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Sustainability & NetZero in Construction Law

21 March 2024

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Today's session

- Climate change and sustainability laws and regulations
- How construction contracts can assist in achieving Net Zero and sustainable outcomes
- Recent planning and green washing case law and how the latter can be avoided

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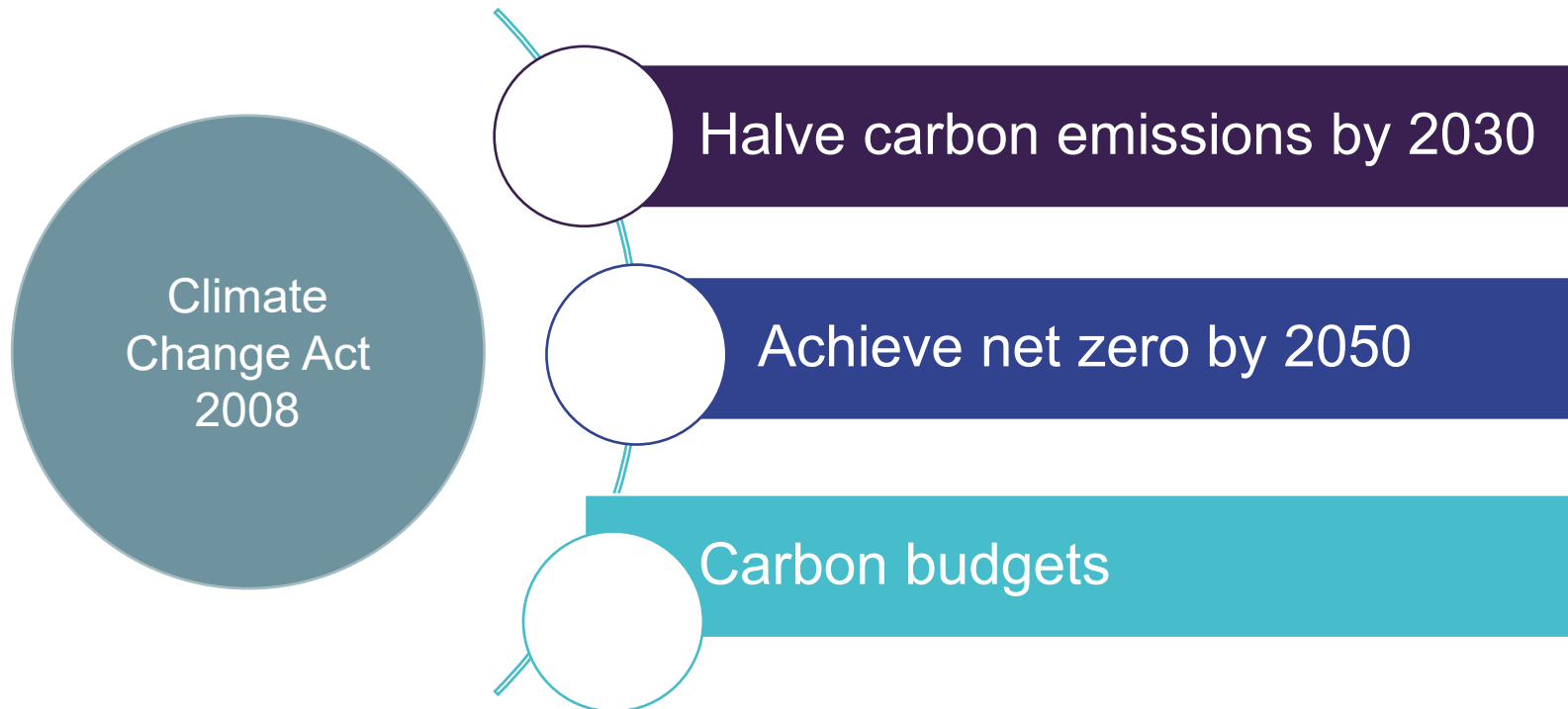
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A crucial decade for climate action



A crucial decade for climate action: the UK

- 42% of UK emissions are directly attributable to the built environment*
- Construction, demolition and excavation = 62% of UK's total waste**



*(UK Green Building Council <https://ukgbc.org/our-work/climate-change-mitigation/>)

** DEFRA <https://environmentagency.blog.gov.uk/2021/03/28/construction-and-demolition-sites-do-you-know-whats-in-your-waste/>

A crucial decade for climate action: what are your statutory requirements?

Environment Act 2021

- Establishes a framework of legally binding targets on air quality, water, biodiversity and resources.
- Requires projects to deliver 10% biodiversity net gain to achieve planning permission, i.e., species abundance to be 10% greater in 2042 than it was in 2030.

The Construction Playbook

- Focus on modern methods of construction.
- Consider taking a whole life approach to mitigating carbon.
- Adapt efficient procurement processes.
- Source and use sustainable products and materials.

Procurement policy Note 06/21

- Companies bidding for government contracts worth more than £5m a year must commit to Net Zero emissions by 2050
- Companies must also detail their greenhouse gas emissions via a “Carbon Reduction Plan”

A crucial decade for climate action: what's needed?

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1. Whole life assessments
2. Supply chain decarbonisation
3. Waste and resource efficiency
4. Regulatory framework support
5. More research into low carbon initiatives
6. Prioritised land regeneration
7. Prioritised retrofitting
8. Contracting for sustainability and climate change

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Good progress but not fast enough

The Infrastructure Carbon Review was published in November 2013 with the call to action 'cut carbon, save cost'. Seven years on, and with the UK government committed to achieving net-zero emissions by 2050, this stocktake assesses progress to date on decarbonising infrastructure.

Authors: Terry Ellis (Arup), Maria Manidaki (Mott MacDonald), Heleni Pantelidou (Arup)
This report was funded by the Department for Business, Energy & Industrial Strategy and sponsored by the Green Construction Board

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Contracting for sustainability and climate change



Contracting for sustainability and climate change

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Recognition as a problem is not universal



Issues in defining sustainability and climate change



How does the industry draw the right conclusions from the above when drafting its contracts?

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NEC4 Secondary Option X29

(1) Climate Change Requirements “CCRs” - (X29.1(1))

- Sit within the Scope – things the *Contractor* has to provide or comply with in order to Provide the Works
- CCRS specify the Climate Change Partners with whom the *Contractor* must collaborate (X.29.1(3) and X.29.2)
- *Contractor* and *Project Manager* to give EWN if achievement of CCRs will be affected (X.29.3)
- Where a failure to comply with a CCR affects the *Works* is a Defect (11.2(6))
- Climate change information may be disclosed and publicised for the purposes stated in the CCRs (X.29.5)
- Check: are your CCRs achievable?

(2) Climate Change Plan (X29.1(2) and X.29.4)

- Sets out the *Contractor's* strategy for achieving the CCRs i.e., stakeholders, roles, timescales, key milestones (X.29.4(2)).
- It is a statement of intent which is either identified in the Contract Data or submitted by the *Contractor* within a specified period.
- No direct contractual sanctions for failing to comply with the Plan
- Subject to revision – both the *Project Manager* and *Contractor* entitled to revise and reissue the plan
- *Project Manager* to approve the Plan within two weeks of it being submitted (X29.4(3))

(3) The Performance Table (X29.1 (4) and X.29.12)

- Provides an optional management regime in relation to matters that may impact climate change with the aim of reducing the whole life cost of the Project.
- Sets financial incentives (which may be positive or negative) to encourage the *Contractor* to achieve stated performance targets.
- No limit on the number of targets but they must be capable of objective measurement.
- *Contractor* reports to the *Project Manager* on its performance against the targets in the Performance Table for the duration of the *works* (X.29.12(1))
- Failure to meet targets addressed by the Performance Table (X.29.12(3)).
- Take care to consider the potential risk exposure under the Performance Table
- Payments under the Performance table are outside Secondary Option X18 (limitation of liability)

NEC4 Secondary Option X29 in practice

Should I
use X29?

Encourages parties to think about steps to reduce carbon emissions at the outset

Recognises that emissions arise in various ways

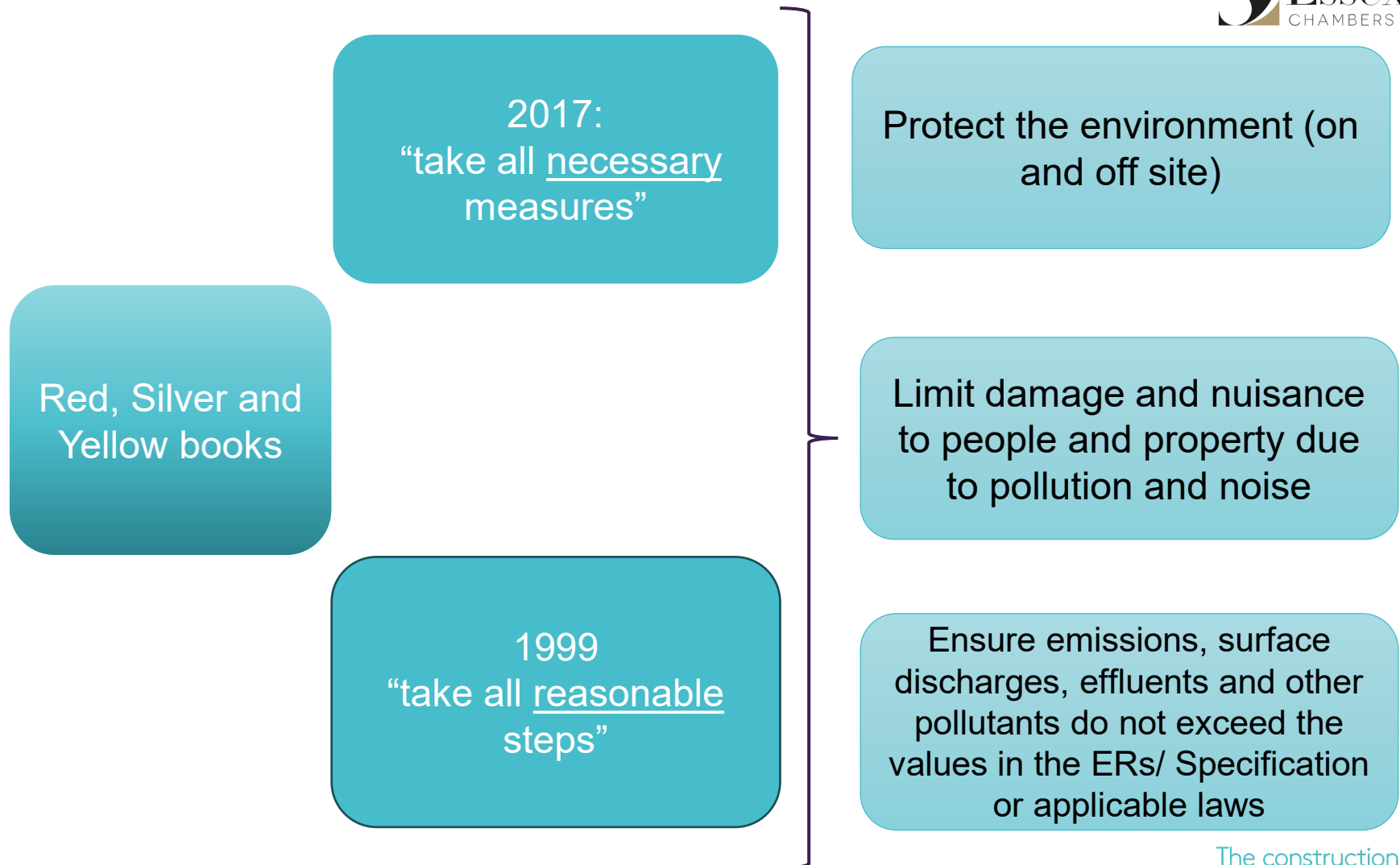
Clause not a standalone solution but a framework to set out steps parties will take to tackle climate change

Contractors must carefully analyse risks they are signing up to in the Climate Change Requirements and Performance Table

JCT Design & Build Contract 2016

- Supplemental Provision 8: Contractor “*encouraged to suggest economically viable amendments to the Works*” which, if instructed as a Change, may result in an improvement in environmental performance in carrying out of the Works or the completed Works; and
- Provide all information that the Employer reasonably requests “*regarding the environmental impact of the supply and use of materials and goods*”.

FIDIC 1999 and 2017



The Chancery Lane Project

Ashkan's clause:

Imposes a requirement to use all reasonable endeavours to procure and implement sustainable onsite working practices

Izzy's clause:

Adds a mechanism that benchmarks a contractor's carbon footprint against activities being carried out elsewhere on the market

TCLP

Estelle's clause:

Requires Contractors and Service Providers to adhere to "Best Industry Practice" in mitigating climate risk and to ensure the Project meets its NetZero Objective

Tristan's clause:

Adds an incentive to use green construction materials via a "Carbon Budget"

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Key points



Key points

- Work needs to be done to turn more Net Zero / sustainability contract provisions into tangible obligations not just aspiration.
- Amendments to the standard forms should be considered to ensure that good sustainability practice is not just encouraged but becomes measurable and an enforceable obligation.
- Consider how climate provisions interact with:
 - The rest of your contract; and
 - Your contracts both upstream and downstream.
- Consider the risks you are taking on

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Recent planning and greenwashing case law



Marks & Spencer decision

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*Marks and Spencer Plc v Secretary of State for
Levelling Up, Housing and Communities*
[2024] EWHC 452 (Admin)

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Marks & Spencer decision

- Paragraph 152 of the National Planning Policy Framework sets out that:
- *“The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure.”*
- The Secretary of State agreed with the inspector that, at [24], *“there should generally be a strong presumption in favour of repurposing and reusing buildings as reflected in paragraph 152.”*

Marks & Spencer decision

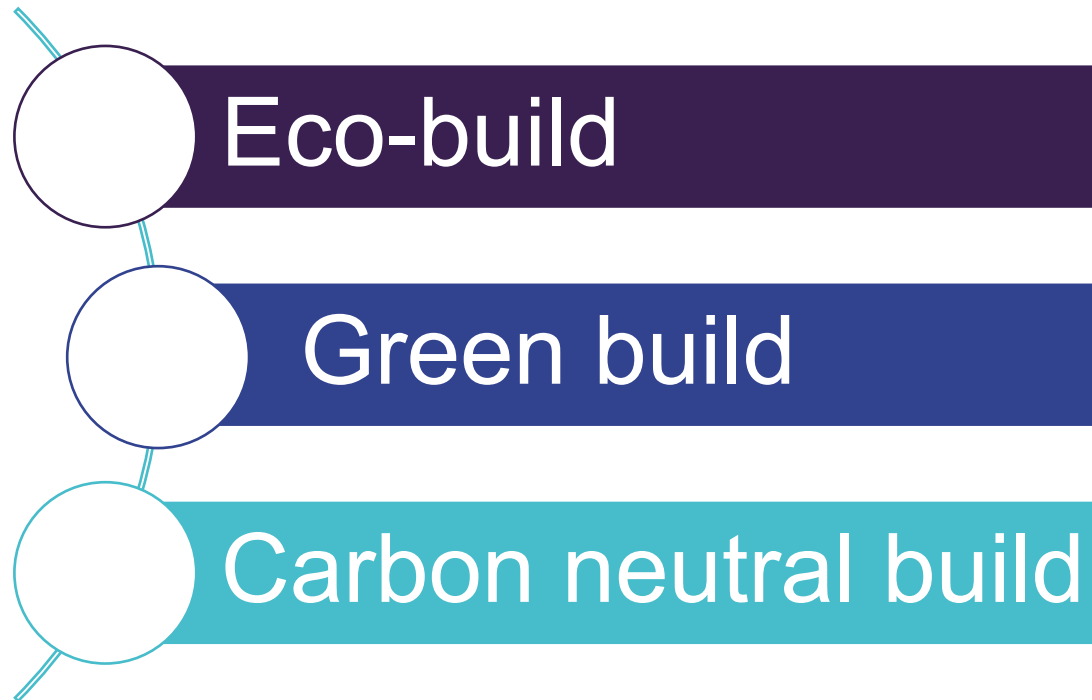
- *Marks and Spencer Plc v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 452 (Admin)
- In paragraph 55 Lieven J’s judgment she held that:
- *“There is in paragraph 152 some encouragement for the reuse of buildings, but nothing that comes close to a presumption. Mr Shadarevian’s argument that paragraph 152 is seeking to achieve a radical reduction in carbon, and thus a presumption of retailing buildings can be inferred, ignores the rest of the paragraph which refers to a number of other very general policy aspirations. There is nothing in the paragraph that supports the application of a policy presumption for one part of the paragraph alone.”*

Greenwashing – what is it and why does it matter?

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Purifies the air as it goes

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ASA Ruling – HSBC

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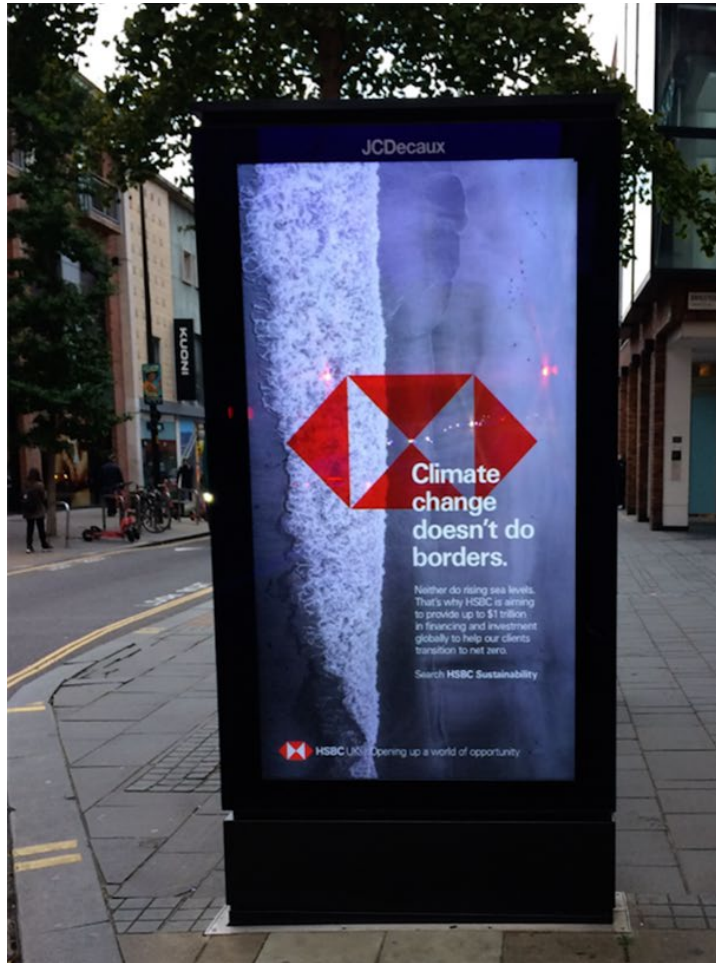


Photo: ASA/SWNS



Photo: ADFREE CITIES

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KLM - Greenwashing

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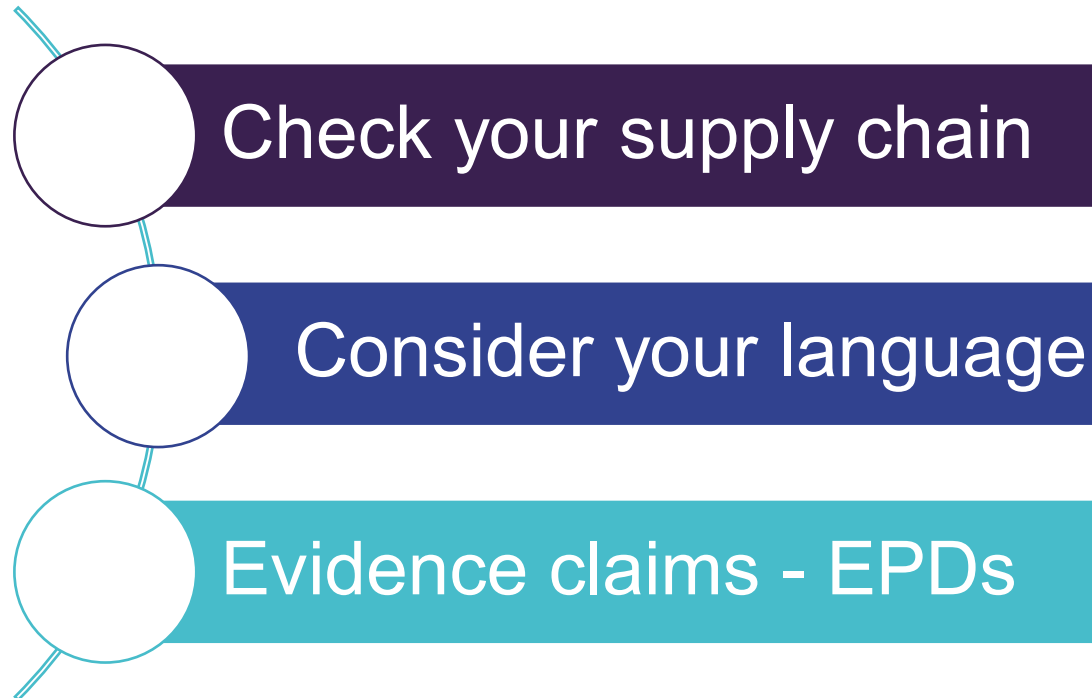
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Greenwashing

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Key takeaways

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Be mindful of contractual provisions – both new and old.

Know your supply chain.

Understand the claims you make and evidence them.

Retrofitting is encouraged.

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**Thank you.
Questions?**

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