

Lords Grand Committee debate: environmental principles policy statement (30 June 2022)

Introduction

The Environment Act 2021 establishes a new environmental governance system for England which comprises four interdependent elements:

- An environmental improvement plan to chart and drive government's progress on the environment
- Legally binding environmental improvement targets on air, water, nature and waste
- An environmental principles policy statement to [embed](#) environmental principles at the heart of policy development across government
- The Office for Environmental Protection to protect and improve the environment by holding government and public authorities to account

[Section 19\(1\)](#) of the Environment Act places a legal duty on ministers of the crown to have "due regard" to the environmental principles policy statement in their policy making. Paragraph 203 of the [explanatory notes](#) to the Act clarifies that this means that, when making policy, ministers must consider the environmental principles policy statement with substance, rigour and an open mind. This duty will apply to ministers when making policy in England and on reserved matters. Separate approaches are being developed in Northern Ireland, Scotland and Wales.

The purpose of the policy statement is to embed environmental principles in policy making, ensuring that the environment is considered at the outset and iteratively. However, the draft statement is not yet sufficiently ambitious or clear to achieve the government's aim. There are concerns about the persistent delays in agreeing the final statement and the unclear forward timetable. More information about the implementation programme and monitoring and evaluation systems are needed.

Advice of the Lords Environment and Climate Change Committee

We note that the House of Lords Environment and Climate Change Committee [wrote](#) to Defra minister Rebecca Pow on 23 June about the policy statement, highlighting several areas on which it considered that further clarity, greater urgency or strengthened wording is needed. These include:

- A more ambitious approach to the integration principle
- An increased sense of urgency in how the prevention principle is used
- A strengthened precautionary principle (this [ENDS article](#) from 22 June sets out the origin of the principle and its importance in policy making)
- Consideration of how policy makers can take account of global impacts
- Application of the principles as soon as is practicable
- Robust monitoring and evaluation by government departments of how the statement is being applied and practically informing policy
- Involvement of the Office for Environmental Protection in reviewing the toolkit of resources intended to aid implementation of the principles across departments

Advice of the Office for Environmental Protection

The Office for Environmental Protection [provided advice](#) to Defra on the draft policy statement in July 2021. While some of its recommendations have been taken on board, for example the improved language adopted in some sections, many remain outstanding. These include the concerns it expressed on the government's approach to the integration and precautionary principles.

Implementation

The legal "due regard" duty on ministers in section 19(1) of the Environment Act is now the only part of the new governance system not yet in place as it has not yet been subject to a commencement order. **The government must clarify when the duty will come into force and set a hard deadline for this, to avoid the risk of further delays. We note that business groups are [calling for](#) rapid implementation of the policy statement to ensure that all government policies are supportive of positive environmental outcomes, and are coherent and cost-effective.**

It is of significant concern that the development of the policy statement has been subject to such persistent and severe delays. Ministers [first committed](#) to a policy statement on environmental principles in the autumn of 2018. The [consultation](#) on the draft statement closed in early June 2021, but the government did not publish its [response](#) until nearly a year later with no reason given for this lengthy delay.

Once the parliamentary scrutiny of the statement concludes, the government has said that it will publish and lay the final statement in Parliament in autumn 2022 but has provided no firm date for this.

The government has also [indicated](#) that there will be an implementation period of unknown length to allow government departments to prepare for the duty. This exacerbates concerns that the legal "due regard" duty in section 19(1) of the Act may not be in force for an unknown and potentially considerable length of time.

There is no clarity on how the environmental principles will be used to actively inform policy making before and during any implementation period. Meanwhile, ministers in other government departments are actively [criticising](#) the environmental principles, taking [a particular interest](#) in the precautionary principle. They are also [setting out their intent](#) to amend, repeal or replace the large amount of environmental law that exists on our statute book in the form of retained EU law, some of which relates to environmental principles. Defra has the largest amount of retained EU law of any government department, so **it is imperative that the duty on policy makers to have due regard to the policy statement is operational before any powers relating to retained EU law are taken up.**

As set out in the Queen's speech, the government is progressing a substantial policy programme. It is not at all clear that this is being prepared with the principles explicitly in mind as there is no legal duty on ministers to do so.

The government should therefore commence any implementation period with immediate effect given that the environmental principles are already set out in statute in section 17 of the Environment Act and will not change at this juncture as they have been approved by Parliament and exist in law.

Considering the lengthy period of time that government departments have already had to consider how to embed the principles in their policy making **the implementation period should be set at a maximum of three months**. This would enable the legal duty to be commenced in the autumn at the same time that the final statement is published and laid.

Government departments should agree to start applying the environmental principles to policy making immediately in spirit and to publish a progress report on how they have embedded the principles in their policy making and plan to apply the “due regard” duty once the policy statement has been finalised. This would be commensurate with and assist in delivering the government’s high environmental ambitions.

Content of the policy statement

The policy statement is a key tool to deliver the flagship aim of the government’s [25 Year Environment Plan](#) to leave the environment in a better state than it found it. To be effective, the policy statement must be applied as widely as possible to government policy making. The Environment Act already excludes certain areas of fiscal and defence policy from this process. To add further restrictions via the policy statement itself would severely inhibit its ability to embed environmental principles in all government policy making and would not be in keeping with the intention of the Act.

Some aspects of the statement have improved since the publication of the draft policy statement in 2021, to take account of the [advice](#) of the Office for Environmental Protection and other [consultation responses](#). For example, the draft statement embraces more positive language, and the government now recognises that the policy statement can be used to promote positive environmental outcomes in policy making as well as avoiding harm.

This recognition is welcome, although **in some places the draft statement still restricts the application of the principles to policies which have a potential negative effect on the environment, making it internally inconsistent**. For example, in explaining the application of the individual principles, the draft statement limits the application of the integration, prevention and polluter pays principles to policies that have the potential to cause “a negative environmental effect”. Similarly, the application of the rectification at source principle is stated as being “to guide the design of policy that addresses or manages environmental damage”. These criteria would restrict the application of the environmental principles to a reduced number of policies, which we do not believe is what Parliament intended when passing the Environment Act.

A diminution of the integration principle

We are concerned by the treatment of the integration principle within the draft statement. The Environment Act defines this principle in section 17(5) as “the principle that environmental protection should be integrated into the making of policies”.

However, the draft statement adopts a more limited approach, advising policy makers to merely “look for opportunities to embed environmental protection in fields of policy that have environmental effects....”.

The final statement could be clearer that the integration principle applies not just for those policies with potential negative environmental effects, but as a cross cutting principle to ensure that all policy making should build in environmental protection from the outset.

The final statement should also consider how the principles could be integrated vertically into different levels of government including at local level. The recognition that policy making of arm's length bodies that develop policies for ministers is in scope is welcome but could be expanded. For example, the final statement could reflect how integrated pollution control across different aspects of the environment (for example, air, water and land) and across different types of policy instruments (for example to align regulatory and fiscal instruments) could be delivered.

Continued overemphasis on proportionality and innovation

The government's [summary of consultation responses](#) highlights five key concerns raised by respondents to the consultation, one of which is that the use of proportionality in the draft statement was excessive. We highlighted this in [our consultation response](#):

"In general, the policy statement takes a wholly disproportionate approach to proportionality, with mentions of "proportionate/proportionality" (19) on a par with "protect" (20) but greatly outweighing "enhance" (7) and "improve" (4). While policy makers will not be counting words when they come to apply the statement, they will nevertheless be greeted by a blizzard of proportionality steers. This will result in policy hesitancy and a tentative approach to the principles and is likely to increase the risk that they will be ignored, disregarded or downplayed in policy making."

The government has not addressed this consistent feedback from stakeholders as the role of proportionality has not substantially altered in the draft policy statement.

Paragraph 187 of the explanatory notes to the Act clearly states that "...it may be necessary to balance the application of a specific environmental principle against other considerations, such as economic and social benefits, whilst taking care to ensure that these do not supersede environmental benefit but are considered alongside."

This clarity is not repeated in the draft policy statement, which instead appears to steer policy makers to regard the principles as optional considerations which can be given less weight than economic and other considerations and disregarded if they conflict with other policy aims. Instead, it should clearly flag the role of the statement in contributing to the improvement of environmental protection and sustainable development, as the Act requires. This is particularly the case for the integration principle where the draft statement merely directs policy makers to "look for opportunities" and fails to define the principle more fully, as highlighted on page 3 of this briefing note.

The draft policy statement places an undue emphasis on enabling innovation as one of its main aims. It lists "supporting innovation and growth" and "to provide ministers, and those developing policy on their behalf, with the space to use the principles to enable and encourage innovation" as aims, which do not sit comfortably alongside the objective stated elsewhere by ministers that the statement aims to put the environment at the heart of all policy making.

In the section on the precautionary principle, the draft policy statement states that the precautionary principle should incentivise innovation and should not unnecessarily hinder innovation due to novelty. Innovation itself is, of course, a valuable means to meet policy objectives. However, to innovate is not a policy objective in itself, innovation is not an environmental principle and its emphasis in the policy statement remains unwarranted.

Collectively, these statements imply that the government sees promoting innovation as of equal and possibly higher importance than environmental protection.

An overly narrow interpretation of the precautionary principle

The draft policy statement uses the 1992 Rio Declaration definition of the precautionary principle “where there are threats of serious or irreversible environmental damage, a lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

As Professor Maria Lee [explains](#):

“This approach has long been criticised for the high threshold for action (serious or irreversible) and the counter-intuitive assumption that in a state of uncertainty the cost effectiveness of decisions can be calculated. It is a highly defensible and common definition, but could be far more ambitious”.

The draft statement states that “there must be sufficient evidence that the risk of serious or irreversible damage is plausible and real, and where choices are considered to reduce or prevent the environmental degradation they should be cost-effective”.

The draft statement also places the precautionary principle under a ‘risk management’ heading. This risks suggesting that the government is promoting a US-style approach of preventing projects or substances only when there is demonstrable evidence that proceeding would lead to serious or irreversible harm.

This approach has long been criticised for the high threshold of proof needed (serious or irreversible) to prove the level of risk and for reliance on mitigation measures/use restrictions to support proceeding with actions with the potential for harm. The draft statement also frames the precautionary principle as a tool for managing the risk of bringing forward innovative policies that may cause harm to the environment, which will further restrict its application.

Applying the precautionary principle only in cases where the risk of serious or irreversible damage is “real” would set the UK on an opposite course to other jurisdictions, including the EU, which embrace a more progressive approach.

Requiring measures to reduce or prevent environmental degradation to be cost-effective would further restrict the application of the principle as it would allow precautionary environmental protection measures to be legitimately disregarded solely on the grounds of cost, at a point when the full costs of the potential harm are not apparent.

The precautionary principle should instead be given its wider interpretation in the final statement, to guide policy makers to take a sensible approach in applying or recommending measures to prevent environmental harm in the absence of full scientific certainty about the severity or cause of the harm.

Conclusion

Overall, the draft policy statement remains deficient in several key regards, which will limit its effectiveness in ensuring that the environment is proactively designed into the policy making process, as the government intends.

Given the concerns we outline in this note, it is difficult to see how the Secretary of State can fulfil their legal duty under [section 17](#) of the Environment Act, under which they must be satisfied that the statement will contribute to improving environmental protection and sustainable development.

For more information, please contact:

Ruth Chambers, senior fellow, Greener UK
e: rchambers@green-alliance.org.uk
t: 020 7630 4524

GREENER UK

