



# Environmental Governance: Overarching Statutory Duties

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# Agenda

- Section 19  
Environment Act  
2021
- Section 40  
Natural  
Environment and  
Rural  
Communities Act  
2006 (as  
amended by  
s.102 EA)



# Part 1: Section 19 EA – Context

- Integration principle – Art 11 of the Treaty on the Functioning of the European Union; Art 191(2) for the other principles
- European Union (Withdrawal) Act 2018 – s 16(1)(a) set of environmental principles; and Environment Act 2021 – s 17(5) defines the principles
- Trade and Cooperation Agreement (European Union (Future Relationship) Act 2020); see Article 391 – Non-regression from levels of protection
  - Art 391(1) Each party set its policies and priorities in areas covered by this chapter (chapter 7 – environment and climate)
  - Art 391(2): A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its environmental levels of protection or its climate level of protection below the levels that are in place at the end of the transition period, including by failing to effectively enforce its environmental law or climate level of protection.”
  - Art 393 Environmental and climate principles – Rio Declaration 1992, UNFCCC 1992 and the Convention on Biological Diversity 1992 – (i) environmental protection integrated into policy-making through impact assessments; (ii) preventative action to avert environmental damage; (iii) precautionary approach (Art 356(2)); (iv) rectification at source and (v) PPP

# Part 1: Policy Statement

- Interpretation + application + other factors + integration
- Policy statement itself:
  - Confirms statutory instrument
  - Duty applies across Govt (subject to certain exemptions)
  - Policy – “broadly understood as an intended course of action adopted to achieve an objective”
  - Need to think through different environmental effects of policy options (see definitions within the 2021 Act)
  - Interaction between the principles: overarching (e.g integration) vs hierarchical (prevention first)
  - Definitions of the principles and how to apply them

# Part 1: Section 19 EA – statutory obligation

19 Policy statement on environmental principles: 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, or

(c) Wales.

For Scotland – see s 19(4)-(6)

## Part 2: Section 40 NERCA

Wording of s.40 up to 31 Dec 2022:

*40 Duty to conserve biodiversity*

*(A1) This section applies where—*

*(a) Her Majesty's Revenue and Customs are exercising their functions;*

*(b) any other public authority is exercising its functions in relation to England.*

*(1) The public authority must, in exercising its functions, have regard, so far as is consistent with the proper exercise of those functions, to the purpose of conserving biodiversity.*

*(2) In complying with subsection (1), a Minister of the Crown or government department must in particular have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992.*

*(3) Conserving biodiversity includes, in relation to a living organism or type of habitat, restoring or enhancing a population or habitat.*

See Buglife [2008] EWHC 475 (Admin); Suliman [2022] EWHC 1196 (Admin) (cf Langton [2021] EWHC 2199 (Admin))

# Part 2: Section 40 NERCA

## Amendments to s.40 (via s.102 EA) came into force 1 January 2023:

### *40 Duty to conserve and enhance biodiversity*

*(A1) For the purposes of this section "the general biodiversity objective" is the conservation and enhancement of biodiversity in England through the exercise of functions in relation to England.*

*(1) A public authority which has any functions exercisable in relation to England must from time to time consider what action the authority can properly take, consistently with the proper exercise of its functions, to further the general biodiversity objective.*

*(1A) After that consideration the authority must (unless it concludes there is no new action it can properly take)—*

*(a) determine such policies and specific objectives as it considers appropriate for taking action to further the general biodiversity objective, and*

*(b) take such action as it considers appropriate, in the light of those policies and objectives, to further that objective.*

*(1B) The requirements of subsection (1A)(a) may be satisfied (to any extent) by revising any existing policies and specific objectives for taking action to further the general biodiversity objective.*

*(1C) The first consideration required by subsection (1) must be completed by the authority within the period of one year beginning with the day on which section 102 of the Environment Act 2021 comes into force.*

*(1D) Any subsequent consideration required by subsection (1) must be completed no more than five years after the completion of the authority's previous consideration.*

*(1E) A determination required by subsection (1A)(a) must be made as soon as practicable after the completion of the consideration to which it relates.*

*(1F) Nothing in this section prevents the authority from—*

*(a) determining or revising policies and specific objectives at any time, or*

*(b) taking action to further the general biodiversity objective at any time.*

*(2) In complying with subsections (1) and (1A), a Minister of the Crown or government department must in particular have regard to the United Nations Environmental Programme Convention on Biological Diversity of 1992.*

*(2A) In complying with subsections (1) and (1A) the authority must in particular have regard to—*

*(a) any relevant local nature recovery strategy, and*

*(b) any relevant species conservation strategy or protected site strategy prepared by Natural England.*

*[...]*

*(3) The action which may be taken by the authority to further the general biodiversity objective includes, in particular, action taken for the purpose of—*

*(a) conserving, restoring or otherwise enhancing a population of a particular species, and*

*(b) conserving, restoring or otherwise enhancing a particular type of habitat.*



## Part 2: Section 40 NERCA

Explanatory notes to s.102 EA:

*924 New subsection (1) sets out that, in order to comply with the revised biodiversity duty, a public authority must periodically consider the opportunities available to improve biodiversity, across the full range of its functions. This represents a proactive, strategic assessment of a public authority's functions, rather than considering each function in isolation as required by the original section 40 duty.*

*925 New subsection (1A) sets out the process that the public authority must undertake following the strategic assessment. It may decide there is no action it can reasonably take that is consistent with the proper exercise of its functions. For example, it may decide a particular action is not possible within existing budget constraints, not good value for money or conflicts with other priorities. If there is action it can take, however, then paragraph (a) sets out that it must decide how that action can be put into effect, through appropriate policies and objectives. Paragraph (b) then requires the public authority to take the action.*



# Questions?



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