



Hannes Veinla

*Docent of Environmental Law
University of Tartu*

Basic Structures of the Draft General Part of the Environmental Code Act

1. Introduction

Contemporary environmental law has a relatively short history.^{*1} The development of this branch of law can be characterised by randomness and lack of a systematic approach. At times, fast reaction has been sought to problems under particular public attention (e.g., environmental disasters)^{*2}, while at other times the development has constituted following the periodically changing ‘fashion trends’ of environmental law. Of the latter, energy and climate policy has lately been especially dominant. M. Kloepper has noted relevant examples from German environmental law. The large-scale accident in the Sandoz chemical plant served as impetus for the development of the German Environmental Liability Act, and even the creation of the German Ministry of the Environment was a reaction to the nuclear disaster of Chernobyl.^{*3}

The incoherent development of environmental law has brought about a need for thorough reform of the current environmental law. Codification of environmental law constitutes a common characteristic of this renovation process. Attempts, with varying levels of success, to codify environmental law have been made in several countries—Sweden, the Flemish and Wallonian regions of Belgium, Germany, the Netherlands, Denmark, and France.^{*4} The list could be continued with, for example, Poland, Hungary, Slovenia, and a number of other countries where environmental law reforms have taken place in different forms and with different objectives. As of 2007, codification of environmental law has also been in progress in Estonia.^{*5} The author of this article has been the leader of the working group for the codification of environmental law since then.

¹ At the same time, certain elements of environmental regulation can be found already in the more distant history. E.g., H. D. Jarass refers to the 1845 Prussian Economic Administration Act, which also contained provisions aiming to protect human health from the negative environmental impact (especially air pollution) issuing from dangerous industrial plants. See H. D. Jarass. *Saksa immissioonikaitseõiguse põhistruktuurid* (Basic Structures of German Immission Protection Law). – *Juridica* 2007/7, p. 465 (in Estonian).

² The press has had a very significant role in bringing out such problems.

³ See M. Kloepper. *Saksamaa tulevase keskkonnaseadustiku mõte ja sisu* (The Idea and Content of the Future German Environmental Code). – *Juridica* 2007/7, p. 503 (in Estonian).

⁴ See *The Codification of Environmental Law. Proceeding of the International Conference in Ghent, 21 and 22 February 1995*. Kluwer Law International 1996.

⁵ See *Keskkonnaõiguse kodifitseerimine* (Codification of Environmental Law). Available at <https://ajaveeb.just.ee/keskkonnaoigus/kodifitseerimisest/> (14.06.2010) (in Estonian).

Nowhere has the codification process progressed without difficulties. In 2007, Kloepfer, a leading figure in the arena of codification of German environmental law, wrote the following: “According to the future plans of politicians as well as the coalition agreement between the Conservatives and the Socialist Democrats, at least the regulation of the General Part of the Environmental Code, if not more, will be adopted during this election cycle. It was about time; I’d like to cry!”⁶ Among other elements, Kloepfer also stressed that preparations for the codification of German environmental law had continued for over 30 years.⁷ Unfortunately, his optimism proved futile. The previous coalition failed to adopt the Environmental Code, and the new coalition (Christian Democrats and Free Democrats) are pessimistic with regard to codification. At best, the General Part of the Environmental Code will be adopted in Germany in the near future, with the specific laws amended proceeding from that.⁸ Even in Estonia, the codification of environmental law is progressing with problems. Within the codification process, numerous innovative ideas have been proposed, which will surely provoke debate. The first stage of the codification process constituted the preparation of the Draft General Part of the Environmental Code Act (the General Part of the Environmental Code), which is in its final stage at present. The purpose of this article is to analyse a selection of the more significant main structures of the Draft General Part of the Environmental Code. The selection of the questions to be discussed stemmed from the topics that the author of the article addressed in more detail during the preparation of the draft and the explanatory note.⁹ At the same time, it must be stressed that the draft was, naturally, prepared as a joint effort of all members of the working group.¹⁰ The first part of the article discusses the reasons for the codification of environmental law, the main objectives of codification, and briefly also the organisation of codification.

2. Reasons for the codification of environmental law

The reasons for the codification of environmental law are relatively similar across various legal orders. Kloepfer has outlined the following factors, which served as impetus for the codification of environmental law in Germany.

- External over-regulation: Legislation containing environmental regulation is too abundant. Also, there is an excess of procedures that are partially redundant and excessively increase administrative burden.
- Internal over-regulation: Legal regulation is too particular and detailed, and at times it is excessively burdening for entrepreneurs and other users of the environment.
- There is no systematic and harmonious concept of environmental law: The legislation has thus far been fragmentary and random.¹¹

The above-mentioned problems are also characteristic of Estonian environmental law. We, too, have too many pieces of environmental legislation. The large amount of legislation is mostly due to Estonian environmental law being dominated by an area-based approach to environmental protection. Water protection, ambient air protection, and other areas of environmental protection are regulated separately from each other. Nature, however, is not so divided and requires integrated measures of protection. The relationships among the various elements of the environment must not be ignored also upon the legal regulation thereof. The most remarkable example here is the existing system of environmental permits, which is almost completely area-based.¹² There are many types of permits—the permit for the special use of water, the ambient air pollution permit, waste permits, radiation practice licences, authorisation for the release of genetically modified organisms into the environment, the extraction permit, etc. A person who simultaneously affects the environment in various ways (uses water, pollutes the air, produces waste, etc.) must at the same time have multiple permits, with all of them having been applied for and issued in different procedures. The requirements of these permit

⁶ See M. Kloepfer (Note 3), p. 502.

⁷ *Ibid.*

⁸ See G. Winter, B. Wegener. Recent Development in Germany. Avosetta meeting 02/03 October 2009 (Stockholm University) “Enforcement of EC Environmental Law: IPPC, EIA, Natura 2000, ET Allowances, and Water and Air Plans”. Available at <http://www.avosetta.org> (2.04.2010).

⁹ The draft contains an abundance of questions that deserve closer attention, especially the basic environmental obligations, environmental rights, and the integrated environmental permit procedure, which do not fit in the framework of this article.

¹⁰ In addition to the author of this article, the working group also comprised E. Saunanen, K. Relve, M. Triipan, K. Vaarmari, M. Viisimaa, A. Männik and O. Kask.

¹¹ See M. Kloepfer (Note 3), pp. 503, 508.

¹² The only exceptions are integrated permits, which are issued pursuant to the Integrated Pollution Prevention and Control Act (*Saastuse kompleksse vältimise ja kontrollimise seadus*). – RT I 2001, 85, 512; 2009, 39, 262 (in Estonian).

procedures are often also differently regulated. Such an area-based system creates a need for a very large amount of legislation, causing external over-regulation. The problems are compounded by variations between regulations of different types.

Internal over-regulation is also inherent to Estonian environmental law. There are too many specific and very detailed regulations. There is a clear lack of provisions with a greater level of abstraction. Particular regulation entails an incessant need for amendment of the acts adopted, because in the case of overly detailed regulation it is impossible to foresee all of the details in the original redaction of the act. For example, the Water Act^{*13} has been amended 31 times, twice this year already. The Nature Conservation Act^{*14}, adopted only in 2004, has already been amended 16 times.

Estonian environmental law also contains regulations that are clearly unjustified and excessively burdensome. An apt example would be the obligation to hold an ambient air pollution permit. The existence of an ambient air pollution permit is often required also for activities that probably do not have the least impact in reality on the state of the environment. The threshold quantities have been laid down by the Regulation of the Minister of the Environment of 2 August 2004.^{*15} The concept of the Special Part of the Environmental Code cites as an example a boiler plant with a capacity of 0.3 MW—this is the threshold at which the possession of an ambient air pollution permit becomes required. Boiler plants with such capacity do not have a significant impact on the quality of the ambient air, and, for the purpose of collection of statistical data, such plants could be burdened only with a reporting obligation. Another example is fuel filling stations with a throughput (loaded) of 2,000 m³, which in their essence also do not constitute significant affecters of the quality of ambient air. According to this logic, an ambient air pollution permit would also be requisite for a medium-sized private residence that uses logs for heating, a household with two dairy cows, or a house-owner who is covering a larger surface with solvent-based paint, as the pollutant emission thresholds applied are unreasonably low.^{*16} Environmental regulation must be justified and proportional, in order not to burden the users of the environment excessively and unreasonably.

Estonian environmental law also lacks a systematic and harmonious concept binding it together. Estonian environmental law consists of a large number of acts and other pieces of legislation of general application adopted at different times and often also proceeding from different underlying principles. Our environmental law has lacked a scientific foundation and thus also predictability and transparency in its regulation. Examples are abundant. Ranking first, however, would be the terminological chaos. Let us look at the term ‘hazard’. The concept is used in very different environmental legislation, but it is difficult to understand what precisely is meant by ‘hazard’. Is a hazard a situation in which it is likely enough that negative environmental impact might ensue, or does a hazard also involve the possibility of the occurrence of negative environmental impact? It is thus unclear what the likelihood of the occurrence of negative consequence must be in order to qualify a situation as a hazard. Neither is it clear what legal reaction must follow the situation of a hazard. Should hazards be averted (e.g., through prohibition or suspension of an activity), or should hazards be endured to a certain extent? An example can be found in the Deliberate Release into the Environment of Genetically Modified Organisms Act^{*17} (hereinafter, ‘the GMO Act’). Section 1 of the act establishes the objective of this piece of law: to protect humans and the environment against the potential negative effect of the release into the environment of genetically modified organisms—indeed, ‘potential’, and not merely the consequences that are completely obvious. The act (as should the relevant EU directive) should thus be supported on the precautionary principle, and take into consideration also the environmental impact concealed by scientific uncertainty. Contemporary scientific research cannot yet definitively answer the question of whether GMOs entail potential negative effect or not. Researchers have long argued about it and will probably continue to do so. Section 12 of the GMO Act regulates the granting of a GMO authorisation, and § 12 (4) 1) lays down that the Minister of the Environment shall not grant authorisation if ‘the genetically modified organisms pose a risk to human health or the environment’. It is unclear what exactly is meant by ‘risk’ in this case and whether, if studies show that a GMO can entail negative effect, authorisation should be granted or not, as well as whether ‘risk’ also includes potential, not only sufficiently proven, negative effect. Similar terminological misunderstandings and lack of a coherent system are still abundant in our environmental law.

All of the above-mentioned means that the environmental law applied in Estonia has turned out to be relatively implementer-unfriendly, unclear, and inconsistent.

¹³ Veeseadus. – RT I 1994, 40, 655; 2010, 8, 37 (in Estonian).

¹⁴ Looduskaitseadus. – RT I 2004, 38, 258; 2010, 29, 151 (in Estonian).

¹⁵ Keskkonnaministri 2. augusti 2004. a määrus nr 101 “Saasteainete heitkogused ja kasutatavate seadmete võimsused, millest alates on nõutav välisõhu saasteluba ja erisaasteluba” (Minister of the Environment 2 August 2004 Decree No. 101 ‘Emissions of Pollutants and Capacities of the Equipment for which Pollution Permits and Special Pollution Permits are Required’). – RTL 2004, 108, 1726 (in Estonian).

¹⁶ See Keskkonnaseadustiku eriosa kontseptsioon (Concept of the Special Part of the Environmental Code), p. 150. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=50045/KSES_010210.pdf (14.06.2010) (in Estonian).

¹⁷ Geneetilisel muundatud organismide keskkonda viimise seadus. – RT I 2004, 30, 209; 2009, 34, 224 (in Estonian).

3. The main objectives of the codification of environmental law

The objectives of the codification of environmental law in Estonia are ambitious. In addition to the systematisation of the existing law, the goal includes the proposal of significant amendments and additions. The main objectives of the codification may be outlined in summary as follows.

The objective is the approximation of the hitherto fragmentary environmental regulation. The existing environmental law contains numerous discrepancies, especially with regard to the terminological corpus. Neither has the existing law been developed in a manner proceeding from definite conceptual foundations. The purpose of codification is to eliminate these discrepancies. Accordingly, gaining an overview of environmental law will become easier for the implementers and addressees thereof. Harmonisation of the regulation therefore entails greater legal clarity and transparency of the regulation.

Objectives of the codification of environmental law also include decreasing external and internal over-regulation. The existing environmental law lays down several clumsy and parallel procedures (especially with regard to environmental permits and environmental impact assessment); therefore, unifying and co-ordinating the procedures should render it possible to decrease the administrative burden significantly. This will simplify and cheapen the implementation of existing law, both for the users of the environment (e.g., applicants for an environmental permit) and for administrative bodies.

Objectives of the codification of environmental law also include filling the gaps. Our law still lacks several of the structures necessary in contemporary environmental law—i.e., regulations concerning environmental rights, the principles and main obligations of environmental protection, a integrated permit procedure, and the basic obligations of operators. Codification should place our environmental law on a systematised and harmonious scientific foundation.

The Draft General Part of the Environmental Code Act¹⁸, as developed in Estonia so far, lays down the principal concepts of environmental law, the principles of environmental protection, the obligations of everyone, obligations of operators, environmental rights, and a new and integrated environmental permit procedure. These parts of the draft form the General Part of the Environmental Code in a narrower sense, thus far absent in our law.

The success of such an ambitious project—codification of an area of law—largely depends on the organising foundations thereof. The codification of environmental law started with the preparation of the General Part of the Environmental Code. The process was divided into two stages. First, the concept of the General Part was developed. The concept comprised a critical analysis of existing legal regulation, comparison with the regulations of other countries¹⁹, and an analysis of the effect of EU law. On the basis of this work, regulation proposals were drafted, with the future draft in mind. The approval of the concept was followed by the preparation of the draft and its explanatory note. As of the time of preparation of this article, the General Part of the Environmental Code and the explanatory note thereto have been prepared and have also passed the first round for approval among ministries. Within the latter, most viewpoints expressed in the draft received fundamental approval. Preparation of the General Part of the Environmental Code will be followed by the preparation of the Special Part, which will be under way presently.

The General Part and Special Part of the Environmental Code must form a uniform whole. It has therefore been planned that upon adoption of the General Part of the Environmental Code by the *Riigikogu*, it will nevertheless become effective only alongside the Special Part, not before. Earlier entry into force of the General Part of the Environmental Code is simply impossible, as this matching the existing law is not feasible. The General Part contains too many innovative elements. The General Part and the Special Part are interconnected by many associations, some of which are obvious and others more concealed. The development of the General Part and of the Special Part are not processes that strictly follow each other, as the case usually is upon codification of a certain area of law, but to a certain extent these processes act in parallel. The task of the Special Part will be the further development and specification of the regulation of the General Part—e.g., regarding the content of basic environmental right, the characteristics of a significant environmental nuisance, the differences of permit proceedings in different areas of environmental protection, and specification of the general duty of care and the obligations of the operator. It is absolutely clear that the completion of the Special Part will entail certain corrections and additions to the regulation in the General Part. The larger the amount of legal structure uniting the various areas of environmental protection, discovered upon the preparation of the Special Part, and the more they can be harmonised, the more valuable the result of the codification.

¹⁸ Keskkonnaseadustiku üldosa seaduse eelnõu. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=44240/kys_eelnou.pdf (14.06.2010).

¹⁹ Preparation of the concept included analysis of the environmental laws of several countries, especially those where codification has been implemented already in the last decade: the Swedish Environmental Code (1999), the German Environmental Code (2007); the Finnish Environmental Code (2000); the French Environmental Code (2002); the Hungarian Environmental Code (1995).

4. Basic structures of the Draft General Part of the Environmental Code

4.1. Determination of the objective of the Environmental Code and the scope of application in the draft^{*20}

A central problem in the development of the Environmental Code is the establishment of that code's objectives. Contemporary environmental policy has a dual objective, balancing between two approaches—the anthropocentric and the eco-centred. Environmental values are usually distributed into three sorts: direct instrumental value or usage value, indirect value, and value for their own sake or inherent value.^{*21} The direct instrumental value of the environment is usually related to the material benefit that a person obtains from nature by interference therein or by consumption thereof. This also includes the release into the environment of pollutants, as the environment is used as means for assimilating pollutants. The indirect value of the environment refers to the environment being considered valuable for humans without direct interference therewith or usage thereof. The recognition of the inherent value of the environment proceeds from the principle that the environment is a value in itself, notwithstanding its material-instrumental or nonmaterial usefulness for humans.

Preparation of the draft also included analysis of how the objective of environmental law has been established in the laws of other countries. The conclusion was that the human is at the core of most environmental legislation, in one way or another. The anthropocentricity of the Environmental Code has been especially emphasised in German law.^{*22} Such an approach was also taken as the basis for the Estonian Draft General Part of the Environmental Code. The Estonian Environmental Code will predominantly be anthropocentric.

The expression of the objectives of environmental protection in the draft has proceeded from the fact that environmental protection largely coincides with the protection of fundamental human rights. Many of these fundamental rights are dependent upon the state of the environment—for example, the quality of air and water. This approach influences the entirety of contemporary environmental law, in almost all of its institutes.^{*23} The European Convention for the Protection of Human Rights and Fundamental Freedoms^{*24} includes several human rights that can be associated with the quality of the environment. These are, in particular, the right to respect for private and family life (Art. 8), the right to peaceful enjoyment of one's possessions (Art. 1 of Protocol 1), and the right to life (Art. 2).^{*25} In addition, associations between environmental protection and human rights can also be found in Article 10, which establishes the right to receive and impart information.^{*26} Since the *López Ostra* case^{*27}, it has been especially the respect for personal and private life that the filers of complaints and the European Court of Human Rights associate with the pollution of the environment. In the *López Ostra* case, the Court ruled that “severe environmental pollution may affect individuals' well-being and prevent them from using (enjoying) their homes, in such a way as to affect their private and family life adversely”^{*28}.

Contemporary environmental law also stresses the need to incorporate civil society into environmental protection, to give the persons concerned (also including environmental organisations) legally guaranteed rights—to receive public environmental information, participate in the legal decision proceedings regarding the environment, and have an opportunity to protect their violated rights through law enforcement authorities. This approach, based on human rights, is prevalent today, and it has also been adopted in EU law. This area is, however, most directly addressed in the 1998 Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.^{*29}

²⁰ See Keskkonnaseadustiku üldosa seaduse seletuskiri (Explanatory Memorandum to the General Part of the Environmental Code Act). Available at http://www.just.ee/orb.aw/class=file/action=preview/id=44241/kys_seletuskiri.pdf (14.06.2010) (in Estonian).

²¹ K. Relve. Kas loodusel võib olla iseväärtus (Can Nature have Self Value). – Keskkonnaetikast säästva ühiskonna eetikani (From Environmental Ethics to Ethics of the society). A. Oja (ed.). Tallinn: Säästva Eesti Instituut (Institute for Sustainable Estonia; SEI Tallinn) 2003, pp. 30–37 (in Estonian).

²² See German Environmental Law for Practitioners. C.H. Beck & Kluwer Law International 1996, p. 56.

²³ See R. Desgagne. Integrating Environmental Values into the European Convention on Human rights. – American Journal of International Law 1995 (89) 2, p. 267; J. Lee. The Underlying Legal Theory to Support a Well-defined Human Right to a Healthy Environment as a Principle of Customary International Law. – Columbia Journal of Environmental Law 2000 (25), pp. 283–340.

²⁴ RT II 1996, 11/12, 34.

²⁵ More or less the same associations also appear in the International Covenant on Civil and Political Rights (RT II 1993, 10/11, 11), and regional human rights instruments.

²⁶ See P. Sands. Human Rights, Environment and the López-Ostra case: Context and Consequences. – European Human Rights Law Review 1996/6, pp. 597–618.

²⁷ *López Ostra v. Spain* (1995). – 20 E.H.R.R. 277.

²⁸ *Ibid.*, paragraph 51.

²⁹ Available at <http://www.unece.org/env/pp/EU%20texts/conventioninestonian.pdf> (1.04.2010).

The anthropocentricity of the Environmental Code is, among other factors, also due to very practical considerations. Anthropocentric values are *prima facie* always accorded great legal weight, unlike the intrinsic value of nature, which is not obvious. On the contrary, protection of the intrinsic value of nature often directly violates the interests of humans, especially land-owners. Justification concerning the necessity of protecting nature *per se* is thus always problematic and often not easily assimilated into the generally recognised anthropocentric legal framework. In the end, it may be said that the association of environmental protection with the well-being of people gives it significantly greater ‘breakthrough power’ and legal weight.

The above notwithstanding, the Environmental Code nevertheless protects the environment also outside the anthropocentric dimension. Such an approach is particularly prevalent in so-called classical environmental protection—i.e., conservation of habitats and species (biological diversity) wherein the protection status is really based on the intrinsic value of the environment. This echoes the viewpoint dominant in contemporary environmental policy that it is necessary not to protect only those species and habitats already endangered but to preserve the diversity of living organisms from all sources, including, *inter alia*, terrestrial, marine, and other aquatic ecosystems, and the ecological complexes of which they are part. This objective has also been established in the Convention on Biological Diversity.³⁰

As another objective the draft establishes sustainable use of natural resources. This objective directly proceeds from §§ 5 and 53 of the Constitution of the Republic of Estonia. The ensuring of sustainable development is important because without achieving such development, we not only jeopardise our own well-being but also condemn our children and grandchildren to an even more hopeless future. If this is not about the preservation of humankind, then at least it is about worthy living conditions for future generations. The achieving of sustainable development presumes very significant changes in the way we think and consume, how and what we produce, and how we manage our economy.

Damage caused to the environment must be compensated for, which is also among the objectives of the code. Compensation for damage is actually a secondary objective, as causing damage should primarily be avoided altogether. These objectives, too, proceed from the general environment-related duty of care, established in § 53 of the Constitution.

In sum, it may be said that the Draft General Part of the Environmental Code attempts to proceed from a combined approach, and besides an anthropocentric environmental protection also to remember the ensuring of the implementation of an environmental policy that is not directly linked to human health and well-being.

4.2. The core of the body of terminology of the draft

In Estonia’s existing environmental law, the usage of terms is inconsistent and irregular. This article does not discuss all questions related to the body of terminology used in environmental law, being confined to the analysis of two basic concepts: hazard and risk.

At the moment, unfavourable environmental impact is referred to with terms such as ‘environmental impact’, ‘negative environmental impact’, ‘significant environmental impact’, ‘environmental damage’, ‘pollution of the environment’, etc., with these terms often carrying the most different content. In the existing law, it is impossible to grasp the relationships among these concepts. In the design of the terminological corpus for environmental law, the example to be followed should instead be that of law enforcement, proceeding from the understanding that human activity affects the quality of the environment with varying intensity. There are situations wherein this impact is obvious and connected to such negative consequences that they should be avoided at all costs. There are, however, also circumstances in which the nature of the unfavourable environmental impact is unclear: there may be negative consequences, but these also might not occur—the impact is here concealed by scientific uncertainty. Such environmental impact with different intensity must also bring about a different legal reaction—more resolute or more flexible, respectively. In the Draft General Part of the Environmental Code Act, the core of the body of terminology for the Environmental Code is determined in a manner proceeding from the above-mentioned platform.

Estonian law needed a term to cover any kind of negative environmental impact in the most general sense. In the draft, this term is ‘environmental nuisance’. The notion of environmental nuisance is developing into the broadest concept as regards the signification of unfavourable environmental impact. Although the concept refers to unfavourable (negative) environmental impact, it must still be stressed that not every environmental nuisance requires prevention or reduction. An environmental nuisance must often be endured if the reduction thereof is not feasible by reasonable means and if the impact of the nuisance on the environment and people is insignificant. The threshold for the prevention or reduction of an environmental nuisance usually is the causing of an environmental hazard or environmental risk. The part of the draft that discusses everybody’s obligations, however, establishes everyone’s general obligation to reduce the environmental nuisance he or she has caused, whenever reasonably possible. The main sources of the obligation of reduction of environmental

³⁰ RT II 1994, 13, 41.

nuisance also include the environmental protection permits, which lay down specific requirements concerning the admissibility of activity that affects the environment.^{*31}

The terms 'environmental hazard' and 'environmental risk' are used in Estonian law, but these, too, thus far lack a singularly understandable content. An objective set during the preparation of the draft was to define the concept of the environmental hazard and to differentiate it from the 'environmental risk' concept. Although distinguishing of the concepts of the environmental hazard and risk is particularly important in relation to applicability of the prevention principle and the precautionary principle, it has precurent importance in the context of the entire draft, and such differentiation should also be a starting point in the preparation of the Special Part of the code.

The definition of the 'hazard' concept has proceeded from the Draft Law Enforcement Act^{*32}, § 4 of which establishes a hazard as a situation wherein, on the basis of objective evaluation of the circumstances that have occurred and on the basis of social experience, it may be considered sufficiently likely that a breach of order is going to take place in the near future. Definitions are also provided for 'serious hazard'^{*33} (*inter alia*, the danger of the creation of large-scale environmental damage), 'significant hazard'^{*34} (including danger to the environment), 'immediate hazard'^{*35}, and 'suspicion of hazard'^{*36}.

For the purposes of the Draft General Part of the Environmental Code Act, an environmental hazard constitutes sufficient probability of the occurrence of a significant environmental nuisance. The concept of the environmental hazard thus has two components, which characterise the probability of the occurrence of a negative consequence and the significance thereof. With respect to hazards, scientific uncertainty regarding the occurrence of negative consequence is either absent or minimal. A negative consequence of a hazard constitutes not simply an environmental nuisance but a significant environmental nuisance, one that need not—and must not—be endured, as a rule. The occurrence of a significant environmental nuisance must, as a rule, be prevented. Environmental hazard is a basis for refraining from activity, for prohibition of an activity or product (or establishment of restrictions thereon), or for imposition of an activity in order to prevent such nuisance.

The Draft General Part of the Environmental Code Act fails to provide an exhaustive definition for a significant environmental nuisance. The characteristics of a significant environmental nuisance should be specified in the Special Part of the Environmental Code. The draft presupposes that the occurrence of a significant environmental nuisance should primarily be associated with a situation that involves the exceeding of environmental quality limit values or the causing of pollution, environmental damage, significant environmental impact, or unfavourable impact within the territory of the Natura 2000 framework.^{*37} This prerequisite is nevertheless not absolute. For example, insignificant or temporary exceeding of an environmental quality limit value may not be regarded as a significant environmental nuisance that should be avoided at all costs. Also, the obligation of prevention of significant environmental impact, and even of unfavourable impact on the Natura 2000 territory, is not always absolute; such impact, too, must in certain circumstances be endured.

Environmental risk differs from the concept of hazard mostly in the fact that, unlike environmental hazard, which is often obvious, environmental risk is concealed by scientific uncertainty. The probability of the occurrence of a negative consequence is not precisely known, but that consequence is still possible. This constitutes a typical situation arising in the case of several activities that affect the environment. Scientific and technological development have significantly increased mankind's possibilities of interfering with natural processes, and this, in turn, has increased the number of situations in which it is impossible to foretell the long-term consequences of such interference with any exactitude. The threshold for preventing environmental risk is lower than that for environmental hazard; accordingly, the measures for preventing environmental risk should be less burdensome. In the implementation of precautionary measures, the share of the proportionality principle is significantly greater than the share of the prevention of hazards.

In summary, in the case of environmental hazard the prevention principle is implemented, and in the case of environmental risk the precautionary principle is implemented. These principles are further addressed in the next part of the article.

³¹ See Explanatory Note to the General Part of the Environmental Code Act (Note 20), p. 11.

³² Korraikaitseaduse eelnõu seletuskiri (Explanatory Memorandum to the Draft Law Enforcement Act). Available at http://www.riigikogu.ee/?page=en_vaade&op=ems&eid=93502&u=20100405165619 (1.04.2010) (in Estonian).

³³ In Estonian: *oluline oht*, respectively.

³⁴ In Estonian: *kõrgendatud oht*, respectively.

³⁵ In Estonian: *vahetu oht*, respectively.

³⁶ In Estonian: *ohukahtlus*, respectively.

³⁷ Explanatory Note to the General Part of the Environmental Code Act (Note 20), p. 12.

4.3. The reflection of the more significant principles of environmental law in the draft

The addressees of the principles laid down in the draft are the legislator and the administrative bodies that implement the law, along with the courts. The legislator will consider the principles when issuing legislation, especially in the preparation of the Special Part of the Environmental Code. For the administrative bodies that implement legislation, and for the court, these principles serve as interpretation guidelines. Persons using the environment are not the direct addressees of the principles established for environmental law. The effect of the principles upon them is indirect. These principles reach environment-users by having been considered in the establishment and implementation of specific norms. For example, the precautionary principle served as a direct basis for the establishing of universal environmental obligations and operator's obligations (which are not discussed in this article).^{*38}

The draft establishes several principles for environmental law. Only some of them are discussed in this article.

The content of the **principle of high-level and comprehensive protection of the environment** is that the measures for protecting people and the environment must provide effective protection against environmental nuisance, and it is not allowed to automatically favour economic considerations over the necessity of protecting the environment and human health and well-being. Comprehensive environmental protection must also be ensured and must take into consideration the possibility of environmental impact carrying over from one element of the environment to another. An example for the realisation of this principle is the integrated environmental permit procedure, established in the draft. Pursuant to Article 3 (3) of the Treaty on European Union^{*39}, achieving a high level of environmental protection is among the main objectives of EU law. In the *Artegodan* case, the European Court of Justice has stressed that the implementation of the precautionary principle in the case of environmental risks concealed by uncertainty is among the main indicators of a high level of environmental protection.^{*40} A high level of protection accordingly also means that the protection of the environment proceeds from the precautionary principle and provides legal reaction also to environmental risks concealed by scientific uncertainty. The European Court of Justice believes that one of the more significant indicators of a high level of environmental protection is effective protection of the fundamental rights of persons who depend on the environment.

The **integration principle** also proceeds from EU law and has been laid down in Article 11 of the Treaty on the Functioning of the European Union, which specifies that 'environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, particularly with a view to promoting sustainable development'. This means that there is no area of life affecting the environment in which environmental requirements should not be taken into consideration. For all such areas, environmental protection becomes a 'personal matter', unlike before, when caring for the environment was considered the responsibility of only the organisations directly responsible for the environment. With the aid of the integration principle, environmental considerations are being introduced to almost all areas of human activity. This tendency has sometimes been called ecological modernisation, proceeding from the idea that economic and social development must not and need not be the reason for environmental harm. Economic and social development may under certain conditions instead entail an improvement of the quality of the environment. The integration principle requires that high-quality environmental protection be ensured through incorporation of environmental requirements into determination of the development of all areas of life, legal regulation, and the implementation thereof. As EU environmental law is implemented by the Member States, the effect of the principle is also transposed to Estonian national law. The mandatory nature of the integration principle has also been pointed out by the Tallinn Circuit Court in the so-called *Koidu Park* case.^{*41}

The most important innovative effect on Estonian environmental law, however, is the **sufficiently strict distinguishing of the prevention principle and the precautionary principle** in the draft. Distinguishing the prevention principle and the precautionary principle is important because the implementation of these principles proceeds from different considerations. The implementation of the prevention principle in the case of environmental hazard is more straightforward than the implementation of the precautionary principle. The latter must take place flexibly. Various viewpoints have been presented in the literature concerning the relationship between the precautionary principle and the avoidance principle. L. Krämer makes no distinction between them, believing them to be dove-tailing concepts.^{*42} E. Reh binder and N. Sadeleer, however, see clear differences in these principles and claim that such differentiation is especially characteristic of German law.

³⁸ *Ibid.*, p. 15.

³⁹ Available at http://www.ecb.int/ecb/legal/pdf/fxac08115enc_002.pdf.

⁴⁰ *Artegodan GmbH v. Council*, Case T-74/00, para. 183. Available at http://curia.europa.eu/jcms/jcms/j_6/ (19.06.2010).

⁴¹ Tallinn Circuit Court 18.04.2008, 3-06-1136. Available at <http://www.kohus.ee/kohtulahendid/index.aspx> (20.06.2010) (in Estonian).

⁴² See L. Krämer. *EC Environmental Law*. London: Sweet and Maxwell 2003, p. 23.

In German law, the prevention principle (*Prävention*) is applied in the case of a known hazard (*Gefahr*), while the precautionary principle (*Vorsorge*) is applied in the case of risk concealed by uncertainty (*Risiko*).⁴³ In addition, German law distinguishes between risks that must be endured (*Restrisiko*) and those against which measures are not justified. An example of the latter in our Draft General Part of the Environmental Code would be insignificant environmental nuisances that must be endured.

If the occurrence of a significant environmental nuisance is obvious or sufficiently probable, the realisation of such hazard must be averted (prevented). The prevention obligation is not absolute, however. In certain cases and to a certain extent, environmental hazards must be endured. The endurance obligation applies on three conditions. An environmental hazard must be endured if so required by a superior interest. Such an interest primarily is the public interest, but the consideration of private interests cannot be completely precluded either. Strict differentiation between private and public interests is generally problematic in the area of the environment. For example, for the production of energy or the managing of dangerous waste, the project may be implemented by a private person with the purpose of making a profit, yet it is without doubt that such an endeavour also serves very significant public interests. Such a project, implemented in the public interest, also has to lack alternatives. When one is considering alternatives, the principle of reasonability is nevertheless considered instead of all potentially possible alternatives being examined. Another condition of the endurance obligation is the taking of measures for the purpose of reducing the danger or significant environmental nuisance to the greatest extent possible.

For the reduction of environmental risks, the precautionary principle is implemented. In the selection of precautionary measures, the consideration of the principle of proportionality is of decisive importance. The purpose of application of the precautionary principle is reduction of environmental risks to as great an extent as possible while the measures are still reasonable. Environmental risks too must be endured, but the extent of said endurance obligation is greater than that in the case of hazards. Environmental risks must be endured if all appropriate (i.e., reasonable) precautionary measures have been taken to reduce them. Determination of what constitutes appropriate precautionary measures is a task involving great responsibility. Precautionary measures are abundant in contemporary environmental law. Precautionary measures include prohibitions and restrictions, measures for the general reduction of environmental impact, environmental quality limit values, volumetric restrictions on use of the environment, and the requirement to use the best possible technology or equipment. Precautionary measures can also have a procedural nature, as with environmental impact assessment, other environmental assessments, and measures for pre-market information and classification.

The differentiation of the prevention principle and the precautionary principle is among the conceptual foundations of environmental law, yet it is natural that in certain practical situations it is not always easy to draw a line between these two principles. The question of where scientific uncertainty ends and certainty begins is not a simple one. The answer is provided through consideration of the particulars of each specific case.

5. Conclusions

The establishment of the General Part of the Environmental Code as a first step creates a conceptual foundation for the entire Environmental Code. Setting of the objectives for the Environmental Code has therefore proceeded from a predominantly anthropocentric position and has interconnected fundamental human rights and environmental protection. At the same time, the conservation of habitats and species remaining outside the anthropocentric dimension has not been forgotten either.

The General Part of the Environmental Code Act defines the central concepts of the Environmental Code. In the existing Estonian environmental law, the usage of terminology is inconsistent and irregular. Clarity and better understanding of the legal order are enabled by the adoption of the following new concepts: environmental nuisance, significant environmental nuisance, environmental hazard, and environmental risk. The definition of concepts results in a shared, coherent understanding of the possible effects (of varying intensity) of human activity on the environment, and of the respectively differentiated legal reaction thereto.

The portion of the General Part of the Environmental Code addressing the basic principles contributes to uniform interpretation of the code and serves as a guide for the implementer, especially an administrative body, upon the entry into application of the code. A particularly innovative element in Estonian environmental law is the differentiation between the prevention principle and the precautionary principle, which requires a different legal reaction to an obvious environmental hazard and uncertain environmental risks.

⁴³ See E. Rehbinder. The Precautionary Principle in an Environmental Perspective. – *Miljørettens grundspørgsmål* 1994, pp. 91–105; N. de Sadeleer. *Environmental Principles. From Political Slogans to Legal Rules*. Oxford University Press 2002, p. 125; K. Pape, K. Schillhorn. *Environmental Law in the Federal Republic of Germany*. – *Environmental Law in Europe*. N. Koeman (ed.). Kluwer Law International 1999, p. 275.

The General Part of the Environmental Code has several other innovative elements, which deserve a more detailed, separate discussion. Among these are the regulation of environmental rights, which aims to provide everyone with an environment suitable for health and well-being, as well as to enable people to protect themselves sufficiently against negative environmental impact, and the integrated permit procedure. The purpose of the regulation concerning the environmental permit procedure is to simplify the procedure for the acquisition of environmental permits both for the applicant for a permit and for other interested persons. In the stead of the hitherto area-based permit procedure, the draft proposes a single environmental permit. Submission of a single permit application is thus sufficient, and hearing of the public will also take place in the context of a single procedure. The integrated permit procedure is a good example illustrating how it is possible to decrease the internal and external over-regulation characteristic of Estonia's existing environmental law and to reduce the administrative burden.