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COMMENT

**The Implementation of the EC Directive  
on Environmental Impact Assessments  
with the English Planning System: A  
Refinement of the NEPA Process**

**Louis L. Bono**

*Environmental impact assessment (EIA) legislation requires an assessment of the effects a project is likely to have on the environment before development begins. EIAs serve a dual role. They inform the community of the potential effects to the environment of a project and allow the developer the opportunity to mitigate any future environmental damage posed by the project. EIAs are the first and probably the most important step in preserving the quality of the environment. This article discusses the 1985 EC Directive on EIAs and its implementation into the British planning system. The article then contrasts the EC Directive with the U.S. National Environmental Policy Act, the father of EIA legislation.*

## I. Introduction

On June 27, 1985, the European Community<sup>1</sup> (EC) issued a directive<sup>2</sup> requiring Member Nations to assess the environmental effects of all major projects,<sup>3</sup> both public and private, to be undertaken within their respective jurisdictions.<sup>4</sup> This Directive was part of the EC's overall environmental policy to protect the environment and the quality of life.<sup>5</sup>

An environmental impact assessment (EIA) directive was first proposed to the EC Council<sup>6</sup> on June 16, 1980 by the EC Commission.<sup>7</sup> The Commission undertook preparatory research and organized a seminar to review environmental impact processes<sup>8</sup> and prepared twenty preliminary drafts before submitting the original proposal to the council.<sup>9</sup>

The proposed directive was designed to help the Member Nations better understand the effects of major projects on the

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1. The evolution of the EC began in 1951, when France, Italy, the Federal Republic of Germany, Belgium, Luxembourg, and the Netherlands signed a treaty creating the European Coal and Steel Community. In 1957, the same six nations formed the European Economic Community and the European Atomic Community. In 1967, the governing bodies of the three institutions were merged to form the EC. Since its founding, the EC has admitted Denmark, the Republic of Ireland, the United Kingdom, Greece, Spain, and Portugal and its focus has expanded to include common social, political and environmental goals.

2. Community directives express results to be achieved, but allow Member Nations to choose the form and the methods for implementation.

3. For definition of projects, *see infra* note 10.

4. Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40.

5. *Id.*

6. The Council consists of representatives of the twelve Member Nations, usually a minister, with the head of government of each nation being the main representative. The Council makes the major policy decisions for the Community. *See* E. NOEL, *WORKING TOGETHER - THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 5-7 (1988).

7. E. Reh binder & R. Stewart, *INTEGRATION THROUGH LAW, EUROPE AND THE AMERICAN FEDERAL EXPERIENCE*, 2 *ENVIRONMENTAL PROTECTION POLICY* 104 (P. Del Duca ed. 1985). The EC Commission consists of seventeen Members appointed by the Member Nations for four year terms during which they must act without influence from the appointing nation. Duties include implementing Community policies and proposing measures which will further the development of these policies. *See* NOEL, *supra* note 6, at 6-7.

8. McSwiney, *Environmental Impact Assessments-EEC*, 1987 *EUR. ENVTL. Y.B.* 166.

9. REHBINDER, *supra* note 7, at 104.

environment.<sup>10</sup> It laid out a common set of rules for Member Nations to apply in the evaluation and authorization process of public and private projects.<sup>11</sup> Another, perhaps more significant purpose, was the recent adoption of legislation concerning impact statements in France, the Republic of Ireland, and the Federal Republic of Germany, in addition to the already existing system in England.<sup>12</sup> There was concern within the Community that great disparities in such legislation would affect investments in the Community and distort economic competition within the common market.<sup>13</sup>

The system of EIAs eventually introduced to the EC by the Directive is based in principle on the United States' National Environmental Policy Act of 1969 (NEPA),<sup>14</sup> which introduced the concept of an environmental impact statement (EIS).<sup>15</sup> The EC Directive is not merely a European-NEPA, but differs significantly from the American legislation. One significant difference is that "the notion of an impact statement contained in a single document patterned on the [NEPA] model has been replaced by a more flexible procedure designed to ensure consideration of environmental effects by both the sponsor of a project and the competent national authority."<sup>16</sup>

An additional difference is that the Directive specifies projects which require EIAs and gives thresholds for these projects, aiding in the determination process.<sup>17</sup> NEPA's lack of specific thresholds or indicative criteria to aid the EIS de-

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10. S. JOHNSON & G. CORCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* 254 (1989). "Projects" is defined by the Directive 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." See 1985 O.J. (L 175) at 41.

11. *Id.*

12. Grant, *Implementation of the EC Directive on Environmental Impact Assessment*, 4 *CONN. J. INT'L L.* 463, 464 (1989).

13. 1985 O.J. (L 175) at 40-41. See also JOHNSON & CORCELLE, *supra* note 10, at 254-55.

14. 42 U.S.C. §§ 4321-4370a (1988).

15. *Id.* § 4332.

16. REHBINDER, *supra* note 7, at 104.

17. 1985 O.J. (L 175) Annexes I and II, at 44-47. See also Grant, *supra* note 12, at 465.

termination process has caused the majority of NEPA litigation.<sup>18</sup>

This article explains the EC Directive on EIAs and its implementation with the English Town and Country Planning System. The article then examines the EIS/EIA distinction and compares how NEPA and the Directive each respond to the threshold question of when to prepare an environmental assessment.

## II. European Community Directive 85/337

The original proposal presented to the Council provided the basic framework for Directive 85/337 as adopted. The proposal required that "projects likely to have significant effects on the environment by virtue of their nature, size and/or location are made subject to an appropriate assessment of these effects."<sup>19</sup>

While the prospect of assessing the environmental effects of major projects was favorably received throughout the Community, the proposed directive encountered criticisms.<sup>20</sup> The proposal contained two categories of projects: one listing projects for which assessments would be mandatory and one listing projects subject to a less simplified assessment.<sup>21</sup> Projects were categorized under the proposal by the potential impact they posed to the environment.<sup>22</sup> A main criticism of the proposal was that the projects listed were defined in vague terms with no indicative criteria or thresholds to aid in the assessment determination process.<sup>23</sup> Thus, a project falling within these vaguely drafted categories would require an assessment even if the project presented no significant impact

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18. F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 9.07 (1985 & Supp. 1990). Six years after NEPA was enacted, the Council on Environmental Quality reported that 654 cases had been filed, 363 of which asserted that an EIS was required. *Id.* See also D. MANDELKER, *NEPA LAW AND LITIGATION* § 8:01 (1984 & Supp. 1990).

19. N. Haigh, *The EEC Directive on Environmental Assessment of Development Projects*, 1983 J. PLAN. & ENV'T L. 585, 592.

20. REHBINDER, *supra* note 7, at 104-06.

21. *Id.* at 104.

22. *Id.*

23. Grant, *supra* note 12, at 465.

on the environment.<sup>24</sup>

The Directive defines projects subject to mandatory assessment in clearer terms and in certain cases provides specific thresholds.<sup>25</sup> This list of projects is "shorter and more selective" than the list in the original proposal.<sup>26</sup> Projects subject to a simplified form of assessment under the proposal are now subject to an assessment at the discretion of the individual Member Nations.<sup>27</sup> Some projects originally subject to mandatory assessment are presently in this category.<sup>28</sup>

The Directive separates projects subject to assessments into two Annexes. Assessments are required for all projects defined in Annex I, while projects falling within Annex II are subject to assessments if "Member [Nations] consider that their characteristics so require."<sup>29</sup> The Directive also requires Member Nations to consider the nature, size, and location of Annex II projects to determine whether they should be subject to an EIA.<sup>30</sup> Member Nations can establish criteria or specify certain types of projects subject to an EIA.<sup>31</sup> This separation of projects balances the need in the Community for consistency in assessing major projects, while allowing for flexibility and diversity in assessing projects with less of an impact on the environment.<sup>32</sup>

Projects listed in Annex I which require assessments are oil refineries, nuclear and thermal power stations,<sup>33</sup> installations for the permanent disposal of radioactive waste, iron and steel melting plants, installations for the extraction and processing of asbestos and asbestos products, integrated

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24. *Id.* Under the proposal, a project could be exempted from an EIA with the consent of the "competent national authority" and the Commission. This is a time-consuming procedure which only serves to delay the project. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 466.

28. *Id.* at 465. One example of this is the manufacture of rubber. *Id.*

29. 1985 O.J. (L 175) art. 4, at 41-42.

30. *Id.* art. 2, at 41.

31. *Id.* art. 4, at 41-42.

32. McSwiney, *supra* note 8, at 167-68.

33. 1985 O.J. (L 175) at 44. The threshold for thermal and nuclear power stations is 300 or more megawatts. *Id.*

chemical installations, major highways, railways, airports,<sup>34</sup> seaports,<sup>35</sup> and installations for the treatment or disposal of hazardous wastes.<sup>36</sup> Projects listed in Annex II which are subject to assessments at the discretion of Member Nations include the following industries: agriculture,<sup>37</sup> extraction,<sup>38</sup> energy,<sup>39</sup> metal,<sup>40</sup> food,<sup>41</sup> glass, textile, leather, wood, paper, and rubber.<sup>42</sup> Annex II also includes infrastructure projects (not included in Annex I),<sup>43</sup> "other" projects,<sup>44</sup> and modifications to Annex I projects.<sup>45</sup>

Once it has been determined that a project will require an assessment, an environmental impact statement (EIS) must be prepared by the developer.<sup>46</sup> The purpose of the EIS is to "identify, describe and assess . . . direct and indirect effects of [the] project" on:

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34. *Id.* The threshold for an EIA for airports is "a basic runway length of 2100 m or more." *Id.*

35. *Id.* The threshold for an EIA for seaports under Annex I are those "which permit the passage of vessels over 1350 tonnes." *Id.*

36. *Id.*

37. *Id.* Annex II, at 45. Examples include reclamation of land from the sea, poultry and pig-rearing installations, and use of uncultivated lands. *Id.*

38. *Id.* Examples include extraction of peat, coal petroleum, natural gas, and cement manufacturing facilities. *Id.*

39. *Id.* Examples include storage of natural and combustible gases, hydroelectric plants, and installations for the collection, production and enrichment of nuclear fuels. *Id.*

40. *Id.* at 46. Examples include iron and steel works not included in Annex I, smelting and refining industries, shipyards, motor vehicle manufacture and assembly, and manufacture of sheet-metal containers. *Id.*

41. *Id.* Examples include manufacture of animal and vegetable oils and fats, packing of animal and vegetable products, breweries, dairy industries, and sugar, fishmeal, and fish-oil factories. *Id.*

42. *Id.* at 45-47.

43. *Id.* Examples include industrial estate and urban development projects, ski-lifts and cable cars, minor roads and harbors, and oil and gas pipeline installations. *Id.*

44. *Id.* at 47. Examples include holiday villages and hotel complexes, automobile/motorcycle race/test tracks, domestic waste disposal sites, and sewage treatment plants. *Id.*

45. *Id.*

46. *Id.* art. 5, at 42. If the project is a public project, the agency proposing the project is responsible for preparing the statement. JOHNSON & COERCELLE, *supra* note 10, at 260.

- human beings, fauna and flora;
- soil, water, air, climate and the landscape;
- the inter-action between the above factors, and;
- material assets and cultural heritage.<sup>47</sup>

The EIS must provide a description of the project size, location, and design; a study of alternatives including a reason why none were chosen; a description of the environment to be affected; and any mitigation measures to be taken by the developer.<sup>48</sup> The developer must also include in the EIS a "non-technical summary" of all the information required to be supplied in the EIS.<sup>49</sup>

After preparing the EIS,<sup>50</sup> the developer must provide the information to the authorities designated by the Member Nations and to the public.<sup>51</sup> Subsequently, both groups have the opportunity to comment on the proposed project.<sup>52</sup> Since a developer may be motivated to provide a subjective EIS, all information and comments received by the decision-making authorities must be taken into consideration.<sup>53</sup> When a consent decision has been reached, the decision-making authority must inform the "public concerned" of the decision and provide it with the basis for the decision.<sup>54</sup>

A significant provision of the Directive is the "transmission of information" to other Member Nations.<sup>55</sup> The Directive requires that if a Member Nation is aware that a pro-

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47. 1985 O.J. (L 175) art.3, at 41.

48. *Id.* art. 5, at 42 and Annex III at 48.

49. *Id.* The purpose of the non-technical summary is to inform the public of the substantive issues which the planning authority will be considering. McSwiney, *supra* note 8, at 167.

50. The total cost to the developer of preparing an EIA is about 0.25% to 0.75% of the total project cost. JOHNSON & CORCELLE, *supra* note 10, at 255.

51. 1985 O.J. (L 175) art. 6, at 42. Article 6, paragraph 1, of the Directive requires Member Nations to designate authorities "likely to be concerned by the project by reason of their specific environmental responsibilities." *Id.*

52. *Id.* Article 6, paragraph 2 requires Member Nations to ensure that the "public concerned" is given the opportunity to comment before a project is approved. Paragraph 3 allows the Member Nations to specify where and how the information will be provided. *Id.*

53. *Id.* art. 8, at 42. See also Grant, *supra* note 12, at 467.

54. 1985 O.J. (L 175) art. 9, at 42.

55. McSwiney, *supra* note 8, at 167.



posed project "is likely" to have significant environmental effects on another Member Nation or if another Member Nation likely to be affected so requests, the information submitted by the developer must be provided to that other Member Nation.<sup>56</sup>

### III. The Implementation of the Directive with the Town and Country Planning System

#### A. The Town and Country Planning System

The law governing the planning and development processes in England is the comprehensive Town and Country Planning Act of 1990.<sup>57</sup> There are four basic elements to the English planning system. First, local planning authorities (LPAs) administer the Town and Country Planning System on the local level. Every part of the country is covered by at least one LPA.<sup>58</sup>

Second, each LPA must produce a development plan for its designated area. The development plan provides guidelines on specific areas within the jurisdiction of the LPA including types of development, preservation of architectural and archaeological heritage, and conservation of landscape and agricultural land.<sup>59</sup>

Third, before any development can begin, planning permission must be obtained from the LPA. In determining whether to approve the application for development, the LPA must consider the development plan along with matters relevant to the particular application. The LPA may approve, deny, or subject the development to conditions or limitations.<sup>60</sup> Fourth, the LPA is required to provide minimum opportunities for public consultation and participation in the

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56. 1985 O.J. (L 175) art. 7, at 42.

57. Noble, *Town and Country Planning: United Kingdom*, 1987 EUR. ENVTL. Y.B. 560. The Town and Country Planning Act of 1990 includes a consolidation of the Town and Country Planning Act of 1971 and its subsequent amendments.

58. *Id.*

59. *Id.* See also Grant, *supra* note 12, at 472 for information concerning guidelines on development plans.

60. Noble, *supra* note 57, at 560.

development formulation process and, to a lesser degree, in the control functions.<sup>61</sup>

The Town and Country Planning Act has no specific "thresholds or criteria" for determining planning applications.<sup>62</sup> Traditionally, the system is based on the "discretion, pragmatism and political accountability" of the planning authority.<sup>63</sup> Thus, while an LPA is not required to specifically assess a project's environmental impact under the Act, it is a factor to be considered in the planning process.<sup>64</sup> Some LPAs may place a significant value on environmental assessments in the planning process while others may be more concerned with development.<sup>65</sup> In areas with stagnant economies, prospects of higher employment associated with development are likely to take precedence over environmental concerns.<sup>66</sup>

The planning process can be said to consist of four stages.<sup>67</sup> The initial or "preparatory activities" stage occurs when a project is first proposed.<sup>68</sup> The developer may hold informal discussions with the LPA to determine the scope of the relevant development plan and how it will affect the proposed project. The developer then prepares a planning application.<sup>69</sup> At this point, the developer has the option to hold public meetings to explain the proposal and to receive initial comments.<sup>70</sup>

The second stage is the "submission" stage.<sup>71</sup> In the sub-

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61. Noble, *supra* note 57, at 560. This provision allows the public to make formal objections to the LPA's proposed development plan, and to appeal an LPA decision.

62. Grant, *supra* note 12, at 472.

63. Grant, *supra* note 12, at 472.

64. Grant, *supra* note 12, at 472.

65. Grant, *supra* note 12, at 472.

66. Grant, *supra* note 12, at 472.

67. Clark, *Environmental Impact Assessment-United Kingdom*, 1987 EUR. ENVTL. Y.B. 183. (chart on comparison between UK development control and EC Directive procedures).

68. *Id.*

69. *Id.*

70. *Id.* This procedure is rare in practice and used only for major or very controversial projects. Interview with Malcolm Grant, Vice-Dean and Professor of Law at the University College of London Faculty of Laws, in London, Great Britain (Jan. 14, 1991).

71. Clark, *supra* note 67, at 183.

mission stage, the developer officially submits an application along with any supporting information to the LPA.<sup>72</sup> The developer may at this stage submit a formal outline of the proposal as an application.<sup>73</sup> An outline application allows the planning authority to approve the project in principle and then consider subsequent applications relating to detailed matters of the proposal.<sup>74</sup>

Next is the "consultation" stage.<sup>75</sup> During this stage, official and public comments are received and reviewed by the LPAs, who then consult with the relevant authorities on the proposal.<sup>76</sup> The relevant authorities, such as the National Rivers authority, the highway authority, or neighboring LPAs, are determined by the nature of the project.<sup>77</sup>

A decision is made in the fourth and final "recommendations" stage.<sup>78</sup> The LPA will either approve the project as proposed, approve it subject to certain conditions, or reject it outright.<sup>79</sup>

Although LPAs have broad discretionary power in the planning process, their decisions are not final. The developer may appeal the LPA decision to the Secretary of State for the Environment if denied approval or approval is made conditional.<sup>80</sup> The Secretary for the Environment will appoint an inspector to investigate the appeal.<sup>81</sup> The Secretary, or the inspector if delegated, will make a decision on the application.<sup>82</sup> The Secretary's decision is reviewable by the High Court only when challenged on procedural grounds, such as the failure to

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72. Clark, *supra* note 67, at 183.

73. Clark, *supra* note 67, at 183.

74. Grant, *supra* note 12, at 470.

75. Clark, *supra* note 67, at 183.

76. Clark, *supra* note 67, at 183.

77. Noble, *supra* note 57, at 564.

78. Clark, *supra* note 67, at 183.

79. Clark, *supra* note 67, at 183.

80. Noble, *supra* note 57, at 564. The Secretary of State for the Environment is responsible for overseeing the local governments and their various functions including planning. Noble, *supra* note 57, at 562.

81. Noble, *supra* note 57, at 564. The inspector investigates the appeal by holding a public inquiry.

82. Noble, *supra* note 57, at 564.

give adequate reasons for the decision or the failure to take into account material considerations.<sup>83</sup>

## B. Implementing the Directive with the Town and Country Planning System

Article 2, paragraph 2 of the Directive states “[t]he environmental impact assessment may be integrated into the existing procedures . . . in the Member [Nations].”<sup>84</sup> The Directive, which took effect on July 3, 1985, required all Member Nations to be in compliance within three years.<sup>85</sup>

In the summer of 1988, regulations were promulgated<sup>86</sup> in compliance with the Directive by the British Government.<sup>87</sup> The regulations incorporate the provisions set forth in the Directive.<sup>88</sup>

### The Town and Country Planning (Assessment of Envi-

83. Interview with Malcolm Grant, *supra* note 70.

84. 1985 O.J. (L 175) art. 2(2), at 41.

85. *Id.* art. 12(1), at 43.

86. *See* Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199 (in force on July 15, 1988); Environmental Assessment (Afforestation) Regulations, S.I. 1988, No. 1207 (in force on July 15, 1988); Land Drainage Improvement Works (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1217 (in force on July 16, 1988); Environmental Assessment (Salmon Farming in Marine Waters) Regulations, S.I. 1988, No. 1218 (in force on July 15, 1988); Highways (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1241 (in force on July 21, 1988); and Harbour Works (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1336 (in force on August 3, 1988).

Subsequent regulations include Electricity and Pipeline Works (Assessment of Environmental Effects) Regulations, S.I. 1989, No. 167 (in force on February 6, 1989) and S.I. 1990, No. 442 (in force on March 31, 1990), and Harbour Works (Assessment of Environmental Effects) (No. 2) Regulations, S.I. 1989, No. 424 (in force on March 9, 1989).

87. The regulations were promulgated under the authority of the European Communities Act 1972, section 2(2), which states, in part: “any designated Minister or department may by regulations, make provision[s] . . . for the purpose of implementing any Community obligation of the United Kingdom.”

The regulations were promulgated by the relevant government department heads. For instance, the Town and Country Planning Regulations were promulgated by the Secretary for Environment, the Harbour Works Regulations were promulgated by the Secretary for Transport and the Ministers for Agriculture and Fisheries and Food, and the Afforestation Regulations were promulgated by the Ministers for Agriculture and Fisheries and Food.

88. For a discussion of the main provisions of the Directive, *see supra* notes 19-56 and accompanying text.

ronmental Effects) Regulations<sup>89</sup> promulgated by the Secretary of State for the Environment, amends the Town and County Planning Act by incorporating the Directive into the planning process. Since the procedure prescribed by the Directive is similar to the Town and Country Planning System in that both require the developer to submit specified information, both allow for public comment, and both require the planning authority to consider these when deciding on a project, the Directive has had little impact on the planning process.<sup>90</sup>

The one impact that the Directive had on the planning process was the introduction of a formal procedure for assessing environmental information.<sup>91</sup> Although environmental information has always been taken into account under the Town and Country Planning System, LPAs are now required to take a more active role by formally assessing the environmental impacts of major projects.<sup>92</sup>

In the preparatory activities stage, the LPA must ascertain the status of the proposed project to determine if it falls within either Schedule 1 or 2.<sup>93</sup> A joint circular issued by the Department of the Environment and the Welsh Office to provide guidance on the Regulations, recommends that developers consult with LPAs before filing an application to determine whether the proposed project will require an EIA.<sup>94</sup> If the project falls within Schedule 1, then an EIA is mandatory.<sup>95</sup> If the project falls within Schedule 2, then the

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89. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199 [hereinafter Regulations].

90. N. HAIGH, *EEC ENVIRONMENTAL POLICY AND BRITAIN* 355 (2d ed. 1987).

91. Interview with Brian Hall, Partner and Head of Planning Department for Clifford Chance, in London, Great Britain (Mar. 1, 1991).

92. *Id.*

93. The term "Annex" is substituted in the Regulations by the term "Schedule". See Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199.

94. Department of the Environment and the Welsh Office, Circular No. 15/88, para. 35 (July 12, 1988)[hereinafter Circular].

95. Town and Country Planning (Assessment of Environmental Effects) Regulations S.I. 1988, No. 1199, § 4.

LPA must determine whether an EIA should be submitted.<sup>96</sup> If the LPA determines that an EIA is required, then it must submit an explanation for its determination, "giving clearly and precisely their full reasons for their conclusion."<sup>97</sup> This explanation provides a developer the basis for the information the LPA requires in the EIA.<sup>98</sup>

There are no specific criteria for LPAs to use when determining whether an EIA is required for a Schedule 2 project. The Regulations require an EIA for all Schedule 2 projects that are "likely to have significant effects on the environment by virtue of factors such as their nature, size or location."<sup>99</sup> The Circular provides further guidance as to which type of Schedule 2 project will require an EIA.<sup>100</sup> It recommends that authorities refer to the list of factors considered in an EIA<sup>101</sup> and determine whether any of these factors will be significantly affected by the project.<sup>102</sup> The Circular then lists three situations for which an EIA will always be required.

1) For "major" or large scale projects "of more than local importance" such as mining operations or new factories.<sup>103</sup>

2) "Occasionally" for "smaller" scale projects proposed for particularly "sensitive or vulnerable locations" such as national parks or other areas of outstanding beauty.<sup>104</sup>

3) "[I]n a small number of cases, for projects with unusually complex and potentially adverse environmental effects, where expert and detailed analysis of those effects would be desirable and would be relevant to the issue of principle as to whether or not the development should be

96. *Id.*

97. *Id.* § 5(4).

98. Circular, *supra* note 94, Appendix B, at para. 11.

99. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199, § 2(1).

100. Circular, *supra* note 94, at para. 20.

101. *See supra* note 47 and accompanying text.

102. Circular, *supra* note 94, at para. 20.

103. Circular, *supra* note 94, at paras. 20(i), 22.

104. Circular, *supra* note 94, at paras. 20(ii), 27.

permitted."<sup>106</sup>

The Circular states that projects falling within these categories will be small in number and in "most [Schedule 2] cases, there should be little difficulty in deciding whether or not an EIA is needed."<sup>106</sup> Developers can also look to prior projects of similar nature to help determine if their project will require an EIA.<sup>107</sup>

Although the Regulations specify what information the developer must provide in an EIS,<sup>108</sup> there are no criteria as to the amount of information required.<sup>109</sup> This created some confusion during the Regulations' initial aftermath, as EIAs were either too scientific or too vague.<sup>110</sup> If the LPA determines that an EIS is insufficient, it can require the developer to provide further information.<sup>111</sup> However, an LPA can not refuse an application on the basis of an insufficient EIS unless the developer fails to provide any necessary information further required.<sup>112</sup>

The silence of the Regulations on quantitative requirements for impact statements provides flexibility in the assessment process. Since each project will pose different environmental effects, each EIS should be reflective of the project's specific impact and not uniform statutory requirements.<sup>113</sup>

Public participation is also an important part of the EIA process. The Regulations require that an EIS, once submitted, should be made available for public inspection.<sup>114</sup> Any com-

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105. Circular, *supra* note 94, at para. 20(iii).

106. Circular, *supra* note 94, at para. 21.

107. Interview with Brian Hall, *supra* note 91.

108. See Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199, Schedule 3.

109. Mertz, *The European Economic Community Directive on Environmental Assessment: How Will it Affect United Kingdom Developers?* 1989 J. PLAN & ENVTL. 483, 495.

110. Interview with Brian Hall, *supra* note 91.

111. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199, § 21.

112. Circular, *supra* note 94, at para. 44.

113. Interview with Brian Hall, *supra* note 91.

114. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199, at §§ 12(2)(a), 13(2)(d).

ments "duly made" about the environmental effects of a project are to be considered by the LPA.<sup>115</sup> The Regulations also require the LPA to notify specified environmental "bodies" and to elicit and consider comments on the proposal.<sup>116</sup>

### C. EIAs and the Courts

Litigation concerning EIAs in England has been minimal, producing few significant cases. This may seem surprising considering the number of lawsuits involving NEPA.<sup>117</sup> There are several reasons for this. One is that English society is generally less litigious than American society.<sup>118</sup> Another reason is the EIA process is still in its primary stages and litigation has yet to develop. A third, and more significant reason for the limited litigation, lies within the nature of the system. The system is designed to minimize litigation through the provision of thresholds and indicative criteria on the projects to be assessed.<sup>119</sup>

In *Lewin v. the Secretary of State for the Environment*,<sup>120</sup> the applicants appealed from a High Court decision to affirm the Secretaries of State for the Environment and Transport granting construction of a highway over part of a historic battlefield site.<sup>121</sup> At issue before the court was whether the highway was subject to an EIA under the Directive, the Town and Country Planning (Assessment of Environmental Effects) Regulations,<sup>122</sup> and the Highways (Assessment of Environmental Effects) Regulations.<sup>123</sup>

In deciding this issue, the court presented the chronology

115. *Id.* §§ 2(1), 4(2).

116. *Id.* §§ 2(1), 4(2), 8(5), 14(2)(C).

117. See HAIGH, *supra* note 90, at 353.

118. See HAIGH, *supra* note 90, at 353.

119. See *infra* notes 187-197 and accompanying text.

120. C.A., Jan. 11, 1989 (Civil Division) (Transcript: Association)(LEXIS, Enggen library, Cases file).

121. *Id.* The site in issue was the field where the Battle of Naseby occurred in 1645.

122. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199.

123. Highways (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1241.



of the proposal. The proposal was first published in 1982.<sup>124</sup> After initial objections, a public inquiry was held by the Department of Transport from September 1984 to June 1985. After the public inquiry, a report was presented to the Secretary of Transport by the inspector in July 1986. In December 1987, the Department of Transport ordered that the project proceed. This order was to take effect on February 5, 1988. The court noted that the notice and comment period and the decision to proceed with the project all occurred prior to July 3, 1988, the date on which the Directive was to take effect.<sup>125</sup>

The court rejected the argument that the Directive was applicable, stating that the Secretary could not have complied with the Directive's requirements since they were not yet incorporated into English law at the time the order was issued. The court pointed to subsection (7) of the new section 105A of the Highway (Assessment of Environmental Effects) Regulations which states "[t]his section does not apply where a draft order . . . is published before the coming into force of [this] Regulation. . . ."<sup>126</sup>

This decision was reiterated by the High Court in a subsequent action brought to determine whether the construction of side roads along a section of the highway would require an EIA.<sup>127</sup> The petitioners also revived the issue of the requirement of an EIA for the section of the highway passing through the battlefield. The court held that an EIA could be required for side roads constructed as part of the overall project and reaffirmed the earlier holding that the section of the road to pass through the battlefield site would not require an EIA since the approval for this section was given before the Directive came into effect.

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124. *Lewin*, C.A., Jan. 11, 1989 (Civil Division) (Transcript: Association) (LEXIS, Enggen library, Cases file).

125. *Id.* Even though the Directive was implemented after July 3, 1988, the fact was not an issue according to the court.

126. Highways (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1241.

127. *Lewin v. Secretary of State for the Env't*, CO/426/91, Q.B. Jul. 17, 1991 (Transcript: Marten Walsh Cherer) (LEXIS, Enggen library, Cases file).

In *Regina v. Swale Borough Council*,<sup>128</sup> an action was brought by a public interest group seeking judicial review of a grant of planning permission for the construction of a "major new international seaport."<sup>129</sup> The Royal Society for the Protection of the Birds(RSPB)<sup>130</sup> challenged the grant of planning permission by the Swale Borough Council(SBC)<sup>131</sup> on two grounds. The first claim by RSPB was that they were not consulted in the planning process despite written assurances that they would be.<sup>132</sup> Despite contentions by SBC to the contrary, the court held that correspondence between the two parties would have led a reasonable person to conclude that RSPB had a "legitimate expectation" to be consulted.<sup>133</sup>

The second challenge asserted by RSPB was that the SBC violated the Town and Country Planning Act (Assessment of Environmental Effects) Regulations<sup>134</sup> by not requiring an EIA for the dredging activities.<sup>135</sup> RSPB alleged that the project, as part of a seaport, fell within Schedule 1, as well as within Schedule 2. RSPB stated that the project qualified as an industrial development project, a site for depositing sludge, and an activity reclaiming land from the sea for the "purpose of agriculture."<sup>136</sup>

The court refused to decide whether the project fell within Schedule 1 or 2, holding that such a determination is one of fact, not law, thus an improper legal question for the court. The court also stated that the SBC findings that the

128. CO/871/89, Q.B., Feb. 5, 1990 (Transcript: Marten Walsh Cherer) (LEXIS, Enggen library, Cases file).

129. *Id.* The dredging activity in question was part of an overall proposal to construct a seaport at the site.

130. *Id.* The Royal Society for the Protection of the Birds was referred to by the court as the largest conservation charity in the United Kingdom.

131. *Id.* The Swale Borough Council is the local planning authority.

132. *Id.*

133. *Id.* The court also based this decision on the fact that since this application was part of an overall project, and since RSPB had been consulted on other aspects of the proposal, they had a "legitimate expectation" to be consulted in this case.

134. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199.

135. *Swale Borough Council*, CO/871/89, Q.B., Feb. 5, 1990 (Transcript: Marten Walsh Cherer)(LEXIS, Enggen library, Cases file).

136. *Id.*

project was not within Schedule 1 or 2 were reasonable; even if the dredging were in a Schedule 2 project, SBC was justified in determining that the project did not require an EIA.<sup>137</sup> As a result, the court dismissed the application for review on the grounds that if the planning permission was denied, the application would be resubmitted to the SBC who would then make a decision as to whether the dredging activity required an EIA.<sup>138</sup>

Another case concerning the EIA determination process is *Regina v. Poole Borough Council*.<sup>139</sup> In this case, the applicants were challenging the grant of planning permission by the LPA and the Poole Borough Council, to itself, without the preparation of an EIA on the project.<sup>140</sup> The project in question was a housing development project. The applicants alleged that this project fell under the Schedule 2 "urban development projects"<sup>141</sup> and that the Council never considered whether an EIA was necessary.<sup>142</sup>

The court held that this was not a basis for quashing the planning permission. The court stated that the purpose of an EIA is "to draw to the attention of the authority material relevant to the coming of a decision."<sup>143</sup> In this case, the information that would have been supplied for an EIA was drawn to the Council's attention. Any information likely to emerge from the "formal process" of an EIA was already present in the "Council's mind."<sup>144</sup>

Both *Swale Borough Council* and *Poole Borough Council* indicate the restrained approach the courts have taken on the

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137. *Id.* The court based this decision in part on the fact that SBC had consulted with the Nature Conservancy Council on the proposal and no objections were raised.

138. *Id.*

139. CO/1070/89, Q.B., Dec. 21, 1990 (Transcript: Marten Walsh Cherer) (LEXIS, Enggen library, Cases file).

140. A local council can undertake its own development, like a private developer, by applying to itself for planning permission.

141. *See* Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199, Schedule 2, para. 10.

142. *Poole Borough Council*, CO/1070/89, Q.B., Dec. 21, 1990 (Transcript: Marten Walsh Cherer) (LEXIS, Enggen library, cases file).

143. *Id.*

144. *Id.*

planning process and the EIA requirement.<sup>145</sup> This is a further indication of the wide latitude of discretion LPAs have in the planning process.

#### IV. Comparing the Directive to NEPA

When comparing the Directive to NEPA, certain factors should be kept in perspective. The Directive applies to twelve sovereign nations, all of which have different planning control systems. Once implemented by a Member Nation, the provisions of the Directive become the national law in that nation.<sup>146</sup> Unlike the Directive, NEPA was enacted by the United States federal government and as such is limited in its application to federal actions.<sup>147</sup>

In addition, NEPA is the forerunner of environmental assessment legislation and as such, was broadly drafted. As a result, NEPA's interpretation was subject to years of controversy and litigation.<sup>148</sup> Any subsequent legislation requiring the assessment of environmental effects is benefitted by NEPA's basic statutory framework, as well as the ensuing litigation which helped to develop the process of assessing environmental affects. Rather than debating which is the more effective system, this section focuses on improvements the Directive has made to the process established by NEPA.

##### A. The EIS/EIA Distinction

NEPA requires all federal agencies to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a *detailed statement . . .*; on the environmental impact of the proposed action. . . ."<sup>149</sup> The President's Council on Environmental Quality (CEQ), created to administer the implementation of NEPA,<sup>150</sup> promulgated

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145. Macrory, *In Court: Environmental Assessment*, 192 E.N.D.S. 40 (1991).

146. Directive, 1985 O.J. (L 175) art. 12, at 43.

147. 42 U.S.C. § 4332(2)(C) (1988).

148. See F. GRAD, *TREATISE ON ENVIRONMENTAL LAW* § 9.07 (1985 & Supp. 1990).

149. 42 U.S.C. § 4332(2)(C) (1988)(emphasis added).

150. *Id.* § 4342. See also REHBINDER, *supra* note 7, at 134.

regulations on the requirement of an environmental impact statement.<sup>151</sup>

These regulations require that an EIS be drafted for each proposed federal action which will significantly affect the environment.<sup>152</sup> After preparing the draft EIS, the agency must then circulate it to the appropriate state and federal agencies and the general public, including public interest organizations.<sup>152.1</sup> The final EIS is to "respond to comments, . . . discuss . . . any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised."<sup>153</sup>

The EIA required under the Directive is more of a process than a statement. The Circular describes the EIA as 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.<sup>154</sup>

Unlike NEPA, where the federal agency proposing the project prepares a single impact statement, the Directive requires the developer of a project to prepare an EIS, including an initial assessment, to initiate the process.<sup>155</sup> The EIS, prepared by the developer along with any other information collected by the planning authority, the comments of interested public and private bodies, and any studies conducted by the planning authority themselves, are then used to assess the environmental effects of a project during the decision-making process.<sup>156</sup> Under the Town and Country Planning (Assessment of Environmental Effects) Regulations, the planning authority "shall

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151. 40 C.F.R. §§ 1500-1508.28 (1990).

152. *Id.* §§ 1502.3, 1502.9.

152.1 *Id.* § 1503.1.

153. *Id.* § 1502.9(b).

154. Circular, *supra* note 94, at para. 7.

155. Grant, *supra* note 12, at 466.

156. Grant, *supra* note 12, at 466-67.

not grant planning permission . . . unless they have first taken the environmental information into consideration.”<sup>157</sup>

While an EIS under NEPA consolidates the environmental information along with comments received into a single statement, the Directive requires all of the information received to be used as part of the decision-making process. Thus, the EIA is more than a statement containing environmental information, but a process of gathering the information and using it in the decision-making process.<sup>158</sup>

#### B. The Threshold Question: When to Prepare an Assessment?

The only criteria provided by NEPA to determine when to prepare an EIS are “major Federal actions significantly affecting . . .” the environment.<sup>159</sup> An action is deemed “federal” under NEPA if it is undertaken by a federal agency or involves federal participation.<sup>160</sup> CEQ regulations list categories under which “Federal actions tend to fall within. . . .”<sup>161</sup> These categories include the adoption of official policy, the adoption of formal plans, the adoption of federal programs, and the approval of specific projects.<sup>162</sup>

Once a proposed action is determined federal, the question then becomes whether the action is “major,” and “significantly affect[s]” the environment.<sup>163</sup> Use of the term “major” in NEPA “ensures that the federal action will have a magnitude sufficient to require an impact statement,”<sup>164</sup> while the

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157. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199, § 4(2). Although neither NEPA nor the CEQ regulations specifically require consideration of environmental information, the federal courts have interpreted NEPA to require such considerations. *See, e.g.*, *Environmental Defense Fund v. Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972) and *Natural Resources Defense Council v. Grant*, 355 F. Supp. 280 (D.D.C. 1973).

158. *See Grant*, *supra* note 12, at 466.

159. 42 U.S.C. § 4332(2)(C) (1990).

160. MANDELKER, *supra* note 18, at § 8:15.

161. 40 C.F.R. § 1508.18 (1990).

162. *Id.* For further discussion of the “federal action” question, *see* MANDELKER, *supra* note 18, at §§ 8:15-8:20.

163. *Id.* § 8:29.

164. *Id.* § 8:30.

requirement of 'significant,' "ensures that [the action] will have more than a minimal impact on the environment."<sup>165</sup>

The federal courts have developed two approaches to the "major" and "significantly affects" criteria.<sup>166</sup> One approach requires that a project be major and have a significant affect on the environment to require an EIS.<sup>167</sup> The other approach holds that an action is major if it is found to be significant.<sup>168</sup> The latter approach has been adopted into CEQ regulations which state that "major reinforces but does not have a meaning independent of significantly. . . ."<sup>169</sup>

Although actions must be federal and "major," the main issue in determining whether an EIS is required under NEPA is whether the action "significantly affects" the environment.<sup>170</sup> A leading case dealing with the issue of significance determination is *Hanly v. Kleindienst* (II),<sup>171</sup> which was decided before any regulations on "significance" were issued.<sup>172</sup>

The court in *Hanly* looked at the character of the environment where the action was to take place, and then considered the comparative and absolute nature of the action's potential impact on the environment.<sup>173</sup> The court devised a significance test focusing on:

- (1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area affected by it, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area.<sup>174</sup>

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165. *Id.*

166. *Id.*

167. See National Ass'n for Advancement of Colored People v. Medical Center, Inc., 584 F.2d 619 (3d Cir. 1978); see also MANDELKER, *supra* note 18, at § 8:30.

168. See Minnesota Public Interest Research Group v. Butz, 498 F.2d 1314, 1321-22 (8th Cir. 1974); see also MANDELKER, *supra* note 18, at § 8:30.

169. 40 C.F.R. § 1508.18 (1990).

170. MANDELKER, *supra* note 18, at § 8:32.

171. 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973).

172. MANDELKER, *supra* note 18, at § 8:34.

173. MANDELKER, *supra* note 18, at § 8:34.

174. *Kleindienst*, 471 F.2d at 830-31.

Under this test, if the action's impact to the environment "conforms to existing uses," then the action will not significantly affect the environment.<sup>175</sup> In other words, the action must be "arguably" or "potentially" significant to require an EIS.<sup>176</sup>

Subsequently, CEQ regulations were issued to provide guidance on the significance question.<sup>177</sup> The regulations state that "significantly" requires consideration of a project in both its "context and intensity."<sup>178</sup> The term context "means that the significance of an action must be analyzed in several contexts such as society as a whole, the affected region, the affected interests, and the locality."<sup>179</sup> Under context, an action's significance varies with its setting.<sup>180</sup>

Intensity "refers to the severity of the impact."<sup>181</sup> The regulations list factors to be considered when evaluating an action's intensity:

- (1) Impacts that may be both beneficial and adverse . . . .
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics of the geographic area . . . .
- (4) The degree to which the effects on . . . the environment are likely to be highly controversial.
- (5) The degree to which the possible effects on the human environment are highly uncertain or involve unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects . . . .
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact . . . .
- (8) The degree to which the action may adversely affect

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175. *Id.* at 831.

176. *Id.*

177. MANDELKER, *supra* note 18, at § 8:33.

178. 40 C.F.R. § 1508.27 (1990).

179. *Id.* § 1508.27(a).

180. *Id.*

181. *Id.* § 1508.27(b).



districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places . . . .

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat . . . .

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.<sup>182</sup>

The regulations provide a basis for courts and agencies when making a significance determination.<sup>183</sup> Like *Hanly*, the regulations require the significance determination to be based on the extent or "severity" of the action's impact to the existing environment.<sup>184</sup> Although NEPA may have been unable to provide a direct answer to the threshold question, requiring the aid of the federal courts and the CEQ regulations,<sup>185</sup> it has caused federal agencies to consider all the possible effects their actions will have on the environment.<sup>186</sup>

The Directive's response to the threshold question can be found in Annexes I & II. Opponents to a directive based on NEPA were aware of the initial problems associated with NEPA's lack of specificity.<sup>187</sup> They feared a similar floodgate of litigation would occur within the EC, resulting in delays to major projects.<sup>188</sup> Through Annexes I & II, the Directive specifically describes which projects will be subject to an EIA.

All projects under Annex I require an EIA.<sup>189</sup> The list of projects in Annex I is short and well defined, leaving little room for interpretation of whether an EIA is required.<sup>190</sup> Projects under Annex II are subject to an EIA at the discretion of Member Nations.<sup>191</sup> Member Nations can adopt their

182. *Id.*

183. MANDELKER, *supra* note 18, at § 8:33.

184. MANDELKER, *supra* note 18, at § 8:33.

185. MANDELKER, *supra* note 18, at § 8:33.

186. REHBINDER, *supra* note 7, at 136.

187. *See* Grant, *supra* note 12, at 463.

188. *See* Grant, *supra* note 12, at 463.

189. Directive, 1985 O.J. (L 175) art. 4(1), at 41.

190. Grant, *supra* note 12, at 465.

191. Directive, 1985 O.J. (L 175) art. 4(2), at 41-42.

own procedures to determine when an EIA is required for Annex II projects.<sup>192</sup> Thus, there is no issue as to whether an Annex II project is required to be assessed under the Directive.

The Circular indicates that the fundamental test to apply when determining whether a Schedule 2 project will require an EIA is "the likelihood of the significant environmental effects."<sup>193</sup> While this language may sound similar to NEPA, it does not similarly involve the threshold question. The Circular recommends that developers approach the LPA at an early stage in the planning process to determine whether the project will require an EIA<sup>194</sup> This procedure allows the developer to coordinate the EIA, if required, with the planning application, thus preventing any future litigation over the requirement of an EIA.

From a developer's perspective, it may very well be advantageous to volunteer an EIS on "borderline" projects.<sup>195</sup> If the planning application is rejected by the LPA for lack of an EIS, and the application is appealed to the Secretary of State, the information required by the EIS will most likely come out in the appeal.<sup>196</sup> Thus, the preparation of an EIS can save time and money which could be "wasted" by arguing the necessity of an EIA.<sup>197</sup>

The approach taken by the Directive to the threshold question is to answer it before it can be asked. By specifying which type of projects will require impact assessments, the Directive minimizes litigation and delays concerning EIA requirements, making the system more of a benefit than a burden to the planning process.

### C. Comparative Application of the Directive and NEPA

The issue arises as to which system is more effective for assessing potential environmental threats; the EC system

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192. *Id.*

193. Circular, *supra* note 94, at para. 31.

194. Circular, *supra* note 94, at para. 39.

195. Interview with Brian Hall, *supra* note 91.

196. Interview with Brian Hall, *supra* note 91.

197. Interview with Brian Hall, *supra* note 91.

which lists projects required to be assessed or required to be considered for assessment, or the NEPA method which requires assessments for all projects which reasonably can pose significant effects to the environment.

The argument in favor of a list is that certain types of projects pose such a threat to the environment by their nature, they should automatically be assessed or considered for assessment. By listing projects and providing thresholds, there is no question as to whether a project is of the nature that poses significant effects to the environment. By not listing projects subject to assessment, legislative intentions come into issue complicating disputes over the necessity of an EIS. This can lead to the approval of certain projects posing significant effects to the environment, without being subject to a full disclosure of the potential environmental impact.

One such example is the case of *Beaufort-Jasper County Water Authority v. Corps of Engineers*.<sup>198</sup> In *Beaufort-Jasper*, the district court for South Carolina held that the granting of dredge and fill permits by the Army Corps of Engineers for the construction of a chemical plant would not require an EIS.<sup>199</sup> The purpose of the plant was to produce chemicals used in phases of a textile manufacturing process. The court held that the Corps of Engineers had properly determined that no EIS was necessary on the basis of a brief environmental assessment prepared by the Corps.<sup>200</sup>

Under the Town and Country Planning (Assessment of Environmental Effects) Regulations, this plant might be subject to mandatory assessment as a Schedule 1 integrated chemical installation.<sup>201</sup> In the alternative, the plant falls into

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198. 22 Env't Rep. Cas. (BNA) 1410 (D.S.C. 1984).

199. *Id.* at 1416. The Army Corps of Engineers is charged with issuing permits for dredge and fill activity under the Clean Water Act, 33 U.S.C. § 1344(a) (1988).

200. *Id.* "An EA [environmental assessment] is a brief document which provides sufficient information . . . on potential environmental effects of the proposed action and, if appropriate, its alternatives, for determining whether to prepare an EIS . . ." 33 C.F.R. § 230.10(a) (1991).

201. Town and Country Planning (Assessment of Environmental Effects) Regulations, S.I. 1988, No. 1199, Schedule 1(6), at 15. Schedule 1(6) applies to integrated chemical installations employed for the production of "olefins from petroleum products, or of sulphuric acid, nitric acid, hydrofluoric acid, chlorine or fluorine." *Id.*

three separate Schedule 2 categories: 1) reclamation of land from the sea,<sup>202</sup> 2) chemical industry (other than projects included in Schedule 1),<sup>203</sup> and 3) textile industry.<sup>204</sup>

The argument against lists is that by specifically designating projects subject to assessments, projects not listed are precluded from assessment by nature of their exclusion, no matter what potential effects of a project. By requiring environmental impact statements for all federal actions which are "major" and which will "significantly affect" the environment, NEPA is not limited in its application to specified projects. This enables NEPA to be applied to any type of project, unlike the Directive which is restricted to listed projects. Types of projects which have been held to require an EIS under NEPA, but not listed by the Directive include correctional facilities,<sup>205</sup> postal facilities,<sup>206</sup> grazing permits,<sup>207</sup> and the sale of lands.<sup>208</sup>

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202. *Id.* at Schedule 2(1)(f), at 16. Reclamation of land from the sea is under the agriculture category, but applies to non-agricultural activities. *See supra* note 37; *Regina v. Swale Borough Council*, CO/871/89, Q.B. Feb. 5, 1990, (Transcript: Marten Walsh Cherer)(LEXIS, Enggen library, Cases file).

203. *Town and Country Planning (Assessment of Environmental Affects) Regulations*, S.I. 1988, No. 1199, Schedule 2(6)(a), at 17.

204. *Id.* at Schedule 2(8).

205. *See Hanly v. Kleindienst* (II), 471 F.2d 823 (2d Cir. 1972), *cert. denied*, 412 U.S. 908 (1973). The Second Circuit in *Hanly* found that a correctional facility can have a significant impact on the surrounding environment. The circuit court remanded the case back to the district court to determine if the particular correctional facility would have a significant effect on the surrounding environment. On remand, the district court for the southern district of New York held that the addition of a correctional facility to New York City would not have such a significant impact on the surrounding environment as to require an EIS. On reappeal, the Second Circuit upheld the decision. *See Hanly v. Kliendienst* (III), 484 F.2d 448 (2d Cir. 1973).

206. *See City of Rochester v. United States Postal Service*, 541 F.2d 967 (2d Cir. 1976); *Morgan v. United States Postal Service*, 405 F. Supp. 413 (D. Mo. 1975).

207. *See Natural Resources Defense Council v. Morton*, 388 F. Supp. 829 (D.D.C. 1974), *aff'd*, 527 F.2d 1386 (D.C. Cir. 1976), *cert. denied*, *Pacific Legal Found. v. National Resources Defense Counsel*, 427 U.S. 913 (1976).

208. *See Scenic Rivers Ass'n of Oklahoma v. Lynn*, 520 F.2d 240 (10th Cir. 1975), *cert. granted*, *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 423 U.S. 1013 (1975), *reh'g denied*, 429 U.S. 875 (1976).

## V. Conclusion

Parliament is aware that by listing projects subject to assessment, certain project types may be excluded.<sup>209</sup> To remedy this, the House of Lords has proposed an amendment to the Planning and Compensation Bill which would enable the Secretary of State for the Environment to extend EIA requirements to projects not included in Schedules 1 or 2, as deemed necessary.<sup>210</sup> Speaking on the amendment's objectives, Lord Norrie stated that:

in having chosen to implement . . . [the EC] Directive . . . , the Government was able only to give effect to the Directive and no more. This meant that it lacked the power to order assessments of 'classes of project [sic] which may come to light in the future as having significant effects on the environment.'<sup>211</sup>

This amendment drew a positive response from the government which indicated that it was giving "urgent thought" to the amendment.<sup>212</sup> If this amendment is adopted, the government will be able to remedy the restrictiveness of the listed projects. The Directive states that "the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects. . . ."<sup>213</sup> By requiring consideration of a project's likely environmental effects before a decision can be made, EIAs are an important step toward preserving environmental quality. Not only do EIAs require consideration of environmental information, but they also encourage developers to minimize a project's environmental effects. This enhances the project's appeal and prevents delays caused by disputes over EIA requirements.<sup>214</sup>

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209. See *Parliament; Planning Bill May Include Powers on Environmental Assessment*, 193 E.N.D.S. 25 (1991).

210. *Id.*

211. *Id.*

212. *Id.*

213. Directive, 1985 O.J. (L 175), at 40-41.

214. Interview with Brian Hall, *supra* note 91.

Since the EIA process has only been in effect in England since the summer of 1988, it is too soon to assess its effectiveness on the planning system. However, there are at least two factors which serve to influence their future. One factor is that the Directive was designed to minimize the problems associated with NEPA. Considering NEPA's overall impact in the United States, EIAs should be able to provide a similar impact in England without years of litigation.

The other factor is the British Government's promotion of the EIA process. In September 1990, the Department of the Environment issued the government's first ever White Paper on environmental policy.<sup>215</sup> In this White Paper, the government announced its support for EIAs, and its willingness to help developers prepare them to strike "the right balance between the development proposed and all aspects of the environment. . . ."<sup>216</sup> The government also stressed the importance of taking environmental impacts into consideration in the planning process.<sup>217</sup>

Both the EC Commission and the Department of the Environment are currently undertaking studies to review the system of environmental assessments under the Directive.<sup>218</sup> These studies will be used to provide further guidance on the EIA process, improving its overall effectiveness. By increasing the effectiveness of the EIA process, the British government will be able to minimize harms to its environment before they occur.

## VI. Postscript

On October 17, 1991, the European Community Environment Commissioner, Carlo Ripa di Meana requested that the British Government halt construction of seven major projects,

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215. This Common Inheritance: Britain's Environmental Policy, White Paper from the Department of the Environment, September 1990, at 87 [hereinafter White Paper]. A White Paper is an official document published by the British Government announcing its policy on a particular subject. Interview with Brian Hall, *supra* note 91.

216. *Id.*

217. *Id.* at 88.

218. *Id.*

including the rail link to the Channel Tunnel and two major highways.<sup>219</sup> The request was made because the EC Environment Commission did not believe that the British Government was properly implementing EC Directive 85/337 on environmental impact assessments.<sup>220</sup> Britain was given two months to formally respond to the charges with the possibility of being taken before the European Court of Justice, if their response does not justify their actions.<sup>221</sup>

The EC claims that the British Government improperly interpreted the Directive to mean that it did not apply to projects for which planning applications were made prior to July 3, 1988, the date the Directive was to come in force in Britain.<sup>222</sup> The EC also claims that the date the planning application was made is irrelevant, and that the Directive applies to all projects which were given approval after July 3, 1988.<sup>223</sup> The EC is requesting the British Government to halt these seven projects because no formal EIAs were prepared on these projects in accordance with the Directive.<sup>224</sup>

The British Government responded defiantly to the EC charges and asserted that Mr. Ripa di Meana was singling out Britain, even though the EC also claimed Germany, Spain, and Portugal were also in violation of the Directive.<sup>225</sup> Malcolm Rifkind, Britain's Secretary of State for Transport re-

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219. *EC Asks Britain to Freeze Motorway and Six Other Major Projects*, The Reuter Library Report, Oct. 17, 1991, available in LEXIS, Europe Library, Alleur File; see also, Nicholas Schoon, *EC Starts Legal Action Against Road Building*, THE INDEPENDANT (London), Oct. 18, 1991 at 6.

220. Nicholas Schoon, *EC Starts Legal Action Against Road Building*, THE INDEPENDANT (London), Oct. 18, 1991 at 6.

221. *Id.*

222. *Id.*; see Lewin, *supra* note 120 and accompanying text, where the Court of Appeal held that the project in question was not subject to an EIA because the planning application and the project approval both occurred prior to the Directive's date of enforcement.

223. Boris Johnson, *Britain 'Not Being Victimised'*, THE DAILY TELEGRAPH (London), Oct. 19, 1991 at 4.

224. Michael McCarthy & Michael Dynes, *EC Demands a Halt to Work on 500m Pound Road Schemes*, THE LONDON TIMES, Oct. 18, 1991 (Home News).

225. Chris Moncrieff & Peter Archer, *Government Defiant Over EC Building Block*, PRESS ASSOCIATION NEWSFILE (London), Oct. 18, 1991 (Home News) and Nicholas Schoon, *EC Starts Legal Action Against Road Building*, THE INDEPENDANT (London), Oct. 18, 1991 at 6.

sponded to the charges saying that the request to stop construction on these projects was “‘quite unnecessary as construction has not begun on any of these sites and is not due to begin for some considerable time to come.’”<sup>226</sup> He said that the projects were “‘urgently needed and the (Transport) Department will be continuing with the necessary advance works.”<sup>227</sup>

On December 17, 1991, the British Government sent a formal letter to EC Environment Commission, along with thousands of pages of documents supporting their position that they had complied with EC Directive 85/337 and stating that they would be proceeding with the seven projects which the EC requested they halt construction on.<sup>228</sup>

After receiving the letter from the British Government, and initially reviewing the supporting documents, the EC Environment Commission indicated that they were not satisfied with the response of the British Government to their charges of not complying with the environmental impact assessment directive. The Environmental Commission indicated that it would take time to review the “voluminous” materials sent by the British Government before making an official decision.<sup>229</sup> The Environment Commission was resolute in their position that if the documents presented fail to show that the British Government has implemented the Directive to their satisfaction, they will take the British Government to the European Court of Justice and seek an injunction from the Court to halt the seven projects until a decision has been rendered.<sup>230</sup> It could take several years for the Court to issue a judgment which would ultimately result in severe economic losses.

The British Government remained resolute in its position not to halt work and began construction on a portion of a

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226. Chris Moncrieff & Peter Archer, *Government Defiant Over EC Building Block*, PRESS ASSOCIATION NEWSFILE (London), Oct. 18, 1991 (Home News).

227. *Id.*

228. Nicholas Schoon, *EC Defied Over Road Building Projects*, THE INDEPENDENT (London), Dec. 18, 1991 at 2.

229. Boris Johnson, *Euro-Court Set to Challenge UK Road Building*, THE LONDON TIMES, Dec. 19, 1991 at 8.

230. *Id.*



highway on January 23, 1992, in defiance of the order of the EC Environment Commission.<sup>231</sup> Meanwhile, the EC Environment Commission proposed legislation requiring EIAs for projects when they are initially conceived, not when the project plans are finalized as is currently required under the Directive.<sup>232</sup> This proposal did not receive initial support from the EC Commission who decided to reconsider it at a later date, possibly after the summer.<sup>233</sup>

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231. Paul Edwards, *Government Defies EC Over New Road*, PRESS ASSOCIATION NEWSFILE (London), Jan. 23, 1992 (Home News).

232. Michael Dynes, *New Fight as EC Tightens Planning Controls*, THE LONDON TIMES, Feb. 5, 1992 (Home News).

233. *Brussels Shelves Plans for Environment Vetting*, The Reuter Library Report, Feb. 19, 1992, available in LEXIS, Europe Library, Alleur File.