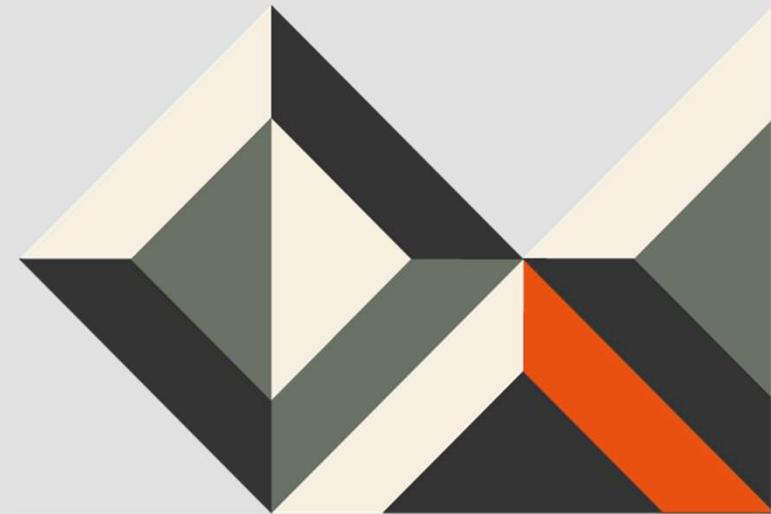


Where are the legal holes in the Government's "*Environmental principles policy statement*", and how might they be filled by other sources of law?



James Maurici KC





Introduction

• .



Introduction (1)

- Many things stood to be lost, and since have been lost, when the UK voted for Brexit ...
- One of these was the environmental principles that had long formed part of the Treaty on the Functioning of the European Union (“TFEU”).
- In order to try and avoid this particular loss the Government enacted via the Environment Act 2021 (“the 2021 Act”) a duty to prepare (s. 17(1) and (2)) a *“policy statement on environmental principles”* (“EPPS”) - *“a statement explaining how the environmental principles should be interpreted and proportionately applied by Ministers of the Crown when making policy.”*
- The process for preparing and publishing an EPPS, including the need for Parliamentary scrutiny, is set out in s. 18 of the 2021 Act.



Introduction (2)



Introduction (3)

- This talk is focused on the law in England. The 2021 Act covers only England and Northern Ireland (albeit the latter under different provisions, see Schedule 2).
- For Wales: <https://www.gov.wales/environmental-principles-governance-and-biodiversity-targets-white-paper>
- For Scotland: <https://www.gov.scot/publications/scotlands-guiding-principles-environment-statutory-guidance/>
- For Northern Ireland: <https://www.daera-ni.gov.uk/consultations/environmental-principles-policy-statement#:~:text=the%20principle%20of%20preventative%20action,the%20polluter%20pays%20principle.>
- But returning to England ...



The 2021 Act and the environmental principles



The principles (1)

The 2021 Act defines the principles as (see s. 17(5)):

“(a) the principle that environmental protection should be integrated into the making of policies,

(b) the principle of preventative action to avert environmental damage,

(c) the precautionary principle, so far as relating to the environment,

(d) the principle that environmental damage should as a priority be rectified at source, and

(e) the polluter pays principle.”

NB s. 17(4) says *“[t]he Secretary of State must be satisfied that the statement will, when it comes into effect, contribute to— (a) the improvement of environmental protection, and (b) sustainable development.”*



S. 19 of the 2021 Act - EPPS: effect

“(1) A Minister of the Crown must, when making policy, have due regard to the policy statement on environmental principles currently in effect.

(2) Nothing in subsection (1) requires a Minister to do anything (or refrain from doing anything) if doing it (or refraining from doing it)—

(a) would have no significant environmental benefit, or

(b) would be in any other way disproportionate to the environmental benefit.

(3) Subsection (1) does not apply to policy so far as relating to—

(a) the armed forces, defence or national security,

(b) taxation, spending or the allocation of resources within government ...”



The EPPS

Policy paper
**Environmental principles policy
statement**

Updated 31 January 2023

**This was published under the 2019 to 2022 Johnson
Conservative government**

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The limitations of the EPPS



What are the limitations?

1. Only applies to a Minister of the Crown, not to any other public bodies;
2. Only applies to policy-making not other decision making;
3. Is only something to have “*due regard*” to;
4. Is subject to some pointed limitations in the 2021 Act including that it does not require the doing of anything “*would be in any other way disproportionate to the environmental benefit*” and this is further developed in the EPPS itself e.g.:
 - “*This means that if the policy has no potential environmental effects, or the environmental effects are negligible (that is, so small or unimportant that it would be insignificant), policymakers do not need to take action.*”
 - “*Environmental, social and economic factors are interlinked. Nature, and the biodiversity that underpins it, ultimately sustains our economies, livelihoods and well-being, and so our decisions must take into account the true value of the goods and services we derive from it. After consideration of these factors, ministers may decide that the public interest is best served by taking forward a policy option that includes associated negative*”



R (Rights Community Action Ltd) v SSHCLG [2024] EWHC 1693 (Admin) (1)

- First judicial consideration of the EPPS. Lieven J.
- JR of a Written Ministerial Statement (“WMS”) *“Planning – Local Energy Efficiency Standards Update”*
- Ground 1 alleged that in promulgating the WMS, and subsequently, the S/S failed to fulfil his duty under s.19(1) of the 2021 Act to have due regard to the EPPS (see [2]).
- Issues: (1) what the correct legal approach to the *“due regard”* duty is; and (ii) whether S/S met that duty on the facts (see [25]).
- C argued that duty to *“have due regard”* in s.19 of the 2021 Act should be interpreted analogously to the duty to have *“due regard”* in s.149 of the Equality Act (“the EqA”) (the Public Sector Equality Duty (“PSED”)) and that the caselaw on PSED should be applied to s.19 of the 2021 Act (see [26]).



R (Rights Community Action Ltd) (2)

- Not disputed that decision maker must have “*considered the EPPS assessment in substance, with rigour and with an open mind*” (see [35]).
- Arguments pursued included:
 - (1) Minister did not assess WMS against the EPPS at time the WMS was approved, instead such assessment only done retrospectively ([30]-[31]) and that not permissible by analogy with the PSED case-law;
 - (2) The EPPS requires consideration of whether the environmental harm could be “*avoided, minimised or reduced*”, but the assessment failed to address those questions. The document it was said did not “*with rigour*” grasp the nettle of the environmental harm caused by the WMS through mandating a lower level of energy efficiency than would be the case if local authorities could apply higher standards ([32]).
 - (3) The assessment failed to make any, or any proper inquiries into the scale of environmental harm caused by the WMS.



R (Rights Community Action Ltd) (3)

- The S/S argued:
- (1) The s. 149 duty is very clearly defined in the statute, by contrast, the duty in s.19 is to a policy statement produced under s.17(1) of the 2021 Act, which will necessarily be a great deal more diffuse, and the balances and issues in play are very different in their nature from those in consideration in the EqA ([36] –[37]).
- (2) The very nature of s.17 of the 2021 Act is to apply principles of proportionality, see s.17(2) and 19(2), which make the objectives much less clear-cut than is the case under s.149 of the EqA ([28]).
- (3) The s.19 duty applies to the “making” of policy, and s.47 of the 2021 Act defines “making” as including “developing, adopting or revising policy”, so arises later than duties in EqA ([39]).
- (4) The caselaw on s.149, itself sets out considerable caveats on the application of the case-law ([40]) and not treating this as if it was a statute ([40]).



R (Rights Community Action Ltd) (4)

“42 ... The two duties are very different, both in terms of the statutory provisions (save for the broad words “have due regard”) and the aims to be achieved. Whereas the impact on those with protected characteristics may generally be relatively straightforward to set out, the environmental issues as set out in the EPPS will often be very multifaceted and complex. This case is a good example of that complexity. Although setting higher CO2 standards for new homes may appear to be more environmentally positive, it might have consequences that lead to an environmentally less good ultimate outcome. Environmental impacts are rarely linear and binary, but rather frequently involved complex and multifaceted impacts which need to be assessed in a holistic manner. The nature of the two statutory schemes, and therefore the due regard duties are very different.

43. The test set out in Hotak of the need to consider the EPPS with substance, rigour and an open mind, is plainly applicable to the s.19 duty. However, beyond that the approach is necessarily one that turns both on the individual facts, but also the broader purposes of the Environment Act 2021”



R (Rights Community Action Ltd) (5)

Judge rejects specific complaints:

- (1) A retrospective assessment can be acceptable: see [44] and [45]
- (2) The assessment does address whether the impact of the WMS is negative in environmental terms: see [46] and [47] as it acknowledged benefits would flow if the LPAs could set higher standards. And this *“is in substance an acceptance of the possible “negative” impacts or harm of the policy, in accordance with the EPPS”*. The S/S *“has chosen to put considerable weight on the impact that might have on the supply of new housing, over the potential benefits of imposing higher standards”* and *“[t]his is a policy choice for the Minister and is explained in the assessment, and does not disclose any error of law. There is nothing irrational in terms of the negative/positive environmental impacts the assessment refers to. Experts might disagree on the issue, but that is a matter for policy makers and not the Court”*



R (Rights Community Action Ltd) (6)

- PTA being sought ...
- Interventions proposed: see <https://green-alliance.org.uk/press-release/green-alliance-seeks-permission-to-intervene-in-legal-case-threatening-environmental-principles/>

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Planning - Local Energy Efficiency Standards Update

Statement made on 13 December 2023

Statement UIN HLWS120

Statement made by



Baroness Penn
Parliamentary Under Secretary of State for Levelling Up, Housing and Communities
Conservative

Life peer
Lords

Statement

As a Government, we continue to make progress towards the net zero goal set out in legislation in 2019, including by improving the energy efficiency of homes and moving to cleaner technologies and sources of power within the homes and building sector.

There has been a long-standing debate within planning about both the best method and body to set energy efficiency and environmental standards. For a number of years, the plans of some local authorities have sought to go further than national standards in terms of such efficiency for new-build properties. Equally, there is a legitimate consideration for the Government to want to strike the best balance between making progress on improving the efficiency and performance of homes whilst still wanting to ensure housing is built in sufficient numbers to support those who wish to own or rent their own home.

In 2015, in reference to an uncommenced provision in the Deregulation Act 2015 which amended the Planning and Energy Act 2008, a written ministerial statement (WMS) (HC Deb, 25 March 2015, vol 584, cols 131-138WS) stated that until that amendment was commenced, local plan policies exceeding minimum energy efficiency standards should not go beyond level 4 of the Code for Sustainable Homes. Since then, the introduction of the 2021 Part L uplift to the Building Regulations set national minimum energy efficiency standards that are higher than those referenced in the 2015 WMS rendering it effectively moot. A further change to energy efficiency building regulations is planned for 2025 meaning that homes built to that standard will be net zero ready and should need no significant work to ensure that they have zero carbon emissions as the grid continue to decarbonise. Compared to varied local standards, these nationally applied standards provide much-needed clarity and consistency for businesses, large and small, to invest and prepare to build net-zero ready homes.

Filling the holes ...



Filling the legal holes ...

Are there other ways to bring into play the environmental principles we lost when we left the EU given the holes in its domestic “replacement”:

- (1) Are there other legislative environmental principles?
- (2) Are any of the environmental principles the subject of the EPPS in fact free-standing principles of domestic law?
- (3) Are any of the principles part of customary international law and so part of our common law?
- (4) The ECHR as a source of environmental principles?
- (5) Do some or all of these principles survive via other assimilated EU law?



Other legislative environmental principles ...

The 2021 Act defines some governing conditions of the EPPS namely that it contributes to:

(1) *“environmental protection”* means (see s. 45)

- *“(a) protection of the natural environment from the effects of human activity;*
- *(b) protection of people from the effects of human activity on the natural environment;*
- *(c) maintenance, restoration or enhancement of the natural environment;*
- *(d) monitoring, assessing, considering, advising or reporting on anything in paragraphs (a) to (c)*
- *(b) sustainable development.”*

(2) *“Sustainable development”* this could be said to be an environmental principle of our domestic legislation see e.g. the Energy Act 2004, the Planning & Compulsory Purchase Act 2004.



Free standing principles of our domestic law? (1)

Take the precautionary principle as an example – is it a free-standing principle of domestic administrative and environmental law?

- (1) The Divisional Court in *R v Secretary of State for Trade and Industry ex p Duddridge* [1995] 3 CMLR 231 suggests not – but case is now 25 years old (NB went to CA but CA did not consider this issue [1996] 2 CMLR 361).
- (2) Some more recent CA case-law that seems to proceed on basis that the precautionary principle is part of domestic law: see e.g. (a) *R (Plan B Earth) v Secretary of State for Transport* [2020] at [257], [258] and [259] applying the precautionary principle as set out in the Rio Declaration; and (ii) *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] Env LR 18. But far from clear-cut and former decision overturned in SC albeit on different grounds.



Free standing principles of our domestic law?(2)

R (Good Law Project) v SSEFRA [2020] 3530 (Admin) – OPH, Garnham J.

A JR of decision of S/S not to bring forward from 2022 his review of the Department's Clean Air Strategy drawn up in 2019 in light of new evidence of links between poor air quality and COVID-19 morbidity and mortality.

“6. The essence of [the] ... argument is that in response to the request from his clients to review the clean air strategy the Secretary of State has failed to apply the precautionary principle as a freestanding principle in domestic law. There might have been arguments of substance as to whether the precautionary principle is a freestanding principle of English law.

7. Had the Government's only response been that there was no such freestanding principle, I may well have granted permission on that issue, but that is not the Government's only response to this head of challenge ...

8. In my judgment, it is plain from that the Secretary of State has adopted what is, in substance, the precautionary principle ...”



Free standing principles of our domestic law? (3)

What about other principles - The Polluter Pays Principle?

Fishermen and Friends of the Sea v Minister of Planning, Housing and the Environment Privy Council (Trinidad and Tobago) [2017] UKPC 37 at [2] per Lord Carnwath (emphasis added):

“The Polluter Pays Principle (“PPP” or “the Principle”) is now firmly established as a basic principle of ... domestic environmental laws. It is designed to achieve the “internalization of environmental costs”, by ensuring that the costs of pollution control and remediation are borne by those who cause the pollution, and thus reflected in the costs of their goods and services, rather than borne by the community at large ...”



Customary International Law (1)

So,

1. Are any of the environmental principles part of customary international law (“CIL”) and, as such, presumptively part of the common law: *R (Keyu) v SSFCA* [2016] AC 1355 (SC), at [144]-[151] (Lord Mance)?
2. To establish the existence of a rule of CIL, it must be shown that:
 - (a) There is an extensive and virtually uniform practice of states conforming to the proposed rule, reflected in their acts and/or their public statements; and,
 - (b) The practice must be followed on the footing that it is required as a matter of law or is required by social, economic or political exigencies (also referred to as “*opinio juris*”): *Al-Waheed v MoD* [2017] AC 821, [14] (Lord Sumption); *Mohammed (Serdar) v MoD* [2017] AC 649, [220].



Customary International Law (2)

The precautionary principle:

1. There are very strong arguments that the precautionary principle is now part of CIL: see Trouwborst, *Evolution and Status of the Precautionary Principle in International Law* (2002). And, in *Environmental Principles and Governance after the United Kingdom leaves the European Union Consultation on environmental principles and accountability for the environment* (May 2018 consultation paper) the Government noted that while “*There is no single agreed definition of environmental principles. However, a number of internationally recognised principles have been developed that help shape environmental policy around the world. Examples include the precautionary principle and the polluter pays principle.*”

2. As to the polluter pays principle: see again *Fisherman and Friends of the Sea* per Lord Carnwath: “*The Polluter Pays Principle (“PPP” or “the Principle”) is now firmly established as a basic principle of ... international environmental laws ...*”



A note on the ECHR and the HRA...

Verein KlimaSeniorinnen Schweiz v Switzerland (53600/20) (2024) 79 E.H.R.R. 1

- *“Even assuming that there was any lack of certainty as to the effects of climate change, consistent with the principle that the Convention could not be interpreted in a vacuum, the precautionary principle would have to be applied, so as to encompass the concepts of directness, inevitability and irreversibility.”* [314]
- *“The prevention principle and the precautionary principle were important sources in determining the scope of the obligation to protect through harmonious interpretation of the Convention ...”* [332]
- Lots more in the judgment on the precautionary and prevention principles.
- The ECHR as a future source of environmental principles??



Assimilated EU law (1)

Back to the 2018 consultation paper again (see above, emphases added):

“23. Environmental principles also form part of the Treaty on the Functioning of the ... TFEU ... These are framed in the EU Treaties as general objectives for the EU, rather than having a direct, binding effect on the delivery of EU measures by the Member States[]. They underpin the development of policy and legislation by the EU institutions, requiring the EU to take account of and ensure that its environment policy incorporates consideration of these principles throughout the policy and law-making process. For example, Article 11 of the TFEU requires the integration of environmental protection into the definition and implementation of the EU’s policies and activities with a view to promoting sustainable development. Similarly, Article 191(2) of the TFEU requires EU environmental policy to be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”*

[* See *R. v Leicestershire CC Ex p. Blackfordby and Boothorpe Action Group* [2001] Env. L.R. 2 pre-Brexit case confirming that precautionary principle from TFEU not directly effective].



Assimilated EU law (2)

The 2018 consultation paper continued ...

“24. These principles feed through into EU legislation. For example, the precautionary principle is included in the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) Regulation (1907/2006) and the Invasive Alien Species Regulation (1143/2014). Similarly, the polluter pays principle is referred to in the Water Framework Directive (2000/60/EC) – as well as in the regulations that transpose it into domestic law ...

26. Where environmental principles are contained in specific pieces of EU legislation, these will be maintained as part of our domestic legal framework through the retention of EU law under the EU (Withdrawal) Bill. Any question as to the interpretation of retained EU law will be determined by UK courts in accordance with relevant pre-exit CJEU case law and general principles, subject to the other exceptions and restrictions within the Bill. For example, CJEU case law on chemicals, waste and habitats includes judgments on the application of the precautionary principle to those areas. This will therefore be preserved by the Bill.”

Of course, must now consider in the light of REUL ...



Assimilated EU law (3)

An even better example than those in the 2018 consultation is the Habitats Directive.

1. So, the requirement in the second sentence of Article 6(3) of the Habitats Directive and in regulation 63(5) of the Habitats Regulations embodies the "precautionary principle": see *CG Fry v SSLUHC* [2024] 2 P&CR 12 at [17] (recently granted permission to go to the SC), citing *Waddenzee* at [58] and *Dutch Nitrogen*.
2. Regulation 3A of the Habitats Regulations states that where the Habitats Directive is referred to it should be construed as if the United Kingdom were still a member state of the European Union.
3. Regulation 9(1) requires "*the appropriate authority*" to "*exercise [its] functions which are relevant to nature conservation ... so as to secure compliance with the requirements of the Directives*".

Lots of domestic case-law referring to the precautionary principle in the context of the Habitats Directive and Regulations.



Assimilated EU Law (4)

The full commencement of REUL might have begun to see the influence of pre-Brexit case-law decline.

But ... The Retained EU Law (Revocation and Reform) Act 2023 (Commencement No. 2 and Saving Provisions) (Revocation) Regulations 2024/976.

The Commencement Regulations were made by the previous Government in order to commence s. 6 of REUL on 1st October 2024.

S. 6 allows our Courts a greater ability to depart from pre-Brexit EU case-law.

The new Government revoked the Commencement Regulations and so s. 6 remains uncommenced.



Conclusions

1. Notwithstanding the 2021 Act and the EPPS it is not clear we have properly replaced what we lost in term of the environmental principles.
2. These will (for now) continue to have influence in a number of areas of assimilated EU environmental law.
3. There may be other routes to the establishing these lost principles more via common law, the EHCR or international law - but none is easy.
4. There is no shortage of environmental litigation, but it is not always easy to find a case where the Court can be forced to grapple with these matters, it is easier to say the decision-maker acted in substantively the manner required by the relevant environmental principle rather that rule on whether it was in fact required to.





Q&A



Thank you

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