Control in Environmental Law

Introduction

As mentioned in chapters 1 and 2, environmental law draws on a variety of disciplines and techniques. I discussed environmental assessment as one such technique in chapter 2. It is now necessary to place environmental assessment in an historical context in the development of environmental law in the United Kingdom. The purpose of this chapter is to examine the development of environmental assessment in the broader context of the development of integrated techniques of pollution control, in particular the approach taken in the Integrated Pollution Control system established by Part I of the Environmental Protection Act 1990. The development of 'best practicable environmental option', the central concept of Integrated Pollution Control, is examined and parallels are drawn between this and environmental assessment procedures. In this chapter, 'techniques' are taken to mean the practical methods applied to carry out a particular task or objective.

I first set out how environmental techniques developed in the nineteenth century in response to the scale and type of pollution caused by industrial activities and in recognition of the limitations of private law (principally the tort of private nuisance) to control such pollution. I outline the development of rudimentary air and water pollution statutory controls in the nineteenth century and discuss the legacy of concepts such as 'best practicable means' in modern environmental law. I then review the range of integrated techniques of pollution control currently available and locate environmental assessment within these.

The Nineteenth Century: Industrial Activity, Public Health and Pollution Control

(a) Industrial Activity and Pollution

England was one of the first world economy to industrialise. Throughout the nineteenth century¹ the economy grew rapidly and diversified but was frequently unstable. A number of factors contributed to the rapid expansion of industry and trade. The end of the Napoleonic War in 1815 brought increased prosperity as traders exported cotton, hardware and iron to markets that had been starved of such goods.² Manufacturing received an immense impetus from technical progress: the invention of steam-generated mechanical power to supplement water power leading to the development of advanced machine tools and the Leblanc process in chemical production. During the 1820s and 1830s large scale investment was channelled into docks, railways, gasworks, water companies and shipbuilding. A great expansion of trade in cotton and natural resources with North and South America, Africa and Asia also occurred. Investment was made in the cotton and woollen industries and in the coal fields. A whole range of industrial activity generated both national income and pollution including chemical production, manufacturing, metal industries, building and engineering, as well as secondary sectors such as the manufacture of domestic goods and distilling.

¹ P. McAuslan, Land, Law and Planning (London, Weidenfeld and Nicholson, 1975) reviews pre-Industrial Revolution legislation in this area.

² S. G. Checkland, The Rise of Industrial Society in England 1815-1855 (London, Longman, 1964), p. 8.

As early as the first quarter of the century the effects of intense economic activity on the environment became apparent in the form of polluted air, blackened and effluvial rivers and outbreaks of epidemic diseases, notably cholera. While air and watercourses had become polluted in the pre-industrial era, the rise of industrial society saw abuse of the environment on a different scale and of a significantly different type: smoke emissions were combined with noxious acid gas compounds, commonly hydrochloric acid gas; pollution by acidic wastes, deleterious matter and sewage led to acute degradation of water. Several industrial sectors had particularly harmful effects.

Severe environmental harm was caused by the chemical industry which came to dominate Lancashire, first in St Helen's and, following litigation in that area,³ in Widnes and Runcorn. The manufacture of chemicals involved the bringing together of vast quantities of bulky materials: salt, kelp, and limestone; and processing them to produce chemicals such as the acid and alkali used in the manufacture of glass, soap and textiles. The processing of such bulk, often only into a single product, produced much waste and pollution, particularly large quantities of hydrochloric acid gas. This acid eroded metal objects such as gutters and blighted crops and fruit trees. Refuse from the manufacture of chemicals, containing a large proportion of sulphur, accumulated in huge mounds at the location of works. Early attempts to reduce air pollution from the release of hydrochloric acid gas from chemical works by wide dispersal of the noxious fumes from high chimney 'stalks' were unsuccessful; the cold, wet fumes rapidly descended to the ground where they inflicted greater harm over a greater area.

³ St Helen's Smelting Company v. Tipping (1865) 11 ER 1483, 11 HL Cas. 642.

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³ St Helen's Smelting Company v. Tipping (1865) 11 ER 1483. 11 HL. Cas. 642.

The coal industry began to operate powerfully on the British economy and society in the 1820s and 1830s when enormous reserves to the south and south east of Durham were opened up.⁴ Increased industrial and domestic demand provided the basis for steady expansion in most coalfields, particularly Lancashire and Yorkshire. Simultaneously, the ironstones of North Stafford were worked following the discovery of new ores providing brass, tin and steel for household goods, plating and railway rolling stock. The pace of coal and metal production had a cumulatively destructive effect upon river quality. Pollution of water arose from the discharge of solid matter during coal washing, from tin and zinc mines which clogged flowing streams and from the emission of other poisonous, noxious solid or liquid waste from the mines. This was acknowledged in a Royal Commission Report on Salmon Fisheries in 1861 which describes how the blocking of rivers and breeding grounds by solid matter from mines, and poisoned water by mine efflux, diminished the supply of salmon from rivers and fisheries in England and Wales.⁵

Further sources of water pollution were dyes and bleaches used in the manufacture of cotton, wool, worsted, silk and jute. A Royal Commission report on pollution of the Rivers Aire and Calder (1867) stated that in the West Riding of Yorkshire, the principal seat of the woollen and cotton trades, 'the water became fouler and more foul after leaving each successive mill'.⁶

⁴ Checkland, Op.cit., p. 154.

⁵ Royal Commission on Salmon Fisheries, Report on Fisheries in England and Wales (1861), British Parliamentary Paper 2768.

⁶ Royal Commission (of 1865), Third Report, The Rivers Aire and Calder (1867) Cmnd. 3850, p.(xxi).

Sewage was a major source of pollution alongside that of industrial and manufacturing activity. Concern about public health problems caused by sewage was expressed in a report by Edwin Chadwick on the Sanitary Condition of the Working Classes in 1842⁷ and two reports of the Royal Commission on the State of Large Towns and Populous Districts in 1842 and 1843.⁸ As a result of these reports the Public Health Act 1848 was passed which required the building of sewage systems and the provision of water supplies. The 1848 Act represents an early legal response to the problem of sanitation. However it came to cause a different environmental problem: the 1848 Act authorised local Boards of Health to empty sewage from the new systems 'into such places as may be fit and necessary', which was generally the nearest river.⁹

The various Royal Commission and Select Committee reports¹⁰ mentioned above and contemporary accounts¹¹ provide vivid pictures of the state of the environment. Rivers were poisoned, clogged and corrupted by refuse from various manufacturing processes,

⁷ See R. A. Lewis, Edwin Chadwick and the Public Health Movement (London, Longman Green, 1952).

⁸ Royal Commission on the State of Large Towns and Populous Districts, Reports of 1842 and 1843.

⁹ Quoted in G. Wilson, 'The Development of Environmental Law in Nineteenth Century Britain', National and European Law on the Threshold of the Single Market. (Frankfurt am Main, Peter Lang, 1993), pp. 17-18; see also Royal Commission on Sewage Disposal, Final Report, General Summary of Conclusions and Recommendations (1914-16) Cmnd. 7821 and Royal Commission (of 1868), Fourth Report, Pollution of Rivers in Scotland (1872) Cmnd. 603.

¹⁰ In particular the Royal Commission on the Pollution of Rivers (1865) Third Report, The Rivers Aire and Calder (1867) Cmnd. 3850 and the House of Lords Select Committee on Injury From Noxious Vapours (1862) HL BPP 14.

¹¹ For example, F. Wyatt, The Progress of the Chemical Industry in Rothwell (1893) quoted in and K. Warrens, Chemical Foundations: The Alkali Industry in Britain Until 1926 (Oxford, Clarendon, 1980).

mining operations and sewage. However, as this brief survey of the rise of industrial society indicates, national income and employment were important consequences of expansive, albeit environmentally harmful, industrial activity. In their Report on Pollution of the Rivers Aire and Calder (1867) the Royal Commission on Pollution of Rivers (of 1865) shows an express interest in the economic importance of industrialisation:

It would be impossible to calculate the extent or the profit which the national products of the West Riding, stone, iron, coal and other mines have been worked, while the profits of the textile manufacture of worsteds and woollens might perhaps exceed the amount of our national debt.¹²

Parliament and the courts were faced with a dilemma of balancing industrial interests with that of public health and the protection of property from pollution. The Reform Act 1832 further complicated their task by granting, in effect, an electoral mandate for industrial interests.

Early nineteenth century legislation offered only 'piecemeal' protection to the environment and gave little opportunity for preventing industrial pollution. For example, the Towns Improvement Clauses Act 1847, enacted to control smoke emissions from furnaces, specifically contained an exemption for industry and excluded noxious vapours or gas from its ambit. Public health legislation was not uniform across the country: for instance, the Smoke Nuisance Abatement Act 1850 applied only to London. Until at least the middle of the century the common law, as distinct from statute law (the law laid down in Acts of Parliament), therefore provided the primary means of environmental protection. The scope

¹² Op.Cit., p. (xi).

and limitations of the common law, particularly the common law of nuisance is discussed below.

(b) The Limitations of Common Law in Protecting the Environment

The system of common law developed from the time of the Norman Conquest in an attempt to cope with new disputes over the use and abuse of land. As the system developed it incidentally became a mechanism for environmental protection through controlling the use of land rather than by regulating the use of natural resources *per se*.¹³ In the nineteenth century, as now, people seeking a remedy in the civil law were entitled to redress for injury caused by environmental harm and a legal remedy only if they possessed certain riparian rights;¹⁴ or if the case fell within the boundaries of one of three tortious actions: trespass;¹⁵ the rule in Rylands v. Fletcher (1866)¹⁶ and private nuisance. The law of tenure, particularly the use of restrictive covenants¹⁷ offered a further means by which landowners might exercise control over the use of land in private law.

¹³ S. Ball and S. Bell, Environmental Law (London, Blackstone Press, 2nd ed: 1994), p. 142.

¹⁴ Riparian rights are common law rights relating to the use of water associated with the ownership of a bank of a watercourse. The nature of a riparian owner's right to clean water was clearly stated by Lord MacNaughten in John Young and Company v. Bankier Distillery Company (1893) [1891-4] All ER 439. at 441.

¹⁵ The action in trespass protects against interference with land whether or not damage is caused by the entry of polluting matter.

¹⁶ Rylands v. Fletcher (1866) LR 1 EX. 265.

¹⁷ See Tulk v. Moxhay (1848) 2 Ph 774, 41 ER 1143 which marks a restrictive covenant as an equitable proprietary interest in land.

In the nineteenth century, the most significant limitation of the common law in protecting the environment was that the principle of private property lay at its heart. This gave the property owner (whether freeholder or lessee) a right to exclude anyone else from the use or benefit of the land unless they have a better title to it.¹⁸ In practical terms, landowners most commonly brought actions in the civil courts and so the general culture and day to day running of those courts was biased towards property interests.¹⁹ This principle of protecting private property was challenged by legislation directed to improve the living conditions of the urban working class, for example, the Removal of Nuisances Act 1846 and the Public Health Act 1848, concerned with nuisances in individual houses, empowered Local Boards of Health to install drains and register and inspect lodging houses, even demolish unauthorised houses.²⁰ Presented with such government action, the courts were unused to making an assessment of the inroads which were to be made on the prevailing ethos of proprietary freedom,²¹ and developed principles, precedents and rules of statutory interpretation which worked to protect property owners.²²

¹⁸ P. McAuslan, Ideologies of Planning Law (Oxford, Pergamon Press, 1980), pp. 2-4.

¹⁹ Id.,

²⁰ P. McAuslan, Land, Law and Planning (London, Weidenfeld and Nicholson, 1975), pp. 38-39.

²¹ Wilson, supra, pp. 13-14.

²² Ibid., p. 3; for example, in Cooper v. Wandsworth Board of Works (1863) 143 ER 414, concerning the demolition of the plaintiff's house for failure to give notice to the district board his intention to build the house, as required by section 76 Metropolis Local Management Act 1855, the House of Lords held that before a person's property is interfered with by public authorities the person must be given an opportunity to be heard.

The Role of the Common Law of Nuisance in Environmental Protection

In the nineteenth century, private nuisance was the most common basis for tortious action for industrial pollution. This arises where there has been an intentional or negligent act which causes unreasonable and indirect injury to land, buildings or vegetation, or substantial interference with a landholder's interest in the use or enjoyment of the land by excessive noise, dust, fumes, smells and so on. The main remedies are an award of damages to compensate for injury suffered as a result of the nuisance and an injunction to restrain the defendant from beginning or continuing the nuisance. The significance of private ownership of property to the tort of private nuisance is clear: an action will lie in the case of unreasonable interference with the reasonable use and enjoyment of land;²³ an individual's ability to obtain redress is therefore tied to a property interest in a specific parcel of land. The limitations which operate in private nuisance actions, for example, applying only to certain types of environmental harm such as those from easily identified sources,²⁴ mean that property owners' freedom of action with respect to their land is also preserved. Furthermore, by conferring rights of exploitation of natural resources, possession or land ownership also provides a defence to causing environmental harm.

The scope of the doctrine of nuisance is illustrated by St. Helen's Smelting Company v Tipping (1865).²⁵ Mr Tipping purchased a valuable estate in St Helen's, which lay within

²³ See St Helen's Smelting Company v. Tipping (1865) 11 ER 1483, 11 HL Cas. 642.

²⁴ See J. P. S. MacLaran, 'Nuisance Law and the Industrial Revolution - Some Lessons from History', (1983) Oxford Journal of Legal Studies Vol. 3, No. 2, 155-221; A. Ogus and G. Richardson, 'Economics and the Environment: A Study of Private Nuisance', (1977) Cambridge Law Review Vol. 36, 284.

²⁵ St Helen's Smelting Company v. Tipping (1865) 11 ER 1483, 11 HL Cas. 642.

a mile and a half of large smelting works from which noxious vapours were emitted. In 1863 Tipping brought an action to recover damages for injury to trees, hedges, fruit and cattle and for substantial personal discomfort. At trial, Mellor J stated that for the injury to be actionable it must visibly diminish the value of the property and the comfort and enjoyment of the property. The jury returned a verdict with damages for Tipping. The House of Lords upheld the Exchequer Chamber's ruling that the company was liable for any physical damage it caused, but that it was not liable for the deterioration of the plaintiff's comfort. In differentiating between the two types of injury, Lord Westbury invoked the 'locality doctrine' that whether discomfort may be called a nuisance depends on the circumstances of the place where the thing complained of actually occurs.²⁶ On the facts of the case, the appeal was dismissed with costs against the defendant, the smelting manufacturer. The House of Lords' interpretation of the locality doctrine was a compromise which constituted a new balance in favour of industrial activity. Notwithstanding this, the decision also underlined the judicial concern to protect private property rights which had long directed the development of nuisance law.²⁷

Given the nature of strict liability in actions for nuisance, the doctrine may be described as a mechanism for the private control of environmental pollution. However, in the nineteenth century nuisance law did not provide the level of protection against environmental damage that might have been expected. Rather industrial development

²⁶ St Helen's Smelting Company v. Tipping (1865) 11 ER 1483, at 1486.

²⁷ This interpretation follows the thesis in J. Brenner, 'Nuisance Law and the Industrial Revolution', (1974) Journal of Legal Studies Vol. 3, 403-431; for a critique, see J.P.S. MacLaren, 'Nuisance law and the Industrial Revolution - Some Lessons from History' (1983) Oxford Journal of Legal Studies Vol. 3, No. 2, 155-221.

continued apace, unhampered by the doctrine of nuisance. This is illustrated by the dearth of case law involving industrial pollution in the courts of the common law in the period 1770-1870.²⁸ The working of the locality doctrine, as seen in St. Helen's Smelting Company v. Tipping (1865), was one reason why nuisance law was not more successful in arresting pollution. Others include the expense for plaintiffs of going to law and the difficulties they faced pinpointing the exact source of the nuisance. The law of nuisance is capable of controlling activities which interfere with the quality of life and caused damage to property. However, in the nineteenth century, nuisance law regulated relations between neighbours,²⁹ and protected individual owners' use or enjoyment of their property from privies,³⁰ the conduct of offensive trades such as candle-making,³¹ brick burning,³² the operation of slaughterhouses³³ and working of mills,³⁴ and complaints by owners of land on river banks that defendants higher up the river were obstructing, diverting or diminishing the flow of water to their premises.³⁵ Nuisance law was not designed to protect the community nor the environment from large scale industrial pollution.

²⁸ MacLaren, Ibid., at 161, calculates that over a ninety year period there were on average one or two actions for air pollution every ten years; the record in noise pollution is even sparser.

²⁹ Wilson, supra, pp. 14-15, considers some of the limitations of nuisance law in offering protection against polluting activities.

³⁰ Tenant v. Goldwin (1705) 92 ER 222.

³¹ Bliss v. Hall (1838) 7 LJCP 122.

³² Hole v. Barlow (1858) 140 ER 1113.

³³ R v. Cross (1826) 172 ER 219.

³⁴ Bealey v. Shaw (1805) 102 ER 1266.

³⁵ Wood v. Waud (1849) 154 ER 1047.

By the middle of the nineteenth century, the limitations of the common law of nuisance became clear, particularly that it is, by its very nature, reactive: such actions are triggered only when individuals bring an action for harm suffered to property. Invoking the common law was also complex and expensive. A Report of the Royal Commission on the Pollution of Rivers in 1867 entitled 'Defects of Existing Law Relating to River Pollution', listed these various limitations:³⁶ 'each individual is left to protect himself by putting the law in motion...The plaintiff has also to prove that what he has suffered has been caused wholly or in part by the special act of the defendant, which is always difficult - often impossible'. Reports such as this provided the stimulus for the development of a second tier of control of legislation and enforcement regimes to supplement the common law of nuisance and other private law actions in the control of primarily industrial activities which caused pollution and associated public health problems.

(c) Legislation and the Control of Industrial Activities

From the middle of the nineteenth century, legislation dealing specifically with problems of environmental pollution was enacted, although the absence of a tradition of state intervention and the fact that there was little state apparatus at the central or local levels organisation meant that this proved difficult. And, as the courts were engaged in balancing industrial interests with public health and conservation in the nineteenth century, so the legislature was faced with a similar exercise. The hallmark of environmental legislation in this period was that it was problem specific - air, water and land pollution were examined

³⁶ Royal Commission (of 1865) on the Pollution of Rivers, Third Report, The Rivers Aire and Calder. (1867) Cmnd. 3850, pp.li-llii.

as distinct subjects. The following offers an outline of statutory responses to air and water pollution and the different techniques which were employed in this period.

(i) Air Pollution

In 1862 the House of Lords Select Committee (the 'Derby Committee') recommended in their Report on Injury from Noxious Vapours³⁷ that laws in respect of nuisances should be consolidated and made uniform throughout the country. By the middle of the century parliamentary bodies had directed their attention to the more specific and direct consequences of air pollution and, prompted by the hearing in St Helen's Smelting Company v. Tipping (1865),³⁸ the recommendations of the Derby Committee and the later Royal Commission Report on Noxious Vapours (1878) were enacted in a series of Alkali Acts which significantly changed the law relating to air pollution.

The Alkali Act 1863 required the condensation of 95 per cent of muriatic acid produced in the alkali-making process. It also mandated the registration of all alkali works and the establishment of the first national public pollution agency, the Alkali Inspectorate. No provision was made to prohibit the release of fumes from copper smelting, for which no abatement technique yet existed. The Ninth Annual Report of the Chief Inspector of the Inspectorate (1873)³⁹ detailed two serious problems with the effective control of air

³⁷ House of Lords Select Committee on Noxious Vapours, Report on Injury from Noxious Vapours (1862), BPP 14.

³⁸ St Helen's Smelting Company v. Tipping (1865) 11 ER 1483, 11 HL Cas. 642.

³⁹ Chief Inspector of the Alkali Inspectorate, Ninth Annual Report (1873), quoted in M. Frankel, Social Audit: Control of Industrial Air Pollution (London, HMSO, 1974).

pollution under the 1863 Act. The first was that an increasing number of processes lay outside the ambit of the Act with the consequence that sulphurous acids were emitted freely from copper smelting works. The second difficulty lay in the fact that the uniform emission standard of condensing 95 per cent of muriatic acid did not ensure clean air since more alkali works were opening in areas such as Merseyside.

The Movement Towards Best Practicable Means

An amendment Alkali Act was passed in 1874 in response to the Chief Inspector's report. The 1874 Act extended the definition of noxious gases to include sulphurous acid which arose from copper works. In response to the second problem identified by the Chief Inspector, the 1874 Act provided that in addition to the condensation of sulphurous acid, the owner of every alkali works should use the 'best practicable means' to prevent the escape of all other noxious or offensive gases from the works. The concept of 'best practicable means' was first applied in 1842 as an attempt to curb smoke nuisance in Leeds, but it was not until the Alkali Etc. Works Regulation Act 1906 that the concept received a statutory formulation:

The expression 'best practicable means' when used with respect to the prevention of the escape of noxious and offensive gases, has references not only to the provision and efficient maintenance of appliances adequately for preventing such escape, but also to the manner in which such appliances are used and to the proper supervision by the owner of any operation in which such gases are evolved.⁴⁰

The concept of best practicable means did not include any clearly defined, formal, environmental quality standards. However, consideration was given to the concept to guide standard setting and enforcement in relation to air and, implicitly, to other environmental

⁴⁰ Section 27 Alkali Etc. Works Regulation Act 1906.

media. The concept of best practicable means still has a place in modern environmental law. It incorporates a scientific approach ('means') and a discretionary approach ('best' and 'practicable') which expresses the feasibility of restraining or abating pollution when determining appropriate pollution levels.⁴¹ There are three main aims in using the concept. First, there is a prohibition on any emission which could constitute a recognisable health risk; second, emissions are to be reduced to the lowest level, whilst considering local conditions and circumstances, the current state of pollution control techniques, and the financial effect upon a company or industry; and third, that harmful emissions should be diluted and dispersed.⁴²

In the nineteenth century, the use of the best practicable means concept had a number of practical effects. The concept encouraged the Alkali Inspectorate to adopt a conciliatory and cooperational approach to achieve compliance because it could be applied flexibly and on an individualised basis to ensure that, in each particular case, the emission controls were 'practicable'. The 'standards' contained within the concept represented a tacit agreement between pollution inspectors and industry about the acceptable level of costs of pollution control. The use of the concept therefore suggests that pollution standards reflected judgments of economic as well as technical feasibility. These judgments were described by a former Alkali Inspector in his Annual Report (1873):

There must be a compromise between (i) the natural desire of the public to enjoy pure air, (ii) the legitimate desire of the manufacturer to meet competition, (iii) overriding

⁴¹ Ball and Bell, *Op.cit.* p. 253.

⁴² *Id.*

national interests. The answer to those opposing interests lies in the honest use by the manufacturer of the best practicable means.⁴³

That the legislature tackled the problem of pollution and abatement according to individual sectors of industry and with little appreciation of the integrated nature of environmental pollution, is apparent in a study of the Alkali Acts of 1863 and 1874: more effective air pollution controls, required under the Acts, led to a substantial increase in water pollution as the liquid products from the condensation of noxious gas, were released into rivers and streams.

(ii) Water Pollution

Royal Commissions on River Pollution were established in 1865 and 1868 to inquire into the pollution of rivers and the means of preventing such pollution.⁴⁴ The primary recommendation of the Commission was that it was necessary to strictly prohibit the casting of solid matter into river channels, to enact standards of purity and to give manufacturers the power to discharge drainage waters into town sewers. The Rivers (Pollution Prevention) Act 1876 embodied a more cautious approach. The 1876 Act placed a prohibition on pollution by solid matter, sewage pollution and pollution by manufacturing and mining. Under Part II of the 1876 Act an offence was created where any person caused to fall or flow or to be carried into any stream, any solid or liquid sewage matter. However, a defence to this

⁴³ Quoted in Frankel, Op.cit. p. 8.

⁴⁴ Reports included: Royal Commission on Pollution of Rivers (of 1865) Third Report on The Rivers Aire and Calder (1867) Cmnd. 3850 and Royal Commission on Pollution of Rivers (of 1868) Fifth Report on Pollution Arising from Mining Operations and Metal Manufacturing (1874) Cmnd. 951.

offence was available if the person was able to show that the 'best practicable and available means' to render the sewage harmless had been taken. The requirement to employ the best practicable means or techniques, promulgated in the Alkali Act 1874, was thereby translated into a defence in the 1876 Act.

Part III of the 1876 Act was concerned with pollution caused by manufacturing and mining. The basic offence of causing or knowingly permitting poisonous, noxious or polluting liquid to be carried into a stream, was similarly subject to a proviso that it was not committed where the defendant could show that the 'best practicable and reasonably available means' had been used. This Part of the 1876 Act also laid down that enforcement proceedings with regard to manufacturing and mining pollution were to be taken solely by a sanitary authority and only with the consent of the local Government Board,⁴⁵ which formed a 'double filter'. The Local Government Board was not to give consent to such proceedings in any district that was the 'seat of any manufacturing industry' unless it was fully satisfied 'that no material injury will be inflicted by such proceedings on the interests of such industry'. The rationale for this test was given in a later Royal Commission report:

In such centres the interests of the community are largely bound up with the interests of the manufacturer and that to demand from manufacturers costly schemes of purification might injure the community without any corresponding improvement in the character of the river which is already materially, if not hopelessly impaired.⁴⁶

Under the Rivers (Pollution Prevention) Act 1876, the combination of the 'best practicable means' defence and the obstructive limitation in the Act's enforcement in areas

⁴⁵ The forerunner of local government as elected local authorities.

⁴⁶ Royal Commission on Sewage Disposal, Ninth Report, Disposal of Wastes from Manufacturing Processes (1914-16) Cmnd. 7829, p. 3.

regarded as a 'seat of any manufacturing industry', ensured that a compromise was reached between industrial and conservatory interests. However, in some cases the courts offered a strict interpretation of the 1876 Act. In Staffordshire County Council v. Seisdon Rural District Council (1907)⁴⁷ the problems of the cumulative effects of pollution was raised. The case concerned an application before the County Court by Staffordshire County Council for an order under the Rivers Pollution Prevention Act 1876 requiring Seisdon Rural District Council to stop polluting the River Stour with sewage as it flowed through a town. The County Court judge refused to make an order on the ground that the pollution was not appreciable: it could not be said that the sewage substantially harmed the quality of the River Stour because that water was already polluted. In the Kings Bench Division, on appeal, it was held that the County Court judge was wrong in law to decide that an order may not be made on the ground that the stream was not rendered more foul by the entry of the sewage. Rather the test was whether the river in its pristine state would be polluted. According to Darling J:

It must not be said: 'See what a lot of filth other people put into it, and therefore you must excuse us'...you must proceed at once against all the offenders or else against none, because everyone could make that answer and the river would not be purified at all... The statute aims at the bringing back of rivers to a pristine state⁴⁸

The court in this case adopted a strict approach to the provisions of the 1876 Act.

⁴⁷ (1907) 71 JP 185.

⁴⁸ (1907) 71 JP 185, at 187.

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⁴⁷ (1907) 71 JP 185.

⁴⁸ (1907) 71 JP 185, at 187.

(d) The Interaction of Statutory Regimes and Private Law

As seen in Staffordshire County Council v. Seisdon Rural District Council (1907),⁴⁹ the new body of public law relating to air and water pollution interacted with private law which had previously controlled environmental harm affecting the use or enjoyment of land. For example, statutes concerned with the sanitation of towns specified that common law rights would continue: actions could therefore be brought by the Attorney General on behalf of private persons who suffered nuisance from the building, or use of sewers. In Attorney General v. Birmingham Corporation (1855),⁵⁰ a wealthy landowner sought an injunction against the defendant corporation to restrain it from dumping sewage in the river which ran through his property. Page-Wood VC found for the plaintiff, saying 'he is entitled to the full use and benefit of the river, just as he enjoyed them before the passing of the Municipal Act 1850'.⁵¹ As rights, such as those enjoyed by the plaintiff, could not be tampered with, equitable remedies were used in a flexible way. In a case concerning the same corporation, Attorney General v. Birmingham Corporation (1880),⁵² the operation of an injunction on the defendant corporation was suspended for five years in order to give the defendants time to carry out works to prevent river pollution by sewage. The abatement of nuisance caused by public works undertaken to improve general public health also provided a spur to corporations to build proper sewage works which did not rely on disposal into the nearest river.

⁴⁹ (1907) 71 JP 185.

⁵⁰ (1855) 70 ER 200.

⁵¹ (1855) 70 ER 200, at 225.

⁵² (1880) 43 LT 77.

It may be convenient to summarise the arguments thus far. During the nineteenth century two tiers of control developed in response to the considerable problems of pollution from industrial and associated activities: the common law of private nuisance and statutory regimes⁵³ mainly found in public law. As seen above, there was some interaction between these two tiers of control. The principle of private property was elaborated by the courts to provide some protection for landowners against government action, as seen in the public works cases brought against Birmingham Corporation by the Attorney General in 1855 and 1880. But, on the whole, statutory controls were not premised upon the protection of property. A number of different legislative approaches and techniques were employed to control air and water pollution. The formation of a national inspectorate under the Alkali Act 1863 was an unusual and innovative legislative response to pollution problems in the nineteenth century. The use of obstructive limitations in statutory enforcement proceedings, for example in areas regarded as the 'seats of the manufacturing industry' under the Rivers (Pollution Prevention) Act 1876 was a further technique. The central technique, though, was the use of the 'best practicable means' concept, either in the form of a requirement, as in the Alkali Act 1874, or as a defence to a statutory offence in the Rivers (Pollution Prevention) Act 1876. The concept was premised upon a system of cooperation and conciliation between industrial interests and the regulatory body. The legislature favoured this presumptive, but ultimately abstract concept, in contrast to more clearly defined, substantive environmental quality standards such as those later drawn up by the Royal Commission on Sewage Disposal in a Report of 1912-13.⁵⁴

⁵³ Under the Alkali Acts 1863 and 1874 and the Rivers (Prevention of Pollution) Act 1876.

⁵⁴ Royal Commission on Sewage Disposal, Eighth Report Standards and Tests for Sewage and Sewage Effluents Discharge into Rivers and Streams, (1912-13) Cmnd. 6464, stated that inland waters should not have a biological oxygen demand of more than two parts per

As seen above, the common law is inherently reactive to problems of pollution. In the nineteenth century, the legislature similarly reacted to environmental problems rather than preempting them. Significantly, the legislature did not countenance the idea of preventative legal controls. In a report on the disposal of liquid wastes from manufacturing processes (1914-16), the Royal Commission on Sewage Disposal considered representations that the law should be altered so that every person who proposes to set up works might be required to give notice to the sanitary authority or Rivers Board specifying the steps to be taken to prevent liquid refuse from becoming polluting and that any person failing to give notice or commencing to discharge liquid refuse after his proposals have been disapproved, should incur a penalty. The Commission rejected the representations, believing that 'the suggested procedures might involve needless interference with manufactures'.⁵⁵ For this and similar reasons, in the case of air pollution, it was not until the Alkali Etc. Works Regulation Act 1906 that legislation introduced a system of prior authorisation for 'scheduled processes'.

In the nineteenth century, the environment was viewed as a matter of pollution control over specific areas or activities. The legislature dealt with environmental problems sector by sector, according to either industrial activities for example the Alkali Acts 1863 and 1874, or environmental media as in the River (Pollution Prevention) Act 1876. As judge-made law was developed in the context of particular fact situations, so too was legislation relating to the environment developed in the context of what were seen as separate problems: problems of public health, problems of the pollution of rivers, problems of the emission of noxious

100,000.

⁵⁵ Royal Commission on Sewage Disposal, Final Report, General Summary of Conclusions and Recommendations (1914-16) Cmnd. 7821, at p. 17.

gases.⁵⁶ Little consideration was therefore given to the possible consequences of imposing control on one sector in relation to the others. Such a sectoral and fragmented approach to environmental problems failed spectacularly to appreciate the integrated nature of environmental problems, typically the transfer of pollutants between environmental media, as seen by the pollution of freshwaters by sulphuric acid following compulsory condensation of noxious gases under the Alkali Act 1863 and the building of sewage works which, typically, discharged effluent to the nearest river. Despite the recommendation made by the Derby Committee in 1862 that the laws respecting nuisance should be consolidated and made uniform, 'environmental law' continued to be split between a number of statutes and administered by a number of bodies. The legacy of nineteenth century environmental law remains an enduring testimony to a reactive, sectoral, and fragmentary approach to the control of pollution.⁵⁷

The Twentieth Century: The Development of Integrated Techniques of Environmental Law

Since the development of the European Community environmental policy,⁵⁸ a more integrated and preventative approach to pollution control has been developed in response to the problems that the sectoral approach to pollution control engendered, and the deterioration in the quality of the environment suggested by a number of environmental indicators. For

⁵⁶ Wilson, *supra*, at 13-14.

⁵⁷ On the general characteristics of environmental law, see R. Macrory 'British Environmental Law: Major Strands and Characteristics' (1989) Connecticut Journal of International Law Vol. 4, No. 2, 287-304.

⁵⁸ The European Community's environmental policy was established in 1972.

example, in its member countries, the Organisation for Economic Cooperation and Development calculated a 12 per cent increase between 1970 and 1987 of nitrogen oxide emissions, which contribute to petrochemical smog and acid rain; an increase in municipal waste, as measured by the weight produced per person, by 26 per cent between 1975 and 1989, an increase in carbon dioxide emissions by 15 per cent between 1971 and 1988 and accumulations of metals in 40 per cent of European agricultural soils.⁵⁹ These figures underlie concerns about acidification of water and soil and the destruction of forests. Recently concern has grown about the depletion of the ozone layer and changes in the global climate caused by human activities modifying the composition of the atmosphere. Environmental concerns were further highlighted by the Chernobyl disaster in 1986. In the United Kingdom, disquiet about pollution levels has been expressed in the context of public health issues, over the quality of drinking water and occurrence of respiratory diseases. The increase in pollution levels, in objective and subjective terms, and the extension of the scope of pollution has had a major impact on the framework of legal regulation as illustrated by the development of a system of Integrated Pollution Control.

(a) The Development of a System of Integrated Pollution Control

The conceptual inability to understand the environment as a whole endured into the twentieth century, having a profound effect on the organisation and administration of modern pollution controls. Prior to the Environmental Protection Act 1990, responsibility for controlling discharges to air, water and land was exercised by a number of central

⁵⁹ Organisation for Economic Cooperation and Development, The State of the Environment. (Paris, OECD, 1991), pp. 18-19; see generally A. Weale, The New Politics of Pollution (Manchester, Manchester University Press, 1991), pp. 23-26.

government departments, local authorities and other bodies.⁶⁰ The laws relating to the environment and governing these organisations and bodies are to be found in an array of statutes and regulations, principally the Alkali Works Etc. Act 1906, the Clean Air Acts 1956 and 1968, the Water Resources Act 1963, the Control of Pollution Act 1974 and the Health and Safety Act 1974.⁶¹

In terms of air pollution, the Alkali Inspectorate dealt with noxious fumes under the Alkali Works Etc. Act 1906, and local authorities became responsible for the control of smoke under the Clean Air Acts 1956 and 1968. Other bodies were created to deal with a variety of subject matters such as the control of health and safety within factories, the control of nuclear installations⁶² and the control of mines and quarries.⁶³ The Robens Committee on health and safety at work reported in 1972 that a new unified body, the Health and Safety Executive, should be set up to deal with all aspects of health and safety at work, and to unify the different inspectorates. This was formed in 1974 and focused its attention upon safeguarding the health of workers.

Modern controls of pollution on land are similarly fragmented. The Control of Pollution Act 1974 created new bodies known as waste disposal authorities with responsibility for the disposal of waste to land. There was little coordination between the Health and Safety Executive and those controlling waste disposal despite the connections that exist

⁶⁰ For example the National Rivers Authority and the Nature Conservancy Council.

⁶¹ As described by Ball and Bell, Op.cit. pp. 250-252.

⁶² Radioactive Substances Act 1960.

⁶³ Mines and Quarries Act 1954.

between the production of waste in factories (regulated by the Health and Safety Executive) and its disposal by waste disposal authorities.⁶⁴

Further complications arose with the control of emissions into water. The River Boards Act 1948 created a number of river boards to control land drainage, fisheries and the prevention of river pollution. Under the Water Resources Act 1963, 27 river authorities were created to take over responsibility from the river boards; these were then superseded by the creation of regional water authorities under the Water Act 1973. The regional water authorities were given sole responsibility for regulating all matters concerned with water: pollution prevention, the supply of water, water conservation and fisheries. The establishment of the National Rivers Authority in the Water Act 1989⁶⁵ was an attempt to overcome the combination of operational and regulatory responsibilities.

The picture of pollution control prior to the Environmental Protection Act 1990 was one of fragmented statutory provisions and administration. The damaging effect of sectoral pollution control was recognised by the Royal Commission on Environmental Pollution in their Fifth Report (1976)⁶⁶ which reviewed the efficacy of methods of air pollution controls from industrial and domestic sources. The Commission found that the waste generated by an activity did not disappear when transferred from one receiving medium such as air to another such as water and that pollution might even be exacerbated by control in a single media.

⁶⁴ Ball and Bell, Op.cit., pp.251-2.

⁶⁵ As amended by the Water Acts 1991; the powers of the National Rivers Authority are now contained in the Water Resources Act 1991.

⁶⁶ Royal Commission on Environmental Pollution, Fifth Report, Air Pollution Control: An Integrated Approach. Cmnd. 6371 (London, HMSO, 1976).

Sectoral legislation, protecting a particular receiving medium, may achieve its effectiveness in terms of its primary purpose by creating unforeseen, and damaging secondary effects on other media. For example, acid precipitation of soils and freshwaters may occur from sulphur dioxide emissions and the evaporation of volatile organic compounds during waste water treatment.⁶⁷ Transfers such as these were viewed by the Royal Commission (1976) not as an incidental or marginal feature of pollution controls; but rather as a central and typical feature of environmental systems in recognition that matter is neither created nor destroyed but instead undergoes cycles of change within nature.⁶⁸

Many problems arose from this fragmented approach to pollution control. The controls overlapped: a single process could be the subject of as many as four different authorities. Where this was the case, the use of different regulatory and enforcement criteria was capable of creating an imbalance in the protection of the environment as a whole. There were also significant gaps in the regulation of pollution, resulting in difficulties in enforcing pollution controls and a lack of public accountability in some areas because there was no one body with responsibility and competence to examine the totality of effects from pollution on the environment. The bias towards sectoral controls was exacerbated by the treatment of environmental policy as a discrete policy area.⁶⁹ Little attention was given to devising integrated coordinating institutions which would allow environmental considerations to affect a range of policy decisions and pollution problems.

⁶⁷ Weale, Op.cit., p. 94.

⁶⁸ Ibid. p. 93; see generally, A. Weale, T. O'Riordan and L. Kramme, Controlling Pollution in the Round (London, Anglo-German Foundation, 1990).

⁶⁹ Ibid. p. 20.

Fragmented controls also lessened opportunities for preventing pollution at source. When pollution problems are approached predominantly as problems of air, water or waste pollution, the solution is usually to move the pollutant to the least protected parts of the environment. Integrated systems of pollution control allow for alternative processes and products to be judged in the light of all the possible paths or cycles of pollutants in the environment. Environmental harm might be prevented by identifying possible changes that might be made to the product or process at an early stage in the authorisation process. Recognising the extent of damage caused by transfers of pollutants between media also provides an incentive to prevent pollution in the first place.

Best Practicable Environmental Option (BPEO)

An appreciation of the transfer of pollutants within environmental systems contrasted sharply with the fragmented law and administration of pollution controls. The Royal Commission on Environmental Pollution (1976) first articulated the need to develop an integrated system of controls to achieve a closer fit to the interconnected nature of the environment and environmental problems.⁷⁰ The Commission proposed to institutionalise a more coordinated and integrated approach to pollution control by establishing a new inspectorate, Her Majesty's Inspectorate of Pollution (by relocating the Industrial Air Pollution Inspectorate from the Health and Safety Executive) and expanding the meaning of 'best practicable means' into the concept of 'best practicable environmental option' (BPEO). This principle generally requires that action regarding industrial pollutants should be chosen

⁷⁰ Royal Commission on Environmental Pollution, Fifth Report, Air Pollution: An Integrated Approach. Cmnd. 6371 (London, HMSO, 1976).

to cause least environmental damage overall, and also that measures avoid transferring pollution from one medium to another. A definition of best practicable environmental option was given by the Royal Commission in their Twelfth Report (1988):

...the outcome of a systematic consultative and decision-making procedure which emphasises the protection of the environment across land, air, and water. The best practicable environmental option procedure establishes, for a given set of objectives, the option that provides the most benefit or least damage to the environment as a whole, at an acceptable cost, in the long as well as the short term.⁷¹

An essential requirement of applying the best practicable environmental option is therefore an assessment of the various pathways and effects following the various options. This requirement brings the concept of the best practicable environmental option into parallel with environmental assessment.

The Royal Commission's broad approach towards integrated pollution control was taken up, albeit belatedly, by the Department of the Environment.⁷² A system of Integrated Pollution Control now operates with respect to certain harmful processes under Part I of the Environmental Protection Act 1990, overseen by Her Majesty's Inspectorate of Pollution. Integrated Pollution Control is based on the premise that operator should justify their choice of processes and abatement techniques in economic and environmental terms. The Secretary of State designates by regulations those industrial processes that have the potential for

⁷¹ Royal Commission on Environmental Pollution, Twelfth Report, Best Practicable Environmental Option. Cmnd. 310 (London, HMSO, 1988).

⁷² Department of the Environment, Integrated Pollution Control: A Consultation Paper (London, HMSO, 1988), pp. 3-4.

significant release of harmful substances.⁷³ The processes are subject to centralised regulation of all discharges into the environment. In addition, the pollutants they emit are considered in their entirety before Her Majesty's Inspectorate of Pollution decide what discharges and what levels of discharges are allowed and to what media. This is achieved by the requirement that an authorisation for discharge of a particular pollutant will be granted by Her Majesty's Inspectorate of Pollution subject to an implied condition that the best practicable environmental option has been achieved in a context of the concept of 'best available techniques not entailing excessive cost' (BATNEEC). This condition is made on the basis of information provided by the applicant and known as a 'best practicable environmental option' assessment.⁷⁴ The 1990 Act does not define 'best practicable environmental option', but nevertheless encapsulates the principle 'where the process is likely to involve the release of substances to more than one medium'.⁷⁵

The best practicable environmental option principle is central to the understanding and operation of the system of Integrated Pollution Control. The principle applies the discretionary approach of the 'best practicable means' to an assessment of how best pollutants

⁷³ There are three primary sets of applicable Regulations: Environmental Protection (Applications, Appeals, and Registers) Regulations 1991, (SI 1991, No. 507); Environmental Protection (Prescribed Processes and Substances) Regulations 1991 (SI 1991, No. 472) and Environmental Protection (Prescribed Processes and Substances) (Amendment) Regulations 1992 (SI 1992 No. 614); and Environmental Protection (Authorisation of Processes) (Determination Periods) Order 1991 (SI 1991 No. 513).

⁷⁴ Section 7(4)(a) Environmental Protection Act 1990: '...there is implied in every authorisation a general condition that, in carrying on the process to which the authorisation applies, the person carrying it on must use the best available techniques not entailing excessive cost'; to be read in conjunction with section 7(7) of the Act: '...having regard to best environmental option available as respects the substances which may be released'; see M. Purdue, 'Integrated Pollution Control in the Environmental Protection Act 1990 - A Coming of Age of Environmental Law?' (1991) *MLR* Vol. 54, No. 4, 534-551.

⁷⁵ Section 7(7) Environmental Protection Act 1990.

might be discharged and mitigated, taking account of the likely pathways of the pollutants and the significance of the effects of pollutants on each environmental medium. The inclusion of best practicable environmental option in the system of Integrated Pollution Control established under the 1990 Act represents a clear departure from the traditional approach of controlling pollution sector by sector.

Appraisal of Integrated Pollution Control

The system of Integrated Pollution Control was implemented in stages from January 1991. The implementation and efficacy of Integrated Pollution Control has been reviewed by Environmental Data Services,⁷⁶ and by Genn⁷⁷ in her report to the Health and Safety Executive on the legal implications and costs of the system. The former gives a varied picture of the Integrated Pollution Control system. In some industries there is a willingness to adopt the Integrated Pollution Control approach; in others, there is a considerable reluctance.⁷⁸ Few operators have attempted to compare their choice with alternative processes or abatement techniques, while almost none have produced supporting data. In addition the Royal Commission on Environmental Pollution has expressed concern that inconsistent application of existing standards has prevented a fully integrated approach to pollution control. In the Royal Commission's view, the responsibilities of Her Majesty's Inspectorate of Pollution have precluded it from pursuing achievement of the concept of the

⁷⁶ Environmental Data Services Ltd, Integrated Pollution Control: The First Three Years (London, ENDS Ltd, 1994).

⁷⁷ H. Genn, The Impact of Integrated Pollution Control on British Firms: A Qualitative Study (London, Department of Trade and Industry, 1993).

⁷⁸ See also J. McEldowney and S. McEldowney, Environmental Science and Law (London, Longman, 1996), chapter 6.

best practicable environmental option, for example the current approach fails to take account of numerous factors such as extraction of raw materials, emissions from off-site power generation and the impacts of waste disposal.⁷⁹ The effectiveness of the system also depends on the enforcement of standards set by Her Majesty's Inspectorate of Pollution. The Inspectorate appear to have moved to a more 'site specific' definition of BATNEEC which tends to address local environmental sensibilities and the economic state of the firm and industrial sector concerned.⁸⁰ Currently, government concern is that there is too heavy a regulatory burden on industry and business.⁸¹

A conceptual understanding of the transfer and accumulation of pollutants between environmental media and legal apparatus has developed in advance of institutional arrangements for the administration of a system of Integrated Pollution Control. Her Majesty's Inspectorate of Pollution was established from an amalgam of units from the Industrial Air Pollution Inspectorate, the Wastes Inspectorate and Radioactive Substances Inspectorate. The National Rivers Authority, formed by the Water Act 1989, was excluded from its scope. This had the effect that the administration of pollution controls could not be integrated.

A fully integrated environmental protection agency with responsibilities for the whole range of pollution control matters was recommended by the House of Commons Select

⁷⁹ 'New Royal Commission Study on Environmental Standards BPEO', (1995) ENDS Report No. 243, p. 3.

⁸⁰ 'HMIP Gets Mixed Reception for BPEO Assessment Plans', (1995) ENDS Report No. 234, p. 34.

⁸¹See McEldowney and McEldowney, Op.cit., chapter 6.

Committee on the Environment in their Report on Toxic Waste in 1989. In 1991 the government announced its intention to create a unified environmental protection agency, to take over the powers and functions of Her Majesty's Inspectorate of Pollution, the waste regulation authorities and the National Rivers Authority. This proposal arose, in part, from an appreciation that the best practicable environmental option principle could only be implemented effectively by an integrated agency.⁸² The Environmental Agency has been set up as a public body corporate under the Environment Bill (to be enacted in 1995) to take an integrated view of its activities.⁸³ Until this agency is fully established, the National Rivers Authority remains, for the most part, outside the Integrated Pollution Control system;⁸⁴ as does the Drinking Water Inspectorate. Fragmentation of pollution controls also continues with regard to the disposal of waste on land since conditions which regulate the final disposal of waste by deposit in or on land cannot be imposed by Her Majesty's Inspectorate of Pollution. The development of the Integrated Pollution Control system has highlighted that an appropriately integrated institutional framework is necessary for the administration of such controls. Aside from these institutional arrangements, the system of Integrated Pollution Control remains incomplete because of the limited number of processes falling within its ambit, although these are being added to. A countervailing trend is the deregulation of about fifty processes which occurred in 1992 when they were moved by

⁸² The Royal Commission on Environmental Pollution reiterated this in their Tenth Report, Tackling Pollution - Experiences and Prospects. Cmnd. 9149 (London, HMSO, 1984).

⁸³ Clause 2 Environment Bill (1995); see also Department of the Environment, Environment Agency. Draft Management Statement (London, Department of the Environment, 1994).

⁸⁴ For those processes prescribed for Part I of the Environmental Protection Act 1990 (those processes subject to Integrated Pollution Control) the National Rivers Authority loses its powers in relation to consents for discharges to controlled waters; though, under section 28 of the Environmental Protection Act, Her Majesty's Inspectorate of Pollution must consult the Authority.

amendments to the controlling regulations⁸⁵ from central control to control under the parallel (sectoral) system of Local Authority Air Pollution Control.

The system of Integrated Pollution Control is, undeniably, a more effective preventative mechanism than the previous sectoral controls. The logical extension of the principle of prevention is that the effects of pollution are considered at an even earlier stage - the design and planning of an industrial plant or other polluting development. This would necessarily involve the local planning authority in matters of pollution control⁸⁶ and, possibly, the structural integration of environmental assessments procedures with aspects of Integrated Pollution Control such as the best practicable environmental option assessment.⁸⁷ Indeed, Tromans considers the principle of the best practicable environmental option to be a step towards comprehensive environmental planning in which the social, economic and political impacts of a proposed activity are evaluated within an environmental framework.⁸⁸ A further, necessary development for the fulfilment of integrated controls is the integration of environmental concerns into a wide range of policy areas. Such an approach has been

⁸⁵ Environmental Protection (Prescribed Processes and Substances) (Amendment) Regulations 1992 (SI 1992 No 614).

⁸⁶ As advanced by C. Miller and C. Wood, Planning and Pollution: An Examination of the Role of Land Use Planning in the Protection of Environmental Quality (Oxford, Oxford University Press, 1983).

⁸⁷ United Kingdom Environmental Law Association and the Institute on Environmental Assessment and Integrated Pollution Control, Overlaps in the Requirement for Environmental Assessment (London, United Kingdom Environmental Law Association, 1993); 'Report Recommends Integration of EA and IPC', (1993) ENDS Report No. 219, 10-11; see also C. Wood, 'EIA and BPEO - Acronyms for Good Planning', [1988] JPEL 310-321, at 315.

⁸⁸ S. Tromans, 'Land Use Planning and BPEO', in S. Tromans (ed.) Best Practicable Environmental Option - A New Jerusalem? (London, UKELA, 1987).

explored by the government⁸⁹ and is implicit in proposals for strategic environmental assessment. To date, however, integration in policy making has been pursued more enthusiastically by the European Community in their Fifth Environmental Action Programme and in draft proposals for environmental assessment of policies, plans and programmes.⁹⁰

Integrated Techniques of Environmental Law

It is important to take stock of the various integrated techniques of environmental law. Integrated Pollution Control has been established within a traditional pollution control strategy known as 'command and control'. As seen in the first part of the chapter, this approach was developed in the context of separate controls for air and water. Some of the limitations identified with the system of Integrated Pollution Control, notably the lack of convergence between institutions, arise from the inherent difficulties encountered with this approach. An appraisal of 'command and control' follows. This is contrasted with two other regulatory techniques: the use of economic instruments and procedural mechanisms such as environmental assessment.

(a) Integrated Pollution Control and 'Command and Control'

Regulation by 'command and control' is characterised by institutional measures which aim to direct or influence behaviour towards the environment by controlling the use of

⁸⁹ HM Government, Policy Appraisal and the Environment (London, HMSO, 1992)

⁹⁰ Commission of the European Communities, Draft Proposal for a Directive on the Environmental Assessment of Policies, Plans and Programmes XI/194/90-EN-REV 4, 4.6.1990 (Brussels, Commission of the European Communities, 1990).

processes or products, limiting the discharge of specific pollutants, or restricting activities to certain times or areas. The key characteristic of this approach is the ability to influence behaviour by administrative mandate, reinforced by criminal sanctions. The approach relies upon the setting of environmental standards - specific limits on the permissible amount of pollution allowed by law.⁹¹ When contained in legislation, such standards constitute a formal definition of unlawful conduct. Compliance with the permissible amount of pollution is monitored and enforced by an administrative body.⁹² This is a form of direct and specific regulation: it involves specifying a desired parameter of environmental quality, behaviour or technology and detecting and sanctioning deviations from this; the expected value of a penalty exceeding the cost of compliance. The system of Integrated Pollution Control conforms to this pattern; with the additional requirement that the effects and transfers of pollutants between environmental media are predicted and evaluated according to the related concepts of the best practicable environmental option and the best practicable techniques not entailing excessive cost.

The 'command and control' method uses environmental quality objectives as guides with which to set specific environmental standards. Environmental quality objectives provide policy makers with a basis for action and offer guidance as to the desired quality of the environment. In formulating environmental quality objectives, an assessment is made of future impacts on the environment based upon current knowledge of the effects of certain pollution levels. The development of environmental quality objectives as a planned, strategic

⁹¹ See G. Richardson, A. Ogus and P. Burrows, Policing Pollution (Oxford, Clarendon, 1983), at pp. 35-40.

⁹² Ibid., pp. 40-48.

response to pollution - 'a goal for the future quality of the environment'⁹³ - was late, the first formed by the Royal Commission on Sewerage Disposal in 1912.⁹⁴ Environmental quality objectives have generally not been implemented formally in legislation, a reluctance attributed to a peculiarly British tendency not to incorporate general, abstract objectives in statutes.⁹⁵

Within a framework provided by environmental quality objectives, standard setting provides specific limits on the permissible amount of pollution and in this way constitutes a formal definition of unlawful conduct.⁹⁶ There are two classes of environmental standard: ambient and receptor standards, and emission standards. First, ambient and receptor standards do not limit the activities of the polluter in terms of pollution discharged into the environment, but rather aim to limit the adverse effects of those discharges on the environment. An ambient standard sets a maximum pollutant concentration permitted in the environment at a given place. It constitutes a 'secondary standard' since it is not applied directly to individuals or companies but instructs those who regulate pollution discharges in order that an aggregate limit of pollution is not exceeded in an area. The use of ambient environmental standards has not generally found favour in the United Kingdom, partly because of arguments that the effects of pollutants are not sufficiently well understood to

⁹³ Ibid., p. 32.

⁹⁴ Royal Commission on Sewage Disposal, Eighth Report, Standards and Tests for Sewage and Sewage Effluents Discharge into Rivers and Streams (1912) Cmnd. 6464, stated that inland waters should not have a biological oxygen demand of more than two parts per 100,000.

⁹⁵ Richardson et al, Op.cit., at p. 34; for example, statutory water quality objectives have yet to be set under Part III of the Water Resources Act 1991 .

⁹⁶ Ibid., at pp. 35-40.

specify statutory concentration levels.⁹⁷ Also within this class, receptor standards are applied directly to an individual discharger and assert liability for causing perceptible harm to the environment. Such standards were first applied in the Nuisance Removal Acts of 1846 and the Public Health Act 1848 and reflect a historical concern with prohibiting 'nuisance' and conditions prejudicial to public health rather than with the deterioration of the environment as such.

Second, emission standards aim to control discharges, rather than their harmful effects. The development of this type of standard arose from a recognition that protection of the environment requires controls on sources of pollution which was made possible by advances in scientific understanding of the causes of environmental harm and the development of abatement techniques. As Richardson et al point out, the scientific basis of early emission controls was rudimentary: the Smoke Abatement (Metropolis) Act 1853, which aimed to control dark smoke, relied upon a subjective judgment of when it was indeed 'dark'. Emission standards later attempted to control the noxious matter of a discharge.⁹⁸

The statutory standard constitutes a formal definition of unlawful conduct which may take a number of forms.⁹⁹ For example it may define unlawful conduct by means of an absolute prohibition as was the case in sections 5 and 6 of the Rivers (Pollution Prevention) Act 1876. As discussed above, the absolute nature of this was tempered: the statute aimed

⁹⁷ Ibid., p. 36.

⁹⁸ Further types of standard aim to control, not the discharge, but industrial processes by setting specifications as to the construction of a plant, how it is to be used and more specifically, the type of fuel to be used and abatement methods to be employed; product specification standards similarly aim to protect against damage occurring.

⁹⁹ Ibid., pp. 40-48.

to prohibit all forms of pollution but limited the circumstances in which the prohibition might be enforced by the requirement that the Local Government Board consented to the prohibition having satisfied itself that means for rendering the pollution harmless were 'reasonably practicable' and no material injury would be inflicted by such proceedings on the interests of the local manufacturing industry.

The statutory standard may also define unlawful conduct by setting a precise legislative definition of unlawful conduct rather than the absolute prohibition. As described above, the earliest example of such a standard is found in the Alkali Act 1863, which required 95 per cent condensation of muriatic acid, and in the later Clean Air Acts 1956 and 1968. Hostility to this form was expressed by the Royal Commission on Environmental Pollution in their Fifth Report.¹⁰⁰ Setting a precise legislative standard is an attempt to regulate by means of a uniform, generally applicable rule. This may be inflexible and fail to take account of favourable or unfavourable local conditions. In contrast, legislative standards may take the form of an imprecise definition of unlawful conduct. In this case, a receptor standard is imposed and the discharger is made liable for causing perceptible harm to the environment. In the case of statutory nuisance, the primary duty to enforce is vested in the local authorities, but 'any person aggrieved' by the nuisance may bring criminal proceedings.¹⁰¹ Within this category of imprecise standards, an exemption may be given where the discharger uses the 'best practicable means' to prevent the escape of pollutants or render them harmless.

¹⁰⁰ *Ibid.*, p. 42.

¹⁰¹ Section 70 Environmental Protection Act 1990.

The final form of legislative standard is that of a prohibition of discharges coupled with an exemption from criminal liability for those acting with a consent or licence issued by the relevant authority. This technique was employed in section 7 Rivers (Prevention of Pollution) Act 1951 and reenacted in the Control of Pollution Act 1974¹⁰² and Part I of the Environmental Protection Act 1990. Criminal liability attaches in the event that conditions under which consent or a license is granted are contravened. It is considered that the combination of a legislative prohibition and a formal delegation of exemption allows for local conditions, particularly the assimilative capacity of the local environment, to be taken into account.

Regulation by the 'command and control' approach is often accompanied by problems of enforcement due, in part, to the often limited resources of the responsible agencies, but also by the exercise of discretion by an agency. Writing in the 1980s, Richardson, Ogus and Burrows¹⁰³ described the 'selective enforcement' of law by water authority officers. The approach also provides little incentive (other than avoiding sanctions) for research and development of technologies that might reduce pollutants below the set standard or individual consent.

The development of this approach to regulating pollution has taken place against a background of political and legal debate about the meaning and legal implications of the concept of 'sustainable development' which arose from the Report of the World Commission

¹⁰² Sections 31-4, 34-43 Control of Pollution Act 1974.

¹⁰³ Richardson, Ogus and Burrows, Op.cit.: similar conclusions are drawn by K. Hawkins, Environment and Enforcement: Regulation and the Social Definition of Pollution (Oxford, Oxford University Press, 1982).

on Environment and Development, Our Common Future, in 1987.¹⁰⁴ One effect of the debate has been to broaden the scope of law relating to the environment beyond pollution control to encompass nature conservation. However, the 'command and control' method remains restricted to controlling pollution because of the specificity of environmental quality standards and the difficulties in formulating more abstract and often more complex objectives, for example the preservation of a landscape or conservation of a habitat. In practical terms, a method which relies upon a combination of standard setting and criminal sanctions for deviations from an environmental quality or emission standard is unable to deal adequately with pollution arising from non-point sources such as nitrate from agricultural sources.

(b) Economic Instruments

Environmental protection approaches have been developed which are based on different conceptual premises to 'command and control'. One such approach is the use of economic, or market instruments, such as charges on pollution, tradeable permits and environmental taxes. Economic instruments are characterised by a financial component and reliance upon the market. Their use is one aspect of the application of economic analysis to environmental policy, one aim of which is to encourage a monetary evaluation of the costs and benefits of alternative action with the expectation that less environmentally harmful alternatives might be chosen.¹⁰⁵ Unlike 'command and control' mechanisms, economic

¹⁰⁴ World Commission on Environment and Development, Our Common Future (Oxford, Oxford University Press, 1987).

¹⁰⁵ See generally R. H. Tietenburg, 'Economic Instruments for Environmental Protection', in D. Helm (ed.) Economic Policy Toward the Environment (Oxford, Blackwell, 1991)

instruments are premised upon choice: a course of action having public effects is chosen on the basis of private motivation. Their use emphasises the liberalisation of a more traditional regulatory approach described above and a greater reliance upon the market to achieve 'optimal' levels of pollution.

Practical problems have been identified with this form of regulation. In the Royal Commission on Environmental Pollution's Sixteenth Report on Freshwater Quality (1993),¹⁰⁶ studies showed that the introduction of pollution charges in place of discharge consents was made difficult by a lack of information about company investment in pollution abatement equipment. The successful introduction of tradeable pollution permits was also hindered by a distinct lack of competitive conditions and by the prospect that firms might hoard permits for strategic reasons.¹⁰⁷ The Royal Commission concluded that pollution charges and tradeable permits were insufficient to protect freshwater quality alone: 'the role of any market mechanism should therefore be to reinforce the regulatory system to ensure that it works as cost-effectively as possible and the choice (of instrument) should fall on a mechanism which could stand alongside a traditional regulation-based ('command and control') system'.¹⁰⁸

Ideological concerns with the use of economic instruments include the desirability of 'valuing the environment' and the translation of this value into a price consideration. In his

¹⁰⁶ Royal Commission on Environmental Pollution, Sixteenth Report, Freshwater Quality. Cmnd. 1966 (London, HMSO, 1993) chapter 8.

¹⁰⁷ Ibid., p. 146.

¹⁰⁸ Ibid., p. 147.

critique of environmental management, Redclift argues that the use of such instruments mediates basic contradictions in industrial society between environmental protection and economic concerns since environmental criteria may be 'priced' or commoditised and legitimately balanced against economic considerations.¹⁰⁹ In his view, economic instruments present a facade of techniques for environmental growth which effectively obscure the need for environmental protection policies.

(c) Procedural Mechanisms

A further regulatory approach is the imposition of procedural requirements. This approach forms the focus of the thesis. The aim of procedural mechanisms is to introduce information about environmental impacts into decision making processes with the expectation that less environmentally harmful decisions might be taken, but without regulating the outcome. Environmental assessment provides a typical example. Its essence is a formal requirement that the environmental effects of a development proposal are analysed. There is an informal expectation that the gathering and consideration of information on the environmental effects of development by an administrative body or developer will lead to the least environmentally damaging option being chosen.¹¹⁰ To the extent that the procedural approach aims to direct decision making, it resembles the use of economic instruments. However, it differs in that the decision maker may be a public regulatory body as well as a private developer or polluter.

¹⁰⁹ M. Redclift, Sustainable Development: Exploring the Contradictions (London, Routledge, 1989), chapter 6.

¹¹⁰ S. Taylor, Making Bureaucracies Think: The Environmental Impact Assessment Strategy of Administrative Reform (Stanford, Stanford University Press, 1984) pp. 295-6.

Procedural mechanisms, such as environmental assessment, are a form of indirect regulation which often work within traditional regulatory systems such as planning. The approach compares markedly with regulation by the imposition of direct standards which typifies the 'command and control' approach. However, as a 'horizontal' or cross sectoral measure, environmental assessment has a conceptual affinity with the system of Integrated Pollution Control: environmental assessment lies on the border of planning and pollution control administrations; Integrated Pollution Control across the traditional administrative boundaries of pollution control agencies. It is significant that, unlike the law on control of pollution, environmental assessment takes account of a wide range of issues involved with the environment. The role of environmental assessment as a regulatory mechanism and the extent to which it overlaps with the system of Integrated Pollution Control are taken up in more detail in Part II.

Conclusions: Towards Integration of Pollution Controls

The development of pollution controls in the nineteenth century and in the context of the Industrial Revolution was a reaction to problems in particular sectors and motivated by specific public health problems. This development was influenced by a specific blend of factors: the balance between central and local government, the justifications for interference with private property and the freedom of trade, hitherto upheld by the courts, and the reliance on legislation to supplement actions and prosecutions at law. The law and administration of pollution controls in this period shaped the structure and content of modern environmental law. The most enduring characteristic is the fragmented administration of environmental law, with an array of bodies having environmental responsibilities and

exercising powers of pollution control in separate sectors. A departure from sectoral controls by the development of a system of Integrated Pollution Control is an important advance in giving effect to the concept of best practicable environmental option which takes account of the environment as a whole, and in terms of triggering institutional reforms which reflect this understanding. Such is the significance of this concept in the development of environmental law that acceptance of its conceptual premise may be seen outside the arena of pollution control, most clearly in the planning system in the form of environmental assessment. In this context, environmental assessment is a dynamic and proactive technique which will facilitate a broader approach to environmental concerns.

In Part II, I intend to explain the law and procedures of environmental assessment. In chapter 4, I discuss the development of environmental assessment as a technique of environmental law by the European Community and the legal form that environmental assessment takes in Council Directive 85/337. In contrast to the development of pollution controls in the United Kingdom, the European Community's environmental policy has developed relatively unrestricted by traditions of environmental protection and techniques of pollution control, and according to quite different conceptual premises. This has led to distinct and novel legal approaches and techniques for protecting the environment, for example, the European-style emission standards defined with reference to 'permissible maximum concentrations of substances' and 'quality objectives' which differ markedly from the flexibility of traditional standard-setting in Britain. In chapter 5, the manner and legal effects of the Directive's implementation in the town and country planning system in England and Wales is explained, illustrating the combination of European techniques of environmental law with those already existing in the United Kingdom.

PART II ENVIRONMENTAL ASSESSMENT: THE LAW AND PROCEDURES

Having discussed an overview of environmental assessment and reviewed the development of integrated techniques of environmental law in Part I, in Part II I now turn to explain and examine the law and procedures of environmental assessment. This part consists of two chapters. In chapter 4, I explain how the European Community has shaped the development of environmental assessment in the form of Council Directive 85/337. I examine the origin, scope and procedures of the Directive and locate it within the environmental law and policy of the European Community. I also give an overview of the implementation of Council Directive 85/337 in the Member States of the European Union.

The focus of chapter 5 is how Directive 85/337 was implemented in the town and country planning system in England and Wales. I first outline the town and country planning system and discuss the methods of environmental assessment which existed prior to the implementation of Directive 85/337. I describe how the aims of the Directive were incorporated into existing planning procedures thus enabling relevant information on the effects of development on the environment to be considered as part of the planning process. I summarise by presenting the legislative framework of environmental assessment and examining the significance of combining 'indigenous' methods of assessment and a European model of environmental assessment in the planning system.

Chapter Four Environmental Assessment and Council Directive 85/337

Introduction: Environmental Assessment and European Community Environmental Law

Environmental assessment originated in the United States. In the United Kingdom, the form of environmental assessment and its development under a statutory framework has been strongly influenced by the European Community and presently constitutes a central part of the European Community's environmental law and policy.¹ The purpose of this chapter is to explain the legal form environmental assessment takes in Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment,² and to give an overview of the legal effect, implementation, and enforcement of the Directive throughout the Community. This provides the legal and policy background to the study of the application of the Directive in the United Kingdom in Part III. First it is necessary to set out briefly the background of the European Community's involvement with environmental assessment and the sources and principles of Community environmental law having relevance for environmental assessment.

¹ This chapter examines the European Community's environmental policy as one part of the wider European Union's activities. In terms of nomenclature, when referring to the sum of its activities and competencies, the term 'European Union' is used; when describing activities falling specifically within the Treaty of Rome as amended, namely environmental protection, the European Community (EC) is preferred.

² Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ L 175, 5.7.85, p. 40.

(a) European Community Environmental Law and Policy

The question arises as to how environmental policy and law has been developed within the Community.³ In this part of the thesis a brief explanation is given of Community environmental law as a background to discussion of Council Directive 85/337. Prior to the establishment of the European Economic Community in 1957, there were few international measures relating to environmental protection. The most notable were the Convention for the Preservation of Wild Animals, Birds and Fish in Africa 1900⁴ and the 1902 Convention for the Protection of Birds Useful to Agriculture.⁵ It was not until the 1972 United Nations Stockholm Conference on the Human Environment, convened following a General Assembly Resolution in 1968, that the impetus for international environmental measures gathered speed. The Conference produced a Declaration of principles and an action plan for environmental protection which highlighted the problem of acid rain in Europe. Influenced by the Stockholm Declaration, the Heads of Member States of the Community declared the establishment of a European Community environmental policy in 1972. The United Nations Declaration stated that 'economic expansion is not an end in itself...rather its aim is to reduce disparities in living conditions and to improve the quality and standard of living'. In

³ On this development, see generally, E. Rehbinder and R. Stewart, 'Legal Integration in a Federal System: European Community Environmental Law', (1985) Vol. 33 AJCL 371-447; A. Haagsma, 'The EC's Environmental Policy: A Case Study in Federalism', (1989) Fordham Int. L.J. Vol. 12, 311; P. Sands, 'Evolution of a Regional Regime of International Environmental Protection', (1991) Yale L.J. Vol. 100, 2513-2523; O. Lomas, 'Environmental Protection, Economic Conflict and the European Community', (1988) McGill L.J. 506-539; and D. Freestone, 'EC Environmental Policy and Law', (1992) JLS Vol. 19, Special Issue: 'Environment, Law and Policy', 135-172.

⁴ (1900) 188 Parry 418.

⁵ 30 Martens (2d) 686.

response, the Commission drew up its first environmental action programme in 1973⁶ - a political declaration which provided the policy framework for action over the next four years. In the absence of an explicit legal base in the Treaty of Rome,⁷ the Commission relied upon a dynamic interpretation of the Treaty which gives 'the constant improvement of the living and working conditions of their peoples' as one of the Community's essential objectives. The Commission also relied upon Article 2 of the Treaty which declares the Community's tasks as promoting 'harmonious development', 'increased stability', 'raising the standard of living through the establishment of a common market and a programme of approximating Member States' economic policies'.

Competence in environmental matters was also assumed on economic grounds. A Council Declaration on the adoption of the First Environmental Action Programme (1973) stated that the establishment of the common market could not be realised without an effective campaign against pollution and nuisance and an improvement in the quality of life and protection of the environment. In particular, competition via the free movement of goods might be inhibited by Member States' differing product regulations set for 'environmental' reasons,⁸ and regulation of industrial processes, typically in the form of the imposition of conditions imposed on operating standards. This was confirmed by the judgment of the

⁶ First Action Programme on the Environment OJ C 112/1, 20.12.73 (Brussels, Commission of the European Communities, 1973).

⁷ Should a measure fall outside the Community's 'sphere of competence', the legal base requirement allows for legal challenge by Member States and Community institutions alike, under procedures set out in Articles 169, 173(2) and 215 of the Treaty of Rome (EC).

⁸ See Case 302/86, Commission v. Denmark [1988] ECR 4607, in which a prohibition on the importation of beer bottles to facilitate a deposit and return scheme was upheld by the European Court of Justice.

European Court of Justice in Case 91/79, Commission v. Italy⁹, that conditions relating to environmental protection 'may be a burden upon the undertakings to which they apply, and if there is no harmonisation of national provisions on the matter, competition may be appreciably distorted'.¹⁰

Direct sources of European Community environmental law were provided in 1986 with the insertion of Title VII on the Environment (Articles 130r-130t) into the Treaty of Rome by section 25 Single European Act 1986. The Title gave constitutional status to environmental policy in the Treaty, by confirming the Community's de facto competence in environmental matters and provided an explicit legal base for future European Community activity in this area.¹¹ Secondary legislation provides a further source of Community environmental law. This takes a number of forms, as listed in Article 189 of the Treaty of Rome. Regulations are directly applicable in Member States' legal systems. In contrast, directives usually require implementation in the legal systems of the Member States by legislation in order to give them legal effect. Secondary legislation must have as its base either a Treaty article or some other secondary act, itself based upon a Treaty article. The European Union Treaty confirms the constitutional status of Community's legal action on the environment and, for the first time, provides an implicit legal base for Community actions

⁹ Case 91/79, Commission v. Italy [1980] ECR 1099.

¹⁰ Case 91/79, Commission v. Italy [1980] ECR 1099, at 1106

¹¹ The Single European Act 1986 was concerned with environmental protection because of the distorting effects of differing national environmental laws on competition and intra-Community trade. A further influence was the likelihood of environmental harm caused by increased transportation, industrial restructuring and enhanced economic growth accompanying fulfilment of the internal market. Environmental policy, alongside social policy, came to be regarded by the Commission as a 'flanking' policy to complement the internal market. See N. Haigh and D. Baldock, Environmental Policy and 1992 (London, IEEP, 1989).

in town and country planning under Article 130s(2) EC¹² by specifying proposals which must be adopted by a unanimous vote in the Council. The previous reservation of land use planning as an area for exclusive competence of the Member States arose from an argument that, whilst having a bearing upon the physical environment, town and country planning has few direct transboundary effects. However, the European Commission has consistently countered this with a policy statement that land use planning has a clear effect upon environmental protection: 'the way in which land is used very largely conditions the quality of the environment...physical land use planning is one of the areas where a preventative environmental policy is necessary and very beneficial'.¹³

Objectives and Principles

The legal character, development, and operation of Community law was influenced by the dominant civil law tradition of the founding Member States which has legislation (the Code) or 'legislative positivism' at its base. A key characteristic of the civil law tradition is the purposive judicial interpretation of statutes, which tend to be marked by guiding objectives and principles.¹⁴ The pronouncement of objectives and principles of environmental law in the Treaty of Rome, as the basic source of Community competence, and the consequent teleological interpretation of the Treaty by the European Court of Justice accord with this tradition.

¹² The Treaty amends Article 130s EEC, requiring unanimous voting in Council, to provide that, subject to some exceptions, environmental measures may be adopted under Article 189c by a qualified majority.

¹³ Third Environmental Action Programme, OJ C 46/1, 7.2.1983.

¹⁴ J. Merryman, The Civil Law Tradition (Stanford, Stanford University Press, 2nd ed.) (1994) chapter 1.

The objectives of the Community's environmental policy, listed under Article 130r(1) are wide ranging: preserving, protecting and improving the quality of the environment; protecting human health; the prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems.¹⁵ A more detailed statement of the objectives of European Community environmental law is to be found in the five Environmental Action Programmes.¹⁶ The current framework of objectives is set out in the Fifth Programme, Towards Sustainability (1992).¹⁷ This departs from the previous Programmes by focusing on activities - industry, energy, transport, agriculture and tourism - rather than environmental media and in its concern with sources rather than receptors of pollution.¹⁸ The Programme stresses the need for integration of environmental protection requirements into other policy areas, for example transport; a first step being environmental assessment of these areas.¹⁹

There are a number of relevant guiding principles of European Community environmental law, first espoused in environmental action programmes and since affirmed

¹⁵ The fourth objective was added to the Environment Title by the Treaty on European Union: on this objective see M. Hession and R. Macrory, 'Maastricht and the Environment Policy of the Community: Legal Issues of a New Environment Policy', in D. O'Keeffe and R. Twomey, (eds.) Legal Issues of the Maastricht Treaty (London, Chancery, 1994).

¹⁶ First Environmental Action Programme, (1973) OJ C 112/1, 20.12.1973; Second Environmental Action Programme, (1977) OJ C 139/1 17.5.1977; Third Environmental Action Programme, (1983) OJ C 46/1, 7.2.1983; Fourth Environmental Action Programme, (1987) OJ C 328/1, 19.10.1987; Fifth Environmental Action Programme, (1993) OJ C 138, 17.5.1993.

¹⁷ Fifth Environmental Action Programme, Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, COM (92) 23 final.

¹⁸ Ibid., Vol. II, at 6.

¹⁹ Ibid., at 7-8.

in Treaty articles and case law of the European Court of Justice and which are central to environmental assessment.²⁰ The precautionary principle is of primary importance. Following amendment of the Environment Title of the Treaty of Rome by the European Union Treaty, Article 130r(2) establishes that environmental policy is to be based on this principle'. The precautionary principle reverses the traditional understanding that environmental damage must be proved before action is taken; instead, only when there is sufficient proof that no environmental damage will occur should there be failure to take action. The principle clearly applies to the promulgation of anticipatory measures, as confirmed by the European Court of Justice in Case C-2/90, Commission v. Belgium ('Wallonian Waste')²¹. Four other principles of European Community environmental law can be identified: the principle of preventing pollution rather than remedying its effects;²² the 'polluter pays principle',²³ that is the cost of preventing and eliminating nuisances must be borne by the polluter; the principle of subsidiarity, which is the establishment of the 'appropriate level' of action in each category of pollution;²⁴ and the principle that environmental protection requirements must be integrated into the definition and implementation of Community policies.

²⁰ N. Haigh, Manual of Environmental Policy: The EC and Britain (London, Sweet and Maxwell, 1992), para 2.4 summarises these principles.

²¹ Case C-2/90, Commission v. Belgium ('Wallonian Waste') [1992] Water Law 171, in which it was decided that wastes should be disposed of as close to their place of origin as possible in order to reduce the possibility of harm occurring.

²² Article 130r(1) EC.

²³ Article 130r(1) EC.

²⁴ The principle of subsidiarity was elevated to a general principle of European Community law (Article 3b EC) by the European Union Treaty.

(b) Council Directive 85/337

(i) Origins

Directive 85/337 has a long history. The European Economic Community made a policy commitment in the First Action Programme on the Environment adopted in 1973²⁵ 'to ensure that more account is taken of environmental aspects of town planning and land use' and, in broader terms, 'to evaluate the effects on the quality of life and on the national environment of any measure adopted or contemplated at national or Community level and which is liable to affect these factors.' The European Parliament advocated the use of environmental assessment in 1974.²⁶ Provision for introducing environmental assessment at Community level was made in 1976 by the Council of Ministers on the basis of proposals made by the European Commission. A Draft Directive was published in 1980.²⁷ The rationale for the Draft Directive was given in its preamble: 'beyond environmental protection...significant divergence in the principles and criteria of assessment existing at present in the Community may well produce disparities in investment conditions between one region of the Community and another and thus create distortion of competition with negative effects on the functioning of the Common Market.' The Draft Directive included provisions on post

²⁵ (1973) OJ C 112/1, 20.12.1973.

²⁶ OJ European Parliament, 13.12.74.

²⁷ EC Draft Directive on Environmental Assessment 7972/80 COM(80)313 final.

assessment monitoring and the supervision of conditions made following environmental assessment.²⁸

The legislative passage of Directive 85/337 was lengthy. The Commission's arguments about the effects of diverse assessment regimes on competition and pollution throughout the European Economic Community were not fully recognised; town and country planning was regarded as a prime example of an area where competence should be reserved exclusively for Member States. The result was an emasculated Draft Directive: the list of projects to which the Directive was applicable was shortened; it no longer applied to plans, programmes and policies as argued for strongly by the European Parliament, but only to development projects and there was no requirement as to post-assessment monitoring or the supervision of conditions arising from the assessment process. Most significantly, the explicit duty on the local planning authority to conduct the environmental assessment was replaced with a more ambiguous statement of the division of responsibility between the developer and the planning authority.²⁹ Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment³⁰ was finally adopted by

²⁸ Significantly, the House of Lords Select Committee on the European Communities, Eleventh Report, Environmental Assessment of Projects. Session 1980-81, (London, HMSO, 1981) paras. 77 and 78, considered that the requirement that the local planning authority make a periodic check on conditions attached to planning permission are being complied with, be amended: 'the further measures being proposed in the Directive should be dealt with under specific legislation, such as pollution control legislation, rather than through the planning system'.

²⁹ On this point, see W. Sheate and R. Macrory, 'Agriculture and the EC Environmental Assessment Directive: Lessons for Community Policy-Making', (1989) JCMS Vol. 28, No. 1, 68-81.

³⁰ OJ L 175, 5.7.1985.

Council of Ministers of the European Economic Community on 27 June 1985 and notified to all Member States on 3 July 1985.³¹

(ii) Scope of Directive 85/337

Unlike the environmental assessment procedure established in the United States by the National Environmental Policy Act (NEPA) 1969 which was concerned with federal projects and policies, Directive 85/337 applies to both public and private development projects. Directive 85/337 distinguishes between two classes of project. For those listed in Annex I, environmental assessment is a mandatory requirement.³² Annex I includes major projects such as large power stations, nuclear installations for the management of hazardous and radioactive waste, and the construction of major oil refineries. The second category, Annex II projects, must have an environmental assessment only 'where member states consider that their characteristics so require',³³ which grants considerable discretion to Member States. Member States may prescribe thresholds and criteria to determine which of the projects falling under Annex II are to be subject to an assessment.³⁴ Article 2 sets out broad guidelines on whether the particular project 'is likely to have a significant effect on the environment by virtue of inter alia its nature, size or location'. The list of projects in Annex II includes those relating to mining and energy projects, metal processing, agricultural development, chemical manufacturing and food production, textile, leather and wood

³¹ Article 12.

³² Article 4(1).

³³ Article 4(2).

³⁴ Article 4(2).

industries and a host of infrastructure projects including the construction of roads, harbours and urban development projects.

(iii) The Procedure Under Directive 85/337

The assessment procedure in Directive 85/337 is divided into three separate stages. First, the public or private developer must provide written information. This must include 'at least' a description of the nature of the project; the measures envisaged 'in order to, and if possible, remedy significant adverse effects'; data required to identify and assess the main environmental effects of the project; and a non-technical summary of the information described above.³⁵ Following the list provided in Article 4, the developer will identify, describe and assess the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate, landscape and the interaction between the above factors, and the effects on material assets and the cultural heritage. The developer might also supply additional information specified in Annex III of the Directive such as a more comprehensive description of the project and of forecasting methods used to assess the effects on the environment.³⁶ The Directive allows Member States considerable discretion in regard to this type of further information: for example it might be required in so far as it is considered 'relevant to a given stage in the consent procedure'. Any authorities with relevant information in their possession must make this available to the developer.³⁷

³⁵ Article 5(2).

³⁶ Article 5(1).

³⁷ Article 5(3).

The second stage involves consultation by the 'competent authority' with 'public bodies likely to be concerned by the projects by reason of their specific environmental responsibilities'.³⁸ This focuses upon information supplied by the developer. The environmental statement must be made available to the 'public concerned'; and they must be given an opportunity to express their opinions on it.³⁹ Member States are given discretion to determine who are the 'public concerned', the details of the consultation arrangements and the way in which the public are to be informed.⁴⁰

At the final stage, the 'competent authority' is obliged to take account of the environmental statement issued by the developer and the result of the consultation in the development consent process.⁴¹ Directive 85/337 does not set out the form this 'assessment' should take, for example a written report or a mental exercise. The Directive suggests that a duty is placed on the local planning authority to conduct an assessment: '...this assessment must be conducted by the 'competent authority' on the basis of the appropriate information supplied by the developer'.⁴² As an example of procedural law, the Directive sets out rules by which information about the environmental effects of development enters the decision making process in the planning system, but does not specify the manner in which the information is to be balanced against other information, typically

³⁸ Article 6.

³⁹ Article 6(2).

⁴⁰ Article 6(3).

⁴¹ Article 8.

⁴² Ninth recital, Preamble to the Directive; to be read in conjunction with Article 5 and Article 8 of the Directive.

that relating to the economic significance of a project. The Directive also remains silent as to the weight that should be given to the information collected under the previous stages.

Directive 85/337 does not allow for a generally enforceable right to disclosure of information and it does not affect limitations to disclosure under national legislation which relate to commercial and 'public interest' confidentiality.⁴³ A further important omission is that there is no provision requiring the monitoring of actual effects of a development project on the environment, only those predicted during the assessment process.

(iv) Proposals for Amending Directive 85/337

To date the Community has kept the operation of Directive 85/337 under review. Its findings are that the Directive has been applied in a pragmatic way. As discussed briefly in chapter 1, the European Commission's five year review of the implementation and operation of Directive 85/337⁴⁴ has formed the basis of a Proposed Directive for amending Directive 85/337, expected to come into force by June 1996.⁴⁵ Of particular interest here are those amendments which would form a departure from existing practice in the United Kingdom. These are that competent authorities would be obliged to take account of the information on

⁴³ Article 10.

⁴⁴ Commission of the European Communities, Report from the Commission on the Implementation of Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment (Vol. 12 Annex for the United Kingdom; Vol. 13 for all Member States) COM(93) 28, 2.4.1993 (Brussels, European Commission, 1993).

⁴⁵ Commission of the European Communities, Proposal for a Council Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

environmental impacts obtained in the course of the procedures and to publish not only their decisions on development consent, but also to give the 'reason and considerations' on which they based a decision to refuse consent or, alternatively, to grant consent 'despite receiving unfavourable opinions from statutory consultees or the public'.

The Commission proposes to clarify the circumstances under which Annex II projects (which require environmental assessment only where the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location) should be subject to an assessment. The Commission proposes to do this by introducing a 'screening' procedure. First, an Annex II proposed project would always require environmental assessment if it is liable to have a significant effect on special protection areas designated by Member States pursuant to Community law. This would include those areas designated under the Directive on the Protection of Wild Birds⁴⁶ and the Directive on the Conservation of Habitats.⁴⁷ Second, for all other Annex II projects, the 'competent authority' would have to determine the applicability of environmental assessment rules and therefore whether the environmental impact is likely to be 'significant' on the basis of thresholds set by the Member States and selection criteria laid down in a new Annex IIa. Annex IIa falls into two parts: authorities would have to consider the characteristics of the project itself, for example, its size, resource consumption, waste generation and impact on cultural and historical heritage. Authorities would also take account of the sensitivity of the

⁴⁶ EC Directive 79/409 on the Conservation of Wild Birds, OJ L 103, 27.4.1979.

⁴⁷ EC Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206, 22.7.1992.

environment liable to be affected by the project, for instance if it was an area where any European Community environmental quality standards were already being exceeded.

The Commission's proposes also to introduce an extra 'scoping' requirement. This imposes a duty on the competent authority to define in advance which of the information in Annex III of the Directive should be provided by the developer. This will be done with the agreement of other interested authorities, for example statutory consultees and in consultation with the developer.

(v) Environmental Assessment in European Community Environmental Law: An Evaluation

The United Kingdom experience of environmental assessment is discussed in detail in chapter 5. Taking a broader view here, environmental assessment has become central to the European Community's environmental law for a number of reasons. First, the principal rule in Directive 85/337, that the effects of development be considered prior to the granting of development consent, embodies the precautionary principle and the principle of preventing pollution. The planning and design of a development therefore become the focus of control. Providing information about the effects of development at this early stage in the planning process lends a possibility of imposing conditions about siting and mitigation prior to harm occurring: environmental harm might in this way be prevented or controlled at its source. Second, by providing a framework for decision making within which Member States may exercise their discretion about whether an assessment is required in the case of Annex II projects, Directive 85/337 appeals to the principle of subsidiarity. This principle regulates the exercise of competencies and powers attributed to the Community in relation to the

Member States and, increasingly, local and regional authorities.⁴⁸ It asserts that 'a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more intermediate or local level'.⁴⁹ Subsidiarity favours non-centralisation; in the context of the European Union, the principle ensures political power cannot be taken from Member States' governments by the Union without common consent.

Directive 85/337 is also in line with the European Community's law on the regulation of land use.⁵⁰ Recently, this has been directed towards encouraging biodiversity and protecting rural environments. The most common technique is the designation of land for special protection. An early example is Directive 79/409 on the Conservation of Wild Birds⁵¹ which requires sufficient diversity of habitats to be provided, particularly through the establishment of protected areas. A similar approach is adopted in Directive 92/43 on the Conservation of Natural Habitats and of Wild Flora and Fauna⁵² which calls for a European ecological network of special conservation areas.

Most significantly, Directive 85/337 represents an approach to environmental protection which is integrated and preventative. The environmental laws of many countries,

⁴⁸ 'The Subsidiarity Principle', (1992) Bull. EC 10-1992, 116-126, at 116.

⁴⁹ This definition has been adopted by the House of Lords Select Committee on the European Communities, Report on Economic and Monetary Union and Political Union, Session 1989-90, 27th Report (London, HMSO, 1990), p. 14.

⁵⁰ For example, Directive on Mountain and Hill Farming and Farming in Certain Less Favoured Areas (75/268) OJ L 128 19.5.75; Regulation on Improving the Efficiency of Agricultural Structures (85/797) OJ L 93 30.3.85; and Regulation on Agricultural 'Set-Aside' (88/1094) OJ L 106 27.4.88, the latter having some environmental benefits.

⁵¹ OJ L 103, 27.4.1979.

⁵² OJ L 206, 22.7.1992.

and the European Community are often piecemeal. Such laws aim to provide environmental protection for a single environmental sector, for example air or water,⁵³ or a single industrial sector such as the titanium dioxide industry⁵⁴ as shown in table 4.1. As discussed in chapter 3, the difficulty which arises from such an approach is that many products or processes threaten most or all sectors and pose particular dangers of 'transsectoral' or cross-media environmental harm. In contrast, laws which are integrated or 'horizontal' can regulate these processes and products directly at source rather than through the protection of target sectors.⁵⁵

Directive 85/337 represents such an integrated approach to environmental protection by requiring that the direct and indirect effects of a project on soil, water, air, climate and the landscape, human beings, flora and fauna and the interaction between these be assessed.⁵⁶ A common technique of integrated and preventative laws is the generation of information on industrial activities in the expectation that environmental groups and others will use this information in demanding from industry and enforcement agencies more effective application of environmental law. This approach is clearly adopted in Directive 85/337. The principal rule in the Directive, that the effects of development will be assessed before development consent is granted, feeds an expectation that information from this process will have an impact on decision making. The approach is also apparent in Directive

⁵³ Unlike air and water, there are very few laws directly addressing soil pollution.

⁵⁴ Directive 78/176 on Waste from the Titanium Dioxide Industry, OJ L 54, 25.2.1978.

⁵⁵ See discussion of 'transsectoral' controls in S. Kiss and D. Shelton, Manual of European Environmental Law (Cambridge, Cambridge University Press, 1993), Part III.

⁵⁶ Article 3.

Table 4.1. A Comparison of Sectoral and Integrated Controls in European Community Environmental Law

	Sectoral Controls ('vertical')	Integrated Controls ('horizontal')
Focus	<p>protection of specific environmental media</p> <p>control of a specific industry or industrial activity</p>	<p>reform of decision making processes</p> <p>public participation</p> <p>self-regulation</p>
Techniques	<p>environmental quality standards</p> <p>environmental emission standards</p> <p>administrative enforcement</p>	<p>procedural mechanisms</p> <p>environmental assessment</p> <p>freedom of information on the environment</p> <p>consultation</p>
Characteristics	<p>precise</p> <p>quantifiable</p> <p>substantive</p>	<p>abstract</p> <p>procedural</p>
Example	<p>Directive 76/464 on Pollution Caused by Certain Dangerous Substances¹</p>	<p>Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment²</p>

¹ OJ L 129, 18.5.1976.

² OJ L 175, 5.7.1985.

90/313 on Freedom of Access to Information on the Environment,⁵⁷ Regulation 92/880 on a Community Eco-Labeling Scheme,⁵⁸ and Regulation 93/1836 on the establishment of an Eco-Management and Auditing Scheme.⁵⁹ These measures form part of the European Community's strategy to encourage compliance and enforcement by bypassing national authorities and harnessing public participation and consumer choice.⁶⁰

The integrated and preventative nature of Directive 85/337 is representative of a radically different approach than that adopted in laws which have as their objective protection of a single environmental sector, or the control of discrete industrial sectors. Sectoral laws represent the Community's early response to environmental problems. The main techniques of the sectoral approach are administratively enforced emission standards, and the establishment of environmental quality standards. In terms of preventing water pollution, the primary legal instrument is Directive 76/464 on Pollution Caused by Certain Dangerous Substances Discharged into the Aquatic Environment of the Communities.⁶¹ The two techniques of establishing emission standards and fixing water quality standards for certain substances are combined in this Directive: on emission standards, Directive 76/464 prohibits certain discharges into fresh, marine and ground waters and regulates others. The Directive also requires that member States establish environmental quality standards, which set an admissible level of a given pollutant in water, rather than setting emission limits for each

⁵⁷ OJ L 158 23.6.90.

⁵⁸ OJ L 99 11.4.92.

⁵⁹ OJ L 168, 10.7.93.

⁶⁰ R. Hunter, 'EU Eco-Management and Auditing Regulation', (1994) Bureau of National Affairs 9 February. 142-149.

⁶¹ OJ L 129, 18.5.1976.

source of pollution. This second technique is also used in directives on water quality intended for drinking,⁶² human consumption,⁶³ bathing,⁶⁴ and for supporting fish life⁶⁵ and shellfish.⁶⁶ Air pollution is regulated on a similarly sectoral basis at Community level. The most widely adopted technique is to establish air quality standards. Directives currently set standards for sulphur,⁶⁷ lead⁶⁸ and nitrogen dioxide.⁶⁹ In addition, several directives are aimed at particular activities or installations. The first of these was Directive 84/360 on Combating Air Pollution from Industrial Plants⁷⁰ which makes a system of prior authorisation obligatory for certain installations, including mines, oil refineries and paper mills.

These sectoral or vertical controls deal with emissions or quality of the environment in separate environmental media and, in the case of the water directives, according to separate waters. The main approach is precautionary rather than trying to deal with problems as they arise. Having said that, the laws only affect industrial and other activities after the activities have begun and the preventative strategy of these sectoral Directives is

⁶² Directive 74/440 on the Quality of Surface Water for Drinking, OJ L 194, 25.6.1975.

⁶³ Directive 80/778 on the Quality of Water Intended for Human Consumption, OJ L 299, 30.8.1980.

⁶⁴ Directive 76/160 on the Quality of Bathing Water OJ L 31, 5.2.1978.

⁶⁵ Directive 78/659 on the Protection of Quality of Freshwaters Needing Protection and Improvement in Order to Support Fish Life, OJ L 222, 14.8.1978.

⁶⁶ Directive 79/923 on the Quality Required of Shellfish Waters, OJ L 281, 10.11.1979.

⁶⁷ Directive 80/779 on Sulphur Dioxide and Suspended Particulates, OJ L 229, 30.8.1980.

⁶⁸ Directive 82/884 on Limit Values for Lead in the Air, OJ L 884, 3.12.1982.

⁶⁹ Directive 85/203 on Air Quality Standards for Nitrogen Dioxide OJ L 87, 27.3.1985.

⁷⁰ OJ L 188, 16.7.1984.

limited by the focus on the effects of activities on separate environmental media. The Community made an explicit commitment to more integrated methods of pollution control in the Fourth⁷¹ and Fifth⁷² Action Programmes on the Environment and has proposed a Draft Directive on Integrated Pollution Prevention and Control.⁷³ Directive 85/337 foreshadows the approach taken in this draft Directive. In representing a departure from sectoral laws, environmental assessment demonstrates the development of new techniques of European Community environmental law - the use of procedural mechanisms combined with freedom of information on the effects of development on the environment and encouraging public participation.

Implementation and Enforcement of Directive 85/337

'Implementation', sometimes known as transposition, refers to the legal process of integrating Community principles into national law; by this process rights and duties contained in Community law are transferred to national legal systems and may be relied upon by individuals. The legal obligation upon Member States to give effect to Community law is then fulfilled. Implementation constitutes a meeting point between national law and legal

⁷¹ European Community, Fourth Environmental Action Programme OJ C 328, 7.2.87 (Brussels, Commission of the European Communities, 1987): 'The Community needs to move to increasingly strict environmental standards in all sectors...it is at least arguable that a sector by sector approach to pollution problems is not necessarily the most economically efficient solution'.

⁷² European Community, Fifth Action Programme on the Environment: Towards Sustainability - A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development OJ C 138, 17.5.1993 (Brussels, Commission of the European Communities, 1993).

⁷³ Draft Directive on Integrated Pollution Prevention and Control COM(93) 423 (Brussels, Commission of the European Communities, 1993).

traditions, and those of the Community; full and accurate transposition would make for uniform law throughout the Community. In the context of environmental law, the obligation to implement directives sometimes includes a duty on the part of the Member States to bring about beneficial changes in the physical environment, in addition to the more familiar obligation to transpose Community directives by enacting legislation.⁷⁴

The European Court of Justice has developed criteria for determining whether a directive has been fully implemented. For example, administrative measures such as circulars are regarded by the Court as inadequate means of transposing directives.⁷⁵ A particularly strong stance on the obligation to implement Community law was taken by the Court in Case C-361/88, Commission v. Germany.⁷⁶ when it upheld a complaint that Germany had failed to secure legislative implementation of European Community directives on air quality. Rejecting the defence that German legislation already conformed with the directives, the Court pointed out that implementation requires Member States to set in place a specific legal framework relevant to the Directive's subject matter to enable individuals to clearly recognise their rights and obligations under European Community law.

⁷⁴ Case C-337/89, Commission v. United Kingdom (1993) JEL Vol. 5, No. 2, 273, in which Advocate General Lenz classified the Drinking Water Directive's requirements in terms of a 'normal obligation' to implement the directive by domestic provisions, and a further 'obligation intended to bring about physical changes in the environment'. See R. Wagenbaur, 'The EC's Policy on Implementation of Environmental Directives', (1990) Fordham Int. LJ Vol. 14, 455.

⁷⁵ This was held to be the case in the environmental field in Case C-361/88, Commission v. Germany [1991] ECR I-2567.

⁷⁶ Case C-361/88, Commission v. Germany [1991] ECR I-2567.

Judging whether Directive 85/337 has been implemented correctly is difficult because many of the Directive's provisions confer discretionary powers to be exercised by Member States or competent bodies. For example, it is for the Member States to determine appropriate criteria and thresholds for whether projects listed under Annex II of the Directive should be the subject of an environmental assessment. These discretionary powers raise the question of whether their exercise should amount to a failure to implement Directive 85/337.⁷⁷ The European Court of Justice held this to be the case in the different context of designations under the Bathing Water Directive:⁷⁸ although discretionary, the United Kingdom's designations were successfully questioned by the Commission on the basis of the incorrect implementation of this Directive.⁷⁹

The implementation of Directive 85/337 throughout the European Community has been problematic. The Commission reported in 1992 that Directive 85/337 comprised the largest number of cases arising from the Commission's own investigations or complaints and that a large number of major construction projects, most frequently involving transport

⁷⁷ R. Macrory, 'The Enforcement of Community Environmental Laws: Some Critical Issues', (1992) CMLR Vol. 29, 347-369, at 358-60.

⁷⁸ Directive 76/160 on the Quality of Bathing Water, OJ L 31, 5.2.1976; Article 1(2) of the Directive defines 'bathing waters' as fresh or sea water in which 'bathing is either explicitly authorised by the Member States, or is not prohibited and is traditionally practised by a large number of bathers'. On this point, see A. Geddes, 'Implementation of EC Environmental Law: Bathing Water', (1994) JEL Vol. 6, No. 1, 125-135.

⁷⁹ Case C-56/90, Commission v. United Kingdom (1994) JEL Vol. 6, No. 1, 125; see similarly Case 322/86, Commission v. Italy [1988] ECR 3995, concerning the failure by Italy to designate waters under Directive 78/659 on the Quality of Freshwaters Needing Improvement or Protection in Order to Support Fish Life (OJ L 222, 14.8.1978) and under Directive 79/923 on the Quality Required of Shellfish Waters (OJ L 281, 10.11.1979).

infrastructure, have proceeded without regard to the Directive.⁸⁰ By 1993, the Commission reported that, whilst all Member States had transposed the Directive, cases had arisen on the grounds of failure to apply it properly. The latter has continued to be the case throughout 1994: the Commission reports that the 'lion's share' of infringement of Community environmental directives relate to Directive 85/337 and that failure to assess the impact of specific projects is the commonest subject of complaint to the Commission.⁸¹ There are particular difficulties with the implementation of the Directive as regards the types of project subject to its rules, the use of environmental assessment in public inquiries and evaluation by public authorities of environmental assessments carried out by those in charge of projects.⁸² Furthermore, assessments are carried out too late in the decision making process, are often of mediocre quality, and biased in favour of the project. The European Commission's proposed amendments to the Directive are, in part, a response to this implementation record.⁸³

⁸⁰ Commission of the European Communities, Ninth Annual Report to the European Parliament on Commission Monitoring and Application of Community Law OJ C 250/6, 28.9.1992 (Brussels, Commission of the European Communities, 1993) p. 150.

⁸¹ Commission of the European Communities, Eleventh Annual Report to the European Parliament on Commission Monitoring and Application of Community Law OJ C 154, 6.6.1994 (Brussels, Commission of the European Communities, 1994), at p. 45 et seq.

⁸² Commission of the European Communities, Report from the Commission on the Implementation of Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment COM(93)28, 2.4.1993 (Brussels, Commission of the European Communities, 1993).

⁸³ See also the Court of Auditors, Special Report 3/92 on the Environment; European Parliament, Report by the Committee on the Environment, Public Health and Consumer Protection on the Implementation of European Legislation on the Environment 6.1.1992 (Brussels, European Parliament, 1992).

The European Commission reported on the implementation of Directive 85/337 in 1993.⁸⁴ The main concerns over the transposition of the Directive's provisions are that different thresholds have been adopted by Member States to determine which particular projects should be subject to assessment under Annex II and those which need not be,⁸⁵ and that there is some variance in the coverage of environmental information required to be supplied by the developer.⁸⁶ Perhaps of most concern is the differing arrangements for review of that information supplied. In summary, whilst all Member States have made some legal provision relating to most of the Directive's articles, in a significant number of cases the Commission is of the view that they are deficient, particularly in respect of implementing provisions or criteria on information to be supplied by developers.

A summary of the state of implementation of Directive in 1995 is given in table 4.2.⁸⁷ As shown, a number of Member States, including the United Kingdom, the Netherlands and Italy have all received reasoned opinions from the European Commission against them in relation to the non-implementation of the Directive. The European Commission has a complaint filed against the United Kingdom government for infringement of the Directive in the case of one project. Luxembourg has been the subject of an adverse

⁸⁴ Commission of the European Communities, Report from the Commission on the Implementation of Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment (Vol. 12 Annex for the United Kingdom, Vol. 13 for all Member States) (Brussels, Commission of the European Communities, 1993).

⁸⁵ Ibid., p. 19.

⁸⁶ Ibid., p. 22.

⁸⁷ For a more detailed review of the state of implementation, see also Environmental Impact Assessment Centre, EIA Legislation and Regulations in the European Union (Manchester, University of Manchester, 1995) and A. Gilpin, Environmental Impact Assessment (Cambridge, Cambridge University Press, 1995).

Figure 4.2. Implementation of Council Directive 85/337 (1995)

Member State	Implementation	Legal Action
Belgium	Not fully implemented in Wallonia and Flanders	Article 169 action pending ¹
Denmark	National legal measures conform to the Directive	No legal action
Germany	Incomplete implementation; transitional arrangements problematic	177 Reference; ² Article 169 action pending ³
Greece	Not entirely transposed in proper form	Reasoned opinion
Spain	Annex II excluded; projects authorised without required assessment	Reasoned opinion
France	Not implemented	Reasoned opinion
Ireland	Partial conformity	Infringement proceedings initiated
Italy	Annex II wholly untransposed	Two reasoned opinions
Luxembourg	Partial conformity	Article 169 action ⁴
Netherlands	Partial conformity and problems in effective application	No legal action
Portugal	Improperly transposed	Reasoned opinion
United Kingdom	Partial conformity	Two reasoned opinions on pipeline cases; one withdrawn

¹ Case C-133/94, Commission v. Belgium (pending) for failure to implement Directive 85/337.

² Case C-396/92, Bund Naturschutz in Bayerne Ev and Others (1994) ENDS Report No. 237, 43, concerning the adequacy of transitional measures for environmental assessment in German law.

³ Case C-431/92, Commission v. Germany. pending.

⁴ Case C-313/93, Commission v. Luxembourg [1994] EnvLR 485.

Article 169 judgment brought by the Commission for failing to adopt within the prescribed period all measures necessary to comply with Directive 85/337 in Case C-313/93, Commission v. Luxembourg.⁸⁸ Germany has been the subject of two cases relating to the transposition of Directive 85/337. In Case C-396/92, Bund Naturschutz in Bayerne Ev and Others (1994),⁸⁹ a German court requested a preliminary ruling in order to clarify problems concerning the admissibility of transitional arrangements for projects which have already been announced but not yet implemented. In this, its first ruling on environmental assessment, the European Court of Justice adopted a strict approach to ensuring that Member States do not delay the implementation of Directive 85/337 which all Member States were expected to achieve by July 1988. The Court held that it is not permissible for transitional arrangements to remain in force after 3 July 1988, the deadline for transposition of the Directive. The second case on environmental assessment, pending before the European Court of Justice, Case C-431/92, Commission v. Germany, was brought by the Commission under the Article 169 infringement procedure and also relates to transitional arrangements; in this case for omitting to undertake a proper impact assessment before constructing a waste oils facility. Case C-133/94, Commission v. Belgium is pending before the European Court of Justice, brought for failure to implement Directive 85/337.

Similarly to most Community environmental law, Directive 85/337 takes the legal form of a directive. Although the result to be achieved by a directive is binding upon

⁸⁸ Case C-313/93, Commission v. Luxembourg [1994] EnvLR 485.

⁸⁹ (1994) ENDS Report No. 237, 43.

Member States, the manner in which that result is to be achieved is not.⁹⁰ This means that directives are not directly applicable in the Member States' legal systems: Member States are required to enact the necessary implementing measures to give effect to the directive. The legal form of the directive grants discretion to the member States to implement measures which they consider to be suitable for achieving the directive's results. This grant of discretion is considered vital for the preservation of existing administrative systems and flexible implementation of European Community law. However it also means that the implementation record of directives is worse than with regulations which are directly applicable in the Member States' legal systems.⁹¹

In general terms, environmental legislation has proved to be poorly implemented. The extension of qualified majority voting for most environmental protection measures contributes to this because Member States may be obliged to adopt and implement policies to which they will be opposed. This difficulty was foreseen in a Declaration annexed to the European Union Treaty which states 'each Member State should fully and accurately transpose into national law the Community Directives addressed to it within the deadlines laid down therein.' The House of Lords Select Committee on the European Communities⁹² attributes the difficulties in implementing environmental directives to the drafting of

⁹⁰ Article 189(3) EC states: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

⁹¹ See F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', (1993) *MLR* Vol. 56, 19-54.

⁹² House of Lords Select Committee on the European Communities, Ninth Report, Implementation and Enforcement of Environmental Legislation, Session 1991-1992 (London, HMSO, 1992) Volume I.

Community legislation in this area; the process of negotiation and adoption in the Council, and the differing styles and techniques of national legislation.

As a cross sectoral measure or 'horizontal' measure, Directive 85/337 required complex arrangements and cooperation between the planning and pollution control administrations to be made and involved changes to many regulations and consent procedures in the Member States. This characteristic is responsible partly for problems of implementation. Additionally, by the time Directive 85/337 was adopted, most Member States had established land use laws, including in some cases, procedures for predicting environmental effects of development proposals. One view is that these Member States found incorporating Directive 85/337 into existing procedures difficult. It appears that the Directive was more easily integrated in those Member States with less well established planning systems.⁹³ There is also an argument that town and country planning has great cultural importance for many Member States; non-implementation or incorrect implementation of Directive 85/337 might therefore represent continuing questions about the Community's competence to legislate in the field.

(a) Individual Protection and Environmental Assessment

The bumpy implementation record of Directive 85/337 in many Member States has led to the direct effect doctrine being applied to the Directive. This doctrine, developed by

⁹³ K. von Moltke, 'Environmental Impact Assessment in the United States and Europe', in B. D. Clarke et al, Perspectives on Environmental Impact Assessment (New York, Reidel, 1984), at 28.

the European Court of Justice in a line of cases,⁹⁴ confronts many of the limitations of the complaints and enforcement procedure by establishing that directives are capable of having direct effect (or 'automatic legal effect') in national courts where Member States have taken no, or insufficient, measures to transpose a directive's provisions into national law and where certain tests have been fulfilled. The criteria are set out in Case 152/84, Marshall v. Southampton and South West Hampshire Area Health Authority ('Marshall I'):⁹⁵

Whereas the provisions of a directive appear as far as their subject matter is concerned to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the state where the state fails to implement the directive in national law by the end of the prescribed period or where it fails to implement the directive correctly.

The direct effect doctrine was developed largely in the context of law relating to free movement of persons and equal treatment. Recognition of the direct effect of environmental directives such as Directive 85/337 has taken far longer; until recently, the emphasis on building a corpus of Community environmental law has meant that the role of the individual in monitoring and enforcing Community law had been barely examined.⁹⁶

The tests for direct effect pose a number of obstacles for plaintiffs seeking to rely on Directive 85/337. As a Directive which sets out a procedural framework for decision making

⁹⁴ Case 41/74, Van Duyn v. Home Office [1974] ECR 1337; Case 148/78, Pubblico Ministero v. Ratti [1979] ECR 1629; Case 8/81, Becker v. Finanzamt Münster-Innenstadt [1982] ECR 53 and Case 152/84, Marshall v. Southampton and South West Hampshire Area Health Authority ('Marshall I') [1986] ECR 723; on this development, see D. Curtin, 'The Effectiveness of Judicial Protection of Individual Rights', (1990) CMLRev Vol. 27, 709; J. Steiner, 'Coming to Terms with EEC Directives', (1990) 106 LOR 144.

⁹⁵ Case 152/84, Marshall v. Southampton and South West Hampshire Area Health Authority ('Marshall I') [1986] ECR 723, at 748.

⁹⁶ L. Krämer, Focus on European Environmental Law (Sweet and Maxwell, 1992) at 348 and Macrory, supra, at 362.

and which confers discretion on Member States or competent authorities to determine which projects are likely to be subject to the assessment rules, the Directive is likely to fail the tests of precision and unconditionality, although Krämer⁹⁷ and Williams⁹⁸ dispute this. No definitive ruling on the direct effect of Directive 85/337 has yet been given by the European Court of Justice. The United Kingdom courts are at variance on this issue.⁹⁹

According to the parallel doctrine of indirect effect, methods of 'sympathetic interpretation' of national legislation in line with Community law should be applied by national courts pursuant to the duty on Member States under Article 5 EC to 'take all appropriate measures' to ensure fulfilment of their Community obligations.¹⁰⁰ This means that conflicting national law should be read in light of the wording and purpose of EC law. However, even after Case C-6/89, Marleasing SA v. La Comercial Internacional de

⁹⁷ L. Krämer, 'The Implementation of Community Environmental Directives Within Member States: Some Implications of the Direct Effect Doctrine', (1991) JEL Vol. 3, No. 1, 39-56, at 49: 'The authorities must conduct environmental assessment pursuant to Directive 85/337 even if there is no national legislation in place'.

⁹⁸ R. Williams, 'Twyford Down', (1991) CLJ. 382-4.

⁹⁹ Compare the views of McCulloch J in Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273, at 279 with those of Lord Coulsfield in the Petition of the Kincardine and Deeside District Council (1992) JEL Vol. 4, No. 2, 351, at 297, and Tucker J in Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd. (1994) JEL Vol. 6, No. 2, 351, at 355-356.

¹⁰⁰ As established in Case 14/83, Von Colson v. Land Nordrhein-Westfalen [1984] ECR 1891.

Alimentacion SA.¹⁰¹ this route relies upon the willingness and capacity of the national court to identify the relevance of 'sympathetic interpretation'.¹⁰²

Following the Court of Justice's judgment in Joined Cases C-6/90, Francovich v. Italian State and Case C-9/90, Bonifaci v. Belgian State.¹⁰³ individuals who have suffered as a result of a Member State's failure to implement a directive may seek financial compensation from that State, even where the directive in question does not have direct effect. In principle, this judgment considerably strengthens the hand of private individuals seeking protection under Community rules before their national courts. This is aided by the ruling in Case C-208/90, Emmott v. Minister for Social Welfare¹⁰⁴ that the time limit for bringing an action under national law runs only from the effective incorporation of a directive into national law. Combined, the rulings contribute to the enforcement of Community law.¹⁰⁵

¹⁰¹ Case C-6/89, Marleasing SA v. La Comercial Internacional de Alimentacion SA [1990] ECR I-4135, gives a broader interpretation of the doctrine: the Court added that the obligation to interpret national provisions in the light of a Community measure applied whether 'the national provisions in question were enacted before or after the Directive'

¹⁰² The scope for United Kingdom courts to ignore an interpretation of national legislation in line with Community law has lessened in the light of Case C-32/93, Webb v. EMO Air Cargo UK [1994] 3 WLR 941 H.L. in which the Court of Justice set aside Lord Templeman's argument in Duke v. GEC Reliance Ltd [1988] 1 All ER 626, HL, that methods of sympathetic interpretation may only be applied where the directive's provisions are directly effective; an interesting gloss on the indirect effect of Directive 85/337 is provided in Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 351.

¹⁰³ Joined Cases C-6/90, Francovich v. Italian State and Case C-9/90, Bonifaci v. Belgian State [1992] IRLR 84.

¹⁰⁴ Case C-208/90 Emmott v. Minister for Social Welfare [1991] 3 CMLR 894.

¹⁰⁵ The relationship between individual protection and enforcement is of Community law is discussed in European Commission, Tenth Annual Report to the European Parliament on Commission Monitoring and Application of Community Law (1992) OJ C 233/6, 30.8.93, at p. 6.

The operation of Francovich liability in the environmental field is potentially significant.¹⁰⁶ At its most far-reaching, the legal effect of Francovich, when combined with the recognition of environmental rights derived from environmental directives,¹⁰⁷ is possibly to create a public 'trust' held by citizens on behalf of the environment and enforceable environmental rights which are not reliant upon the holding of private property.¹⁰⁸ At the very least, the judgments in Case C-237/90, Commission v. Germany¹⁰⁹ and Case C-337/90, Commission v. United Kingdom¹¹⁰ appear likely to trigger actions to establish Francovich liability. In both cases the European Court of Justice explicitly stated that a ruling that the EC Treaty had been infringed by incorrect or non-implementation of Directive 778/80 on the Quality of Drinking Water might give rise to Francovich liability of the Member States to individuals for damages for harm caused by poor water quality.

This principle of Member State non-contractual liability might not be so easily applied in a case concerning Directive 85/337. To establish Francovich liability three conditions

¹⁰⁶ H. Somsen, 'Enforcement of EC Environmental Law and the Implications of the Francovich Judgment', [1992] Water Law, 184-187; and, more generally, J. Steiner, 'From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law', (1993) 18 ELRev 3.

¹⁰⁷ For example in Case C-361/88, Commission v. Germany [1991] ECR I-2567, para. 23, Advocate General Mischo made clear that two air pollution directives were intended to give 'individuals, ordinary citizens...the right that the air which they breathe should comply with quality standards which have been laid down' and that individuals have a right under Community law to 'rely on those quality standards when they are infringed', either in fact or by the measures adopted by the public authorities'.

¹⁰⁸ K. Gray, 'Equitable Property', (1994) Current Legal Problems Vol. 47, 157-214, at 206-7.

¹⁰⁹ Case C-237/90, Commission v. Germany. Judgment 24 November 1992, (nyr).

¹¹⁰ Case C-337/89, Commission v. United Kingdom (1993) JEL Vol. 5, No. 2, 273.

must be fulfilled:¹¹¹ the result required by the Directive must confer rights for the benefit of individuals; the content of these rights must be determined by reference to the provisions of the Directive; and there must be a causal link between the breach of the obligation of the state and the damage suffered by the person affected. Directive 85/337 gives effect to abstract public rights of participation and freedom of information, the content of which are unlikely to be easily ascertainable. Furthermore, it might prove difficult to establish a causal link between non-implementation or incorrect implementation of the Directive and damage suffered, particularly in cases in which some environmental information has come to light, for example during a public planning inquiry.¹¹² Notwithstanding these difficulties, an action for Francovich liability is currently being brought against the United Kingdom government for delayed implementation of Directive 85/337.¹¹³ This action follows the failure of Wychavon District Council to invoke Directive 85/337 in Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd.¹¹⁴

¹¹¹ Joined Cases C-6/90, Francovich v. Italian State and Case C-9/90, Bonifaci v. Belgian State [1992] IRLR 84, at para. 40.

¹¹² A further important obstacle in establishing Francovich liability for non-implementation of environmental directives is locus standi because the legal rules governing standing in actions brought by individuals seeking protection under Community law remain a matter of national law within the legal framework established in Case C-213/89, R v. Secretary of State for Transport, ex parte Factortame and Others [1991] 1 AC 603 at para 19 of the judgment; on this point, see A. Geddes, 'Locus Standi and EEC Environmental Measures', JEL (1992) Vol. 4, No. 1, 30-39, at 37-8.

¹¹³ 'EC Backs Lawsuit Over Chickens', The Guardian, 21 March 1995.

¹¹⁴ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 351.

Conclusion: Environmental Assessment and Future Directions in EC Environmental Law

The competence of the European Community in matters of environmental policy is now confirmed, though some questions remain about the European Community's role in the field of town and country planning. An array of techniques of environmental law have been developed by the European Community. These include the imposition of emission and environmental quality standards, providing information and encouraging consumer choice, auditing and other self-regulation schemes, designation of areas of land for special protection, environmental assessment and risk analysis. Directive 85/337 represents a trend of favouring integrated and preventative mechanisms over the administrative setting and enforcement of substantive and prescriptive environmental standards focused on the control of a specific industry or protection of a single environmental medium. Environmental assessment demonstrates the development of new techniques of environmental law - the use of procedural mechanisms combined with freedom of information and public participation. The practical effect and significance of this development is examined in Part III.

The promulgation of measures relying upon the use of procedural mechanisms in Directive 85/337 and techniques of freedom of information has been influenced by the practical problems of implementation and political pressure that legislation on the environment accord with the principle of subsidiarity and increasing demands for decentralisation. Two future developments of European Community environmental law will be significant for environmental assessment. First is the commitment in Article 130r(2) EC to integrate environmental protection policies into other areas of European Community

environmental policy.¹¹⁵ This extends the need for environmental assessment in policy making at Community level. To date, a number of policy areas - agriculture, energy, transport - and Community procedures such as the distribution of structural funds have been subject to 'integrated' documents, but more significant steps remain tentative. The second significant development is the principle of subsidiarity which was elevated to a general principle of Community law by the European Union Treaty.¹¹⁶ Whilst the form of environmental assessment in Directive 85/337 accords with the principle of subsidiarity because of the essentially discretionary nature of Annex II, the future development of environmental assessment in the context of European Community planning law is likely to be arrested by the application of the principle by some Member States: although the legal impact of the principle is untested,¹¹⁷ subsidiarity would appear to give greater opportunity for Member States to insist that the Commission justify activity at Community level.

¹¹⁵ This requirement is also the subject of a 'Declaration by the Member States on Assessment of Community Measures' annexed to the Treaty on European Union which states: '...the Commission undertakes in its proposals, and that the Member States undertake in implementing those proposals to take full account of their environmental impact and the principle of sustainable growth'; see also Fifth Environmental Action Programme, Towards Sustainability - A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development OJ C 138, 17.5.1993 (Brussels, Commission of the European Communities, 1993); House of Lords Select Committee on the European Communities, Fifth Environmental Action Programme: Integration of Community Policies. Session 1992-93 (London, HMSO, 1992); and D. Baldock et al, The Integration of Environmental Protection Requirements into the Definition and Implementation of Other EC Policies (London, IEEP, 1992).

¹¹⁶ Article 3b EC: 'In the areas which do not fall within its exclusive competence, the Community shall take action only if, and in so far as, the objective of the proposed action cannot be sufficiently achieved by the Member States and can therefore by reason of the scale or effects of the proposed action be better achieved by the Community'.

¹¹⁷ The principle has come close to being judicially interpreted in R v. London Borough Transport Committee ex parte Freight Transport and Others [1992] CMLR 5; see also A. G. Toth, 'Is Subsidiarity Justiciable?', [1994] ELRev 268.

By way of conclusion, it is useful to compare the expression of abstract public rights of access to environmental information and public consultation, quite unrelated to the protection of an individual's property in Directive 85/337, with the specificity of property rights which provided a conceptual framework for the development of environmental law in the United Kingdom, as discussed in chapter 2. These public rights of Directive 85/337 are a strong expression of doctrines of good public administration and typically European values of environmental law. This characteristic of Directive 85/337 suggest the theoretical possibility of circumventing property interests by refusing development consent on grounds of environmental protection; the practical corollary of the consideration of environmental effects being a reduced role for private property considerations. The implementation of Directive 85/337 in the United Kingdom has led to the integration of these abstract public environmental rights and values with typically British methods of environmental protection, such as those described in chapter 3. In the following chapter, I examine this process of implementing Directive 85/337 in the town and country planning system in England and Wales.

Chapter Five Environmental Assessment and the Planning Process in England and Wales

Introduction

The purpose of this chapter is to provide a background explanation of the implementation of Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment,¹ in the town and country planning system in England and Wales, Scotland and Northern Ireland having their own distinct planning systems. Implementation was required in order that the Directive have legal effect. Following the implementation of Directive 85/337 in 1988 by a number of regulations, environmental assessment forms part of planning law. However, there is some discordance between Directive 85/337 and the implementing regulations in the United Kingdom. The example which forms a focus of this thesis is that the procedures introduced to comply with the Directive in the United Kingdom differ from the spirit of the Directive's objective that the local planning authority conduct the assessment on the basis of information provided by the developer. I first outline the town and country planning system in England and Wales and relevant planning policies, and ideologies. This includes a review of arrangements for assessing environmental effects of development existing prior to the Directive and which shaped its implementation. I then explain the legislative framework of environmental assessment following the implementation of Directive 85/337.

¹ OJ L 175, 5.7.1985, p. 40

The Town and Country Planning System in England and Wales

Since the Town and Country Planning Act 1947, Planning Acts have set out a statutory framework for the use and development of land. The statutory basis of planning law is now to be found in the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991. The Town and Country Planning Act 1990 requires that any development of land must be authorised by a grant of planning permission.² 'Development' is defined broadly by the 1990 Act as making a physical change or a change in the existing use of any buildings or land.³ There are several exemptions conferred by the 1990 Act⁴ and by two statutory instruments. One of these, excludes a variety of use changes from the definition of development;⁵ the other automatically grants planning permission for a number of defined purposes.⁶ In dealing with an application for planning permission, the local planning authority⁷ must have regard to the provisions of the relevant development plans,⁸ and to 'any other material considerations'. Such 'material considerations' include

² This requirement is now set out in section 57 Town and Country Planning Act 1990.

³ Section 55(1) Town and Country Planning Act 1990.

⁴ For example, section 55(2)(e) Town and Country Planning Act 1990 provides exemptions for the use of any land for the purposes of agriculture or forestry (including afforestation).

⁵ Town and Country Planning (Use Classes Order) 1987 (SI 1987 No. 764).

⁶ Town and Country (General Development) (Amendment) Order 1988 (SI 1988 No. 1272) as revised by Town and Country Planning (General Development) Order 1988 (SI 1988 No. 1812); with regard to environmental assessment see also Town and Country Planning (General Permitted Development) Order 1995 (SI 1995 No. 418).

⁷ The local planning authorities are the district councils save that the county councils decide where mineral extraction and waste disposal are involved.

⁸ The primary statutory development plans are structure plans, local plans and unitary development plans; see Part II Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991, Schedule 4.

circulars, planning policy guidance notes, and representations made by third parties. Where the local planning authority has regard to the plan, planning permission is to be determined in accordance with that plan unless 'material considerations' indicate otherwise.⁹ In addition, special regard must be paid to the desirability of preserving or enhancing the character or appearance of a conservation area.¹⁰ These various statutory provisions require that 'weight' be given to particular considerations. Since 1988, information arising from the environmental assessment process is also a 'material consideration' of the local planning authority.¹¹

The authority may grant planning permission either unconditionally or subject to such conditions¹² as they think fit, or refuse planning permission.¹³ In addition, the local planning authority might enter into a contract with the developer. This may take the form

⁹ Section 54A Town and Country Planning Act 1990; on the legal effect of this provision see I. Gatenby and C. Williams, 'Section 54A: The Legal and Practical Implications', [1992] JPEL 110-120, and M. Harrison, 'A Presumption in Favour of Planning Permission?', [1993] JPEL 121-129.

¹⁰ Section 72 Planning (Listed Buildings and Conservation Areas) Act 1990. This statutory test came into conflict with development plan policy of providing residential housing in Heatherington UK Ltd v. Secretary of State for the Environment [1994] 2 PLR 9: the objective of 'preservation' was interpreted as meaning that 'great importance' was attached to that material consideration. Section 16 Planning (Listed Buildings and Conservation Areas) Act 1990 includes a similar test with regard to the desirability of preserving a listed building or its setting.

¹¹ Regulation 4 Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1199).

¹² Subject to statutory guidance in sections 72 and 75 Town and Country Planning Act 1990, central government policy, currently contained in Circular 1/85, The Use of Conditions (London, HMSO, 1985); and judicial control over what is permissible, in particular the 'Newbury' tests in Newbury District Council v. Secretary of State for the Environment [1981] AC 578.

¹³ Section 70(1) Town and Country Planning Act 1990; local councillors may delegate this function in whole or part to planning officers under section 101 Local Government Act 1972.

of an agreement between the developer and authority, or a unilateral undertaking made by the developer, both of which are referred to in the 1990 Act as a planning obligation.¹⁴ The existence of a valid planning obligation is a material consideration which might be taken into account by the local planning authority under section 70(2) of the 1990 Act.¹⁵ The applicant has a right of appeal to the Secretary of State against a refusal of planning permission, or if the authority have failed to determine the application either within the prescribed period. Appeals are handled by the specialist Planning Inspectorate of the Department of the Environment. 'Transferred' appeals may be recovered on request by the Secretary of State, in which case the decision is made by the Secretary of State.¹⁶

This is the basic legal framework of the planning system. The 1990 Act gives wide scope for the exercise of discretion on behalf of the local planning authority and Secretary of State on the basis of the prevailing planning policy, which is usually contained within circulars and planning policy guidance notes. Generally, very little is specified in law as to the scope and content of planning policy, other than that its focus is the use and development of land. This makes for flexibility in the planning system to take on board varying policies, including policy relating to environmental protection. This general approach to planning policy changed markedly in the 1980s when circulars were used in a more deterministic manner by central government, as discussed below.

¹⁴ Section 106 Town and Country Planning Act 1990.

¹⁵ Although the law on this point is not clear, for example, compare the reasoning in Tesco Stores Ltd v. Secretary of State for the Environment [1995] 2 All ER 636 (CA) with R v. Plymouth County Council and South Devon Cooperative Society [1993] JPEL 1099.

¹⁶ As set out in Town and Country (Determination by Inspectors) (Inquiries Procedures) Rules 1992 (SI 1992 No. 2039); Town and Country Planning (Inquiries Procedures) Rules 1992 (SI 1992 No. 2038); and Town and Country Planning (Written Representations Procedure) Regulations 1987 (SI 1987 No. 701).

(a) Policies and Ideologies in Planning

Planning policy has relevance to environmental assessment by determining the priority accorded to environmental protection in the planning system. The flexibility of the planning system means that, within the scope of planning policy, information on the effects of development on the environment might be 'weighted' in a manner determined by the local planning authority. There follows an outline of the main strands of planning policy and planning ideologies¹⁷ having significance for environmental assessment.

As discussed in chapter 2, the roots of planning lie predominantly in the public health movement of the nineteenth century, with its concerns of health, the removal of nuisances, provision of sanitation and improving the living and working conditions of the urban working class. Nevertheless, planning consent controls operate within a prevailing ideology of the protection of private property.¹⁸ This ideology derives from the principles, precedents, and rules of statutory interpretation developed by the courts to protect landowners from governmental works which sought to remove nuisances by imposing rudimentary planning controls. One contemporary expression of the ideology of protection of private property is that a right to develop land and be involved in planning decisions is linked strongly to the possession of a legal interest in land. This ideology contributes to a 'private property'¹⁹ theory of planning law which holds that planning control is an interference with established

¹⁷ Following P. McAuslan, Ideologies of Planning (Oxford, Pergamon Press, 1980), 'ideologies' are taken to refer to ideas and assumptions articulated in a less formal manner than planning policy.

¹⁸ Ibid.

¹⁹ M. Grant, Urban Planning Law (London, Sweet and Maxwell, 1982), at p. 334.

proprietary rights, and that potential developers are entitled to planning permission in the absence of cogent reasons to the contrary. A further effect of the ideology of private property is a preoccupation in planning with the environmental and other qualities of a specific site; the parcel of land is thus the unit of planning.

The right to develop land was accorded a greater priority by the market-oriented planning policy pursued in the 1980s. This policy was directed towards local economic regeneration. At its apex were vigorously deregulatory strategies aimed at alleviating many of the legal and financial constraints imposed on development. Circular 22/80 provided:

The planning system should play a helpful part in rebuilding the economy. Development control must avoid placing unjustified obstacles in the way of any development especially if it is for industry, commerce, housing or any other purpose relevant to the economic regeneration of the country...Local planning authorities are asked therefore to always grant planning permission, having regard to all material considerations, unless there are sound and clear-cut reasons for refusal.²⁰

This guidance was applied most clearly to housing projects: local authorities were required to undertake studies with the house building industry to ensure that sufficient land for private house building was allocated to meet the needs of the industry.²¹ Draft circulars mooted the withdrawal of green belt status from pockets of open land surrounded by existing housing

²⁰ Department of the Environment, Circular 22/80, Development Control: Policy and Practice (London, HMSO, 1980).

²¹ Section 116 of the Local Government Planning and Land Act 1980 empowered the Secretary of State to undertake such assessments; see M. Loughlin, Local Government in the Modern State (Oxford, Clarendon, 1986) pp. 137-143, at 141.

development and the release of undeveloped land for house building.²² Similar policy was applied to road and airport projects.

Official guidance espoused a presumption in favour of development in the 1980s. This meant that planning consent for development projects was only to be refused if the project was likely to 'cause demonstrable harm to interests of acknowledged importance.'²³ The presumption in favour of development, coupled with a host of deregulatory measures, changed the character of planning from being predominantly plan-led to appeal-led. This meant that the development plan was relegated in status to a material consideration on a par with any other: as a consequence, planning permission was often granted by the Secretary of State on appeal, even in cases in which the proposed project was in conflict with the relevant development plan at the local level.

(b) Planning Policy and Environmental Protection

A side effect of the appeal-led planning system outlined above was that the traditional focus of the planning system, the parcel of land, was strengthened by a conception of

²² Department of the Environment draft circulars, Memorandum on Structure Plans and Local Plans and Green Belts and Land for Housing: see Loughlin, *Id.* and R. Grove-White, 'Land Use Law and the Environment', (1992) *JLS* Vol. 19, Special Issue: 'Environment, Law and Policy', 32-43.

²³ For example, Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1988), para. 15: 'the planning system fails in its function whenever it prevents, inhibits or delays development which can reasonably be permitted. There is always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development would cause demonstrable harm to interests of acknowledged importance'.

individual sites and their environmental resources as commodities.²⁴ This created a narrow arena in which to discuss the complex relationship between planning controls and environmental protection controls having the potential to affect wider ecological systems.²⁵ In this legal and policy framework it was also rare for pollution or poor environmental quality to be cited as the sole, or even primary reason for refusal of planning permission.²⁶ The use of conditions or clauses within a planning agreement allowed for some compromise about environmental effects to be secured and for the project to go ahead.²⁷ The Royal Commission on Environmental Pollution (1976) expressed concern in their report on air pollution controls that matters of pollution were not dealt with adequately in the planning process. The Commission considered that in most of those cases where pollution caused acute local problems, polluting industry was located close by, and recommended that consultation to establish the pollution implications of proposals become common practice.²⁸

There was some acceptance of the Royal Commission's recommendation by professional planning bodies. For example, in 1976, the Royal Town Planning Institute

²⁴ P. Healey and T. Shaw, 'Operationalising Environmental Considerations in the British Planning System', Transactions of the Institute of British Geographers (forthcoming) at 23.

²⁵ Id.

²⁶ C. Miller and C. Wood, Planning and Pollution: An Examination of the Role of Land Use Planning in the Protection of Environmental Quality (Oxford, Oxford University Press, 1983) p. 7.

²⁷ For example, Circular 22/80, Development Control: Policy and Practice (London, HMSO, 1980), para. 13: '...where there are planning objections (intrusion into open countryside, noise, smell, safety health or excessive traffic generation) it will often be possible to meet them to a sufficient degree by attaching conditions to the permission or by the use of agreements, rather than by refusing the application.'

²⁸ Royal Commission on Environmental Pollution, Fifth Report, Air Pollution Control: An Integrated Approach (London, HMSO, 1976) para. 336.

acknowledged the role of the ecological movement in the general reassessment taking place of the objectives of planning.²⁹ Miller and Wood report that, over the following years, planning authorities and inquiry inspectors showed a greater readiness to cite particular forms of pollution, for example, noise, odour and air pollutants, rather than rely on vague phrases such as 'prejudicial to amenity', in order to defend refusals of consent for environmentally unacceptable development.³⁰ The planning system was thus recognised as offering an opportunity to anticipate and forestall environmental harm by refusing development consent or by separating incompatible land uses. In addition, green belt policies continued to perform a containment function and served also to protect land from development. However, the extent to which planning controls could be used to intervene further to prevent pollution remained limited. On the recommendation of the Royal Commission on Environmental Pollution (1976), Circular 71/77 stated that planning conditions should not be used to deal with problems which are the subject of controls under separate environmental legislation.³¹ Planning has since trodden carefully in imposing controls in the form of conditions and planning obligations in which other statutory controls exist. On this point, planning policy served to emphasise that 'planning legislation should not normally be used to secure

²⁹ Royal Town Planning Institute, Planning and the Future (London, Royal Town Planning Institute, 1976), pp. 9-12

³⁰ Miller and Wood, Op.cit. p. 7.

³¹ Circular 71/77, Local Government and Industrial Strategy (London, HMSO, 1977).

objectives achievable under other legislation³² and, specifically, that planning conditions are considered unnecessary where they duplicate pollution controls.³³

Since the late 1980s, the debate on the role of planning in environmental protection has broadened beyond questions of preventing and controlling pollution to encompass issues of sustainable development.³⁴ Planning is now regarded by the government as one of the main arenas within which its strategy for sustainable development is to be achieved.³⁵ This policy extends both the traditional stewardship role and the public interest purpose of planning which developed out of the public health movement during the nineteenth century.³⁶ The explicit recognition of the positive role of planning in environmental protection was accompanied by a swing back in favour of a plan-led planning system engendered by section 54A Town and Country Planning Act 1990. This 'return to plans'

³² Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1988) para. 22, as confirmed in Gateshead Metropolitan Borough Council v. Secretary of State for the Environment and Northumbria Water Group plc [1995] EnvLR 36 (CA).

³³ Circular 1/85, The Use of Conditions (London, HMSO, 1985) Annex, paras. 18 and 19. This policy statement might be compared with the approach taken by the courts, for example in Hoveringham Gravels Ltd v. Secretary of State for Wales [1975] QB 754 and with Planning Policy Guidance Note 1 General Policy and Principles (London, HMSO, 1992), para. 46 which advises 'the imposition of conditions can enable many development proposals to proceed where it would otherwise be necessary to refuse planning permission'. Clear guidance is now given in Planning Policy Guidance Note 23, Planning and Pollution Control (London, HMSO, 1993) para. 1.3.

³⁴ For example, A. Blowers, (ed.) Planning for a Sustainable Future (London, Earthscan, 1993); see also Healey and Shaw, *supra*.

³⁵ Department of the Environment, The UK Strategy for Sustainable Development (London, HMSO, 1994); the role of the planning system was foreseen in HM Government, White Paper on the Environment, This Common Inheritance, Cm. 1200 (London, HMSO, 1990) and Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1992), para. 3.

³⁶ J. Simmie, 'Planning and London', in J. Simmie, (ed.) Planning London (London, University College London Press, 1994) p. 3.

provides an opportunity for environmental protection to be translated into planning policy, as illustrated by the requirement that planning authorities include environmental policies in their unitary development plans or district-wide plans.³⁷ This suggests that environmental considerations might be legitimate reasons for refusing development consent.

The debate on the interrelation of planning and environmental protection has recently centred on a number of themes which reveal a more sophisticated treatment of the issue than previous debate on the siting of industrial activities. The first theme is the effect of transport policies on energy use, conservation and pollution.³⁸ This issue highlights the importance of combining land use policies with transport policies at local, regional and national levels. The second theme is the possibility of linking more closely the Integrated Pollution Control procedures with the planning system, for example by requiring a single assessment for the purpose of establishing the best practicable environmental option (BPEO) and to fulfil environmental assessment requirements.³⁹ Along these lines, the draft European

³⁷ Planning Policy Guidance Note 12, Development Plans and Regional Planning Guidance (London, HMSO, 1992), para. 3.1; however, St Albans District Council v. Secretary of State for the Environment [1993] JPEL 374 and Sainsbury v. Secretary of State for the Environment [1993] JPEL 651, suggest that the presumption in favour of the development plan is capable of being overridden, in both these cases on grounds of lack of demonstrable harm to the policies of the development plan.

³⁸ Some links between planning and transport are now being made, for example, Department of the Environment and Department of Transport, Reducing Transport Emissions Through Planning (London, HMSO, 1993). See also Royal Commission for Environmental Pollution, Eighteenth Report, Transport and the Environment (London, HMSO, 1994).

³⁹ This is discussed by Healey and Shaw, supra, p. 13; see also United Kingdom Environmental Law Association, Overlaps in the Requirements for Environmental Assessment (London, United Kingdom Environmental Law Association, 1993); W. Sheate, Making an Impact: A Guide to EIA Law and Policy (London, Cameron May, 1994), chapter 13; C. Wood, 'EIA and BPEO - Acronyms for Good Planning', [1988] JPEL 310-321; and D. T. Cross and L. D. Guruswamy et al, BPEO Through the Planning System (London, HMSO, 1987); more recently, 'Environmental Assessment Toolkit for IPC Applicants Takes Shape', (1995) ENDS Report No. 244, 10.

Community Directive on Integrated Pollution Prevention and Control makes provision for information supplied in accordance with Directive 85/337 to be included in pollution control authorisation.⁴⁰ A third theme is assessment and mitigation of adverse impacts of development projects through public debate and participation, and cross sectoral coordination of policies.

Interrelation of Planning and Pollution Controls

The brief review of planning policy above suggests a growing conceptual acceptance of the legitimacy of a role for planning in environmental protection. This is so notwithstanding that positive intervention by planning law is capable of interfering with property interests. However, the planning system remains related weakly to pollution controls, as confirmed by official guidance which states that planning legislation should not normally be used to secure objectives achievable under other legislation.⁴¹ This approach was followed closely in Gateshead Metropolitan Borough Council v. Secretary of State for the Environment and Northumbria Water Group plc.⁴² The Secretary of State granted planning permission for a clinical waste incinerator in the North East. The Inspector appointed to hear the appeal recommended that permission be refused. One of the issues which was taken into account by the Inspector was the public fear that dioxins emitted from the site would be harmful. The Secretary of State concluded that this issue could be

⁴⁰ Article 5(1) EC Draft Directive on Integrated Pollution Prevention and Control COM(93) 423, Article 5(1) (Brussels, Commission of the European Communities, 1993).

⁴¹ Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1988), para. 22 (as amended by Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1992).

⁴² [1995] EnvLR 36.

satisfactorily addressed as part of the Integrated Pollution Control authorisation procedure. That decision was challenged by the local planning authority on the ground that the planning system and Integrated Pollution Control were so closely linked that it would be unreasonable to grant planning permission without knowing if emissions could be adequately controlled under the Integrated Pollution Control authorisation. The High Court, and confirmed by the Court of Appeal, decided that although the two statutory requirements overlapped, the extent of the overlap would vary on every occasion. Sullivan J held:

...just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the Environmental Protection Act 1990 for preventing or mitigating that impact and for rendering any emissions harmless.⁴³

This reasoning makes clear that in appropriate cases misgivings by the local planning authority about a project's effect upon the environment may be resolved by imposing conditions in the Integrated Pollution Control authorisation process. The trust placed in the operation of the system of Integrated Pollution Control shown by Sullivan J, and endorsed by the Court of Appeal, circumscribes the means by which planning controls might prevent environmental pollution. The judgment recognises, but nevertheless limits, the common ground between planning and pollution control: whilst local planning authorities can still refuse planning permission on the grounds of harm to the environment, they must adduce certain evidence of that harm.⁴⁴ Planning Policy Guidance Note 23 reinforces the position

⁴³ Gateshead Metropolitan Borough Council v. Secretary of State for the Environment and Northumbria Water Group plc [1995] EnvLR 36, at 44.

⁴⁴ R. Macrory, 'Appeal Court Ruling on Planning and Pollution Interface'. (1994) ENDS Report No. 233, 43.

in Gateshead.⁴⁵ This also emphasises the complementary nature of the two systems, but stresses that the local planning authority must approach their decision assuming that the pollution control authority will fully carry out their statutory duties. On the scope of conditions, guidance is given that 'the local planning authority should restrict the imposition of conditions to any matters which are properly their responsibility and do not fall within the remit of the pollution control authority'.⁴⁶

A similar separation between planning and pollution controls also exists in relation to private law actions. Gillingham Borough Council v. Medway (Chattham) Dock Co Ltd (1992)⁴⁷ illustrates the interplay between planning permission and nuisance law. Gillingham Borough Council brought an action in public nuisance against the Medway Dock Company for noise caused by lorry traffic throughout the night. The Dock Company's defence to the claim of the public nuisance was based on the submission that public nuisance could not arise from a lawful act, in this case because the defendants had been granted planning permission for change of use of the Docks. Buckley J restated that planning permission was not a licence to commit nuisance and that a planning authority has no jurisdiction to authorise nuisance. However, it was decided that a planning authority can, through its development plan and decisions, alter the character of the neighbourhood. The grant of planning permission may have the effect of rendering innocent activities which, prior to the grant of planning permission, would have been actionable nuisance. Buckley J judged that the

⁴⁵ Planning Policy Guidance Note 23, Planning and Pollution Control (London, HMSO, 1993).

⁴⁶ Ibid. para. 1.3.

⁴⁷ Gillingham Borough Council v. Medway (Chattham) Dock Co Ltd (1992) JEL Vol. 4. No. 1, 251.

resident's claim in nuisance by reference to the present character of the neighbourhood pursuant to the planning permission for use of the dockyards as a commercial port and that therefore the disturbance of the residents was not actionable. In a narrow sense, the judgement clarifies that, where the existence of planning permission changes the character of the neighbourhood, what would have been considered a nuisance before the permission was granted may no longer be sufficiently detrimental because the standard of nuisance required had changed. In a broader sense, the judgment suggests that there was no nuisance because planning permission constituted a new kind of statutory authority for noise pollution. This implies that where the resulting nuisance is an inevitable result of the grant of planning permission, nuisance cannot be invoked to negate that permission.⁴⁸

The practical separation of planning from matters of environmental protection as seen in the case of imposing conditions, taking account of material considerations, and public nuisance actions is the effect of the creation of special laws, institutions and procedures for dealing with pollution, agriculture, mineral extraction, industrial development, and transport, as described in the context of the development of pollution controls in chapter 3. This separation is epitomised in the statutory definition of 'development' in planning law,⁴⁹ on the basis of which planners operate the development control system: this excludes afforestation and agricultural land uses and only indirectly relates to national policy areas such as energy and transport.⁵⁰ In contrast to this separation of functions, the

⁴⁸ see C. Crawford, 'Public Law Rules Over Private Law as a Standard for Nuisance: OK?', (1992) *JEL* Vol. 4, No. 2, 262.

⁴⁹ Section 55(1) Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

⁵⁰ Section 55(2)(e) Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

implementation of Directive 85/337 in the planning system, discussed below, offers a clear example of the integration of an emergent environmental agenda with planning law and policy and the combination of traditionally discrete areas of policy. The implementation of Directive 85/337 and the legal significance of this process of implementation forms the focus of the remainder of the chapter. I first outline how environmental information was gathered and evaluated in the planning system prior to the implementation of Directive 85/337.

Environmental Assessment Prior to the Implementation of Directive 85/337

(a) Environmental Information as a Material Consideration

Prior to the implementation of Directive 85/337, information about the environmental effects of a proposed development was obtained in a number of ways. A type of environmental assessment was first required by the Town and Country Planning Act 1971. The 1971 Act stipulated that the written statement of a structure plan should include measures for the improvement of the physical environment.⁵¹ This requirement was reinforced by Department of the Environment guidance in Circular 4/79 on development plans that the local planning authority should set out in the development plan how environmental considerations had been taken into account, including measures for reducing water, air and noise pollution.⁵²

⁵¹ Sections 7-11 Town and Country Planning Act 1971.

⁵² Department of the Environment, Circular 4/79 Memorandum on Structure and Local Plans (London, HMSO, 1979).

Environmental information could also be obtained under the procedure set out in the General Development Order 1977.⁵³ The 1977 Order gave planners powers to request 'further information' from a prospective developer beyond that contained in the planning application. This included the likely environmental impact of the project.⁵⁴ However, this power did not appear to entitle a local planning authority to insist on the submission of environmental information and analysis as a formal environmental assessment.⁵⁵ The result was that environmental impacts were assessed via information provided solely by the developer. Official guidance also made clear the need to assess the environmental effects of specific categories of development.⁵⁶ At the same time, environmental assessments were conducted outside the town and country development consent system when the proposed

⁵³ Regulation 5 Town and Country Planning General Development Order 1977, (SI 1977, No. 289) (enacted under section 25 Town and Country Planning Act 1971, as amended): the power was one to require such further information as may be specified...to be given to them in respect of an application...to enable them to determine that application.'

⁵⁴ McAuslan, *Op.cit.*, pp. 154-55 describes this type of environmental assessment.

⁵⁵ Supplementary written evidence of the House of Lords report on the proposed Directive, Eleventh Report, Environmental Assessment of Projects Session 1980-81, at p. 149: 'there is doubt whether local authorities can require all the information now specified in the proposed directive, but in any event, this provision (regulation 5 General Development Order 1977) is discretionary'.

⁵⁶ An assessment of possible harms was to take place if the proposed project involved hazardous storage (Circular 1/72, Development Involving the Use of Storage in Bulk of Hazardous Material (London, HMSO, 1972)), was likely to be a noisy development, (Circular 10/73, Planning and Noise (London, HMSO, 1973)) or was a small business sited in a residential area, (Circular 61/72, Small Firms (London, HMSO, 1972)); there also had to be special scrutiny of any proposal to build on open countryside, (Development Control Policy Note 4, Development in Rural Areas), housing developments, (Circular 102/72, Land Available for Housing (London, HMSO, 1972)) and hotel and motel development, (Development Control Note 12, Hotels and Motels (London, HMSO, 1972)).

project fell outside the statutory definition of 'development'⁵⁷ or became the subject of a public planning inquiry.⁵⁸

Planning legislation and guidance issued by the Department of Environment imposed few constraints upon the internal procedures for judging the weight to be given to environmental information obtained by the various procedures discussed above.⁵⁹ In deciding whether to grant or refuse planning permission, or grant it subject to conditions, the local planning authority and the Secretary of State for the Environment were to have regard to the facts of the case, the development plan and other local policies, central government policies as set out in circulars and planning policy guidance notes, representations from the public and statutory consultees, and 'any other material considerations'.⁶⁰ Information

⁵⁷ For example, a de facto environmental assessment arose from the statutory requirement that official notices about a road building project 'shall state the general effect of the proposed scheme', Highways Act 1959, schedule 1, para. 7; see also Department of the Environment, Circular 30/73, Participation in Road Planning (London, HMSO, 1973), Annex 2, paras 2-6; examined by McAuslan, Op.cit., p. 61.

⁵⁸ T. O'Riordan, 'Beyond Environmental Impact Assessment', in O'Riordan and Hey (eds.) Environmental Impact Assessment (Farnborough, Saxon House, 1976) p. 207: 'the present method of assessing environmental impacts is the planning inquiry'; more generally on environmental assessment in the planning inquiry, see Wathern, Environmental Impact Assessment: Theory and Practice (London, Routledge, 1988) p. 200; K. von Moltke, 'Environmental Impact Assessment in the United States and Europe', in B. D. Clarke et al. (ed.) Perspectives on Environmental Impact Assessment (New York, Reidel, 1984) p. 32; and Miller and Wood, Op.cit.

⁵⁹ Grant, Op.cit., pp. 245 and 277.

⁶⁰ Section 29 Town and Country Planning Act 1971: '...where an application is made to a local planning authority for planning permission, that authority, in dealing with the application, shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations'; Circular 22/80, Development Control: Policy and Practice (London, HMSO, 1980) and Circular 14/85, Development and the Environment (London, HMSO, 1985), and Planning Policy Guidance Note 1 General Policy and Principles (London, HMSO, 1988) advised that there was a presumption in favour of development, and that planning permission should always be granted unless it could be shown that particular proposals would cause demonstrable harm to interests of acknowledged importance.

about the environmental effects of a project constituted a 'material consideration'.⁶¹ As with other 'material considerations' such as precedent, the preservation of existing use, and 'enabling development', the weight to be given to environmental information when deciding whether a proposed project should be granted planning permission was left to the discretion of the planner. The evidential value of the environmental information could therefore be judged by the local planning authority so long as it constituted a 'material consideration' as defined by the courts. This discretion gave planners and the Secretary of State ample opportunity to examine, but also to dismiss the significance of environmental effects of individual projects.

It might be helpful to summarise the position prior to the implementation of Directive 85/337: whilst no statutory or uniform system existed, environmental appraisal was clearly a feature of the land use planning system.⁶² Although informal and discretionary, and often premised upon information provided by the developer, planners' consideration of environmental information and use of the 'further information' power by local planning authorities meant that assessments could be made beyond those which formed the subject of specific policy guidance. However, the requirement to conduct an assessment and assessment procedures were contained largely in circulars which might be disregarded by the local

⁶¹ In Stringer v. Minister of Housing and Local Government [1971] 1 All ER 65, at 77, Cooke J defined this legal concept as '...any consideration which related to the use and development of land'. The safeguarding of land required for a road widening scheme (Westminster Bank Ltd v. Minister of Housing and Local Government [1971] AC 508), the abnormal level of airborne abrasive dust that a ready-mixed concrete batching plant would generate (RMC Management Services Ltd v. Secretary of State for the Environment (1972) 222 EG 1593) and the disturbance to neighbouring occupiers from a casino (Ladbroke (Rentals) Ltd v. Secretary of State for the Environment [1981] JPL 427) have since all been held to be material 'environmental' considerations.

⁶² O'Riordan and Hey, Op.cit. at p. 3: 'Environmental Impact Assessment, although not under the same name already plays a part in many planning decisions in Britain'.

planning authority and Secretary of State. There was little guidance as to how environmental information was to be evaluated or about the priority environmental information should be accorded in relation to other material factors; economic and social factors played at least as large a role in decision making. Those affected by a proposed development were unable to require that an environmental assessment be carried out. There was no statutory requirement that environmental information be taken into account by the local planning authority and Secretary of State: its use was subject to planners', the Secretary of State's and, ultimately, the courts' view of whether it constituted a 'material consideration'. Studies of pre-statutory environmental assessment in the planning system found an absence of any rigorous environmental appraisal on the part of the local planning authority,⁶³ and considerable variation in the structure, content, and role of environmental assessments conducted in this period.⁶⁴ While not denying that the informal assessment procedures in the development consent process generally permitted the impact of a proposed development on the surrounding area, this assessment was generally carried out in relation to a specific site. In contrast, Directive 85/337 was designed to require an assessment with respect to the wider environment and in terms of the cumulation and interaction of the effects of development on the environment.

⁶³ P. H. Selman, 'The Use of Ecological Evaluations by Local Planning Authorities', (1982) Journal of Environmental Management, 15, 1-13; see also G. Dobry, The Development Control System. Final Report, (London, HMSO, 1975); the Royal Commission on Environmental Pollution Air Pollution Control: An Integrated Approach. Cmnd. 6371 (London, HMSO, 1976) at para 351; J. Catlow and C. G. Thirlwall; Environmental Impact Analysis. Department of the Environment Research Report No. 11 (London, HMSO, 1976); Clark et al, Assessment of Major Industrial Applications (London, HMSO, 1976); Department of Transport, Report of the Advisory Committee on Trunk Road Assessment (the Leitch Committee) (London, HMSO, 1976).

⁶⁴ C. Rostron, Four British Environmental Impact Assessments: A Preliminary Study of the General Characteristics of EIA's in the UK Working Paper, (School of Geography, University of Leeds, 1981) at para. 6.5.

(b) Environmental Assessment and the Planning Inquiry

Prior to the implementation of Directive 85/337, the local inquiry held into planning appeals and into planning applications referred to the Secretary of State was a further and important means by which information about the effects of development on the environment was gathered and evaluated.⁶⁵ The local public planning inquiry provides a forum for debate on planning applications refused by the local authority and appealed to the Secretary of State, for local plans, debate on building or extending existing roads and other public works, and for a whole range of land use issues. It is also one of the major vehicles of public participation in the planning system. Most cases of public sector development proposals handled through planning procedures involve usually (though not always) a public local planning inquiry. The inquiry explores the validity of arguments presented by the applicants and objectors to a particular planning proposal through public examination.⁶⁶

The inquiry system was the subject of criticism in the late 1970s to mid 1980s, primarily because of its adversarial approach.⁶⁷ The inquiry's procedures, which are borrowed from the judicial system, tend to inhibit agreement on matters of fact prior to the inquiry and discourage witnesses from making evidence known in advance. This limits the

⁶⁵ Planning inquiry procedure is governed by section 78 Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

⁶⁶ R. Kemp, 'Planning, Legitimation and the Development of Nuclear Power: A Critical Theoretic Analysis of the Windscale Inquiry', (1986) *Policy and Politics* Vol. 14, No. 1, 350-371, at 351.

⁶⁷ Some of the criticisms were addressed in House of Commons Environment Committee, Fifth Report, *Planning Appeals and Call-in and Major Public Inquiries*. Session 1985-1986 HC 181 Cm. 43 (London, HMSO, 1986).

scope for 'real' public participation.⁶⁸ At the time of the implementation of Directive 85/337, some writers considered that environmental assessment might bring a more neutral and reasoned air to the inquiry because of its investigative procedures by which a public body conducts an environmental assessment on the basis of information provided by the developer and other sources:

... a fully informed inquiry process could only be achieved if preceded by some form of environmental impact assessment which would consider all the diverse effects of a particular proposal upon the natural environment. Such an examination could be interpreted as the optimum stage of instrumental or purposive rationality and therefore of fundamental value to practical decision making on major planning proposals.⁶⁹

Similarly,

Those who argue against the delay and cost of inquiries ignore the improvements which the greater use of environmental impact assessment could bring to them: some measure of pre-inquiry agreements on the key issues, information on a comprehensive range of impacts.⁷⁰

Particular faith was placed in the ability of environmental assessment procedures to strengthen the hand of environmental and conservationist groups:

(Environmental assessment) will ensure that inquiry participants are fully prepared and that common ground and areas of dispute have been identified in advance. It will help all the parties with information and allow the public to be well informed and it should add a further element of objectivity to hearings.⁷¹

⁶⁸ N. Hutton, Lay Participation in a Public Local Inquiry: A Sociological Case Study (Aldershot, Gower, 1986).

⁶⁹ Kemp, *supra*, at 364.

⁷⁰ J. Herington, 'Environmental Values in a Changing Planning System', in M. Clark and J. Herington, (eds.) The Role of Environmental Impact Assessment in the Planning Process (London, Mansell, 1988), at 153.

⁷¹ M. Clark, 'Environmental Impact Assessment: An Ideology for Europe', [1978] TCP 395-399, at 388.

Notwithstanding the optimistic tone of such comments, at the time of the implementation of Directive 85/337, there was little consideration of how the environmental statement would be integrated practically into the planning inquiry.⁷² As a consequence, although the same projects are often the subject of both statutory assessment rules and an inquiry, no reference is made to environmental assessment in the statutory instruments which govern the environmental assessment process or inquiries system.⁷³ The case studies described in chapter 7 address the integration of the European model of environmental assessment and the British inquiry procedure.

Implementation of Directive 85/337 in 1988

Faced with a draft Directive on environmental assessment⁷⁴ the government's view was that environmental assessment was 'implicit in the United Kingdom's town and country planning system',⁷⁵ and thus mandatory assessment should be avoided. From this

⁷² Though later Wood and Jones, *Op.cit.*, pp. 45-46 raised this issue: 'public inquiry decisions will inevitably have significant ramifications for the adequacy of environmental statements generally' and '...the use made in public inquiries of environmental statements by the various parties should be investigated to determine whether environmental assessment is being integrated appropriately in the call-in and appeal procedures'.

⁷³ Town and Country Planning (Inquiries Procedures) Rules 1992 (SI 1992 No. 2038); Town and Country Planning (Written Representations Procedure) Regulations 1987 (SI 1987 No. 701); Town and Country Planning (Determination by Inspectors) (Inquiries Procedure) Rules 1992 (SI 1992 No. 2039); Circular 7/94, Environmental Assessment: Amendment of Regulations (London, HMSO, 1994) paragraph 18, makes some reference to the place of environmental information arising from the assessment process at the inquiry.

⁷⁴ Commission of the European Communities, Draft Directive 7972/80 on Environmental Assessment COM(80) 313 final (Brussels, Commission of the European Communities, 1980).

⁷⁵ House of Lords Select Committee on the European Communities, Eleventh Report, Environmental Assessment of Projects. Session 1980-81 (London, HMSO, 1981) para. 31 and pp. 131-136; see also Hansard Parliamentary Debates (1981b) 30 April 1981 cols 1311-1347.

perspective, the consequence of statutory environmental assessment was the removal of discretion and, in its place, an arbitrary classification system. In line with its policy of 'lifting the burden' on developers, the government considered that the Directive would also impose unreasonable costs on developers. The Commons concurred.⁷⁶ The government's views are usefully summarised as follows:

...the broad powers of planning authorities in development control are a significant means of preventing development which may have an adverse environmental impact. Authorities may take into account the extent to which the proposed development is likely to cause environmental damage...a decision may be taken to refuse permission on these grounds...the flexibility of development control and the breadth of the 'other material considerations' discretion has meant that planning authorities have been able to increase their scrutiny of environmental impact without need for further legislation.⁷⁷

Since environmental assessment was already to be found in the planning system, the government intended to achieve the result of Directive 85/337 by absorbing its requirements into existing legislative and administrative arrangements for applying for development consent.⁷⁸ This method of implementing the Directive's requirements into existing planning

⁷⁶ House of Commons Select Committee on European Legislation, Session 1980-81, Twelfth Report; though the House of Lords' Select Committee, *Ibid.*, warmly welcomed the Directive. For an account of the government's response, see C. Wood, 'The Impact of the EEC's Directive on Environmental Planning in the United Kingdom', (1981) *Planning Outlook* Vol. 24, No. 3, 92-98.

⁷⁷ Grant, *Op.cit.*, p. 434.

⁷⁸ The working party set up by the Department of the Environment to explore the means of implementation concluded principally: 'the requirements of the Directive can be met within the context of the existing planning system without imposing significant new burdens on either developers or planning authorities' (Department of the Environment, *Implementation of the European Directive on Environmental Assessment* (London, HMSO, 1986), at para. 6).

procedures was permitted because, as a directive, the measure gave discretion to Member States as to how its result was to be achieved.⁷⁹

Directive 85/337 was first implemented in the United Kingdom in the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 on 15 July 1988 (the '1988 Environmental Effects Regulations')⁸⁰ by powers contained under section 2(2) of the European Communities Act 1972. These powers provide for the future implementation of Community obligations by means of secondary legislation.⁸¹ To fully implement Directive 85/337, nineteen regulations have since been enacted, also under section 2(2) of the 1972 Act.⁸² The passage of this legislation has been recounted elsewhere.⁸³ Of relevance here is that no primary legislation was enacted. This meant that, initially at least, the categories of projects subject to environmental assessment in secondary legislation

⁷⁹ Article 189(3) Treaty of Rome: 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.'

⁸⁰ SI 1988 No. 1199.

⁸¹ Section 2(2) European Communities Act 1972: '...any designated Minister or department may by regulations make provision for (a) for the purpose of implementing any Community obligation in the United Kingdom.'

⁸² These are listed in Appendix III; for a review of these regulations, see Commission of the European Communities, Report from the Commission on the Implementation of Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment COM(93) 28, 2.4.1993 (Brussels, Commission of the European Communities, 1993) pp. 78-79. J. Salter, 'The Challenge From Brussels', [1992] JPEL 14-20, at 14 recounts that the Directive was also implemented by contract in those cases in which the assessment of projects relates to land lying below the low water mark - within Community law, but outside the jurisdiction of the local planning authority.

⁸³ N. Haigh, Manual of Environmental Policy: EC and Britain (London, Sweet and Maxwell, 1992) Part 11; and M. Grant, 'The UK Implementation of Environmental Assessment', [1989] Connecticut Journal of International Law 463-447.

could not, under section 2(2) European Communities Act 1972, be enlarged beyond those listed in Directive 85/337.⁸⁴

There are various explanations for why the Directive's requirements were integrated within the existing statutory framework in the United Kingdom. These tend to fall into two camps. First, is that given the Directive's integrated approach, the traditional administrative boundaries between planning law, pollution control, and conservation had to be reworked; this required a panoply of secondary legislation.⁸⁵ Less charitable is a second view that the government considered that the rules contained in the Directive presented the distinct possibility of restricting development on grounds of likelihood of environmental harm which conflicted with the policy of relaxing constraints upon granting planning permission. 'Lifting the burden' on developers was thought to be best achieved by adopting a statutory environmental assessment system which approximated to the then discretionary assessment procedures and practices.

These accounts of the manner of implementation of Directive 85/337 omit to consider that the procedural rules contained in the Directive are framed in a civil law fashion in which emphasis is placed upon guiding principles and loosely defined terms.⁸⁶ One example is the

⁸⁴ Following insertion of section 71A into the Town and Country Planning Act 1990 by section 15 Planning and Compensation Act 1991, there is now provision in primary legislation for the categories of environmental assessment to be extended, suggesting a recognition that there should be direct statutory authority for implementing the Directive.

⁸⁵ R. Macrory, 'Environmental Assessment: Critical Legal Issues on Implementation', in D. Vaughan, Current EC Legal Developments: Environment and Planning Law (London, Butterworths, 1991) pp. 31-43, at p. 32.

⁸⁶ With the exception of J. Alder, 'Environmental Impact Assessment - The Inadequacies of English Law', (1993) JEL, Vol. 5, No. 2, 203-221.

Directive's central principle that 'development consent for public and private projects which are likely to have significant effects should be granted only after prior assessment of the likely significant environmental effects has been carried out'; and that '... this assessment must be conducted by the 'competent authority' on the basis of the appropriate information supplied by the developer.'⁸⁷ Such a principle is not immediately amenable to integration by secondary legislation in existing assessment procedures which traditionally placed an onus upon the developer to provide information and which centred attention upon a specific parcel of land. The implementation of Directive 85/337 by the absorption of its requirements into the town and country planning system in England and Wales was incongruent with the purpose and meaning of this principle and effectively narrows the scope of the environmental assessment process as set out in the Directive.⁸⁸

(a) Legal Framework of Environmental Assessment

Following implementation of the Directive in the planning system, certain categories of project are subject to statutory environmental assessment. For those projects statutorily defined as 'development',⁸⁹ the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ('the 1988 Environmental Effects Regulations') may apply.⁹⁰ All

⁸⁷ Ninth recital, Preamble to the Directive; see in conjunction with Article 5 and Article 8 of the Directive.

⁸⁸ See J. McEldowney, *Public Law* (London, Sweet and Maxwell, 1994), pp. 219-221 on the integration of aspects of the civil law tradition into English law; and see J. D. Mitchell, 'The State of Public Law in the United Kingdom', (1966) 15 *ICLQ* 133.

⁸⁹ Section 55(1) Town and Country Planning Act 1990.

⁹⁰ Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No. 1199) as amended by the Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1990 (SI 1990 No 367), the Town and

projects falling within Schedule 1 of the 1988 Environmental Effects Regulations must be accompanied by an environmental statement, as must projects falling within Schedule 2 of the Regulations 'likely to have significant environmental effects by virtue of factors such as its nature, size and location.'⁹¹ Therefore the fact that a project falls within Schedule 2 does not mean that environmental assessment is necessarily required. There is no statutory definition on what is meant by 'significant effects'. There is, however, guidance in Circular 15/88 which lays down three general criteria as to whether the environmental effects are likely to be significant. These main criteria of 'significance' relate to the scale, location and types of environmental effects associated with the project in question.

Whether a project falls within a particular threshold set in either Schedule 1 or Schedule 2 (which approximate to Annex I and Annex II under the Directive) remains a subjective judgment to be made by the local planning authority. Official guidance in Circular 15/88 (Welsh Office 24/88)⁹² endorses that the application of environmental assessment rules is a matter for the planning authority,⁹³ although certain indicative criteria and thresholds are also given in Annex A of Circular 15/88. Difficulties in reaching this decision arise in cases in which the development is mixed, with some operations falling within Schedule 2 and others not doing so. The application of the Regulations is similarly tenuous

Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1992 (SI 1992, No. 1494) and Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1994 (SI 1994, No. 677).

⁹¹ Regulation 2 1988 Environmental Effects Regulations.

⁹² Circular 15/88 (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988).

⁹³ As confirmed in R. v. Swale Borough Council and Medway Ports ex parte The Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135, at 142.

in cases of cumulative development in which planning applications are 'staged'⁹⁴ and those in which the development may be described so as to fall outside the Regulations.⁹⁵

The developer's obligation under Directive 85/337 is one of providing information to assist the authority in making a decision. This information then forms part of the decision making process. No detailed statutory guidance is given in the 1988 Environmental Effects Regulations about the form that the developer's environmental statement should take. This situation may be compared with the legal provisions⁹⁶ and extensive guidance⁹⁷ governing the drawing up of development plans by local planning authorities, and scrutiny by the courts of the content and structure of development plans.⁹⁸

As mentioned, the information provided by the developer in an environmental statement constitutes a 'material consideration' of the local planning authority.⁹⁹ Should a

⁹⁴ As was the case in R v. Swale Borough Council and Medway Ports ex parte The Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135.

⁹⁵ This practice is highlighted by Wychavon District Council v. Secretary of State and Velcourt Limited (1994) JEL Vol. 6, No. 2, 531, in which an application for planning permission to build a broiler house fell outside the scope of the Regulations, although the number of broiler chickens to be accommodated later rose to the level triggering the environmental assessment process.

⁹⁶ Part III Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

⁹⁷ For example, Department of the Environment, Planning Policy Guidance Note 12, Development Plans and Regional Planning Guidance (London, HMSO, 1992).

⁹⁸ For example, as in Great Portland Estates plc v. Westminster City Council [1985] AC 661.

⁹⁹ Regulation 4 1988 Environmental Effects Regulations in conjunction with section 29(1) Town and Country Planning Act 1971; now governed by sections 70(2) and 78 Town and Country Planning Act 1990 to be read in conjunction with section 54A Town and Country Planning Act 1990. The materiality of information in an environmental statement is confirmed in Gateshead Metropolitan Borough Council v. Secretary of State for the Environment [1995] EnvLR 36 (CA).

developer fail to include an environmental statement when required to do so with an application for planning permission, the authority may refuse to consider the application. When an environmental statement is submitted, the 1988 Environmental Effects Regulations expressly prohibit the grant of planning permission unless the local planning authority or the Secretary of State has first taken the environmental information into account.¹⁰⁰ In the event that planning permission is granted in breach of the Regulations, for example because the planning authority fail to consider an environmental statement, the validity of that permission may be challenged and possibly declared void.¹⁰¹ Local authorities which propose to carry out a relevant development must also prepare and publish an environmental statement, invite representations from the public, and consult those bodies listed in the 1988 Environmental Effects Regulations before passing a resolution of planning permission.¹⁰²

Projects which do not constitute 'development', such as those permitted under a development order, are subject to different procedures.¹⁰³ For example, general guidance suggests that planning permission ought not to be given to any project which should be the

¹⁰⁰ Regulation 4 1988 Environmental Effects Regulations.

¹⁰¹ See A. E. Telling, Planning Law and Procedure (London, Butterworths, 1990), pp. 138-143: challenge will take place in the High Court by way of the procedure under section 288 of the Town and Country Planning Act 1990; if the local planning authority fails to determine that a proposed development requires the submission of an environmental statement, remedy also lies in an application to the High Court for judicial review.

¹⁰² Under regulation 25A 1988 Environmental Effects Regulations.

¹⁰³ Permitted development rights are removed where the proposal would require environmental assessment, or is likely to have significant effect on a special protection area or special area of conservation under the provisions of the Town and Country Planning (General Permitted Development Order 1995 (SI 1995, No 418) and Town and Country (Environmental Assessment and Permitted Development) Regulations 1995 (SI 1995, No 417). See Circular 3/95, Permitted Development and Environmental Assessment (London, HMSO, 1995) for guidance.

subject of an environmental assessment in a simplified planning zone.¹⁰⁴ Furthermore, projects falling within Annex I of Directive 85/337 are excluded from all simplified planning zone permissions. A similar procedure exists in the case of enterprise zones.¹⁰⁵

Projects such as highways building, electricity works, and drainage works fall outside the town and country planning development consent system because they are considered to be of particular economic or environmental significance, or are public developments in which case the 'competent authority' granting consent for a project is not the local planning authority but the Secretary for State for Highways, the Minister for Energy, or a public body such as the Crown Estate Commissioners or the Forestry Commission. These projects are the subject of specific regulations¹⁰⁶ which give effect to the requirements in Directive 85/337. For example, the Highways Environmental Effects Regulations 1988 amended the Highways Act 1980 so as to oblige the Secretary of State for Transport to publish an environmental statement on a proposed highway or alteration to an existing highway if the project falls within Annex I or Annex II of the Directive.¹⁰⁷ For the most part, agricultural and forestry developments are also excluded from the ambit of the legal definition of 'development' in the town and country planning system and thus do not require development

¹⁰⁴ Department of the Environment, Circular 24/88 (Welsh Office 48/88), Environmental Assessment of Projects in Simplified Planning Zones and Enterprise Zones (London, HMSO, 1988).

¹⁰⁵ The vast majority of enterprise zones were designated before July 1988 and are therefore unaffected by environmental assessment law.

¹⁰⁶ For example, Electricity and Power Line Works (Assessment of Environmental Effects Regulations) 1989 (SI 1989 No. 167); Land Drainage Improvement Works (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No. 1217). A complete list of these projects is given in Appendix III.

¹⁰⁷ Highways (Assessment of Environmental Effects) Regulations 1988 (SI No. 1241) inserted section 105A into the Highways Act 1980.

consent.¹⁰⁸ For this reason, some categories of forestry¹⁰⁹ and agricultural¹¹⁰ projects also fall under separate regulations.

No statutory guidance is given in the implementing regulations as to what weight should be given to information arising from the environmental assessment process. There is no provision to parallel section 54A Town and Country Planning Act 1990 which gives clear guidance that priority should be given to the relevant development plan in determining a planning application over other 'material considerations'. Therefore whilst environmental assessment is responsible for formalising procedures for eliciting information about the effects of development on the environment, this has not been accompanied by statutory criteria for determining the significance of information arising from the process.

(b) Adequacy of the Implementation of Directive 85/337

National and European Community criteria for judging the adequacy of implementation of European Community legislation are not uniform and very often are not

¹⁰⁸ For a discussion on the post war settlement for farming contained in the Agricultural Act 1947 which contributed to the exclusion of agricultural and forestry 'development' from control by the Town and Country Planning Act 1947 see S. Elworthy, Farming for Drinking Water (Aldershot, Avebury, 1994) pp. 31-35; see also R. Macrory and B. Sheate, 'Agriculture and the European Community Environmental Assessment Directive: Lessons for Community Policy Making', (1989) JCMS Vol. 28, No. 1, 68-81, at 78: the Directive 'appeared to touch upon what might be described as the leitmotif of the British planning system - the total exclusion of agriculture and forestry use from anticipatory land-use controls.'

¹⁰⁹ Forestry projects funded by grants from the Forestry Commission generally fall under the Environmental Assessment (Afforestation) Regulations 1988 (SI 1988 No. 1207).

¹¹⁰ The Environmental Assessment (Salmon Farming in Marine Waters) Regulations 1988 (SI 1988 No. 1218); and Land Drainage Improvement Works (Assessment of Environmental Effects) Regulations 1988 (SI No. 1988 No. 1217) may apply.

made explicit. The European Commission has recently begun to issue guidelines to Member States on the administrative arrangements for implementing Community instruments and these are likely to be used to judge implementation.¹¹¹ A set of criteria has also been developed by the European Court of Justice. For example, implementation requires European Community legislation to be incorporated in a public manner, to meet fully the requirements of legal certainty and transpose obligations into binding national law.¹¹² The Court has also endorsed a clear, 'absolute' definition of implementation of environmental Directives which includes bringing about physical changes to the environment.¹¹³

By any criteria, there are a number of problems with the Directive's implementation in the town and country planning system in England and Wales.¹¹⁴ Clearly omitted from the 1988 Environmental Effects Regulations is any requirement to assess cross-boundary effects as required by Directive 85/337.¹¹⁵ Other examples of discordance between Directive 85/337 and the 1988 Environmental Effects Regulations are more difficult to gauge, for example, the type and detail of information to be provided by the developer. Annex III of the Directive outlines the information developers must include in their environmental

¹¹¹ D. O'Keeffe, 'European Community Law', (1993) *CLP* Vol. 46, 73-109, at 100.

¹¹² Case 239/85. *Commission v. Belgium* [1986] ECR 3645. (1988) 51 CMLR 248: the Court held a government circular to be inadequate to implement a Community toxic waste Directive.

¹¹³ Case C-337/89, *Commission v. United Kingdom* (1993) *JEL* Vol. 5, No. 2, 273; Case C-237/90, *Commission v. Germany* (n/r) judgment 24 Nov. 1992.

¹¹⁴ See Commission of the European Communities, *Report from the European Commission on the Implementation of Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment* COM(93) 28 final, Vol. 12 Annex for the United Kingdom, Vol. 13 for all Member States (Brussels, Commission of the European Communities, 1993).

¹¹⁵ Article 7.

statement other than that specified in Article 5(1) of the Directive. This includes a description of the forecasting methods used and the identification of alternative processes and sites.¹¹⁶ By employing the word 'may' when referring to the provision of this information the 1988 Environmental Effects Regulations relegate much of the Annex III information to an optional extra and downgrade generally the requirements in this Annex.¹¹⁷ On this aspect the Regulations provide the developer, not the local planning authority, with discretion to decide which of the information referred to in Annex III (Schedule 3 in the 1988 Environmental Effects Regulations) must be submitted.

The adequacy of environmental assessment of some agricultural and forestry projects is also at issue because of the variance between the large number of developments listed in the Directive's Annex II when compared to the parallel Schedule 2 of the 1988 Environmental Effects Regulations.¹¹⁸ Most notably, an environmental assessment will not be required for the cultivation of semi-natural or uncultivated land, land reclamation from the sea and the restructuring of rural land holdings, all of which are listed in Directive 85/337.

From 1989 the Commission began to receive complaints about the inadequate implementation of the Directive; these focused on seven major projects including the M3

¹¹⁶ W. Sheate, The Environmental Assessment Directive: Five Years On (London, Council for the Protection of Rural England, 1991) paras. 3.13-3.19.

¹¹⁷ Ibid. para 3.13.

¹¹⁸ For example projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes (Annex II Article 1(b) and initial afforestation projects (Article 1(d)) listed in the Directive are excluded from Schedule 2 of the 1988 Environmental Effects Regulations; on this issue see Sheate and Macrory, supra.

Extension near Winchester through Twyford Down and the proposed East London river crossing through Oxleas Wood.¹¹⁹ These complaints led to the European Commission commencing enforcement procedures against the United Kingdom government and requesting that work on the projects in question be halted. A letter of formal notice from the Commissioner for the Environment, Mr de Meana, set out general respects in which the Commission alleged the United Kingdom was in breach of the Directive in addition to the seven projects. One such respect included the application of environmental assessment rules to 'pipeline' projects.¹²⁰ The United Kingdom government argued that any project which had embarked upon the consent process before the Directive was adopted in July 1988 was exempt from its provisions; the Commission considered that where consent was not received until after the Directive's implementation, such projects should be subject to its provisions. This initiated Article 169 Treaty of Rome enforcement proceedings by the Commission for failure to implement correctly a legal act of the European Community.

Of central importance was that the Commission raised as an 'issue of principle' whether a developer's environmental statement can properly constitute an environmental assessment. It considered that the United Kingdom's implementation in this respect did not amount to environmental assessment because the local planning authority is required to undertake it under Directive 85/337, not the developer. Regulation 4 of the 1988 Environmental Effects Regulations prohibits the authority from granting planning permission

¹¹⁹ Written Questions in the European Parliament 26 March 1991. Other projects were M3 and M11 Motorways, Rail link between London and the Channel Tunnel, Coca-Cola plant at Brackmills and Hospital Incinerator in South Warwickshire.

¹²⁰ Press Release of the European Commission on the United Kingdom infringement of the Directive, 31 July 1992. Other issues included that bodies benefitting from Crown immunity were not covered by the United Kingdom's implementing Regulations. The Directive did not provide for any such exemptions from its requirements.

without having considered the developer's environmental statement, any representations and the views of various statutory consultees ('environmental information').¹²¹ This aspect of the implementing legislative provisions has the effect of placing an emphasis upon the environmental statement, compiled by the developer.¹²² The effect is a departure from the process of environmental assessment envisaged in the Directive in which the 'competent authority' carries out an assessment on the basis of 'environmental information' provided by the developer and from other sources.¹²³ Circular 15/88 (Welsh Office 23/88) acknowledges that the term 'environmental assessment' refers to the collection of information on the environmental effects of a project from the developer (in an environmental statement) and other sources such as the results of consultation with statutory consultees and the public.¹²⁴ Nevertheless, the Circular places an emphasis upon the developer's environmental statement which is to be published, rather than how the local planning authority is to consider the information.¹²⁵ Alluding to these legislative provisions and guidance, the Commission maintained that the United Kingdom's interpretation of the Directive compromised the independent appraisal of environmental impacts.

¹²¹ See regulations 8-15 1988 Environmental Effects Regulations.

¹²² Sheate. Op.cit., para. 3.11.

¹²³ See the ninth recital, preamble to the Directive, to be read in conjunction with Article 8 which states that the authority must consider all the relevant environmental information before making a decision as to development consent.

¹²⁴ Circular 15/88 (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988) paras. 12-13.

¹²⁵ Circular 15/88, (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988) para. 11.

The European Commission terminated five of the seven proceedings against the United Kingdom. In most of these cases, the Commission pragmatically accepted equivalent assessments in cases in which it had been demonstrated that the procedures were equal to those provided for in the Directive. In the two remaining cases, the Commission sent a reasoned opinion.¹²⁶ A few months after the European Commission formally terminated the five enforcement proceedings, the government gave the Commission an undertaking that planning legislation would be amended in some of the respects complained of.¹²⁷ The most notable concession was the agreement in principle that environmental assessment will apply to cases involving the use of natural or semi-natural areas for intensive agriculture where 'such projects are likely to have significant effects on the environment' which, as noted, had been excluded from the scope of environmental assessment on the United Kingdom though listed in Annex II of the Directive.¹²⁸

The height of the exchanges between the Commission and the Secretary of State about implementation took place against a background of the United Kingdom opting out of the Social Chapter of the Treaty on European Union.¹²⁹ During the dispute, which had become focused on several individual road building projects, the principle of subsidiarity was invoked by the United Kingdom government. This principle, derived from Title VII of the

¹²⁶ East London River crossing and extension to the BP plant at Kinneil, Scotland. The Commission later terminated formal proceedings against the BP extension project, accepting the United Kingdom's suggestion that the environmental assessment be attached to the application for Integrated Pollution control authorisation.

¹²⁷ Institute for European Environmental Policy, Press Notice, November 1992.

¹²⁸ House of Commons Written Answers 16 December 1992, Cols 319-320; 'Changes in Environmental Assessment Rules Announced', (1993) ENDS Report No. 216, 33-34.

¹²⁹ 'Silly Wrangle Raises New Summit Obstacle', The Guardian 19 October 1991.

Treaty of Rome, was awaiting elevation as a general principle of the European Community in the Treaty on European Union. The government relied upon the principle of subsidiarity to persuade the European Commission that some matters were the exclusive concern of a Member State, of which town and country planning was a prime example.

These various difficulties encountered with the formal implementation of Directive 85/337 raise questions about the clarity and consistency of the criteria used for judging the adequacy of its implementation. Though appearing to require a straightforward legal assessment of legislative provisions, implementation is a subjective and changeable concept. The implementation of Directive 85/337 was influenced in an immediate sense by political events; more fundamentally, though, by the existence in the United Kingdom of a long-standing, informal, and discretionary approach to environmental assessment.

Implementation of Directive 85/337: An Assessment

Several conclusions can be drawn from the implementation of Council Directive 85/337 in the United Kingdom's town and country planning system. Primarily, existing procedures for assessing the effects of development on the environment have been formalised and codified as a result of the implementation of the Directive. The Directive provides for the formal introduction of expert and public opinion on the effects of development on the environment into political planning procedures. The implementation of the Directive therefore raises questions about the evaluation of the adequacy and significance of this information by planners and the use of information about environmental effects by various parties in the planning system.

Although procedures for assessing the environmental effects of development are formalised, fragmentation in the administration of environmental assessment rules still exists because of the absorption of the Directive's provisions into the existing planning system by means of twenty sets of regulations. It was perhaps therefore inevitable that the legal and administrative features of the ad hoc and largely informal pre-statutory environmental assessment procedures came to be combined with those designed to give legal effect to Directive 85/337, for example that an onus is placed upon the developer to provide information about the effects of development on the environment and that, in eliciting and presenting this information, the developer should enjoy discretion. For this reason also, the planning system's existing lacunae, particularly the exclusion of all but a handful of agricultural and forestry projects from the need for development consent, exist in environmental assessment law.

The various environmental assessment regulations, and principally the 1988 Environmental Effects Regulations, confer considerable discretion on planners to determine the application of environmental assessment rules and the adequacy of environmental statements submitted by developers with an application for planning permission despite overall responsibility for the implementation of a statutory and uniform environmental assessment system lying with central government. However, unlike the procedures existing prior to the implementation of Directive 85/337, this discretion is now subject to certain statutory boundaries. The environmental assessment regulations remove environmental assessment from the planners' near exclusive discretion and, potentially at least, render the procedures subject to amendment by the Secretary of State and to control by the courts. The implementation of Directive 85/337 might therefore be seen as an example of 'legalisation'

in which broad, discretionary and non-binding standards of environmental assessment have become transformed into procedural rules attaching a definite legal consequence. In theory, this has the effect of increasing administrative accountability to the public because, once policies and standards are taken out from under the ambit of discretionary application and exposed as rules, they are no longer hidden from public scrutiny.¹³⁰ Similarly to pre-statutory assessment, the implementing regulations may also be interpreted as granting discretion to the developer with respect to the selection and presentation of information. Such control over information on the effects of development on the environment entering the decision making processes in the planning system becomes particularly significant in cases in which the developer's environmental statement is treated as though it were an account of the full environmental assessment process.

Perhaps most significant is that implementation of Directive 85/337 provokes a reassessment of the interrelation of planning and environmental law. The flexibility and scope of the planning system has meant that, through environmental assessment procedures, environmental protection has become an explicit factor in individual developments in the context of the development consent system. In addition, the environmental assessment procedures have adjusted planning's traditional focus on the specific site as property and contributed a broader concept of environment in planning law. In legal terms, the effect of Directive 85/337 is to extend the legitimate scope of planning law to encompass matters of environmental protection and therefore blur the boundaries of responsibility between planning and environmental law. The implementation of environmental assessment rules also has

¹³⁰ J. Jowell 'The Legal Control of Administrative Discretion', [1977] Public Law 178-220, at 183.

considerable symbolic value: environmental assessment upholds an idea of 'balance' between developmental and environmental or conservatory interests in the planning system.¹³¹

The practical impact of the implementation of Directive 85/337 is addressed in the following chapters in the context of five case studies in which environmental assessment procedures were invoked. First, in chapter 6 I explain the research methods I adopted in compiling these case studies.

¹³¹ Healey and Shaw, *supra*. at 23.

PART III IMPLEMENTATION OF ENVIRONMENTAL ASSESSMENT: THE CASE STUDIES

In Part I of this thesis I set the scene of environmental assessment in environmental law by tracing its origins to the United States' National Environmental Policy Act 1969 and its development as an integrated and preventative technique of environmental law. In Part II, I explained how environmental assessment became a central part of planning law following the implementation of Council Directive 85/337 in the United Kingdom's town and country planning system and how the European model of environmental assessment has become combined with 'indigenous' methods of project appraisal. The subject of this Part is the practical application of Directive 85/337, in the context of five case studies of proposed projects subject to environmental assessment rules.

Part III consists of three chapters. In chapter 6, I explain the methodology of the empirical research, particularly the use of the case study. I describe the sources of material for the case studies and the methods used in analysing this material. I also analyse key texts in the planning process which form the basis of much of the analysis: the development plan, the decision letter and the developers' environmental statement. In chapter 7 I present the case studies. First, the Thanet Way Bypass scheme, proposed by Kent County Council highways and transport department, and determined by the planning department of the same Council. Second, a combined heat and power station on the site of a disused electricity generating plant in the City of London. Third, a proposed waste disposal site in Warwickshire. Fourth and fifth, a minerals extraction application and an incinerator plant in Essex and South Yorkshire respectively.

These case studies form the basis of the analysis of the environmental assessment process in chapter 8. In this chapter, I first summarise the tentative conclusions which may be drawn from the five case studies in chapter 7. I then focus my analysis on the key issues raised by the case studies: the contribution of statutory environmental assessment to identifying and mitigating adverse environmental effects; the scope of administrative discretion on the part of planning officers; and the integration of European and preventative legal procedures with those already existing in the planning system. A primary finding is that the method of implementation of the Directive was such that rules introduced to implement the Directive have come to resemble closely and, in some cases overlap with, existing methods of assessing the effects of development upon the environment. Significantly, the environmental assessment process is used by developers; in some cases by voluntarily submitting an environmental statement with an application for planning permission with the expectation that this will ease the project through procedures for planning permission.

The analysis of specific points raised by the five case studies is used as the starting point for a more general discussion about the operation of environmental assessment as a technique of environmental law and the place of environmental assessment in the planning system in Part IV of the thesis.

Chapter Six The Case Study Methodology

Introduction

It is first necessary to outline the methodology adopted for the case studies used in this thesis. In this chapter, I outline the reasons for adopting a case study approach and explain the selection of the case studies, sources of information, and method of analysis of the case studies. First, I restate the aims and objectives of the research. The aim of the research is to find out how environmental assessment has developed and how environmental assessment rules arising from Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment¹ are applied in the context of five case studies. The main objectives in carrying out this research are to assess the impact of European Community environmental law on environmental assessment in the United Kingdom; and to study how planning and environmental law interrelate in a practical way. In light of these objectives, the research was designed and intended to address questions about how the environmental assessment procedures work and are integrated in the planning consent procedure, the relevance of environmental assessment as a method of pollution control, and the effect of the procedure on the local planning authority's decision making processes and also the local public planning inquiry. It is also necessary to consider the contribution of this study to literature on environmental law lies in its practical approach; the case studies on the application of environmental assessment counter the present bias in legal

¹ Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ L 175, 5.7.1985, p. 40.

research towards legislative implementation or the promulgation of new laws to comply with European Community law.

The Case Study Methodology

The case study method provides some explanation of the practical working of procedures and processes. For this reason, the methodology allowed me to fulfil the primary objectives of this thesis - understanding how environmental assessment works as a process, examining the effect of statutory methods of assessment on the discretion exercised by planners, and the influences of environmental assessment as part of European Community environmental law on the planning process. Relevant information in the case studies included planners' perceptions of the impact of statutory environmental assessment rules on their decision about whether to grant or refuse planning permission; and their evaluation of the significance of information about the environmental effects of projects in the development consent system. Information such as this would be difficult to obtain by other methods, for example a survey which uses quantitative rather than qualitative methods of research and therefore gives a broader, and less detailed picture of procedures and processes. The case study is also capable of representing the complexities of decision making² as seen in the use of the method in other areas of law by Snyder,³ Elworthy,⁴ and Miller and Wood.⁵ This

² J. Platt, 'What Can Case Studies Do?', (1988) Studies in Qualitative Methodology 1-23, at 20.

³ F. Snyder, New Directions in Community Law (London, Weidenfeld and Nicholson, 1992) in which the European Community's 'sheepmeat' regime is used as a case study.

⁴ S. Elworthy, Farming for Drinking Water: A Study of a Regulatory Regime (Aldershot, Avebury, 1994) studies the designation of Nitrate Sensitive Areas.

is because the case study method views a social phenomenon as a whole, and encourages connections to be made between features in the case studies. Further functions of the method include its offering detailed examples of phenomena and its being used as evidence of an argument or to suggest hypotheses.⁶

It is also accepted that there are some disadvantages in using a case study approach. The case study method does not provide a wide basis for statistical analysis of cases not studied;⁷ findings may therefore be unrepresentative of a larger population. In this research, the function of the case studies was not to represent a larger 'population' of projects but rather to establish some essential features which characterise the projects studied and thereby permit analysis of how theories or principles manifest themselves in a particular set of events.⁸ In using this method, the insights and opportunities for detailed study of environmental assessment procedures are inevitably traded off against the scope for statistical generalisation.

⁵ C. Miller and C. Wood, Planning and Pollution: An Examination of the Role of Land Use Planning in the Protection of Environmental Quality (Oxford, Oxford University Press, 1983), Preface, explain that they chose to use the case study method for this reason.

⁶ Platt, supra, at 5-9.

⁷ For such analysis, see the work of the Environmental Impact Assessment Centre, Manchester University, for example, C. Wood, C. Jones and N. Lee, Environmental Statements 1988-1990: An Analysis (Manchester, University of Manchester, 1990).

⁸ In this use of the case study, I follow the approach adopted by J. C. Mitchell, 'Case and Situation Analysis', (1983) Sociological Review 188-211, at 207.

(a) Selection of Case Studies

Case selection was carried out in three stages. First I wrote to those local planning authorities in England and Wales which had experience of three or more environmental assessments. This information was obtained from lists compiled by Wood, Jones and Lee in their review of environmental statements written between 1988 and 1990.⁹ I arranged for initial interviews to take place at twenty local planning authorities. I carried out pilot interviews at three authorities and, having reviewed the information arising from these, modified the questionnaire to take account of those areas which I identified as requiring greater focus and probing. Second, at an initial interview in addition to asking planning officers those questions listed in the questionnaire (Appendix II), I asked them to describe any projects they were familiar with which had been the subject of environmental assessment. Third, I made an initial study of most of the projects mentioned by interviewing other officers in the planning authority and reading the planning file on the project. The case studies described in the following chapter were chosen from these. A project (rather than an individual, organisation, or event) is at the centre of each case study because, as the focus of decision making in the planning process, the 'project' appeared to offer greater opportunity for considering environmental assessment procedures than the other possibilities.¹⁰

⁹ C. Wood, C. Jones and N. Lee, Environmental Statements 1988-1990: An Analysis (Manchester, University of Manchester, 1990); I sought initial interviews with those authorities listed as having experience of three or more environmental statements on the grounds that C. Wood and C. Jones, Monitoring Environmental Assessment and Planning (London, HMSO, 1990) had already carried out an in-depth study of those planning authorities with little or no experience of environmental assessment.

¹⁰ This is also the case in other studies on environmental assessment: for example, Miller and Wood, Op.cit.

This selection process means that the case studies tend to represent more planners' interpretation of a project worthy of study rather than a wider category or population of project. This reinforces that, in doing this research, information on environmental assessment was inevitably filtered and interpreted by the planning officers I interviewed. However, further criteria included the opportunity a case study gave to study a range of planning regimes, environmental resources, developmental pressures, and different locations.¹¹ An important criterion was to study projects proposed or sponsored by the public sector since research in this area has tended to focus on the assessment of private developments.¹² Decisions were also influenced by the extent to which access to planning files and planning inquiries could be obtained and the opportunity to conduct a number of interviews in a planning department.

(b) Sources of Material for the Case Studies

I relied on interviews as the source of much of the case study material, particularly interpretations of the decision making process. Informal interviews were carried out at twenty planning authorities, generally with planning department managers and, where possible, with planning officers at both county and district level in one area, over a period of two years from May 1992. Interviews were also conducted with statutory consultees (representatives from Her Majesty's Inspectorate of Pollution (HMIP), the National Rivers

¹¹ Some of the case study area selection criteria were derived from S. Boucher and S. Whatmore, 'Green Gains? Planning by Agreement and Nature Conservation', (1993) JEPM Vol. 36, No. 1, 33-49, at 39.

¹² For example, J. Alder, 'Environmental Impact Assessment: The Inadequacies of English Law', (1993) JEL Vol. 5, No. 2, 213-221, at 205, concentrates upon private sector projects.

Authority, English Heritage and environmental health departments), Members of the European Parliament and local action groups, environment and planning lawyers, planning inspectors and councillors. In the course of the research forty-five interviews took place; most taped and transcribed verbatim. To maintain confidentiality, those interviewed are not identified beyond a description of their professional role and the organisation in which they are employed.

The purpose of interviewing planners was to gain insights into their attitudes about the environmental assessment procedure and to discuss their experiences. I asked planners those questions listed in Appendix II, but the conversations were intentionally more wide ranging. Broadly, the topics covered in the course of the interview were as follows: the organisation of the planning department, their responsibility for environmental assessment, and their evaluation of the use of environmental information and experiences with the procedure. I sought to understand how planning officers assessed environmental effects prior to the implementation of Directive 85/337 and the effect of the Directive's procedures on these methods of assessment. Some of the interviews took place whilst attending planning inquiries, in which case the interviews were directed more by the set of questions in Appendix III.

Planners' Functions in the Environmental Assessment Process

Given the emphasis in this research upon interviewing planners, I here outline the structure of the local planning authority, and describe planners' functions in the environmental assessment process and in the wider environmental responsibilities of local

government. The planning authority is one department within local government. Planning departments exist at both county and district levels of local government, but have different planning functions and duties: county councils take responsibility for minerals and waste applications and highways development; district councils have responsibility for most other development consent applications.

The local planning authority's planning functions take place in a wider context of the local authority's responsibilities for protecting the environment. These tend also to be divided broadly between the two tiers of government in non-metropolitan areas.¹³ Part I of the Environmental Protection Act 1990 provides for a system of local authority air pollution control to be administered by district council environmental health officers.¹⁴ This system is quite separate from the authority's powers of planning control; notably, there is no requirement that planning permission should be in force before authorisation is granted under Part I of the Environmental Protection Act 1990.¹⁵ With respect to the control of waste under Part II of the Environmental Protection Act 1990, the main regulatory function of administering and supervising the waste management licensing system falls to the county council as a waste regulation authority, the district council in Wales, and waste disposal

¹³ On the division of environmental responsibilities in local government, see Association of County Councils, County Councils and the Environment (London, Association of County Council Publishers, 1990) and R. Macrory, 'British Environmental Law: Major Strands and Characteristics', (1989) Connecticut Journal of International Law Vol. 4, No. 2, 287-304, at 296.

¹⁴ In the case of processes listed as Part B processes under Schedule 1 and prescribed substances under Schedule 4 of the Environmental Protection (Prescribed Processes and Substances) Regulations 1991 (SI 1991, No. 472) as amended by Environmental Protection (Prescribed Processes and Substances) (Amendment) Regulations 1992 (SI 1992, No. 614).

¹⁵ On this point, see J. Pugh-Smith, 'The Local Authority as a Regulator of Pollution in the 1990s', [1991] JPEL 103-109, at 104.

authority or London borough councils and district councils in metropolitan areas.¹⁶ Unlike air quality control, planning permission must be in force before authorisation for a licence may be granted,¹⁷ even though the most effective time to impose conditions relating to waste disposal and management is likely to be when granting planning permission.

Returning to the development consent process administered by the local planning authority, planning officers of the local planning authority present their views and recommendations of a development proposal to the elected planning committee of the local council who determine formally whether planning permission should be granted, or refused, or granted subject to conditions. In most cases, the planning committee will follow the planners' recommendation. Individual planning officers may also have delegated planning powers.¹⁸

As discussed in chapter 5 in relation to the administration of environmental assessment rules, planning officers judge the need for an environmental assessment. In the case of Schedule 2 (discretionary) projects, planners rely on the test set out in Circular 15/88 of whether the development is likely to give rise to significant environmental effects, to make this judgment and the views of statutory consultees.¹⁹ With respect to Schedule 1 (mandatory) projects, planners must determine whether a particular project falls within the

¹⁶ This arrangement is subject to change under Part I of the Environment Bill 1995: clause 2 transfers all the functions of the Waste Regulatory Authorities (and the National Rivers Authority and Her Majesty's Inspectorate of Pollution) to the Environment Agency.

¹⁷ Section 36(2) Environmental Protection Act 1990.

¹⁸ Section 101 Local Government Act 1972.

¹⁹ Circular 15/88 (Welsh Office, 23/88) Environmental Assessment (London, HMSO, 1988) para. 18.

various thresholds set in the Schedule. On receiving an environmental statement by the developer, planning officers organise a round of consultation with statutory consultees and the public and must also judge the adequacy of the developer's environmental statement. According to Directive 85/337, planning officers are then to conduct an environmental assessment themselves on the basis of this information.²⁰ The environmental information arising from the developer's statement and the consultation process is a material consideration of the planning authority for the purposes of determining an application for planning permission.²¹ Planners enjoy a discretion as to what weight to attribute to this category of information as against a host of other 'material' considerations such as official policy guidance, the prospect of financial gains, 'enabling' development, or the preservation of existing uses. According to section 54A Town and Country Planning Act 1990, planners must give priority to the development plan. In theory, this amounts to a presumption in favour of the development plan. Planners must also pay special attention to the desirability of preserving or enhancing the character or appearance of a conservation area.²²

Planners employed by county councils tend to have greater experience of environmental assessment than those working in district councils because of the county council's statutory responsibilities and planning powers over highways, minerals working and waste disposal matters, all of which tend to have significant environmental effects. All the planners interviewed held a professional qualification from the Royal Town Planning

²⁰ Ninth recital, Preamble, Directive 85/337.

²¹ Section 70(2) Town and Country Planning Act 1990.

²² Section 72 Planning (Listed Buildings and Conservation Areas) Act 1990; this provision introduces a specific weighting for the protection of conservation areas; a similar duty exists in relation to listed buildings under section 16 of the Planning (Listed Buildings and Conservation Areas) Act 1990.

Institute. Their formal training in environmental assessment tended to be limited. Some had undergone higher education courses on environmental assessment and strategic planning; one had written a detailed guide to the procedures, and another had conducted research on environmental assessment. Few planners were familiar with Council Directive 85/337; most referred instead to the United Kingdom's implementing regulations. There was therefore little appreciation of the implementation of European Community rules on environmental assessment in national law. This is perhaps a consequence of training planners in United Kingdom planning law and the relatively recent competence of the European Community in matters of town and country planning. A number of officers recounted the influential effect of the environmental agenda on planning's traditional concerns of amenity, recreation and landscape. In recent years pollution control and conservation have become more important in their work, though their 'working perspective', as one planner described their outlook, has tended to remain that of amenity.²³

The planners tended to perceive their role in environmental protection to be that of generalists when compared with more specialist pollution control bodies such as environmental health officers. Indeed, it is to these officers that planners frequently turn for advice on matters of pollution. Planners and environmental health officers share the same background in public health, often work near to each other and share a common

²³ On the changes to the profession brought by the environmental movement, see P. Healey, 'The Professionalisation of Planning in Britain', (1985) *TCP* Vol. 56, No. 1, 492-507; and A. Blowers, (ed.) *Planning for a Sustainable Future* (London, Earthscan, 1993).

vocabulary.²⁴ In contrast, planners' liaison with inspectors from Her Majesty's Inspectorate of Pollution tends to be less frequent and more formal.

Planners do not have a monopoly on expertise on environmental assessment. Varied scientific and technical skills are required to carry out environmental assessment and to evaluate environmental statements. A number of experts are therefore often engaged in the environmental assessment process: biological scientists, architects, ecologists, archaeologists, and engineers, many of whom are retained by environmental consultants.²⁵

Texts Used in the Planning Process

In addition to interviewing planners and other individuals, material for the case studies was drawn from development plans, planning decision letters, and environmental statements. Together with planning committee reports and minutes, correspondence, and consultation papers in the planning file, these texts offered an official history of a project and also served to fill in many of the details of the decision making process described at interview. The characteristics of the development plan, decision letter and environmental statement relevant to this research are summarised in table 6.1.

²⁴ B. Irving, Environmental Health Officer, Croydon Borough Council, personal communication, May 1994.

²⁵ On the environmental consultancy profession, see Environmental Data Services Ltd, Environmental Consultancy in the United Kingdom: A Market Analysis (London, ENDS Ltd, 1995).

Figure 6.1 Texts Used in the Planning Process¹

	Development Plan	Appeal Decision Letter	Environmental Statement
Author	Council	Inspector with quotes from appeal parties	Developer, environmental consultant
Vetted	At examination in public or public local inquiry by panel or inspector	Department of the Environment in certain cases	Informal contributions by planning authority only
Objective	Provide a framework for development consent decisions; statement of intent	Confer or deny development rights	Constitutes a 'material consideration'; states developers' intent
Audience	Councils, developers, local electorate	Appellant, councils, objectors, subsequent property owners	Planners, Councils, objectors
Function	Political: part of ongoing policy process; 'cultural' authorisation of future development	Legal: final say (subject to courts); legal authorisation to future development	Hybrid: confers legal and 'cultural' authorisation

¹ Adapted from G. Myerson and Y. Rydin, 'Environment and Planning: A Tale of the Mundane and Sublime', (1994) *Space and Society* Vol. 12, 437-452.

The development plan,²⁶ arising from consultation and a public examination at inquiry, provides a politically sanctioned statement of policy and a framework for future decisions by the local planning authority. The development plan tends to include broad brush policies in respect of housing, industry and commerce, employment, education, social and community services and, recently, 'the conservation of the natural beauty and amenity of the land, the improvement of the physical environment and the management of traffic'.²⁷ In formulating policy and general proposals in respect of development and land use, the plan confers 'cultural authorisation'²⁸ or legitimacy to a programme of action, usually to advance some notion of the public interest - even against the interests of private landowners.²⁹ Case law on the scope of private property interests vis-à-vis various public interests has grown up in the frame of the development plan.³⁰

Second, planning decision letters, written by a planning inspector following an appeal, perform a legal function of conveying a decision conferring or denying development rights.

²⁶ The Local Government, Planning and Land Act 1980 divided plan making functions: counties in metropolitan and non-metropolitan areas were given responsibility for broad planning strategy (structure planning); districts, for local plans and most matters of planning control. The Local Government Act 1985 deemed metropolitan boroughs and London boroughs unitary authorities, responsible for compiling unitary development plans, combining strategic and more detailed guidance on land use. Sections 37 and 38 Town and Country Planning Act 1990 confer a mandatory responsibility on county councils (district councils in Wales) to prepare plans for minerals working and waste disposal on land.

²⁷ For general guidance, see Department of the Environment, Planning Policy Guidance Note 12, Development Plans and Regional Planning Guidance (London, HMSO, 1992).

²⁸ G. Myerson and Y. Rydin, 'Environment and Planning: A Tale of the Mundane and Sublime', (1994) Society and Space Vol. 12, 437-452.

²⁹ P. McAuslan, Ideologies of Planning (Oxford, Pergamon Press, 1980), p. 151; see also the discussion on the plurality of 'public interest' in development plans, in J. Jowell, 'Legal Control of Administrative Discretion', [1977] Public Law 178-220, at 216-217.

³⁰ For example, Great Portlands Estates plc v. Westminster City Council [1985] AC 661.

In giving a concise written account of the decision making process and reasoned justification for a decision, the letters provide legal authorisation of the decision so that it can be upheld and defended.³¹ The decision letters also give information about the development proposal and site, the inspectors' consideration of environmental information and the role of the environmental statement in appeal. This text, in contrast to the development plan, stresses the importance of individual decisions on their merits, focusing upon a landowner's right of development on his property.

These texts represent two limbs of the planning system - development planning and development control. As discussed in chapter 5, the correspondence between the two is an enduring issue in planning law.³² A general reluctance to closely relate development planning and development control meant that, until recently, the significance of the development plan was subject to 'other material considerations'.³³ The amendment of the Town and Country Planning Act 1990 by the insertion of section 54A appears to represent a concerted effort on the part of the legislature to draw the development plan back to the centre of decision making, replacing the general presumption in favour of development with a presumption in favour of the development plan.³⁴

³¹ Myerson and Rydin, *supra*. at 12.

³² McAuslan, *Op.cit.*, p. 151, describes the changing relationship between planning development and development control.

³³ For example, Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1988) para. 15 (as amended by Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1992)) states that a project not in accordance with the development plan might still be permitted 'so long as it could be said that there would be no demonstrable harm to interests of acknowledged importance'.

³⁴ Section 54A Town and Country Planning Act 1990, inserted by section 26 Planning and Compensation Act 1991, states: '...the determination (of planning permission) shall be made in accordance with the development plan unless material consideration indicate otherwise';

The third and, for the purposes of this research, the most important text is the environmental statement. Submitted by the developer to the local planning authority with an application for planning permission in certain cases, this gives a developer's description of the proposed development, assessment of its likely environmental effects and, usually, a statement of intent of measures to be taken by the developer to mitigate adverse effects. The views of interested parties (statutory consultees, local residents or environment groups) are often given. The statement might also include a detailed account of the compatibility of the project with relevant development plans. As mentioned, the statement is likely to be written by a number of experts working in different fields and overseen by an environmental consultant. Although the planning authority might suggest areas to be assessed and mitigating measures which might be taken by the developer, the environmental statement is not vetted formally by the planning authority or independent verifier. A number of local planning authorities have produced guides or manuals to be used by developers in compiling an environmental statement.³⁵

The environmental statement is a hybrid of the development plan and planning decision letter. Its legal function is to provide information forming a 'material consideration' of the planning department in their deliberations about certain proposed projects;³⁶ should the planning authority fail to consider an environmental statement, the validity of any

see I. Gatenby and C. Williams, 'Section 54A: The Legal and Practical Implications', [1992] JPEL 110.

³⁵ For example, Kent County Council, Environmental Assessment Handbook (Maidstone, Kent County Council, 1990) and Essex Planning Officers' Association, Environmental Assessment: The Way Forward (Chelmsford, Essex County Council, 1995).

³⁶ Regulation 4 Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No. 1199) (the '1988 Environmental Effects Regulations') and section 70(2) Town and Country Planning Act 1990.

permission granted by them may be challenged.³⁷ The statement thereby contributes legal authority to the decision. However, in representing the consideration of environmental effects and communicating the developer's intention to lessen these, the statement might also legitimate the decision and thus encourage its acceptance by conferring 'cultural' authorisation.³⁸ The exact legal significance of environmental assessment and 'weight' to be attributed to environmental information contained within it has yet to be statutorily or judicially defined in the same manner as the development plan.

In studying environmental statements, I analysed the role the document performed in planning procedures. This analysis focuses on the significance of the statement in the planning process as one 'material consideration' amongst many others; its effect on planning inquiry procedures; the evaluation of the developer's environmental statement by planners; and the integration of technical and scientific information contained in the environmental statement in a political planning process.

Analysis of the Case Studies

Chapter 7 gives an account of the five case studies. Each case study is a collection of material derived primarily from interviews and planning texts. The nature of the case study method means that there is no precise way of setting criteria for analysing case

³⁷ Regulation 4 1988 Environmental Effects Regulations.

³⁸ Jowell, *supra*. at 217.

studies.³⁹ For example, the responses to informal questionnaires emerge in a natural flow and are developed and expressed in the respondents' own words. For this reason, I used a combination of techniques.⁴⁰ I first fixed a number of codes to the field notes and interview transcripts to allow comparisons to be made about the planners' evaluations of the procedures, different situations and procedures. I noted the use of similar phrases and examples by the planners and in development plans, decision letters and environmental statements. I also noted where there was scope for the integration of environmental and planning procedures, for example during consultation, when the planning authority set conditions on a grant of planning permission, and in the planning inquiry. Gradually, I built up an analysis of the essential characteristics of each project and the use of environmental assessment in each case. Each assertion made on the basis of the case studies was compared with previous data collected in this area. I selected extracts from the transcript that are typical of the responses. Where quotations are presented, they are verbatim extracts from transcripts.

The case studies are presented in the following chapter and analysed in chapter 8. From this analysis, I make a number of conclusions about how the environmental assessment procedure works, the effect of the procedures in integrating environmental and planning law and the contribution of European Community environmental law to the development of environmental assessment as a technique of environmental law in the United Kingdom.

³⁹ See A. Bryman and R. Burgess, (eds.) Analysing Qualitative Data (London, Routledge, 1994).

⁴⁰ In doing this, I followed methods described in M. B. Miles and A. M. Huberman, Qualitative Data Analysis (London, Sage, 2nd ed. 1994).

Chapter Seven The Case Studies

Introduction

The projects forming the case studies are summarised in table 7.1. The criteria I used in selecting these case studies and the methods I used in compiling them are discussed in chapter 6. Whereas case studies in existing research on planning and environmental protection offer examples of projects having effects upon a discrete environmental medium, these projects each affect a number of different environmental media. The case studies represent a diverse range of projects - energy production, highway construction, incineration of waste, landfill, and minerals extraction - and they are similar in terms of their complexity. The areas in which the projects took place or were proposed are described in table 7.2. These are quite different in character but, significantly, are all subject to relatively high levels of development pressures, albeit from different sources. Kent is undergoing considerable infrastructure development to cope with pressures brought by the Channel Tunnel but, in most quarters, also seeks to sustain a reputation as the 'garden of England'. Warwickshire's minerals reserves create developmental pressures which are often intensified by the opportunity such developments create for waste disposal projects; in the City of London the 'developmental' strain generally arises more from the need for office development than infrastructure works.

Two of the projects were the subject of an appeal to the Secretary of State. For this reason these projects may be deemed 'hard cases' and possibly unrepresentative of many of the projects subject to environmental assessment law. However, this characteristic also

Table 7.1 Case Study Projects

Case Study	Project Description	Developer	LPA	Environmental Assessment	Inquiry	Decision
Thanet Way (1991)	Bypass Whitstable to Herne Bay	Highways Department Kent CC	Kent CC	1988 TCPA Regs, Schedule 2, para 10(d)	Yes	Approved by SOS
Smithfield (1991)	Combined Heat and Power Plant	Private with public support	Corporation of London	1988 TCPA Regs, Schedule 2, para 3(a) (voluntary statement)	No	Approved by SOS
Paradise Farm (1992)	Waste Disposal, Mining and Building	Private	Warwick CC	1988 TCPA Regs Schedule 2, para 11(c)	No	Withdrawn pending refusal
Manor Farm (1988)	Gravel Extraction	Private	Essex CC Essex BC	1988 TCPA Regs, Schedule 2, para 2(c)	No	Refused
Doncaster Waste Treatment Centre (1989)	Waste processing and incineration	Private	Doncaster MBC	1988 TCPA Regs, Schedule 1, para. 9	Yes	Refused

Table 7.2 Case Study Areas¹

	Planning Regime	Environmental Resources	Developmental Pressures
Kent	County Council District Council	Lowlands Ancient woodlands Designated areas Agricultural areas	Infrastructure - road building House building Tourism
City of London	Corporation	Buildings of archaeological and historic interest Conservation areas	Energy projects Transport Office building
Warwickshire	County Council Borough Council	Agricultural areas Conservation areas Green Belt	Minerals - aggregates, coal Waste disposal Agriculture Industry
Essex	County Council District Council	Agriculture	Minerals - aggregates Light industry Commercial building
Doncaster	Metropolitan Borough Council	Agriculture Woodland Pasture Rough land	Industrial

¹ Adapted from S. Boucher and S. Whatmore, 'Green Gains: Planning by Agreement and Nature Conservation', (1993) *Journal of Environmental Planning and Management* Vol. 36, No. 1, 33-51, at 39.

meant that they offered an ideal opportunity to study first, the way in which the European model of environmental assessment has been integrated in the local public planning inquiry which traditionally assessed the environmental and other effects of a development and, second, to examine the influence of the developer's environmental statement in the decision making process, particularly since no 'record of decision' need yet be given by the local planning authority explaining why a particular decision was reached and what weight was attributed to the various factors considered.

An account of each case study follows. The main issues in relation to the role of environmental assessment are outlined. Common characteristics of the case studies and conclusions about the working and role of statutory environmental assessment in the planning process in the context of the case studies are discussed in detail in chapter 8.

Case Study 1: The Thanet Way Bypass (1991)

(a) Introduction

This project is a highway to be constructed by Kent County Council from Whitstable to Herne Bay (the Thanet Way) in the North East corner of Kent. The highway constitutes a 'bypass' of the two towns. The project was proposed by a public developer, the Highways and Transportation Department of Kent County Council and fell to be decided by the local planning authority of the same council. The project was the subject of a public local planning inquiry which ran for seven months from September 1992. In September 1994 the Secretary of State for Transport accepted the Planning Inspector's recommendation to grant

the project under the Highways Act 1980 and Acquisition of Land Act 1981 and various orders relating to side roads and compulsory purchase of property. The project is currently undergoing construction.

The Thanet Way was constructed in the 1930s to improve access to Kent's coastal towns - Whitstable, Herne Bay and the Isle of Thanet. The traffic on the Way is now at, or above, the limits of its capacity. The dualling of the Thanet Way, including the bypass skirting Whitstable and Herne Bay is expected to help cope with the predicted further increase in traffic brought by the Channel tunnel development and also to 'balance' economic growth in the County: away from the main centre of Ashford and to the less economically strong areas in the North East such as Whitstable. The dualling of the Thanet Way is considered vital to the economic regeneration of the area at local level. In 1986 the Secretary of State for Transport confirmed the inclusion of the dualling of the Way in the Council's Highway Programme on the basis that it was a project of regional importance. The Way was identified in the County's 1989 Structure Plan as a primary route. This states that it is imperative that such routes have sufficient capacity in order to bring about economic growth and prosperity in the area.¹ A 1991 review of the County, the Kent Impact Study, confirmed the road's status in the County and concluded that measures including improvements to the road and rail links would be urgently needed to support the North East Kent economy through the early years of the Channel Tunnel's operation.

The Thanet area has been given Assisted Area Status, making it eligible for funding from the European Community for infrastructure projects. Regional Planning Guidance Note

¹ Kent County Council, Structure Plan (1989) policy T1.

9 states that 'local planning authorities should ensure that their land-use allocations reflect the potential offered by both Assisted Area Status and the European Community funding'. It was considered that the Thanet Way bypass project be funded by a Department of Transport grant.²

As is the case with many road building projects, the bypass project, which forms part of the overall dualling project, triggered confrontation between those objecting to the project and public authorities proposing it. This was partly because, as part of a county-wide road plan, the project was regarded as having been the result of little local input. Real opposition, though, came from those arguing that the road would be intrusive to the landscape in the area, and would destroy valuable agricultural and woodland areas. In contrast, those supporting the bypass project tended to live in Whitstable and Herne Bay and would be relieved of traffic congestion and resultant air pollutants should the road be built.

Two key issues about the environmental assessment process were raised by this project. First, the manner in which the cumulative effects of development were dealt with in the planning process, since the bypass constituted just one section of a larger road building programme in the County. Second, the extent of the requirement to review 'alternative' projects as part of the environmental assessment process. This case is described as a major testing ground for the scope of the evaluation of alternatives in environmental assessment, as reflected in the Planning Inspector's report which focuses almost exclusively on the

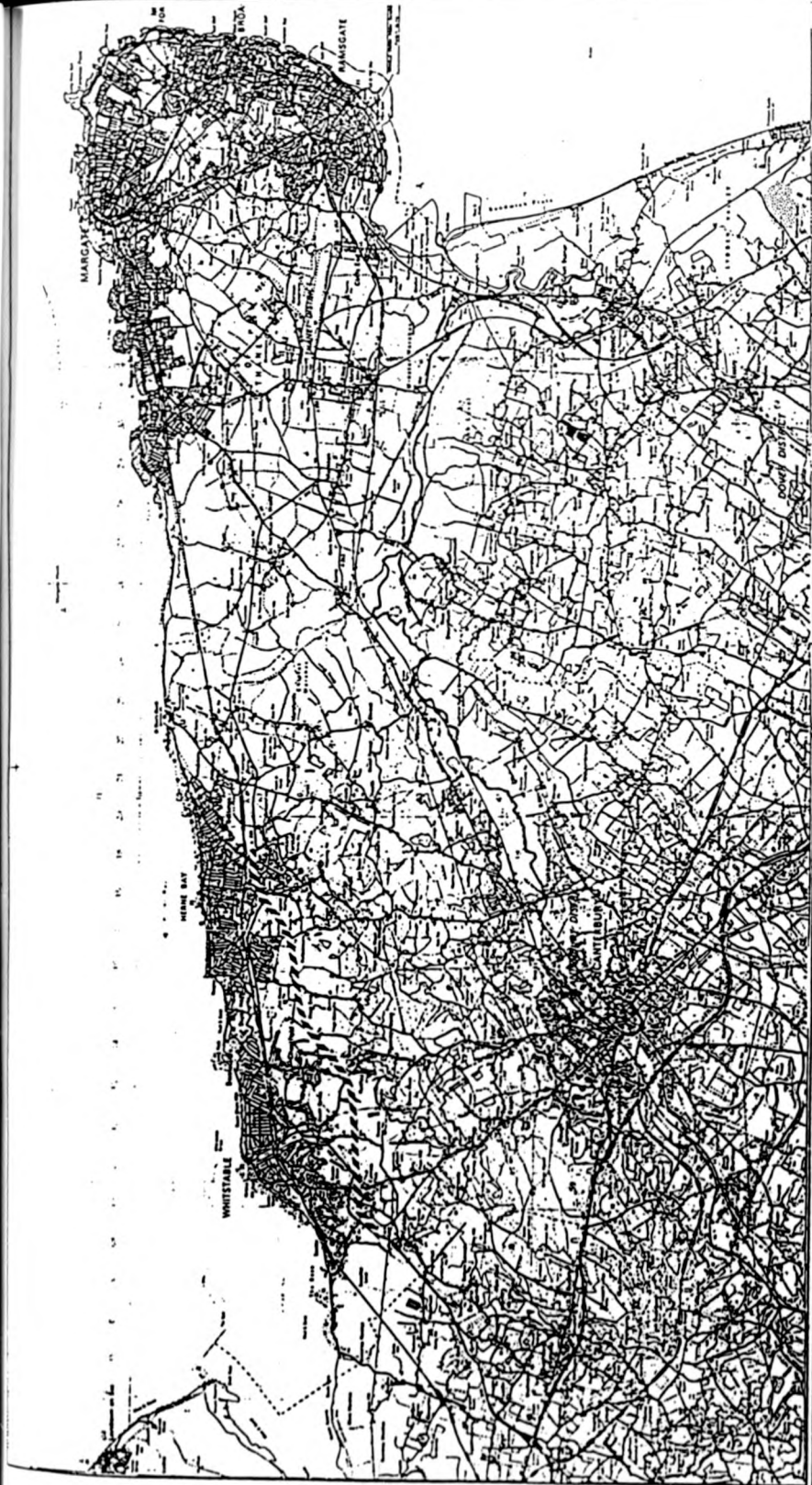
² Department of the Environment, Regional Planning Guidance Note 9 Regional Planning Guidance for the South East (London, HMSO, 1994), para. 3.14.

question of 'alternative' routes to the published route. Also of relevance is the role of the developer's Environmental Statement in the planning inquiry.






(b) The Thanet Way Bypass Project

The by-pass was proposed as a new dual carriageway on a green field site to the south of the existing road (the A299), and Whitstable and Herne Bay towns, as seen in map 7.1. The route is 6.9 miles long. At one point the planned road runs close to a village and conservation area, through a golf course, the edge of a Special Landscape Area and a Site of Nature Conservation Interest. A public consultation exercise carried out by the County Surveyor in 1988 led to this 'off-line' bypass route first being proposed by the Council.³ Consultation with the affected golf course and parish council led to a proposal to create a tunnel, built at existing ground level with the ground of the golf course extended to cover the structure. It was expected that, in addition to removing the dual carriageway from view, this would also reduce noise pollution, provide opportunities for landscaping, and permit access over the tunnel, allowing golf to continue to be played. A planning application was submitted in 1989 under regulation 4, Town and Country Planning General Development Regulations 1976. In January 1991, the Secretary of State for the Environment imposed directions under Article 14, Town and Country Planning General Development Order 1988 for the Thanet Way scheme. This Article directed the County Council not to deem itself permission for the proposed highway without his authorisation.

³ As opposed to various 'on-line' routes previously suggested by the Council which would have been built on the existing road structure, for example a flyover.



**REGIONAL
CONTEXT**

-  Published route
-  Motorways
-  Major roads
-  Minor roads
-  Railways

LAND & COUNTRYSIDE GROUP as
agents for HIGHWAYS &
TRANSPORTATION DEPARTMENT
**A299 THANET WAY DUALLING
WHITSTABLE TO HERNE BAY**

NOT TO SCALE



**Kent
County
Council**
LAND & PROPERTY
11 KINGS PLACE, CANTON, FOLK
HEAD OF LAND AND PROPERTY
Sittingbourne
Kent
Tel: (0432) 671411

An environmental assessment was required of this project in accordance with the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988.⁴ Other sections of the Thanet Way between Whitstable and Herne Bay were already under construction at the time that this bypass was proposed. The environmental assessment process in this case therefore related to the single outstanding section that was planned to link these existing sections. The Environmental Statement was compiled by the Highways and Transportation Department of Kent County Council with considerable help from the Council's planning department. The statement evaluated several alternative routes to the published route. Representations were made to the planning department by local groups that the evaluation of the alternative routes was not satisfactory, in particular that a 'do-nothing' alternative had not been evaluated fully. Planners responsible for the project informally sought the advice of the European Commission on this aspect of the Environmental Statement they had compiled. They were advised to amend their existing evaluation of alternative routes by compiling an addendum of supplementary information to the Environmental Statement which outlined a 'do-nothing' alternative. This they did several weeks before the planning inquiry.

In this case study the need for the development was addressed in lieu of a proper examination of alternative routes in the environmental statement. The proponents of the scheme concluded that having reviewed the 'main alternatives' there was a need for the bypass. A parish group opposing the road was of the opinion that 'the environmental

⁴ Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1199).

statement has started from the premise that the proposal is both necessary and desirable and is disturbingly biased...the statement does not properly compare the published route with other viable alternatives which would clearly expose the published route's shortcomings'. The Council for the Protection of Rural England was similarly of the opinion that the Environmental Statement was flawed for reason of not properly evaluating the alternative routes.

Whilst the identification and presentation of 'alternatives' using scientific models gave an appearance of objectivity in the environmental statement, the main alternatives were treated in such a way as to substantiate the proposed location or design and to justify the need for the development. There was much justification in the Environmental Statement for the development in terms of environmental benefits likely to arise from the building of the road, for instance that residents of Whitstable and Herne Bay would experience lower levels of traffic related pollutants than if the Thanet Way dualling took place along the length of the present route which cuts through the two towns. The need for the development was argued on the ground of the public benefit of the project.

Mitigation of the adverse effects of the development was a further key feature of the Environmental Statement. Substantial mitigating measures were described: a 300m long twin bore tunnel to minimise the final impact of the road on a golf course; extensive ground modelling to create a hill upon which golf could continue to be played; shrub and tree planting and visual screening to reduce visual impact and noise. The Statement indicated not merely an intention on the part of the local planning authority to minimise impacts, but proposed also to enhance the landscape and 'integrate the road into its landscape setting and

to provide a valuable wildlife habitat' by planting an avenue of willow and creating a number of settling ponds:

The intention here is to turn the unavoidable intrusion of the road to an advantage by introducing a strong new landscape element which will reflect and enhance the history and character of the existing landscape...two balancing ponds in the bypass section of the road will be treated as an opportunity to introduce an attractive landscape feature.

The identification and description of such mitigating measures went some way to alleviate concerns about the environmental impact of the proposed project by exchanging environmental harm for 'gain'. Kent County Council Transportation and Highways Department concluded in the Environmental Statement that the 'off-line' route was favoured because it offered a greater opportunity for successful mitigation than the dualling of an 'on-line' route through Whitstable. The Secretary of State for Transport accedes to this view in his decision letter: there is 'no doubt that the Council are conscious of the need for sensitive measures to lessen the impact of the (proposed) route'. English Nature made representations at the public local planning inquiry held into the proposed development that the full impact of the development (including indirect effects) had not been addressed in the Environmental Statement. For example, the substantial loss of verges, hedges, and wayside trees was not evaluated. Such losses could not, in English Nature's view, be compensated by transplanting or replanting. Furthermore, it was claimed that the conservation value of the site had been underestimated because only flora had been assessed; no account was taken of the size of the site, its naturalness, fragility, and the spatial and ecological relationship to adjacent habitats.

(c) Cumulative Effects of Development on the Environment

As noted, the bypass of Whitstable to Herne Bay, a route of 6.9 km, formed part of a wider highway project: the dualling, or 'upgrading' of the whole 28km length of the Thanet Way (A299) from Faversham to Monkton on the Isle of Thanet. The Thanet Way was divided into sections. At the time that the bypass application was made, three out of four sections of the road had been the subject of an inquiry and, by 1991, one of these had already been completed. The division of one project into a number of separate sections for planning and construction purposes is a common practice which raises questions about the adequacy of an environmental assessment of one section of the wider scheme, particularly when this is viewed in isolation from the whole development. In the case of the Thanet Way, no account was taken in the Environmental Statement of the likely cumulative effects of all the sections of the route. Rather, one part of the wider scheme - a 6.9 km section of road forming the bypass - was dealt with in the environmental assessment process.

(d) The Local Public Planning Inquiry

Conflict is often heightened in road inquiries because the issues give rise to clear divisions of opinion and participators make explicit use of the inquiry for the promotion of alternative routes. In the Thanet Way inquiry the Environmental Statement became one part of this conflict or 'adversarial apparatus'. One aspect of this conflict was that environmental information contained in the Statement was selected and highlighted by witnesses in a disjointed manner. The Statement was therefore not referred to as a coherent document; nor was it given a particular status in the inquiry. The legal relevance of the Environmental

Statement as a document representative of a process of inquiry in itself was also not explained. More practically, this use of the developer's Environmental Statement led to the duplication of information contained in the Statement in their proofs of evidence, for example on the environmental implications of traffic related pollutant releases and the effects of development on conservation areas.

(e) The Role of Environmental Assessment Procedures in the Thanet Way Project

Prior to statutory environmental assessment, projects such as the Thanet Way bypass would have been subject to informal guidance on the evaluation of road projects.⁵ One aspect of this guidance was a requirement that a feasibility study be conducted to consider a number of alternative corridors or routes. There was also provision for participation in the planning procedures and the publication of a consultation statement on traffic needs, and any other material factors. Interestingly, there was a requirement that where the evidence appears to favour one alternative both on economic and environmental grounds, the consultation statement was to draw attention to this and this was to be taken into account by the Departments in deciding which route to develop. However, these procedures operated by courtesy of the Secretary of State and not by law, so that certain schemes were excluded from the procedures.

In contrast, the environmental assessment procedures in the Thanet Way case were a mandatory part of the planning process. Furthermore, a degree of supervisory control over

⁵ Such as that contained in Department of the Environment Circular 30/73 Participation in Road Planning (London, HMSO, 1973).

the operation of environmental assessment in the case of this proposed project was exercised by the European Commission. The Environmental Statement became the focus for criticism of the project in representations to Kent County Council since the 'alternatives' to the route in the statutory procedures were obscure, with the 'off-line' bypass project clearly supported by Kent County Council from the outset. On the advice of the European Commission, the planning department of the Council provided supplementary information evaluating the environmental effects of a 'do nothing' route just weeks before the inquiry took place.

At the planning inquiry, the focus on the Environmental Statement by opponents and supporters on the project prior to the inquiry had two main effects: primarily, attention was diverted away from the Environmental Statement as an integrated document. This was because proofs of evidence, delivered by those experts responsible for them, became the focus of attention. In addition, the practice of dealing with issues arising from the Environmental Statement, but elaborated in individual proofs of evidence, meant that the cumulation and interaction of effects of the project on the environment were not fully addressed.

Case Study 2: The Smithfield Combined Heat and Power Plant (1991)

(a) Introduction

The second case study involves the construction and operation of a combined heat and power station in Charterhouse Street, City of London, on the site of a disused electricity generating station (see map 7.2). The City of London is subject to strains of development

suitable for a financial centre, such as office developments. These present quite different environmental problems from those experienced in the other project areas studied. The urban location also meant that the Corporation of London, the local planning authority, had relatively little experience of the environmental assessment process or of combined heat and power. The combined heat and power process allows low grade energy produced as a by-product of electricity generation to be recovered and used to provide district heating and chilled water. The process is almost 100% efficient. A number of environmental benefits arise from combined heat and power projects including reducing the consumption of fuels and the consequent production of carbon dioxide by half when compared with more conventional methods of heat and electricity production.⁶ Environmental concerns, about the production and the use of energy have led to a renewed interest in combined heat and power. It has been suggested that such environmental concerns are likely to be the most significant parameters influencing the future role of the process in energy policy.

The Corporation of London has long established policies relating to energy conservation. One aspect of these policies was that the Corporation commissioned a feasibility study of a combined heat and power project. This study led to interest being shown by Citigen Ltd to develop the site of a disused electricity station in order to construct

⁶ See E. Unterwurzacher, 'Combined Heat and Power Developments: Impacts of Energy Markets and Government Policies', (1992) Energy Policy. Vol. 20, No. 9, 893; on this type of initiative, see J. McEldowney and P. McAuslan, 'Towards a Legal Framework of a Privatised Electricity Supply Industry: the Input from Public Utilities Law', Urban law and Policy (1988) Vol. 9, 165-200.



MAP 7.2

and operate a combined heat and power plant. The Corporation responded favourably to this proposal. The case study offers an example of a privately funded project, which was supported strongly by planners in the local planning authority. Combined heat and power is also favoured by government policy. The relevance of this project for the working of the environmental assessment process lies primarily in that the developer's Environmental Statement performed a number of different functions. First, the developer supplied the environmental statement voluntarily. Following advice given by planners responsible for evaluating the project, it was considered that the Statement would aid the progression of the project through the development consent procedures. Second, the measures designed to mitigate the effects of the development, described in the developer's Environmental Statement, led the Secretary of State to consider that planning permission be granted, subject to the measures forming the basis of planning conditions attached to the permission. Furthermore, the developer's Environmental Statement offered an opportunity for the various environmental 'options' of energy production and reuse to be discussed thoroughly.

(b) Planning Permission

The application for planning permission for construction of the combined heat and power plant was made by Citigen Ltd to the planning department of the Corporation of London in 1991. The project fell to be decided by the Secretary of State for Energy under section 36 of the Electricity Act 1989 and a direction under section 90 Town and Country Planning Act 1990. The application for planning permission to the Corporation of London was accompanied by the developer's Environmental Statement of the likely effects of the development on the environment. This was not required under environmental assessment

law, but was supplied voluntarily by the developer. The Environmental Statement constituted supplementary information to that contained in the planning application. as mentioned above, it was the view of the applicant and planning authority that the environmental assessment process might progress the project through the various development consent procedures:

...we are not the applicants but we were behind it and so I suppose there was agreement amongst ourselves and the applicant to actually speed it through, so they agreed to do the statement...it (environmental assessment) meant we were in a position to try to get the go ahead on the development (Planning Officer, City of London Corporation).

The Environmental Statement submitted by Citigen Ltd described the principal areas of environmental impact - noise, vibration, atmospheric emissions, and discharges to sewers as well as impacts during the construction stage. By way of mitigating measures, the Statement included an air quality assessment: the plant design incorporated a catalytic reduction unit to convert 90% of nitric oxides into nitrogen and water and a low energy liquid scrubber to remove 90-95% of oxides of sulphur produced by burning fuel oil.

In granting consent for the development, the Secretary of State took account of the way in which the environmental effects of the development were to be mitigated by measures to be undertaken by the developer, as described in the Environmental Statement.⁷ Several of these measures were formulated as planning conditions attached to the planning permission, for example those relating to air pollution monitoring.⁸ Unlike many sets of

⁷ Correspondence from Department of Energy to Principal Planning Officer, Corporation of London, 26 February 1992.

⁸ For example, condition 23: 'The commissioning of the Development shall not take place until there has been submitted to and approved in writing by the City Council a scheme for the monitoring of pollution; and condition 25: 'The Company shall make every effort to ensure that the fuel oil is free from contamination.'

planning conditions, those relating to this project were not confined to construction and land use but also concerned matters of pollution control and the on-going operation of the plant. For reason of the mitigating measures and their formulation as planning conditions, the Secretary of State believed that the environmental effects would not be such that it would be appropriate to refuse planning permission. The Secretary of State gave a direction under section 90 Town and Country Planning Act 1990 that planning permission for the development be granted subject to the planning conditions. The imposition of planning conditions allowed the project to proceed when it might otherwise have been refused planning permission.

(c) The Role of Environmental Assessment in the Smithfield Combined Heat and Power Plant Case Study

In this case study, the environmental assessment process was employed by the developer to facilitate the development. This, environmental assessment did in a number of respects. First, the Environmental Statement was held up by developers and planners supporting the project as a procedural safeguard that the environmental effects of the project had been assessed; this had the potential to progress the project through planning procedures:

...the environmental statement serves to demonstrate that a matter is not going to be a problem...the developer can actually demonstrate that they have identified particular environmental issues and have addressed them (Planning Officer, Corporation of London).

This contributes also to an idea that the developer's Environmental Statement is capable of legitimating a project.

Second, the mitigating measures described in the developer's Environmental Statement had legal effect because they formed the basis of planning conditions attached to the planning permission. The undertakings to be taken by the company to mitigate the effects of the development, as described in the Environmental Statement, contributed to the grant of planning permission because, when constituted as planning conditions, these measures persuaded the Secretary of State that the adverse environmental effects of the project could be overcome. As a 'material consideration', the information contained in the Environmental Statement had a direct bearing on the Secretary of State's decision and the legal framework of planning permission drawn up by the planning authority. The Environmental Statement provided the developer with a platform for presenting information to the planning authority, thus altering the balance of information entering the development consent system.

Third, the developer's Environmental Statement also provided a forum for evaluating the environmental benefits likely to accrue from the project. The Statement described that the Combined Heat and Power plant conferred a genuine environmental benefit because local emissions of sulphur dioxide and oxides of nitrogen would be considerably reduced as a result of the displaced use of individual oil and gas fired heating systems. The project was presented by the developer as offering a means by which the Corporation of London might implement practically its long term energy policy which was unlikely to be achieved with present methods of energy supply in the City.

Case Study 3: The Paradise Farm Waste Disposal Project (1992)

(a) Introduction

The third case study is a waste disposal project. In this project, the developer sought to combine the closely related activities of mineral extraction, in this case coal, and waste disposal by landfilling. The project was planned to take place in Nuneaton, Warwickshire. Similar to many counties in the Midlands, land use issues in Warwickshire are determined by the history of the coal mining industry in the area and the opportunities that this has created for waste disposal on vacated or near exhausted coal sites. These activities have created environmental problems in the form of mine gas from coal sites as well as methane gas and leachate from landfilling waste. In terms of the working and role of the environmental assessment process, the primary issue in this case study was that the local planning authority commissioned an independent assessment of the effects of the development on wildlife in the area in order to test assertions made in the developer's Environmental Statement. This assessment was instrumental to the Director of Planning's recommendation that the application for planning permission be refused by the Environment Committee of Warwickshire County Council and the subsequent withdrawal of the application by the developer.

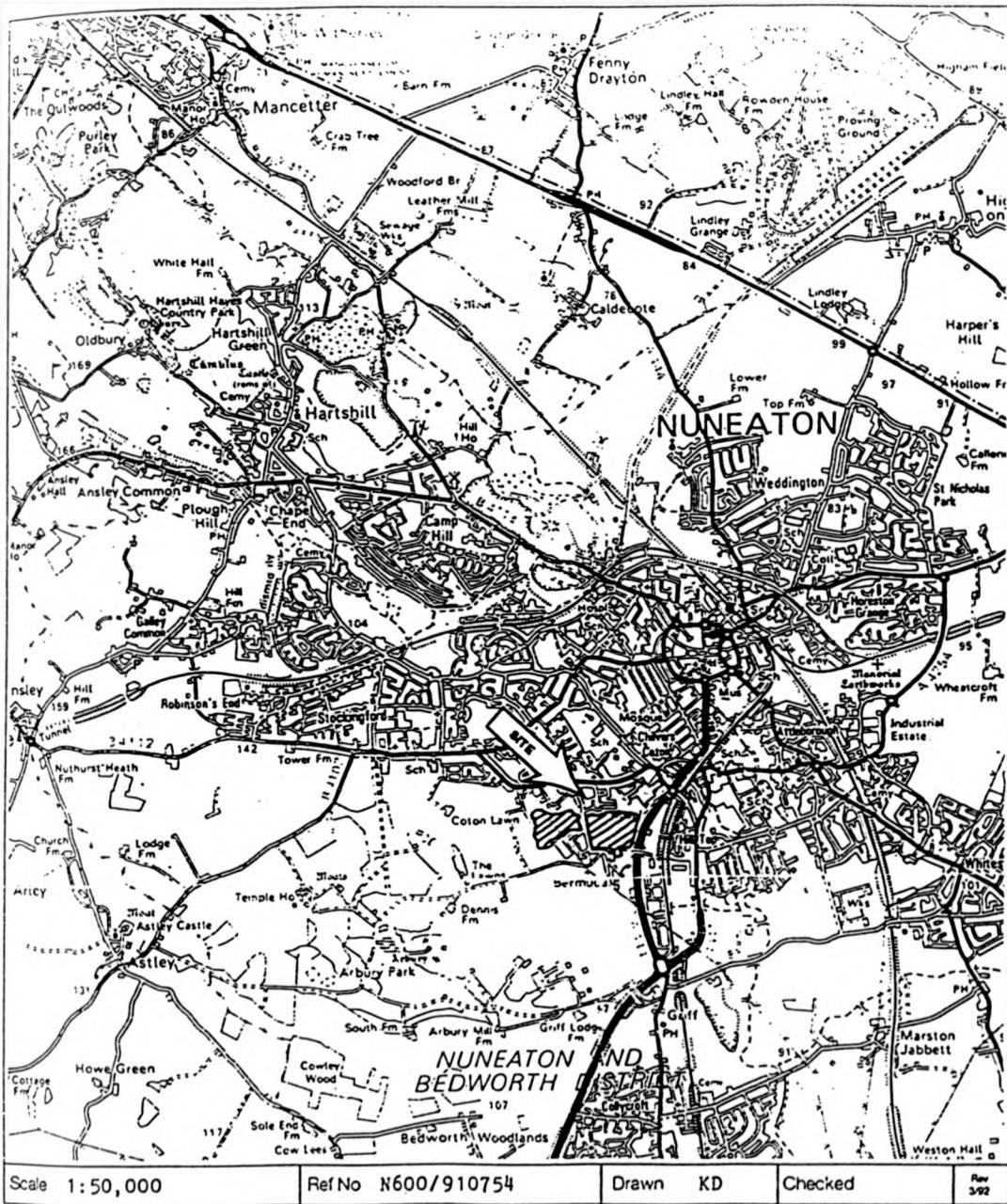
The attempt by the developer to build residential housing on the Paradise Farm site has a long history. Planning permission for the use of the Paradise Farm site in Nuneaton for the deposit of refuse in disused clay pits was first given in 1968 by Coventry Corporation as a response to increases in waste from that City. By 1970 the site was found to be half

filled with polluted water which was a cause of air pollution in the vicinity and also a source of methane gas. In 1982 an application for building 130 dwellings on the site was made. This was refused by Nuneaton and Bedworth Borough Council. On appeal, the Secretary of State for the Environment, following the recommendations of the planning inquiry inspector, also refused planning permission; the potential environmental pollutants arising from the site being unacceptable for a residential area.

Notwithstanding these problems with the site, the Nuneaton and Bedworth Borough Local Plan designates the Paradise Farm area as one for housing development. However, on the ground of the previous refusals for planning permission, such development could only take place on the site if the waste was removed. The 1991 application which forms the subject of this case represented an attempt to mitigate these environmental pollutants and overcome the planning objections to residential housing on the site.

(b) The Project

The proposed project involved three sites: Paradise Farm, Ensor Pool and Arbury Spoil Tip, all of which lie in close proximity to one another near Bermuda Village, Nuneaton (see map 7.3). The application was to excavate approximately 580,000 cubic metres of domestic wastes from the Paradise Farm site in order to make the land suitable for housing, as identified in the Draft Deposit Nuneaton and Bedworth Borough Local Plan. The waste would be moved to the nearby Ensor Pool which would be drained, enlarged, and lined to receive the waste. Approximately 218,000 tonnes of coal would be extracted from the base of the Paradise Farm site and the void filled with material from the Arbury Spoil Tip. The



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Subject

EXCAVATE AND RELOCATE DOMESTIC WASTE TO WASTE FACILITY AND EXCAVATE, RECOVER RESIDUAL COALS AND RESTORE SITE FOR FUTURE DEVELOPMENT; 27HA OF LAND AT PARADISE FARM AND AT ENSOR POOL, BERMUDA ROAD, NUNEATON [Grid ref: 355.902].

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MAP 7.3

operation was expected to take approximately three years to complete, during which time it was estimated that there would be 570 vehicle movements each day during the most intensive parts of the operation. Coal and leachate was to be removed from the site. It was planned that the three sites would ultimately be restored. Paradise Farm and Arbury Spoil Tip would be left in a condition suitable for future housing and industrial development respectively, and Ensor Pool capped and restored to shrub woodland. A landfill extraction system was also to be installed.

The application for planning permission was made by Swiftridge Limited, Coventry, in December 1992. The application was accompanied by an Environmental Statement in compliance with the 1988 Environmental Effects Regulations, the project being identified as a Schedule 2 project.⁹ The primary issue identified in the developer's Environmental Statement was that, undeveloped, the Paradise Farm site is an uncontrolled source of landfill gas emanating from the waste site. Under the heading 'Project Justification' in the statement, the developer outlined that the proposed works would remove the source of the landfill gas (the waste) to a site where containment could be more adequately managed. In addition, by replacing an uncontained landfill structure with an engineered containment site, the project was expected to reduce opportunities for leachate contamination of groundwater.

The developer's Environmental Statement failed to adequately evaluate alternatives to the project in terms of different sites or processes: 'By the very nature of this project, any choice of alternatives regarding this development is limited to a consideration of the ways

⁹ Paragraph 11(c) Schedule 2 1988 Environmental Effects Regulations.

in which the application area may be satisfactorily rehabilitated in line with planning requirements'. Mitigating measures were described in a similarly sketchy manner:

With regard to the Ensor Pool site it may be assumed that this area will experience a total loss of ecological value. However, final restoration is designed to incorporate shrub and woodland plantings to provide an attractive wildlife area and complement the proposed landscape scheme...It is proposed to remove the crayfish population and use them to stock other sites.

Objections to the proposed project were made by a number of statutory consultees. Nuneaton and Bedworth Borough Council highlighted that the use of the Ensor Pool for the resited waste would result in the loss of a Grade A site, as defined in the Council's adopted Green Map, and an area of Natural History Interest as defined in Warwick County Council's Structure Plan. The National Rivers Authority expressed concern at the proposal to infill the Pool due to the existence of a large population of Atlantic Stream Crayfish which are a protected species under the Wildlife and Countryside Act 1981, notwithstanding that they might be caught and moved elsewhere. English Nature also made clear that they would not support removal of the fish as this, in their view, would threaten a species already experiencing a decline. Three petitions signed by 2966 people and 54 individual letters of objection were received by the planning authority.

The Director of Planning recommended to the Environment Committee of Warwickshire County Council that planning permission be refused: 'in the context of this application any presumption in favour of development is outweighed by the environmental objections to the scheme, namely the loss of Ensor Pool and the serious detriment to local

amenity that would be experienced during the period of the operations'.¹⁰ The Director elaborated that the environmental objections to the project were not outweighed by any other considerations, including the need to control landfill gas and leachate at the site, since it had not been shown that the waste needed to be removed in order to control landfill gas.

(c) The Role of Environmental Assessment in the Paradise Farm Project

The effects on the environment of developing residential housing on the site did not come to light via the developer's Environmental Statement which accompanied the application for planning permission. Indeed, the Director of Planning was of the opinion that there was insufficient information in the developer's Environmental Statement to judge whether the use of the Ensor Pool as a receptor site for the waste was technically feasible. More information was requested of the applicant to determine the quality of the clay bed in the Pool, however the applicant declined to undertake further studies. The effects of methane gas and leachate from the landfill site were detailed in the local public planning inquiry which followed the 1982 application to develop the site. In addition, information about the effects of development on wildlife arose from a study conducted by English Nature which was specially commissioned by the planning authority. This study formed what may be termed part of the planning authority's environmental assessment of the project. However, the authority did not conduct a formal assessment on matters other than the crayfish issue.

¹⁰ Warwickshire County Council, Environment Committee 1992, Report of the Director of Planning and Transport, 6 August 1992, para. 5.40.

The environmental information in this case was complex, including diverse environmental effects - of leachate, landfill gas, mine gas, dust and noise in construction, harm to wildlife - in the case of numerous operations on three different but related sites. The Environmental Statement did focus attention on the environmental connections between the operations and the effects on each site in a related manner; environmental assessment proving capable in this case of dealing with planning issues beyond a particular site. However, the developer's Environmental Statement served generally to simplify the evaluation of these effects on the environment. The developer presented the development in terms of public benefits: the removal of waste and hazards of landfill gas and leachate. from the developer's perspective the resolution of the environmental problems on the site was to take place by granting a private right of development, evocative of the 'planning gain' cases of the 1980s.

The conferral of a public benefit of reduced environmental pollution from leachate and methane via the development of residential housing was reinforced by the terminology used in the developer's Environmental Statement. This included references to making the Paradise Farm site 'clean', 'stable', and 'contained', and finding an 'engineered' solution to the environmental problems. The Statement expressed the developer's view that all the long term impacts of the development would be positive in nature since the development would considerably reduce the adverse impact of the landfill gas and that all the negative impacts would occur during the operational stages only ('the outcome of the development is a cleaner, safer environment suitable for full use and enjoyment'). This assessment relied upon the developer's description of the Ensor Pool as a disused, flooded, clay pit which overlooked its ecological contribution to the local environment.

The environmental information which arose from the planning authority's independent study of the development on the crayfish population was, in this case, capable of balancing the developer's favourable presentation of the effects of the project and their mitigation in the Environmental Statement with other likely effects on the environment from the development and rebutting the strong presumption in favour of development which arose from the designation of the area for housing in the local development plan. The Planner primarily responsible for determining the application for planning permission expressed the view that the environmental information about the effects of this development on the environment would have come to light even before Directive 85/337 was implemented.

Case Study 4: The Manor Farm Minerals Extraction Project (1988)

(a) Introduction

This project concerned two related developments on approximately 160 acres of land at Manor Farm, Great Baddow, a rural area in Essex (see map 7.4): mineral extraction and the creation of a watersports park including a nature conservation area, jetties and slipways and car parking areas. The application for the extraction of minerals on the site was first referred for a decision to Essex County Council, as the Mineral Planning Authority in March 1987. The County Council made a resolution to grant planning permission, subject to conditions and a proposed section 52 agreement.¹¹ The project was 'called in' by the Secretary of State for the Environment. However, the application was withdrawn by the applicants shortly before the Inquiry date, together with an appeal against Chelmsford

¹¹ Now section 106 Town and Country Planning Act 1990 ('planning obligations').

Borough Council's refusal of planning permission for the creation of the watersports park.

A similar application was submitted in 1988; this forms the subject of the case study. It was expected that the recreation scheme would be the subject of a further application. In January 1989 the Secretary of State for the Environment directed, in accordance with a request from Essex County Council, that an environmental assessment was required with the application. The developer's Environmental Statement was submitted by the applicants in February 1990. The application for planning permission and the accompanying Environmental Statement were considered by the Borough Council's Planning Committee in June 1990, by reason of their status as a statutory consultee and because of the Borough Council's involvement in the future watersports development, allied to this proposal. The Borough Council recommended refusal of planning permission. This was followed by the County Council in September 1991. The County Planner confirmed that 'the application did not constitute a significant reason for overriding the substantive reasons for objection that were based upon justified environmental concerns and adopted planning policies.'

The relevance of this project in terms of environmental assessment lies primarily in the opportunities the Environmental Statement offered the developer to promote the project by referring to the recreational opportunities created by the watersports park on the site of the mineral extraction operation. Also of importance are the issues raised about the role of the development plan in relation to the developer's Environmental Statement. As with the other projects studied, the Environmental Statement was regarded as a supplementary document in the planning process. In this case, the conclusions drawn in the Statement about the environmental effects of the development and the opportunities the project offered for

various environmental 'gains' to be made in the shape of a nature conservation area and water environment, required a reappraisal of the policies contained in the Essex Structure Plan about development in open countryside, the protection of landscape, and sports facilities development.

(b) The Manor Farm Project

The applicants own Manor Farm, which lies within the Chelmer River's floodplain, a Special Landscape Area for reason of its water meadows and valley floor scattered with trees and wild plants and which consists mainly of agricultural land. This site forms a wedge of open land which extends to Chelmsford town centre. The site was expected to yield 350,000 tonnes of sand and gravel per annum for five years.¹² A restoration scheme provided for the creation of five water areas, together with nature conservation areas of about 40 acres. It was foreseen that the mineral extraction and the restoration work would be linked together by means of a section 106 planning obligation.¹³

The Environmental Statement which accompanied the application for planning permission was considered to be inadequate by Essex County Council and Chelmsford Borough Council primarily because no consideration was given to possible contamination of the gravel and lakes by leachate from a nearby waste tip. The applicant was requested

¹² See Department of the Environment, Minerals Guidance Note 6, Guidelines for Aggregate Provision in England (London, HMSO, 1994).

¹³ Section 106 Town and Country Planning Act 1990.

to carry out further research on the hydrology of the area because, in the view of the County Council, the treatment of this area in the developer's Environmental Statement was 'unsupported by factual or scientific opinion'. Other environmental impacts identified in the Environmental Statement included the noise of the extraction machinery, and dust during the extraction of gravel.

The various local development plans did not provide a favourable context for the project. The Minerals Plan of the area does not include the site as a preferred area for extraction.¹⁴ According to the County Planner, the restoration scheme would result in an uncharacteristic concentration of lakes in the Chelmer Valley, contrary to the policy of the Planning Authority to maintain the existing character of the Chelmer Valley Special Landscape Area as defined in the Structure Plan. In addition the County Planner noted that, should the proposal be approved in the absence of any special justification when contrary to development plan policies, this would set an 'unfortunate precedent' for other similar proposals in the Chelmer River Valley. The County Planner made particular reference in this case to the forthcoming amendment of the Town and Country Planning Act 1990 by the insertion of section 54A by section 26 Planning and Compensation Act 1991. This, according to Circular 14/91,¹⁵ provides for a 'positive role for development plans in decisions by Local Authorities and the Secretary of State'.¹⁶

¹⁴ Minerals Subject Plan, Policies 1 and 2.

¹⁵ Department of the Environment, Circular 14/91, Planning and Compensation Act 1991 (London, HMSO, 1991).

¹⁶ Ibid., para. 9.

(c) The Role of Environmental Assessment in the Manor Farm Project

The environmental assessment process offered the developer an opportunity to promote the proposed project. The Environmental Statement referred to the many recreational opportunities created by the watersports park on the site of the mineral extraction operation, and generally emphasised the public benefits likely to arise from the project in the Statement. In this case, though, the shortcomings of the Environmental Statement identified by the Borough Council did not contribute to the refusal of planning permission. The primary reason for the refusal was that the application was contrary to planning policy as set out in local development plans. These policies were given a high priority by the planning authorities, most probably with an eye to the legal effect of the forthcoming insertion of section 54A into the Town and Country Planning Act 1990. In this case study, the relevant development plans provided the primary means of reconciling conflict between the need for development and protection of the natural environment;¹⁷ a role foreseen also for environmental assessment. The development plans, rather than the environmental assessment process, therefore provided the basis and context for decision making. This suggests that the content of an Environmental Statement is of second order importance if the application is contrary to the relevant development plan policies; there is a prima facie presumption that the development will be refused in such cases, whatever the results of the environmental assessment process or content of an environmental statement. In cases in which the application is in accordance with development plan policies, the environmental statement is only then likely to become significant.

¹⁷ On this role of the development plan see Planning Policy Guidance Note 1, General Policy and Principles (London, HMSO, 1992), para. 17.

The case study serves to emphasise that the status of the developer's environmental statement is not statutorily or judicially defined in the same manner as the development plan, and that there is no clear agreement about the interrelation of the environmental statement and the development plan as texts in the development consent system. Within planning law, a broad hierarchy of planning texts currently operates: in the case of inconsistencies, policies contained in specific plans (local plans, waste local plans, minerals plans) generally take precedence over the more general plans (such as structure plans).¹⁸ Precisely where the environmental statement fits into this hierarchy is not legally defined, though the practice in cases such as this suggests that it will take a low priority, at least where the application is inconsistent with approved planning policy. This is undoubtedly the correct result because development plans are the result of statutory procedures allowing for public participation; environmental statements, invariably produced by an environmental consultant on behalf of the client developer, are not. However, the logic of the implied lower priority accorded to environmental assessment in the development consent system is that the environmental statement might not prove capable of arresting development if this is permitted in a relevant development plan, whatever the significance of the environmental effects of the project.

¹⁸ See Planning Policy Guidance Note 12, Development Plans and Regional Planning Guidance (London, HMSO, 1992), paras. 3.16-3.17.

Case Study 5: The Doncaster Regional Waste Treatment Centre (1989)

(a) Introduction

This proposed project concerned the change of use of an existing plant and construction of an incinerator for chemical solid, liquid, and sludge residues on the Kirk Sandall Industrial Estate, 6 km North East of the centre of Doncaster (see map 7.5). The proposed waste treatment centre included a thermal treatment unit for liquid and solid industrial wastes, a solvent recycling plant and an acid neutralisation plant. The thermal unit was designed to treat 20,000 tonnes of waste per year. The solvent plant was to recycle bulk deliveries of solvents and offer them for resale.

An application for planning permission for change of use was made in 1989 by Leigh Environmental Ltd to Doncaster Metropolitan Borough Council and was refused. The applicants appealed under section 78 Town and Country Planning Act 1990. The subsequent public inquiry took place between April and June 1990. In November, the Inspector recommended that permission be refused on the ground that the handling and processing of hazardous material was incompatible with the surrounding pattern of land uses including residential housing, schools and community facilities and thus contrary to policy in the South Yorkshire Structure Plan. In addition to constituting an incompatible land use, the Inspector took account of the effects of the development on pollution in the area, rejecting the conclusion of the developer's Environmental Statement that the proposal would have no significant adverse effects on the local environment. The Inspector accepted the Borough

Council's view that Her Majesty's Inspectorate of Pollution does not have adequate staffing resources to monitor and enforce legislative requirements properly and concluded that the controls operated by the agency are but one consideration in the proposal:

The question to be posed in relation to the pollution issues...is whether the proposed development, regulated and operating within the framework of the non-planning controls would cause demonstrable harm to interests of acknowledged importance.

The Inspector highlighted that an aquifer underlying the site was particularly vulnerable. Whilst acknowledging that in theory it would be possible to protect the aquifer, and that this would be a matter for the site licence controls, the necessary standards might not be achieved in practice. The Inspector espoused a precautionary approach, detailing that planning controls constitute a locational form of defence against the risks of pollution. The development, in the Inspector's view, would have the potential to cause substantial and long lasting damage. These potential environmental impacts, particularly those relating to the aquifer, overrode the issue of the need of the plant for incineration and the prospects for employment created by the development. In his decision letter, the Secretary of State for the Environment concurred with the Inspector's recommendation to refuse planning permission.

An Environmental Statement accompanied the application for planning permission. This listed opportunities for local employment as an effect of the project. In terms of air pollution, the analysis was scant in accordance with the developer's view that the proposed development was expected to have very little impact on the existing air quality:

A number of industries could be sensitive to stack emission levels...the various food processing industries, food retail outlets...stack design will therefore ensure that there is no impact on these sites.

Potential concerns in residential areas might include effects arising from noise, dust, smoke, and toxic fumes. However it has been established that no significant effect will arise from normal operation of the plant.

Any toxic constituents carried within the plant emissions will be at levels far below those causing significant short-term respiratory problems.¹⁹

The applicant showed a marked reluctance to evaluate the effects on air quality, considering that these would be a formal requirement of statutory agencies such as Her Majesty's Inspectorate of Pollution: 'such a survey would place unacceptable demands on the Applicant at this stage...since after planning approval there is a two year period prior to operation, there is adequate time for such work to be undertaken once a feasible scheme has been agreed with all relevant authorities.'²⁰ There was, though, some acceptance by the developer of the potential impact of the pollution of the key aquifer. The Statement explains that because the site overlies an aquifer which has poor natural protection due to the permeability of the overlying ground, pollution of the aquifer could be rapid in the event of an accidental spillage. The Statement described the developer's intention that the incinerator proposed that the incinerator be designed to include impermeable flooring and bunding. In the developer's view, this 'engineered solution' ensured that there would be little impact upon the aquifer.

The developer's Environmental Statement was relatively unsophisticated, with little attention paid to alternative sites or process. For example, the developer expressed the opinion that 'there is no valid alternative process to incineration for the range of wastes listed in the application'. For this reason, Doncaster Metropolitan Borough Council requested

¹⁹ Environmental Statement, Volume II, p. 19.

²⁰ Environmental Statement, Volume II, p. 19 (emphasis added).

further information from the developer showing a proper evaluation of the alternatives and the impacts of the project, particularly during the construction stage. In contrast, the Statement did elaborate on the visual effect of the development, finding that trees for screening and low growing plants will supplement the existing landscapes features and that the development would fit in well with the current industrial environment.

The primary issue in this case was the extent to which the environmental assessment process was capable of integrating concerns about pollution in the development consent system. It is significant that environmental information about the effects of the development on the aquifer and air quality were adduced in the course of the planning inquiry. These effects were not fully evaluated in the developer's Environmental Statement. Rather, the scope of the Statement reveals the developer's reluctance to conduct a full evaluation of the environmental effects of the development, preferring instead to engage in such an assessment to fulfil statutory requirements under pollution control legislation. This suggests that the statutory environmental assessment process overlays existing methods of evaluating the environmental effects of development, such as the planning inquiry. The developer's Environmental Statement also highlights the partiality of such documents.

Conclusion

It will be readily appreciated that the five case studies in their own raise wider issues about the implementation and operation of environmental assessment in the planning system. Although not intended to be statistically representative of a wider category of environmental assessment in the same manner as quantitative research such as the survey, the case studies

presented in this chapter may be taken to establish some essential features which characterise the projects studied and thereby permit analysis of how theories and principles of environmental assessment manifest themselves in a particular set of events. Analysis of the specific conclusions to be drawn from the five case studies follows in chapter 8. Chapter 9 deals with the more general points which may be made about the implementation and operation of environmental assessment in the planning system.

Chapter Eight The Environmental Assessment Process and the Case Studies

Summary of the Five Case Studies

Some tentative conclusions may be drawn from the five case studies presented in chapter 7:

- (i) There has been little change in the manner in which environmental information contributes to the planning authority's decision about whether to recommend that planning permission be granted. In the main, planners considered the effects of development as listed in Directive 85/337 even before the implementation of the Directive. Planners remain most concerned with 'traditional' planning issues which arise in the course of the environmental assessment process: for example, amenity and landscape.

- (ii) There is a perception amongst developers and some planners that the environmental assessment process progresses a project through the various development consent procedures. A key point is that the applicant's environmental statement may be used to 'justify' a particular proposal. The statement might also be used to assuage concerns about the proposed development by presenting plans to mitigate the effects of the project and, in some cases, by enhancing the local environment in some way.

- (iii) Developers tend to describe mitigating measures comprehensively in the environmental statement. Mitigating measures might be positive in nature; in which case these aim to balance environmental harm with apparently environmentally beneficial measures.

(iv) Few developers identify alternative sites and processes in their environmental statements or examine pollution control measures at the planning stage.

(v) A significant change following the implementation of Directive 85/337 is the increase in cases of voluntary environmental assessment: developers consider it advantageous to give information about the environmental effects of development on the environment in the form of an environmental statement, even if this is not required statutorily.

(vi) Consultation procedures vary. This contributes to the inconsistent application of Directive 85/337.

(vii) At the local public planning inquiry, information about the environmental effects of development, contained in an environmental statement produced by the developer, is duplicated in proofs of evidence submitted by both parties to the inquiry.

In the remainder of the chapter I intend to analyse the five case studies presented in chapter 8 and the conclusions outlined above in more detail. It is hoped that this analysis will assist in understanding the implementation and application of Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment¹ in the United Kingdom. The more general issues arising from the case studies are discussed in chapter 9. A particularly important issue addressed in this chapter is the effect of the environmental assessment procedures on the process and outcome of decision making in the

¹ Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ L 175, 5.7.1985, p. 40.

planning system. A number of further issues raised by the case studies are discussed in the course of this chapter: the first is the contribution and significance of environmental assessment, representing an integrated and preventative method of regulation, to the development of techniques of environmental law. A key point here is that environmental assessment is presently limited to planning issues. The second is the integration of statutory procedures, enacted to give legal effect to Directive 85/337, with 'indigenous' and informal methods of environmental assessment which existed in the planning system in England and Wales prior to the Directive's implementation. A third issue is the changing scope of planners' administrative discretion as a consequence of Directive 85/337 particularly following the centralisation of matters of environmental assessment required in implementing Directive 85/337.

I first characterise the application of statutory environmental assessment rules, the consultation process and content of the developers' environmental statements. I then assess the role of the developer's environmental statement as a 'material consideration' in the local planning authority's deliberations and as evidence in the local public planning inquiry. The general approach adopted in the analysis arises from an idea that environmental protection and development control may be integrated at certain junctures in the development consent process. The conclusions about the application of Council Directive 85/337 in the context of the five case studies contribute to a main focus of the thesis: the development of connections between planning and environmental law in the context of European Community environmental law.

Application of Environmental Assessment Rules: A Case Study Analysis

The five case studies underline that the present Directive 85/337 requires reform as the procedures set out in the Directive are not universally applied throughout the country. As discussed in chapter 6, the 'significant effects' test contained in Directive 85/337 and restated in Circular 15/88 (Welsh Office 23/88) grants a high degree of discretion to planning officers to determine the application of environmental assessment rules. Given the potential breadth of the test it is perhaps inevitable that the application of the rules varied widely between the local planning authorities studied. For example, one Planning Officer, Essex County Council, described 'we will always need a statement if the development is to be in a special landscape area' which departs from official guidance on this point.² The officer also explained that, in making this decision, he relies heavily upon statutory consultees' opinions of the likely significance and effects of the development. In contrast, the application of environmental assessment rules in the Paradise Farm case study (1992),³ was made by a group of elected members. The participation of councillors in the environmental assessment process was introduced by Warwickshire County Council at the outset of statutory environmental assessment to compensate for the absence of a full committee meeting in the determination period. This procedure is highly unusual and has been the subject of criticism by planners. The following statement is a planning officer's view of the procedure:

² Circular 15/88 (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988) para. 27: "...in the Secretary of State's view not all Schedule 2 projects affecting sensitive areas will require environmental assessment. In each case it will be necessary to judge the likely significance of the environmental effects in the particular location proposed for the development."

³ See chapter 7.

...the Planning Committee feel that if they haven't asked for an environmental statement they won't be able to refuse a project in the future...they link it to refusal or approval rather than using it as an information gathering system...so they sometimes ask for an environmental statement based on previous compliance rather than because it strictly fits within the Regulations (Planning Officer, Warwickshire County Council).

The absence of precise thresholds and guidance to determine the application of assessment rules was a common concern of some of the planners.⁴ In the example of the Manor Farm Mineral Extraction (1988)⁵ case study, planners concerned with the project, expressed the view that the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988⁶(the '1988 Environmental Effects Regulations') failed to provide clear guidance on whether an environmental assessment should be required for Schedule 2 developments and requested further clarification of the circumstances in which such developments should be considered likely to have significant environmental effects.⁷ A planning officer, City of London Corporation, similarly expressed concern, in the context of the Smithfield Combined Heat and Power Plant case study (1991), that: '...unless we get some guidelines, environmental assessment is not going to work properly.'

⁴ This finding is in line with the findings in C. Wood and C. Jones, Monitoring Environmental Assessment and Planning (London, HMSO, 1990) p. 28: the great majority of those planners, developers and statutory consultees interviewed felt that further guidance was needed on how to define "significant environmental effects" when determining whether or not an assessment is necessary for Schedule 2 projects for example by the issuing of clear, quantitative thresholds.

⁵ See chapter 7.

⁶ Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1199).

⁷ Chelmsford Borough Council, Planning Committee Agenda, 1 September 1991.

In the Manor Farm Mineral Extraction, Doncaster Regional Waste Treatment Centre and Paradise Farm Waste Disposal case studies, the decision to require a statement was delegated well down the planning authority hierarchy, for example, at a junior or intermediate level. In the Smithfield Combined Heat and Power Plant case study, however, this decision was taken at a senior level. The reason for this was that the project had a high public profile and the authority had an interest in its success:

The plant was dealt with at a high level, right at the top...it was in principle our application and so was dealt with in this way... we are not the applicants but we were behind it and so I suppose there was agreement amongst ourselves and the applicant to actually speed it through, so they agreed to do the statement...it (environmental assessment) meant we were in a position to try to get the go ahead on the development (Planning Officer, City of London Corporation).

In this case study it was the view of the developer and planning authority that the environmental assessment process might work to progress the project through the various development consent procedures: 'it (the environmental statement) meant we were in a position to try to get the go ahead on the development'. Similarly in the Manor Farm Mineral Extraction case study, a private developer was encouraged to submit voluntarily an environmental statement⁸ because, according to the environmental consultant working on the project:

We have done them (statements) under Schedule 2 not because we have to, simply because this makes life easier...they were done because of public opinion problems, rather than actual problems... they are obviously a vehicle towards gaining planning permission.

⁸ Once submitted with an application for planning permission, the statement is treated for all purposes as though it is a statutory assessment (Regulation 4, Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No. 1199) (the '1988 Environmental Effects Regulations').

A Planning Officer, Essex County Council, noted in the context of this project:

What tends to happen is we end up with a project and then they (developers) search for an environmental statement to justify it.

Likewise, in the view of a Planning Officer, Warwickshire County Council:

If environmental impacts cannot be mitigated satisfactorily...the person who has prepared the statement ought to say to the person who commissioned it, "I'm sorry, the advice is don't progress this project"...in reality it is never like that because the objective of the statement is to progress the project not to find out if it is acceptable or not.

This use of the environmental statement to justify a project was also a feature of the Thanet Way Bypass, a public sector development. According to a Kent County Council Transport and Highways Officer:

They (the planning department) are very keen that we can justify exactly what we are doing...although the final decision is really Kent judging Kent, judging itself, they are still very conscious of the need and they press us on the environmental statement very hard to make sure that we justify exactly what we are doing.

The above statements suggest that, in the case of the Thanet Way Bypass and Smithfield Combined Heat and Power Plant case studies, determining the need for an environmental statement was informed, not only by the 'likely significant effects' test set out in the 1988 Environmental Effects Regulations, but also by judgments about the public profile of a project, the local authority's support of it and the need to justify the development by the developer. The vagueness of the 'significant effects' test, particularly when unrestricted by concise, quantitative criteria and thresholds, means that there is considerable scope for criteria other than a project's likely environmental effects to inform the planners' judgment about the applicability of environmental assessment rules. The influence of such

criteria serves also to underline that environmental assessment has a function beyond predicting harm to the environment. The process is capable of being used in a non-neutral manner by developers and planning authorities alike to advance, support, or justify a project. The latter is a key point. The environmental assessment process might therefore be used by developers to demonstrate that their project is reasonable and acceptable rather than as a means to scrutinise potentially harmful effects.

In the context of the case studies, the subjective nature of the application of environmental assessment rules was also reflected in the consultation which took place between the developer, planners and statutory consultees, the content of the developers' environmental statements and planners' evaluation of information arising from the environmental assessment process. I consider each of these aspects of environmental assessment in turn.

(a) Consultation in the Environmental Assessment Process

Consultation between the developer, local planning authority and a host of statutory consultees, including the Nature Conservancy Council, the Countryside Commission, and Her Majesty's Inspectorate of Pollution, is a legal requirement in the environmental assessment process.⁹ Such consultation gives pollution and planning bodies an opportunity to exchange information on the likely environmental effects of development and the best means of remedying or reducing these. Consultation therefore potentially encourages the identification

⁹ Regulations 14 and 15 1988 Environmental Effects Regulations, derived from Article 6 Directive 85/337.

of alternative sites, project design and processes, and mitigating measures at an early enough stage to shape the final project.

No statutory definition of consultation is given in either Directive 85/337 or the implementing regulations. The main characteristic drawn from the case studies is that consultation procedures are imbued with discretion. Although not an inherently bad quality, discretion leads to varying practices which contribute to the inconsistent application of Directive 85/337. This has an effect of making reliance on the Directive difficult by those affected by its provisions. In some of the case studies, consultation between the developer and planning authority (the first stage of the consultation process) was not sufficient to satisfy the requirements of Directive 85/337.¹⁰ One Planning Officer, City of London, was unaware of any consultation with developers about environmental information prior to their making an application - the initial stage of consultation. Another Officer, Essex County Council, with experience of fourteen environmental statements described the extent of this type of consultation:

What normally happens is you get an application with an environmental assessment and that is probably the first time we will see it...or we get the application in and they are getting a statement ready to throw at us (Planning Officer, Essex County Council).

This experience might, however, be contrasted with that of one Planning Officer, Warwickshire County Council: out of twelve environmental statements submitted to the planning department, the majority of developers did consult from the very beginning.

¹⁰ Wood and Jones, *Op.cit.*, pp. 29-30 similarly found that consultation between the applicant, the local planning authority and public bodies before submission of an environmental statement is not being used as often as it might.

Generally speaking, consultation between the planning authority and statutory consultees (the second stage of consultation) was less common in the case studies than that indicated in previous research.¹¹ The standard of consultation also varied: 'negative clearance', in which statutory consultees are provided with the developer's environmental statement, was usual; the consultees might give their views or provide further information on receiving the statement, but this was not necessarily requested by the planning authority. One Planning Officer, Essex County Council, said their practices do not involve 'a real consultation with statutory consultees - you just refer the statement to them'. This would appear to be a practical outcome to a practical problem of how to secure 'real' consultation amongst statutory consultees with differing remits, working practices and responsibilities.

A further feature of the majority of the case studies is that consultation between the local planning authority and Her Majesty's Inspectorate of Pollution¹² did not take place.¹³ This was partly because of the nature of the projects studied: two of the five projects were

¹¹ Wood and Jones, Op.cit., pp. 30-31 found that in the majority of cases at this stage, consultation with statutory consultees was found to be helpful to the local planning authority; in over half of the cases studied the local planning suggested modifications to the development proposals and that consultation with statutory bodies and the public was significant in influencing such suggestions in half of these cases.

¹² Under regulation 8(5) 1988 Environmental Effects Regulations, Her Majesty's Inspectorate of Pollution are to be consulted on developments involving mining operations or manufacturing industry or the disposal of waste likely to either give rise to waste, the disposal of which requires authorisation under the Radioactive Substances Act 1960, and those which discharge controlled waste, or special waste likely to require a licence, or consent of the National Rivers Authority, or to involve works specified under Health and Safety (Emissions to the Atmosphere) Regulations 1983, Schedule 1 (amended 1989).

¹³ In contrast, Wood and Jones, Op.cit., p. 31, found that consultation generally took place with HMIP quite early in the environmental assessment process and that the planning officers interviewed were satisfied with this consultation; see also United Kingdom Environmental Law Association and the Institute of Environmental Assessment Working Party on Environmental Assessment and Integrated Pollution Control: Overlaps in the Requirements for Environmental Assessment (London, UKELA, 1993).

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not subject to control by Her Majesty's Inspectorate of Pollution under the system of Integrated Pollution Control. Of those cases in which Her Majesty's Inspectorate of Pollution should have been consulted under the 1988 Environmental Effects Regulations (the Smithfield Combined Heat and Power Plant, Doncaster Regional Waste Incinerator Centre, and the Paradise Farm case studies) there was active consultation via a meeting or correspondence with Her Majesty's Inspectorate of Pollution in only one. Further support for the general assertion of a poor standard of consultation with Her Majesty's Inspectorate of Pollution may be found in the experiences of planners interviewed. Having dealt with fourteen environmental statements, one Planning Officer, Essex County Council, interpreted the broad provisions in the 1988 Environmental Effects Regulations in this area to mean that consultation with Her Majesty's Inspectorate of Pollution 'is going to take place only on rare occasions'. Another was unable to recall the cases in which Her Majesty's Inspectorate of Pollution are to be consulted ('Perhaps it is just the waste ones, I am not sure'). This apparent reluctance to consult Her Majesty's Inspectorate of Pollution is possibly a manifestation of a tendency to treat pollution authorisation separately from the assessment of environmental effects. One Planner, Warwickshire County Council, similarly described: 'they (developers) get their planning permission and then worry about their authorisations.'

A final feature of the cases studied was that very few officers consulted the public about the projects: one planning officer with experience of fifteen environmental statements knew of no cases where members of the public had been consulted.

(b) Assessment of Alternatives to the Proposed Project or Process

The primary purpose of wide and 'real' consultation lies in the opportunities it offers for identifying alternative sites which are less likely to be harmed by development than that proposed, and less damaging processes. These 'main alternatives' are to be studied by the developer and may be presented as 'supplementary information' in the environmental statement.¹⁴ Whilst undoubtedly an important aspect of the environmental assessment process, in the context of the case studies this part of the statement was often sketchy,¹⁵ in particular a 'no development alternative' was rarely presented. Dissatisfaction with the treatment of alternatives was expressed by a number of planners. One explained that of the 'headings which they (developers) have inadvertently left out...the main area omitted is alternative locations...when of course there should be a site search of alternatives' (Planning Officer, Essex County Council). In the Thanet Way Bypass case study, the developer, the Highways and Transport department of Kent County Council, failed to assess the 'alternative' of not building the bypass and alternative routes were presented unfavourably. However, as mentioned in chapter 7, prior to the planning inquiry on the scheme, a 'no route' alternative was provided by planning officers responsible for the project: the likelihood of a complaint to the Commission of the European Community by a local action group and advice from the Commission persuaded them to take this course of action. In the Thanet Way Bypass case study, the question of 'need' for the development was addressed in lieu of a proper examination of the alternatives in the environmental statement. The proponents of

¹⁴ Schedule 3 1988 Environmental Effects Regulations.

¹⁵ Similarly, C. Wood, C. Jones and N. Lee, Environmental Statements 1988-1990: An Analysis (Manchester, Manchester University, 1990) pp. 31-32, found that out of 236 environmental statements, 34% listed the main alternatives to a project.

the scheme concluded that having reviewed the 'main alternatives' there was a need for the bypass. A group opposing the road were of the opinion that 'the environmental statement has started from the premise that the proposal is both necessary and desirable and is disturbingly biased'. More generally, whilst the identification and presentation of 'alternatives' using scientific models gave an appearance of objectivity in the environmental statement, the main alternatives were treated in such a way as to substantiate the proposed location or design and to justify the need for the development.

(c) Assessment of Interaction of Environmental Effects

Describing the interaction between different impacts relates directly to a primary aim of environmental assessment: to reflect accurately the integrated nature of environmental harm and the transfer of pollutants between soil, water, and air.¹⁶ However, similarly to the often poor recognition of 'main alternatives' addressed above, the majority of statements in the case studies failed to describe this integration adequately: listing environmental effects under separate headings and with little discussion of the interaction of adverse effects within and between environmental media.¹⁷ One planner, with fifteen years experience of environmental impact assessment at Warwickshire County Council, explained that this deficiency commonly arises because of a tendency for experts working in different fields to take responsibility for a specific area and to be subject to little coordination. As a result, in the case of one of the projects a sense of its cumulative impacts is project was lost:

¹⁶ As required by Schedule 3(2) 1988 Environmental Effects Regulations, derived from Article 3 Directive 85/337.

¹⁷ Wood, Lee and Jones, *Op.cit.*, pp. 43-4, found that of 236 statements studied, only 14 covered the more complex, interactive impacts.

The developer got a lot of people to put bits in...there was no overview...it (environmental statement) was just a compendium of information (Planning Officer, Warwickshire County Council).

(d) Assessment of Mitigating Measures and 'Environmental Gain'

The measures envisaged to 'avoid, reduce, or remedy' significant adverse environmental effects are to be specified in the developer's environmental statement.¹⁸ A number of issues arise from the identification of such mitigating measures. First, in all of the case studies, developers described mitigating measures comprehensively in their environmental statements. The measures included reducing noise by planting trees and building screening devices, damping down areas during construction to limit dust and restricting operations to particular times or weather conditions. In the Thanet Way Bypass case study, the extent of these measures was related to the deemed economic importance of the project. This project was described in the County's structure plan as a primary route essential to the economy of North East Kent, which had hitherto failed to attract industry and business centred on the Channel Tunnel. Likewise, a review of the state of the environment by the County's planners concluded that 'measures including the improvement of road and railway links would be urgently needed to support the East Kent economy in the early years of the Channel Tunnel operations'. The measures proposed by the developers to mitigate the environmental effects of the project were, accordingly, substantial: a 300m long twin bore tunnel to minimise the final impact of the road on a golf course; extensive ground modelling to create a hill upon which golf could continue to be played; shrub and tree planting and visual screening to reduce visual impact and noise. The Environmental Statement describes

¹⁸ Schedule 3 1988 Environmental Effects Regulations.

that dense planting 'will also provide a valuable wildlife habitat and assist road noise'. In other, less economically advantageous, projects there was a tendency for mitigating measures to be less extensive.

Second, although mitigating measures are commonly negative in nature, for example, the building of settling tanks to gather pollutants, in most of the case studies a number of measures were identified which were positive in nature; these aimed to balance environmental harm with apparently environmentally beneficial measures, in some instances, to create 'environmental gains'.¹⁹ These measures enhanced aspects of the proposed project, such as the possibilities for recreation or making of new habitats, whilst also alleviating concerns about the effects of development on the environment. It might be recalled that in the Thanet Way Bypass case study, the environmental statement indicated not merely an intention on the part of the local planning authority to minimise impacts, but proposed also to enhance the landscape. The planning authority indicated a willingness to 'integrate the road into its landscape setting' by planting an avenue of willow and by the use of settling ponds 'giving an opportunity to 'introduce an attractive landscape feature.' In this case study, the identification and description of mitigating measures alleviated concerns about the environmental impact of the project by proposing to exchange environmental harm for 'gain'. A similar 'gain' of a reservoir to be used for recreational purposes was identified in the Manor Farm case study. In such circumstances there is the danger that the intrinsic value of a particular space or habitat may be overlooked in favour of such opportunities.

¹⁹ S. Boucher and S. Whatmore, 'Green Gains? Planning by Agreement and Nature Conservation', (1993) Journal of Environmental Planning and Management Vol. 36, No. 1, 33-51.

In summary, in all of the five case studies, mitigating and positive measures were identified by planners and developers. These were described with reference to the visual quality of a project, and the contribution of the development to the character or recreational opportunities of an area. The positive connotations of terms such as 'environment', 'nature', 'landscape', and 'amenity' were combined with the proposed development described in the environmental statement. This has the effect of enhancing the development, often emphasising its contribution to a 'community' as well as a local economy and thereby encouraging an accommodation of diverse interests concerned with the proposed project. Furthermore, in the identification of 'environmental gains' in the environmental statements, environmental resources were aligned with exchangeable 'goods', and environmental harms presented as separate and remediable 'problems'.

Arising from this observation, is the issue of how expressions of intent to mitigate or create 'environmental gains' made in the environmental statement are used by planners in the development consent process. On the basis of the Thanet Way Bypass case study, it would appear that such expressions are capable of forming the basis of planning conditions²⁰ and planning obligations.²¹ In this case study, the County Planning Officer granted planning permission subject to a number of conditions - planting trees, ground mounding, and provision of new hedges, all of which were described as mitigating measures in the environmental statement. The role of such measures in determining a planning application was described by a planning officer:

²⁰ Section 70(1)(a) Town and Country Planning Act 1990.

²¹ Section 106 Town and Country Planning Act 1990.

The assessment shows how it would work and we can then say well you must do this...that is why the mitigating factors identified in the statement must be capable of working. They (developers) might have put in vague information... then we find that they don't work and that's where we get problems and we may have to get involved with legal agreements with them (Planning officer, Kent County Council).

In granting consent for the Smithfield Combined Heat and Power Plant development, the Secretary of State took account of the way in which the environmental effects of the development were to be mitigated by the measures to be undertaken by the developer as described in the Environmental Statement.²² Several of these measures were formulated as planning conditions attached to the planning permission, for example those relating to air pollution monitoring.²³ For this reason, the Secretary of State for Energy believed that the environmental effects would not be such that it would be appropriate to refuse planning permission.

These clear examples apart, there was only limited correlation between the expressions of intent on the part of the developer and the planners' formulation of planning conditions.²⁴ The extent to which planning conditions and planning obligations are based on information contained in an environmental statement, particularly mitigating measures, was sometimes difficult to determine. This is because proposals are often modified as a result of suggestions made during the consultation process and so it may prove unnecessary to

²² Correspondence from Department of Energy to Principal Planning Officer, Corporation of London, 26 February 1992.

²³ For example, condition 23: 'The commissioning of the Development shall not take place until there has been submitted to and approved in writing by the City Council a scheme for the monitoring of pollution; and condition 25: 'The Company shall make every effort to ensure that the fuel oil is free from contamination.

²⁴ In contrast A. Kiss and D. Shelton, Manual of European Environmental Law (Cambridge, Cambridge University Press, 1993) p. 57 are of the view that licensing conditions are often based upon environmental assessments.

attach conditions to a grant of planning permission.²⁵ It is also possible that mitigating measures described in environmental statements allow developers to pre-empt conditions that planners are likely to impose. Where conditions were imposed which could be traced to the provision of information in a developer's environmental statement, they tended to relate more to the construction of the development (the control of dust and noise) than to any on-going activities on a site.

'Environmental Options'

In addition to presenting information about the likelihood and significance of the effects on the environment of development, the environmental assessment process is clearly capable of gathering and presenting information about the environmental benefits of a project and differing environmental 'options' in terms of the use of equipment and discharges to environmental media. Potential therefore exists for an assessment, similar to the 'best practicable environmental option' assessment for authorisation purposes under Part I of the Environmental Protection Act 1990, to be made in the planning system. In two of the case studies, such an assessment was made. In the Smithfield Combined Heat and Power Plant case study, information was presented about energy savings to be brought by a combined heat and power plant; these were compared with predictions of emissions from the plant. To a more limited extent, in the Paradise Farm Waste Disposal case study, the transfer of methane-producing waste from a landfill to a drained pond was compared with the possible dangers of doing this, and subsequent building on the site.

²⁵ Wood and Jones, Op.cit. p. 36, in two thirds of 24 cases studies, project proposals were modified during the environmental assessment process.

Whilst the case studies suggest that such complex assessments of environmental harm and benefit are clearly possible in the context of planning procedures, the 'best practicable environmental option' is not always reflected fully in the environmental statement. This was particularly apparent in the Paradise Farm case study in which the developer's environmental statement failed to explore the alternative environmental 'option' of different treatment methods of the waste. In the Thanet Way Bypass case study no assessment was made of a 'no-route' alternative, the presumption being that one of the two routes proposed by the Highways and Transport authority would be acceptable. In both of these case studies, a full assessment of the various 'environmental options' was substituted for descriptions of the advantages of the proposed project including the environmental and public health 'gains' which might ensue. Such descriptions in the developers' environmental statement offered a rationalisation of the preferred project: the developer commonly placed an emphasis upon the need for the preferred option, less so on its possible alternatives. In the context of the case studies, the environmental statement is capable of justifying the need for a particular project. This characteristic of environmental assessment is seen most clearly in the Thanet Way Bypass case study in which the first chapter of the environmental statement was devoted to establishing the need for the project.²⁶

Planners' Evaluation of Environmental Information

The above account of consultation process and the developers' assessment of mitigating measures and alternative sites and processes raises important questions about the

²⁶ Kent County Council, Highways and Transportation, A299 Route Improvement Whitstable to Herne Bay, Environmental Statement. March 1991, pp. 2-11.

consistency of application of environmental assessment rules and the quality and objectivity of information elicited in the process. Planners' critical evaluation, including both reviewing the adequacy of information contained within an environmental statement and evaluating the information to come to a decision, is central to the effectiveness of the environmental assessment procedure. In the following part of this chapter, this evaluation process is examined in more detail.

Information about the effects of development on the environment arising from the environmental assessment process is often complex and technical. However, planners are not trained specifically to evaluate the validity and significance of this information. In two of the case studies, environmental consultants were employed to evaluate information contained in a developer's environmental statement. In the Paradise Farm Waste Disposal case study, environmental consultants employed by English Nature evaluated the applicant's information about the effect of the proposed development on Atlantic Crayfish inhabiting a pond which was to be drained under the developer's scheme. This evaluation was expensive, but its conclusions contributed to the Chief Planner's recommendation to refuse planning permission for this project. More often, planners relied on 'in-house' expertise such as environmental health officers and engineers, as explained by one planner:

As planners, we tend to be generalists rather than specialists so we can look at something and say whether it is inadequate, for example, if someone fails to submit a noise report we will request one...when it comes in, we can go some way to assessing whether it is along the right lines but we would then go to the environmental health officer for an expert view (Planner, Warwickshire County Council).

Generally, there was no strategic approach to the evaluation of information, such as the use of a simple checklist or established techniques.²⁷ Rather, evaluation tended to take place on an ad hoc basis as described in the extract below:

To work out what is going on in the statement we value the non-technical summary...we use that to hopefully work out what the salient points are in the whole document (Planner, Essex County Council).

This assessment of planners' evaluation of environmental information accords with recent research commissioned by the Department of the Environment²⁸ and lends support to a view that the environmental assessment procedure has not fundamentally altered planners' evaluation of environmental information: this is appraised in much the same way as any other information accompanying an application for planning permission.²⁹ This has an effect that environmental information, provided primarily by the proponent of a proposed project, enters the political forum of decision making in the local authority without regular and thorough evaluation and scrutiny.

²⁷ For example the Lee-Colley Review Package, designed by N. Lee and R. Colley, Reviewing the Quality of Environmental Statements (Manchester, University of Manchester, 1990); the review criteria drawn up in P. Tomlinson, 'Environmental Statements: Guidance for Review and Audit', The Planner 3 November 1989; or Institute of Environmental Assessment, Review Criteria (East Kirkby, Institute of Environmental Assessment, 1991).

²⁸ Department of the Environment, Good Practice on the Evaluation of Environmental Information for Planning Projects (London, HMSO, 1994), pp. 8-11: 'a common reaction amongst development control staff to a lengthy and apparently competent environmental statement is to assume that the critical environmental issues have been addressed...there appears sometimes a nervousness to appraise critically the contents on the ground that it is a specialist area of work in which the planning officers have little knowledge or experience'.

²⁹ The adoption of more formal evaluation methods might accompany the requirement, set out in the Commission's draft proposals to amend the Directive, that an authority publish an explanation of its decision to grant or refuse development consent in those cases in which the project is subject to environmental assessment.

The Function of the Environmental Assessment Procedure in the Planning System

The environmental information elicited from the developer's statement and the planning authority's consultation procedures has two specific statutory functions: as a material consideration in the local planning authority's deliberations about granting planning permission³⁰ and, in cases appealed to the Secretary of State, as evidence in the public planning inquiry.³¹ Here, I assess both functions with an emphasis upon the interrelation of planning and environmental law.

(a) Environmental Information as a 'Material Consideration'

As discussed in chapter 5, prior to the implementation of Directive 85/337, environmental assessment procedures were governed by non-binding guidance and were subject to the discretion of planners and the Secretary of State. Environmental information was considered on an ad hoc basis. Following the implementation of Directive 85/337 in the town and country planning system in England and Wales, information arising from the environmental assessment process must be considered by the local planning authority in reaching its decision about whether to grant planning permission: should planning permission be granted without this information having been considered, the planning permission may be deemed void.

³⁰ Section 70(2) Town and Country Planning Act 1990.

³¹ Rule 6 and rule 13 Town and Country Planning (Inquiries Procedure) Rules 1992.

The case studies indicate that there has been little change in the manner in which environmental information contributes to the planning authority's decision. The consideration of environmental effects in the decision making process has not altered fundamentally because an emphasis upon environmental information provided by the developer remains. For example, none of the planning authorities produced a formal assessment of the environmental effects likely to arise from a development. Environmental assessments were de facto carried out by the developer, taking the form of an environmental statement which thus constituted a 'material consideration' for the purposes of determining an application for planning permission.³² This treatment of a developer's statement as representative of the full assessment process is a clear departure from the objective of Directive 85/337 that an environmental assessment should be conducted by the planning authority on the basis of information provided by the developer (the environmental statement) and that arising from consultation.³³

Many of the planners interviewed were of the opinion that they would have considered the effects of development upon the areas listed in the Directive even before the advent of statutory assessment (with the possible exceptions of climate and transfrontier effects).³⁴

³² Section 70(2) Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

³³ Ninth recital, Preamble to the Directive, '...this assessment must be conducted on the basis of the appropriate information supplied by the developer'; see also Article 8: 'Information gathered pursuant to Article 5, 6 and 7 (developers' information, consultation with relevant authorities and the public and other Member States in the case of transfrontier projects) must be taken into consideration in the development consent procedure' (emphasis added).

³⁴ Article 3 Directive 85/337 requires identification, description and assessment of the direct and indirect effects of a project on the following areas: human beings, flora and fauna; soil, water, air, climate and the landscape; the inter-action between the factors mentioned and material assets and the cultural heritage.

Several planners described that no great 'sea change' in the decision making process has taken place. Rather, existing practices of evaluating and considering environmental information have been formalised:

A lot of the information in the environmental statement we would have had supporting the application anyway...I think it (statutory assessment) has just put it into a discrete, separate document called an environmental statement (Planning Officer, Warwickshire County Council).

A lot of the information was around perhaps in not such a systematised way but I think it was there (Planning Officer Essex District Council).

Although it is called an environmental assessment, the content is not very different than we would have expected anyway...it (statutory assessment) has formalised everything but we were asking for and getting this sort of information before the Regulations came in (Planning Officer, Warwickshire County Council).

Similarly, little change was discerned in the type of information considered by planning authorities to be material to their decision. The environmental effects considered in the Thanet Way Bypass and Smithfield Combined Heat and Power Plant case studies related largely to questions of amenity, the pursuit and enhancement of which has long been a central concern of planning. One planner described this priority:

We are relatively good at urban design, we deal with design issues, archaeological issues, architecture, in the environmental statement...we are well equipped to do that...but I think we fall down on the broader environmental issues (Planning Officer, City of London Corporation).

In practice, the primary responsibility for conducting the environmental assessment rests with the developer in the form of compiling an environmental statement. The environmental statement 'as assessment' is a presentation of a developer's perception of the proposed project, the type and extent of environmental harm likely to arise, and the main alternatives to it. This has several important consequences. First, it contributes to a view

of environmental assessment as a single document (the environmental statement) which supplements the planning application, rather than an entire and complex process. Second, considerable discretion is given to the proponent of a project in terms of scoping the study, selecting and presenting information about the main alternatives to the proposal, the interaction and cumulation of any adverse effects and their mitigation. The environmental statement does not document information about the predicted environmental effects of the proposed development neutrally or objectively. Third, by contributing directly to the fulfilment of statutory environmental assessment rules, the developer acquires partial responsibility for environmental protection but, in so doing, the developer is capable also of controlling the assessment procedure by interpreting scientific data and presenting information in a favourable light.

Voluntary Submission of Environmental Statements

The most significant change following the implementation of Directive 85/337 is the increase in cases of voluntary environmental assessment. The 1988 Environmental Effects Regulations contribute to a climate in which developers consider it advantageous to give information about the environmental effects of development on the environment in the form of an environmental statement, even if this is not required statutorily. As mentioned, in the Smithfield Combined Heat and Power Plant and Manor Farm Mineral Extraction case studies it was the view of the developer and planning authority that the voluntary submission of environmental information might work to progress the project through the various development consent procedures. In this respect, environmental assessment operates as a self

regulatory mechanism, but might also be used by developers to promote a particular project.

(b) Environmental Assessment in the Planning Inquiry

The case study projects which went to appeal represent the two main types of public local planning inquiry: the Doncaster Regional Waste Treatment Centre inquiry took place against a refusal of planning permission, the most common type of inquiry, usually involving a dispute between a local planning authority arguing against development and a private developer;³⁵ the Thanet Way Bypass inquiry debated a road building proposal so that the principal argument for development was put by the public authority. In the case studies, the environmental assessment procedures undeniably provided a further opportunity for examining the validity of information on the predicted environmental effects of a development at inquiry. As mentioned, in the Thanet Way Bypass inquiry, public examination of the environmental statement led the developers to submit additional information on a 'no-route' alternative. In this case study, the environmental statement failed to withstand the enhanced scrutiny characteristic of inquiries.

Notwithstanding the opportunity for further scrutiny of environmental information at inquiry, a number of practical difficulties of integrating environmental assessment in inquiry procedures are also apparent.³⁶ The most notable is the duplication of information contained

³⁵ Described by P. McAuslan, The Ideologies of Planning Law (Oxford, Pergamon Press, 1980), p. 43.

³⁶ Similarly see K. Williams, 'Environmental Impact Assessment in the Vale of Belvoir Coalfield', in M. Clark and J. Herington, (eds.) The Role of Environmental Impact Assessment in the Planning Process (London, Mansell, 1988), in which environmental assessment did not shorten discussion or clarify the issues at inquiry; and the use made of environmental information in planning inquiries in C. Miller and C. Wood, Planning

in the environmental statement provided by the developer and that in proofs of evidence submitted by both parties to the inquiry.³⁷ One planner explained:

The environmental statement is likely to be written by different consultants and does not differ in many respects from the proofs of evidence in inquiry which also look at noise, dust, amenity and ways in which they might be mitigated (Planner, Warwickshire County Council).

This duplication of environmental information, and sometimes the presentation of contradictory evidence about environmental impacts limits opportunities for public participation. One environmental consultant was of the opinion that objectors' workload at inquiry was increased by their scrutiny of both an environmental statement and proofs of evidence. Problems also existed where individuals focus their attention on the environmental statement when preparing their arguments, as described by a party to the Thanet Way Bypass inquiry:

When you get to inquiry, the chances are that there will be far more information than there is in the statement...the environmental statement is not detailed enough to deal with the objections...

If you are a member of the public and focus your energies on the environmental statement you are also not going to know exactly what is being disputed at inquiry because the statement went in with the planning application much earlier and so it is superseded by proofs of evidence (Statutory Consultee, English Heritage).

A planner's opinion is similarly that:

It is rare for the appellants to rely on the environmental statement...although that is what should happen...the environmental statement ought, in fact, to deal with all the

Pollution Prevention (Oxford, Oxford University Press, 1983).

³⁷ Under rule 13 Town and Country Planning (Inquiries Procedure) 1992 (similar provisions are included in the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 1992.

issues so there shouldn't actually be any scope for further information at inquiry...that this does not happen implies a failure of the environmental assessment process (Planning Officer, Kent County Council).

In the case of the Thanet Way Bypass project, therefore, the environmental assessment procedure apparently fails to facilitate 'real' public participation in the inquiry.

The potential of assessment as a neutral and investigative procedure to temper the more adversarial aspects of the local public planning inquiry has similarly not been realised. The nature of the inquiry means that the validity of evidence on environmental effects contained in an environmental statement is examined in segments according to different subject areas - air pollution, conservation, dust and noise. These 'segments' of environmental information usually correspond to the organisation of evidence within proofs of evidence. As a consequence, environmental information is pared down into contestable or supportable parts with the effect that the interaction and cumulation of impacts on the environment tends not to be addressed fully. This also leads to an emphasis being placed on the developer's environmental statement which forms the subject of a discrete document, less so on the more amorphous body of information which arises from the entire environmental assessment process, including from wider consultation. The various effects of the structure of argument in inquiries on the consideration of environmental information are summarised by an in-house lawyer, English Nature:

Because of the general approach of slicing up the arguments in planning inquiries, what gets lost is the fact that even if you have got several environmental issues which in themselves are not sufficient to warrant refusal, cumulatively they might amount to a major environmental impact...that is not sufficiently taken into account at inquiry. But I also identify this as a defect of the environmental statement...I do not think that the planning inquiry does much to help the compartmentalisation of environmental statements (Lawyer, English Nature).

At inquiry, the environmental statement, prepared by the developer, therefore becomes one part of the existing adversarial apparatus. This, in turn, has an adverse effect on the submission and consideration of environmental information:

It is often intensely frustrating to us that at the public inquiry you might get some information put forward that might actually have had some impact on the decision. You think, well, had that been provided as part of the planning application process then we might not be here at the planning inquiry...but of course by that time, views are polarised and it is much less likely for you to turn around at an inquiry and say well we give in (Planning Officer, Essex County Council).

In the context of the case studies, the integration of environmental assessment in the planning inquiry did not fundamentally alter existing inquiry procedures for considering environmental information. In the view of one planner:

I honestly couldn't say that I notice a difference between the treatment of environmental information at public inquiries since the EC Directive was implemented (Planning Officer, Essex County Council).

Whilst perhaps not altering the scrutiny of environmental information to any great extent, the environmental statement did perform specific functions at inquiry. In the Thanet Way Bypass inquiry, the environmental statement was used by opponents of the road scheme as a staying device: in the weeks prior to the inquiry, those opposing the project demanded a full exposition of the 'main alternatives' with the purpose of securing compliance with the 1988 Environmental Effects Regulations but also to delay the appeal. In contrast, in the Doncaster Regional Waste Treatment Centre case study, the Environmental Statement served to show that the developer had considered a number of environmental effects of the development.

To summarise these points on the integration of the statutory environmental assessment procedure in the local planning inquiry, prior to the implementation of Directive

85/337, assessments of environmental effects were made in the inquiry alongside similar assessments about the social, economic and other effects of a proposed development. Since the Directive's implementation, the environmental assessment process is represented at inquiry by a discrete document, most likely produced by the proponent of the development. A planning application forming the subject of an appeal is therefore likely to be submitted to two methods of assessment which take place at different times and perform different functions: initially, statutory environmental assessment on submission of an application for planning permission; and, later, 'adversarial' assessment by way of cross-examination on the basis of proofs of evidence at the inquiry. The case studies suggest that there has been a tendency for environmental assessment procedures to be overlaid upon existing inquiry procedures. This leads to replication of environmental information. In the context of the case studies subject to an appeal, the environmental assessment and inquiry procedures were not integrated satisfactorily.

Planners' Treatment and Use of the Environmental Assessment Process

Planners' use and treatment of environmental assessment is essential to the operation of the process. This is because planners enjoy discretion to request that the developer provide an environmental statement, and to attribute particular weight to information about the environmental effects of a development arising from the environmental assessment process.³⁸ This discretion is enhanced by an absence of statutory guidance as to the form that environmental statements should take, and the evaluation of information elicited. It thus

³⁸ See Circular 15/88 (Welsh Office 23/88) Environmental Assessment (London, HMSO, 1988) which grants the local planning authority discretion in these areas.

remains open for an authority to grant permission for development likely to have significantly adverse effects. In the context of the case studies, a number of factors may be identified which influenced planners' treatment of the environmental assessment procedure, including their evaluation of the environmental information arising from environmental assessment. These are classed below as 'legal defensiveness', the planners' 'working perspective' and the significance of the project to the local planning authority as an organisation. These factors are not explicitly articulated in the environmental assessment process, nor formally balanced against other criteria.

(a) Legal Defensiveness

'Legal defensiveness' refers to a concern on the part of those responsible for administering environmental procedures that the legal requirements of consultation, participation and consideration of environmental information are upheld and are seen to be upheld in order to insure themselves against legal action for procedural failures.³⁹ Although not a very common response, the treatment of environmental statements by one planning authority bore its hallmark:

The procedures are more formalised...it certainly makes life more complicated...we have got to show them (objectors) that we have sort of reviewed the environmental statement in order to safeguard our own position. So that means more work in writing reports (Planning Officer, Essex District Council).

This approach contributes to a view of environmental assessment as concerned primarily with the presentation of information.

³⁹ S. Taylor, Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform (Stanford, Stanford University Press, 1984), p. 220.

(b) Planners' 'Working Perspective'

A second influential factor identified in the case studies is the 'working perspective' of the planners. This refers to a set of views and assumptions held by planners including those about the environment and environmental harm, and their function in protecting the environment. Within this 'working perspective', planners' exercise discretionary powers, interpret the environmental assessment rules and evaluate environmental information arising from the process. Planners' views and assumptions about the environment commonly reflected the fundamental distinction between the environment as a public good and a view of the intrinsic qualities of the environment.⁴⁰ The former, encompassing primarily issues of public health and the public use of the environment for recreation, has the attainment and preservation of 'amenity' as its focus and reflects what may be labelled a 'public environmental interest'. The latter represents a departure from human centred understandings of the environment - an 'ecological interest', as represented in table 8.1.

In the context of the case studies, planners most commonly viewed the 'environment' as a public good. Their 'working perspective' was a concern with amenity and public health considerations. An important consequence of this perspective was a receptiveness towards projects in which concerns about public health are assuaged and compensated by the identification of mitigating measures and environmental gains, notwithstanding likely damage to the intrinsic ecological quality of a habitat. Planners accorded a priority to mitigating measures when considering an application for planning permission. The identification (and

⁴⁰ See D. Pepper, The Roots of Modern Environmentalism (London, Routledge, 1986) for a description of the derivation of these views; for a more recent interpretation, see Boucher and Whatmore, supra, at 36.

negotiation) of 'trade-offs' in individual cases was also encouraged by the planners. This gave an appearance of 'balance' in the decision making process. In contrast, the appeal by some planners for more precise standards and thresholds for the environmental impact of development represents a move away from this notion of 'balance' and towards a more absolute sense of environmental qualities to be protected.⁴¹

Table 8.1. Planners' 'Working Perspectives' and Treatment of the Environmental Assessment Process

	Public Environmental Interest	Ecological Interest
View of the 'environment'	'environment' as a public good	intrinsic quality of 'environment' and 'nature'
Concerns	public health and recreation; amenity; pollution control	conservation; ecology
View of environmental assessment	balance	absolute protection
Function of environmental assessment	identification of mitigating measures; lessen impacts; exchange of environmental 'goods'	recognition of capacity of environment to change; environmental protection mechanism

⁴¹ See G. Myerson and Y. Rydin, 'Environmental Planning: A Tale of the Mundane and the Sublime', (1994) *Society and Space* Vol. 12, 437-452, for a description of 'balance' versus absolute protection.

Directive 85/337 is directed towards two different but related objectives: the prediction and mitigation of impacts on both human health and population (public environmental interests) and on fauna, flora, soil, and landscape (ecological interest). The broad distinction between a 'public environmental interest' and 'ecological interest' was clearly apparent in the Thanet Way Bypass case study. The bypass road which was proposed to skirt Whitstable, was expected to confer a benefit of less polluted air and reduced noise to the town's residents. In cutting through a Site of Special Scientific Interest, the development would also be detrimental to surrounding open countryside and the landscape. One planning officer, supporting the project, clearly prioritised the public environmental interests of the development: she referred to the 'selfishness' of the conservationist and agriculturalist lobby in this case, and considered that the 'amenity' value of the project for the town's residents should take priority over the preservation of countryside and landscape.

Within the broad dichotomy of a public environmental interest and an ecological interest described above, some planners made a further distinction between rural and urban environments when discussing the application of environmental assessment rules and significance of environmental information:

The attitude two years ago towards environmental assessment was 'well that is all very well but how is it relevant to the City?', but now it is clearer to people how relevant it is regardless that this is in the City (Planning Officer, Corporation of the City of London).

In a similar vein, one planner described how this distinction influenced the choice of statutory consultees:

Since we only have a small bit of AONB (Area of Outstanding Natural Beauty), we tend not to get them (Countryside Commission, National Parks Authority) involved in environmental issues (Planning Officer, Kent County Council).

One planner also drew upon a hierarchy of environmental impacts; in the example below, by using the terms 'hard' and 'soft'.

We are used to dealing with amenity impacts, the effect of traffic, noise, dust, fumes. But in the minerals and waste department we are dealing with the real 'hard' environmental problems, the effect on groundwater aquifers, leachate, impact in terms of landfill gas, that could impact on public health rather than just not making the place so happy to live in...whilst landscaping is the amenity thing that planners were trained to do...the impacts on the 'hard' environment have made us more cautious (Planning Officer, Warwickshire County Council).

It is just such 'hard' environmental impacts - air pollution, groundwater pollution, and landfill gas - which are the subject of the environmental assessment process. There is therefore the potential for tension between these concerns and the traditional working perspective of planners such as the protection of amenity,⁴² landscape, and the management of space.

(c) Organisational Importance

A further factor in the treatment of environmental assessment by planners is the commitment of the local planning authority to a particular development. This was particularly apparent in cases in which the development was proposed by the local authority. For example the Thanet Way Bypass was proposed by the highways and transport department

⁴² There is some question as to whether 'amenity' encompasses matters of pollution; I follow M. Grant, Urban Planning Law (London, Sweet and Maxwell, 1982) in using the term to mean well designed and well laid out development, pleasantness and harmony, and enjoyment of the environment.

of Kent County Council and supported by the local planning authority which helped to prepare the environmental statement and to which the application for planning permission fell to be decided.⁴³ A Planner (Kent County Council) expressed the opinion that the success or failure of the by-pass reflected the planning department's work and commitment to the local authority's policies. Other planners spoke in terms of 'winning' an appeal and 'supporting' an environmental statement. Not surprisingly, planners' commitment to a project was particularly strong where it was likely to contribute substantially to an area's economy.⁴⁴ In the Thanet Way Bypass case study, the planning officer responsible for the project explained that the County Council had been committed to the proposed route for economic reasons before an environmental statement was prepared; the statement, compiled later by the planning department, confirmed their view that it was also the best route, but for environmental reasons.

The Environmental Assessment Process: An Evaluation

An evaluation of the working of environmental assessment may be made in the context of the case studies. Primarily, the existing process of gathering and considering environmental information has been formalised as a result of the implementation of Directive 85/337. Environmental assessment introduces a genuinely preventative element into the development consent decision making process. This is seen most clearly in the Paradise

⁴³ The application of environmental assessment rules, particularly the publicity requirements, where the local planning authority is the applicant is governed by regulation 25A 1988 Environmental Effects Regulations; in this case, the project was 'called in' by the Secretary of State for the Environment.

⁴⁴ E. Gouge, 'The UK Implementation of Environmental Assessment (EA): Organisational and Political Implications,' (1989) Local Government Policy Making, 55-63, defines this as a 'pro-development pressure'.

Farm case study in which it was decided that, as a result of information contained in the developer's statement and on the basis of further research commissioned by the planning authority, the likelihood of harm to wildlife was such that planning permission to develop the site would have to be refused. However, statutory environmental assessment rules have not led to a fundamental change in the culture of decision making of the planning system, as discussed in detail in chapter 9.

In terms of discretion exercised by planners in obtaining and evaluating information about the effects of development on the environment, the implementation of Directive 85/337 has limited the scope of planners' discretion to some extent: planners' choices about eliciting environmental information, consulting statutory consultees and the public and taking account of that information as a material consideration in making a decision to grant or refuse planning permission are now bounded by statutory rules. This forms part of a general centralisation of planning policy. However, the overall picture of environmental assessment is one of 'residual' discretion exercised by the local planning authority. In practice, the application of environmental assessment rules, consultation process and evaluation of environmental information arising from the process (particularly the significance to be attached to mitigating measures) are shaped by subjective judgments made within the scope of the planners' discretion. This might be compared with the more limited discretion exercised by planners in the development plan making process: plans are made within a battery of statutes and official guidance; the format and content of the plans is controlled; some plans are submitted to an examination in public, conducted by a planning inspector;⁴⁵

⁴⁵ See Part II Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991; Town and Country Planning (Development Plan) Regulations 1991 (SI 1991, No. 2794), and Policy Planning Guidance Note 12, Development Plans and

an appeal is possible to the Secretary of State for the Environment; and the entire process is overseen by the courts.⁴⁶ In this light, the discretion enjoyed by planners in the environmental assessment procedure is novel.

More unusually, the developer also enjoys discretion in terms of selecting and presenting information about the likely environmental effects in the environmental statement. Given that, in practice, this information is central to the planning authority's deliberations as a 'material consideration', the environmental assessment procedure gives greater status to the developer's information about the effects of development on the environment than is warranted by the traditional constitutional position of the developer in planning law. In the developer's statement, the main alternatives to the project, the interaction of environmental impacts and mitigating measures tend to be couched in objective terms; this derives from the use of scientific methods of modelling impacts and the use of technical language. The style of the environmental statement contributes to an appearance of neutrality in the environmental assessment process. As seen in the Thanet Way Bypass and Smithfield Combined Heat and Power Plant case studies, this contributes to the conclusion that the environmental assessment process is capable of legitimating a proposed project.

By providing environmental information, the developer fulfils a statutory requirement that the effects of certain projects on the environment be considered at the planning stage.

Regional Planning Guidance (London, HMSO, 1992).

⁴⁶ For example, Great Portland Estates plc v. Westminster City Council [1985] AC 661 in which the inclusion of policy protecting certain categories of leasehold occupiers in the local development plan was reviewed by the courts.

This is significant because the traditional presumption in favour of development which has long operated in the planning system is reversed by environmental assessment: the onus shifts to the developer to provide adequate information to show that a proposed project is acceptable in environmental terms. If the developer fails to do so, the authority may refuse permission for that reason.⁴⁷ However, there is no statutory guidance as to the exact type of information required from the developer or its presentation. Similarly, methods of evaluating the adequacy and significance of the developer's environmental information by the planning authority are not statutorily determined, for example in the same manner as the development plan. The developer's assessment of the likely environmental effects is not subject to a formal vetting process by independent verifiers and evaluation by planners is often rudimentary because of their lack of experience with such documents. Most notably, there is no requirement that, should the developer fail to show that the development is acceptable in environmental terms, the local planning authority must refuse planning permission. This absence of statutory guidance grants developers considerable discretion in gathering, selecting, and presenting information about the environmental effects of a proposed development. For example, developers often place an emphasis on the suitability of the proposed site in their environmental statements and pay little attention to the availability and suitability of alternative sites.

Following this observation, it becomes clear that the environmental assessment procedure performs specific functions in the planning process. In the Smithfield Combined Heat and Power Plant case study, the environmental statement served to ease the project

⁴⁷ R. Carnworth, 'The Planning Lawyer and the Environment', (1991) JEL Vol. 3, No. 1, 57-67, at 53.

through the development consent process. In the Thanet Way Bypass case study the procedures were used by opponents of the proposed development to slow its progress through planning procedures. These examples call for a reassessment of the view that environmental assessment is a neutral, 'one-way system' of flows of information towards a decision maker. Rather, in communicating and accommodating the needs of the proponent of a project via the statement, environmental assessment is capable of giving expression to the developers' interests. Though having a procedural form, environmental assessment is not a neutral process. A connection may therefore be made between the legal function of environmental assessment as a 'material consideration' of the local planning authority and a 'cultural' function of the procedure in legitimating a project. Furthermore, the latter function of environmental assessment extends beyond legitimating an individual project; the environmental assessment process upholds a view that the planning system as a whole is capable of eliciting and evaluating the likely environmental effects of a project and balancing these against non-environmental benefits to be achieved from the development.

It is possible to see also the non-neutral use of the environmental assessment process by the public sector, often to protect the 'public environmental interest' and, less commonly, ecological interests.⁴⁸ In the Thanet Way Bypass case study, 'public good' issues - amenity and public health - were predominant in the Environmental Statement. In the Smithfield Combined Heat and Power Plant case study, the combining of (private) property interests in development and the public interest in the protection of environmental goods proved potent in terms of shepherding the project through the development consent process. Related to

⁴⁸ See also McAuslan's identification of tensions which arise in public developments such as clearance area policy, Op.cit., pp. 77-117.

this, environmental statements often draw upon development plans, which increasingly have an environmental component.⁴⁹ The proposed project is embedded in within a politically sanctioned plan of land use, thus joining in a very convincing manner, the proposed project and the policy statements of the local planning authority. In the Thanet Way Bypass case study this took the form of marking the characteristics of the project which accorded with the structure and local development plans. It would appear that public developers are in a privileged position to relate closely a proposed project and the development plan because of the information they hold about official planning policy. A supporting authority will also present the project to planning committee and have greater access to information and central government funding, for example a road transport grant.

The main conclusion is that environmental assessment is being used in some cases to advance and legitimate development projects. This conclusion has implications for the development of environmental law in a context of European Community law because it suggests some discordance between the aims of European legislation and their practical implementation in the United Kingdom. A clear example of this discordance is that procedures introduced to comply with Directive 85/337 departed from the Directive's objective that the local planning authority conduct the environmental assessment. The statutory environmental assessment procedure has therefore come to resemble closely and overlap with existing methods of assessing the effects of development upon the environment described in chapter 5, in which an onus was placed upon the developer to provide environmental information. For example, the correspondence of the environmental

⁴⁹ As required by Planning Policy Guidance Note 12, Development Plans and Regional Planning Guidance (London, HMSO, 1992) paras. 6.1-6.24.

assessment process and the local public planning inquiry in the Thanet Wav Bypass and Doncaster Regional Waste Treatment Centre case studies suggest that the European Community's model of environmental assessment envisaged in Directive 85/337 is integrated inadequately into the 'traditional' assessment procedure of the planning inquiry.

To summarise, in the context of the case studies, the environmental assessment rules set out in implementing regulations are not applied consistently. Planners' evaluation of information arising from the process is also uneven. The exact contribution of environmental information in the development consent process is not apparent because of the breadth of material factors considered by planning authority and because there is no requirement to record the significance of environmental information in decision making. A number of these points are addressed by the Commission's Proposed Directive amending Directive 85/337.⁵⁰ The relevant amendments are those which would clarify the circumstances under which Annex II projects (which require environmental assessment only where the project would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location) should be subject to an assessment by introducing a 'screening' procedure and additional criteria for selecting those projects which should be subject to environmental assessment under Annex IIa. An extra 'scoping' requirement to be introduced would permit interested parties, the local planning authority and other statutory parties to ascertain the scope of the environmental assessment and the degree of investigation required. It is expected that this latter amendment might lead to more effective consultation between the

⁵⁰ Commission of the European Communities, Proposal for a Council Directive Amending Directive 85/337 on the Assessments of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

local planning authority, statutory consultees and the public. Most significantly, the amendments proposed by the Commission include a requirement that the local planning authority or other competent body take account of the information on environmental impacts obtained in the course of the procedures and to publish the 'reason and consideration' on which they base a decision to refuse development consent or, alternatively, to grant consent 'despite receiving unfavourable opinions from statutory consultees or the public'. This would implicitly require planners to give weight to information arising from the environmental assessment process.

A further possible amendment to the practice of environmental assessment comes, not from planning law, but from the Draft Directive on Integrated Pollution Prevention and Control.⁵¹ The Draft Directive provides for the combination of pollution control authorisation and aspects of the environmental assessment process.⁵² This would clearly signal that the pollution control and planning procedures should be more closely integrated than they are at present, even in the case of those projects subject to environmental assessment.

In Part IV I expand on this analysis of specific points arising from the five case studies by turning to more general conclusions about the working of environmental assessment in the town and country planning system in England and Wales.

⁵¹ Draft Directive on Integrated Pollution Prevention and Control COM(93) 423 (Brussels, Commission of the European Communities, 1993).

⁵² Article 5(1) Draft Directive on Integrated Pollution Prevention and Control COM(93) 423 (Brussels, Commission of the European Communities, 1993).

PART IV ENVIRONMENTAL ASSESSMENT AND ENVIRONMENTAL PROTECTION: CONCLUSIONS AND FUTURE DIRECTIONS

In the light of the case studies presented and analysed in detail in Part III of the thesis, in this Part I address more general questions about the implementation of environmental assessment in the town and country planning system in England and Wales. These include: how has environmental assessment developed as a technique of environmental law in the planning system? How does planning and environmental law interrelate via environmental assessment? What are the prospects for a system of European Community planning law?

In chapter 9 I relate the conclusion reached in chapter 8, that the environmental assessment process is capable of being used by developers to justify and advance a particular project, to the existence and priority given to property rights in the planning system. I consider that the planning system is clearly affected by ideas of ownership and private use and development of land and suggest that this has limited the effectiveness of environmental assessment to prevent environmental harm at the planning stage. I examine four characteristics of the planning system which reveal this influence of private property and which have not proved amenable to the objectives and methods of the European model of environmental assessment in Council Directive 85/337. These are: the narrow assessment of effects of development and a reluctance to take account of cumulative effects; a pragmatic approach to public participation; and limited recognition of environmental interests.

By way of conclusion in chapter 10, I summarise the state of environmental assessment and consider the implications of the prevalence of property and developmental interests discussed in chapter 9 for the future direction and development of environmental assessment in a context of environmental law in the 1990s.

Chapter Nine Environmental Assessment and Protection of the Environment in the Planning System

Introduction

In chapter 8, I examined specific points arising from the five case studies. In this chapter, I give a more general analysis of the implementation of Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment¹ in the town and country planning system in England and Wales. In commenting upon, and analysing the working of environmental assessment in the planning system, I discuss in turn a number of key issues relating to the protection of the environment in the planning system through the environmental assessment process: (i) the development of environmental assessment as a technique of environmental law in the planning system; (ii) the interrelation of planning and pollution controls; and (iii) the prospects for common planning procedures in the European Community. An important focus of the chapter is the protection of property rights in the planning system and the impacts of this on the operation of environmental assessment. Before analysing generally the implementation of environmental assessment in the town and country planning system in England and Wales, I first assess the development of environmental assessment as a technique of environmental law.

¹ Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, OJ L 175, 5.7.1985, p. 40.

Development of Environmental Assessment as a Technique of Environmental Law

As discussed in Part I, environmental assessment represents the significant development of integrated and procedural mechanisms in preference to the promulgation of sectoral, substantive and quantitative measures. By establishing certain procedural requirements for introducing information about the effects of development on all environmental media in decision making processes, environmental assessment offers a regulatory technique of environmental law which responds to some of the inadequacies of sectoral controls but retains the principles and pragmatism which informed the concept of 'best practicable means' and, latterly, 'best practicable environmental option'.² The legal control offered by environmental assessment is abstract and indirect: environmental assessment does not have positive goals, nor does it control future action according to specific standards, but rather by a presumption that environmental harm might occur. Similarly to 'best practicable means', environmental assessment also progresses an idea of 'balance' between environmental and developmental interests. This contrasts with the adoption and enforcement of environmental standards which provide a clear signal of the acceptable level of a particular pollutant and thereby emphasises the constraints on the capacity of ecological systems to absorb pollutants.

Environmental assessment is clearly a technique of environmental law. However, by applying to the planning stages of development, environmental assessment has also undergone development as a procedure within the planning system. Environmental assessment is an important part of planning law and forms the subject of official guidance

² See chapter 3, 'The Movement Towards Best Practicable Means'.

and planning policy. Thus in implementing Council Directive 85/337 in the town and country planning system in England and Wales, environmental assessment was incorporated in a planning system having broader functions and objectives than environmental protection. The implications and significance of this integration of environmental assessment as a technique of environmental law in the planning system is the subject of the remainder of this chapter.

Protection of the Environment in the Planning System Via Environmental Assessment

Methods for assessing the effects of development already existed in the planning system when Council Directive 85/337 was adopted, albeit that these were often informal and ad hoc. The planning system had proved to be sufficiently flexible to embrace environmental protection as a 'material consideration'. The implementation of Directive 85/337 required that informal assessment procedures for evaluating the effects of development in the planning system be replaced by statutory environmental assessment in the case of certain projects. The United Kingdom government relied upon the existence of these informal assessment procedures as evidence that the requirements of Directive 85/337 could be absorbed into the existing legislative and administrative framework of the development consent system. This manner of implementation meant that the general and novel principles advanced by Directive 85/337 became combined with features of the existing informal methods of assessment, for example that an onus is placed upon the developer to provide environmental information and that, in eliciting and presenting this information, the developer should enjoy discretion. For this reason also the exclusion of all but a handful of agricultural and forestry projects from the ambit of the development consent system similarly exists in environmental assessment

law: the narrow definition of 'development' in the planning system taking precedence over the broader definition of 'project' in Directive 85/337.³ In certain cases, statutory environmental assessment procedures overlap with those previously existing informal procedures for taking account of environmental effects. Planners describe Directive 85/337 as 'merely' formalising their existing assessment practices and give little sign that it has altered the decision making culture in the local planning authority. This view is supported by the duplication of environmental information contained in a developer's environmental statement and proofs of evidence in the local public planning inquiry. The method of implementing Directive 85/337 made the 'bolting on' of a statutory environmental assessment procedure very likely. Arguably, the various departures in Directive 85/337 from the existing assessment procedures - the formal assessment of effects on ecological systems beyond a particular site, the reform of the culture of decision making, and formal consultation and participation requirements - justified new legislative procedures and administrative machinery. Some effects of this method of implementation may be seen in the five case studies discussed in chapters 7 and 8.

In the context of the case studies, the developer's environmental statement is commonly regarded as a substitute for the entire environmental assessment process, which includes consultation with statutory consultees and evaluation of information provided by the developer by the local planning authority. Information about the environmental effects of development, provided by the developer thereby constitutes a 'material consideration' of the local planning authority in their decision about whether to grant or refuse planning

³ Article 1(2) Directive 85/337 defines 'project' as the execution of construction works or of other installations or schemes; or other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.

permission or grant it subject to conditions. This aspect of the practice of environmental assessment is a departure from a primary objective of Directive 85/337, that the local planning authority carry out an environmental assessment on the basis of information provided by the developer in the environmental statement.

Because of the special status of the developer's environmental statement as a de facto environmental assessment, the environmental assessment process is capable of being used to gain development consent for a project. The information contained in the statement influences decision making procedures in a manner disproportionate to the developers' constitutional role of the developer in the planning system. The developer's role is therefore enhanced by the responsibility of contributing environmental information. This, notwithstanding that environmental assessment would appear to offer an opportunity to restrict the scope of developers' rights of development on property or at least to interfere with rights of development by imposing a 'burden of proof' on the developer that a proposed project is acceptable in environmental terms at the planning stage. This conclusion highlights that, although statutory assessment procedures have replaced informal and discretionary methods of environmental assessment in certain cases, discretion is still exercised by the developer with respect to the selection and presentation of environmental information in the environmental statement. The scientific and technical information contained in an environmental statement is capable of being used to support a proposal for planning permission, and thereby contribute to the political processes of the planning system.

The specific analysis of the five case studies in chapter 8 and summarised above raises a general point about the regulation of environmental harm in the planning system by the method of environmental assessment: this is that the existence of property rights plays a key role in understanding the uses to which the environmental assessment process is put by developers in the planning system. As described briefly in chapter 2, an individual's ability to obtain redress when subjected to pollution and to be free from nuisance was historically tied to a property interest in a specific parcel of land. This was incorporated by judicial interpretation into the post war planning system. Manifestations of the prevalence of property interests in planning are the focus on specific land use developments and the long-held presumption in favour of development. In pursuing a system of environmental assessment, there exists some scope for circumventing property interests, particularly by refusing development consent; the practical corollary of taking account of environmental effects of development being a reduced role for private property considerations. Moreover, by broadening environmental concerns beyond a particular site to the wider ecological system by a presumption that the effects of environmental harm will be felt beyond their source, environmental assessment represents a conceptual understanding of the environment as integrated and interdependent and which transcends the division of land into parcels or sites denoting ownership.

One effect of the developer providing an environmental statement which constitutes an 'environmental assessment' for the purposes of complying with Community law is a conflict in the roles the developer is expected to perform in the assessment process: as the

proponent of a particular development with property interests in a specific parcel of land; and as an objective assessor of the effects of that development upon the wider environment notwithstanding possibly adverse consequences for the property interest. In the single text of the developer's environmental statement private property interests are combined with environmental interests which are public or communitarian in nature. A tension also exists on a spatial level: the developer must make an assessment of the effects of a project beyond the limits of a parcel of land defined by property ownership. In all of the case studies, but particularly in the Smithfield Combined Heat and Power Plant, Thanet Way Bypass and Manor Farm Mineral Extraction cases, this tension in the developers' roles in the environmental assessment process was mediated by an emphasis in the environmental statement upon their intentions to mitigate impacts and achieve environmental gains. These statements of intent tend to denote general, shared and public interests such as the provision of recreation areas or extensive landscaping, thus reducing objections to potentially environmentally harmful development. Combined with the 'procedural safeguard' offered by the form of environmental assessment, these statements also prove capable of justifying and rationalising development. The zealous identification of mitigating measures and environmental gains in the developer's environmental statement compares markedly with the low priority accorded to identifying alternative sites and processes and examining pollution control measures at the planning stage in these documents.

The specificity of property rights in a parcel of land in the planning system contrasts with the expression of abstract, public rights of access to information and public consultation in Council Directive 85/337. As mentioned in chapter 3, these public rights are quite unrelated to the protection of private property and are in line with doctrines of good public

administration and typically European values of environmental law. The implementation of Directive 85/337 by its absorption into the property oriented planning system of England and Wales has led to some discordance between the European Community model of environmental assessment in the Directive and existing assessment procedures in the planning system. Several of these have been discussed in the context of the case studies. The most notable is that the traditional onus on developers to provide information on the effects of development has meant that statutory environmental assessment procedures depart from the objective of Directive 85/337 that the local planning authority conduct an environmental assessment.

The prevalence of interests of private property in planning is highlighted by a number of specific characteristics of the planning system which have proved to be incompatible with the objectives and assessment procedure laid down in Directive 85/337. Here, I discuss four such characteristics and their interpretation in policy and in the courts:⁴ the first is the site specific nature of the development consent system; the second is a reluctance to take account of the cumulative effects of development; the third is a disregard for formal public participation requirements; and the fourth, the limited recognition of environmental interests.

(a) Development Consent: A Site-based System

A primary characteristic of the development consent system is the focus on specific land use developments rather than on planning in a broader, more strategic sense. This, as

⁴ J. Alder, 'Environmental Impact Assessment - The Inadequacies of English Law', (1993) JEL Vol. 5, No. 2, 203-221 discusses the incompatibility of aspects of English legal culture with Directive 85/337; here, I focus on legal characteristics of the planning system.

discussed above, is derived from an emphasis on property ownership of an individual parcel of land, the unit of planning. The potential for conflict between traditional proprietorial boundaries in planning law and a key conceptual premise of environmental assessment, that effects may be felt beyond their source and must be taken into account in the decision making process, may be seen in Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd.⁵ A decision of the Planning Inspector was challenged as being ultra vires on the ground that he had failed to require an environmental assessment in accordance with Directive 85/337 because the application for planning permission to erect poultry houses and dwellings for agricultural workers had been made several days before the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (the '1988 Environmental Effects Regulations')⁶ came into effect. One of the applicant's grounds of leave to quash the decision was that the Inspector had failed to give due weight to the absence of an adequate environmental assessment of the effects of the off-site disposal of chicken litter from the site. The Inspector stated in his decision letter that 'what happens to it (the disposal of waste on the second site) afterwards is another matter and not one which is before me to consider...It becomes a separate operation which may or may not require planning permission.' Tucker J considered that the Inspector had properly directed himself in law on this matter because the sites (for the development and the disposal of chicken litter) were not linked physically and were not dependent on each other for planning permission.⁷ The Inspector's acceptance that the effects of the off-site disposal of chicken litter need not

⁵ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352.

⁶ Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988, No. 1199).

⁷ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352, at 356-57.

be subject to the 1988 Environmental Effects Regulations relies on a narrow conception of environmental assessment since the disposal of such wastes can clearly have significant environmental consequences.⁸ This case highlights that the biases of the planning system are directed by a concept of planning consent being concerned with an immediate geographical area, most commonly defined by property ownership. For this reason also, planning has tended to be nervous of requiring detailed consideration of alternative sites which is a requirement of environmental assessment.⁹ A different approach has been taken by the courts in conservation law. For example, in Sweet v. Secretary of State for the Environment and Nature Conservancy Council,¹⁰ it was held to be permissible for land of lesser intrinsic scientific interest to be designated as a Site of Special Scientific Interest under section 29 Wildlife and Countryside Act 1981 if it is part of the same environmental unit as land which is of genuine interest, thus creating a surrounding 'buffer'. In this case, Schiemann J took account of the advantage of protecting a site defined more broadly than that of immediate scientific interest.

⁸ On this point, see comment by B. Fitzpatrick, 'Redressing the Late Implementation of the Environmental Impact Assessment Directive', (1994) JEL Vol. 6, No. 2, 351, at 368.

⁹ See R v. Carlisle City ex parte Cumbria Cooperative [1986] JPL 206, as noted by R. Carnwath, 'The Planning Lawyer and the Environment', (1991) JEL Vol. 3, No. 1, 56-67, at 62. The following are cases in which the courts have accepted that where a proposal has severe environmental implications, consideration of alternative sites may be necessary: Greater London Council v. Secretary of State and Cablecross Projects Ltd [1986] JPL 183; R v. Royal County of Berkshire ex parte Magnall [1985] JPL 258; and Trusthouse Forte Hotels Ltd v. Secretary of State for the Environment and Another [1986] EG 279. A further exception is to be found in guidance relating to development on green belt sites: the owner of a green belt site is required to take pains to ensure that there are no other (non-green belt) sites on which the proposed development might be located, as noted by D. Millichap, 'Sustainability: A Long-Established Concern of Planning', [1992] JPEL 1111-1119.

¹⁰ Sweet v. Secretary of State for the Environment and Nature Conservancy Council (1989) JEL Vol. 1, No. 2, 245.

(b) Narrow Assessment of Effects of Development on the Environment

Arising from the site specific nature of the planning system is a second characteristic of the planning system: a reluctance to take account of the cumulative effects of development and thus narrowly assessing the effects of development on the environment. Directive 85/337 defines 'project' broadly to include a whole enterprise that is proposed.¹¹ In the development consent system in England and Wales, a 'project' is commonly equated with a particular application for planning permission. This means that a development can be broken up into separate components with the effect that a sense of the cumulative impacts of the development as a whole is lost. This issue was raised before the Court of Appeal in R v. Swale Borough Council and Medway Ports Authority ex parte the Royal Society for the Protection of Birds (1991).¹² The case concerned a grant of planning permission for reclamation of 125 acres of mudflats in the Medway Estuary. After the original application was lodged, associated applications concerning larger development schemes were submitted. The Royal Society for the Protection of Birds argued that the planning authority had breached the 1988 Environmental Effects Regulations by granting planning permission without first requiring an environmental assessment and thus formally taking into account information on the environmental effects of the proposal on a Site of Special Scientific Interest and a Ramsar designated area. On the question of cumulative impacts from staged applications, the Royal

¹¹ Article 1 Directive 85/337 defines 'project' as: the execution of construction or other installation or schemes, and other interventions in the natural surroundings and landscape including those of extraction of mineral resources. On the opportunities in environmental assessment to take account of cumulative effects, see N. C. Sontag and R. R. Everitt et al, Cumulative Effective Assessment: A Context for Further Development and Research (Quebec, Canadian Environmental Assessment Research Centre, 1987).

¹² R v. Swale Borough Council and Medway Ports Authority ex parte the Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135; See M. Grant, 'Development and the Protection of Birds: the Swale Decision', (1991) JEL Vol. 3, No. 1, 135-152.

Society for the Protection of Birds argued that the applicants should have submitted an integrated planning consent application, accompanied by an environmental statement. Simon Brown J upheld the planning authority's argument that 'the question whether or no the development is of a category described in either schedule must be answered strictly in relation to the development applied for, not any development contemplated beyond that.'¹³ A large project that as a whole might require assessment could be broken up into separate smaller applications, thus escaping the 1988 Environmental Effects Regulations. Simon Brown J distinguished such circumstances from those in relation to Schedule 2 projects (discretionary projects) in which case, if the project is an integral part of an inevitably more substantial development, the authority must consider whether, as a whole, they are likely to have significant environmental effects.¹⁴

A similarly narrow approach to the question of the cumulative effect of development arising from staged applications was taken in Lewin and Rowley v. Secretary of State for Transport (1990)¹⁵ which concerned the construction of the M1-A1 link road. It was held that a side road order could be treated as a separate project and therefore fell only within Schedule 2 of the 1988 Environmental Effects Regulations. Treating the side road as part of the main road project would have made an environmental assessment mandatory by

¹³ R v. Swale Borough Council and Medway Ports Authority ex parte the Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135, at 142.

¹⁴ Id.

¹⁵ Lewin and Rowley v. Secretary of State for Transport (1990) JEL Vol. 2, No. 1, 216-220.

bringing the whole project within the ambit of Schedule 1 of the 1988 Environmental Effects Regulations.¹⁶

(c) Public Participation

A third characteristic of the planning system having relevance to the working of the environmental assessment process is that, whilst the rhetoric and practice of public participation in the planning system is well established, an avowedly pragmatic approach to the public participation requirements of Directive 85/337 is advanced in official guidance¹⁷ and adopted by local planning authorities and the courts. The general approach is that participation requirements in the Directive are deemed to have been fulfilled if environmental information comes to light, notwithstanding the absence of a formal environmental assessment procedure. This treatment of public participation requirements is demonstrated clearly in three cases: R v. Poole Borough Council ex parte Beebee (1991),¹⁸ Twyford Parish Council and Others v. Secretary of State for Transport (1992),¹⁹ and Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994).²⁰

¹⁶ For a different view on this point, see M. Grant, 'Development and the Protection of Birds: The Swale Decision', (1991) JEL Vol. 3, No. 1, 135, at 151.

¹⁷ Circular 15/88, Environmental Assessment (London, HMSO, 1988) para. 11.

¹⁸ R v. Poole Borough Council ex parte Beebee [1991] JPEL 643.

¹⁹ Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273.

²⁰ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352.

In R v. Poole Borough Council ex parte Beebee²¹ the local planning authority granted itself planning permission for a housing development on an area of Canford Heath, a Site of Special Scientific Interest and habitat to a number of protected species. The applicants, who represented the World Wildlife Fund and the British Herpetological Society, applied for judicial review of the Council's decision on the grounds, inter alia, that the authority had failed to consider whether an environmental assessment should be carried out. The authority had, however, considered some relevant data. Schiemann J refused to quash the planning permission (though the Secretary of State later did) on the following grounds:

The authority had in their possession the substance of what they would have had if they had applied their minds to the 1988 Regulations. The substance of all the environmental information which was likely to emerge by going through the formal process had already emerged and it was apparently present in the Council's mind.²²

In so doing, Schiemann J ignored the participatory aspects of environmental assessment and the likelihood that the results of formal participation procedures might bear on the substance of decision making.

A similar approach was adopted by McCulloch J before the Divisional Court in Twyford Parish Council and Others v. Secretary of State for Transport.²³ Two parish councils and three individuals sought judicial review of the Secretary of State for Transport's decision to permit the construction of a motorway extension to the M3 across Twyford Down. The applicants relied on the ground that an environmental assessment had not been

²¹ R v. Poole Borough Council ex parte Beebee [1991] JPEL 643.

²² R v. Poole Borough Council ex parte Beebee [1991] JPEL 643 [1991] JPEL 643, at 650.

²³ Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273.

carried out, in breach of Directive 85/337, as implemented in the Highways (Assessment of Environmental Effects) Regulations 1988. The Regulations came into effect eighteen days after the implementation deadline set in Directive 85/337. Whilst the Highways (Assessment of Environmental Effects) Regulations 1988 prohibited the granting of development consent after the deadline to projects which had not been subject to an environmental assessment, in accordance with the Directive, these Regulations did not apply to 'pipeline' projects - those projects in progress before the date that the Regulations came into force. The applicants argued that it was possible for them to rely on the direct effect of provisions under Directive 85/337. Obiter, McCulloch J failed to uphold the provision of a non-technical summary, a basic procedural requirement of the environmental assessment procedure, on the following grounds:

The complaint...is one of form and not substance. None of the applicants have asserted that there was any relevant piece of environmental information which he was in ignorance of, or which was not made available in too complex a form so that he was not unable to understand it, or its significance.²⁴

In Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd.²⁵

Tucker J similarly failed to appreciate the contribution of the procedural elements of environmental assessment in decision making, as expressed in his obiter comments on the exercise of discretion in this case:

...it became apparent that there was material available to the Inspector which, although not put in the form of an environmental impact assessment, covered all matters that such a statement would have provided...the Applicants did not themselves

²⁴ Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273, at 281.

²⁵ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352.

argue that the contents or substance of the Directive would or should have affected the outcome of the appeal process or as to the effect of the Regulations.²⁶

(d) Environmental Interests

A fourth relevant characteristic of the planning system is limited recognition of environmental interests. 'Environmental interests' are here taken to include, including public participation in decisions having environmental consequences and freedom of information on the environment, both of which are elements of environmental assessment. To give some examples: third parties and objectors are given few rights to parallel those conferred on developers to appeal to the Secretary of State against a grant of permission, or to challenge a decision of the planning authority in the ordinary courts.²⁷ There are restrictions on the scope of environmentally beneficial conditions, with the courts adopting the attitude that conditions that take away private property rights and which are not compensated are ultra vires.²⁸ There is also no requirement that the local planning authority give reasons for a decision granting development consent. The limited recognition of environmental interests

²⁶ Wychavon District Council v. Secretary of State for the Environment and Velcourt JEL, Vol. 6, No. 2, 352, at 357.

²⁷ This is mainly a consequence of restrictive rules of locus standi, for example, R v. Secretary of State for the Environment ex parte Rose Theatre Trust [1990] 1 QB 504; this case might be compared with R v. Poole BC ex parte Beebee [1991] JPEL 643 in which the British Herpetological Society, a local environmental interest group was granted standing to oppose a grant of planning permission and R v. Her Majesty's Inspectorate of Pollution ex parte Greenpeace Ltd (1994) JEL Vol. 6, No. 2, 297, at 312.

²⁸ See Hall v. Shoreham Urban Development Corporation [1964] 1 WLR 240; affirmed in Bradford Metropolitan Borough Council v. Secretary of State for the Environment [1986] JPL 598; however policy guidance in Circular 1/85, The Use of Conditions in Planning Permission (London, HMSO, 1985), para. 59 (development of contaminated sites) and Planning Policy Guidance Note 23, Planning and Pollution Control (London, HMSO, 1992) paras 3.23-3.27 tends to be more amenable to the use of environmentally beneficial conditions.

in the planning system may be contrasted with the priority accorded to property rights. This arises because a right to develop land and be involved in planning decisions is linked closely to the possession of a legal interest in land. As discussed in chapter 2, the protection of specific, easily defined, property was a primary function of the common law of nuisance. The principle of the protection of private property became incorporated into the planning system as rights of development.

That environmental interests are generally not well represented in the planning system is illustrated by Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd²⁹ in which the local planning authority was considered incapable of acting 'for the promotion and protection of the interests of the inhabitants of their area' in opposing the applicant's development.³⁰ The prevalence of rights of development is seen also in case law on environmental assessment. In Twyford Parish Council and Others v. Secretary of State for Transport,³¹ the 'public interest' was aligned with the developer's interests in building the road as quickly as possible so as not to lose a Department of Transport grant for its construction.³² Similarly, in R v. Swale Borough Council and Medway Ports Authority ex

²⁹ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352.

³⁰ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352, at 354.

³¹ Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273.

³² Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273, at 282, McCulloch J: 'to have quashed this scheme would have occasioned considerable further delay to the building of this much needed section of road which would have been contrary to the interests of the wider public'.

parte the Royal Society for the Protection of Birds³³ the applicants were not regarded as representing the 'public interest': Brown J refused to quash the planning permission on the ground that the financial interests of the developer outweighed the environmental concerns of the applicants which were at most a right to be consulted.³⁴

'Weight' Given to Environmental Information

The low priority accorded to environmental interests, as seen above, is one consequence of information about the effects of development on the environment constituting one material consideration of the local planning authority amongst many others when determining an application for planning permission: no special weight is thus attributed to this category of environmental information. This reflects the traditional flexibility of the planning system to take account of a number of often conflicting material considerations. However, three precedents exist in the planning system for granting greater weight to information arising from the environmental assessment process in the development consent system. The first precedent is section 54A Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991. This section requires that planning permission is to be determined in accordance with the relevant development plan unless 'material consideration indicate otherwise'. This gives rise to a presumption in favour of the development plan, albeit that this is capable of being rebutted. Policies relating to environmental protection which are incorporated into a development plan, as required in

³³ R v. Swale Borough Council and Medway Ports Authority ex parte the Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135.

³⁴ R v. Swale Borough Council and Medway Ports Authority ex parte the Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135, at 149-50.

current planning policy,³⁵ might thereby be granted greater weight by the local planning authority in determining an application for planning permission.³⁶

A second precedent for granting environmental information greater weight is found in section 72 Planning (listed Buildings and Conservation Areas) Act 1990. This requires that, in addition to having regard to the relevant development plan, the local planning authority must 'pay special regard to the desirability of preserving or enhancing the character or appearance of that area' when considering applications for development consent in conservation areas.³⁷ The courts have held that this objective of preservation is of 'great importance' as a material consideration when in conflict with development plan policy.³⁸

Perhaps the clearest example of the 'weight' which might be given to information arising from the environmental assessment process is derived from conservation law. Regulation 48 Conservation (Natural Habitats, &c.) Regulations 1994³⁹ requires that the local planning authority, before deciding whether to grant planning permission for a project

³⁵ Department of the Environment, Planning Policy Guidance 12, Development Plans and Regional Planning Guidance (London, HMSO, 1992).

³⁶ For example, Southwark Deposit UDP, Policy E.3.2: 'Environmental Assessment' contains a specific reference to the significance of information arising from the environmental assessment process.

³⁷ A parallel provision exists for developments involving listed buildings in section 16 Planning (Listed Buildings and Conservation Areas) Act 1990.

³⁸ See Heatherington UK Ltd v. Secretary of State for the Environment [1994] 2 PLR 9.

³⁹ Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994, No. 2716). See also Planning Policy Guidance Note 9, Nature Conservation (London, HMSO, 1994).

which is likely to have a significant effect on a 'European site',⁴⁰ shall make an assessment of the implications for the conservation of the site. Notwithstanding a negative assessment of the implications of the site, the local planning authority may grant planning permission for the project if they are satisfied that the project must be carried out for imperative reasons of overriding public interest, which may be of a social or economic nature. However, where the site concerned hosts a 'priority' natural habitat type or a priority species, in which case the habitat or species is endangered, then the planning authority may only grant planning permission for reasons relating to human health or public safety. A two-tier system of protection therefore operates with the effect that greater weight is given to information relating to a 'priority' European habitat site or species and development consent is correspondingly likely to be more difficult to obtain.

On the basis of the case studies discussed in chapters 7 and 8, it is necessary that, should greater weight be given to information arising from the environmental assessment process along any of the lines discussed above, this be accompanied by reforms in the evaluation of environmental statements, and possibly the establishment of a system of independent verification as discussed in the following chapter. To do otherwise would be to give disproportionate weight to developers' views of a project's likely environmental effects and, more commonly, its desirability.

⁴⁰ The term 'European site' includes both Special Protection Areas, as defined by Directive 79/409 on the Conservation of Wild Birds, OJ L 103, 25.12.1979, and Special Areas of Conservation designated for the purposes of Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora, OJ L 206, 21.5.1992.

Development of Links Between Planning and Environmental Law

The general points raised above, based on the experience of environmental assessment in the five case studies in Part III, suggest that characteristics of the planning system are incompatible with fundamental aspects of the environmental assessment process. This has implications for the development of closer links between planning and environmental law.

As discussed in chapter 5, by regulating land use the planning system is central to environmental protection. This is seen most clearly in the functions the planning consent system performs in determining the location of polluting processes and hence the production of wastes; and by controlling damage from pollution by encouraging its diffusion and determining the location of receptors, for example by refusing housing close to a source of pollution. Planning further provides a flexible cultural 'frame' within which environmental issues, most commonly focused on a specific land use development, have found practical and public expression. Finally, planning and environmental law share the prevention of pollution as a guiding aim. All of these features point to the close interrelation of planning and environmental law. These various conceptual links between the regulation of land use and environmental protection are, however, more clearly defined than current practical interrelation between planning and pollution control administrations. This is because legal controls over land use and polluting activities developed separately and continue to operate with only limited correspondence, as seen in chapter 5 in relation to the imposition of environmentally beneficial planning conditions.

The resistance to fully integrating aspects of the development consent and pollution control procedures is conceptually overcome in environmental assessment. Environmental assessment offers a clear example of the integration of an emergent environmental agenda with planning law and provides an opportunity for the interrelation of these traditionally separate areas of policy. Environmental assessment also operates as a focus for concerns about the environmental effects of individual projects as well as the treatment of broader environmental issues in the planning system, even to the extent that the technique is heralded as a means by which the principle of sustainable development might be implemented in practice. However, the absorption of environmental assessment into a planning system influenced by property rights has limited the scope for environmental assessment to operate as a fully effective means of regulating environmental harm in the planning system, thus reducing opportunities for the development of closer links between planning and pollution controls. For example, departing from previous research,⁴¹ the case studies indicate that there are few overlaps in the legal requirements for the planning and pollution control systems: the local planning authority seeks the view of Her Majesty's Inspectorate of Pollution only rarely; and environmentally beneficial planning conditions, having an on-going effect on the polluting activity, are uncommon; planning conditions relate more to the construction stage of development. In contrast, there tends to be a more comprehensive evaluation of those matters which have traditionally concerned planners: 'amenity', and landscape.

⁴¹ As concluded in United Kingdom Environmental Law Association, Overlaps in the Requirements for Environmental Assessment (London, UKELA, 1993).

Further opportunities for integrating the planning and pollution control systems exist in combining more closely the assessment requirements in planning law with those for Integrated Pollution Control authorisation. For example, the selection of the 'best practicable environmental option' may be included within the environmental assessment process as a specific requirement. The Department of Environment Consultation Paper on the European Commission's Proposed Directive to amend Directive 85/337 puts forward that the 'best practicable techniques' available to developers should be used to calculate and predict the effects of a proposal.⁴² Arguably, the extension of 'best practicable means' into 'best practicable environmental option' by the Environmental Protection Act 1990⁴³ should be reflected also in the environmental assessment process. This would emphasise the need to identify alternative processes and emission paths to mitigate the potential impact of development. Such an approach is adopted in the European Community Draft Directive on Integrated Pollution Prevention and Control⁴⁴ which provides for information supplied in accordance with Directive 85/337 to be included in an application under the Integrated Pollution Control regime.⁴⁵ This reform would have significant institutional effects: a more active role for Her Majesty's Inspectorate of Pollution and latterly the Environmental Agency⁴⁶ in the planning system; institutionalising the close working relationship between planners and Environmental Health Officers; and, possibly, the establishment of an

⁴² Department of the Environment, Draft Guidance on Preparing Environmental Statements for Planning Projects (London, HMSO, 1994).

⁴³ Section 7(7).

⁴⁴ Draft Directive on Integrated Pollution Prevention and Control. COM(93) 423 (Brussels, Commission of the European Communities, 1993).

⁴⁵ Article 5(2) Draft Directive on Integrated Pollution Prevention and Control COM(93) 423 (Brussels, Commission of the European Communities, 1993).

⁴⁶ See clauses 1 and 2 Environment Bill (1995).

independent body to oversee the compilation and evaluation of environmental statements or to verify those statements produced by developers.

Environmental Assessment and Prospects for European Community Planning Law

The conceptual integration of planning and environmental protection controls in environmental assessment arises primarily from European Community law: Council Directive 85/337 is the product of the first attempt to provide an input of European Community law into town and country planning in the Member States. Since the integration of Directive 85/337 into Member States' development consent system, albeit with some variance in the application of the Directive's provisions in certain cases, considerable interest has been shown in the prospects for a Community planning system which might supersede the Member States' planning systems. The publication of Community-wide planning policy by the European Commission,⁴⁷ gives support to such a development.⁴⁸ However, the discordance between fundamental characteristics of the town and country planning system and the European method of environmental assessment in Directive 85/337, discussed above, has implications for the future development of European Community planning law. The five case studies highlight that, in England and Wales at least, this development is likely to be shaped by the prevalence of ideas of property and the related principle of stewardship in the planning

⁴⁷ Commission of the European Communities, Europe 2000 - Outlook for the Development of the Community's Territory. COM(91) 453 final (Brussels, Commission of the European Communities, 1991); and Commission of the European Communities, Green Paper on the Urban Environment. COM(90) 218, 27.6.1990 (Brussels, Commission of the European Communities, 1990).

⁴⁸ For example, M. Redman, 'European Community Planning Law', [1993] JPEL 999-1011; and R. H. Williams, 'EC Environment Policy, Land Use Planning and Pollution Control', (1986) Policy and Politics Vol. 14, No. 1, 93-106.

system. The case studies indicate also that the application of Directive 85/337 was determined to a great extent by the nature of measures for environmental assessment existing at the time of implementation. The potential for legal control of environmentally harmful activities via environmental assessment is lessened by the integration of statutory environmental assessment within the existing, informal, planning framework for evaluating the effects of development on the environment.

Subsidiarity

The development of Community wide planning law is also likely to be affected, if not arrested, by the principle of subsidiarity. By this it is meant that in those areas which do not fall within its exclusive competence, the Community shall take action only if the objective of the action cannot be sufficiently achieved by the Member States. The elevation of subsidiarity to one of the main principles of the European Community in Article 3b EC Treaty (as amended by the Treaty on European Union) may lead to challenges to the validity of future Community legislation on the basis that planning objectives would be better achieved by national legislation of the Member States. Whilst Council Directive 85/337 appears to fit well into the logic of subsidiarity (its structure is such that Member States enjoy discretion as to whether its rules apply to certain projects) it is this very aspect of the Directive which has contributed to difficulties in its uniform application throughout the Community: exercising discretion as to whether a project falls within Schedule 2 or not may be interpreted as not applying the Directive's provisions properly.

Also of relevance for the future reception of European Community planning law in the United Kingdom is that the lower courts have proved unsympathetic to the broad objectives of public participation and a thorough assessment of environmental effects in Directive 85/337. One manifestation of this is a restrictive interpretation of the direct effect doctrine with respect to Directive 85/337. In Twyford Parish Council and Others v. Secretary of State for Transport,⁴⁹ McCulloch J decided in his *obiter* comments that an individual must have suffered in some way from the failure to implement the Directive in order for the direct effect doctrine to operate.⁵⁰ This is also apparent in the resistance shown to sympathetic interpretation of national law in line with Directive 85/337 according to the principle of indirect effect in case law on environmental assessment. For example, in R v. Swale Borough Council and Medway Ports Authority ex parte the Royal Society for the Protection of Birds,⁵¹ Brown J refused to interpret national provisions, which failed to implement Community law adequately, in light of Directive 85/337. Similarly, but more understandably, in Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd,⁵² Tucker J refused to construe the commencement date of the implementing Regulations so that a project would be subject to the Directive's rules.⁵³

⁴⁹ Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273.

⁵⁰ Twyford Parish Council and Others v. Secretary of State for Transport (1992) JEL Vol. 4, No. 2, 273, at 279.

⁵¹ R v. Swale Borough Council and Medway Ports Authority ex parte the Royal Society for the Protection of Birds (1991) JEL Vol. 3, No. 1, 135.

⁵² Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352.

⁵³ Wychavon District Council v. Secretary of State for the Environment and Velcourt Ltd (1994) JEL Vol. 6, No. 2, 352, at 356.

The possible difficulties facing the European Community's creation of common planning law parallel those it confronted in legislating in the environmental field. The legitimacy of European Community activity in environmental policy and law is now confirmed, the legal competence of the European Community in this field having been given constitutional status in the Treaty of Rome. The undeniable role of the planning consent system in environmental protection and the logic of the precautionary principle would appear to require the European Community to further develop a body of planning law to accompany its environmental law. With the granting of an implicit base for Community legislation on matters of town and country planning in the Treaty on European Union this seems very likely, subject to any legal challenge on the grounds of incompatibility with the principle of subsidiarity. The cornerstone of a body of European Community planning law will be environmental assessment, most possibly strengthened by the European Commission's proposed Directive amending Directive 85/337.⁵⁴

Following these general observations on the development of environmental assessment as a technique of environmental law, and the place of environmental assessment in the planning system and as part of Community planning law, in chapter 10, I summarise the current state of environmental assessment and make several conclusions about the future direction and development of environmental assessment.

⁵⁴ Commission of the European Communities, Proposal for a Council Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

Chapter 10 Conclusions and Future Directions of Environmental Assessment and Environmental Law

Introduction

In chapter 8 I made a number of specific points about the working of environmental assessment drawn from a synthesis of the five case studies. In chapter 9, these specific points were expanded to take account of the nature of the planning system, in particular the priority accorded to the protection of private property, and the effect of this on the implementation of Directive 85/337 in the town and country planning system and achievement of the Directive's objectives. In this concluding chapter I review the objectives of the research and set out the key conclusions drawn from the case studies and the broader analysis. I summarise the current state of environmental assessment and then suggest some future directions for environmental assessment in a context of environmental law.

Current State of Environmental Assessment

Environmental assessment originated in the United States. It has since been developed by the European Community in the form of Council Directive 85/337 and implemented within Member States' development consent systems. In the United Kingdom, environmental assessment has developed as a technique of environmental law which, alongside the establishment of a system of Integrated Pollution Control and elaboration of the concept of the 'best practicable environmental option', represents one of the most progressive developments within environmental law. This is because environmental assessment

represents a fundamental shift towards the perception that development is likely to be damaging to the environment and that, accordingly, developers should demonstrate the acceptability of a project in environmental terms before being granted consent: environmental assessment therefore espouses the principles of precaution, preventative action and integrated pollution control. Environmental assessment also represents the codification of environmental law in which general principles of environmental law (of public participation, consultation and prevention of harm to the environment) operate to provide a generalised system of 'rational' decision making.

In the United Kingdom, the provisions of Directive 85/337 were absorbed into a planning system having wider objectives than environmental protection, including industrial and commercial development, affordable housing and urban regeneration, and a system long defined by a presumption in favour of development. The implementation of the provisions of Directive 85/337 led to the new statutory form of environmental assessment being combined with existing 'indigenous' methods of assessment in the planning system. The implementation of Directive 85/337 led me to conduct research to address a number of fundamental questions: Does the Directive represent a radical change in approaches to planning decisions, or no more than a restructuring of current practices? Can the development consent system, focused upon individual parcels of land, take account of broader environmental effects of development? What role does the European Community have in requiring the effects of development on the environment to be taken into account at the planning stage? To address these questions, I examined the application of environmental assessment rules in the context of the five case studies presented in chapter 7.

Case Study Findings

The five case studies make clear that Directive 85/337 has formalised the existing diverse, non-statutory, and ad hoc methods for assessing the environmental effects of development in the planning system. The preventative nature of environmental assessment is also borne out by the case studies. However, the Directive has not led to a radical restructuring of the decision making process. Planners are of the opinion that much of the information on environmental effects which was elicited in the environmental assessment process would have come to light in any event prior to the implementation of Directive 85/337. This is also apparent in those projects which are the subject of a planning inquiry: the information contained in the developer's environmental statement is often duplicated in proofs of evidence.

A significant finding in the context of the case studies is that there is a clear tendency for developers to describe measures which might mitigate adverse effects of development in considerable detail and to propose compensating measures such as landscaping and restocking to produce environmental 'gains'. In doing so, developers use references to 'nature', 'ecology' and 'environment' liberally and loosely. In contrast, developers' assessments in the environmental statements relating to the control of pollution are often rudimentary and perfunctory. There is a general tendency for developers to use the environmental statement as a means to justify a particular project. This is made particularly apparent by the low priority given by developers to identifying alternative sites and processes.

The clearest conclusion to be drawn from the experience of environmental assessment in the case studies is that the developer plays a central part in the environmental assessment process. Since most local planning authorities do not give their own written assessment of the effects of a proposed development, the developer's environmental statement is commonly taken to represent the entire environmental assessment process. This pronounced role of the developer suggests a process of 'privatisation' in the planning system in which developers contribute to planning procedures by eliciting and presenting information about the effects of development and, by setting out intentions in the environmental statement to mitigate harm, adopting some responsibility for environmental protection.

Notwithstanding the central role of the developer in the environmental assessment process, an appearance of neutrality and objectivity is conveyed. This derives primarily from the use of scientific methodology and language in compiling and presenting information in the environmental statement. The appearance of neutrality stems also from the procedural form of environmental assessment, which includes a requirement of public participation and consultation with statutory consultees. The case studies indicate that, as a procedural technique of environmental law, environmental assessment confers an idea of 'due process' which may have the effect of legitimating decisions favouring developmental interests. This would appear to be recognised by those developers who voluntarily submit an environmental statement with an application for planning permission. That planners do not currently possess the evaluative techniques to scrutinise information contained in an environmental statement, that consultation procedures vary considerably, and that environmental information is granted no more weight in the decision making process than any other category of

information are therefore important drawbacks in the current environmental assessment process.

In summary, in the context of the five case studies, environmental assessment represents a 'procedural safeguard' that environmental factors have been considered, but fails to offer a standard of environmental protection which is transparent, publicly determined, and enforceable. As an integrated, but ultimately abstract technique of environmental law, environmental assessment operates as a modern variant of the nineteenth century concept of 'best practicable means'. The form of environmental assessment is capable of being used by developmental interests. Environmental assessment therefore legitimates those projects subject to its rules. In a broader sense, environmental assessment also grants legitimacy to the planning system. This is because the application of environmental assessment law supports a view that the planning system is sufficiently flexible to take account of a whole manner of concerns, including those relating to the environment.

General Observations and Reform of Environmental Assessment

Drawing on the case study findings, it is possible to make a number of general observations about the current state of environmental assessment and the possibilities for reform of the process. Principally, the conceptual premises of environmental assessment - of precaution, public rights of freedom of environmental information and participation, and integrated and anticipatory control of pollution - are limited by their absorption within a planning system long defined by a presumption in favour of development and focused on the ownership and control of specific parcels of land. This points the way to the conclusion that

the environmental statement gives developers the opportunity to take on board the aims of the environmental assessment process whilst also effectively advancing a particular project. This observation suggests the need for reform on two levels.

At the level of the planning system, assessments of the effects of development on the environment might prove more effective if a system of independent verification was to be established, possibly administered by the Institute of Environmental Assessment (IEA). This would ensure that developers' claims are supervised and that the environmental statement is not used primarily to publicise or justify a proposed project. An explicit 'weighting' of environmental information along the lines discussed in chapter 9 and following precedents for this which exist already in the planning system would enhance the status of information on the environmental effects of development, but would also require some adjustment to the hierarchy of objectives which presently exists in the planning system. It is possible to argue that this process has already begun by the requirement that environmental factors be included in the development plan and the explicit presumption in favour of the plan in section 54A Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991.

Some of these points are addressed by the European Commission in their proposed Directive Amending Directive 85/337 as discussed in chapter 8.⁵⁵ In summary, this would oblige planning authorities to take account of the information on environmental impacts

⁵⁵ Commission of the European Communities, Proposal for a Directive Amending Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment OJ C 130, Vol. 37, 12.5.1994 (Brussels, Commission of the European Communities, 1994).

obtained in the course of the assessment procedures and to publish, not only their decisions, but also to give the 'reason and considerations' on which they base their decision. This might encourage a more serious and transparent consideration of environmental information contained in an environmental statement and might possibly bring the status of the environmental statement closer into line with the development plan as a document which has an explicit input into the planning authority's decisions.

At a strategic level, a more extensive reform which addresses the priority accorded to property interests in the planning system is the inclusion of environmental information derived from the assessment processes in a broad sweep of policy concerns. This would require the environmental effects of plans, programmes and legislation to be assessed and thus overcome some of the limitations of 'project-based' environmental assessment, for example that decisions are inevitably taken within the scope of broader policy frameworks and constraints. Such a reform would parallel the establishment of a system of Integrated Pollution Control in environmental law in that previously distinct environmental problems might come to be perceived as closely connected, but at the policy rather than project level.

In considering the above reforms to the environmental assessment process at the planning and strategic level, it is helpful to take account of the symbolic importance of environmental assessment. Environmental assessment represents a framework for discussion about individual projects and 'rational' decision-making. By providing such a framework environmental assessment contributes to an idea of 'balance' between economic and environmental interests in the context of individual planning applications and, more broadly, in the planning system. This idea of balance is reinforced by the apparent neutrality and

objectivity of environmental assessment, in particular the scientific and technical terms in which developers' statements are couched. The amenability of environmental assessment with planning's traditional concern with balance reinforces the possibilities for mediation in the planning system: whilst allowing for the effects of development on the environment to be considered, these may ultimately be overlooked in favour of environmentally damaging development. An important outcome of this appearance of balance is that a project may be legitimised by having been subject to the environmental assessment procedure. This aspect of environmental assessment draws upon the prevalence of more fundamental ideas of 'balance' between development and environmental interests in society, the clearest expression of which is the principle of sustainable development. The prevalence and attraction of the idea of balance suggests that the planning system might yet prove resistant to reforms giving greater priority to environmental protection. That is to say that environmental assessment fulfils a need for information on the effects of development on the environment to be assessed and considered and weighed in balance with other considerations.

Future Directions of Environmental Assessment in Environmental Law

The current state of environmental assessment, as discussed above, allows some predictions to be made about its future development in the context of environmental law in the United Kingdom. One possible direction is the further development of the evaluative techniques and concepts of environmental assessment to warrant a status as a sui generis form of law. Whilst bearing upon development consent and pollution control law, environmental assessment law might retain its distinctive conceptual premises and close relationship with scientific methodology. This development is likely to be accompanied by a growth of case

law on environmental assessment with actions brought for the adequacy of the developer's environmental statements, as much as for the failure to provide a statement at all. This view of the future development of environmental assessment also raises questions about its possible scope, in particular its relationship with strategic environmental assessment (of plans, programmes and policies) and assessment of social impacts of development. Such a development is also reliant upon the implementation of uniform evaluative techniques and procedures.

A second possible future direction of environmental assessment law is as a practical focus point or 'bridge' between planning and environmental law. Specifically, opportunities for integrating the planning and pollution control systems exist in combining more closely the assessment requirements in planning law with those for Integrated Pollution Control authorisation for instance by requiring the developer to include the selection of the 'best practicable environmental option' in an environmental statement for planning purposes.⁵⁶ This future development might also involve linking environmental assessment with other techniques of environmental law such as environmental auditing (in which the environmental effects of a project during operation are evaluated). Taking the latter example, a closer linking of environmental assessment and environmental auditing could lead to the provision of a comprehensive environmental evaluation of a development throughout the planning and operational stages. This might serve to ensure that mitigation measures identified by the environmental assessment process at the planning stage are met later on. As yet, planning and environmental law share several common aims and functions through environmental assessment but retain separate institutions and administrative arrangements. Further research

⁵⁶ See chapter 9, 'Development of Links Between Planning and Environmental Law'.

is necessary on the current working of 'best practicable environmental option' assessments and also the status of environmental statements in the pollution control authorisation systems to more accurately evaluate the scope for the future integration of planning and pollution control systems through environmental assessment.

Drawing on the analysis of the case studies in chapter 8, a more likely future direction is the continued operation of environmental assessment as a self-regulatory, in some cases voluntary mechanism, within the development consent system. Environmental assessment might therefore develop in parallel to the use of other self-regulatory mechanisms such as environmental auditing. This conclusion arises from the use of environmental assessment by developers in the planning process as, variously, a 'procedural hurdle', and a means to achieve development consent. The responsibility for environmental protection borne by the developer who conducts an environmental assessment contributes to this conclusion, as does the slow progress in reforming the decision making culture of planning and pollution control administrations via environmental assessment. This interpretation of the future development of environmental assessment accords with a description of environmental assessment as a type of procedural and 'post regulatory' law, thus raising questions about broader developments in environmental law.

Conclusion: Environmental Assessment as 'Post Regulatory' Law

Procedural law is characterised by legal self-restraint or 'regulated autonomy' and rules that regulate processes and the organisation and distribution of rights and competencies. Whilst providing an arena for 'rational' decision making, procedural law is not concerned

with the outcome or substance of those decisions. Environmental assessment offers an example of procedural law because, as a measure intended to enable decision makers to make informed choices between environmental and other objectives (and for the public to be consulted about these), its rules do not appear to contain substantive or positive goals. Particular weight may not therefore be attributed to environmental factors and it remains open for decisions likely to have significantly adverse environmental effects to be taken. Rather, environmental assessment, setting out common procedural requirements for decision makers, relates to the style, nature, and structure of decision making.

The significance of labelling environmental assessment as procedural law lies in the identification of this as an emerging type of 'post regulatory' law. Post-regulatory law offers an alternative to substantive law such as legislation establishing prescriptive environmental standards. The development of procedural techniques of environmental law such as environmental assessment forms part of a wider and radical development in legislation of prescribing procedural rules rather than substantive rights.⁵⁷ This legal tendency matches the growing political and economic importance of subsidiarity, decentralisation and, increasingly, deregulation. Analysis of the five case studies in chapter 8 suggests that this tendency is also capable of undermining environmental protection: environmental assessment was used by developers to relieve concerns about the effects of development on the environment and to shepherd an application for planning permission through development consent procedures. In the context of the case studies, environmental assessment is not free

⁵⁷ On this general development, see G. Teubner, 'After legal Instrumentalism? Strategic Models of Post Regulatory Law', in G. Teubner, (ed.) Dilemmas of Law in the Welfare State (Berlin. Walter de Gruyter, 1986), pp. 299-325; and generally, G. Teubner, (ed.) Environmental Law and Ecological Responsibility (Chichester, John Wiley, 1994).

from external influences, nor does it operate as a 'one-way' flow of information about the effects of development on the environment from the developer to decision maker as suggested by its procedural form. Rather, by communicating and accommodating the needs of the proponent of a project via the environmental statement, the environmental assessment procedure is capable of giving expression to developmental interests.

The experience of the case studies signals that procedural rules such as environmental assessment are not immune from partisanship. This lends support to the continuing relevance of property and developmental interests in planning law. In recognising this, the contribution of Council Directive 85/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment in the future might be counted more in terms of forcing recognition of the common ground between planning and environmental law and of quickening the pace of Community-wide planning law than a substantial contribution to environmental protection.

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APPENDIX I

Environmental Statements Published in the United Kingdom Classified According to Environmental Assessment Regulations July 1988 to August 1993¹

Regulation	Numbers	%
Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1199)	1042	63
Environmental Assessment (Scotland) Regulations 1988 (SI 1988 No 1221)	199	12
Environmental Assessment (Salmon Farming in Marine Waters) Regulations 1988 (SI 1988 No 1218)	0	0
Environmental Assessment (Afforestation) Regulations 1988 (SI 1988 No 1207)	26	2
Highways (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1241)	148	9
Land Drainage Improvement Works (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1217)	71	4
Harbour Works (Assessment of Environmental Effects) Regulations 1988 (SI 1988 No 1336)	2	< 1
Town and Country General Development Order (Amendment Order 1988 (SI 1988 No 1272) revoked by Town and Country General Development Order 1988 (SI 1988 No 1813). The provisions of SI 1272 now form Article 14(2) of the 1988 General Development Order	0	0
Town and Country (General Development, Scotland) Amendment No 2 Order 1990 (SI 1990 No 442)	77	5
Electricity and Pipeline Works (Assessment of Environmental Effects) Regulations 1989 (SI 1989 No 167 Revoked by Electricity and Pipeline Works (Environmental Assessment Effects) Regulations 1990 (SI 1990 No 442)	0	0
Town and Country Planning (Assessment of Environmental Effects) (Amendment) Regulations 1990 (SI 1990 No 367)	0	0
Town and Country Planning (Assessment of Environment of Environmental Effects) (Amendment) Regulations 1992 (SI 1992 No 1494)	0	0

¹ Institute of Environmental Assessment, Practical Experience of Environmental Assessment in the UK (East Kirkby, Institute of Environmental Assessment, 1993), p. 2.

Regulation	Numbers	%
Harbour Works (Assessment of Environmental Effects) Regulations 1992 (SI 1992 No 1421)	0	0
Roads (Assessment of Environmental Effects) Regulations (Northern Ireland) 1988 (SR 1988 No 344)	4	< 1
Planning (Assessment of Environmental Effects) Regulations (Northern Ireland) 1989 (SR 1989 No 20)	34	2
Environmental Assessment (Afforestation) Regulations (Northern Ireland) 1989 (SR 1989 No 226)	3	< 1
Harbour Works (Assessment of Environmental Effects) Regulations (Northern Ireland) 1990 (SR 1990 No 181)	0	0
Drainage (Environmental Assessment) Regulations (Northern Ireland) 1991 (SR 1991 No 376)	4	< 1
Private Bills	33	2
Exemptions	10	< 1
Total	1653	100

APPENDIX II

Local Planning Authority Questionnaire

A. Planning Authority

1. Please describe your duties and responsibilities in the planning department?
2. How many environmental statements have been submitted to the planning authority since the implementation of the Directive?

Of this number, how many were submitted voluntarily by the developer?

How many were submitted under the Town and Country Planning (Assessment of Environmental Effects) Regulations? Or, others (please state).
3. Which division of the planning authority is primarily responsible for environmental assessment procedures?
4. Who is responsible for requesting an environmental statement? i.e. junior/intermediate members of staff/chief planning officer.
5. How are these members of staff trained for these responsibilities? i.e. are courses run? Are there internal/external training programmes?

B. Environmental Assessment Procedure

6. Have developers approached your department for information about the environmental impact assessment rules?

If yes: at what stage in the statutory process did they seek information?
7. Have developers requested an opinion from your department about whether a project is likely to require assessment in advance of making an application?
If so: how did you respond?
8. In general, has your department consulted Her Majesty's Inspectorate of Pollution and/or Environmental Health Departments at the planning application stage?

If yes: please describe why such consultation was held, i.e.
 - whether a statement should be prepared by a developer?
 - to assess the environmental statement?
 - to discuss HMIP authorisations under Part I Environmental Protection Act 1990?

9. Has your department consulted other environmental bodies, for example English Nature, the Countryside Commission, Historic Buildings and Monuments Commission, or District Council/Parish Council?

10. Has the planning authority employed environmental consultants to advise on the evaluation of developer's environmental statements?

If yes: please state which environmental consultant has been used; please explain the way in which the consultant was used (area of expertise) etc.

If no: do you foresee the planning authority doing so in future?

11. What methods do you use to evaluate environmental information?

C. Environmental Assessment

12. In your view, are developers generally aware of the environmental impact assessment rules?

13. If possible, please explain how environmental criteria were introduced into decision making before the Directive was implemented.

14. Before 1988, would the planning department have considered all the impacts listed under Schedule 3 of the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988?

If no: which impacts might it have considered?

15. Has the number of voluntary assessments increased since the implementation of the Directive?

If yes: why do you think this has occurred?

16. Have you or another member of the department imposed planning conditions on a developer as a result of an environmental statement identifying impacts?

17. Does your department conduct post-implementation monitoring, i.e. a study of actual impacts?

If not: why is this the case?

18. In your view, what has been the effect of the Directive on the decision making process?

APPENDIX III

Planning Inquiries and the Environmental Statement Questionnaire

A. Planning Inquiries

1. How many planning inquiries have you or your organisation been involved in?

B. Environmental Statements

2. Can you briefly describe the main inquiries in which an environmental statement was used?
3. What, in your view are the advantages of using an environmental statement in the planning inquiry?
4. Has the use of environmental statements helped your organisation?
If yes: in what ways?
If no: why do you think this is the case?
5. What do you think are the main advantages for the developer of using an environmental statement at planning inquiry.

C. Adequacy of the Statement

6. Has your organisation contested the adequacy of an environmental statement?
7. If yes: In contesting the adequacy of an environmental statement has your organisation employed environmental consultants?
If yes: was this a help to your organisation?
7. What has been the standard of the statements which you have reviewed?
8. In your view, is there a difference between contesting an environmental assessment in, or outside the planning inquiry?
9. Does your organisation work with other groups at the planning inquiry?
10. Has your organisation provided additional or conflicting information to that provided by the developer?
If yes: how was this information used in the inquiry?

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