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UK Environmental Legislation and Its Administration in 2013—Achievements, Challenges and Prospects

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Abstract

This article considers the unwieldy state of UK environmental legislation in 2013, after 25 years of innovation, ad hoc reform and political change. It shows that an appraisal of UK environmental legislation involves considering much more than primary legislation emanating from Westminster—secondary legislation, devolved legislative instruments, policy documents and administrative norms all serve to constitute and inform the legislative picture. Through this wide analytical lens, the article considers legal problems that characterise UK environmental legislation today, from undermining of the rule of law due to its inaccessible complexity, to occupying an awkward place in public law terms. A particular problem is the fragmentation of legislation, and the article examines the case for integrating environmental legislation in a way that does not undermine the flexibility and institutional expertise that more focused legislation allows. The article offers not only a method for analysing the current UK environmental legislative landscape, but suggests routes for reform that might now be considered.

Keywords: environmental legislation, legislative integration, environmental policy, environmental administration, legislative reform

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1. Introduction

This article assesses the state of UK environmental legislation in 2013, in light of developments during the quarter of a century that the *Journal of Environmental Law* has been a landmark of this subject. We argue that UK environmental legislation, after years of some notable developments and achievements, is now an unwieldy legal beast, but also a fertile area for legal analysis, innovation and reform. This is because seeing environmental legislation in the round, as for environmental law generally, requires juggling multiple legal materials and perspectives. In particular, one cannot appraise the nature and evolution of environmental legislation without considering the processes and actors involved in its administration, and the vast amount of supplementary, quasi-legislative material that complements environmental legislation in the form of policy and guidance.[1]

Accordingly, the article is structured around three overlapping aspects of environmental legislation. Firstly, we focus on developments in environmental *legislation* itself. This is important for grasping the sheer scale and fragmented complexity of UK environmental legislation, which is both inevitable and problematic. This focus also highlights how regulatory mechanisms, the administration of environmental legislation and the transposition of EU environmental law are all legally constructed and driven by legislative and parliamentary processes. These processes not only reflect evolving political priorities, but raise real legal and institutional challenges for the future.

Secondly, the article considers the *policy* aspects of environmental law. Policy has a complex legal character in UK environmental law. Policy supplements legislation in regulating environmental problems, to the point where policy and guidance documents contain substantive obligations and legally constitute the subject in some respects, whilst also being constrained by certain statutory limits. The role of environmental policy, and its interaction with environmental legislation, thus raises doctrinal and constitutional issues in relation to the development of the subject.

Thirdly, the article analyses the *administration of environmental legislation*, considering the institutional practices of administrative decision-making under statutes. We focus specifically on innovative practices that are employed by the Environment Agency in implementing the Environmental Permitting Regulations 2010 (EPRs),[2] in order to show how environmental legislation depends critically on its administrative implementation.

1 Or without considering the various bodies of legal doctrine with which it interacts: Elizabeth Fisher and others, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 JEL 213, 230. See eg Maria Lee, 'Safety, Regulation and Tort: Fault in Context' (2011) 74 MLR 555.

2 Environmental Permitting Regulations (England and Wales) 2010 SI 2010/675 (EPRs).

The article identifies a central theme running through the subject—the *integration* of environmental law. We highlight this not with a view to achieving a perfectly organised legal subject—environmental law is simply not that kind of subject[3]—but to recognise that there are common aspects of the subject that map its character as a body of law and which should drive its inevitable evolution. On this basis, the final section suggests ways forward for rationalising environmental legislation. These ideas, and the legal problems driving them, are particularly relevant now with political agitation for the simplification of environmental legislation.[4]

Two caveats should be made at the outset. First, myriad legislative developments over the past 25 years have increasingly fragmented environmental law across the UK's devolved administrations.[5] Thus we address overall trends and themes in UK environmental legislation, but consider English legislative developments in most depth. However, we note that some of the most innovative developments in UK environmental legislation today are happening in the UK's devolved administrations, particularly in Wales and Scotland.[6]

Second, we recognise that problems generated by legislative complexity extend beyond environmental law.[7] The late Sir Tom Bingham observed that we are in an age of 'legislative hyperactivity', with draftsmen employing skills of 'technical virtuosity'.[8] In his view, this state of affairs undermines the rule of law, which requires that 'the law must be accessible and so far as possible intelligible, clear and predictable'.[9] Thus there is a bigger legislative challenge, of which the issues we highlight form part. However, there are also particular features of, and pressures on, environmental legislation that make it a serious example of legislative complexity, as the following section examines.[10]

3 Fisher and others (n 1) 230–31.
4 Defra, *Smarter Environmental Regulation Review*, <https://www.gov.uk/government/publications/smarter-environmental-regulation-review-phase-1-report-guidance-and-information-obligations> accessed 27 August 2013.
5 UKELA and King's College London, *The State of UK Environmental Legislation in 2011: Is There a Case for Reform? – Interim Report*, April 2012 (Interim Report) 18, 25.
6 In Wales in 2013, there is: a new environmental regulator, Natural Resources Wales (NRW) since 1 April 2013 (The Natural Resources Body for Wales (Establishment) Order 2012 SI 2012/1903 W.230); a planned 'Future Generations Bill' (incorporating sustainable development as a 'central organising principle' of government); and an Environment Bill (promoting natural resource management based on an ecosystem approach). In Scotland, the Regulatory Reform (Scotland) Bill (March 2013), inter alia, reforms environmental offences, sanctions and powers of the Scottish Environmental Protection Agency.
7 'People find legislation difficult': <www.gov.uk/good-law> accessed 27 August 2013.
8 Lord Bingham, 'The Rule of Law' (2007) 66 CLJ 67, 70.
9 ibid.
10 See also Interim Report (n 5) 20–22.

2. Legislative Developments

This section considers key legislative developments and innovations over the past 25 years to highlight the distinctive legal character of UK environmental legislation, and various problems to which this gives rise. In considering these developments, one could attempt to give a chronological account of all significant statutes since 1988,[11] or recount the legislative innovations come and gone.[12] However, we start by looking at a single significant Act during this period—the Environmental Protection Act 1990 (EPA)—as a representative example of legislative developments. The section then considers four further features of environmental legislation today: reasons for the complexity of the landscape; fragmentation and integration of overlapping legislative controls; the legislative construction of regulatory strategy and environmental administration; and reliance on delegated lawmaking and guidance. It should be noted that there have also been ongoing institutional developments during the past 25 years, brought about by legislative reform, which in turn shape the legislative and regulatory picture. These range from measures that have integrated institutions by combining them, promoting the collaborative, holistic and efficient exercise of regulatory expertise in relation to environmental issues,[13] to fragmenting measures, particularly as separate environmental agencies are set up within the increasingly independent devolved administrations.[14] We do not consider these developments in detail but they inform several of the points we underline, including problematic disconnections between legislative measures considered in Section 2.2, and uncertainty over who should issue environmental policy and when, considered in Section 3.2.

2.1 An Environmental Statute in Focus: The Environmental Protection Act 1990

The EPA was a landmark piece of environmental legislation that brought together various areas of environmental law into a single statute and introduced institutional changes that were a sign of more devolved law and administration

11 The tip of the iceberg includes: Environmental Protection Act 1990 (EPA), Town and Country Planning Act 1990 (TCPA), Water Resources Act 1991 (WRA), Environment Act 1995, Pollution Prevention and Control Act 1999 (PPC Act), Countryside and Rights of Way Act 2000 (CROWA), Natural Environment and Rural Communities Act 2006 (NERC Act), Climate Change Act 2008, Regulatory Enforcement and Sanctions Act 2008 (RESA).

12 eg the UK Emissions Trading Scheme, defunct since the EU Emissions Trading Scheme; and s 85 WRA (now in slightly modified form in the EPRs).

13 eg in 1995, the Environment Agency (EA) took over the roles of Her Majesty's Inspectorate of Pollution, the National Rivers Authority and local waste regulation authorities in England and Wales. See also (n 17).

14 eg (n 6) and (n 15).

to come.[15] The Act has three particularly remarkable features, which reflect characteristics of modern UK environmental legislation more generally.

First, the EPA was innovative. It moved towards controlling pollution by seeking to *prevent* environmental harm in an *integrated* way, rather than simply limiting its harmful effects. Thus Part I's Integrated Pollution Control (IPC) and local air pollution control (LAPC) regime introduced the requirement that 'Best Available Techniques Not Entailing Excessive Costs' (BATNEEC) should be used to regulate the processes of industrial facilities in order to prevent or minimise pollution.[16] This innovation, made administratively possible by the institutional integration of different regulatory bodies into Her Majesty's Inspectorate of Pollution in 1987,[17] was one inspiration for the EU Integrated Pollution Prevention and Control regime that was introduced in 1996.[18] Also innovative were Part IIA's contaminated land provisions, introduced by the Environment Act 1995 to establish a bold vision of liability (sometimes retrospective) for restoring historically contaminated land; and Part VI's general framework for regulating the use and release of genetically modified organisms (GMOs), dealing with a contrasting regulatory challenge characterised by considerable scientific uncertainty.

Second, the Act represents a miscellany of topics and laws relating to environmental protection. Thus the innovative regimes of Parts I, IIA and VI involve distinct regulatory mechanisms—a general licensing regime for industrial plants that sets technology-driven pollution control limits; a scheme for remedying environmental damage that relies on local authority resources and discretion for finding and identifying contaminated sites; and a consent regime for GMO use that relies on risk assessment and advice from an independent scientific committee. Part II does something different again, revamping the existing system of waste management by controlling all stages in the waste chain and shifting the focus to waste recovery. Parts III (statutory nuisances) and V (radioactive substances) introduced more piecemeal reform in those areas, but again these Parts operate differently.[19] These different functions of the Act's Parts have at least one implication: simply listing one environmental topic after another can amount to a very crude attempt to integrate environmental

15 Pt VII EPA split the then Nature Conservancy Council into discrete bodies across England, Scotland and Wales.

16 EPA, s 7. See ss 33–34 for more preventive environmental control.

17 Formed from the Industrial Air Pollution Inspectorate (Health and Safety Executive), Radiochemical Inspectorate, Water Inspectorate, and Hazardous Waste Inspectorate (Department of Environment).

18 Directive 96/61/EC concerning integrated pollution prevention and control [1996] OJ L257/10. See now Directive 2010/75/EU on industrial emissions [2010] OJ L334/17 (IED).

19 Part III's statutory nuisance provisions consolidated historical and new provisions, loosely connected in concerning local amenity problems; Part V revised an Act that has since been superseded. See also Part VIII's miscellaneous topics.

laws, where they are linked by a common objective but not much more in legal terms.

Third, and related to this, today the Act is a partly 'hollowed out' and highly variegated piece of legislation due to separate reforms of its Parts. Part I and significant sections of Part II—IPC and 'Waste on Land'—have been repealed by the introduction of the Pollution Prevention and Control Act 1999 and the EPRs. The EPRs integrate the administration of most pollution control permitting in England and Wales, but not in Scotland, where more of the EPA continues to have effect, creating a messy picture of jurisdiction-specific sections in the Act. Other parts of the Act have been removed altogether,[20] whilst some sections remain intact as important provisions of environmental protection control.[21] Furthermore, many sections rely heavily on secondary legislation or guidance for their operation. Thus statutory guidance issued under section 78YA contains key legal obligations for Part IIA's contaminated land provisions, including provisions on defining and identifying contaminated land and allocating responsibility to appropriate persons for its remediation.[22]

The picture of the EPA as a whole is one of a fragmented and disparate statute that is difficult to read on its face, increasingly so due to diverging amendments in the devolved administrations, and which is incomplete without reading subsequent legislation and accompanying guidance.[23] This picture represents much environmental legislation, and raises questions as to its accessibility. Lord Bingham's concerns about undermining the rule of law, set out in the Introduction, are thus particularly pertinent.[24] The following three sub-sections elucidate this picture further, considering general themes of UK environmental legislation today and the legal problems that they generate.

2.2 Complexity and Fragmentation in Environmental Legislation: a Case for Integration?

Environmental law is an inherently varied subject. It concerns diverse problems that involve the resolution of different and often competing interests (those at least of landowners, industrial operators, regulators and the interested public). It pursues multiple purposes including environmental protection, providing community amenity and infrastructure, and economic imperatives.

20 eg pt V, and schs 2 and 2A.
21 Notably ss 33–34.
22 Defra, *Environmental Protection Act 1990: Part 2A – Contaminated Land Statutory Guidance* (April 2012).
23 This difficulty is compounded by limited up-to-date versions of legislation online: UKELA, King's College London and BRASS, *The State of UK Environmental Legislation in 2011-2012: Is There a Case for Legislative Reform?*, May 2012 (Final Report) 9.
24 ibid 6.

It is informed by a range of values.[25] Thus it is not surprising that, as the EPA suggests, the picture of UK environmental legislation is highly fragmented. In the first place, the diversity of environmental problems means that 'environmental' legislation ranges from nature conservation and pollution control to climate change law and extensive planning provisions,[26] and then interacts with a range of other legal subjects, from public law to EU law to property law to tort law, not fitting the doctrinal framework of a discrete legal field.[27] A recent UK Environmental Law Association report summarised further reasons for the intricate web of UK environmental legislation, which include:[28] waves of piecemeal and reactive reform;[29] the pervasive influence of ever-evolving EU environmental law, transposed either by copy-out or referential drafting techniques;[30] 'a reluctance to consolidate legislation sufficiently often';[31] inherently complex technical requirements due to the nature of environmental problems;[32] extensive reliance on secondary legislation and guidance to establish legal requirements; and increasing fragmentation of environmental legislation across the UK devolved administrations.[33] As a result, academics,[34] judges,[35] regulators,[36] and the wide range of individuals, institutions and businesses who work with environmental law,[37] have commented that the speed and scale of legislative development has created problems for the application, analysis and implementation of environmental law.

One particular feature of fragmentation is the prevalence of overlaps or disconnections in environmental legislation. There are now multiple bodies of statute that regulate the same or similar environmental problems and they do not necessarily fit or work together *on the face of the legislation*. For example, despite having no obvious legislative connection, the contaminated land and planning regimes overlap in practice, with the planning regime often acting as a proxy for the contaminated land regime by imposing conditions on planning consents that require decontamination of land prior to development.[38] The operational interaction of these regimes can be seen either as a

25 Elizabeth Fisher, Bettina Lange and Eloise Scotford, *Environmental Law: Text, Cases and Materials* (OUP 2013) 46–53.
26 Planning law is an aspect of environmental law in addressing conflicts over and harmful uses of land.
27 Fisher and others (n 1) 230.
28 Interim Report (n 5) 7.
29 Fisher and others (n 1) 228–29.
30 These incorporate directly the text of EU Directives. See Interim Report (n 5) 104–05.
31 ibid 7.
32 Such as modelling and measurement of air pollution effects: see eg Annexes to Directive 2008/87/EC on ambient air quality and cleaner air for Europe [2008] OJ L152/1 (AQFD).
33 Interim Report (n 5) 52–67.
34 Fisher and others (n 1) 228–31.
35 Robert Carnwath, 'Environmental Litigation – A Way Through the Maze' (1999) 11 JEL 3.
36 Jonathan Robinson, 'Improving Environmental Law' (2009) 21 ELM 120.
37 Final Report (n 23).
38 Ben Pontin and Chris Willmore, 'Displacing Remedies from Environmental to Planning Law: The Enforcement of Contaminated Land Legislation in Britain' (2006) 6 Ybk Eur Envtl L 97.

problematic overlap that subverts Part IIA's carefully constructed liability regime, or as a practical accommodation between regimes that operate in tandem (with Part IIA acting as a shadow regime that drives property transactions and development planning).[39] This kind of de facto integration of regimes indicates that legislative overlaps are not always a problem. Environmental law is inherently fragmented and it can involve various types of legal control. Furthermore, it involves a range of institutions in its administration (such as the Environment Agency, local government authorities, Natural England, Secretaries of State), which have different institutional expertise and consider and represent a range of interests in environmental decision-making. However, even with this intrinsic plurality, some environmental statutes (and their administration) overlap or disconnect for no justifiable reason—that is, in some cases, legislation is *poorly integrated* due to arbitrary rather than complementary interactions.

We use the term 'integration' here in a particular sense, referring to the interconnection of legal instruments, processes and obligations across environmental statutes,[40] rather than to the linking of policy ideas.[41] In thinking about legislative interconnections, a further distinction can be made between the *substantive* integration of environmental obligations and requirements (such as environmental standards, liability rules and regulatory strategies), and the *administrative* integration of mechanisms employed for implementing environmental regimes (such as permitting systems or enforcement provisions).[42] Overall, we argue that thinking about integrating fragmented environmental legislation involves a balance. On the one hand, integration can promote consistency of regulatory requirements and thus certainty for those regulated, improve accessibility of environmental obligations, and streamline administrative processes.[43] On the other hand, there can be practical benefits in having independent regulatory systems that treat overlapping environmental problems with discretely appropriate standards and relevant expertise, whilst also allowing flexibility for regulated and affected parties in engaging with different regulatory regimes.

39 Steven Vaughan, 'The Contaminated Land Regime: Still Suitable for Use?' [2010] JPEL 142.

40 Integration can be defined in many ways, including by distinguishing between 'internal' (as considered here) and 'external' integration of environmental law: Jenny Steele and Tim Jewell, 'Law in Environmental Decision-Making' in Tim Jewell and Jenny Steele (eds), *Law in Environmental Decision-Making* (Clarendon Press 1998) 5–7.

41 Environmental law 'integration' often concerns balancing different policy objectives through international agreements on sustainable development (eg UNCED, *Rio Declaration on Environment and Development* (1992) 31 ILM 874, principle 4; cf A Dan Tarlock, 'Ideas Without Institutions: The Paradox of Sustainable Development' (2001) 9 Ind J Global Legal Stud 35, or incorporating environmental law obligations within other policy areas (eg TFEU, art 11).

42 This distinction is not perfect, but highlights different dimensions of integrating legislative provisions. See further Interim Report (n 5) 43–67.

43 See further Adrian Penfold, *Penfold Review of Non-Planning Consents: Final Report* (July 2010).

A case for such balanced legislative integration can be seen in the interaction of pollution control permitting and planning law.[44] A large industrial facility will often require both planning consent and an environmental permit to be established. Whilst some legislative provisions acknowledge this dual control,[45] and planning policy statements attempt to demarcate the respective roles of planning and regulatory authorities in these consenting processes,[46] there remains some uncertainty over the precise extent to which environmental protection concerns are the province of planning authorities or environmental regulators in deciding whether a proposed facility should operate, and on what conditions. A body of case law on this issue has resulted, indicating that planning authorities can consider the amenity impacts of likely emissions in determining an application for a proposed facility, whilst generally leaving the control of polluting emissions to the regulator.[47] This approach involves cumulative but interrelated decision-making, which is highly fact-dependent, but which involves subtly distinct issues that are within the respective expertise of these different administrative bodies. However, the administrative integration of these overlapping processes between planning authorities and regulators is poor—their timing is not generally synchronised and there are no universal mechanisms for sharing information. Recognising this problem, the Environment Agency now offers guidance to streamline these processes, including the parallel tracking of permit and planning applications in complex cases.[48]

However, this example also highlights how legislative disconnections can have practical benefits and reinforces the need for separate institutions. The current separation of planning and environmental permitting enables developers to sequence the separate applications: there may be little point in committing resources to a comprehensive application for a permit under the EPRs, for example, if there is a risk that the development will not secure planning permission.[49] Furthermore, there is a concentration and fostering of expertise, as well as economic efficiency, in brigading similar complex environmental permitting decisions across the country in one specialised environmental regulator, rather than requiring the expertise to be duplicated in each local authority.[50] If this approach is taken, a land use planning regime that

44 Similar issues arise with other environmental consents required alongside the planning process: Adrian Penfold, 'The Relationship between Planning Permission and Non-Planning Consents: Unfinished Business?' [2010] (13 Supp) JPEL 27.

45 EPRs, sch 9, para 3.

46 Department of Communities and Local Government, *National Planning Policy Framework* (2012) (NPPF) [120], [122].

47 eg *Hopkins Developments Ltd v First Secretary of State* [2006] EWHC 2823 (Admin); *Harrison v The Secretary of State for Communities and Local Government* [2009] EWHC 3382 (Admin).

48 Environment Agency, *Guidance for Developments Requiring Planning Permission and Environmental Permits* (October 2012).

49 Note that the reverse risk is now mitigated by the EA's new guidance: ibid.

50 (n 13).

considers issues of amenity leads inevitably to scope for argument at the boundary about the extent to which environmental protection issues should be left to the specialised regulator, or be relevant factors in determining planning decisions.

Notably, there have been some efforts to integrate environmental legislation. Substantively, the EIA regime is woven tightly into the planning regime,[51] as are aspects of nature conservation regimes.[52] Despite challenges in the practical application of the EIA regime by planning authorities,[53] the legislative interconnection is tight. There have also been concerted efforts to integrate related bodies of environmental legislation in Scotland,[54] with more ambitious plans on the horizon, as there are in Wales.[55]

Administratively, the EPRs represent a considerable effort to integrate almost all processes for pollution control permitting in England and Wales. The Regulations are voluminous, with multiple schedules setting out the substantive requirements for different kinds of permitting (for landfill, large combustion plants, 'Part A' Integrated Pollution Prevention and Control or IPPC installations, water discharge activities, and so on), but they have a common permitting framework, which unites the administration of these pollution control processes. The integrating reform of the EPRs casts into sharp relief other fragmented aspects of environmental laws that vary across statutes. This is particularly in relation to enforcement, as seen with remediation powers,[56] powers of entry,[57] and appeals.[58] The legislative picture in relation to these provisions is problematically fragmented, with opportunities to develop consistent and best practice across areas of environmental law not yet being maximised. Section 5 examines these opportunities.

2.3 The Legislative Construction of Regulatory Strategy and Administration

Despite the fragmentation of legislative measures and bodies involved in regulating environmental problems, some interesting trends emerge in considering

51 Town and Country Planning (Environmental Impact Assessment) Regulations 2011 SI 2011/1824 (EIA Regulations). Note EIA is also integrated into other consent schemes (eg for agricultural land projects) and implemented separately across the devolved administrations, generating multiple sets of EIA regulations across the UK applied by different regulators.

52 Conservation of Habitats and Species Regulations 2010 SI 2010/490 (Habitats Regulations) Pt 6(2).

53 Joe Weston, 'Screening for Environmental Impact Assessment Projects in England: What Screening?' (2011) 29 Impact Assessment and Appraisal 90, 96.

54 eg Water Environment (Controlled Activities) (Scotland) Regulations 2005 SI 2005/348.

55 (n 6).

56 (n 172).

57 (n 171).

58 Richard Macrory, *Consistency and Effectiveness – Strengthening the New Environment Tribunal* (Centre for Law and the Environment, UCL 2011) 9.

how UK environmental legislation constructs regulatory strategy and administration. To begin with, whilst an array of regulatory strategies deals with environmental problems[59]—including command-and-control standard setting, market-based mechanisms,[60] voluntary mechanisms,[61] and decision-making mechanisms that embed a preventive approach[62]—nearly all environmental regulatory strategies[63] are underpinned by a statutory 'command' and a 'control' mechanism to enforce this, often using a criminal sanction. Thus, for example, criminal and civil penalties back up the economic instruments of the landfill tax and EU emissions trading scheme,[64] and landowners and occupiers of land protected for nature conservation purposes are incentivised to enter into voluntary management agreements by the threat of compulsory acquisition of land.[65]

There are other statutory trends in regulatory strategy. First, environmental quality standards (EQSs) have increasingly been adopted in legislation, incorporating a holistic approach for controlling pollution in air and water by the simple, powerful mechanism of requiring administrators to ensure that certain overall pollution levels are not exceeded,[66] or improved standards are achieved over time.[67] The most ambitious version of this approach is the pioneering Climate Change Act 2008, which sets statutory limits on UK greenhouse gas emissions. This approach is not without implementation challenges,[68] but EQSs can send strong signals of acceptable environmental limits.[69]

Second, despite some academic scepticism,[70] strict liability criminal offences retain an important role in environmental regulation. Thus, in introducing the EPRs in 2007, Parliament not only maintained the strict liability offence of causing poisonous, noxious or polluting matter to enter controlled waters (derived from the former section 85 Water Resources Act 1991),[71] but also

59 Stuart Bell, Donald McGillivray and Ole Pedersen, *Environmental Law* (8th edn, OUP 2013) ch 8.
60 Greenhouse Gas Emissions Trading Scheme Regulations 2012 SI 2012/3038 (ETS Regulations); Finance Act 1996, pt 3 (landfill tax).
61 NERC Act (n 11) s 7.
62 EIA Regulations (n 51).
63 Other than those that are purely voluntary eg environmental management standards ISO 14 000, ISO 14001.
64 Finance Act 1996, sch 5; ETS Regulations (n 60), pt 7.
65 Wildlife and Countryside Act 1981, s 28N.
66 Albeit often subject to exceptions. See eg Water Environment (Water Framework Directive) (England and Wales) Regulations 2003 SI 2003/3242; Air Quality Standards Regulations 2010 SI 2010/1001.
67 Directive 2000/60/EC establishing a framework for Community action in the field of water policy [2000] OJ L327/1 (WFD) art 4.
68 *R (on the application of ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2013] UKSC 25.
69 Despite discretion as to how limits are measured eg AQFD, Annex III.
70 eg Herbert L A Hart, *The Concept of Law* (3rd edn, OUP 2012) 167–79. See also Richard Macrory, 'Sanctions and Safeguards – The Brave New World of Regulatory Enforcement' (2013) 66 CLP in press.
71 EPRs, regs 12, 38 and sch 21, para 3.

restricted the due diligence defence for all permitting offences, which can be committed without intent or negligence.[72] Justifying such strict liability provisions can be a contentious exercise, but this approach is now ingrained in environmental legislation.[73] In theoretical terms, it can be supported on the basis of corrective justice,[74] or by prioritising 'outcome responsibility' and risk allocation,[75] particularly in relation to large enterprises whose activities pose social risks and which have the ability to spread or prevent any losses suffered by individuals as a result of their activities.[76] Indeed, the practical effect of EPR offences is to incentivise operators to take available steps to *prevent* pollution of waters, deposits of waste, or any act in contravention of a permitting requirement.

A third regulatory trend in environmental legislation is the increasing introduction of extended producer responsibility to regulate environmental problems. This includes statutory schemes that make manufacturers liable if their products end up as harmful waste in the environment, thus taking prevention to its extreme with a life-cycle approach to pollution control.[77]

Finally, there has been increasing localism in environmental control, particularly since the Localism Act 2011,[78] which gave local communities a greater voice in determining permissible land-use through the planning system.[79] This Act has generated a substantive integration challenge, since other aspects of the planning system have been increasingly centralised,[80] and the interconnecting Acts and policies that make up the planning framework now raises some knotty legal problems.[81] However, localism is consistent with the dominant trend in regulating environmental issues of requiring that views from a wide group of interested parties be considered in deliberative decision-making processes—from expert bodies, local authorities, and the public (including neighbours, competitors, community interests).[82]

This links to the other key point of this section—environmental legislation is central to the legal construction of how environmental regimes are administered.[83] In this respect, innovation in environmental legislation over the past

72 EPRs, reg 40; cf EPA, s 33(7).
73 *Empress Car Company v NRA* [1998] UKHL 5.
74 Richard Epstein, 'A Theory of Strict Liability' (1973) 2 JLS 151.
75 Tony Honoré, *Responsibility and Fault* (Hart 1999) 14–40.
76 *Escola v Coca Cola Bottling Co or Fresno* 150 P 2d 436 (1944) (Traynor J). See eg *Rylands v Fletcher* (1868) LR 3 HL 330.
77 eg End-of-Life Vehicles (Producer Responsibility) Regulations 2005 SI 2005/263; Producer Responsibility Obligations (Packaging Waste) Regulations 2007 SI 2007/871.
78 Localism Act 2011.
79 ibid, s 122, schs 9–11. See also Planning and Compulsory Purchase Act 2004 (PCPA), ss 18–19.
80 Planning Act 2008 (as amended); NPPF (n 46).
81 See eg *Tewkesbury Borough Council v SSCLG* [2013] EWHC 286 (Admin); *Colman v SSCLG & Npower* [2013] EWHC 1138 (Admin).
82 See Eloise Scotford and Rachael Walsh, 'The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context' (2013) 76(6) MLR 1010.
83 As public law doctrine makes clear, eg *R (Badger Trust) v Welsh Ministers* [2010] EWCA Civ 807.

25 years has been a story of ever-evolving administrative regimes in which regulatory discretion plays a central role.[84] Two brief examples show how such discretion has been shaped by legislative reform. First, regulators now have greater power in the creation and enforcement of regulatory determinations,[85] as well as new enforcement powers under the Regulatory Enforcement and Sanctions Act 2008. Second, regulators (and other public authorities) are increasingly subject to overriding duties to minimise pollution, promote sustainable development and conserve biodiversity in exercising their functions.[86] Thus, while much administrative activity is beyond the purview of judicial oversight,[87] it is often constituted and guided by the detailed provisions of legislation.

2.4 The Rise of Secondary Environmental Legislation

The final notable feature of UK environmental legislation is its heavy reliance on secondary legislation. At least the following constitute core elements of English environmental law: the Environmental Impact Assessment Regulations 2011 (first introduced 1988),[88] Conservation of Habitats and Species Regulations 2010 (originally 1994),[89] Greenhouse Gas Emissions Trading Scheme Regulations 2012 (for Phase III of the ETS—GHG ETS Regulations were first introduced in 2003),[90] Water Environment (Water Framework Directive) (England and Wales) Regulations 2003,[91] Environmental Assessment of Plans and Programmes Regulations 2004,[92] EPRs 2010 (first introduced 2007), Air Quality Standards Regulations 2010 (originally 2007),[93] Environmental Damage (Prevention and Remediation) Regulations 2009,[94] and the Waste (England and Wales) Regulations 2011.[95] These Regulations were introduced either under section 2(2) of the European Communities Act 1972 or under delegated powers in other primary legislation,[96] and can be

84 Fisher, Lange and Scotford (n 25) ch 3.
85 eg CROWA 2000 (n 11).
86 eg sustainable development objectives: Environment Act 1995, ss 4,7: Water Industry Act 1991, ss 2(3)(e) and 27A(12); Local Government Act 2000, s 4(1). For other statutory environmental objectives, see EPRs, sch 7, para 3; NERC Act (n 11), s 40. For a critique of such duties, see Carnwath (n 35) 5–7.
87 Michael Adler (ed), *Administrative Justice in Context* (Hart 2010) and (nn 130–133).
88 (n 51); initially Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 SI 1988/1199.
89 (n 52) (as amended). The 2010 Regulations replaced the Conservation (Natural Habitats, &c) Regulations 1994 SI 1994/2716.
90 (n 60) (previously SI 2003/3311 and 2005/925).
91 SI 2003/3242.
92 SI 2004/1633.
93 SI 2010/1001 (previously SI 2007/64).
94 SI 2009/153.
95 SI 2011/988.
96 PPC Act (n 11), s 2, sch 1; TCPA (n 11), s 71A; Environment Act 1995, s 87(1).

easily amended (which they frequently are). Delegated legislation is preferred because it provides an efficient method for transposing EU legislation;[97] it offers flexibility to incorporate new legal developments, and more space (often in schedules) to dictate technically complex regulatory requirements that often need frequent amendments.

However, this flexibility also raises a concern of constitutional law.[98] Introducing measures by way of secondary legislation avoids the Parliamentary scrutiny processes to which primary legislation is subject. Considering that regulations (along with guidance documents)[99] are extensively relied on to set out the bulk of English environmental control requirements, this means that much environmental law does not get debated or voted on in Parliament, or considered by specialist Parliamentary committees.[100] Most regulations are passed by the negative resolution procedure whereby statutory instruments automatically become law on a specified date unless a prayer to annul triggers their revocation.[101] This seems a very short time for complex delegated legislation to be reconsidered. This concern is compounded by the fact that some regulations impose primary obligations on the state as well as regulated entities,[102] and they can also have a significant impact in constraining government policy, as Section 3 demonstrates.

However, there are arguments to justify using secondary legislation extensively. First, the relevant frame for thinking about constitutional legitimacy may be more appropriately focused on EU governance. Since the bulk of UK secondary environmental legislation transposes EU environmental law into domestic law, the transposition process is the final stage in a longer lawmaking process through the European institutions, involving extensive consultation, democratic control through the directly elected European Parliament, indirect democratic accountability through the Council of Ministers, and decision-making by expert committees at the EU level.[103] Second, the legitimacy of such regulations might be justified by the technical expertise of those who draft, or contribute to drafting, them.[104] In spite of these reasons, the limited

97 Contrast the lengthy legislative procedure for a Bill in both Houses of Parliament with Ministers making Regulations to enter into force typically within 21 days of laying (Statutory Instruments Act 1946, s 5(1)).

98 cf Tim Jewell, 'Public Law and the Environment' in Tim Jewell and Jenny Steele (eds), *Law in Environmental Decision-Making* (Clarendon Press 1998) 75.

99 See Section 3.

100 Although the Parliamentary Merits of Statutory Instruments Committee, Regulatory Reform Committee and Joint Committee on Statutory Instruments should in serious cases pick up where regulations inappropriately use or go beyond the scope of delegated power, or imperfectly achieve policy objectives.

101 (n 97).

102 eg Air Quality Standards Regulations 2010 SI 2010/1001, pt 3 and reg 25.

103 On the contested legitimacy of EU governance processes, see Beate Kohler-Koch and Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield 2007).

104 See Robert Baldwin, *Rules and Government* (OUP 1995) 41–49.

parliamentary scrutiny of secondary environmental legislation has been seen as a significant practical reason for the highly fragmented, and often inaccessible, state of environmental legislation.[105]

3. The Role of Policy

Environmental legislation presents a complex and fragmented landscape not only for the reasons examined above, but also because various forms of policy are central to environmental law,[106] and are closely intertwined with environmental legislation.[107] Not only do certain statutes empower and delimit the formulation of environmental policy documents, but policy documents are often vital to the operation and implementation of statutory regimes. This is to the point that environmental policy contains key regulatory obligations and might be seen to constitute environmental 'law' in certain respects,[108] whilst also being subject to statutory constraint. This close legal interaction between environmental legislation and policy shows there is no clean constitutional separation of environmental policy from the scope of environmental law, despite dominant paradigms of constitutional theory and public law doctrine that relegate policy matters to the domain of politically accountable discretion alone.[109] It also raises important questions about who is issuing environmental policy documents, when they are doing this, and how accountable these processes are.

3.1 The Legislative Construction and Role of Environmental Policy

Environmental policy is not susceptible to a single definition.[110] It exists in myriad forms—from national planning polices and statutory guidance for particular environmental regimes to Ministerial statements and technical guidance written by expert committees and regulators. Despite this diversity, in many cases environmental policy is legislatively constructed and constrained, even in the case of high-level government policy, which ordinarily does not bind the government and is generally immune from judicial

105 Interim Report (n 5) 77–102.

106 Again, environmental law is not unique in this respect. Consider the extensive role of policy in immigration law: *R (Pankina) v SSHD* [2010] 3 WLR 1526.

107 For a fuller discussion of the role of policy in environmental law, see Fisher, Lange and Scotford (n 25) ch 11.

108 Where 'law' comprises measures that control and influence behaviour, backed up by a court's authority: Robin Creyke and John McMillan, 'Soft Law v Hard Law' in Linda Pearson, Carol Harlow and Michael Taggart (eds), *Administrative Law in a Changing State* (Hart 2008) 383.

109 Ronald Dworkin, *Taking Rights Seriously* (2nd edn, Duckworth 1978) and *Bushell v Secretary of State for the Environment* [1981] AC 75.

110 *Bushell* (n 109) 98.

review.[111] An example is the Planning Act 2008's regime for National Policy Statements (NPSs), which set out government objectives for developing nationally significant infrastructure in key sectors. The Planning Act sets out the elements that a NPS must contain, and prescribes the process for its formulation, involving both public consultation and parliamentary scrutiny.[112] This kind of formalised, democratic process reflects how legalised environmental policies can be,[113] and challenges the constitutional view that government policy is beyond the domain of law and, in particular, judicial control.

Other forms of environmental policy are also often legislatively directed,[114] and can have significant legal effects. In particular, a wide variety of environmental policy documents guide administrative decision-making by regulators and local authorities under statutory frameworks. Section 2 discusses how legislation constructs such decision-making regimes in key respects, but the exercise of administrative discretion within them—in balancing considerations and deliberating to decide planning or permitting applications, or to impose other environmental controls—is heavily influenced by policy documents. Some of these documents are in the form of statutory guidance that contains key regulatory obligations, such as the Part IIA EPA guidance discussed above. Others, even though not all statutorily required, are fundamental to the operation of regimes, as in planning where local and central government policy documents constitute key material considerations in deciding planning applications.[115] Some policy documents are highly specialised, providing the technical details of environmental regimes that set general or 'open' environmental quality standards.[116] Other policy documents serve to structure administrative processes, setting out frameworks and criteria on the basis of which regulators will exercise their powers, as in the case of the Environment Agency's comprehensive enforcement policies.[117] Classifying these different types of policy more precisely may well be important, considering that courts now routinely hold decision-makers to account for lawful compliance with their own policies, but not as stringently as if they were statutes.[118] There are particular features of policies that will determine their legally constraining

111 *R v Secretary of State for the Environment, ex p Hammersmith and Fulham LBC* [1991] 1 AC 521, 597.

112 See also the formulation of climate budgets under the Climate Change Act 2008, ss 8–10.

113 See also Directive 2008/98/EC of 19 November 2008 on waste [2008] OJ L312/3 (Waste Framework Directive), arts 28 and 29; WFD (n 67) art 13.

114 And governmental policy in general on the basis of environmental criteria: Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L197/30, art 3.

115 eg PCPA (n 79), s 15; cf NPPF (n 46).

116 Such as Best Available Technical Reference (BREF) documents establishing what constitutes Best Available Techniques (BAT) across sectors under the IPPC regime: IED (n 18), art 13.

117 See <http://www.environment-agency.gov.uk/business/regulation/31851.aspx> accessed 27 August 2013.

118 *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 [19].

impact in administrative law terms—including who issues them (the decision-maker or another authoritative body),[119] how carefully drafted and considered they are,[120] whether a policy leaves room for judgment,[121] whether prosecutorial discretion is involved,[122] whether policies are more 'rule making' than 'rule-interpreting'.[123]

Despite this legal uncertainty, policy now has a significant role in environmental administration, being vital to the operation and construction of legislative regimes. Policy can bring up-to-date technical expertise into decision-making; it allows flexibility; and it often structures decision-making so as to prevent it from being arbitrary.

3.2 Environmental Policy and Questions of Public Law

Whilst the role of policy in environmental law is significant, the landscape of policy documents is also prolific and fragmented. In particular, there are uncertainties about who issues policy documents, when this occurs, and the accountability of the processes involved. This gives rise to problems of accessibility and workability for users of environmental law.[124] Furthermore, due to the key role of environmental policy in the exercise of public power—in constituting legal obligations and also guiding administrative discretion—these issues provoke public law questions about the nature and quality of policy documents, which relate to the uncertainty of their legal impacts in administrative law terms discussed above.

In terms of *who* issues policy and guidance documents, this is many public bodies. This is because there are a significant number of regulators, authorities and government departments that have responsibility for environmental issues, including EU authorities. It is also because the borderline between the role of government and that of regulators in issuing guidance in the UK is blurred. While the current Government has sought to demarcate the role of central Departments in making strategic policy choices, regulators routinely issue guidance documents setting out their own internal policies, particularly relating to their practices for implementing and enforcing environmental regimes.[125] Furthermore, differing guidance on similar regulatory issues can be given across devolved administrations.[126]

119 ibid; cf *R (Hart) v SSCLG* [2008] EWHC 1204 [31]-[33].
120 *R (Manchester Ship Canal) v Environment Agency* [2012] EWHC 1643 (QB) [93] and generally.
121 *Tesco Stores* (n 118) [18].
122 *Moss v CPS* [2012] EWHC 3658 (Admin).
123 eg Contaminated Land Statutory Guidance (n 22); cf *Hart* (n 119). We would like to thank an anonymous referee for pointing out this helpful distinction.
124 Final Report (n 23) 9.
125 eg EA flood risk assessment guidance (<http://www.environment-agency.gov.uk/research/planning/93498.aspx> accessed 27 August 2013), and enforcement policies (n 117).
126 eg *Scottish Power Generation Ltd v Scottish Environment Protection Agency* [2005] CSOH 67 (differing waste classification between the EA and Scottish Environmental Protection Agency).

In terms of *when* policy documents are issued, the timing is essentially ad hoc, considering the multiple statutory sources, issuers and purposes of such documents. In some cases, EU developments may drive timing. EU Directives transposed directly (using referential drafting) into secondary legislation may then be supplemented with guidance to interpret them more closely in the UK administrative setting. This layered method of transposing EU law is efficient and context-driven but it can involve regulatory choices on ambiguous EU law points.[127] The fact that interpretive choices are being expressed through guidance leads to the next issue—the *accountability* of processes for creating policy documents.

This raises a constitutional law question, as with secondary legislation in Section 2. Is it appropriate for a considerable quantity of environmental law, including key obligations and frameworks for exercising public power, to be introduced outside formal parliamentary processes? UK constitutional law has no clear answer to this question;[128] at a minimum, the evolution of environmental regulation shows that there are now important questions to be asked about the nature and legitimacy of the processes by which guidance and policy documents are issued.[129]

There are in fact various ways in which environmental policy processes might be seen as legitimate, depending on one's theoretical basis for evaluating the legitimacy of administrative power.[130] Thus wide consultation exercises are conducted in developing key guidance documents, democratising the process through public participation;[131] and there is some Parliamentary imprimatur where processes for developing guidance are required and constructed by statute.[132] Further, the very production of some guidance documents is arguably legitimising. Since internal policy documents perform an important function in publicising in advance how regulatory powers are to be exercised, they can structure administrative discretion and legally constrain its

127 eg under the Large Combustion Plants Directive (Directive 2001/80/EC [2001] LJ L309/1, now subsumed within the IED (n 18)), it was unclear whether a National Emissions Reduction Plan (arts 4(3)(b) and 6) could apply to some existing plants, and emissions limit values (art 4(3)(a)) to others. This was resolved in guidance issued by the Department for Business Industry and Skills (this interpretation is now implicit in sch 15, para 3(2) EPRs).

128 cf Tony Prosser, 'Regulation and Legitimacy' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (OUP 2011).

129 See further Final Report (n 23) 9, 12.

130 Public law scholars debate this fundamental point eg Tony Prosser, *Nationalised Industries and Public Control: Legal, Constitutional and Political Issues* (Blackwell 1986) (deliberative participation as key to legitimate administration in the modern democratic state); cf Baldwin (n 104) (multiple legitimacy arguments, from expert rationality to respecting legislative mandate to due process, promote legitimacy cumulatively).

131 See Benjamin Richardson and Jona Razzaque, 'Public Participation in Environmental Decision-Making' in Benjamin Richardson and Stepan Wood (eds), *Environmental Law for Sustainability* (Hart 2006).

132 eg RESA (n 11) ss 63–65.

application into predictable patterns.[133] In short, policy is an aspect of environmental law that is pervasive, and which raises challenging questions of public law, legal theory and good regulatory practice.

4. The Administration of Environmental Legislation: Environmental Permitting Decisions in Practice

This section reflects on how the practical impact of environmental legislation depends not only on how regulatory powers are structured by statute, as Section 2 considers, but also on how regulators choose to exercise discretion under legislation. Just as policy documents play an important role in constructing statutory regimes, so do norms of institutional practice that are not readily discoverable by more traditional legal analysis.[134] Thus appraising the state of environmental legislation requires some understanding of the institutional application of legislative requirements by administrative officials.[135] This section cannot present a comprehensive study of administrative practices. Rather, it considers decision-making processes within the Environment Agency (EA) in relation to a key integrating reform, the introduction of the EPR regime, to show how internal norms of institutional practice are central to the operation and evolution of statutory regimes.

In regulating polluting facilities and activities, the EPR process starts with the statutory requirement that, in order to carry out specified activities,[136] an operator must: apply for a permit;[137] pay a fee prescribed in a charging scheme made by the EA;[138] comply with the permit, which includes those conditions the EA sees fit to impose;[139] and be subject to inspection and any enforcement action determined by the Agency in cases of permit breaches.[140] Whilst there are other statutory provisions that control the EA's discretion to make permitting decisions,[141] such as the overriding requirement to pursue 'the purpose of preventing or minimising, or remedying or mitigating the

133 Kenneth C Davis, *Discretionary Justice: A Preliminary Inquiry* (Illinois Books 1971) 98; Denis Galligan, *Due Process and Fair Procedures: A Study of Administrative Procedures* (Clarendon Press 1997) 35–36; *Manchester Ship Canal* (n 120).

134 However, doctrinal developments can reflect norms of public administration: Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart 2007).

135 As well recognised by socio-legal scholars: eg Genevra Richardson, Anthony Ogus and Paul Burrows, *Policing Pollution: A Study of Regulation and Enforcement* (Clarendon Press 1982); Keith Hawkins, *Law as Last Resort: Prosecution Decision-Making in a Regulatory Agency* (OUP 2002).

136 EPRs, regs 12 and 8.

137 ibid, sch 5, para 2.

138 ibid.

139 EPRs, sch 5, para 12(2).

140 ibid, regs 34, 36–38, 57.

141 ibid, sch 5, para 12.

effects of, pollution of the environment',[142] and particular environmental standards for certain activities,[143] the EA's discretion is fundamentally informed by various institutional practices for implementing the regime.

In the first place, the practical impact of the requirement to *apply for a permit, and pay a prescribed fee*, has changed significantly over the past decade, as a result of changing EA practices. This is partly because standard environmental permits for certain categories of activity have simplified the process for a large number of operators.[144] Unlike bespoke permits where conditions are set taking into account specific features of proposed activities or installations, an operator can pay a reduced fee for a permit on standard terms for certain common operations, which the Agency will grant if satisfied that the operator can comply. Another administrative approach, which obviates the need for permits altogether, is the Agency's development of waste protocols. Determining when material ceases to be waste, so that its management is no longer subject to EPR permitting requirements,[145] involves complex legal analysis,[146] detailed evidence and scientific assessment, generating considerable costs for regulators and uncertainty for operators. Accordingly, the EA has developed 10 Waste Quality Protocols, which adopt technical criteria to define when material ceases to be waste for different waste streams.[147] The EA's waste protocols are another example of publicly available 'policy' documents informing the operation of environmental regimes, and they also represent an internal regulatory initiative to structure administrative power, so as to provide legal clarity for operators and promote efficiency.

Second, regulatory practices can also inform the *conditions with which an operator must comply* under an environmental permit. Thus, in relation to the annual subsistence fee that an operator must pay to cover the regulator's costs of compliance-checking,[148] the Agency's Operator Performance and Risk Appraisal (OPRA) imposes costs to reflect the environmental risk posed by the individual operator, and hence the level of supervision undertaken.[149] This variable charge reflects the cost of regulating a site, but can also create a financial incentive for improved performance. Another significant administrative innovation in permit conditions involves shifting responsibility for monitoring from the regulator to operators themselves, accompanied by a duty on

142 Environment Act 1995, s 5(1).
143 eg BAT requirements for IPPC installations (EPRs, sch 7, para 5).
144 EPRs, regs 26–27.
145 ibid, regs 8, 12, sch 9.
146 *R (OSS Group Ltd) v Environment Agency* [2008] Env LR 8.
147 <http://www.environment-agency.gov.uk/business/sectors/142481.aspx> accessed 27 August 2013. These will be supplemented or replaced over time by EU end-of-waste decisions for particular waste streams: Waste Framework Directive (n 113), art 6.
148 Environment Act 1995, s 41.
149 <http://www.environment-agency.gov.uk/business/regulation/31827.aspx> accessed 27 August 2013.

the operator to report non-compliance.[150] Whilst self-monitoring can generate enforcement challenges,[151] these kinds of conditions can also significantly reduce regulator costs and subsistence charges for operators. In order to avoid such conditions leading to breaches going unnoticed, they are accompanied by random inspections by regulators and heavy penalties on the operator for failing either to monitor accurately or to report breaches.[152]

Third, EA practices are also determinative of *enforcement action* taken in relation to the EPR regime. Although the EPRs provide that certain activities are unlawful if carried out without a permit, or in breach of a permit, that unlawfulness in practice depends on the way in which the EA decides to bring enforcement action, and particularly prosecutions. Under the Code for Crown Prosecutors, a prosecution is only to be brought where it is in the public interest.[153] To this end, the EA has developed regulatory Position Statements,[154] which are formalised statements expressing the regulator's view that it would not be in the public interest to prosecute for certain types of breach, provided that environmental protection conditions specified in the Statement are met. This certainty can enable operators to act in the most environmentally advantageous way, which in some case may involve breaching permit conditions, without the risk of a potential prosecution.

Furthermore, the Agency is currently exploring still more radical administrative practices for reducing costs, in order to maintain compliance and environmental outcomes, within the constraints of reduced government funding. The Agency has begun to reduce the frequency of inspection at sites that demonstrate a high standard of compliance,[155] whilst increasing the level of resources devoted to bringing into compliance, or closing down, poorly performing sites. More ambitious steps are to rely on inspections carried out by third parties, including sector-based quality assurance schemes,[156] or to rely on annual compliance statements by operators signed by senior officials in regulated businesses. The Agency is running pilot projects to test these approaches.

Overall, the example of the EPRs illustrates how the practical impact of legislative requirements depends on the administrative, organisational and

150 See eg <http://www.environment-agency.gov.uk/business/topics/water/121308.aspx> accessed 27 August 2013.

151 ENDS Report 447 (April 2012) 20–21.

152 *R v St Regis Paper Company* [2012] Env LR 16.

153 <http://www.cps.gov.uk/publications/code_for_crown_prosecutors/introduction.html> accessed 27 August 2013.

154 <http://www.environment-agency.gov.uk/research/library/position/> accessed 27 August 2013.

155 Better Regulation Executive and National Audit Office, *Effective Inspection and Enforcement: Implementing the Hampton Vision in the Environment Agency* (available at <http://www.bis.gov.uk/files/file45355.pdf>) 32 accessed 27 August 2013.

156 eg the Red Tractor farm assurance scheme: <http://www.redtractor.org.uk/farm-assurance> accessed 27 August 2013.

procedural approaches of regulators. These involve choices that are mostly invisible in a study of legislation and formal government policy, involving innovations that are driven by overarching environmental protection duties, trial and error of processes over time, and the political reality of continuing reductions in public money available for environmental regulation.

5. Looking Forward: Prospects for Legislative Reform

The sections above illustrate a legislative landscape that is rapidly evolving, highly fragmented, difficult to access, and riddled with complex legal questions. This is particularly because environmental legislation is supplemented and informed in important respects by policy and administrative practice. This picture is the result of EU developments, legislative history, UK environmental ambition,[157] politics,[158] and the growing pace of devolution in recent years.[159] With the prospect of more legislative change on the horizon,[160] this final section reflects on a number of routes for legislative reform that, in combination, could start to address the problems highlighted so far in this article. In making these suggestions, we note that the sheer extent of environmental law, and the limitations on parliamentary time, means that a wholesale recasting of environmental legislation in each UK jurisdiction is unlikely.

Accordingly, the section sets out three potential routes for reform: pursuing further legislative integration where appropriate; connecting legislative objectives strategically through principles; and rationalising environmental policy and guidance. In setting out these ideas, we aim to provoke discussion on the goals and possibilities of legislative change rather than to provide a comprehensive blueprint for reform. Beyond these three suggestions, there are also important institutional questions to consider relating to the creation and scrutiny of secondary environmental legislation and policy, which we do not consider in detail. On this point, various ideas could be pursued to deal with the kinds of constitutional law problems highlighted in Sections 2 and 3—from empowering an overarching legislative design committee to scrutinise environmental legislation more closely,[161] to reappraising the public law framework that ought to apply to environmental legislation and policy, as suggested

157 UK environmental legislation sometimes goes further than EU requirements eg Part 1(b) and Part 2 installations under EPRs; Climate Change Act 2008; Part IIA EPA (cf Environmental Damage (Prevention and Remediation) Regulations 2009 SI 2009/153).

158 eg endless planning system changes, recently through the Localism Act 2011 and NPPF (n 46).

159 Some measures remain UK-wide, where this is fundamental to their operation (eg ETS Regulations (n 60); producer responsibility regulations (n 77)), but others are now highly fragmented (eg EIA Regulations (n 51)).

160 (n 4) and (n 6).

161 As with New Zealand's Legislative Design Committee: <http://www2.justice.govt.nz/lac/who/index.html> accessed 27 August 2013.

above.[162] Furthermore, as Section 4 highlighted, any legislative reform will require complementary administrative norms to support its implementation in practice.

5.1 *Pursuing Further Legislative Integration*

In suggesting further legislative integration, we are not seeking to establish a perfectly integrated picture of UK environmental legislation. As Section 2 highlighted, fragmentation can be a justifiable policy choice that facilitates administrative flexibility and efficiency, and the devolved picture of UK environmental legislation is now inherently fragmented. However, as Section 2.2 argued, there are legislative disconnections in environmental legislation that are not justified. In light of this, we suggest a first step in minimising unjustified fragmentation of environmental legislation is to take inspiration from the EPRs, and to pursue further administrative, as well as substantive, integration where appropriate. Such integrating efforts could be pursued in at least three ways.

First, all environmental consent requirements could be brought within the EPR regime itself. This is whether they derive from EU law (for instance abstraction controls under the Water Framework Directive)[163] or not,[164] and irrespective of the relevant regulator involved.[165] This would remove unnecessary administrative duplication, increasing the efficiencies already delivered by the Regulations. By the same token, we suggest that regimes that extend beyond England (and for the time being Wales),[166] or which are inherently linked to other mechanisms (such as permit allocation and trading),[167] should not be brought within the EPRs, in order to maintain the administrative simplicity of the relevant regime. Along these lines, Defra currently has plans to extend the permitting framework to water abstractions and impoundment licensing, fish pass approvals and flood risk consents.[168]

Second, and taking the model of the EPRs further, we suggest that the example of the EPR could be replicated by bringing together *analogous*

162 Text accompanying (nn 103–104, 130–33).

163 WFD (n 67) art 11(3)(e) (currently regulated by a free-standing licensing regime in the WRA (n 11)).

164 eg flood defence consents (WRA (n 11) s 109); fish pass approvals (Salmon and Freshwater Fisheries Act 1975, ss 9 and 11; Eels (England and Wales) Regulations 2009 SI 2009/3344, reg 14).

165 The EPRs already include regimes administered by local authorities and the EA: reg 32. Furthermore, different government Departments have introduced regulations under the EPRs eg regulation of radioactive substances (sch 23, introduced by Department of Energy and Climate Change); cf most of the EPRs (introduced by Defra).

166 Current Welsh Government reforms (n 6) signal a greater divergence between English and Welsh environmental legislation, including the likely ultimate restriction of the EPRs to England.

167 eg ETS Regulations (n 60).

168 Defra, *Red Tape Challenge - Environment Theme Implementation Plan* (September 2012) 13.

administrative and enforcement mechanisms that currently exist across diverse pieces of environmental legislation, building on the administrative integration achievement of the EPRs.[169] As indicated in Section 2.2, there currently exist divergent mechanisms relating to appeals, inspection powers, and sanctions across various environmental regimes. In relation to appeals, Macrory's 2011 review of environmental merits appeal mechanisms has already concluded that most appeals from environmental decisions made by government or regulatory agencies should be synchronised and referred to the First-Tier Tribunal.[170] Similarly, in relation to inspection powers, currently divergent powers of entry[171] might be brought within one set of Environmental Inspection Regulations, bringing greater clarity for users of environmental legislation and administrative efficiency. This would also provide an opportunity for consistent consideration of when entry powers are justified and what procedural safeguards ought to be included for land occupiers.

A more ambitious suggestion for administrative integration would be to create a set of Environmental Sanctions Regulations. Currently, despite the Regulatory Enforcement and Sanctions Act 2008, there is considerable unjustified legislative divergence in the powers and sanctions for enforcing environmental regimes. For example, there are divergent remediation powers under the EPA and EPRs, which rely on similar but differently worded standards to activate preventive remediation powers, and have varying notice and costs provisions.[172] Furthermore, analogous but varying offences have been created for individual environmental regimes, such as ancillary offences of providing misleading information;[173] and there is unjustifiable divergence across civil sanctions provisions for environmental offences, including adopting varying standards of proof for equivalent sanctions.[174] In light of such legislative inconsistency, and where differences are driven not by any underlying policy imperative,[175] but by the accident of being produced at different times by different drafters and policy officials, we argue that there is a case for administrative integration. This is particularly because efforts to integrate environmental legislation in other respects, whether along the lines of the EPRs or by interconnecting related substantive obligations, are undermined if related provisions for the enforcement of environmental requirements diverge unjustifiably.

169 Text accompanying (nn 55–58).
170 Macrory (n 58). This does not include decisions relating to land-use planning.
171 Environment Act 1995, s 108; cf eg Habitats Regulations (n 52) pt 7; Packaging Waste Regulations (n 77) reg 35.
172 EPRs, reg 57; cf EPA, ss 78N-P. See also EPA, s 59; WRA, s 161A.
173 eg EPRs, reg 38(4); cf Waste Batteries and Accumulators Regulations 2009 SI 2009/890, reg 89(1)(b).
174 eg RESA (n 11) s 42 notices (beyond reasonable doubt that offence committed); cf EPR notices, such as those in regs 36, 57 (balance of probabilities).
175 eg some detailed costs provisions in s 78P EPA relate to the contaminated land regime's liability structure.

Third, there may be a case for integrating *analogous substantive mechanisms* across environmental regimes. Further substantive integration can be justified in cases where the purposes or implementation of regimes are undermined by poorly coordinated substantive provisions. One contender for such reform is the group of disparate provisions relating to producer obligations for packaging waste, vehicles, batteries and electrical and electronic waste, which all derive from EU legislation.[176] These could be brought into a common regime, in an effort to remove unnecessary duplication and minimise the implementation challenges of these novel regimes.[177] However, as Section 2.2 pointed out, any exercise in substantive integration needs to be sensitive to requirements of relevant institutional expertise and administrative flexibility.

After any exercise of integrating and simplifying analogous legislative mechanisms, remaining areas of legislation would need to be consolidated or restructured to avoid being 'hollowed out' (in the sense explained above).[178] One way to do this is to reorganise environmental legislation along EU environmental law lines. Considering that EU environmental protection directives now drive much UK environmental law, there is a case for combining legislation in EU-driven areas such as waste, water and air pollution regulation, in relation to which transposing measures and related controls are currently scattered across multiple pieces of UK legislation.[179] This simpler framework could particularly assist legal practitioners (and academics and students) in cross-checking the current disparate domestic structure against the EU requirements, particularly to consider arguments based on the supremacy of EU law.

5.2 Connecting Legislative Objectives through Principles

To extend the suggestion of further substantive legislation integration in the previous sub-section, another route for reform is to move beyond connecting and restructuring provisions of overlapping areas of regulation, to connecting *legislative objectives* more strategically. In this vein, some argue that incorporating 'environmental principles' (such as the preventive principle, polluter pays principle and precautionary principle) into legislation, as overarching objectives or purposes, might serve to unite environmental law as a discipline.[180] This is a

176 (n 77).

177 eg *R (Repic) v SS for Business Enterprise and Regulatory Reform and ors* [2009] EWHC 2015 (Admin).

178 Text accompanying (nn 20–22).

179 eg the Waste Framework Directive (n 113) is implemented in English law through various legislative measures, including: the EPA; EPRs, sch 9; Waste (England and Wales) Regulations 2011; Hazardous Waste (England and Wales) Regulations 2005 SI 2005/894.

180 eg Nicolas de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (OUP 2002) 264–68; Piet Gilhuis, 'The Consequences of Introducing Environmental Law Principles in National Law' in Maurice Sheridan and Luc Lavrysen (eds), *Environmental Law Principles in Practice* (Bruylant 2002) 50–51.

simplistic hope as a discrete reform, considering the inherent fragmentation of environmental law outlined above.[181] Furthermore, the legal effects of inserting environmental principles into legislation would be unpredictable,[182] considering the nuances of UK legal and administrative culture which would shape their application and interpretation.[183]

Nevertheless, the statutory incorporation of environmental principles as overarching statutory objectives could inform and regularise processes of decision-making, by indicating where the overall balance of priorities lies in relation to polycentric environmental problems. This is a pragmatic more than doctrinal suggestion (at this stage),[184] concerned with influencing the everyday practice of environmental lawyers and regulators. For instance, in areas of scientific uncertainty, the precautionary principle suggests a way of approaching evidence-gathering and decision-making, in which regulators, applicants and affected third parties can participate.[185] As Section 4 shows, the everyday institutional practice of environmental administrators is central to the implementation of environmental legislation, particularly in promoting the predictability of decision-making.[186]

5.3 Reforming Environmental Policy and Guidance

There is already reform afoot that will reorganise UK environmental policy documents quite fundamentally, providing an opportunity to address some of the issues raised in Section 3. This change will follow the migration of all government websites to a single platform,[187] on which all policy and guidance documents relating to environmental regulation are now brought together, whether issued by government or arm's length bodies like regulators. Guidance documents are in the process of being rationalised and reorganised into sectors and tiers of specificity (from high-level summaries for the general

181 Text accompanying (nn 25–27). See Eloise Scotford, *Environmental Principles and the Evolution of Environmental Law* (Hart 2014, forthcoming).

182 Final Report (n 23) 17.

183 Fisher (n 134); Scotford (n 181).

184 Consider the limited legal bite of sustainable development objectives entrenched in environmental legislation (n 86): Fisher, Lange and Scotford (n 25) 436–39. However, the statutory inclusion of environmental principles could well have doctrinal effects: Interim Report (n 5) 133–43.

185 Whilst any application of the precautionary principle reflects the legal culture in which it is applied (n 183), UK administrators dealing with EU obligations recognised to implement the principle must act in light of relevant EU jurisprudence: eg *Secretary of State for Environment, Food and Rural Affairs v Downs* [2009] Env LR 19.

186 Baldwin (n 104) 25; cf David Robinson, 'Regulatory Evolution in Pollution Control' in Tim Jewell and Jenny Steele (eds), *Law in Environmental Decision-Making* (Clarendon Press 1998) 53–54.

187 <www.gov.uk>.

public to technical information for industry compliance officers and experts).[188] This ambitious exercise has the potential over time to provide a structural answer to the questions of who issues guidance and when, and to make environmental policy documents more accessible. However, if not done carefully, it might obscure the source and thus the status of guidance.[189]

Beyond this, a wider reform exercise might reassess when guidance is required by legislation, including on what conditions and to what end, and how it is scrutinised and developed. This would not only determine any confusing overlaps or unjustified fragmentation in existing policy documents as a result of their statutory construction, but also address the accountability of those who issue guidance.

6. Conclusion

This article aimed to give a representative view of the environmental legislative landscape from different scholarly, professional and institutional perspectives, and by taking into account all the materials that combine to constitute it. All these perspectives and materials inform and demonstrate the state of UK environmental legislation, and are required in thinking about directions for reform. Overall, UK environmental legislation is a complex and ever-evolving legal landscape that reflects and requires balance in various respects: between the efficient brigading or integration of similar controls and decision-making processes, and incorporating flexibility and the expertise of discrete institutional bodies; between domestic legal control and administrative culture, and EU legal supremacy; between rigorous Parliamentary oversight and more nuanced public law notions of accountability; between the role of the UK Government and that of devolved administrations; and between legislation itself and the policy and administrative practices that inform it. For at least these reasons, legal analysis of UK environmental legislation is challenging, but it also provides scope for innovative legal thought and reform.

188 (n 4).

189 Liz Fisher, 'Gov.Uk?' <http://ukconstitutionallaw.org/2013/05/09/liz-fisher-gov-uk/> accessed 27 August 2013.