

David Hughes

Environmental Law



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Introduction

The late 1960s saw growing concern over environmental abuse, exhaustion of natural resources and alteration of nature's balances. Concern arose over, *inter alia*: population increases; greater pollution levels; human impact on animal populations and natural landscapes; great increases in car ownership; consequent increase in the use of hydro-carbon fuels; and other aspects of resource depletion. International concern was expressed in the Stockholm Conference on the Environment in 1972. Many states took steps to increase the scope and effectiveness of environmental protection laws, for example the UK's Control of Pollution Act 1974, and harmonising measures taken by members of the European Communities. Since 1974 the world's attention has, perhaps, been principally concentrated on economic affairs (largely the consequence of heavy dependence on that volatile commodity, oil) and the need to preserve world public order. Nevertheless the factors that gave rise to environmental concern remain, some of them in increasingly urgent forms.

Many remain unaware of the fragility of the environment, but there is an increasing consciousness of the issues. Jowell and Witherspoon *British Social Attitudes: the 1985 Report* (published by Gower) revealed serious concern over civil nuclear programmes, radioactive waste, noise (particularly from traffic), lead in petrol, and industrial pollution of air and water. In some other European nations, notably West Germany, environmentalism is already a strong political force. The UK as yet lacks realisation of a broad common identity between the variously concerned environmental groups sufficient to enable the emergence of a 'green' political party as a major force. *Concern* has not given rise to a broad *consensus* on issues.

This book examines, against the background of concern, current UK law and practice, though the increasing role of obligations imposed under EEC law is examined. It is impossible, for reasons of space, to examine relevant international law. The same constraints have made it necessary to concentrate on large scale issues affecting the whole nation, or major parts thereof, with regard to the physical environment. This has entailed *generally* omitting protection of plant and animal life, also laws protecting individual historic buildings or areas of architectural interest. The book is intended primarily as a textbook for students in British universities and colleges reading for law degrees. It is also intended for those studying for qualifications in planning and environmental health, and may, it is hoped,

be useful as an initial guide for those in central and local government and industry who have to administer the law.

Before individual chapters examine specific problems, the general national issues in environmental law should, however, be examined.

The general issues

- 1 It is not always possible, and rarely easy, to know what environmental consequences may in future flow from particular industrial, agricultural or energy producing processes, nor the ways in which they may eventuate. Accordingly the law could require:
 - (a) cautious progress on processes until found to be 'innocent';
 - (b) progress with processes until found to be 'guilty'; or
 - (c) no progress until intensive research has been conducted into a proposed process.

Each course of action involves social, economic and environmental consequences, but (b) represents the 'traditional', most common British approach to such issues, though it is *not* the exclusive approach.

- 2 It is frequently easier to attack a particular process, by stating what *may be* its undesirable consequences, than to defend it.
- 3 It is easy for opinions on the merits/demerits of policies and processes to polarise, especially where there is apparently conflicting data on a process or project's consequences. This is especially true where a project's proponents rely on demand forecasts to support proposals. Such forecasts are mistrusted by many. They have had some history of unreliability, being on occasions overtaken by technical progress made elsewhere.
- 4 Where a process is found to have unwanted consequences questions arise of who should 'pay' for them. The principle usually argued for is 'the polluter pays', by being taxed, or required to install anti-pollution devices, or being made to pay awards of damages. However, these extra costs may be passed on to the polluter's customers. It may also be in the final analysis desirable to impose pollution control costs on some other body. For example, it may be considered 'better' for water authorities to remove nitrates from water rather than to require farmers to curtail putting nitrates on land whence it may get into water supplies; reduced use of nitrates could seriously disrupt farming patterns and cut crop yields to unacceptable levels. The 'cost' has to be borne somewhere in society nevertheless.
- 5 Some environmentally disruptive projects may be justified in 'cost benefit analysis' terms; the monetary cost of the projects being said to be outweighed by benefits that will flow therefrom. Many people feel that the equation is meaningless in that 'benefits', a vague word, cannot always be quantified in monetary terms.
- 6 Where law imposes standards of environmental control there is debate over what type of standard to impose. It could be:

- (a) *an absolute prohibition* on a particular activity;
- (b) *a specification standard*, attempting to *prevent* a polluting consequence of a process by specifying design, construction and use features in relevant plant and machinery;
- (c) *an emission standard* laying down upper limits for emissions from relevant processes;
- (d) *an ambient standard* requiring regulatory agencies to formulate and apply controls so that the maximum permitted concentration of a pollutant at any given place is not exceeded by the aggregate of the emissions of the various relevant local processes;
- (e) *a receptor standard* imposing control on a process when a particular level of environmental damage is perceived; or
- (f) *managerial or licensing control* whereby whether or not to allow a particular activity in a particular location is left to the discretion of an authority who are generally required to have policy guidelines in relation to such matters.

[See further Harte *Landscape, Land Use and the Law* ch 3, and especially pp 92–93, to which the author acknowledges indebtedness.]

Examples, singly or in combination, of these types of standard can be found in environmental law. Emission standards are used in the protection of air and water. Specification standards are also used in respect of clean air control. Planning law is an example of managerial or licensing control. Ambient standards are little used, however, in British practice, though they are favoured by our European partners.

- 7 There is no national consensus on environmental issues. The interests of persons and groups can frequently be at odds. This compounds the problem discussed above in relation to choosing appropriate standards of regulation: where there is no clear consensus on the desirability of control the law will find it hard to formulate and apply an appropriate level of control. To be successful an environmental measure to counter a hazard needs: clear, agreed perception of the hazard, its nature, quality and consequences; a body of supporting authoritative scientific evidence detailing issues; an available corrective technology; and a convergence of interests between 'the public' and 'the polluter' so that it makes social and economic sense to eradicate the hazard and for any increased costs flowing therefrom to be borne. If one or more of these conditions is not met, the law must normally be managerial, providing for orderly management of physical change while laying down basic levels of protection for the environment and its occupants. Law in such circumstances must give enforcing agencies wide discretion, and must to an extent rely on education and exhortation to bring about better environmental behaviour.
- 8 The personnel of control are diffusely scattered between various local, national and ad hoc agencies, with little effective coordination between them. *Pollution Paper No 22* in response to the *Royal Commission on Environmental Pollution* 10th Report announced, however, the

creation of a Central Directorate of Environmental Protection within the Department of the Environment, and pointed out that the Ministry of Agriculture has an Environment Coordination Unit to deal with pollution, conservation and rural affairs. Furthermore government adopts, in relation to pollution issues, the 'best practicable environmental option' (BPEO) approach to ensure the least harm both in relation to individual local issues, and strategic national matters.

- 9 However, environmental policy should not be the preserve of just one or two governmental agencies. *All* bodies — public and private — should be required to consider the environmental aspects of practices and policies. This should be particularly true in relation to energy and transport, though it is debatable whether either is the subject of a fully formed, thought-through and coordinated national policy.
- 10 Many are apprehensive that current policies will lead to environmental despoilation, and are angry because they feel they have no real chance to halt changes taking place. This is particularly marked in relation to long term 'cliff hanger' projects such as London's third airport, or the widening of Archway Road in North London, where objectors have resisted proposals for many years, and have appeared at costly and time consuming inquiries, only to find the development re-proposed. This leads to a breakdown in the relationship between governors and governed — a serious issue for any legal system.

The law, except as separately stated in ch 4, is stated as at 6 September 1985.

Further reading

Each chapter ends with a further reading list. As general authoritative guides see the Encyclopedias of *Environmental Health Law and Practice*, *Planning Law and Practice* and *Health and Safety at Work Law and Practice* (Sweet and Maxwell), Garner *Control of Pollution Encyclopaedia* (Butterworths), the Reports of the *Royal Commission on Environmental Pollution* and the series of *Pollution Papers* issued by the Department of the Environment on particular issues and as replies to the Royal Commission's report.

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Legal Studies (1983), Richardson, Ogus and Burrow's *Policing Pollution* (1982), Hawkins's *Environment and Enforcement* (1984), and Miller and Wood's *Planning and Pollution* (1983); the University of Leicester Press for quotations from Flinn's *The Medical and Legal Aspects of Sanitary Reform*.

Abbreviations

AONB	Area of Outstanding Natural Beauty
CEGB	Central Electricity Generating Board
DOE	Department of the Environment
MOHLG	Ministry of Housing and Local Government
NCB	National Coal Board
NCC	Nature Conservancy Council
NII	Nuclear Installations Inspectorate
NUM	National Union of Mineworkers
SSSI	Site of Special Scientific Interest
UKAEA	United Kingdom Atomic Energy Authority

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