Environmental principles in UK law after Brexit

Building blocks for environmental protection
Thank you

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While the ideas contained here have been developed with others, any recommendations and errors remain ours alone.

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# Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary</td>
<td>2</td>
</tr>
<tr>
<td>Introduction</td>
<td>4</td>
</tr>
<tr>
<td>The issue</td>
<td>4</td>
</tr>
<tr>
<td>The principles</td>
<td>6</td>
</tr>
<tr>
<td>Recommended approach to enshrining environmental principles in law: hybrid approach</td>
<td>21</td>
</tr>
</tbody>
</table>
Summary

1. The environmental principles provide important building blocks for environmental protection. They have a central, constitutional character in environmental law and, through EU law, they have shaped UK environmental protections since the 1970s. The proposed procedures for retaining EU law on exit day via the Withdrawal Bill do not properly ensure that these important environmental principles will be kept in the body of UK law. As the principles are a core part of the EU environmental acquis, failure to bring them into UK law after exit will create a gap in the law. A new provision in the Withdrawal Bill goes some way to resolving this issue by requiring the Secretary of State to publish, within six months of the passage of the Bill, a new draft Bill which includes a set of environmental principles.

2. These principles must not be lost after the UK exits the EU. Brexit presents an opportunity to cement the principles in UK law and to build upon the existing EU environmental acquis which the UK will inherit.

3. The EU environmental principles work together to further the ultimate goal of a high level of environmental protection. They are as follows:
   - **The precautionary principle:** This principle requires that where there is uncertainty as to the extent of risk of environmental harm, protective measures may be taken without having to wait until the harm materialises. It has repeatedly been demonstrated to be valuable in environmental decision-making and management. The precautionary principle is particularly relevant, alongside scientific research, as a tool to manage risk in situations where there is a high level of ignorance or uncertainty about a particular issue.
   - **The prevention principle:** This principle requires that preventive measures be taken to anticipate and avoid environmental damage before it occurs. It is central to the UK’s planning mitigation hierarchy and underlies much of the UK’s environmental policy and legislation. Prevention is a fundamentally important principle to ensure that environmental degradation is first and foremost avoided.
   - **The principle that environmental damage should be rectified at source:** This principle works alongside the prevention principle to ensure that damage and pollution is dealt with at its source as a priority. It operates in many areas of UK environmental policy to prioritise the manner in which environmental harm is addressed.
   - **The polluter pays principle:** This principle holds simply that the person who causes pollution or is doing an activity which creates a threat of pollution should bear the costs of the damage caused and any remediation required. It has a significant role in environmental management: acting as a deterrent, directing accountability for environmental harm, and providing a mechanism for remediating damage when it occurs.
   - **The integration principle:** This principle sits alongside the others and requires that environmental protection is integrated into all other policy areas and activities, with a view to promoting sustainable development. Integration is less developed than the other principles in EU law, but nevertheless has an important conceptual role in bringing environmental issues and considerations into all areas of policy, recognising that environmental matters do not exist in a vacuum. The principle has a role to play in creating a more joined-up approach in the UK and the UK’s exit from the EU presents an opportunity to develop and implement it more thoroughly after exit.

4. ClientEarth proposes that, as well as retaining the EU environmental principles, the UK should incorporate additional environmental principles into UK law. The non-regression principle holds that there should not be a rollback of environmental protections, promoting a ratcheting up of ambition in subsequent law reform and prevention of any lowering of standards or scope. It could operate to ensure that environmental protections remain strong in the UK over time, setting a benchmark for constant improvement. A principle that environmental management should take place at the appropriate temporal and spatial scales should also be considered. This would ensure that environmental issues are addressed at a scale that makes best ecological sense. For example, freshwater management is considered best done at a catchment-level, whereas climate change requires a much broader response.
5. This report makes the following recommendations:

<table>
<thead>
<tr>
<th>Key recommendations for enshrining environmental principles in UK law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Recommendation 1</strong></td>
</tr>
<tr>
<td><strong>Recommendation 2</strong></td>
</tr>
<tr>
<td><strong>Recommendation 3</strong></td>
</tr>
<tr>
<td><strong>Recommendation 4</strong></td>
</tr>
</tbody>
</table>
**Introduction**

6. When the UK exits the EU there is a real risk that it will lose important environmental principles that have been operating in the UK for decades due to the presence of those principles in EU treaty law and jurisprudence. The proposed procedures for retaining EU law on exit day via the Withdrawal Bill do not properly ensure that these important environmental principles will be kept in the body of UK law. An amendment made in the House of Lords would, if passed, go some way to resolving this issue by establishing a requirement to propose primary legislation to apply the EU environmental principles in the future after exit day.

7. This report sets out:

- How the loss of these principles may occur and why it is a concern;
- The meaning and effect of the EU environmental principles and their importance in the UK;
- Potential additional principles that could be enshrined in the UK after exit; and
- Recommendations for the structure through which these principles can be enshrined.

**The issue**

8. Despite the Government’s commitment to legal continuity and promise to carry over the full EU environmental acquis on exit day, the Withdrawal Bill as introduced to Parliament did not make proper provision for retaining the general environmental principles contained in EU treaty law. While some principles may be saved in specific contexts where they are explicitly referenced in EU legislation or case law, the general applicability of these environmental principles after exit is not provided for. A new provision in the Withdrawal Bill goes some way to resolving this issue by requiring the Secretary of State to publish, within six months of the passage of the Bill, a new draft Bill which includes a set of environmental principles and a duty on the Secretary of State to publish a policy statement in relation to the application and interpretation of those principles. However, this provision does not establish the principles in UK law via the Withdrawal Bill itself, nor is the approach proposed for the future Bill sufficient.

9. The potential loss of these principles from UK law is significant. EU environmental principles have been used in the European courts and in the UK as interpretive aids for statutes and policies, have provided a basis for scrutiny and challenge of Government actions in court, and have guided administrative decision-making and policy. They have therefore operated in a number of ways to shape the UK environment and environmental decision-making (discussed further below).

10. Ensuring that these principles continue to operate in the UK after Brexit is important so that they carry on shaping the UK’s approach both domestically and internationally to environmental issues and challenges. The Government has committed to develop a trading framework which supports environmental goals as an underlying principle. It has also pledged to ensure the maintenance of high standards of environmental protection in trade agreements. As well as guiding domestic policy and decision-making, the principles should also play a guiding role in fulfilling these promises.
Principles in EU law

11. As noted above, the EU environmental law principles are:

- the precautionary principle;
- the prevention principle;
- the principle that environmental damage should be rectified at source;
- the polluter pays principle; and
- the integration principle.

12. While there is some contestation as to the grouping of environmental principles in EU law,8 the above list is considered to represent the core EU environmental principles for the purpose of this report. Sustainable development, although sometimes listed as a principle, has a much more loosely-defined legal treatment and nature. It is conceptually different to the rest of the EU principles, arguably acting more as an overarching objective.9 It is discussed separately below.

13. EU law incorporates environmental principles in primary EU law, in the Treaty on the Functioning of the European Union (TFEU). This means the principles have a constitutional character and form the underpinning guidance for EU environmental policy and decision-making. As well as being based on the principles, EU environmental policy is also directed to aim at a high level of environmental protection.10

14. The EU environmental principles in the TFEU are increasingly articulated in EU legislation and environmental policy,11 used to interpret uncertain legislative terms, and they inform and generate legal tests in the development of environmental law doctrine in the courts.12 European courts have frequently turned to the environmental principles to aid in interpretation of EU law, relying on those principles to inform a purposive approach to statutory interpretation. Prominent examples of this include the Waddenzeet and ARCO decisions.13 The principles therefore form part of the ‘environmental acquis’ in EU law. The principles have undoubtedly been influential in the development of EU case law and in interpreting EU legislation.14 They have also begun to reach beyond environmental areas in some cases.15

Principles in UK law

15. As the UK is an EU Member State, the general environmental principles outlined above are currently part of UK law. For example, directives interpreted by the European courts in light of the environmental principles have to be similarly understood in their implementation in the UK.16 The legal impact of the EU principles tends to manifest in public law disputes relating to a failure to take the principles into account or arguments relying on the principles to interpret contested statutory provisions.17 The environmental principles do not, however, have direct effect, and therefore there is no duty on the UK Government to apply the environmental principles directly.18

16. Outside of their applicability via EU law, environmental principles have a more minor role in the UK.19 However, in recent years, statements of broad principles or objectives have begun to make their way into UK legislation, signalling perhaps that there may be a movement in the UK towards a greater role for these kinds of general concepts in domestic law.

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8 For example, Reid identifies a different grouping to Scotford: sustainability, proportionality, integration, and the precautionary principle – see E. Reid, Human Rights, Environment Protection and International Trade (Hart Publishing, Oxford, 2013), at 55. See also J.J. Veder, who identify a ‘group of principles’ similar to those listed by Scotford and also ‘general principles of EU law relating to environmental protection’, including subsidiarity, proportionality and equal treatment – see J.H. Jans and H.V. Vedder European Environmental Law: After Lisbon (4th ed) (Europa Law Publishing, Groningen, 2012), Ch 1. De Sadeleer identifies the same list as Scotford, but with the addition of the principle of ‘high level of protection and improvement of the quality of the environment’ – see above n 7.
9 Lee, above n 4 at 79.
10 TFEU, Article 191(2).
11 Scotford, above n 7, at 148-149.
12 E Fisher, B Lange, E Scotford, above n 7, at 148-149.
13 Case C-127/02 Landelijke Veringing tot Behoud van de Waddenzee v Staatssecretaris van Landbouw [2004] ECR I-7405 (Waddenzeet). Held at [44] that the Habitats Directive must be interpreted by reference to the precautionary principle in Art 191(2) TFEU, and therefore that the protective measures in the Habitats Directive should apply where uncertain environmental risks could not be excluded.
14 Case C-418/97 & C-419/97 ARCO Chemie Nederland v Minister Van Volkshuisvesting, Wasserstaat en Milieu [2000] ECR I-4481, at [36][40] (ARCO). Held that, applying the precautionary and preventive principles, the term ‘waste’ should be interpreted expansively to incorporate as many discarded items as possible.
15 Although the employment of the principles as doctrine in the European courts has at times been unclear. See Fisher et al, above n 12, at 149, 674. See also for example Case C-343/09 Arbon Chemical Limited v Secretary of State for Transport [2010] ECR I-07027 where the Court (presumably) decided the case on the basis of the precautionary principle, but is unclear from the judgment the extent to which the principle played a decisive factor or how much weight was given to other factors considered in the judgment, such as proportionality; see also ARCO (above n 14), where the court was not entirely clear in its reasoning as to why an application of the principles necessitated the broad interpretation.
16 Case T-1389 River Animal Health 5A v Council of the European Union (2003) ECR II-03205, at [146]-[147], where the Court held that the precautionary principle should apply not just in environmental law but in other areas of decision-making such as under the common agricultural policy or health.
17 Fisher et al, above n 12, at 432; see for example Downie v Secretary of State for Environment, Food and Rural Affairs (2008) EWHC 2668 (Admin), holding that UK action under the EU Plant Products Directive was inadequate for failing to take all necessary steps to limit the risk of harm of a pesticide before approving it, as required by the precautionary principle in light of ‘solid evidence’ raising doubt as to its safety – applying the reasoning in Case T-229/04 Sweden v Commission [2007] ECR I-2437.
18 Fisher et al, above n 12, at 432.
19 Fisher et al, above n 12, at 432; see for example Case C-172/07 Landelijke Veringing tot Behoud van de Waddenzee v Staatssecretaris van Landbouw [2008] ECR I-1353, where the Court held that the precautionary principle should apply not just in environmental but in other areas of decision-making such as under the common agricultural policy or health.
The principles

17. This section considers the meaning and effect of the EU environmental principles as they have operated in the EU and in the UK. These principles have operated as a coherent set, driving towards the ultimate policy goal of environmental protection and sustainable development, and are often utilised in combination.

Precautionary principle

18. The precautionary principle is one of the best known and well-developed environmental principles. It has had substantial international-level uptake in treaties and jurisprudence. However, the meaning and operation of the principle itself is still contested.

19. Broadly, three ‘versions’ of the precautionary principle have evolved and can be summarised as follows:

- ‘uncertainty does not justify inaction’ (the ‘weaker’ but most common version);
- ‘uncertainty justifies action’; and
- reversal of the burden of proof, requiring that the person undertaking an activity demonstrate that the activity will not have a significant (negative) effect on the environment before being allowed to proceed (the ‘strongest’ version).

20. The precautionary principle is not defined in the TFEU but is elaborated in Commission guidance, which explains that it is to be considered as part of a structured approach to risk management. The guidance states that when decision-makers become aware of a risk to the environment or human, animal or plant health that may have serious consequences in the event of non-action, decision-makers must obtain the best possible scientific analysis and determine action to achieve an appropriate level of protection. The European Court of Justice (ECJ), as it was then, defined the principle in relation to health issues as follows: “Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks becomes fully apparent.”

21. The precautionary principle is directly incorporated into some specific EU legislation, such as chemicals regulations and fisheries management laws and nuances have developed in its applications in different policy contexts. It has also been applied directly by the courts in a number of EU cases. For example, in the ECJ found that the Habitats Directive must be interpreted by reference to the precautionary principle. It held further that where a plan or project is considered likely to have a significant effect on a protected site, an appropriate assessment is required and ultimately, in order for a project or plan to be authorised, the assessment must show that it is certain that it will not adversely affect the integrity of the site. The ECJ also specified in the 2002 Pfizer decision that protective measures invoking the precautionary principle may be taken “without having to wait until the reality and seriousness of those risks become fully apparent.”


22 Lee, above n 4, at 5-11.

23 Weiner, above n 21, at 602-608.

24 This is the version contained in the original elaboration of the principle in the 1991 Rio Declaration: Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.


26 Ibid, at 88.


28 Common Fisheries Policy ‘Basic Regulation’, above n 3; Regulation No 1907/2006 of the European Parliament and the Council: 18 December 2006 concerning the registration, evaluation, authorisation and restriction of chemicals (REACH Regulation), Article 1(3).

29 Waddensee, above n 13, at [44].

30 Ibid, at 89.

31 Pfizer Animal Health, above n 16, at [139].
22. The principle also plays a role in domestic interpretation and application of EU law within the UK. For example, the Northern Ireland Court of Appeal has recently applied the precautionary principle in a judicial review decision involving planning permission and environmental impact assessment. The Court held that the operation of the principle meant that an activity should not be granted planning permission until it is established that there is no unacceptable impact on the environment. The Minister’s decision to proceed on the basis that there was an absence of evidence of an unacceptable impact on the environment was held to be incorrect.

23. The precautionary principle has been considered by UK courts outside of the EU law context in a few instances but has not been found to support a separate basis for challenging a public decision. In the AMVAC Chemical case heard in the High Court of England & Wales, Crane J held that: “… on a substantive challenge to a regulatory decision, it may in some fields of regulation be relevant to take into account the precautionary principle and, more important, its limitations. It may be relevant to refer to the principle in a substantive challenge in the field of pesticide approval. However, my very firm conclusion is that there is – at least so far – no settled, specific or identifiable mechanism of risk assessment in the field of pesticide approval that the Claimant is entitled to rely on as part of the ‘precautionary principle’, viewed as a separate basis for challenging a decision.”

24. However, Crane J did indicate a willingness to review a decision suspending approval of a pesticide on the basis of its compliance with the precautionary principle in the event where the governmental decision-maker had purported to apply the precautionary principle in its decision “…as a term of art or any settled, specific or identifiable mechanism or methodology.” However, since that had not been the case in AMVAC, the Court was not required to examine the decision at issue on that basis. In the planning context, the High Court of England & Wales has also been willing to give the precautionary principle an interpretive role if it is included in the policy guidance at issue.

25. The principle is referenced in some UK administrative policy documents. For example, in the UK sustainable development strategy and also in guidance on Environmental Impact Assessment. The Interdepartmental Liaison Group on Risk Assessment has also produced a report attempting to develop further guidance for policy and application of the precautionary principle. Fisher et al note that the precautionary principle would likely have a more prominent role in English law independent of the EU if it were included in more domestic statutory and policy measures.

26. The precautionary principle has sometimes been criticised for risking ‘false positives’ – where regulation is imposed based on precaution but later found to be unnecessary, resulting in over-regulation of minor risks or regulation of non-existent risks and thereby misapplying public funds and regulatory effort as well as creating unnecessary burdens on industry and / or leading to a chill on innovation. However, a recent analysis done for the European Environment Agency included a detailed literature review of cases since the 1990s and identified just four examples of genuine false positives in the application of the precautionary approach to regulation for health and environmental risks. The main findings of the study were that, despite a vast amount of literature raising concerns that the precautionary principle leads to false positives, the fear is misplaced and false positives are few and far between compared to ‘false negatives’ (i.e. where early warnings of risk of serious harm existed, but preventive or precautionary action was not taken). The study also highlighted a number of ‘mistaken’ false positives raised by commentators which, upon analysis, turned out to be either real risks, cases where the ‘jury was still out’, unregulated alarms, or risk-risk trade-offs.

33. ibid, at [34]-[37]. Held that the Department of the Environment erred in deciding not to issue a Stop Notice halting dredging in Lough Neagh on the basis that there was no evidence of harm, in light of repeated findings that the operation of the principle meant that an activity should not be granted planning permission until it is established that there is no unacceptable impact on the environment. The Minister’s decision to proceed on the basis that there was an absence of evidence of an unacceptable impact on the environment was held to be incorrect.


35. AMVAC, above n 35, at [86], discussed in Fisher et al, above n 12, at 434.


42. ibid.
43. ibid.
44. ibid.
27. The precautionary principle does have limitations as a risk management tool. In particular, Mielke has cautioned that it provides more limited assistance in situations of ‘double uncertainty’, where there is uncertainty or inadequate information both as to the extent and risk of harm presented, and as to the regulatory solution to that risk.45 Heyvaert has also queried the extent to which the precautionary principle has truly ‘made the difference’ or been fully embedded in some decisions and policy areas.46

28. On balance, however, this principle has been repeatedly demonstrated to be valuable in environmental decision-making and management.47 In particular, the precautionary principle is still highly relevant (alongside novel research) where there is low knowledge and a high level of ignorance on a particular issue.48 It has also enjoyed a large volume of analysis, jurisprudence, and legal integration in the past few decades. This continued honing and improvement contributes to the ongoing development, relevance and usefulness of the precautionary principle as a tool for environmental risk management.

Prevention

29. The core principle of prevention is generally well understood. Preventive measures anticipate damage before it occurs and try to avoid it. Timely prevention of environmental damage makes intuitive sense, particularly when it is likely to be irreversible or difficult to deal with through civil or criminal liability, or where reparation would be excessively expensive.49

30. Prevention can be linked to both pollution sources and points of impact. Public authorities can adopt policies to assess and regulate pollution sources to make them less damaging. When it comes to points of impact, authorities may focus on preventing the effects of pollution or activities on particular areas by, for example, adopting quality standards for receiving environments or establishing protected areas to prevent harm occurring to particular habitats or species.50 Environmental liability regimes and economic instruments have preventive components in so far as they are designed to deter environmentally damaging behaviour and activities.

31. This principle informs the basic rationale for many environmental protection laws at the international, EU and national levels.51 Prevention is a core component of EU waste policy, which requires Member States to encourage first the prevention or reduction of waste production and its harmfulness, and second the recovery of waste.52 European courts often use the principle to interpret provisions of the Waste Framework Directive to favour protection of the environment.53 Another example of EU legislation implementing the prevention principle is the Industrial Emissions Directive.54

32. In the UK, the courts have not explicitly considered or applied the prevention principle in domestic case law. However, prevention forms the first rung in the ‘mitigation hierarchy’ in UK planning policy.55 It is also arguably embedded implicitly in various UK environmental policies and legislation aimed at, for example, establishing protected areas for biodiversity conservation, regulating pollution, or setting environmental standards.

33. Applying the principle of prevention can be complex despite the simplicity of the initial proposition. It is not always clear how to prevent certain forms of environmental damage, and the principle is silent as to whether it requires prevention at all costs in all cases, or whether prevention gives way to lesser protection in the face of matters such as overriding public good or excessive cost. The principle also presupposes full knowledge of the risks of harm or impacts of a particular activity and knowledge of the means of prevention.56 It is therefore complementary to the precautionary principle, which operates where information levels are less certain.

34. As a general concept, prevention is well-understood and arguably already implicitly underlies much of the UK’s environmental policy and legislation. It is a fundamentally important proposition to ensure that environmental degradation is first and foremost avoided.
Rectification at source

35. The principle that environmental damage should as a priority be rectified at source is closely related to the polluter pays and prevention principles.

36. In EU case law, the principle of rectification at source has an important role in the control of transboundary movements of wastes intended for disposal.\textsuperscript{57} It is often invoked in concert with other environmental principles and the general principle of proportionality, with the requirements placed on polluters being necessary and effective, and not disproportionate to their contribution to the problem.\textsuperscript{58}

37. While this principle has featured in some UK cases, it has not been considered in depth in any judicial decision.\textsuperscript{59} However, remediation of environmental effects forms another central component of the planning mitigation hierarchy, where prevention of negative environmental impacts cannot be wholly achieved. The concept of rectification at source is also implicit throughout UK law and policy with regards to remediating land contamination and water pollution remediation. Alongside the polluter pays principle, the idea that damage should be remediated at the source drives policy and legal requirements for operators and land owners to remediate contaminated sites or remediate water pollution caused by their actions or emanating from their land.\textsuperscript{60}

38. The principle that environmental harm should be rectified at source is fundamental to many areas of UK and EU environmental policy. It operates in conjunction with the polluter pays and prevention principles in particular to provide an overarching framework for dealing with activities that will have an effect on the environment and to prioritise the manner in which environmental harm is dealt with.

\textsuperscript{57} Case C-290/90 Commission v Belgium [1992] ECR I-1 at [34], held that the principle that environmental harm should as a priority be rectified at source meant that any local authority is entitled to adopt measures to limit the transport of wastes and to ensure that their disposal takes place as close as possible to their place of production. See also de Sadeleer, above n 7, at 69.

\textsuperscript{58} C-293/97 R v Secretary of State for the Environment ex p Standley [1999] BCR I-2603, at [53]; Lee, above n 4, at 12.

\textsuperscript{59} See for example Re Friends of the Earth [2017] NICA 41, at [14]; Baker v Bath and North East Somerset Council & Ors [2009] EWHC 3520 (Admin), at [116].

\textsuperscript{60} See for example Environmental Protection Act 1990, s 78E, under which local authorities are obliged to require remediation of land that has been identified as contaminated.
Polluter pays

39. The polluter pays principle holds simply that the person who has caused pollution or is carrying out an activity that creates an imminent threat of environmental damage should pay for the costs of the damage caused and remediation of the environment, or for necessary preventive measures.61 The polluter pays principle commonly manifests in liability regimes imposing legal responsibility on the person who causes damage to the environment. If the polluter does not bear the costs of environmental damage, costs are shifted to other parties such as the Government (and therefore taxpayers), local communities, or landowners.

40. This principle has had a gradual shift in meaning over time.62 De Sadeleer notes:63 “The Recommendations of the OECD and EC referred to the [polluter pays] principle as a means of preventing the distortion of competition (instrument of harmonization intended to ensure the smooth functioning of the common market); later it formed the basis both for internalizing chronic pollution (instrument of redistribution) and preventing it (instrument of prevention); finally it served to guarantee the integrated reparation of damage (curative instrument). These various functions are at times complementary and at other times mutually exclusive."

41. The principle was originally elaborated in 1975 in a European Council Recommendation and has recurred in all subsequent Environmental Action Programmes.64 In 2000 the European Commission adopted a White Paper on Environmental Liability, which led to the Environmental Liability Directive.65 This legislation is based directly on the polluter pays principle as a means to prevent and remedy environmental damage.66 Other EU directives such as the Waste Framework Directive also directly apply the polluter pays concept.67 Several European court decisions have applied the principle to issues of taxation for the removal of waste and to apportion liability for oil spills and other pollution.68

42. In the UK, the principle has been enlisted in several environmental policy areas, including before the introduction of the Environmental Liability Directive. It is most prominent in the context of contaminated land remediation and waste management. For example, the Environmental Protection Act 1990 implements a system for the remediation of contaminated land or water pollution that is underpinned by the polluter pays principle.69 The Act provides that the ‘appropriate person’ to remediate the land will be the person who caused or knowingly permitted the contamination.70 However, if that person cannot be found then responsibility for remediation falls on the current owner or occupier, even if they have not contributed to the contamination.71

43. The policy importance of the polluter pays principle has received judicial recognition in the UK. In Re Mineral Resources Neuberger J observed that “there is considerable public interest in the maintenance of a healthy environment, and in the principle pithily expressed as ‘the polluter must pay’.72 Subsequently the Court of Appeal of England & Wales limited the application of the principle by holding that it cannot be applied so as to require unsecured creditors of the polluter to pay when the polluter itself cannot.73 In Scotland, however, a recent decision by the Inner House of the Court of Session followed the approach in Mineral Resources, holding that the polluter pays principle was an additional persuasive factor in giving pre-eminence to the policy of maximising environmental protection, finding that the debts of an insolvent company for remediation of contaminated land must be enforced in the winding up process and treated as liquidation expenses, meaning that the liquidator could not simply abandon or surrender a statutory licence to divest itself of the responsibility to remediate the land as required by that licence.74

61 For a thorough discussion see de Sadeleer, above n 7, at 21.
63 De Sadeleer, above n 7, at 34.
66 75/436/Euratom, ECSC, EEC: Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters. While not strictly legally binding, national courts are required to take recommendations into consideration when deciding disputes – see Case C-262/99 Grimaldi [1999] ECR I-4407, at [16]. Also discussed in de Sadeleer, above n 7, at 28.
68 Lee, above n 4, at 13.
70 See for example Mineral Protection Act 1990, s 78K which imposes liability for contamination of substances that have been caused or permitted to escape by a person onto any other land primarily on the person who caused the contamination, rather than the owner or occupier of the affected land or on people who did not cause or knowingly permit the substances to escape or contamination in question. And in Re Celtic Extraction Ltd (In Liquidation), In Re Bluestone Chemicals Ltd (In Liquidation) [2001] CSIH 475, at 490. Note however that the Inner House of the Court of Session in Scottish Environment Protection Agency v Joint Liquidations of the Scottish Coal Company Ltd [2003] CSIH 108 at [114] (Scottish Environment Protection Agency) and in Re Celtic Extraction Ltd (In Liquidation), In Re Bluestone Chemicals Ltd (In Liquidation) [2001] CSIH 475, at 490. Note however that the Inner House of the Court of Session in Scottish Environment Protection Agency took a different approach, in line with Neuberger J’s decision in Mineral Resources [1999] BCC 422.
71 Scottish Environment Protection Agency, above n 72, at [144].
44. The polluter pays principle has also influenced UK Government policy development. It is referenced particularly in policy areas such as management of hazardous substances and guidance for environmental reporting. The Government tax relief scheme for remediation of contaminated or derelict land provides another example. Relief is provided for remediation of land owned by companies who acquire it in a contaminated or derelict state, but if a company acquires a contaminated site and then adds further contamination it is not entitled to claim the tax break on any remediation expenditure it occurs.

45. While neatly applicable in straightforward cases of environmental damage (where action or inaction causes an event with immediate impacts on the environment, and with an easily identifiable source), the polluter pays principle is more difficult to apply to complex, chronic environmental harm, or to non-point-source pollution for which there are multiple contributors. Difficulty also arises when it is not possible to identify the original polluter, or where that polluter is an entity which no longer exists. Determining the boundaries of the interpretation of ‘polluter’ is not always straightforward.

46. There may also be valid policy reasons why the polluter should not pay in certain circumstances. For example, a local government may elect to provide a free waste removal service for its residents to promote recycling. Strictly applying the polluter pays principle would suggest that all homeowners who produce recycling waste should pay a direct fee for its collection and disposal. However, the local council may consider that this might provide a disincentive to recycling, preferring instead to bear the cost of that waste disposal itself as the provision of a public good.

47. In another example, in applying an environmental liability regime, a government may wish to encourage the use of insurance or financial instruments to mitigate against risks such as a polluter being illiquid, or use of loopholes such as thinly capitalised subsidiary companies carrying out operations in order to minimise a parent company’s exposure. Insurance products to cover some forms of pollution liability may be either difficult to acquire or prohibitively expensive, particularly for smaller operators. In that case, a government may decide to cap liability in order to encourage an insurance market. Capping liability is inconsistent with a ‘pure’ application of the polluter pays principle. But it may in practice be the most reliable way to ensure that funds are available to cover the costs of prevention and remediation of environmental damage even if they expose the government, communities, or other parties to some of the costs of that damage.

48. On balance, the polluter pays principle is undoubtedly important and has a significant role to play in environmental management. But it is also not applicable to every situation, and in some instances there may be valid public policy reasons for why the polluter pays principle should not be applied, or should be only partially applied.

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79 For example, the Gas Acts 1948, 1972 and 1986 limited successor liability to only those liabilities of the predecessor that arose ‘immediately before’ the date of transfer. This was discussed in R (on the application of National Grid Gas plc (formerly Transco)) v Environment Agency [2007] UKHL 30 at [29]-[36] where the Lords rejected an argument that sought to extend the concept of the ‘polluter’ beyond the original polluter and on to successors in light of the clear statutory provisions, noting this was a matter for Parliament, not the courts. See also Powys County Council v Price and Hardwick [2016] EWHC 2568 (QB), at [40].
Integration

49. The ‘integration principle’ in EU law requires that environmental protection requirements should be integrated into the definition and implementation of all of the EU's policies and activities, in particular with a view to promoting sustainable development. It is designed to fill normative gaps and ensure that environmental protection is considered in all decision-making procedures where it is relevant, not just in the ‘environmental’ policy sector. Nolkaemper has noted that it can fulfill a role in finding solutions in cases where applicable norms conflict, requiring reconciliation of norms so that environmental protection is achieved.

50. This principle has had a role in extending environmental considerations into other policy areas. The Sweden v Commission decision upheld an argument based on the integration principle (among others) to challenge EU measures in non-environmental policy fields for their compliance with environmental protection requirements. The principle was also considered in the Environmental Crime case, where the Court held that in light of the integration principle, the Community institutions should have introduced a measure concerning the enforcement of environmental law through criminal measures under the EU Treaty, despite criminal law being a matter traditionally reserved for Member States. However, these decisions do not appear to have triggered a widespread review of EU measures on environmental grounds in subsequent years and overall integration is difficult to institutionalize.

51. The principle of integration has not featured in UK case law. It is also not explicitly raised or referenced in Government policy documents. Historically, environmental issues have been largely self-contained in UK policy and decision-making. While more recent initiatives towards environmental integration and embedding of sustainable development have demonstrated progress, there is still a way to go in the UK before environmental protection could be considered truly integrated.

52. The integration principle remains somewhat underdeveloped and has been difficult to institutionalize in contrast to other EU environmental principles. However, conceptually it plays an important role in bringing environmental concerns and sustainable development into all areas of policy. Environmental issues cannot be addressed in a silo and will inevitably spill into other policy sectors. This principle, with its strong ties to sustainable development, has an important role to play in creating a more joined-up approach in the UK and there is an opportunity to develop and implement it more thoroughly after exit.


[81] Nollkaemper, above n 80, at 31.


[84] Case C-176/03 Commission v Council (Environmental Crime) [2005] 3 CMLR 20, at [42].

[85] Fisher et al, above n 12, at 429; Lee, above n 4, at 68.


[87] ibid, at 71.

[88] Lee, above n 4, at 69.

Additional environmental principles for the UK

53. As well as the EU environmental principles, the Government could incorporate additional principles to guide policy and decision-making in the UK. This subsection considers the principle of non-regression, the principle that environmental management should be carried out at the appropriate scale, and ‘environmental net gain’.

Non-regression

54. ‘Non-regression’ is an environmental principle that has emerged more recently than some of the others discussed in this report. It promotes a constant improvement in ambition and environmental protection and management practices. The ‘non-regression’ principle requires that there should not be a rollback in environmental standards, promoting a ratcheting up of ambition in subsequent law reform and policy and preventing any lowering of ambition or protection.

55. The ‘non-regression’ principle originated in the context of economic, social and cultural rights. The International Convention on Economic, Social and Cultural Rights Article 2(1) requires that full realisation of rights is achieved progressively, which has been interpreted as follows:90

“…an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.”

56. In international environmental law, the principle of non-regression is receiving increasing recognition.91 At the Rio+20 conference, the UN General Assembly adopted a resolution affirming that back-tracking on the commitments at the Rio Earth Summit would be unacceptable.92 And most recently, the principle has been incorporated in the Paris Agreement on climate change. The Paris Agreement requires a constant ‘ratcheting up’ of effort on the part of state parties by requiring that each party must prepare and maintain successive nationally determined contributions to achieve the objectives of the Agreement, with each successive contribution representing a progression beyond the current contribution and reflecting its highest possible ambition.93 Recently, the World Conservation Congress of the International Union for Conservation of Nature (a global membership union composed of both government and civil society organisations) has also passed a resolution strongly urging states to further develop and implement the non-regression principle.94

57. Since 2016, France has included the principle of non-regression in its Environmental Code.95 Non-regression is defined in French law as requiring “…that the protection of the environment is the subject of constant improvement, taking into account scientific and technical knowledge”. The principle has also been adopted in the Ecuadorian Constitution.96

58. The principle of non-regression would be a sensible and valuable addition to the suite of general principles put in place in the UK after exit, requiring new environmental law and policy to represent at least the same level of ambition as the law and policy it seeks to replace. The Government’s ambition to leave the environment in a better state than that in which we found it is essentially an expression of the non-regression principle.97 Therefore, inserting such a principle could provide a benchmark at which to set environmental protections, and create a mechanism for a check on future policy as it is developed. The addition of such a principle would work alongside the existing EU principles to drive towards a high level of environmental protection. However, further thought should be given to ways in which a principle of non-regression might be able to address any conflicting environmental aims,98 or potential situations where urgent or overriding reasons of public interests might require temporary or permanent regression to some degree.

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90 UN Committee on Economic, Social and Cultural Rights: “The nature of States parties obligations (Art. 2; par.1)” 14/10/80 C/ESCR General comment 3.
92 UN Resolution ‘The Future We Want’ A/Res/66/288, at [20].
93 90 UN Committee on Economic, Social and Cultural Rights “The nature of States parties obligations (Art. 2, par.1)”
94 Recently, the World Conservation Congress of the International Union for Conservation of Nature (a global membership union composed of both government and civil society organisations) has also passed a resolution strongly urging states to further develop and implement the non-regression principle.94
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The non-regression principle has a different but related application in the international trade context. Michel Barnier, European Chief Negotiator for the UK Exiting the EU, has stated that "the agreement on the future relationship with the UK should include a non-regression clause". Non-regression clauses are contained in some existing EU free trade agreements. These clauses seek to prevent parties to the agreement reducing environmental protection in order to gain a trade advantage. A non-regression clause in a future UK-EU trade agreement or in the negotiated framework for the future relationship could also function to ensure that environmental protections in the UK do not reduce after exit.

Managing environmental issues at the appropriate scale

The Government should also consider a principle that environmental issues should be managed at the most appropriate scale. This policy also has an administrative, rather than a strictly environmental, application.

The scale at which an environmental matter may be best managed, or the scale at which certain actions should be taken, can vary. For example:

- A landscape-scale approach to conservation is increasingly recognised as necessary to contribute, alongside more localised efforts, to halting and reversing biodiversity decline.
- An issue such as climate change must be managed first on an international scale, but also on a UK-wide scale to ensure that the UK is reducing its total national carbon emission levels and contributing to global efforts to address climate change and at devolved level in terms of specific policy areas (eg renewable energy).
- Management of rivers and freshwater bodies may be best done at a catchment-wide level.
- Management of the marine environment is increasingly acknowledged as requiring an ecosystem-based approach.

Including a new principle to this effect could assist in developing and implementing management action and policy decisions at the most appropriate scale both administratively and environmentally. It will ensure that management is connected across the UK if there is an issue that requires national attention, or conversely would ensure that matters which are localised can be addressed at the community level to ensure that best use is made of local knowledge and that local conditions are properly accounted for.
Environmental net gain

65. In the 25 Year Environment Plan (25YP), the Government has proposed to embed an ‘environmental net gain’ principle for development, including housing and infrastructure, with the potential for eventual expansion of the concept into other areas of environmental policy.

66. An ‘environmental net gain’ principle could potentially be implemented as an overarching goal that requires public bodies to pursue net gain of all biodiversity and ecosystem services across the UK, similar to the principle of non-regression. However, the prevailing understanding and application of this concept (including the initial application proposed in the 25YP) is in the narrower, specific development / planning and biodiversity offsetting context.

67. Offsetting has had mixed results in practice in the UK, with a report on the Defra pilot programme concluding that whilst biodiversity offsetting has the potential to deliver improvements in biodiversity outcomes it will require additional resources and ecological expertise in local authorities to deliver it. Mixed results have also been reported in other jurisdictions. A UK ‘net gain’ principle must therefore recognise the limitations of offsetting. Achieving net gain for the environment needs to begin with strict adherence to the mitigation hierarchy by requiring prevention of loss and minimising of impacts in the first place, with offsetting a last resort. In addition, some biodiversity or habitats, such as ancient woodland or limestone pavement, may be irreplaceable and therefore impossible to offset.

68. The fact that, initially at least, a net gain principle would not have general application means it has a different character to the other environmental principles explored in this report and may therefore not sit easily with those principles. In addition, the mixed results seen for offsetting so far indicate that the concept should be implemented carefully and further demonstration of its effectiveness for promoting environmental protection is required.

104 HM Government, above n 97, at 32


106 See for example Sarah Bekessy et al ‘The biodiversity bank cannot be a lending bank’ (2010) 3 Conservation Letters


Sustainable development

69. The overarching conceptual framework of ‘sustainable development’ runs through EU and UK law and is now well-established. It has a more amorphous character and legal treatment than the environmental principles. 110 However, it is incorporated to some degree into the principle of integration (discussed above) and also plays a role as an overarching policy driver.

70. Sustainable development is most commonly and broadly understood to mean development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs. 111 It also generally requires that environmental needs are promoted and at a minimum, that economic, social and environmental policies are integrated and balanced. 111

71. Sustainable development is directly referenced in the TFEU, the Treaty on European Union, and in the European Charter of Fundamental Rights. 112 It has been incorporated broadly into EU policies and legislation across all areas via the EU Sustainable Development Strategy. 113 However, at the EU level sustainable development provides more of a high-level policy driver rather than having a prominent role at the legislative or jurisprudential level. 114 As a concept, it has a different legal character to the environmental principles in TFEU Article 191(2) – framing a policy domain and acting as a policy paradigm, rather than establishing or informing any specific legal rules. 115

72. Sustainable development is directly incorporated into many UK statutes. 116 It is a widely referenced and utilised concept in UK domestic law, usually manifesting as a general aim or duty imposed upon public authorities to consider in decision-making or apply to the exercise of public powers. 117 Sustainable development also features strongly in several policy documents. In particular, the National Planning Policy Framework (NPPF) for England, where it is seen as a ‘golden thread’ running through plan-making and decision-taking. 118 The NPPF contains a presumption in favour of sustainable development. 119 However, while sustainable development has subsequently been a key consideration in the determination of planning applications, its meaning has frequently caused confusion and difficulty for planning authorities and courts. 120

73. Welsh policy and law has also been shaped considerably by sustainable development in the past decade. The Welsh Government had a statutory duty to promote sustainable development under the Government of Wales Act 2006. 121 And sustainable development now enjoys even more widespread application via the Wellbeing of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016. 122 Northern Ireland has also introduced a statutory duty to contribute to sustainable development, imposed upon all public authorities when exercising their functions. 123 In Scotland, sustainable development is referenced in various policy areas including planning, land reform, marine management, and environmental impact assessment. 124

74. Despite the fact that sustainable development has caused difficulties in interpretation and application, its inclusion as a guiding policy across the UK has been influential. However, its contested and unclear meaning has resulted in variable application. The generalised statement and formulation of the concept in legislation has resulted in a high degree of discretion for decision-makers and policy-makers in its application. 125

109 Lee, above n 4, at 72-80.
111 Bartosz et al, above n 110, at 618; Fisher et al, above n 12, at 437.
112 TFEU, Art 11; Treaty on European Union, Art 3; European Charter of Fundamental Rights, Art 37.
114 Lee, above n 4, at 63-79; Fisher et al, above n 12, at 43.
115 Scoftord, above n 7, at 192 to 196; Lee, above n 4, at 66-79.
117 Fisher et al, above n 12, p 408.
119 ibid, at 114.
121 See also North West London Strategic Plan 2006, s 29; Planning etc. (Scotland) Act 2006, s 30; Land Reform (Scotland) Act 2007, s 1.
122 S Chadwick ‘Sustainable development: residual issues with the tilted balance?’ 2017 8 JPL 796-802, at 796 and 798-801. It has most recently been considered in Barwood Strategic Land II LLP v East Staffordshire Borough Council and another (2017) EWHC Civ 893.
123 Section 70.
Options to give legal effect to environmental principles after exit

75. As explained above, the Government has committed to ensure that the whole body of existing EU environmental law continues to have effect in UK law after exit. This must include incorporating the environmental principles so that they have general application across all environmental policy areas in the UK.

76. There are several possible ways that the principles could be enshrined. They could be incorporated into primary legislation (either as a bare list or with added detail) with corresponding duties attaching to public authorities. They could also be contained within a policy statement. This report recommends a hybrid approach whereby the principles are listed in statute and then elaborated in a policy statement, with two corresponding legal duties attached to public bodies.

77. This section explores existing models that incorporate principles into the law, examples of policy statements and their operation, and corresponding duties on public authorities. It also explores a case study from a recent Privy Council decision on the operation of an environmental principles policy statement in Trinidad and Tobago.

Principles, duties and policy statements in UK legislation

Principles and duties

78. Various principles and related duties are contained in many pieces of legislation dealing with environmental issues in the UK, for example, generally applicable duties to act in accordance with sustainable development objectives. They are also found in many other areas such as the public sector equality duty and the counterterrorism ‘prevent duty’.

79. Failure to comply with a duty required by statute will give rise to a claim of judicial review on the grounds of illegality. However, statutory duties incorporating principles or high-level objectives often leave public authorities with discretion in fulfilling their obligations. For example, some legislation requires public authorities to ‘have regard’ to certain principles or objectives when exercising their functions. This establishes those principles and objectives as mandatory relevant considerations, but does not amount to a legal requirement to give a particular weight to the considerations or to reach a certain outcome. A rarer but stronger requirement is a duty to ‘have special regard’, as seen with respect to listed buildings. The addition of ‘special’ impacts the balancing exercise required for that particular consideration, requiring the decision-maker to give it greater weight. Another formulation can be found in the duty to ‘have due regard’ contained in some legislation, such as the Equality Act 2010. This is also stronger than the bare requirement to ‘have regard’, requiring real thought to be given, requiring an open mind and rigour, and not mere box-ticking. Although the courts have also recently noted that the concept of due regard is not equivalent to a requirement to give any particular weight to a matter or achieve a particular result, the court simply has to be satisfied that there has been a ‘proper and conscientious look at the statutory criteria’.

126 Secretary of State for Exiting the European Union, above n 1, at 17: Example 2; see also [1.24] and [2.9]-[2.11].
130 Barnwell Manor Wind Energy Ltd v East Northamptonshire District Council [2014] EWHC 137, at [218] and [29].
131 Equality Act 2010, s 149.
132 R (Brown) v Secretary of State for Work and Pensions and others [2008] EWHC 3158 (Admin) at [32], affirmed in R (Domb and others) v London Borough of Hammersmith and Fulham and others [2009] EWHC 941.
133 Ealing London Borough Council v H and others [2017] EWCA Civ 1127 (28 July 2017), at [110]-[113].
80. Other legislation imposes a stronger statutory duty than requiring public authorities to simply ‘have regard’. There are many cases where public authorities are required by statute to ‘act in accordance with’ or ‘must take certain actions or comply with’ certain principles. This still provides the authority with some discretion, as there may be several courses of action that would amount to ‘acting in accordance with’ a duty. However, the courses of action open to the authority will nevertheless be limited in order to comply with its statutory duty, and are certainly more restricted than if it were simply required to have regard to certain matters.

81. The Human Rights Act 1998 imposes even stronger requirements on public actors. It is unlawful for a public authority to act incompatibly with the rights in the European Convention on Human Rights (Convention rights). The Act also requires that all UK law be read and given effect to in a way that is compatible with the Convention rights. If legislation breaches Convention rights, the courts can declare the legislation incompatible. Subordinate legislation which is incompatible with Convention rights can be quashed by the courts. A declaration of incompatibility does not affect the validity of primary legislation or allow the court to quash the provision in question, although the Act does provide the Minister with special powers to amend incompatible primary legislation by Order. Declarations of incompatibility have nevertheless proved to be a powerful influencing factor over the Government and will usually prompt subsequent legislative change.

134 See for example Marine Strategy Regulations 2010, reg 4 – requiring public bodies to exercise their functions, so far as relevant, so as to secure compliance with the Marine Strategy Framework Directive, including the requirement to take the necessary measures to achieve or maintain good environmental status of marine waters; Well-being of Future Generations (Wales) Act 2015, s 3 and s 5 – which states each public body ‘must’ carry out sustainable development and ‘take all reasonable steps’ to exercise their functions in order to meet the Act’s sustainability objectives; Environment (Wales) Act 2016 s 6 – stating that public authorities must seek to maintain and enhance biodiversity in the exercise of functions in relation to Wales and, in so doing, promote the resilience of ecosystems; Planning Act 2008, s 104(3) – stating that decisions on applications for development consent must be made in accordance with a relevant national policy statement.

135 Human Rights Act 1998, s 6(1).

136 ibid, at s 3.

137 ibid, at s 4(2) and (4).

138 ibid, ss 3(2) and 6.

139 ibid, ss 4(6) and 10(1).

82. The duties explored above give rise to causes of action under judicial review. The judicial review procedure focuses on the processes involved in exercising public power. The corresponding remedies available include an order quashing the decision and requiring a public authority to reconsider, an order prohibiting action that may have arisen from an unlawful decision, and a declaration clarifying the law or stating a party’s rights. The Court can only substitute its own decision for that of the decision-maker in very limited circumstances or in cases where incompatibility with Convention rights has been found. Combined with the discretion inherent in the formulation of many statutory duties, judicial review therefore offers a limited range of remedies or avenues for challenge in many situations. For example, even if a court finds there has been a failure to have regard to a particular matter and requires the public authority to reconsider, the authority may still reach the same outcome as it did previously even when the matter is then properly taken into account. The exception to the above, however, are the remedies available under the Human Rights Act, which have more teeth than the standard judicial review remedies.

Independent body

83. The establishment of an independent body, for example the Future Generations Commissioner in Wales or the Equality and Human Rights Commission, lends greater strength to the duties established in law, as those bodies are charged expressly with the monitoring and (in the case of the Equality and Human Rights Commission) enforcement of the duty. This increases the impact of the duty itself, as it allows for greater scrutiny and better enables individuals to make complaints or bring matters to the body’s attention without embarking on costly litigation themselves.

84. The Government has recently announced a consultation on environmental governance outside the EU. ClientEarth has published a report outlining the legal powers that a new independent body should have in order to uphold environmental law and build on EU enforcement mechanisms. This body will need a legal toolbox with a range of investigation and enforcement powers, including the ability to take public authorities to court to achieve compliance with the law. The duties proposed below relating to the environmental principles should be included within its remit.

Policy statements

85. Policy statements are another common feature of UK legislation and governance. Policy statements can have a significant legal force if associated with strong statutory provisions. For example, the Planning Act 2008 requires decision-makers to determine an application in accordance with any relevant national policy statement unless to do so would breach international obligations, directly contravene another law or duty, the adverse impact would outweigh the development’s benefits, or any other condition prescribed for deciding an application otherwise than in accordance with a national policy statement is met.

86. Policy statements are more prone to amendment and change by the government of the day than legislation. But they can therefore be more flexible and guide policy development in a detailed way while still retaining discretion for decision-makers. This may be more appropriate in the context of environmental principles, which are necessarily general and may develop further over time. A policy statement may also be more desirable than setting out complicated or detailed policy and guidance in legislation.

References:

141 Civil Procedure Rule 54.192(3); Senior Courts Act 1981 s 31(5)(b).
144 [1996] 2 CMLR 361 (CA) at 366.
145 Marine and Coastal Access Act 2009, s 56.
146 For example in R v Secretary of State for Trade & Industry, Ex parte Dudbridge [1998] 2 CMLR 361 (ICA) at 368, where the Court of Appeal cited with approval the judgment in the first instance which noted that if the Government announces a policy which it intends to adopt without being under any obligation to do so, it must be entitled to define the limits of that policy in any way it wishes.

ClientEarth
Considerations for including environmental principles in UK law

87. The general nature and continued contested meanings of the environmental principles raises some challenges to incorporating them into UK law. Despite the growing use and development of these principles over the past few decades, there is still some mixed treatment in EU and UK legislation and case law regarding their legal status and meaning. The need to be able to apply them across all areas of environmental policy lends support to a form of legal integration that gives the environmental principles a role as a policy driver and interpretive aid, albeit with compulsory force.

88. General environmental principles can leave a wide margin of discretion for public authorities in terms of their implementation, and allow for a potentially broad range of decisions or approaches. But this is arguably appropriate, as the meanings and application of these principles are contested, will be context-specific, and do not lend themselves to absolute rules. De Sadeleer notes that environmental principles could not be confined within a complete and final definition in any case, as this would have the effect of setting limits on their meaning and preventing their continued evolution to meet new situations and challenges.

89. Further, De Sadeleer suggests that an overly clear distinction between the principles risks disturbing the often subtle interactions and linkages between them. The related principles and legal rules that can flow from a general environmental principle in a particular situation are what makes the normative power of the general environmental principles more concrete. For example, in the context of transboundary movement of hazardous waste, the broad principles of prevention and rectification at source flow into subsidiary principles such as use of best available technologies and a presumption against export of hazardous waste, and finally would flow into specific rules such as a provision requiring the use of a specific technology in certain situations, or a prohibition on movement of particular substances.

90. A 2011 UKELA and Kings College London project conducted workshops and interviews with various experts considering the possible challenges with incorporating environmental principles in the UK context. The report noted that the British drafting technique has ‘tended to avoid the use of wide-sweeping principles or policy goals’. The report also noted differing appetites for the use of principles across the devolved administrations, which it considered could result in a more ad hoc development of principles across the UK. The English common law legal tradition of judicial reasoning was also cited as a potential barrier, the report expressing views from interviewees that judges are not as good at responding to or applying abstract general principles as they are dealing with more precise statutory or common law rules, with judges also treating the principles as matters for environmental experts, being generally reluctant to get involved. The absence of a specialist environment court was also noted as a difficulty.

91. However, the environmental principles have also increased in profile over the past few decades. And the appetite amongst legislators to incorporate more general policies and principles in UK appears to be growing, with many examples of more recent legislation incorporating broad objectives, duties, or policy goals. Judges in the UK have also become more familiar with general environmental principles through the interpretation of EU law. The fact that UK courts have made limited use of the environmental principles while the UK has been a member of the EU or in the common law legal tradition to date does not dictate the way in which the principles may be used in the future.

147 De Sadeleer, above n 7, Ch 6.
148 Ibid, at 309.
149 Ibid, at 310.
150 Ibid, at 131.
151 Ibid, at 134.
152 Ibid, at 135.
153 Ibid, at 139.
154 Ibid, at 308.
155 See for example, Well-being of Future Generations (Wales) Act 2015, s 4 – establishing ‘well-being goals’; Environment (Wales) Act 2016, ss 4 – 7 – setting out principles of sustainable management; general duties for Natural Resources Wales, and the ‘biodiversity duty’; Northern Ireland (Miscellaneous Provisions) Act 2006, s 25 – establishing a general duty on all public authorities to exercise functions in a way best calculated to contribute to sustainable development; Equality Act 2010, s 149 – establishing the public sector equality duty and associated principles; Natural Environment and Rural Communities Act 2006, s 2 – establishing a general purpose for Natural England, involving various overarching goals such as ‘protecting natural conservation and promoting biodiversity’ and ‘promoting access to the countryside’; Marine and Coastal Access Act 2009, s 125 – establishes general duties on public authorities to exercise their functions in a manner that best furthers the conservation objectives of a relevant marine conservation zone.
Comparative case study

92. The Privy Council has recently adjudicated a case concerning the polluter pays principle in Trinidad and Tobago. It held that a public authority had to change its practice when charging for permits to discharge pollutants to water in order to properly implement the polluter pays principle and ensure it could charge an adequate fee to remedy any environmental damage that might be caused by permit holders. 157

93. The polluter pays principle is enshrined in a National Environmental Policy. 158 The Trinidad and Tobago Environmental Authority and all other governmental entities are required to ‘conduct their operations and programmes in accordance with the National Environmental Policy’. 159 The main issue in the case was whether ministerial regulations by which charges were fixed for discharging pollutants into water were consistent with the polluter pays principle as set out in the National Environmental Policy, and whether the Minister gave proper consideration to the National Environmental Policy and other water management policy when formulating regulations. The National Environmental Policy stated that as part of the polluter pays principle, an application fee or processing fee should be charged for permits that entitled the holder to generate pollutants, and the money collected should be used to correct environmental damage.

94. The Board held that setting a flat, fixed fee model for a permit which only recovered administration costs was a breach of the National Environmental Policy, and thus a breach of the statutory duty, because it constrained the Environment Authority’s ability to charge a fee for the clean-up of environmental damage. 160 While not a UK case, the fact that it was decided by the Privy Council may give an indication of how the Supreme Court would treat a similar policy document in the UK context.

Recommended approach to enshrining environmental principles in law: hybrid approach

95. In order to ensure full incorporation of the EU environmental acquis, the general environmental principles should be enshrined in primary legislation in the UK.

96. The environmental principles should be listed in statute to ensure that they have a strong legal foundation, are set out clearly as having general applicability, and create concrete legal standards. The statute should also make it clear that the principles will guide policy and decision-making in the UK with the aim of ensuring a high level of protection for the environment.

97. That same legislation should require the creation of an environmental principles policy statement elaborating on the principles listed in the statute. This policy statement can then provide more fulsome guidance and direction as to the meaning and intended application of these general principles. Explicitly providing for the principles in statute will ensure a greater permanence and influencing power in UK law and elaborating on the principles in a policy statement will ensure that policy-makers and decision-makers have sufficient guidance as to their application and interpretation in practice. As explored above, a policy statement alone without statutory footing requiring it to be prepared and followed will not provide a sufficiently firm basis for the principles to have a strong and lasting legal effect. 161

98. A new provision in the Withdrawal Bill requires the Secretary of State to publish, within six months of the passage of the Bill, a new draft Bill which includes a set of environmental principles and a duty on the Secretary of State to publish, within six months of the passage of the Bill, a new draft Bill which includes a set of environmental principles and a duty on the Secretary of State to publish a policy statement in relation to the application and interpretation of those principles. The draft Bill must also include a duty that Ministers ‘have regard’ to the policy statement in certain circumstances. 162 This proposed duty is insufficient in both scope (it applies only to Ministers) and substance (it relates only to the policy statement and the ‘have regard’ standard proposed is too weak).
Instead, the duties must be formulated to give the principles true weight in environmental decision-making and policy development and all public bodies should be subject to the duties. The recommendations below are suggested as a way to apply the environmental principles in domestic law in the strongest possible manner.

Strong statutory duties

99. The following statutory duties should be established for the environmental principles:

- There should be a statutory requirement that, so far as it is possible to do so, legislation that is relevant to environmental matters must be read and given effect in a way that is compatible with the environmental principles.\(^{163}\) A declaration of incompatibility remedy should also be available if a court is satisfied that legislation is incompatible with one of the listed environmental principles;
- All public bodies exercising powers or functions relating to environmental management or affecting the environment should be required to aim for a high level of environmental protection by, among other things, having special regard to the environmental principles; and
- All public bodies exercising powers or functions relating to environmental management or affecting the environment must be required to do so in accordance with the principles policy statement.

100. The duty to interpret and give effect to legislation relevant to environmental matters in a way that is compatible with the environmental principles so far as it is possible to do so, would guide all actors that interpret and apply the law and sends a clear signal that consistency with the principles should be assumed unless Parliament has expressly drafted legislation differently. This would help to drive the systemic influence of the principles and establish them as clear interpretive aids. The qualifier of ‘so far as it is possible to do so’ mirrors the qualifier in section 3 of the Human Rights Act and could operate in a similar way to address situations where it is impossible to interpret a particular piece of legislation compatibly. This would preserve the principle of Parliamentary sovereignty.

101. The reason for the differing obligations proposed with regards to the policy statement and the bare principles is that, as explored above, each principle has a contested meaning and often applies in a nuanced way. An obligation to always apply or act in accordance with the polluter pays principle, for example, is unnecessary, as the principle is not relevant or applicable to all situations. It may also be necessary to balance certain principles against others in some situations. An obligation to ‘have special regard to’ the principles listed in the statute establishes them as mandatory relevant considerations to be given significant weight and important policy drivers without imposing them as a rigid requirement in all cases, preserving a more nuanced approach. However, a strong obligation to act in accordance with an environmental principles policy statement is needed.

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\(^{163}\) ‘Environmental matters’ should be defined broadly, similar to the definition of ‘environmental information’ in section 2(1) of the Environmental Information Regulations 2004.
Environmental principles policy statement

102. An environmental principles policy statement will set out in more detail how each principle will operate and guide UK environmental law and policy. It could also provide sector-specific or context-specific guidance. Policy statements can provide more detail and can be updated more flexibly than legislation, to respond to new contingencies. This level of administrative discretion is appropriate to strike the balance between giving the general principles normative force as guiding legal principles in UK law, and recognising the inherent vagueness and general application of the principles themselves. Safeguards such as a requirement to lay the policy statement before Parliament(s) or to review the statement periodically could also be included in legislation.

103. Development of a policy statement would also be an appropriate way to allow for co-operation and a joint approach between the UK Government and the devolved administrations. An approach similar to the Marine Policy Statement could be adopted. The Marine Policy Statement is jointly developed by all four home nations, and applies across the UK. However, if one administration were to withdraw from the Marine Policy Statement, it would continue to have effect in the territory of the remaining administrations. This pragmatic approach allows for maximum collaboration and application for the policy statement, but also ensures that the process is not hindered if there is disagreement. However, there should also be an accompanying requirement that any administration which withdraws from a principles policy statement create an individual one of its own.

Enforcement

104. The legislation establishing the environmental principles and the related duties should also give standing to environmental NGOs to challenge decisions on the basis of the environmental principles. The UK is a party to the Aarhus Convention, which requires states to allow environmental NGOs standing to challenge laws relating to the environment. Allowing NGOs standing to challenge decisions on the basis of their compatibility with the environmental principles would go some way to fulfilling this international law obligation.

105. In addition, the UK should establish an independent body with powers to bring challenges against public bodies on the basis of environmental principles and to monitor the application of the environmental principles in the UK.

Additional principles included as well as the EU environmental principles

106. The UK should take this opportunity to enshrine not only the EU environmental principles, but also other environmental principles that are relevant and applicable for the domestic context and in light of more recent developments in environmental law since the EU treaties entered into force. The Government should include the principle of non-regression and the principle that environmental matters should be managed at the level that corresponds with the most appropriate ecological scale in the future policy statement and accompanying statute (explored above).

164 Aarhus Convention, Article 9(2) and (3).
ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw.

We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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