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CASE LAW ANALYSIS

Restricting the Application of EIA for Agricultural Projects

Department for Environment, Food and Rural Affairs v Alford

Queen's Bench Division, Administrative Court, Divisional Court

[2005] EWHC 808 (Admin)

Brooke LJ and David Steel J

The Judgment

The following judgment was given:

BROOKE LJ:

This is the judgment of the Court.

Introduction

1 This is an appeal by way of case stated by the defendant Ellen Mary Alford arising out of her conviction at the Plymouth Magistrates' Court on 10 June 2004 on four charges of carrying out projects on land she owned at Vixen Tor Farm, Merrivale, Dartmoor without obtaining a screening decision or the grant of consent by the Secretary of State, contrary to regulation 19 of the Environmental Impact Assessment (Uncultivated Land and Semi-natural Areas) (England) Regulations 2001 ('the 2001 Regulations').

2 The projects in question involved the application of farmyard manure and calcified seaweed to four of her fields between 31 March and 13 April 2003. In the Case Stated Deputy District Judge Tate said that he found the following facts:

A. No application was ever made for a screening decision, and no consent was given by the Secretary of State for the project.

B. Vixen Tor Farm is a grassland farm consisting of approximately 56 acres of land bordering the open common land of Dartmoor of which the four compartments of land referred to in the informations, Vixen Tor, and Fields 1, 2 and 3, form part.

C. From 1966 until 2002 the farm was tenanted by farmers called Cole. It appeared to have been abandoned by them. There was no evidence of cultivation, nothing was applied in terms of fertilizer or additives, and it was kept as grazing moor land. It was maintained in its natural habitat. The boundary walls and fences had been allowed to fall into disrepair and livestock from the common land had relatively unrestricted access to the farm.

D. The land came within the description 'uncultivated land, or semi-natural areas'.

E. The appellant carried out an intervention in the natural surroundings and landscape of the four compartments of land, by the application of farmyard manure and calcified seaweed. The purpose was to make the grass palatable to cattle. It was intended to graze 40 suckler cows on the land. The boundary walls and fences had been repaired and made stock proof. On Vixen Tor Field, Field 1, and Field 2 farmyard manure was spread at the rate of four cubic yards per acre, and calcified seaweed at the rate of 200 kilos per acre. On Field 3 only farmyard manure was spread, at the rate of four cubic yards per acre.

3 The Case Stated continued in the following terms:

3. It was contended by the Appellant that the project did not involve the use of the land for 'intensive agricultural purposes'. She contended that the question was not whether the project intensified the agricultural purposes to which the land was put, but whether the land was used for intensive agricultural purposes. Reliance was placed upon a definition of the word 'intensive' in the New Oxford Dictionary of English (Second Edition 2003) '(of agriculture): aiming to achieve maximum production within a limited area, especially by using chemical and technological aids; intensive farming. Often contrasted with extensive'.

4. It was contended by the Respondent that any works to increase the agricultural usefulness of the land, thereby intensifying the agricultural purposes above the current agricultural purposes, met the requirement. Reliance was placed upon the definition of the word 'intensive' in the Oxford English Dictionary: 'applied to methods of cultivation, fishery etc, which increase the productiveness of a given area; opposed to *extensive* in which the area of production is extended'.

5. I concluded that prior to 2002 no effort had been made to farm the land and it had been effectively abandoned. The appellant had repaired the boundary walls and fences and made the farm stock proof. The project involved the application of farmyard manure and calcified seaweed to the land in order to increase its productive value, and enable the raising of 40 suckler cows on the land. I decided that the project came within the definition of use of the land for intensive agricultural purposes, and followed the definition of the word 'intensive' in the Oxford English Dictionary.

I found the appellant guilty of all four offences. I fined the appellant £250 on each offence making a total of £1,000 and ordered her to make a contribution to the prosecution costs of £5,000.

6. The question for the opinion of the High Court is what is meant by the phrase 'intensive agricultural purposes' in regulation 2(1) of the Environmental Impact Assessment Regulations 2001. Does an increase in the productiveness of a given area, or an intensification of the agricultural purposes to which the land is put come within the definition? Did the appellant's project amount to an intervention in the natural surroundings and landscape involving the use of uncultivated land or semi-natural areas for intensive agricultural purposes?

4 The Explanatory Note to the 2001 Regulations makes it clear that they are concerned to implement two EC directives which have a bearing on the control of projects for the use of uncultivated land and semi-natural areas in England for intensive agricultural purposes.

These are Council Directive 85/337/EEC, as amended by Council Directive 97/11/EC of 3 March 1997 ('the EIA Directive'), on the effect of certain public and private projects on the environment, and Council Directive 1992/43/EEC, as amended ('the Habitats Directive'), insofar as it has any application to such projects. Mr Blair, who appeared for the respondent department ('DEFRA'), accepted that while the contents of the Habitats Directive might colour the department's decision-making progress once a project had been correctly identified as one involving the use of uncultivated land or semi-natural areas for intensive agricultural purposes, they could not affect one way or other the question whether that project had been correctly so categorised.

5 The EIA Directive was implemented in our national planning law by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ('the 1999 Regulations'). The agricultural or agriculturally-related operations that are most relevant to the uncultivated land provisions with which we are concerned do not, however, require planning permission. A parallel system of control, administered by DEFRA, was therefore required to ensure that the requirements of the EIA Directive were also complied with in the agricultural sphere. Hence the 2001 Regulations. The scheme set out in both the 1999 and the 2001 Regulations provides that whereby if a 'project' falls within one of the categories set out in Annex II of the EIA Directive (and if, in connection with the 1999 Regulations, its scale exceeds the threshold, if any, that is set out in those regulations in respect of that type of project), the relevant statutory authority must consider it and make what is called a screening decision. It has to decide whether the project's effects are sufficiently significant, so far as the environment is concerned, to warrant the preparation of what is called an environmental statement. The publication of this statement will then inform the decision-making process that is concerned with determining whether to permit the project to proceed notwithstanding its effect on the environment.

6 From the outset the EIA Directive divided the projects which might fall within its ambit into two lists. If a project was placed in the list in Annex I, it was mandatory to provide the requisite statement. If it was placed in the list in Annex II, on the other hand, it was for the Member States to decide whether a statement was required. The preamble to the 1997 amending directive shows how experience had shown that the scheme should be strengthened in certain respects. The list in Annex I, in particular, was greatly enlarged, and the list in Annex II was also extended.

7 Paragraph 1(b) of Annex II of the EIA Directive, both in its original and in its amended form, includes among the projects which may, at the discretion of a Member State, be subject to an environmental impact assessment

> Projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes.

8 This is included in a list numbered 1 under the heading 'Agriculture, silviculture and aquaculture'. The other items on this list, as it appears in the amended directive are:

(a) Projects for the restructuring of rural land holdings;
(c) Water management projects for agriculture, including irrigation and land drainage projects;
(d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;
(e) Intensive livestock installations (projects not included in Annex 1);
(f) Intensive fish farming;
(g) Reclamation of land from the sea."

9 Incidentally, Annex I to the EIA Directive includes in its amended form a new item 17:

> Installations for the intensive rearing of poultry or pigs with more than
>
> (a)85,000 places for broilers, 60,000 places for hens;

(b) 3,000 places for production pigs (over 30 kg); or
(c) 900 places for sows.

With this exception, the Directive casts no further light on the meaning of the word "intensive".

10 In the field of planning law the 1999 Regulations excluded plots less than 0.5 hectares in size from consideration if they were otherwise embraced by category (b) in the list of agricultural projects in Annex II of the directive, but the 2001 Regulations contain no such threshold. DEFRA has explained in a helpful guidance note on its website that it decided not to apply thresholds because some very small areas of land may be environmentally valuable.

11 We must now say a little about certain features of the 2001 Regulations before we turn to the question of interpretation at the centre of this appeal.

12 Regulation 2, which is concerned with 'Interpretation' identifies the two directives which the regulations are concerned to implement, and Regulation 2(2) provides that:

(2) Unless it is otherwise provided, expressions used both in these Regulations and in the EIA Directive or in the Habitats Directive shall have the same meaning in these Regulations as they have in those respective Directives.

13 Regulation 2(1) defines the word 'project' as meaning:

(a) the execution of construction works or other installations or schemes; or other interventions in the natural surroundings and landscape, involving the use of uncultivated land or semi-natural areas for intensive agricultural purposes.

14 It is not in issue on this appeal that the appellant's land was properly to be regarded as uncultivated (or a semi-natural area); the question we have to determine is whether her project involved the use of her land for intensive agricultural purposes. If it did, it did not qualify for any exemption under Regulation 3(2) or (3), and Regulation 4 prohibited her from beginning or carrying out a project without first obtaining a screening decision. Regulation 5 shows that the screening process enables the Secretary of State to decide whether the project is likely to have a significant effect on the environment. If it does, it becomes a 'relevant project' for the purposes of the Regulations so that it may not be begun or carried out without the Secretary of State's consent. Finally, Regulation 19, under which the appellant was convicted, provides that:

Any person who begins or carries out a project without first obtaining either a decision that the project is not a relevant project or a decision granting consent for the project in accordance with these Regulations shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

15 We have been told that there is no English or ECJ case-law which casts any light on the meaning of the words 'intensive agricultural purposes'. It is, however, instructive to note that in *Aannemersbedrijf P K Kraaijeveld Bv e.a v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-0503 the European Court of Justice was concerned to interpret the words 'canalization and flood-relief works' which appeared in point 10(e) of Annex II to the EIA Directive in its unamended form. One of the questions which arose in that case was whether the phrase embraced dyke work along navigable waters which was carried for the purpose of retaining water and preventing floods.

16 After observing that the different language versions of point 10(e) fell into two categories according to whether the terms employed denoted the idea of flooding—the English and Finnish versions did, while nine other versions, including the Dutch (which referred merely to 'canalization and regulation of watercourses') did not—the court said at paras 30–33:

30 Given that divergence, one must go to the purpose and general scheme of the directive. According to Article 1(2) of the directive, 'project' means the 'execution of construction works or of other installations or schemes' and 'other interventions

in the natural surroundings and landscape including those involving the extraction of mineral resources'. According to Article 2(1), the directive is aimed at 'projects likely to have significant effects on the environment by virtue inter alia of their nature, size of location'. Article 3 provides that the environmental impact assessment is to identify, describe and assess the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage.

31 The wording of the directive indicates that it has a wide scope and a broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods, and therefore dyke works, even if not all the linguistic versions are so precise.

32 Even if, as argued by the Government of the Netherlands, dyke works consist in the construction or raising of the height of embankments in order to contain watercourses and avoid flooding, works retaining a static quantity of water, rather than a running watercourse, may have a significant effect on the environment within the meaning of the directive where they are liable permanently to affect the composition of the soil, flora and fauna or the landscape. Such works must therefore fall under the directive.

33 Consequently, the argument of the Government of the Netherlands that dyke work does not alter the course of a waterway is not well founded.

17 This judgment contains a salutary reminder that in interpreting regulations based on EC law it is incumbent on a national court, if confronted with a dispute about the meaning of a phrase used in a directive, to identify the purposes of the directive and adopt a meaning (provided that the words are capable of bearing that meaning) which best promotes the wide scope and broad purpose of the directive.

18 When we first read these papers we were surprised to see that a project which involved no more than the re-invigoration of farmland which had been badly neglected for many years could properly be categorised as one which used the land for intensive agricultural purposes. Mr Blair did not suggest that the application of farmyard manure and calcified seaweed in the volumes described in finding E in the Case Stated (see para 2 above) could have been calculated to raise the productivity of the land above what could normally be expected of such land if it had not fallen into a state of neglect. We were fortified in my original impression by the definition contained in the second edition of the *New Oxford Dictionary of English* (2003) at p 901:

> *intensive* (of agriculture) aiming to achieve maximum production within a limited area, especially by using chemical and technological aids: *intensive farming*.

For what it is worth, Mr Blair accepted that no chemical or technological aids were used in this case.

19 Our initial impressions were then confirmed by DEFRA'S own guidelines, in which they said (at para 15):

> We will need to judge individual cases to see whether the land use resulting from the proposed operations is 'for intensive agricultural purposes'. We will take account of whether the project involves using the land at *greater than the average agricultural intensity for the activity in question.* (emphasis added)

20 Mr Blair, however, argued that his clients were entitled to take the view that this project qualified for screening under the 2001 Regulations. He said that uncultivated and semi-natural areas have been decimated by agricultural practice in the decades since the Second World War, and that this process has brought about the destruction of important habitats for flora and fauna. As a result, species of flora and fauna have been seriously damaged and even extinguished.

21 In this case the land had been abandoned to nature for decades without the application of fertiliser—the evidence showed that it contained less than 10% of rye grass and clover, on which cattle will thrive—and he said that there can be a significant impact on the environment from a relatively small intensification of the agricultural productiveness of an area. Through neglect the land had become a significant habitat for acid loving flora, and the appellant's intervention was intended to bring this state of affairs to an end. In these circumstances he submitted that a project designed to cultivate previously uncultivated land was one designed for an intensive agricultural purpose. It was proper to compare the state of the land after it had been fertilised with its neglected state before the project commenced. This was the legitimate comparison, and not a comparison with land in a normal state of cultivation.

22 Mr Blair explained to us the dilemma that faced his clients in trying to police the regulations if their preferred approach was not upheld. It is relatively easy to identify for screening purposes a project which intensifies the agricultural potential of the land over and above its pre-existing state. It is far less easy to identify projects which intensify the agricultural productivity of land above the norm for land in an ordinary state of cultivation, and the need to protect threatened flora and fauna is sufficiently pressing that the court should accept that his client's approach was correct in law. In this context he drew comfort from the *Oxford English Dictionary* meaning of 'intensive' which the district judge quoted in para 4 of the Case Stated (see para 3 above).

23 When one examines that definition, however, and the nineteenth century examples of the usage of the phrase, it is obvious that the distinction made in the dictionary between intensive cultivation and an intensive fishery on the one hand, and extensive cultivation and an extensive fishery on the other, shows that what is in contemplation is an increase in the productivity of cultivated land, or of a fishery. The two suggested options are to use intensive methods to obtain greater productivity from the same area, or to eschew intensive methods and to extend the area of production. I do not consider that this definition takes Mr Blair's case any further forward.

24 In his written submissions he drew attention to the fact that the Secretary of State for Environment, Food and Rural Affairs is identified at the start of the 2001 Regulations as a Minister designated for the purposes of section 2(2) of the European Communities Act 1972 in relation to measures relating to the conservation of natural habitats and of wild fauna and flora. This reference was needed, however, to show that she had the legal power to introduce regulations to give effect to the Habitats Directive. We have already observed, however, that there is nothing in the Habitats Directive that throws any useful light on the interpretation of the words 'for intensive agricultural purposes'.

25 We did not obtain any assistance from DEFRA's explanation in its Guidelines that relevant cultivations could include spreading soil or other material, including fertiliser or lime in excess of existing routine application rates. Even if fertiliser and lime had not been applied for many years (so that there were no existing routine application rates and any new application would have exceeded what was there before), this explanation of the concept of 'cultivations' casts no light at all on the meaning of the words 'for intensive agricultural purposes' on which, as we have observed, DEFRA's Guidelines favoured the appellant's case.

26 Nor did we obtain any assistance from the argument that DEFRA had decided not to insert any quantity threshold criteria in relation to this item in the first list in Annex II, whereas such thresholds appeared elsewhere in the EIA Directive and in the 1999 Regulations. Either this project came within the definition of 'project' in Regulation 2 (see para 13 above) or it did not.

27 In our judgment it did not. We do not consider that what was done in this case was capable of being described as an intervention for intensive agricultural purposes, and although

we remind ourselves that the EIA Directive has a wide scope and a broad purpose, we do not consider that its framers intended it to catch a project that was concerned only to bring land back to a normal level of agricultural productivity.

28 For these reasons we would allow this appeal and grant the appellant a defendant's costs order both in this court and below.

29 The answers to the questions posed by the deputy district judge are therefore:

(i) No, unless the productivity of the land for agricultural purposes is intensified above the norm.

(ii) No.

Analysis by Donald McGillivray, Kent Law School[1]

Introduction

Although only a first instance decision, and a fairly short one at that, *Alford* is an instructive case on some central environmental law issues. In particular, the case raises questions about what we understand by the 'natural environment'[2] and some of the difficulties in using law to regulate threats to that kind of environment, especially here where the potential ecological harm arises from the resumption of agricultural practices. The *Alford* decision also acts as a useful insight into issues about the customarily hands off approach of environmental law to matters agricultural; about drafting and practical implementation of environmental rules, especially rules originating in EC environmental law; and about enforcement styles. Above all, it concerns the interpretation to be given to the phrase 'intensive agricultural purposes' in deciding whether environmental impact assessment is required for certain agricultural activities.

Agriculture, EIA and the UK

To understand the wider context in which the Alford prosecution arose we need to consider the legislative history of the 1985 EIA Directive and its UK implementation. The judgment in *Alford* charitably glosses over the extraordinary delay in transposing the requirements of the Directive in relation to agriculture. Although the 1997 amending Directive clarified the point that consent procedures had to be required for projects that fell within the scope of the Directive, arguably this was always implicit from a purposive reading of the original Directive. Hence, the 2001 Regulations at issue here can be seen as being implemented over 13 years after the 1988 deadline for transposition of the original Directive. As the Minister responsible remarked of the issue in 2000, 'To be honest, it has been sat on for many reasons'.[3]

To understand why the UK[4] delayed we need to go back to the lengthy pre-legislative phase of the 1985 EIA Directive. A key concern then was to avoid the US experience

[1] I am grateful to Heler Byron, Bill Howarth, Richard Macrory and Chris Rodgers for comment on a draft of this note. The usual disclaimers apply.

[2] '[The land] was kept as grazing moor land. It was maintained in its natural habitat' (para 2).

[3] HC Hansard, 24 November 2000, Vol. 357, Col 599 (Eliot Morley).

[4] The position is broadly the same beyond England; see the Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) (Scotland) Regulations 2002 (SSI 2002/6), the Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) (Wales) Regulations 2002 (SI 2002/2127 (W.214) and the Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) (Northern Ireland) Regulations 2001 (SI 2001/435).

with implementing the National Environmental Protection Act 1970 (NEPA). This, the seminal provision on environmental assessment, gave rise to much litigation in the interpretation of the requirement for an environmental impact statement for 'every recommendation or report on proposals for legislation and any other major Federal Actions significantly affecting the quality of the environment'.[5] As Richard Macrory has recently noted in this Journal, 'the spectre of US environmental litigation haunted much of the discussion and negotiation during the development of the EC Directive'.[6] An additional factor may also have been that the US approach, of enacting ambitious statutes and relying on the courts to work out the details, was difficult to reconcile with what, at the time at least, was a much more detailed approach taken to the drafting of Community legislation.[7] As a result, by the time of the 1980 draft Directive,[8] the split-list system had been agreed upon, under which certain projects would require mandatory assessment (Annex I projects), whereas for those projects in Annex II of the Directive, assessment would only be required if they would be likely to give rise to significant environmental effects. While agricultural projects had originally featured in Annex I, by the time of the 1980 draft Directive they had been placed in Annex II and made subject to discretionary assessment. The main reason for this was, it seems, UK insistence, without which—under unanimity—no Directive could have been agreed.[9]

The key Parliamentary debates on the draft Directive took place at the same time that the Wildlife and Countryside Bill was making its contested passage through the House of Lords. This gave rise both to an appreciation of the damage that agriculture could cause to the natural environment, but also to the passage of the Wildlife and Countryside Act 1981 which decisively continued the voluntary approach to nature conservation. Some actors thought that the provisions of the draft EIA Directive could be a powerful tool to counteract the absence of the agricultural use of land from planning law and the availability of environmentally-insensitive grants for agriculture. But, as has been argued, one reason why the UK felt able to accept the EIA Directive was because of its belief that only the provisions relating to Annex I projects had any practical legal force.[10] Most of these were subject to existing consent procedures and in many cases would be subject to a public inquiry, leading the government to argue that this amounted to compliance with the Directive.[11] There was never any government desire to apply EIA to projects falling within Annex II of the Directive unless this was expedient. The later stages of the negotiation of the Directive also coincided with the period of the first Thatcher administrations and

[5] S 102 National Environmental Protection Act 1970 (US).

[6] R. Macrory, 'Principles of Judicial Review on Environmental Assessment' (2004) 16 JEL 2 at 279, 285.

[7] W.R. Sheate and R.B. Macrory, 'Agriculture and the EC Environmental Assessment Directive: Lessons for Community Policy-Making' (1989) 28 JCMS 1 at 68, 71.

[8] COM(80), 313, OJ C 169/14, 9 July 1980.

[9] Sheate and Macrory, n 7 above. The UK Department of the Environment was originally reluctant to agree to mandatory EIA for any projects, see House of Lords Select Committee on the European Communities, *Environmental Assessment of Projects*, eleventh Report, Session 1980–81, HL 69.

[10] Sheate and Macrory, n 7 above at 73–74.

[11] A view taken up to the point when the main tranche of implementing regulations were being enacted. See, for example, Lord Caithness, House of Lords, Hansard, Vol. 492, No. 1380, 27 January 1988: 'The planning system in Great Britain already ensures that the environmental implications of new development are considered before permission is granted'. This view neglected the structured nature of considering environmental information, and the role of public consultation in this process, which would later be so central to cases such as *Berkeley v Secretary of State for the Environment and Fulham Football Club (Berkeley No. 1)* [2001] AC 603; (2001) 13 JEL at 89.

their deregulatory desire to reduce the scope of planning law and ease the regulatory burden on business.[12] And 'when it came to implementation of the Directive, the UK Department of the Environment and the Ministry of Agriculture, Fisheries and Food in particular [chose] to remain silent on the subject of the cultivation of semi-natural areas'.[13] Untouched by town and country planning controls,[14] and indeed actively supported by generous grant aid,[15] these provisions led to a 'do nothing' approach to implementation. Any attempt at regulating these activities would have cut across the approaches being taken to nature conservation law and to planning control, and might have opened a Pandora's box of legal controls over agriculture.

The Commission Intervenes

The questionable approach of the UK towards EIA and agriculture received its first formal challenge at the time of the 1992 furore over the extension of the M3 motorway at Twyford Down and other headline development and infrastructure projects. As a part of a political deal that was cut at the time, the Commission terminated infringement proceedings against the UK in relation to a number of infrastructure projects (the M3 extension at Twyford Down, the M11 Link Road and the Channel Tunnel Rail Link)[16] in return for the UK accepting, amongst other things, that EIA procedures should be applied to the use of semi-natural and uncultivated land for intensive agricultural projects.[17] However, it took a further decade, and a certain amount of sailing close to the wind in relation to the European Court of Justice,[18] before legislation in England and in each of the devolved administrations was enacted.

[12] See, generally, N. Haigh, 'Environmental Assessment – the EC Directive' [1987] JPL 4; J. Holder, *Environmental Assessment* (Oxford: OUP, 2004) at 265.

[13] Sheate and Macrory, n 7 above at 75. The Agriculture Ministry did not even participate in implementation working groups on the grounds that most agricultural practice was outside the scope of the planning laws and therefore not affected by the Directive; see P. Wathern, 'The EIA Directive of the European Community' in P. Wathern (ed.), *Environmental Impact Assessment: Theory and Practice* (London: Routledge, 1988) at 192–209, 205.

[14] Although projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes have always been included in Schedule 2 to the general implementing regulations covering town and country planning, this was always meaningless, since these activities fall outside the town and country planning system.

[15] The justification for not formally applying EIA to initial afforestation projects for many years was to link it with grant aid; see, generally, C. Reid, 'The Changing Pattern of Environmental Regulation: British Forestry and the Environmental Agenda' (1997) 9 JEL 23 at 38. In 1980, 50% grants were available for conversion of open morrland to ryegrass lots; see M. Shoard, *The Theft of the Countryside* (London: Temple Smith, 1980) at 77.

[16] By press release; see IP/92/669, and see, generally, P. Kunzlik, 'Environmental Impact Assessment: The British Cases' (1995) 4 EELR at 336.

[17] HC Written Answers, 16.12.1992, Cols 319–20. See J. Holder, *Environmental Assessment* (Oxford: OUP, 2004) at 50. The UK also agreed to drop proposals for the East London River Crossing which would have affected ancient woodland at Oxleas Wood. On the Commission problematically accepting guarantees 'equivalent' to those required by the EIA Directive, and the controversy generally see P. Kunzlik, 'The Lawyer's Assessment' in B. Bryant (ed.), *Twyford Down: Roads, Campaigning and Environmental Law* (London: E and F N Spon, 1996).

[18] Commission moves against Spain, Italy, United Kingdom, and the Netherlands over Impact Assessment Directive, IP/01/1166; Case C-421/02 *Commission v UK* [24 June 2004, ECJ]. Whether the Commission has any great enthusiasm to prosecute for non-transposition of this provision is unclear. There appear to be no reported infraction proceedings that have reached the Court of Justice, and it must be somewhat doubtful whether the Commission would take infringement proceedings for practical non-compliance. Where impacts on the environmental media or on conservation interests are at stake then these are likely to be the subject of other, more specialist, provisions of EC law. But otherwise, the significant environmental effects from, say, ploughing uncultivated land, such as impacts on archaeological features, might be such that, as a matter of sensitivity to subsidiarity, the Commission might be reluctant to take enforcement action.

During this period the failure to implement EIA in relation to certain agricultural operations was not without environmental consequences. For example, as the House of Commons Select Committee noted in its inquiry into the serious flooding of 2000,

> The difficult question is what to do about damaging agricultural practices, especially in view of the low level of current farm incomes. One thing we can be certain about is the need to apply the Environmental Impact Assessment Directive to agriculture. … [The Directive] has applied for several years to many types of development, but MAFF has managed to delay its implementation for 15 [sic] years … It is salutary to consider that a contributory cause of the recent floods may have been the determination of MAFF over many years not to implement the Environmental Impact Assessment Directive. This is a grave condemnation of this Ministry. We welcome the statement by the Minister for Agriculture and the Countryside that these regulations will now be issued. This must be done as a matter of urgency.[19]

The Agricultural EIA Regulations: Law and Practice

Various points may be made about the shape of the Environmental Impact Assessment (Uncultivated Land and Semi-Natural Areas) (England) Regulations 2001 (henceforth 'the Agricultural EIA Regulations') that, as I argue below, may be material to how the *Alford* case should have been decided.

The first is that the Regulations are unique in the UK in relation to the implementation of the EIA Directive in their use of the criminal law to secure implementation. It is tempting to say that a consent procedure has—for the first time—been established, because projects must be screened for the significance of their environmental impact and, if they are likely to give rise to significant environmental effects, then an Environmental Statement must be submitted to DEFRA and the consent of the Secretary of State given. However, it might be more accurate to say that the Regulations have gone out of their way to *avoid* the setting up of a consent system. While the Regulations provide for criminal liability if uncultivated land is brought into more intensive production without the submission of a request for a screening opinion, the offence is a stand-alone one and is not linked to any prior approval regime. By contrast, most other regulations which implement the EIA directive link screening with an existing consent system, so that the penalty for not submitting an environmental statement or for not submitting a project proposal to screening is simply that the regulator is prevented from issuing any consent until, if need be, environmental information is properly considered.

The direct use of the criminal law in this way has some important consequences. It contributes in part to the very light touch that is taken in practice by DEFRA to the exercise of its powers under the Regulations. Although there have been a handful of successful prosecutions under this provision,[20] these have tended to follow tip-offs from members of the general public, and there has been little or no routine enforcement activity by DEFRA. More notably, when screening opinions are sought it is DEFRA policy to make a site visit and advise the landowner on how to pursue his or her objectives without triggering the need to submit an environmental statement. A common approach is by suggesting to farmers how they might shape their proposals

[19] HC Select Committee on the Environment, Transport and Regional Affairs, Second Report, *Development on, or Affecting, the Flood Plain*, HC 64, Session 2000–01, para 44.

[20] For a note on two early prosecutions see ENDS Report 353, July 2004 at 62.

so that they would not require screening, for example by DEFRA officials offering suggestions on how the proposal might come within one of the financial incentive schemes that currently operate.[21] The success of this strategy can be seen from the striking fact that no environmental statements have ever been required, and hence no consent decisions made.[22] But it also emphasises the point that the Agricultural EIA Regulations do not provide a general consent system; only where projects have been identified as being likely to have significant environmental effects and these have not been able to be mitigated or the project proposal modified will they fall within the consent system in the Regulations. Or, in other words, there is no fallback control regime if these high hurdles are not cleared,[23] because the use of land for agriculture is excluded from the town and country planning regime.[24] This might be considered a valid reason for interpreting the provisions of the Agricultural EIA Regulations generously in favour of DEFRA.

However, a further consequence of the use of the criminal law is that the general presumptions of the criminal law in favour of the defendant will apply. This is important because, while the definition at issue may carry an autonomous meaning as a matter of EC law (see below), it nevertheless adds an additional factor to the interpretive mix that is not present when, for example, provisions of the main town and country planning EIA Regulations are at stake. Hence, it may not be possible simply to read across from the general case law on the interpretation of the EIA Directive (discussed below) since this jurisprudence has invariably arisen in the context of administrative decision-making.

The *Alford* Case and the Definition of 'Intensive Agricultural Purposes'

The law in relation to whether an activity falls within one of the project categories in Annexes I or II of the EIA Directive is now most definitively expressed in the *Big Yellow Property Co* case.[25] In deciding whether the construction of a warehouse and self-storage building was an 'urban development project' for the purposes of Schedule 2 to the main EIA Regulations, the Court of Appeal stated that:

> However fact-sensitive such a determination may be, it is not simply a finding of fact nor of discretionary judgement. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the Regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must

[21] See DEFRA, Environmental Impact Assessment for Use of Uncultivated Land or Semi-Natural Areas for Intensive Agricultural Purposes: Guidelines (2002), para 3.

[22] Personal communication, DEFRA, 24 June 2005. A flavour of how the consent regime is intended to work can be seen in Reg. 13(11)(c): 'the consent authorises the project only as described in the consent application, subject to any amendments approved by the Secretary of State pursuant to a request by the applicant …'.

[23] With the possible exception—where subsidy is linked to production—of agri-environmental cross-compliance; see, e.g. the Common Agricultural Policy Single Payment and Support Schemes (Cross Compliance) (England) Regulations 2004 (SI 2004/3196), Reg. 15. Under s 42 of the Wildlife and Countryside Act, 1981 moorland conservation orders can be made by the Secretary of State, but these apply only to land within national parks and only provide for a 12-month waiting period within which to negotiate a suitable agreement with the landowner. Very few have been made.

[24] S 55(2)(e) Town and Country Planning Act 1990.

[25] *R (Goodman) v Lewisham London Borough* [2003] Env LR 28. For comment see Macrory, n 6 above. Note that Brooke LJ, the leading judge in *Alford*, also sat in *Big Yellow*.

correct that error: and in determining the meaning of the statutory expressions the concept of reasonable judgment as embodied in *Wednesbury* simply has no part to play.[26]

Buxton LJ went on:

That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions may be legitimately available. That approach to decision-making was emphasised by Lord Mustill, speaking for the House of Lords, in *R. v Monopolies Commission ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 at p.32G, when he said that there may be cases where the criterion, upon which in law the decision has to be made:

'may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational'.

Following *Big Yellow*, therefore, whether a project falls within a listed category—which in relation to Annex II projects must precede the question whether the project is likely to give rise to significant environment effects—is only 'a straight question of law'[27] with this proviso. For the reasons given by Buxton LJ, as well as further factors considered below, a more subtle approach may be needed.

There are three key stages to deciding whether a project falls within the wide[28] scope of the Directive: (A) whether it falls within a project category—the categorisation question; (B) the legality of any thresholds that have been applied—the threshold question; and (C) whether a project is likely to give rise to significant environmental effects—the significance question. The balance of matters of law over fact is clearly greatest in the categorisation question and weakest in the significance question but not to the complete exclusion of other factors.[29] Decisions about thresholds, however, involve a greater mix of matters of fact and law, because as a matter of reviewing the legality of the setting of thresholds the discretion of the national authorities must be tempered by the overriding consideration in Article 2(1) of the Directive that projects with likely significant environmental effects must be assessed.[30] But the 'pull' of Article 2(1) decreases the further that the decision involves matters where fidelity to project categorisation is at issue. As noted above, the categorisation approach is important since, as well as providing for a measure of legal certainty about which kinds of projects may require assessment, it also reflects a central element of the legislative history and purposive intent of the Directive. Similarly, the weight to be given to Article 2(1) decreases

[26] Para 8.

[27] M. Grant, 'Development and the Protection of Birds: The *Swale* Decision' (1991) 3 JEL at 150.

[28] Case C-72/95 *Aanemersbedriff P K Kraaijeveld BV v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403 ('Dutch Dykes'), para 31 ('The wording of the directive indicates that it has a wide scope and broad purpose').

[29] See *R (Jones) v Mansfield DC* [2003] EWHC 7 ('determination of "significance" (for Annex II projects) is a matter for the administrative authorities, subject only to judicial review on conventional "*Wednesbury*" grounds', per Carnwath LJ, para 60 and see also *R (Malster) v Ipswich Borough Council and Ipswich Town Football Club* [2001] EWHC Admin 711.

[30] Case C-72/95 *Kraaijeveld* (see n 28 above) and, more restrictively, see *Berkeley v Secretary of State for the Environment, Transport and the Regions (No.3)* [2002] Env LR 14 (for comment see W. Upton (2002) 14 JEL at 346).

the more that the matter is one which is better judged by expert decision-makers, as in significance questions.[31]

As in *Alford*, therefore, whether something is done for an 'intensive agricultural purpose' is not to be gleaned by a battle of dictionary definitions alone. It is a decision which is predominantly to be determined as a matter of law, but it is also a decision in respect of which other factors may need to be considered. These factors may not carry great weight in the interpretive process but neither are they wholly irrelevant.

A central difficulty in the *Alford* case is that the relevant project category—projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes—conflates different environmental problems; the loss of uncultivated land and of semi-natural areas, and the problem of agricultural intensification. The latter is well recognised as giving rise to environmental problems, especially in the form of waste production, water pollution and amenity interferences. But the former can lead to environmental problems regardless of the activity that gives rise to this. For example, in addition to things like habitat damage or nutrient loss from activities like the ploughing of meadows,[32] additional problems can be caused, such as damage to land of archaeological or landscape interest.[33] The degree of severity of this damage is not necessarily linked to the intensity of the agricultural operations.

However, the categories listed in Annexes I and II of the EIA Directive are project based—they are based on potentially harmful activities rather than potentially harmful consequences. While listing according to consequences might have been environmentally and ecologically preferable, the difficulty would have been that the NEPA-avoidance approach, discussed above, would have been compromised. The more that something falls within a project category because of the significance of its impacts, the more that the importance of the project categories themselves melt away.

The argument in favour of the DEFRA interpretation of what 'intensive' amounts to—as one aimed at an increase in productivity for a given area of land—might be made at its strongest by putting various considerations together. As I have argued above, it is at least tenable that the overriding objective of the EIA Directive as contained in Article 2(1) carries some weight, even in relation to classification questions. This is a matter on which the Court of Justice has yet to give a definitive ruling but, as the *Kraaijeved* case in particular makes clear, there may be circumstances where the purpose of the legislation demands that the courts take a particularly

[31] A similar point could be made about the weight given to Article 2(1) in relation to national procedural rules; there are several examples, even after *Berkeley (No. 1)*, where the courts have stressed that principles of good administration may dictate that a project ought not to be considered for environmental assessed when this might otherwise have been required. See *R (Jones) v Mansfield DC* [2003] EWHC 7, per Carnwath LJ, para 59. See also *R v North West Leicestershire District Council and East Midlands International Airport Ltd, ex parte Moses (No.2)* [2000] Env LR 443 and *R v London Borough of Hammersmith and Fulham ex parte Trustees of the CPRE* [2000] 81 P&CR 73 (CA). There are ongoing proceedings brought by the Commission before the Court of Justice in relation to the issues raised in the *CPRE* case. Generally on the tension between procedural EC law and national procedural rules in EIA see K-H. Ladeur and R. Prelle, 'Environmental Assessment and Judicial Approaches to Procedural Errors—A European and Comparative Law Analysis' (2001) 13 JEL at 185.

[32] In recent years [reference does not seem particularly *recent*], the first-time cultivation of meadows for potato growing has given rise to particular problems, including potentially harmful increases in water abstraction for this thirsty crop. Between the 1930s and the 1980s, 97% of unimproved grassland in England and Wales was lost, see R. Fuller, 'The Changing Extent and Conservation Interest of Lowland Grassland in England and Wales: a Review of Grassland Surveys 1930–1984' (1987) 40 *Biological Conservation* at 281–300. See also Judgment, para 20.

[33] See, generally, *The State of Soils in England and Wales* (Environment Agency, 2004).

broad approach to interpretation.[34] There is also some authority that significance in EIA must be judged relative to the status quo. This is a point that emerges from the *Ipswich Town Football Club* case. In that case it was held that the significance of the impact of a replacement of a football stand had to be judged in part by comparing the effects of the development—on things like shadowing of neighbouring properties—with existing impacts from the current stadium.[35] In addition, as has been argued, how the courts review an exercise of discretion under EC law may properly depend on the things that are intended to be protected through law.[36] However, even stacking all this up, the interpretation of categorisation questions is restricted because of the list system adopted. Where this is the case, as in *Alford*, then 'significance' in relation to categorisation questions is, I would argue, of little weight.

It must be borne in mind, however, that one factor in giving the EIA Directive an expansive reading, in cases like *Grosskrotzenburg*[37] and *Kraaijeveld*, was to limit the scope for Member States to evade their responsibilities and hence to further the effectiveness of the Directive as a whole. In the former case, the mischief was the possibility that mandatory EIA might be avoided by enlarging existing installations rather than developing new facilities; in the latter, that excessively high thresholds might be used in practice to remove whole categories of projects from the need for assessment. *Alford* is different to both cases, however, because there is no sense in which—at least following the Agricultural EIA Regulations—the Member State or its public authorities are seeking to avoid their responsibilities, either by a restrictive reading of the Directive or of its implementing legislation. Indeed, a notable feature of *Alford* is that it is the relevant competent authority that is seeking the more expansive interpretation.

The compromise solution in relation to agricultural projects, therefore, serves to emphasise that matters of significance must have a very restricted role to play in determining as a matter of law the autonomous meaning of phrases like 'intensive agricultural purposes'.

Does the Judgment Go Too Far?

Thus far I have favoured the view that the restrictive judgment of the Divisional Court is defensible if one understands the legislative history of the EIA Directive and the limitations on taking a purposive approach to its interpretation. Indeed, the Court stressed the need, following *Kraaijeved*, to take such an approach:

[34] As seen most clearly in *Kraaijeveld* in the Court's interpretation of the Directive that modifications to Annex II projects might themselves amount to Annex II projects (on which see now Annex II, para 13, added by the amending EIA Directive 97/11/EC).

[35] *R (Malster) v Ipswich Borough Council and Ipswich Town Football Club* [2001] EWHC Admin 711.

[36] A point made in C. Hilson, 'Legality Review of Member State Discretion Under Directives' in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-First Century: Volume 1* (Oxford: Hart Publishing, 2004), where he uses a number of examples from environmental directives to question the limits of member states' discretion in implementation, and argues that it may be proper under what Prechal calls 'legality review' (S. Prechal, 'Does Direct Effect Still Matter?' (2000) 37 CML Rev at 1047)—the *effet utile* doctrine—to distinguish the standard of review depending on whether matters of fundamental rights are at stake, as might be the case where matters of human health are concerned, an approach that has parallels with that taken by the Strasbourg Court to the required intensity of review in fundamental rights cases (see *Smith and Grady v UK* (2000) 29 EHRR at 493).

[37] Case C-431/92 *Commission v Germany* [1995] ECR I-2189.

We do not consider that what was done in this case was capable of being described as an intervention for intensive agricultural purposes, and although we remind ourselves that the EIA Directive has a wide scope and a broad purpose, we do not consider that its framers intended it to catch a project that was concerned only *to bring land back to a normal level of agricultural productivity.* (emphasis added)[38]

There are any number of environmentally harmful activities that could be included in Annex II but which are omitted. The legislature chose certain kinds of activities for intensive agricultural purposes, and this decision ought to be respected.

However, in reply to the first question stated—does an increase in the productiveness of a given area, or an intensification of the agricultural purposes to which the land is put come within the definition of 'intensive agricultural purposes'?—the Court answered:

No, unless the productivity of the land for agricultural purposes is intensified above the norm.

From this the Court seems to be defining 'intensive agricultural purposes' relative to 'normal agriculture' rather than relative to prior agricultural uses of the land in question. But this seems to imply that 'normal' agriculture is not intensive, something that most would find to be a problematic conclusion. In relation to the dictionary definition that the Court found more helpful, of 'aiming to achieve maximum production', it might be asked whether, within the parameters of the CAP, farmers ever set out to achieve production that is sub-optimal. It also begs the question as to what 'the norm' is—is this something for the decision-maker to determine as a matter of fact, or a matter of law for the courts to oversee?

An ambiguity in the judgment, then, is that it is not clear what the standard is against which to judge intensiveness—does it mean 'the norm' for the land, or 'the norm' for agriculture generally? If it is the latter, then in practice this would make the provision fairly meaningless. For example, on this interpretation the mere ploughing of land per se would not be an 'intensification above the norm'. If this is the case, then the decision in *Alford* calls into question at least one previously successful prosecution of a farmer under the Agricultural EIA Regulations for the ploughing of four hectares of unimproved grassland without, it would seem, any further 'intensification' in the sense of the application of synthetic fertilisers.[39]

But if it is the norm for the land in question, then the issue is what time frame is employed?[40] As noted above, there is a strong suggestion in *Alford* that the Court was reluctant to see the landowner prosecuted only for bringing the land *back* into productive use. Indeed, although it is not specifically mentioned in the judgment, it is worth noting that in 2002 Mrs Alford obtained vacant possession of the land at Vixen Tor following a successful application to the Agricultural Lands Tribunal for a Certificate of Bad Husbandry.[41] However, issues of time are to be taken into account when deciding whether land is 'uncultivated' or 'semi-natural', with a benchmark of 15 years discontinuation of activities like ploughing.[42] Nevertheless, the point remains

[38] Judgment, para 27.
[39] See ENDS Report 353, June 2004 at 62.
[40] Moorland is of course land which after the Ice Age was forested but subsequently cleared for sheep runs and for timber, see Shoard, above n 15 at 76.
[41] Under s 346 Agricultural Holdings Act 1986.
[42] DEFRA, *Guidelines*, n 21 above, para 12.

that here the conservation interest that was said to be at stake arose from years of bad agricultural husbandry.

Perhaps the real root of the problem is that the concept of intensiveness is one that might ordinarily be thought of as admitting of degrees, whereas the difficulty here is that intensive is being used in an absolute way (an agricultural purpose being either intensive or not).[43] It is certainly difficult to characterise the modern agricultural revolution as having a 'big bang' moment when production methods suddenly shifted towards something that could be labelled intensive, and perhaps it is better to see intensification as a process. Although the Court rejected the OED definition of 'intensive'—as referring to any increase in productivity rather than to an increase of land under production—as being unhelpful to the prosecution's case, perhaps this is the better approach, and an approach which better fits the actual wording of the Directive and the reference to 'intensiveness' alongside primarily unimproved land.

Vixen Tor: The Wider Picture

The EIA prosecution at issue is not the only, nor even the main, legal dispute about the Vixen Tor area. For decades, some of this land, including the Tor itself, was subject to de facto public access, no doubt in part because of the neglect and acquiescence of the previous tenants. Having blocked access on acquiring an interest in the land in 2002, in March 2005 Mrs Alford was largely successful in a series of appeals against the mapping of land in the area, including the Tor itself, for the purposes of the 'right to roam' provisions of the Countryside and Rights of Way Act 2000.[44] To fall within the definition of 'mountain, moor, heath or downland' to which, along with common land, the 2000 Act extends, land must be 'wholly or predominantly' of this kind. In the case of the field containing the Tor itself, the Inspector's decision was that the land was on balance not predominantly moorland because of the extent of improved or semi-improved grassland.

Some who are unhappy at the restrictions on access have therefore suggested a link with the EIA prosecution by alleging that the improvements undertaken were motivated in part at least by a desire to take the land out of the category of 'mountain, moor, heath or downland'.[45] This may have been reached because of the actions of the spreading of the fertiliser that gave rise to the EIA prosecution. There is nothing in the Inspector's report on the access dispute to suggest that the spreading of the fertiliser tipped the categorisation of the Vixen Tor field in particular away from being predominantly moorland. Nevertheless, the concern remains that activities such as those undertaken by Mrs Alford may be used as a means of avoiding the mapping of access land under CROWA 2000, and that addressing this potential loophole was a motivating factor behind the prosecution.

[43] I am grateful to Bill Howarth for this point.

[44] The Inspector's appeal decision is available via the Planning Inspectorate website <www.planning-inspectorate.gov.uk>.

[45] See e.g. 'Access Shock at Vixen Tor Undermines CRoW Act', British Mountaineering Council press release, 24 February, 2005; ' "Shock and anger" at Vixen Tor', Ramblers' Association press release, 25 February 2005; <www.ukclimbing.com/forums/t.php?t=119922>.

Conclusion

Farming has tended to be cosseted when it comes to its environmental impacts. JB Ruhl, commenting on the US experience, has expressed this as an 'anti-law' that has insulated modern agriculture from many of the regulatory controls that otherwise apply to modern environmentally harmful activities.[46] On the other hand, modern agriculture has of course benefited from, and continues to benefit from, law in its imperium mode. In the absence of planning law controls on the use of land for agriculture, and of conservation law protections for land like Vixen Tor (which presumably is deemed not to be of sufficient interest to be designated on nature conservation grounds), attention has turned in part to the role that EIA law might play. In rejecting calls for the use of land for agriculture to be brought within the planning system, however, the Royal Commission on Environmental Pollution noted that the Agriculture EIA Regulations should be given time to show their worth, failing which the need for planning law to extend to controlling agricultural land use might need to be reconsidered.[47]

What we think of the decision in *Alford* may depend on whether the issue is approached from a primarily agricultural or environmental perspective. From the former, the actions of the farmer brought the land *back* to a more desirable, and legally supported, state. But an environmental perspective eschews such considerations and focuses on the *consequences* of the action. Although neglect can be a problem for some conservation interests,[48] here neglect was the reason *for* the conservation interest arising.

It may be that the approach of the Court to the interpretation of the Regulations is appropriate and defensible.[49] But it is also clear that potential loopholes remain. However, in this note I have tried to argue that these arise as much from the initial drafting of the EIA Directive than from any lack of purposive interpretation by the Court. It is certainly clear that, during the negotiation of the Directive, the potentially harmful consequences of ploughing uncultivated land and semi-natural areas were recognised, and that 'intensive' could simply not have been inserted into the definition in Annex II. Against this, however, there is a clear difficulty in interpreting 'intensive agricultural purposes' in a way that catches at least some harmful activities. This is a difficulty which, it is understood, may be addressed by the higher courts[50]—and would not seem inappropriate for a reference to the Court of Justice.

[46] J.B. Ruhl, 'Farms, Their Environmental Harms, and Environmental Law' (2000) 27 Ecology LQ at 263, 288. For example, most US states have 'right to farm' laws, which protect agriculture from the effects of the rule under which it is normally not a defence to an action in private nuisance to argue that the claimant 'came to the nuisance'.

[47] Royal Commission on Environmental Pollution, *Environmental Planning*, Twenty Third Report, Cm 5459, para 9.53.

[48] Provisions to counter damage to SSSIs from neglect are central features of the amendments to Part II of the Wildlife and Countryside Act 1981, see s 28J (management schemes) and s 28K (management notices) added by the Countryside and Rights of Way Act 2000.

[49] To give a flavour of reaction to the judgment, the Open Spaces Society was 'appalled' by it, see 'Judgment for Vixen Tor', 11 May 2005 <www.oss.org.uk>.

[50] It is understood that DEFRA is likely to lodge an appeal. Also of note is the *Public Consultation on Introduction of New Environmental Impact Assessment (Agriculture) (England) Regulations* (DEFRA, August 2005).