

## Environment, Climate Change and Land Reform Committee

### EU Environmental and Animal Welfare Principles

#### Written submission from ClientEarth

#### Introduction

ClientEarth welcomes the opportunity to provide this evidence to the Committee. ClientEarth is a non-profit environmental organisation based in London, Brussels and Warsaw. We work in Europe and beyond, bringing together law, science and policy to create practical solutions to environmental challenges. ClientEarth wants a new, robust legal framework and governance structure for environmental management across the UK after it exits the EU.

This evidence will focus on environmental principles rather than animal welfare principles. The EU environmental principles are found in Articles 11 and 191(2) of the Treaty for the Functioning of the European Union (*TFEU*). These are the precautionary principle; the principle of prevention; the polluter pays principle; the principle that as a priority environmental damage should be rectified at source; and the integration principle.

#### Question 1: how important are the EU principles?

The environmental principles are an important part of EU environmental law, forming building blocks for environmental protection.<sup>1</sup> Through EU and international law they have shaped UK and Scottish environmental policy for several decades. The principles in the TFEU do not have direct effect<sup>2</sup> but they are increasingly articulated explicitly in EU legislation and environmental policy<sup>3</sup> and aid the development and interpretation of environmental law in the courts,<sup>4</sup> for example in the *Waddenzee*<sup>5</sup> and *ARCO*<sup>6</sup> decisions. While the principles do not provide precise rules, they have undoubtedly been influential in shaping decisions and policy to provide an overarching framework that results in better environmental outcomes.<sup>7</sup> It is

<sup>1</sup> M Lee *EU Environmental Law, Governance and Decision-Making* (2nd ed, Bloomsbury Publishing, London, 2014) pp 4-15.

<sup>2</sup> *R v Secretary of State for Trade and Industry, ex p Duddridge* [1996] 2 CMLR 361 (CA), at [17]-[21].

<sup>3</sup> See for example the Common Fisheries Policy Basic Regulation (1380/2013), Article 2(2); the REACH Regulation (1907/2006), Article 1; the Waste Management Directive (2008/98/EC), Article 14; the Environmental Liability Directive (2004/35/EC), Article 1; and the Environmental Impact Assessment Directive (2011/92/EU), Article 5.

<sup>4</sup> E Scotford *Environmental Principles and the Evolution of Environmental Law* (Hart Publishing, Oregon, 2017), p 148-149; E Fisher, B Lange, E Scotford *Environmental Law: Text, Cases and Materials* (Oxford University Press, Oxford, 2013), p 416.

<sup>5</sup> Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw* [2004] ECR I-7405. Held at [44] that 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.

<sup>6</sup> Joined Cases C-418/97 & C-419/97 *ARCO Chemie Nederland v Minister Van Volkshuisvesting* [2000] ECR I-4475, at [36]-[40]. Held that, applying the precautionary and preventive principles, the term 'waste' should be interpreted expansively to incorporate as many discarded items as possible.

<sup>7</sup> M Lee "Brexit and environmental protection in the United Kingdom: governance, accountability and law making" *Journal of Energy & Natural Resources Law* (2018) DOI: [10.1080/02646811.2018.1439347](https://doi.org/10.1080/02646811.2018.1439347).

important to ensure that these principles continue to shape Scotland's approach to environmental management.

**Question 2: how and where have these principles had an impact on environmental policy in Scotland?**

The EU environmental principles have had a beneficial impact on many areas of environmental policy in the UK and Scotland. For example:

The precautionary principle has been used to apply and interpret the Birds and Habitats Directives to ensure that decision-makers favour caution and environmental protection in managing activities that may negatively affect protected habitats and species;<sup>8</sup>

Waste management, environmental liability and contaminated land laws implement the prevention, rectification at source, and polluter pays principles to avoid environmental degradation and to require those responsible for causing damage to the environment to meet the costs of remediation;

In line with the principle of integration, sustainable development is promoted in various areas of policy, such as in Scotland's National Performance Framework.<sup>9</sup>

The environmental principles have also shaped judicial decisions in Scotland. For example, in 2013 the Inner House of the Court of Session found that the polluter pays principle was a persuasive factor in giving pre-eminence to environmental protection.<sup>10</sup> The Court held that the debts of an insolvent company to pay for remediation of contaminated land must be enforced in the winding up process and treated as liquidation expenses, and that a liquidator could not simply abandon a permit or licence in order to get rid of the responsibility to remediate land.<sup>11</sup>

**Question 3: the appropriateness of retaining these EU principles in law or alternative principles / approaches that could be adopted**

To deliver continuity, the EU environmental principles must be clearly incorporated into Scottish and UK law after exit. The Scottish Continuity Bill now explicitly includes the environmental principles (although, not the integration principle). However, it has yet to receive Royal Assent.<sup>12</sup> This statutory incorporation can also be further improved by providing greater precision as to the meaning, legal value and scope of the principles in a principles policy statement.

Exit from the EU also provides an opportunity to enshrine additional principles. The principle of non-regression should be incorporated into Scots law. This principle holds that there should not be a rollback of environmental protections, promoting a

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<sup>8</sup> Waddenzee above n 5.

<sup>9</sup> Scottish Government "Scotland Performs", available at <http://www.gov.scot/About/Performance/scotPerforms>.

<sup>10</sup> Scottish Environment Protection Agency & Ors v Joint Liquidators of the Scottish Coal Company Ltd [2013] CSIH 108 at [144].

<sup>11</sup> Ibid.

<sup>12</sup> UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (SP Bill 28B) 2018 [as passed], clause 13B.

ratcheting up of ambition in subsequent law reform and prevention of any lowering of standards or scope. Internationally, the principle of non-regression is receiving increasing recognition.<sup>13</sup> It has been recently ingrained in the Paris Agreement on climate change and enshrined as a key principle in French environmental law.<sup>14</sup> It is also set down in Ecuadorian law.<sup>15</sup> A principle that environmental management should take place at the appropriate temporal and spatial scales could also be included. For example, freshwater management is considered best done at a catchment-level,<sup>16</sup> whereas climate change requires a much broader response.

It is also critical that to ensure that all the rights guaranteed to UK citizens under international law, including the important procedural rights under the Aarhus Convention, will be fully incorporated into domestic law after exit. While these rights will partially come across into domestic law where they have been explicitly implemented in retained EU legislation, this will still fall short of a general and full application of these important guarantees.

#### **Question 4: if and how environmental principles could and should be enshrined in law in Scotland and enforced**

The environmental principles should be set out in domestic legislation to give them permanence and certainty in Scots law. In addition, as the principles are generally applicable, we consider they should also be elaborated in a UK-wide principles policy statement co-designed and co-owned by the four UK governments. The policy statement should elaborate on the meaning and interpretation of the core principles listed in the legislation, and provide binding guidance for public bodies on how to apply the principles in policy and decision-making.

The legislation should also create corresponding duties:

a duty upon all public authorities to aim for a high level of environmental protection by, among other things, having special regard to the principles listed in the legislation when carrying out functions affecting the environment;

a requirement, similar to that in the Human Rights Act 1998 section 3, to interpret legislation consistently with the principles where possible; and

a duty upon all public authorities to implement the policy statement and act in accordance with it when carrying out functions affecting the environment.

A new, independent statutory body should also be established to hold public bodies to account in their compliance with the principles and other environmental duties.

<sup>13</sup> M Prieur 'Non-regression in Environmental Law' (2012) SAPIENS 5, available at <http://sapiens.revues.org/1405>.

<sup>14</sup> Loi n° 2016-1087 pour la reconquête de la biodiversité, de la nature et des paysages. Art 2(4).

<sup>15</sup> Constitution of the Republic of Ecuador, 20 October 2008, Article 423(3).

<sup>16</sup> Department for Environment, Food and Rural Affairs "Catchment Based Approach: Improving the quality of our water environment" May 2013, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/204231/pb13934-water-environment-catchment-based-approach.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204231/pb13934-water-environment-catchment-based-approach.pdf).

### Question 5: Examples of where key environmental principles have been enshrined in domestic legislation elsewhere

Environmental principles have been enshrined via the policy statement approach in the Trinidad and Tobago National Environmental Policy (*NEP*).<sup>17</sup> All governmental entities are required to 'conduct their operations and programmes in accordance with' the NEP.<sup>18</sup> This policy statement was recently the subject of a Privy Council decision.<sup>19</sup>

The NEP states that as part of the polluter pays principle, charges should be levied in the form of an application fee for discharge permits entitling the holder to generate pollutants, and that money collected should be used to correct environmental damage. The Privy Council held that setting a flat, fixed fee for a discharge permit which only recovered administration costs was a breach of the NEP, and thus a breach of the statutory duty, because it constrained the ability to charge a fee for the correction of environmental damage, as required by the NEP.<sup>20</sup>

France provides another example. It sets out environmental principles in its *Code de L'Environnement*, including the precautionary principle, non-regression, polluter pays, principle of prevention, sustainable development, and a commitment to the fight against climate change.<sup>21</sup> Environmental principles have also been adopted in New South Wales in Australia, Colombia and Ecuador.<sup>22</sup>

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<sup>17</sup> National Environmental Policy (2006) (Trinidad and Tobago), laid in Parliament April 7 2006, available at <http://www.ema.co.tt/new/images/policies/national-environmental-policy2006.pdf>.

<sup>18</sup> Environmental Management Act 2000 (Trinidad and Tobago), s 31.

<sup>19</sup> *Fishermen and Friends of the Sea (Appellant) v The Minister of Planning, Housing and the Environment (Respondent)* (Trinidad and Tobago) [2017] UKPC 37.

<sup>20</sup> *Ibid*, at [45].

<sup>21</sup> *Code de l'environnement, Partie législative, Livre Ier: Dispositions communes, Titre Ier: Principes généraux, Article L110-1.*

<sup>22</sup> Colombian Constitution 1991, Articles 78-90; Constitution of the Republic of Ecuador, 20 October 2008, Articles 14 and 15, Chapter 7; New South Wales Protection of the Environment Administration Act 1991, s 6(2).