

RURAL DEVELOPMENT POLICY AND ENVIRONMENTAL PROTECTION: REORIENTING ENGLISH LAW FOR A MULTIFUNCTIONAL AGRICULTURE

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I. RURAL DEVELOPMENT AND THE ENVIRONMENT: SETTING THE LEGAL CONTEXT

A. Agri-Environment Measures and the CAP

Rural development policy in the European Union (EU) has wide (and some may claim conflicting) aims. Although many laymen might not consider the protection of rural environment to be a “development” issue, it has nevertheless become a central plank of European rural development policy in the last ten years. The EU has travelled down a long road fairly quickly in its attempts to assimilate environmental protection into the operation of common agricultural policy. The development of a robust rural development policy, and the recognition of Rural Development as the second pillar of the Common Agricultural

Product (CAP) (along side market management), have been key elements in this. Market management and price support policies pursued within the CAP have unquestionably led to an intensification of farming practices. This has led to problems for landscape preservation and biodiversity; and to problems of water, soil and air pollution, which have been recognized by European policymakers, who now recognize that agricultural production methods can have both beneficial and detrimental effects on local ecosystems, and also on landscape values.¹

This has been recognized and addressed in environmental law. The European Commission's (EC) Fifth Action Programme on the Environment, which established a range of objectives and target measures to be pursued between 1992 and 2002, selected agriculture as one of the five target sectors singled out for special attention.² This was accompanied by an explicit recognition that one of the effects of CAP expenditure across the Community had been an over emphasis in some areas on production levels resulting in excessive intensification, with consequent degradation of the natural resources on which agriculture itself ultimately depends.³ The thrust of the action program was on shared responsibility and the use of multiple mechanisms (both legal and economic) to target the environmental challenges it identified.⁴ This in turn meant that agri-environment measures have played a central role in giving legal effect to policies to promote "sustainable" agriculture.⁵ This approach has continued in the Sixth Environmental Action Programme, agreed in 2002, which emphasises the need to work with the market while using a range of flexible regulatory tools.⁶ The Sixth Programme identifies four priority areas for regulatory action by the Community in the period to July 2012.⁷ These include two to which the role of modern agriculture is of clear relevance, namely nature and biodiversity, and the protection of natural resources.⁸

Since the inception of efforts to "green" the CAP, agri-environmental measures have been closely linked with market management tools within the Community legal order for agriculture. Their environmental focus has often been

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1. See European Commission, *Indicators for the Integration of Environmental Concerns into the Common Agricultural Policy* 2.6 COM (2000) 20 final (Jan. 26, 2000).

2. Europa, *Fifth European Community Environment Programme: Toward Sustainability* (1993) O.J. (C 138), 5, http://europa.eu/legislation_summaries/other/1128062_en.htm (last visited Aug. 3, 2009) [hereinafter *Toward Sustainability*].

3. See *id.*

4. See *id.*

5. See *id.*

6. Council Decision 1600/2002, art. 3, 2002 O.J. (L 242)1, 5 (EC).

7. *Id.* at art. 1.

8. *Id.* at art. 2.

blunted as a consequence of being included in measures with multiple aims. The earliest agri-environment measures were introduced under CAP farm structures, legislation aimed at improving the efficiency of agricultural structures.⁹ This permitted member states to establish zonal programs to encourage the adoption of traditional farming methods in environmentally vulnerable areas. The impetus towards adopting an environmental agenda within the CAP was substantially strengthened by the “accompanying measures” adopted under the 1992 McSharry reform package prior to the conclusion of the WTO Agreement on Agriculture in 1994.¹⁰ The environmental aspects of the 1992 CAP reform were to some extent peripheral to its central thrust. It was primarily aimed at reducing the overproduction of many agricultural commodities within the CAP regime, while at the same time responding to the ongoing GATT negotiations leading to the 1994 agreement. The 1992 agri-environment regulation, one of the so-called accompanying measures, was nevertheless an important step forward, as member states were required (for the first time) to draw up agri-environment programmes and submit them to the Commission to a set timescale.¹¹

The next major development was the effect of the Agenda 2000 reform, which positioned greatly expanded agri-environmental measures within the wider context of “rural development” policy. The Commission’s original proposals for Agenda 2000 posited an expansion of rural development policy to enable agriculture to adapt to changes in market evolution, market policy and trade rules, as well as the need to promote sustainability in land use.¹² They envisioned deepening and extending the 1992 CAP reforms in order to shift agricultural policy towards the introduction of a multi-faceted concept of agriculture, to which a strong rural development policy was integral. This in turn led to the adoption of the “multifunctional” model of European Agriculture by the Berlin European Council in March 1999.¹³ The Council proposed that the final Agenda 2000

9. Council Regulation 797/85, art. 1, 1985 O.J. (L 93) 1, 4 (EC).

10. Comm’n of the European Communities, *Report From the Commission to the Council and the European Parliament*, 1.1-1.2 COM (1997) 620 final (Dec. 4, 1997) (the “Agri-Environmental Regulation”) [hereinafter *Report on Agri-Environmental Regulation*]; Council Regulation 2079/92, art. 1, 1992 O.J. (L 215) 91, 92 (EC) (on early retirement from farming); Council Regulation 2080/92, art. 1, 1992 O.J. (L 215) 96, 97 (EC) (instituting a Community aid scheme for forestry measures in agriculture).

11. *Report on Agri-Environmental Regulation*, *supra* note 10 at 3.1.

12. See generally *Commission of the European Community, Agenda 2000 for a Stronger and Wider Union*, COM (1997) 2000 final (July 15, 1997).

13. Posting of Bulletin EU 3-1999, *Content of the CAP Reform* (June 10, 1999), <http://europa.eu/bulletin/en/9903/i1011.htm>.

reform should be aimed at securing a multifunctional, sustainable and competitive agriculture throughout Europe from the beginning of the new millennium.¹⁴

Although “multi functionality” became a cornerstone of European farm policy, the Agenda 2000 reforms primarily represented an extension of the 1992 MacSharry measures. As such they were premised on the need to continue the progress made since 1992 in reducing institutional surpluses and in introducing further agri-environment measures on the model of the “accompanying measures” adopted in 1992. Their tenor was therefore one of incremental change, not radical innovation. One consequence of this approach was that agri-environment measures remained linked to commodity management and continued to be seen, by many, as subsidiary to the principal market support function of the CAP.

Turning to the environmental measures themselves, the Agenda 2000 reform package moved agri-environment policy firmly into the broader framework of the new policy on rural development, and in so doing strengthened its role within the framework of the CAP. Agenda 2000 also instituted a major reorientation in the administration and policy goals of agricultural policy, with rural development becoming the “second pillar” of the CAP alongside market management.

The 1999 Rural Development Regulation brought together all previous rural development measures, including the 1992 accompanying measures on agri-environment, early retirement and forestry, into one composite framework regulation.¹⁵ The objectives envisioned for rural development policy remained considerably wider than environmental protection.¹⁶ Member states were able to include funded measures in their rural development plans for nine objectives in total—of which the promotion of agricultural methods designed to protect the environment and maintain the countryside was just one.¹⁷ The European Commission rather ambitiously claimed that the regulation had laid the foundations for:

a comprehensive and consistent rural development policy whose task will be to supplement market management by ensuring that agricultural expenditure is devoted

14. *Id.* For a wide-ranging account of the outcome of the Berlin Summit, *see* MICHAEL CARDWELL, *THE EUROPEAN MODEL OF AGRICULTURE* 112-129 (2004).

15. Council Regulation 1257/99, arts. 2, 10, 1999 O.J. (L 166) 80, 85, 87 (EC).

16. *Id.* at art. 2.

17. *Id.* at art. 22. The measures for which support could be made available within rural development plans also included: investment in agricultural holdings; establishing young farmers; training; early retirement; less favoured areas; improving processing and marketing of agricultural products; forestry; and promoting the development of rural areas.

more than in the past to spatial development and nature conservancy, the establishment of young farmers [and other development programmes in rural areas]¹⁸

Although there was a commitment to significantly higher expenditure on rural development and environmental measures, however, the proportion of total CAP expenditure dedicated to rural development was only approximately 10% of the total CAP budget.¹⁹ And in turn, of course, expenditure specifically dedicated to environmental programmes made up only a small part of an overall rural development budget with much wider ranging objectives.²⁰

II. THE 2005 RURAL DEVELOPMENT REGULATION

Rural development policy has now been substantially strengthened by the adoption of a new “2005 Rural Development Regulation” which has established a European Agricultural Fund for Rural Development,²¹ streamlined the administration and financing of rural development by the member states, and provided a much clearer focus, especially in the area of agri-environment measures.²² To ensure the sustainable development of rural areas, the new regulation focuses on a limited number of “core objectives,” one of which is land management and the environment.²³ The other core objectives are, firstly, agricultural and forestry competitiveness, and secondly the quality of life and diversification of activities in rural areas “taking into account the diversity of situations, ranging from remote rural areas suffering from depopulation and decline to peri-urban rural areas under increasing pressure from urban centres.”²⁴

The 2005 Regulation explicitly links rural development policy to the implementation of the Sixth Community Environment Action Programme, with key issues to be addressed identified as including “biodiversity, Natura 2000 site management, the protection of water and soil, climate change mitigation includ-

18. *Reform of the Common Agricultural Policy (CAP)*, EUROPA, http://www.europa.eu/legislation_summaries/agriculture/general_framework/160002_en.htm (last visited Aug. 3, 2009).

19. *See* Berlin European Council, *Presidency Conclusions*, EUROPEAN PARLIAMENT (March 24, 25, 1999), available at http://www.europarl.europa.eu/summits/ber1_en.htm (Between 2000 and 2006, rural development expenditure was budgeted to run annually at between 4,300 million and 4,370 million Euros. In the same period, however, total annual CAP expenditure was budgeted to be between 40,920 million Euros (in 2000 itself) and a maximum of 43,900 million Euros (in 2002)).

20. *See id.*

21. Council Regulation 1698/2005, pmbl. recital 6, 2005 O.J. (L 277) 1 (EC).

22. *See id.* at art. 2.

23. *Id.* at pmbl. recital 11.

24. *Id.*

ing the reduction of greenhouse gas emissions, the reduction of ammonia emissions and the sustainable use of pesticides.”²⁵ It adopts a “public goods” model for agri-environment measures funded through the rural development programme, under which farmers supply environmental services to society, and by so doing support the sustainable development of rural areas.²⁶ In this context, it is stressed that “the conservation of genetic resources in agriculture should be given specific attention.”²⁷ The 2005 Regulation also seeks to apply the “polluter-pays” principle, by specifying that agri-environment payments should cover only commitments going beyond the relevant mandatory standards, e.g., those set in the cross-compliance conditions for receipt of the single farm payment.²⁸ Payments can also only be made for commitments going beyond the minimum requirements for fertilizer and plant protection, product use and other relevant mandatory requirements established by national legislation and identified in the member state’s rural development program.²⁹

This is a continuation of the previously expressed Community policy on the polluter pays principle in agriculture, viz., that adherence to the minimum standard of environmental care for the countryside demanded by compulsory legislation, and represented in good agricultural practice, should be an attribute of the farmer’s property rights and left uncompensated, whereas farmers should be paid for their costs and lost income in providing environmental services beyond this basic level of good practice.³⁰ Payments can be made not only to farmers who make agri-environmental commitments on a voluntary basis, but also to other land managers.³¹ Agri-environment commitments must normally be

25. Council Regulation 1698/2005, *supra* note 21, at pmb1., recital 31 (“[s]upport for specific methods of land management should contribute to sustainable development by encouraging farmers and forest holders in particular to employ methods of land use compatible with the need to preserve the natural environment and landscape and protect and improve natural resources”).

26. *Id.* at pmb1. recital 35.

27. *Id.*

28. *Id.* at pmb1. recital 35 art. 39 (For cross compliance see, Council Regulation 1782/2003, art. 4-5, O.J. (L 270) 8 (EC); Council Regulation 1698/2005, *supra* note 21 at annex III-IV).

29. *Id.* art. 39.

30. European Commission, *Directions Towards Sustainable Agriculture*, at 20, COM (1999), C 173/02 (June 19, 1999). The difficulty here, of course, is in establishing the “bright line” distinction between polluter pays and “provider gets”, represented by the norm of good agricultural practice—a mutable and imprecise standard at best. See also Christopher P. Rodgers, *Environmental Policy and the Reform of European Agricultural Law*, in *AGRICULTURAL AND INTERNATIONAL TRADE: LAW, POLICY, AND THE WTO* 277, 287-289 (Michael N. Cardwell et al. eds., 2003); Michael Cardwell, *The Polluter Pays Principle in European Community Law and its Impact on United Kingdom Farmers*, 59 OKLA. L. REV. 89, 92 (2006).

31. This may be done only “where duly justified to achieve environmental objectives.” Council Regulation 1698/2005, *supra* note 21, at art. 39(2).

undertaken for a period of between five and seven years.³² “The payments shall be granted annually and shall cover additional costs and income foregone resulting from the commitment made. Where necessary, they may cover also transaction costs.”³³ The 2005 Regulation expressly allows for the selection of participants in agri-environment schemes on the basis of calls for tender, “applying criteria of economic and environmental efficiency.”³⁴ As we shall see *infra*, this model has already been used in the UK for agreements under a number of agri-environment programmes prior to 2005, with considerable success.

Rural development policy has also been given clearer focus, through the reorientation of its objectives around just three “axes.”³⁵ The 2005 regulation stipulates that support for rural development shall contribute to achieving the following objectives: (1) improving the competitiveness of agriculture and forestry by supporting restructuring, development and innovation; (2) improving the environment and the countryside by supporting land management; (3) and improving the quality of life in rural areas and encouraging diversification of economic activity.³⁶ Agri-environment measures fall within Axis 2, as specified in Title IV and article 36 of the 2005 Regulation.³⁷ The importance of agri-environment policy is underlined by the fact that the regulation requires that the Community contribution for Axis 2 must be a minimum of 25% of the total EAFRD contribution to the rural development plan budgets approved by the European Commission; for Axes 1 and 3 it is only 10%.³⁸

Finally, the administration of rural development policy has been simplified by the adoption of Community Strategic Guidelines,³⁹ within which a national strategy plan for each member state will be nested.⁴⁰ The individual rural development programmes for each member state⁴¹ will then be evaluated against the relevant Community and national strategic guidelines.⁴² Article 7 establishes the subsidiarity principle at the heart of rural development policy implementation, by stating that the Member States are to be solely responsible for implementing the rural development programmes “at the appropriate territorial level,”

32. *Id.* at art. 40 (referring to a procedure for member states to apply to the European Commission for approval for commitments of longer duration).

33. *Id.* at art. 39(4).

34. *Id.*

35. *Id.* at art. 4.

36. *See id.* at art. 4.

37. *Id.* at art. 4 (referring to agri-environmental payments under Article 36).

38. *Id.* at art. 17.

39. *Id.* at art. 9.

40. *Id.* at art 11.

41. *Id.* at art. 15.

42. *Id.* at art. 11.

and in accordance with their own institutional arrangements, under the terms of the 2005 Regulation.⁴³

III. AGRI-ENVIRONMENT MEASURES IN ENGLAND AND WALES

A number of schemes to promote environmental beneficial farming have been undertaken since 1985 under the auspices of the EU's rural development policy. Most of the schemes currently in place, and included in the England Rural Development Plan, were approved by the European Commission under the 1999 EC Rural Development Regulation.⁴⁴ Until the introduction of the Environmental Stewardship Scheme in March 2005⁴⁵ there were two principal agri-environment schemes in England within the England Rural Development Plan: the Environmental Sensitive Areas (ESA) scheme and the Countryside Stewardship Scheme (CSS). Both are now closed to new entrants. Agreements under both were for ten years, and they will therefore not become "spent" for some years. Since March 2005 the principal agri-environment scheme in England has been Environmental Stewardship, which has replaced CSS and ESA and is administered by Natural England on behalf of DEFRA.⁴⁶ The new Environmental Stewardship scheme is open to all farmers and land managers and is considered further *infra*.⁴⁷ A total of £3.9 billion has been allocated to agri-environment measures within Axis 2 of the 2005 Rural Development Regulation in the 2007-2013 budgets.⁴⁸ This is double the budget for rural development programmes in England between 2000-2006, and will be targeted to the Environmental Stewardship scheme, the woodland grant scheme, the hill farming scheme, and an energy crops scheme.⁴⁹

43. *Id.* at art. 7.

44. *Directions Towards Sustainable Agriculture*, *supra* note 31, at 2.

45. DEFRA, IMPROVE ACCOUNTABILITY THROUGH A CLEARER SEPARATION OF RESPONSIBILITY FOR POLICY AND DELIVERY FUNCTIONS 8.2 (2004), *available at* http://www.defra.gov.uk/rural/pdfs/ruraldelivery/hask_nov_report.pdf.

46. DEFRA, *Written Ministerial Statement by Hilary Benn: Uplands Entry Level Stewardship Scheme, 18 December 2008* (2008), *available at* <http://www.defra.gov.uk/corporate/ministers/statements/hb081218.htm>.

47. The England Rural Development Programme (Enforcement) Regulations, 2000, S.I. 2000/3044, explanatory note (Eng.) (stating that provision is made for the enforcement of controls on payments made under all included schemes).

48. DEFRA, *The Rural Development Programme for England 2007-2013* (2007), *available at* <http://www.defra.gov.uk/rural/rdpe/index.htm>.

49. *Id.*

A. Contractual Models for Implementing Agri-Environment Policy

In England and Wales agri-environment measures have primarily been implemented using environmental contracts. The EC's Fifth Action Programme on the Environment set a target for fifteen percent of the utilized agricultural area of the community to be under management contracts for the maintenance of natural habitats and minimizing natural risks (such as erosion) by 2000.⁵⁰ In statistical terms, progress towards this target across the Community during the period of the Fifth Action Programme was encouraging. Reviewing the implementation of agri environment programmes introduced under the 1992 "agri-environment" regulation, the European Commission found at the mid point in the 1997 budget year that some 1.35 million agreements had been concluded with farmers, covering 17% of the Utilised Agricultural Area (UAA) of the EC at that time.⁵¹

An implementation strategy based upon the use of contractual instruments offers the member states considerable flexibility, and different contractual models have been used by the member states to implement agri-environmental measures. Some, such as the *Prime a l'Herbe* scheme in France⁵² and the Rural Environmental Protection Scheme (REPS) in Ireland,⁵³ have been based on the use of standard form agreements with prescribed terms that apply very basic requirements for environmental land management and stewardship, usually across either their whole territory, or in identified (but geographically large) zones. The effectiveness of this type of approach has been questioned, not least because it may be viewed as a socio-economic policy that effectively acts as farm income support with little environmental focus.⁵⁴

Although the first generation of Environmentally Sensitive Area ("ESA") agreements in England and Wales were targeted at geographically designated ESA zones, they were a variant of the standardised contractual model. Standardised and inflexible management prescriptions were applied to all participating farms in each ESA, with prescriptions appropriate for the type of farming predominant in each area. A more sophisticated approach was adopted in the second and third generation of ESA agreements in the UK, which combined participation in a basic tier of obligations aimed at preserving environmental features of the

50. *Toward Sustainability*, *supra* note 2.

51. *Report On "Agri-Environmental" Regulation from the Commission to the Council and the European Parliament*, *supra* note 10, at 16-17.

52. Brian Jack, *Protecting the European Environment from the Community: The Case of Agriculture*, *Env.L.Rev* (2001) 3, 44 at 60.

53. Brian O'Domnaill, Seanad Debates, *Rural Environment Protection Scheme* (May 7, 2009), available at <http://www.kildarestreet.com/sendebates/?id=2009-05-07.183.0>.

54. See Brian Jack, *supra* note 53, *passim*; Clive Potter, *AGAINST THE GRAIN: AGRICULTURAL ENVIRONMENTAL REFORM IN THE UNITED STATES AND THE EUROPEAN UNION* (1998).

ESA concerned, with optional additional (or higher) tiers of participation under which additional premiums could be paid for allowing public access to farmland or for additional environmental obligations targeted at particular habitat types. This is essentially a more sophisticated variant of the standardised or “general” contractual model, in which prescriptions were targeted at particular ESA areas (many of which were geographically very large, such as the Cambrian Mountains ESA in Wales) rather than at individual farms and farm based habitats.⁵⁵

This approach has now been superseded by a more sophisticated strategy based on the purchase by the state of “environmental goods.” This facilitates the targeting of aid to projects offering the best environmental potential for the enhancement and restoration of farmland habitats and wildlife species, by requiring farmers to submit bids for contracts according to the environmental “goods” to be purchased. The Countryside Stewardship scheme was the first agri-environment scheme in England to be implemented using this model of environmental contract. The new Environmental Stewardship scheme in England is also firmly based on this model. This type of approach enables the “screening out” of cases where an agreement would offer no tangible environmental advantage,⁵⁶ limits participation to cases where a defined and measurable environmental “good” is to be purchased by the taxpayer, and therefore represents a better use of public resources to fund agri-environment agreements.⁵⁷ The public goods model of environmental agreement also offers greater flexibility, in that management prescriptions can be tailored to the particular farm concerned, and facilitates the use of “whole farm” plans in order to develop a holistic conservation strategy for the entire holding is increasingly common – this is, for example, a central feature of the Environmental Stewardship scheme currently being rolled out in England.⁵⁸ It is also a contractual model more closely attuned to the priorities identified by the European Commission for programme design for agri-environment measures, and offers clear benefits for the delivery of the priorities identified by the European Commission in this regard.⁵⁹

55. See David Colman, *Comparative Evaluation of Environmental Policies ESAs in a Policy Context*, in INCENTIVES FOR COUNTRYSIDE MANAGEMENT: THE CASE OF ENVIRONMENTALLY SENSITIVE AREAS 219-252 (Martin Whitby ed., 1994); see also Martin Whitby, *What Future for ESAs*, in INCENTIVES FOR COUNTRYSIDE MANAGEMENT: THE CASE OF ENVIRONMENTALLY SENSITIVE AREAS 253-271 (Martin Whitby ed., 1994).

56. Protecting the European Environment from the Community, *supra* note 53, at 16 (stating that a major criticism of the first generation of ESA schemes in England, and of schemes such as *prime a l'herbe* in France).

57. See AGAINST THE GRAIN, *supra* note 55.

58. DGVI COMMISSION, STATE OF APPLICATION OF REGULATION (EEC) NO. 2078/92: EVALUATION OF AGRICULTURE/ENVIRONMENT PROGRAMMES 95, available at http://ec.europa.eu/agriculture/envir/programs/evalrep/text_en.pdf.

59. See *id.*

B. Environmentally Sensitive Areas

The ESA programme was originally introduced in 1986, under one of the early EC Farm Structures Regulations.⁶⁰ It has subsequently been brought into the England Rural Development Plan and is now funded within the EC Rural Development Regulation. The secretary of state has power to designate an area an “environmentally sensitive area” (“ESA”) by statutory instrument if he considers that the adoption of a particular agricultural method is likely to facilitate the conservation and enhancement of the natural beauty of an area or conservation of the flora, fauna or geographical or physiographical features of that area, or the protection of buildings or other objects of archaeological architectural or historic interest in an area.⁶¹ There are currently 22 ESAs in England:

Stage 1 ESAs : The Broads, Pennine dales, Somerset Levels and Moors, South Downs, and West Penwith.⁶²

Stage 2 ESAs : Breckland, Clun, North Peak, Suffolk River valleys, and Test Valley.⁶³

Stage 3 ESAs : Avon Valley, Exmoor, The Lake District, North Kent marshes, South Wessex Downs, and the South West Peak.⁶⁴

Stage 4 ESAs : Black down Hills, Cotswold Hills, Dart moor, Essex Coast, Shropshire Hills, and the Upper Thames Tributaries.⁶⁵

Policy and payments within the areas concerned are subject to 5 yearly reviews. The secretary of state has power to enter into management agreements with farmers in the designated ESAs whenever it appears to her that any of the conservation interests of the scheme are likely to be facilitated by her doing so.⁶⁶ The terms of the management agreements in each ESA are specified in the relevant designation orders.⁶⁷ These provide for both payments of a capital nature and for annual payments for maintenance of the land using traditional farming

60. Council Regulation 797/85, *supra* note 9, at art. 34 (referencing an amendment to Article 2(2) on “improving the efficiency of agriculture structures”).

61. The Environmentally Sensitive Areas (Cambrian Mountains-Extension) Designation Order, 1987, S.I. 1987/2026, explanatory note (Eng.).

62. See The Environmentally Sensitive Areas (Stage I) Designation Order, 2000, S.I., 2000/3049, explanatory note (Eng.).

63. The Environmentally Sensitive Areas (Stage II) Designation Order, 2000, S.I., 2000/3050, explanatory note (Eng.).

64. The Environmentally Sensitive Areas (Stage III) Designation Order, 2000, S.I., 2000/3051, explanatory note (Eng.).

65. The Environmentally Sensitive Areas (Stage IV) Designation Order, 2000, S.I., 2000/3052, explanatory note (Eng.).

66. *Id.*

67. *Id.* at sched. 3 pt. 2 (listing the capital activities for the ESA Stage IV area of Dartmoor).

methods.⁶⁸ The capital activities to be carried out by the farmer will be specified in a capital works plan incorporated into the management agreement, e.g., the recreation of herb rich meadows, coppicing of hedges or other works for the restoration or recreation of wildlife habitats.⁶⁹ The capital activities allowed for in each ESA are specified in the designating order for that area, and vary depending upon the local types of traditional farming practices and the terrain.⁷⁰ Fixed capital payments will be agreed and incorporated into the agreement plan.

The requirements for managing the land for environmental protection and for public access are also specified for each ESA in the relevant Designation Order.⁷¹ These will also vary from one area to another, depending on the traditional nature of the husbandry practiced there and the nature of the terrain and locality. Payments will be agreed up to a maximum rate per hectare laid down in each designating Order. The allowances for each management prescription reflect the importance and difficulty of modifying the participants' existing husbandry regime to accommodate the terms of the ESA agreement. Penalties are provided for the breach of a management agreement prescription.⁷²

C. *Countryside Stewardship*

The Countryside Stewardship scheme provides for management agreements to be available to farmers and others, with specific obligations as to land management designed to meet site-specific environmental considerations.⁷³ The scheme now incorporates several former schemes including the Countryside Access Scheme (under which voluntary access is grant aided on set aside land)⁷⁴ and the former Habitat Improvement Scheme (targeted at the recreation of water fringe habitats and salt marsh habitats in several pilot areas).⁷⁵ It also provides

68. *Id.* at art. 4.

69. *Id.* at sched. 3 pt. 2.

70. *Id.* at art. 4.

71. *Id.* at art. 6.

72. The England Rural Development Programme (Enforcement) Regulations, 2000, S.I. 2000/3044, art. 6 (Eng.) (The Secretary of state can withhold future payments under a management agreement where a farmer is in breach of its terms, and can also demand repayment of all monies paid under it and levy an additional penalty of up to 10% of the payments made. Powers of entry to property are conferred on the secretary of state and her officials to check and monitor performance of agreements, and to require the production of relevant documentation).

73. *See* The Countryside Stewardship Regulations, 2000, S.I. 2000/3048, sched. pt. 1 (Eng.).

74. *Id.*

75. *See, e.g., id.*

for the promotion of greater environmental stewardship on arable land, and includes a number of arable land management options.⁷⁶

Participation in the scheme requires the preparation of a conservation plan for approval by the secretary of state. The scheme's objectives go beyond protecting existing environmental features of the land, and include the recreation of new habitat or landscape features. Each English county has target priorities set under the scheme. The scheme is aimed at protecting and enhancing priority habitats and landscape features identified in the England Rural Development Plan and in the various county programmes for the scheme. Management agreements are offered, at the discretion of the Secretary of State, to those able to deliver environmental benefits matching the declared local priorities and those identified in the England Rural Development Programme Countryside Stewardship management agreements are for 10 years, and payments are made annually on the basis of the benefits offered. Unlike other schemes in the England Rural Development Programme, Countryside Stewardship is not limited to farmers, and is open to local authorities, charities, wildlife groups, and other landowners eligible for grant aid under the scheme. Grant aid can now be claimed by participants in the scheme for the preparation of whole-farm environmental audits of the land affected.⁷⁷

D. Environmental Stewardship: A New Approach

The Environmental Stewardship scheme replaced CSS and ESA in England from 2005 and seeks to adopt a whole farm as well as a more "holistic" approach to farmland biodiversity.⁷⁸ Under the terms of the Environmental Stewardship scheme, the Secretary of State can make grants for the management of land under one of three optional elements: Entry Level Stewardship ("ELS"), Organic Entry Level Stewardship ("OELS") and Higher Level Stewardship ("HLS").⁷⁹ The Secretary of State can also make a grant to any person who enters into, and complies with, the conditions of an environmental stewardship agreement.⁸⁰ The environmental stewardship agreement must require the beneficiary to carry out specified activities to further environmental protection on land in which he has an

76. See DEFRA, Access Publicity and Promotion Strategy: Background, http://www.defra.gov.uk/rural/publicaccess/review/pp_strategy.htm.

77. The Countryside Stewardship (Amendment) Regulations, 2004, S.I. 2004/114, sched. 2 pt. 3 (Eng.).

78. D.G. Hole et al., *Does Organic Farming Benefit Biodiversity*, SCIENCE DIRECT, Aug. 28, 2004.

79. See The Environmental Stewardship (England) Regulations, 2005, S.I. 2005/621, explanatory note (Eng.).

80. *Id.* at art. 3.

interest, and detailed prescriptions to this end are set out in the 2005 Environmental Stewardship regulations.⁸¹ The agreement can include elements from both ELS, OELS and HLS,⁸² and the conditions of each agreement can be varied by the secretary of state either with the other party's agreement, or by notice (without agreement) where an alteration is necessary to comply with EC legislation.⁸³

An application for grant aid must include an application to enter into an environmental stewardship agreement.⁸⁴ A grant can also be made for the preparation of a plan identifying the features of environmental significance on the farm, or common land, to be included in an environmental stewardship agreement containing an HLS element.⁸⁵

An environmental stewardship agreement "must contain an ELS element, an OELS element, an HLS element or, exceptionally, a special project element."⁸⁶ The agreement can contain more than one element in combination, although this is not obligatory and an agreement can (for example) contain exclusively ELS elements alone.

As noted *supra*, the scheme marks a new departure because it adopts a bidding model for the provision of environmental goods by the applicant. Eligibility for participation in the scheme is determined by the applicant achieving the relevant points score for management undertakings under each of the four elements of the scheme.⁸⁷ So, for example:

(a) Under an environmental stewardship agreement with an ELS element the farmer must undertake to carry out on his "conventional land"⁸⁸ sufficient ELS options to meet his ELS points target. The points target is calculated by reference to the area of his conventional land: in relation to land within the less favoured area ("LFA land") which comprises all or part of a parcel of at least 15 hectares the target is 8 points per hectare; and in relation to all other conventional land, 30 points per hectare.⁸⁹ ELS is a whole farm scheme and farmers are paid a flat rate (currently £30 per ha., less in the LFA for par-

81. *Id.* at sched. 2 pts. 2-3 (stating the basic prescriptions for ELS agreements are set out in Schedule 2 Part 2 and more advanced prescriptions for inclusion in HLS agreements in Part 3 of Schedule 2).

82. *Id.* at art. 5.

83. *Id.* at art. 3.

84. *Id.* at art. 4.

85. *Id.* at explanatory note.

86. *Id.*

87. *See id.* at art. 5 (stating that reg 5(2) (ELS), 5(3) (OELS), and also reg 5(4) in relation to HLS obligations to be included in the agreement).

88. *Id.* at art. 2 (stating the definition of "conventional land" as "the agreement land which is not organic land").

89. *Id.* at sched. 3 pt. 1.

cels in excess of 15 ha.) for land entered into the scheme. Applicants must prepare a Farm Environment Record for submission, and Natural England will set a points target for each farm dependant on its size. The scheme has 50 options (for example hedgerow management, low input grassland and various arable options) and entrants earn points for each option selected. If the requirements of the scheme are met and the points target satisfied, entry is guaranteed. Management agreements under ELS are for 5 years;

(b) Under an environmental stewardship agreement with an OELS element the farmer must undertake to carry out on his organic land sufficient OELS options to meet the OELS points target. This is calculated by reference to the area of his organic land and set at 60 points per hectare;⁹⁰

(c) The beneficiary of an environmental stewardship agreement with an HLS element must undertake to carry out on his agreement land at least one HLS option;⁹¹ and

(d) in exceptional cases an agreement can contain a special project element.⁹² In the case of an environmental stewardship agreement with a special project element the farmer must undertake to carry out on the agreement land any activity which, in the Secretary of State's opinion, would better or more fully achieve the specified purposes than an ELS option, an OELS option, an HLS option or an HLS capital works item (or more than one such option or capital works item).⁹³

The calculation of the amount of grant in respect of an ELS, OELS, HLS and special project element of an environmental stewardship agreement is made in respect of an ELS and OELS element by reference to the area of conventional land and organic land respectively.⁹⁴

So, for example, the ELS payment in relation to any LFA land is fixed at £8 per hectare per agreement year and (as noted above) in relation to all other conventional land at £30 per hectare per agreement year.⁹⁵ Grant in respect of an HLS element is calculated by reference to amounts set out in the environmental stewardship agreement for the HLS options and HLS capital works items included in it,⁹⁶ subject to maximum amounts specified in the relevant regulations.⁹⁷ "Grant in respect of a special project element is calculated by reference to the

90. *Id.* at sched. 3 pt. 2.
91. *Id.* at explanatory note.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at sched. 3 pt. 1.
96. *Id.* at explanatory note.
97. *Id.*

payment rates or amounts specified in the environmental stewardship agreement for the special project activities included in it,⁹⁸ subject to maximum payment rates and amounts.⁹⁹ A conversion grant can be made to a farmer under an environmental stewardship agreement that contains an OELS element for organic farming.¹⁰⁰

E. Hill Livestock

Another scheme that has an important environmental protection element within the England Rural Development Plan is the Hill Farming Scheme under which financial support is provided for hill livestock farming. The current provision is made by the Hill Farm Allowance Regulations 2005 in England.¹⁰¹ These provide for hill farm allowances to be paid by the appropriate minister for cattle and sheep maintained by the occupier of land with an eligible forage area.¹⁰² The claimed forage area lying within a less favoured area must be at least 10 hectares.¹⁰³ The claimant must give a written undertaking that he will, for a period of five years from the date of the first payment to him of a compensatory allowance, continue to use at least 3 hectares of land situated in a less favoured area for the purposes of agriculture.¹⁰⁴ The payment regime allows for differential payment rates per hectare for severely disadvantaged land, disadvantaged land and moor land, with the highest payments accruing to land in the former category. Payments are enhanced by twenty percent if the notional stocking density of the land is less than 1.0, and in other cases where two or more of a specified number of environmental management conditions are satisfied. These include where the farmer is an organic farmer, where the stocking density is less than 1.2 livestock units/hectare, or where at least 1 hectare or 5% of the claimants eligible land is planted with either arable crops or woodland in respect of which he is not receiving any other financial support.¹⁰⁵

98. *Id.*

99. *Id.* at explanatory note, art. 5.

100. *Id.* at art. 7, sched. 4, explanatory note.

101. *See* The Hill Farm Allowance Regulations, 2005, S.I. 2005/154 (Eng.).

102. *Id.* at art. 3.

103. *Id.* at art. 4(1)-(2).

104. *Id.* at art. 5.

105. *See id.* at art. 7, sched. 2, art. 7. In the case of the woodland or arable enhancements, the land must not have been converted from permanent pasture after 1998.

F. Organic Farming

Provision has been made for grant aid to be available to support organic farming under the England Rural Development programme.¹⁰⁶ The Secretary of State may make a grant if “common conditions of eligibility” are satisfied.¹⁰⁷ These are: that the application must be made in respect of not less than one hectare of land; where it relates to an application for top fruit orchards, the land is planted with at least eighty top fruit trees per hectare; the applicant must have an interest in the land (for example as a freehold owner or tenant); and the applicant must give undertakings to farm the land by organic farming methods in accordance with stipulated management standards laid down in the relevant regulations.¹⁰⁸ The obligations as to organic land management require the recipient of grant aid *inter alias*: (1) not to plough, reseed or improve heath land, grassland of conservation value (including species-rich grassland) or rough grazing; to avoid localised heavy stocking in the nesting season on areas of semi-natural vegetation; (2) not to carry out field operations, such as harrowing and rolling, on species-rich grassland or rough grazing during the nesting season; not to cultivate within one metre of any boundary features, such as fences, hedges or walls, to carry out hedge trimming in rotation (but not between March 1st and August 31st); to maintain any stock proof boundaries using traditional methods and materials; (3) to carry out ditch maintenance in rotation, to maintain streams, ponds and wetland areas; (4) to retain any copses, farm woodlands or groups of trees; and (finally) to ensure that no feature of historical or archaeological interest is destroyed or damaged.¹⁰⁹ The applicant can apply for a maintenance grant if the land has been fully converted to an organic-production unit, holding or stock farm, provided that he is not a beneficiary of a conversion grant in relation to the land.

Conversion grants are also available for the conversion of traditionally farmed land to organic cultivation methods. For conversion grant to be available “additional conditions of eligibility” must be satisfied.¹¹⁰ This requires that the land has not been fully organic at any time since August 10, 1993 and that the first certificate of its registration as organic is received by the Secretary of State within twelve months of the date of registration.¹¹¹ The grant aid payable is cal-

106. The Organic Farming (England Rural Development Programme) Regulations, 2003, S.I. 2003/1235 (created under section 2(2) European Communities Act 1972); *Id.* at art. 4 (providing the conditions for entitlement).

107. *Id.* at art. 4.

108. *Id.* at art. 5.

109. *Id.* at sched. 1.

110. *Id.* at sched. 1.

111. *Id.* at art. 6.

culated in accordance with conditions stipulated in the relevant regulations, and includes (in the case of conversion grant) a sum for training in organic farming methods.¹¹²

IV. IMPLEMENTING AGRI-ENVIRONMENT MEASURES: SPECIFIC LEGAL ISSUES

As noted *supra*, the 2005 Rural Development Regulation seeks to implement an integrated rural development strategy, with national rural development plans integrated within a wider national strategic plan. In some respects, however, the move to greater integration of rural development policy at the EU level has not been matched by appropriate integration of rural development policy into the domestic legal mechanisms governing decisions on land use. Two issues merit discussion here. The first is the categorization of rural “development” for the purposes of development control law. The second concerns the property rights regime applicable to land on which rural development initiatives are planned. The latter raises questions about the need to ensure that the execution of rural development initiatives is not impeded by inappropriate and restrictive forms of land tenure; and also the question of the preservation of the “agricultural” status of the holding, with the attendant legal privileges that brings, when substantial diversification into agri environmental measures has taken place.

A. Rural Development: is it “Development”?

The 2005 Rural Development Regulation¹¹³ defines operations to execute rural development objectives very widely: ‘operation’ means any “project, contract or arrangement, or other action selected according to criteria laid down for the rural development programme concerned and implemented by one or more beneficiaries” for the achievement of the objectives for rural policy set out in the Regulation. This is a purposive definition, wherein the character of the development is defined by reference to the rural development objectives in the EC legislation, i.e., “improving the competitiveness of agriculture and forestry by supporting restructuring, development and innovation” (axis 1); “improving the environment and the countryside by supporting land management” (axis 2); and/or “improving the quality of life in rural areas and encouraging diversification of economic activity” (axis 3).¹¹⁴

112. *Id.* at art. 8., at sched. 2 (conversion grant provided in part 1, calculation of the training sum provided in part 2, and maintenance grant provided in part 3).

113. Council Regulation 1698/2005, *supra* note 21, at art. 2(e).

114. *Id.* at art.4(1).

English Law adopts an altogether narrower definition of “development” for the purpose of applying land use controls. In planning law “development” is defined to include “the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.”¹¹⁵ This is a non-purposive, or neutral definition that takes no cognizance for the purposes of development control of either the nature of the development that is proposed, or its position within the wider rural policy imperatives set by the Rural Development Regulation. If a grant aided rural development project involves “operations” or a material change of use of land or buildings, then it will require planning consent from the local planning authority.¹¹⁶ It will not be exempted from this requirement simply because it has been grant aided by DEFRA under the England Rural Development Plan.¹¹⁷ It should be noted, however, that planning policy guidance on decision making within the development control system, issued to local planning bodies by central government, seeks to encourage supportive decision making in this regard.¹¹⁸

Planning legislation in England and Wales adopts a preferential approach to agricultural development in two ways. First, planning permission is automatically granted (subject to conditions) for various classes of development, which would otherwise require planning permission, by Article 3 and Schedule 2 to the General Permitted Development Order 1995.¹¹⁹ Secondly, the Town and Country Planning Act 1990 exempts from the definition of ‘development’ (and thus from development control) the *use* of land and existing buildings for agricultural purposes, and any change of use to agricultural user.¹²⁰ For these purposes agriculture is given a relatively narrow definition. By virtue of section 336(1), it is defined to include:

horticulture, fruit growing, seed growing, dairy farming, the breeding and keeping of livestock (including any creature kept for the production of food, wool, skins, or fur, or for the purpose of its use in farming the land), the use of land as grazing land,

115. Town and Country Planning Act, 1990, C.8, § 55(1) (Eng.).

116. *See id.* at § 57.

117. *See id.* at § 55.

118. *See generally* Planning Policy Statement 7, *Sustainable Development in Rural Areas* (ODPM 2004). (Paragraph 30 of PPS7 requires local planning authorities to both include in local development documents the criteria to be applied to planning applications for farm diversification projects, and to be “supportive of well-conceived farm diversification schemes for business purposes that contribute to sustainable development objectives and help to sustain the agricultural enterprise, and are consistent in their scale with their rural location”).

119. Town & Country Planning (General Permitted Development) Use Order 1995, SI 1995/418 Sched. 2 pt. 6.

120. *See* Town and Country Planning Act, *supra* note 115, at § 55(2)(e).

meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes.¹²¹

Only a land use that is agricultural, within the extended meaning given by s 336(1), will be exempt from planning control.¹²² The definition is “inclusive,” and not exhaustive, and omits mention of some very common agricultural activities, such as the growing of corn.¹²³ Although the courts will extend its ambit, they will not do so indefinitely, and a land use will only qualify as “agricultural” if it is comparable by reference to the matters listed in the Act and occurs in an agricultural context.¹²⁴

This definition has remained unchanged since the planning legislation was introduced in 1947, and does not reflect the multifunctional nature of modern European agriculture. The use of land for environmental purposes is not categorised as “agriculture,” whether or not the change of land use involved is funded by measures under the rural development regulation. Where a change in land use requires the continuation of farming in a modified fashion to provide environmental benefits (for example reducing livestock grazing densities) this will be unproblematic, provided the primary land use remains “agricultural.” For the purpose of deciding whether a material change of use has occurred, and whether planning consent will be required, the courts will have regard to the pre-existing use of the *planning unit*, i.e., the whole of the area on the holding that was used for a particular purpose or for activities ancillary to that purpose. This is not necessarily co-terminous with the holding itself. For activities that are truly incidental to farming the holding will not involve a material change of use, and will not require planning permission.¹²⁵

Where, however, land is taken out of agricultural production to be set aside exclusively for environmental purposes, this will constitute a material change of use requiring planning permission before it can be executed for example, as a nature reserve.

Similarly, if buildings or other structures are to be erected for an environmental purpose unconnected with the farming of the holding this will require

121. See *id.* at § 336(1).

122. See *id.* at § 336(1).

123. See *McLinton v. McFall* [1974] 232 E.G. 707 (U.K.).

124. See *Hemens v. Whitsbury Farm and Stud Ltd.* [1988] 1 All. E.R. 72, 78 (HL). For an exploration of the legal implications of the definitions of “agriculture” used in British and French domestic legislation, against the background of EC rural development measures and the single farm payment, see Luc Bodiguel & Michael Cardwell, *Evolving Definitions of “Agriculture” for an Evolving Agriculture*, CONV. & PROP. LAW. (N.S.) 419 (Sept./Oct. 2005).

125. See *Allen v. Sec’y of State for the Env’t* [1990] JPL 340 (sale of home grown produce not a material change of use, even if on a large scale).

development consent. The automatic consents for small-scale building operations¹²⁶ given in the General Permitted Development Order 1995 only apply to structures or buildings *designed* for agricultural purposes.¹²⁷ The provision of a building for educational or research purposes on a farm-based nature reserve, for example, would not qualify for permitted development rights, neither would the erection of structures such as hides for the viewing of wildlife on the farm. These would require planning consent from the local planning authority before they could be undertaken – irrespective of the fact that they may have been approved for funding under national measures implementing the rural development regulation.

It will be apparent from the foregoing discussion that the application of planning law principles can have anomalous consequences when “environmental” land uses are proposed on-farm. Publicly funded agri-environment measures may require planning consent in individual cases, even if clearly within the policy objectives laid down in EC and national rural development strategic plans. At the same time, environmentally damaging agricultural operations or development may *not* require planning consent, and may therefore escape planning scrutiny prior to execution. This could occur in two situations:

First, as noted above, a change of use from one agricultural use to another does not require planning consent.¹²⁸ Where there is a change of user from one agricultural use to another, the question whether it is a ‘material’ change of use is irrelevant—planning permission is not required, irrespective of the aesthetic merits or environmental impact of the changed agricultural use.¹²⁹

An intensification of an existing agricultural use will not, therefore, require planning permission even if its environmental impacts are considerable. An increase in the number of pigs kept outdoors on an intensive pig rearing farm would be an example where the visual and environmental implications of the change in land use could be considerable, but entirely outwith planning control. Some categories of agricultural land use are now subjected to environmental impact assessment, but this applies only to restructuring land holdings and the conversion of semi-natural habitat to intensive agricultural use, for example, by

126. For example, agricultural buildings with a ground area less than 465 square meters. See The Town and Country Planning (General Permitted Development) Order, *supra* note 119 at sched. 2 pt. 6 Class A (Eng.) (development on units of 5 hectares or more).

127. *Id.* at sched. 2, pt. 6, Class A.1(c).

128. See Town and Country Planning Act, *supra* note 116, at § 55(2)(e).

129. *Crowborough Parish Council v Sec’y of State for the Env’t* [1981] 43 P. & C.R. 229, 231.

erecting polytunnels.¹³⁰ In these cases, the assessment is undertaken by the Ministry prior to the operation being carried out,¹³¹ and does not in any event trigger a requirement to apply for full planning consent. Moreover, a change from a non agricultural to an agricultural use, will not be “development” requiring planning permission—for example, a decision to discontinue the use of part of the farm as a nature reserve and to return the land to intensive agricultural production—even if the intensive farming proposed may have environmental implications such as (in the case of arable) increased nitrate and pesticide runoff into surface or ground waters.¹³² Paradoxically, a decision to subsequently revert to the former non agricultural use (in our example a nature reserve) would require permission—even though the supplanting use (agriculture) is not “development” within the meaning of the 1990 Act.¹³³

Second, if the change in land use involves “development”, such as the erection of buildings or other fixtures, it may benefit from permitted development rights under the General Permitted Development order 1995.¹³⁴ This gives automatic planning consent for a variety of minor types of agricultural development on holdings that exceed 5 hectares in extent, and which will therefore be exempt from planning scrutiny. An example of an environmentally damaging development that would escape planning scrutiny might be the erection of an inappropriately sited livestock building (within the size limits allowed by the General Development Order)¹³⁵ in an environmentally sensitive location. Some controls are imposed through environmental law on this kind of development, but only if the land has been designated for protection under the Wildlife and Countryside Act 1981 as a Site of Special Scientific Interest,¹³⁶ or has been designated under other environmental legislation (for example as a Special Area of Conservation

¹³⁰ See The Environmental Impact Assessment (Agriculture) (England) (No.2) Regulations, 2006, S.I. 2006/2522, art. 3(1). On the question of whether erecting temporary polytunnels for fruit growing can constitute “development” requiring full planning consent see: *R (Hall Hunter Partnership) v Secretary of State* (2006) EWHC 3482 (Admin.)

¹³¹ *Id.* at art. 4(1).

¹³² Town and Country Planning Act, *supra* note 116 at §§ 55(1), 55(2)(e); see also *JL Eng 'g Ltd. v. Sec'y of State for the Env't* [1994] JPL 453.

¹³³ See *JL Eng 'g Ltd.*, at 456; *Young v. Sec'y of State for the Env't* [1983] 47 P. & C.R. 165.

134. See, e.g., The Town and Country Planning (General Permitted Development) Order, *supra* note 127, at art. 3 sched. 2 pt. 6 class A.2(2).

135. See *id.* at sched. 2 pt. 6 class A.1(d)(ii) (ground area is less than 465 sq. Metres).

136. Wildlife and Countryside Act 1981, ch. 69 § 28 (1).

under the Conservation (Natural Habitats & C) Regs 1994).¹³⁷ If the development is within a designated wildlife area – such as Site of Special Scientific Interest or Special Area of Conservation – permitted development rights are withdrawn.¹³⁸ A development may also be subjected to an environmental impact assessment if the project is likely to have “significant” environmental effects on the conservation interest and value of the site.¹³⁹ These controls will not, however, prevent developments that impact on farmland ecology in the wider countryside.

B. Land Tenure

When considering the legal issues raised by farm diversification into environmental land uses, a problem common to both types of tenancy is the restrictive definition of “agriculture” which is integral to both tenancy structures. The 1995 Act retains the somewhat limited definition of “agriculture” used in previous farm tenancy legislation.¹⁴⁰ This limits the scope of the agriculture condition to traditional farming activities such as livestock breeding, dairy farming and the use of land as grazing land. It does not recognize the wider “stewardship” role expected of the farming community under environmental protection measures, set aside, or the agri-environment schemes introduced under modern EC Rural Development policy. Like the planning law definition (considered *supra*) this restrictive definition fails to take account of the multi functional model of modern European farming. Most agricultural tenancies also incorporate user clauses limiting the use of the holding to agriculture.¹⁴¹ Agricultural user clauses are often restrictively interpreted by the courts by reference to the statutory definition in the tenancy legislation, and greatly restrict the tenant’s ability to unilaterally undertake environmental management.¹⁴²

The courts have given tenant farmers some protection where diversification has occurred on tenanted land. Under the 1986 Act, a tenancy would be an agricultural holding if the “substantial” use of the land were for its use for agri-

137. Conservation (Natural Habitats, & c.) Regulations 1994, Part II, 8(1) (This implements the requirements of the EC Habitats and Species Directive in the UK (Council Directive 92/43)).

138. *See, e.g., id.* at pt. 11 § 9.

139. *See* The Town and Country Planning (Assessment of Environmental Effects) Regulations, 1999, S.I. 1999/293, pmb1.

140. *See id.* at § 38(1) (this repeats the definition to be found in section 96 of the Agricultural Holdings Act 1986, with one minor amendment to the definition of “livestock”).

141. Agricultural Holdings Act 1986 *supra* note 142, at §1.

142. *See, e.g., Jewell v McGowan* [2002] 2 P. & C.R. DG 6, ¶ 44, 45 (open farm activities).

culture for the purposes of a trade or business.¹⁴³ This is a question of fact. The courts have adopted a generous interpretation of situations under the 1986 Act where a farmer has diversified away from traditional agricultural production into non-agricultural land uses. In order to lose the protection of the 1986 Act the tenant will have to abandon agricultural use of the land let for a period of at least two years prior to service of notice to quit, although the landlords consent is not required for abandonment to take effect.¹⁴⁴ However, a tenancy can cease to be that of an agricultural holding if it is still used for the purpose of a trade or business, but the character of the tenant's business ceases to be *substantially* "agricultural"—for example if the activities generating the majority of the business' income cease to be agricultural. In *Short v Greeves*¹⁴⁵ the Court of Appeal held that a holding which is clearly agricultural at the outset should not cease to be such, unless there is the clearest evidence of its substantial user ceasing to be agricultural.¹⁴⁶

Under the 1995 Act, the courts would have less scope to apply a generous interpretation where substantial diversification had occurred on land within a farm business tenancy. By virtue of section 1(3) of the 1995 Act, the character of the tenancy must be *wholly or primarily* agricultural for the farm business tenancy regime to be applicable.¹⁴⁷ Therefore, the protection of the 1995 Act will cease to apply as soon as diversification results in the *primary* use of the land let ceasing to be agricultural. The Tenancy Reform Industry Group (TRIG) was convened by the government in 2002 to review the farm business tenancy legislation.¹⁴⁸ TRIG considered proposals to amend the definition of agriculture, so as

143. See Agricultural Holdings Act, *supra* note 142, at § 1(1)-(2).

144. *Short v. Greeves* [1988] 1 EGLR 1, CA.; see Christopher P. Rodgers, *Agriculture as Business, Business as Agriculture: Selecting the Code of Tenancy Protection*, CONV. & PROP. LAW. (N.S.) 430 (Nov./Dec. 1988).

145. Christopher P. Rodgers, *supra* note 147 at 431, 433 (in this case the protection of the 1986 Act was not lost, even though over 60% of the farm's turnover was contributed by a farm shop selling goods bought wholesale from outside the holding).

146. See *Weatherall v Smith* [1980] 1 W.L.R. 1290, 1299.

147. Agricultural Tenancy Act 1995, *supra* note 141, at § 1(3).

148. Tenancy Reform Industry Group Final Report (TRIG), *Final Report*, §§ 2.2, 2.3, 6.2 (2003) [hereinafter TRIG]. The terms of reference of the Tenancy Reform Industry Group were to attempt to establish an industry consensus or propose options for tenancy reform, and to make the case for the removal of fiscal disincentives and the introduction of fiscal incentives that are broadly revenue neutral indicating why this would be in the public interest. The government policy objectives from this exercise included the promotion of "sustainable diverse, modern and adaptable farming", and ensuring that tenant farmers can take steps to protect and enhance the environment. Their proposals were enacted in the Regulatory Reform (Agricultural Tenancies) (England and Wales) Order, 2006, S.I. 2006/2805. None of the legislative proposals eventually enacted have relevance to the implementation of agri-environmental measures by tenant farmers. The Code of Practice promulgated in 2004 is the principal measure of relevance to agri-environmental matters.

to widen the possible uses of land permitted under the farm business tenancy legislation. They concluded, however, that it was not feasible to do so.¹⁴⁹ One of the problems they cited was the possibility of creating anomalies where planning and rating legislation used very different definitions.¹⁵⁰ Their preferred approach as to propose a Code of Practice for Landlords and Tenants proposing diversification into agri environment and other diversification schemes.¹⁵¹ The possibility of widening both sets of legislative definition—those in both planning law and the tenancy laws—does not seem to have been considered, although it will be apparent from the discussion *supra* that the current definition used in planning law also gives rise to anomalies.

The farm business tenancy legislation confers much greater flexibility on the landowner when renting land, both as to the length of the term granted and as to the terms of the lease. Moreover, despite adopting a restrictive definition of agriculture, the 1995 Act expressly envisages the diversification of the farming enterprise within a farm business tenancy. The Act provides a notice facility for creating a farm business tenancy, whereby reciprocal written notices can be given by landlord and tenant stating that the tenancy is to remain a farm business tenancy throughout its duration, irrespective of changes in land use by the tenant.¹⁵² Provided the land use at the outset of the tenancy is wholly or primarily agricultural, subsequent diversification into non-agricultural land uses will not render the tenancy outside the farm business tenancy code—even if agricultural land use ceases altogether. It follows, then, that the legislation gives greater scope for the adoption of environmental objectives within the farm business tenancy than was possible under the 1986 Act.

This has not necessarily encouraged greater participation in agri-environment schemes by tenant farmers, however. Interestingly, there is evidence that one of the unintended side effects of the liberalization of the let market by the 1995 Act has been to encourage the use of short term agreements (typically of under 3 years), which has meant that many tenants are now unable to take advantage of agri-environment agreements. Some landlords have taken advantage of the greater flexibility offered by farm business tenancies to include conservation clauses in leases, but these have in the main been organisations with environmental or conservation objectives.¹⁵³ Research carried out for DEFRA on the impact

149. *Id.* at § 6.2.

150. *Id.*

151. *Id.*; see also DEFRA, *Code of Practice for Agri-Environment Schemes and Diversification Projects Within Agricultural Tenancies* (2004) [hereinafter *DEFRA Code of Practice*].

152. Agricultural Tenancies Act 1995, *supra* note 141, at § 1(4). These notices must be served at the commencement of the tenancy.

153. See Ian Whitehead et al., *Economic Evaluation of the Agricultural Tenancies Act*, § 2.23 (2002).

of the 1995 Act found that 80% of landlords felt that the introduction of farm business tenancies had enabled them to introduce environmental clauses, and 98% of those who had been approached by tenants requesting permission to enter agri-environment schemes had responded positively.¹⁵⁴ These encouraging figures nevertheless mask differences of approach between different categories of landowner. Institutional landowners with a conservation objective (such as the National Trust) were more likely to include conservation covenants in their tenancy agreements than private landowners. Additionally, where land agents negotiated agreements on behalf of private landowners, forty-six percent were found to “seldom” incorporate environmental clauses, and twenty-three percent never did so.¹⁵⁵

One of the principal problems for diversification on tenanted land concerns the compatibility of environmentally beneficial farming methods with the Rules of Good Husbandry that are incorporated into most farm tenancy agreements. The rules themselves are set out in the Agriculture Act 1947.¹⁵⁶ They require a tenant to maintain a “reasonable standard of efficient production as respects both the kind of produce and the quality and quantity [produced] . . . while keeping the [holding] in a condition to enable such a standard to be maintained in the future.”¹⁵⁷ The 1947 Act lays down a number of criteria against which this standard must be tested, including the maintenance of permanent pasture in a properly grazed and mown condition, maintaining arable land in a clean and good state of cultivation, and in the case of livestock enterprises ensuring that they are “properly stocked” and that an efficient standard of livestock management and breeding is practised.¹⁵⁸

The sanctions for breach of the rules were repealed as long ago as 1958¹⁵⁹ but they have retained considerable importance notwithstanding their lack of direct enforceability. The rules are enforceable indirectly against a tenant through the notice to quit procedures of the 1986 Act, and are relevant in (for example) rent reviews and disputes as to repairs under the 1986 Act. They are also frequently incorporated into tenancy agreements for farm business tenancies and agricultural holdings, making compliance with their standards of husbandry an express term of the tenancy. Where a conservation covenant was expressly included in a 1986 Act tenancy, the tenant will be protected against possible breaches of tenancy by a provision that protected him in proceedings for a certif-

154. *Id.* at §§ 3.31, 3.32.

155. *Id.* at tbl. 3.10.

156. *See* Agriculture Act 1947, § 11.

157. *Id.* at § 11(1).

158. *Id.* at § 11(2).

159. Agriculture Act 1958, § 10(1), sched. 2.

icate of bad husbandry or for remediable or irremediable breach of tenancy.¹⁶⁰ This protection only applies in strictly circumscribed conditions, however: the practice complained of must have been adopted pursuant to a provision in the tenancy, or in “any other agreement with the landlord”, which indicated that its object was the furtherance of one or more stated conservation objectives *viz.* the conservation of flora or fauna, the protection of buildings of archaeological/historical interest, and the conservation or enhancement of the natural beauty of the countryside.¹⁶¹ This would be of direct relevance if the rules of good husbandry have been expressly incorporated as a term of the farm business tenancy, in either unamended or amended form, provided that a conservation clause has also been taken either in the tenancy itself or separately.¹⁶²

The Agriculture Act 1947 was a product of the post-war period, when the emphasis was on improving production and producing food as cheaply and efficiently as possible. The rules of good husbandry therefore reflect the agricultural imperative, and stress the need to maintain optimum levels of efficient production on tenanted holdings. They do not accommodate modern public policy priorities such as environmental protection and countryside “stewardship”—reflected, for example, in agri-environmental measures such as Environmentally Sensitive Area agreements or the Entry Level Environmental Stewardship scheme, which require participating farmers to farm “extensively” by reducing the stocking density of livestock or setting arable land aside with a green cover to encourage ground nesting birds and other wildlife. The rules have been held to require an evaluation solely of the tenants husbandry practises, an exercise in which considerations of a financial or personal nature are irrelevant.¹⁶³ However

160. Agricultural Holdings Act, *supra* note 142, at §§ 9(2), 10(1)(d), 11(2).

161. *Id.* at sched. 3 § 2.

162. There is no requirement that the agreement to pursue conservation objectives be made in writing, or in the tenancy agreement itself: it can be made orally and quite separately from (and subsequent to) the tenancy agreement. Clearly, however, a tenant wishing to rely on this protective provision would be well advised to have the agreement recorded in writing for evidential reasons.

163. An example of the problems for a tenant farmer participating in an agri-environmental scheme (such as ESA or Environmental Stewardship) is provided by the recent decision in *R (Davies) v Agricultural Land Tribunal and Philipp* [2007] EWHC 1395 (Admin). The Agricultural Land Tribunal issued a certificate of bad husbandry in circumstances where the tenant was burying waste on farmland (a clear breach of the rules of good husbandry). The tenant had also left semi-natural grazing land unmanaged – allegedly under the terms of an agreement under the Tir Cynnal agri-environment scheme. On the evidence the tribunal found that there had been no management at all of the land in question, and that approximately one third of the holding had been “abandoned.” The issues of husbandry must be assessed by looking at the tenant’s husbandry across the whole of the agricultural unit. The husbandry on the remaining two thirds of the holdings was adequate, but not impressive. On the facts, therefore, the High Court refused to overturn the tribunal’s findings and upheld the certificate of bad husbandry. This decision is authority

financially advantageous it may be to enter an agri-environmental scheme, therefore, this in itself will not be accountable if the landlord alleges that reductions in output amount to a breach of the rules of good husbandry.¹⁶⁴

The Agricultural Tenancies Act of 1995 partially reflects the changed priorities of modern farming, in that the “rules of good husbandry” are not statutorily incorporated into farm business tenancy agreements. The terms of the agreement are, however, entirely left to the parties for negotiation, and will usually want to incorporate a yardstick against which to assess both the tenant’s husbandry and when poor husbandry will amount to a breach of contract. To do this, the parties to a farm business tenancy will commonly either expressly incorporate the statutory 1947 rules into the agreement, or incorporate a variation of them that meets the particular circumstances of the proposed letting. Unlike the Agricultural Holdings Act 1986, the 1995 Act contains no protective provisions for environmental land management, and where the rules of good husbandry have been expressly incorporated into a farm business tenancy it is therefore essential for the tenancy agreement to make special provisions for the protection of the tenant against claims of bad husbandry arising out of the adoption of environmental land management.¹⁶⁵ Another approach would be to incorporate the rules, but in an amended form that takes account of agri-environment measures adopted by the tenant. Amending the 1947 rules will be important, for example, where participation in set aside or agri-environmental schemes is in prospect, as a tenant changing his farming system under one of these schemes may find himself in breach of his tenancy if the rules of good husbandry have been incorporated into the tenancy in an unamended form.

This issue cuts both ways, however. If the rules of good husbandry have *not* been incorporated into a farm business tenancy agreement, the tenant will be free to diversify into less productive forms of environmentally beneficial farming without sanction from the landlord. The only residual constraint in this situation is the “business condition,” i.e., the rule that all or part of the land comprised in the tenancy must be farmed for the purpose of a trade or business.¹⁶⁶ It will be necessary to retain some of the holding in agricultural production if it is to remain a farm business tenancy. It follows that where a farm business tenancy

for the proposition that the tribunal must focus exclusively on the agricultural management of the unit, taken as a whole.

164. See *Cambusmore Estate Trustees v Little* [1991] SLT (Land Court) 33 (Scot.) (decided on the Agricultural Holdings (Scotland) Act 1949 § 28. The tenant here had leased out his entire milk quota, to some financial advantage, and ceased milk production altogether. This was held to be bad husbandry).

165. See generally Jennifer M. Bishop, *Reforming Land Tenure: Farm Business Tenancies and the Rural Environment*, (1996) Conv. 243

166. Agricultural Tenancies Act 1995, *supra* note 141, at § 1(2).

exclusively envisages maximising agricultural production, it will be important for the landlord to expressly incorporate the rules of good husbandry—or some other appropriate management criteria—into the tenancy agreement if an appropriate standard of management is to be enforceable. Unlike the 1986 Act, the 1995 Act does not provide for the enforcement of the rules independently of the tenancy agreement.¹⁶⁷ Under the 1986 Act, the rules could be enforced through the agricultural land tribunal by an application for a certificate of bad husbandry. This, if granted, would give the landlord a right to serve notice to quit.¹⁶⁸

Agri-environmental schemes vary as to whether the landlord's consent is required for participation—some (such as the Environmentally Sensitive Areas scheme) require only that the landlord be notified prior to entry, while others require the landlord's written consent before a management agreement can be concluded. The DEFRA Code of Practice strongly recommends full disclosure and discussion between the parties before a proposal to enter a scheme is put forward by the tenant.¹⁶⁹ The landlord may wish to include a covenant obliging the tenant to consult him as to the choice of scheme to be entered, especially where participation is likely to be a long term commitment. Conversely, if the tenancy is for a short fixed duration, the tenant may not have sufficient security to guarantee performance of the scheme requirements for the required period of time (e.g., 10 years in the case of an ESA management agreement or Countryside Stewardship). In this event, the landlord will have to be a party to any management agreement, and the tenancy agreement should make a provision for consultation as to land management between landlord and tenant, and for the division of any payments made under schemes entered into.

V. CONCLUSION

At the level of public policy, the program design and implementation of agri-environment measures has improved dramatically since their inception in the 1980s. The domestic law of England and Wales remains wedded, however, to an outmoded and restrictive notion of agriculture that sits uneasily with the modern multifunctional model of European agriculture. The law of development control raises issues common to both freehold and tenanted farms. Where land is

167. The landlord has a ground for possession where the agricultural land tribunal has issued a certificate of bad husbandry. Agricultural Holdings Act 1986, *supra* note 142, at sched. 3 case C. This is applicable whether or not the rules have been made a term of the tenancy agreement itself.

168. If the rules had been incorporated as a term of the tenancy agreement, an additional ground for serving notice to quit—breach of tenancy—would also be available to the landlord. *Id.* at sched. 3 case D.

169. See DEFRA Code of Practice, *supra* note 154.

tenanted, the restrictive definition of “agriculture” deployed in the tenancy legislation adds further complications, as does the retention of outmoded notions of “good” husbandry. The European Court of Justice has held, in *Rv. Ministry of Agriculture Fisheries and Food*, that the legal relations between landlords and tenants are a matter solely for the domestic law of the different member states.¹⁷⁰ If these issues are to be satisfactorily resolved, therefore, the necessary changes will have to be made in English Law. They will not be resolved in European Law.

One of the fundamental issues facing the English law of land tenure in this area is its continuing adherence to principles of freedom of contract. The efficient implementation of agri-environmental policy arguably requires a more imaginative approach grounded in principles of public law. A key element in this would be the reconfiguration of the definition of agriculture to give it an objective meaning independent of the intention of the contracting parties to a farm lease. The first steps in this direction have been taken in Scotland. The Agricultural Holdings (Scotland) Act 1991 was amended in 2003 so as to provide that environmental or conservation activities carried out by a tenant farmer are not breaches of the rules of good husbandry if carried out pursuant to “an agreement entered into under any enactment by the tenant,” or under the conditions of any grant paid out of public funds.¹⁷¹ This simple reform would remove many of the problems discussed above, and which continue to trouble English Law.

The adoption of the Scottish reform model would abrogate the private rights of the parties, in the sense that the introduction of a publicly funded agri-environment scheme would automatically entitle a farmer to participate irrespective of tenancy restrictions to the contrary.¹⁷² The principal objections to this approach are, first, that it introduces an element of retrospectivity in that the definition of agriculture could change after a tenancy has been concluded, thereby altering the land use envisaged by the landlord when letting the land.¹⁷³ This objection carried considerable weight with the Tenancy Reform Industry Group, who backed away from recommending legislative change and instead recommended the adoption of a Code of Practice backed by an ombudsman scheme.¹⁷⁴ A more fundamental objection, however, might be that in abrogating the private rights of the parties it enables the state to unilaterally alter the nature of farm

170. *The Queen v. Ministry of Agric., Fisheries and Food* [1994] ECR I-955, I-985 (U.K.).

171. Agricultural Holdings (Scotland) Act 1991, § 85, as amended by Agricultural Holdings (Scotland) Act, 2003, § 69.

172. See TRIG, *supra* note 152, at § 6.2.

173. See *id.*

174. See *id.* at § 6.3.

tenancy agreements whenever a new agri-environment or publicly funded rural development measure is adopted. There are arguments for and against this approach, depending on whether one regards freedom of contract, or an approach grounded in public law and democratic accountability, as the more appropriate for regulating land use. Following the failure of the TRIG report to suggest legislative changes, there appears to be little political will to resolve these issues in England and Wales. This is particularly to be regretted, as DEFRA has subsequently withdrawn public funding from the ombudsman scheme on which the Code of Practice for farm diversification relied for its enforcement. If the legal issues are to be resolved, a more radical approach will clearly be required.