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By email only

Dear Shane,

Advice on the Northern Ireland Environmental Principles Policy Statement

I am pleased to provide the OEP's advice on the draft Northern Ireland Environmental Principles Policy Statement (EPPS) as requested in your letter of 2 June 2023.

We welcome the steps DAERA has taken towards preparing the EPPS, and the proactive seeking of our advice prior to wider consultation. We also commend your team's efforts in having developed a clear, usable and impactful draft EPPS.

In your letter, you asked for our advice on the following specific points, as well as inviting our wider comment:

1. Your explanation of the duty to "have due regard" to the EPPS.
2. Your definitions of the principles and the relevance of the examples provided.
3. The usefulness of the general application section and its ability to guide policymakers in utilising the EPPS effectively.
4. Whether the OEP considers that you have fulfilled the statutory requirement to be satisfied that the statement will contribute to the improvement of environmental protection and to sustainable development.

We present the substance of our advice on these points and wider matters in the Annex attached. We will make this advice publicly available on our website within the next few days.

Our advice identifies strengths in the draft EPPS as well as areas that could be improved. We consider the most pressing challenge is to ensure that adherence to the duty to have due regard to the EPPS is not translated into an onerous checklist for policymakers, or viewed as something to be fulfilled via a tick box approach after policy has been developed. Rather, it should be properly disseminated to the appropriate audience of policymakers and incorporated from the outset into every stage of policymaking, including the early consideration of options.

We have developed our advice with a view to supporting DAERA and other Northern Ireland departments in realising these outcomes. As part of this we have highlighted the 2010 *Bracking* case in which the Court of Appeal set out principles for complying with such a “have due regard” duty.

Our advice also highlights the need for effective governance, oversight and assurance frameworks to support effective application of the EPPS. This should include regular review and reporting on application of the statement by DAERA and other departments.

I trust that you find our advice helpful. We would be pleased to discuss with you or your team any aspect of it, or how any further advice we might give can be of most value. We would also welcome the opportunity to consider additional detail and provide further advice as you develop the EPPS and the tools for its implementation.

As you may be aware, the OEP is currently preparing to evaluate implementation of the duty to have regard to the UK Government’s EPPS which takes effect in November 2023. We will develop our plans for similar evaluation in Northern Ireland, taking account of resourcing issues and other priorities, as your statement is finalised and comes into effect. We therefore look forward to building upon our existing constructive relationship with DAERA and developing such relationships with other Northern Ireland departments in support of the effective, long-term application of the EPPS.

Yours sincerely,



Natalie Prosser
CEO
The Office for Environmental Protection

Annex: OEP advice on the draft Northern Ireland Environmental Principles Policy Statement

1. Introduction

We welcome the opportunity to provide advice to DAERA on the draft Environmental Principles Policy Statement (EPPS) for Northern Ireland. We have identified strengths in the draft EPPS as well as areas that could be improved.

The draft EPPS demonstrates a positive aim to contribute to environmental protection and sustainable development. While there is room for improvement, as a draft for consultation we think it is clear and that, with adjustments such as we suggest below, has the potential to be an impactful and beneficial tool.

We consider that the most pressing challenge is to ensure that adherence to the duty to have due regard is not translated into an onerous checklist for policymakers, or viewed as something to be fulfilled via a tick box approach after policy has been developed. Rather, it should be properly disseminated to the appropriate audience of policymakers and incorporated from the outset into every stage of policymaking, including the early consideration of options. We also highlight the importance of regular review and reporting on application of the statement by DAERA and other departments to support its long-term effectiveness.

You asked for our advice on four specific points while also welcoming our wider comment on the draft EPPS as a whole. We have addressed those four matters alongside other points within the overall advice below. For clarity and transparency, in each case we have highlighted the specific point in question and the substance of your request for advice on it.

2. Policy rationale and desired outcome

We note that the section on the purpose of the statement suggests that it is to assist ministers and departments when making policy decisions, and to provide *guidance* on the interpretation of the principles and how the duty to have due regard to them is to be applied.

The Environment Act (paragraph 6(2) of Schedule 2) provides that the EPPS should be a statement explaining how the principles ‘should be interpreted and proportionately applied’ by departments and ministers in making policy. This is more than providing guidance and assistance. We therefore consider that the purpose of the policy statement could better represent the status of the document as per the Act. We also consider that paragraph 8(3) of Schedule 2 of the Environment Act requires departments or ministers to act (or refrain from acting) on the basis of having had due regard to the principles, unless it would be disproportionate to do so or there would be no significant environmental benefit.

Recommendation 1: We recommend modifying the explanation of the purpose of the draft EPPS to ensure it reflects the status provided for it in the Environment Act.

Further, this section could offer wider information that might help those considering the EPPS to do so in the most effective way. We suggest, in particular, that DAERA may wish to add material in this section to reflect the policy rationale and desired outcome underpinning the intended production and application of the EPPS. This

could help policymakers understand and have due regard to the principles in a more purposeful way with greater practical effect.

This could be related to the requirement in paragraph 6(4) of Schedule 2 of the Environment Act (see Section 4 below), as well as to the provisions of each of the individual principles. On this basis, for example, the underlying policy rationale and desired outcomes associated with the EPPS could be viewed as:

- Guiding and assisting ministers and departments in making policy that will contribute to the improvement of environmental protection and the achievement of sustainable development in Northern Ireland.
- Favouring policies that will support environmental improvement, or that will at least avoid or prevent environmental damage.
- Where environmental damage cannot be avoided, seeking to target its original cause and favouring rectification of the damage at source.
- Seeking to allocate or direct the associated costs to those who cause pollution or other environmental damage or give rise to need for action to prevent or rectify it.
- Acting in a precautionary manner in favour of protecting the environment in the absence of full scientific certainty where there are credible threats of serious or irreversible environmental damage.
- Pursuing these outcomes and wider environmental objectives across the development of government policy in all departments rather than only those with a core environmental focus. This should be achieved by ensuring environmental protection and improvement aims and requirements are integrated into departments' policies and activities, promoting sustainable development.

Recommendation 2: We recommend strengthening the draft EPPS's statement of purpose by reflecting the policy rationale and desired outcome underpinning its intended production and application.

3. Proportionality

The definition of proportionality in the draft EPPS cites paragraph 6 of Schedule 2 to the Environment Act. However, the obligation on policymakers is that in paragraph 8 (the duty to have due regard). The provisions in paragraph 6 apply only to the obligation on DAERA to prepare the statement in the first place. It is the EPPS itself that should explain how the environmental principles should be interpreted and proportionately applied. Policymakers should then have due regard to the EPPS as it is, rather than bringing in any wider consideration of proportionality not provided for in the statement. We suggest that this should be clarified.

The reference to proportionality in paragraph 8 deals with a different point. Specifically, paragraph 8(3) provides that, despite having had due regard to the EPPS, the relevant minister or department does not have to do anything (or refrain from doing anything) if this would have no significant environmental benefit or would be in any other way disproportionate to the environmental benefit. In our understanding, therefore, this is about deciding how to act in making the relevant policy decision having considered the principles. As we have noted earlier, we consider that this means there is a requirement for departments or ministers to act in favour of realising environmental benefit (or refrain from acting in a way that would lead to harm) on the basis of having had due regard to the principles, unless it would be disproportionate to do so or there would be no significant environmental benefit.

Recommendation 3: We recommend amending the discussion of proportionality in the draft EPPS to reflect more accurately the relevant provisions of the Environment Act and the corresponding obligations on ministers and departments.

More broadly, the requirement to have due regard to the EPPS will be in addition to the normal process of considering environmental issues, specific or general, alongside other factors in the process of developing policy and decision-making.

We believe that where there is potential for greater environmental impact, more robust consideration should be necessary. If reasonable assessment at the outset demonstrates little or no potential environmental effect (positive or negative) from development of a policy, and little or no potential to change that as a result of different policy options, the consideration of the principles should be proportionately light. In contrast, if, in the process of considering policy options and making decisions, it is identified that there are more significant potential environmental effects, consideration of the principles should proportionately be deeper.

At present while the draft EPPS reflects this to some degree, we consider it could be clarified. For instance, it says that: ‘This method allows the policy maker, in appropriate cases, to apply the statement in a lighter touch way. In other cases, where the potential for environmental effects is greater, more robust consideration *may be necessary*’ (emphasis added). This could be read as favouring a preference for lighter touch consideration of the principles, because even where the potential environmental effects are greater the text still appears to allow no more robust consideration.

Recommendation 4: We recommend adjusting the section on proportionality to clarify the relationship between the significance of the potential environmental effects in developing a policy and the corresponding robustness and depth of consideration of the environmental principles.

4. The draft statement’s contribution to environmental protection and sustainable development

This was a specific point on which you requested our advice. You asked:

“We are also happy to take any thoughts the OEP may have on any aspect of the draft statement, but we would particularly welcome the OEP’s advice on whether, in its view, we have satisfied the statutory requirement to contribute to environmental protection and sustainability. Obviously, the requirement is that we are satisfied and independent confirmation of that from the OEP would add considerable weight.”

As stated in the Environment Act (paragraph 6(4) of Schedule 2), the obligation on DAERA in relation to this matter is as follows:

‘The Department must be satisfied that the statement will, when it comes into effect, contribute to —

- (a) the improvement of environmental protection, and
- (b) sustainable development.’

As you note in your request to us, the requirement is that DAERA is satisfied on this point. This is a matter of judgement and discretion, therefore, and not one on which

the OEP can give a definitive view. There are no specific elements in the draft EPPS that give us significant grounds to question it against this requirement. However, we advise that some points could be strengthened to provide a more confident and clear demonstration of how the requirement has been met.

We consider that the statement would be improved through more clearly articulating how and why its application is expected to contribute to sustainable development. For example, you may therefore wish to set out in more substantive terms (or provide a link to other material that explains) what sustainable development means, what is necessary to achieve it, how it relates to the improvement of environmental protection, and how application of the EPPS should support these outcomes.

We note that while the draft EPPS includes a definition of 'environmental protection' which accords with that in the Environment Act, it does not provide an equivalent level of information for 'sustainable development.' We appreciate that 'sustainable development' is not defined in the Environment Act and that the draft EPPS does describe it in general terms as an internationally recognised approach which seeks to conserve, protect and enhance the environment while also pursuing social and economic goals. We agree with this as a brief summary and suggest that it could be amplified by providing some further explanation.

There is an important inter-generational element to sustainable development which we suggest would be beneficial to highlight. In this regard, you may wish to note that sustainable development was originally defined in the World Commission on Environment and Development's 1987 Brundtland report¹ 'Our Common Future' as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. You might also wish to refer to the 2030 Agenda for Sustainable Development², adopted by all United Nations (UN) Member States in 2015, which reflects 17 Sustainable Development Goals (SDGs).

The draft EPPS also explains that the requirement for the statement to contribute to sustainable development aligns with a similar duty in the Northern Ireland (Miscellaneous Provisions) Act 2006. However, it does not describe how that other duty has been explained or implemented in practice, or what the pursuit of sustainable development in Northern Ireland is expected to involve. You may wish to refer to Northern Ireland's outcomes-based Programme for Government in this context. The stated intention was that the draft Outcomes Framework would be Northern Ireland Government's way to demonstrate progress towards the achievement of the UN SDGs.

It could also be helpful to explain the relationship between sustainable development, the draft EPPS and the intended Northern Ireland Environment Strategy (which the draft EPPS currently mentions only in the introduction). We consider that the goals of environmental protection and improvement would be supported by giving greater emphasis and equivalent weighting to the Northern Ireland Environment Strategy, alongside that currently given to plans focused on or related to sustainable development, such as the Green Growth Strategy.

More generally, we note that at different points the draft EPPS refers variously to 'sustainable development,' 'environmental sustainability' or simply 'sustainability.' It

¹ [UN. Secretary-General; World Commission on Environment and Development, Report of the World Commission on Environment and Development: Our Common Future, 1987.](#)

² [United Nations Department of Economic and Social Affairs, Sustainable Development: The 17 Goals.](#)

is not always clear if these terms are synonymous or have distinct meanings. We suggest that DAERA revisit the use of these different expressions to ensure the meaning is clear and appropriate in each case.

Recommendation 5: We recommend incorporating additional material and references, and clarifying the specific terms used, as the basis for a more confident, clear and balanced demonstration of how the requirements to contribute to environmental protection and sustainable development have been met.

To support environmental protection and sustainable development more effectively, we suggest the EPPS could also address implementation arrangements. We consider that strengthening the statement by providing more detail and setting expectations on procedures, governance, oversight and assurance mechanisms could encourage consistent and purposeful application among departments, while still allowing flexibility in tailoring the mechanisms as needed. This should include regular review and reporting on application of the statement by DAERA and other departments.

The draft EPPS notes that one way of showing that the requirement to have due regard to the EPPS has been fulfilled would be for the policymaker to record the consideration given to the policy statement in respect of the relevant policy decisions. It explains that DAERA does not intend to prescribe the content of such a record and refers to the forthcoming 'toolkit' as a source of guidance.

We believe that the EPPS should set out what departments should do and how they should do it. As noted previously, the Environment Act (Schedule 2, paragraph 6(2)) says it should explain 'how the environmental principles should be interpreted and proportionately applied.' Hence we consider that anything sufficiently important to be viewed as something that departments should do ought to be in the EPPS itself. While we agree that an associated toolkit of guidance, case studies, etc. can be helpful, these can only be supporting material and will carry less authority and certainty than the EPPS.

We therefore suggest that the draft EPPS should identify key steps that each department should take, regardless of any differences in specific departmental practices. Such key steps would be for DAERA to determine and we do not seek to prescribe them. To illustrate, however, they could, for example, include ensuring that: staff are aware of and understand the EPPS and the duty to have due regard to it; departments have effective processes to have due regard to the EPPS at all stages of policymaking; staff have access to resources and information needed to properly consider the principles; information is recorded and retained as appropriate to be able to demonstrate how the EPPS has been applied; and consideration of the principles for individual policies sits within wider departmental frameworks of governance, oversight and assurance. We suggest that such mechanisms should also provide an appropriate opportunity for transparency and audit.³

Our advice is that the statement should highlight the best practice of keeping records to show how the decision-maker has had due regard to the EPPS, including how and when the principles have been considered in relation to the policy in question. This

³ We note in this regard that the need for better record keeping has also previously been underscored in the findings of the [Renewable Heat Initiative Inquiry. Department of Finance, Finance Minister Publishes Report on RHI Inquiry Recommendations](#), 07 October 2021.

would be consistent with the outcomes of the *Bracking*⁴ case which we discuss in Section 6 below. Ideally, the information recorded should note the potential areas of the policy to which the principles relate, how each question was addressed, and what (if any) changes were made, or indeed not made, to the policy as a consequence of having had due regard to the EPPS.

Recommendation 6: We recommend setting out in the draft EPPS key elements in respect of procedures, governance, oversight and assurance mechanisms that departments should apply to have due regard to the statement as policy is developed and to be able to demonstrate this after the fact.

5. General application and guidance to policymakers

This was another of the specific points on which you requested our advice. You asked:

“Another section on which we seek advice is our general application section, this was provided in the statement as an additional set of guidance to the policymaker on how the principles can interact with one another. We are seeking advice on whether this section is clear and actually does provide the policymaker with some guidance on how best to use the principles. One additional point to make is that we do intend to develop a policy toolkit which will provide Departments with an additional level of guidance on how best to use the statement and be able to comply with the due regard duty.”

The draft EPPS draws a connection to measures intended to meet climate change, environmental and green growth agendas. We consider it would be helpful if the statement were also to include information on how the EPPS interacts with the Climate Change Act’s ‘just transition principle.’⁵ This is particularly pertinent to the climate action plans currently being developed where principles will interact.

Similarly, the draft Green Growth strategy includes a growth test which will likely be mandatory. It would be helpful to policymakers to understand how this will interact with the EPPS. This will be key to ensure the application of ‘Green Growth principles’ is underpinned by the environmental principles.

The current draft EPPS suggests that Northern Ireland’s Environmental Improvement Plan is a measure of how Northern Ireland is performing on environmental matters. In our understanding it would be better to describe it as a plan for what Northern Ireland wants to achieve in respect of environmental improvement and how this will be realised. The evaluation of how Northern Ireland is performing will be reflected in DAERA’s and the OEP’s progress reports and assessments against the plan. We suggest clarification of this point in the draft EPPS.

We note that there may also be a question for officials over how the duty to have due regard to the EPPS will interact with the Northern Ireland Protocol and Windsor Framework where those apply. Our broad understanding of this matter is that where a policy is developed which relates to both, then it would be necessary to apply the principles as per the EPPS, but also in accordance with the protocol and applicable

⁴ *R (aoa Bracking) v Secretary of State for Work and Pensions* [2013] EWCA 1345.

⁵ [Climate Change Act \(Northern Ireland\) 2022](#), s. 30(3).

EU law. In other words, there would be two sets of principles that are legally binding to different extents and potentially with different interpretations.

This is clearly a complex issue on which DAERA may wish to seek specialist advice from those with particular knowledge of this topic. In general terms, however, we consider that it would be helpful if the draft EPPS could set out how its interaction with the protocol and framework is expected to operate and what this means in practice for policymakers.

Recommendation 7: We recommend including further information to explain how the draft EPPS interacts with the Climate Change Act's just transition principle and the draft Green Growth strategy, and to clarify the role of Northern Ireland's Environmental Improvement Plan. Clarification on the interaction of the EPPS with the Northern Ireland Protocol and Windsor Framework would also be helpful.

We agree that policymakers should be aware of the due regard duty and build in protections or enhancements into the policymaking process, as this section states. We suggest it would be helpful in this regard if the EPPS could clarify what delineates the boundaries of policymaking. The principles should be applied throughout the entirety of the policymaking process.

The draft EPPS states that the policymaking process does not necessarily entail an extensive exercise of data and information collection. We agree. However, it only reflects one end of the range of possibilities. In any particular case, the process may or may not need to involve an extensive collection of data. The exercise should be proportionate and fit for purpose for the environmental implications being addressed.

The general application section also points to other factors that policymakers need to take into consideration, such as proportionality. According to the Environment Act (Schedule 2, paragraph 6(1)), the EPPS itself should explain 'how the environmental principles should be interpreted and proportionately applied.' We are therefore concerned that the current draft EPPS could be viewed as advising policymakers that they may or would need to take into account a further consideration of proportionality. This is unnecessary, given that the EPPS already contains an explanation of the necessary approach to proportionality in its separate, specific section on this topic.

Recommendation 8: We recommend adjusting the general application section to explain the boundaries of policymaking and to clarify the text in respect of data and information collection and proportionality.

6. Duty to have due regard

This was a further specific point on which you requested our advice. You asked:

"In terms of the due regard duty, we regard this as a significant aspect of the statement, given that Departments and Ministers of the Crown will be required to have due regard to the statement and be able to provide evidence of this compliance. In this section we have included guidance on how the duty can be complied with as well as an example to illustrate how the duty is to be applied. Specifically, we would be grateful for advice on whether the due regard duty has been explained to the policy maker adequately and whether the case law provided is an appropriate example of the duty (not) being exercised?"

Due regard duty

Paragraph 11 of Schedule 2 to the Environment Act defines what policy is. It may be clearer to use that definition in the 'What is policy?' and 'What is making policy?' sections of the draft EPPS. In essence, policy is the outcome of the policymaking process. The current language might also be improved by combining the two sections and clarifying that it is a decision taken by a minister or a Northern Ireland department.

More generally, we consider that the section explaining due regard could be made more coherent and user friendly. As a specific example, the definition of 'policy' in the draft EPPS asserts that it has both 'vertical' and 'horizontal' components. These terms could be more clearly defined, with some examples given.

The section listing considerations when applying the due regard duty could also be clarified in some areas. Firstly, policymakers must be aware of the duty and its aims, i.e. that the duty exists, and what it is intended to achieve. The suggestion of a conscious approach could be elaborated on and substantiated with an example.

The draft statement correctly highlights that although the due regard duty is owed to the EPPS rather than to the individual principles, this does not lessen the importance of the principles. Each of the principles should be considered fully on its own merit when policymakers develop policy. Having due regard to the statement as a whole entails having had due regard to each principle described therein.

We also note that this is the only provision in the Environment Act to use the term 'have due regard to' rather than the more common 'have regard to.' This gives it a strengthened status which we suggest is worth emphasising in the draft EPPS.

Recommendation 9: We recommend adjusting the general explanation of the due regard duty to emphasise its status and to provide further clarity in the areas that we highlight around the definition and making of policy, and considerations when applying the duty in respect of all of the principles.

Caselaw example

You asked for our advice on whether the case law cited is an appropriate example of the duty to have due regard. While we are pleased to do so in the context of this overall advice, we cannot provide specific *legal* advice to DAERA, and that is not our intent in the following comments. DAERA may wish to take its own legal advice on the correct definition of the 'have due regard' duty. In our comments below, we offer an alternative case for DAERA to consider as a useful example of how the duty has recently been articulated by the Court of Appeal.

The draft EPPS cites the *Brown*⁶ case and provides a list of considerations when applying the due regard duty. While we think this case remains relevant, we consider that the *Bracking*⁷ case is a more appropriate one to cite. In our opinion, this more recent case (2010) offers rather fuller authority and summarises all the relevant principles of 'due regard' including those in the earlier *Brown* case. The Equality

⁶ R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 paras 90-96.

⁷ R (aoa Bracking) v Secretary of State for Work and Pensions [2013] EWCA 1345.

Commission for Northern Ireland has also provided a helpful guide on the applicability of *Bracking* to a Northern Ireland audience.⁸

In the case of *Bracking* the court set out the following principles for complying with that 'have due regard' duty:

- (a) decision-makers must be **aware** of the duty
- (b) they must fulfil it **before and at the time** when considering their decision, they cannot engage in '**rear-guard action**', **following a concluded decision**
- (c) the duty must be '*exercised in **substance**, with **rigour**, and with an **open mind***'; '*it is not a question of ticking boxes*'
- (d) general regard to relevant issues is different from having **specific regard**, by way of a **conscious approach** to the statutory criteria
- (e) while there is no obligation to **expressly refer** to the duty (for example in reasons), doing so is good practice and reduces the scope for argument
- (f) the duty is **non-delegable**. What matters is what *the decision-maker* considered and was aware of. They cannot necessarily be taken to know what their officials know or what may have been in the minds of officials in proffering their advice
- (g) the duty is a **continuing** one
- (h) the duty includes a **duty to inquire** – a decision-maker must be properly informed so if the relevant material is not available, they must acquire it
- (i) it is good practice for a decision maker to keep **records** demonstrating how they considered the duty
- (j) officials must not merely tell the decision-maker what they want to hear but must be '**rigorous in both enquiring and reporting**', and
- (k) provided the court is satisfied of the above, it is **for the decision maker to decide how much weight** to give to the statutory factors.

Recommendation 10: We recommend referencing and including a brief description of the *Bracking* case in the draft EPPS together with a concise list of explanations of the resulting principles to explain what needs to be done to comply with the due regard duty.

7. Definitions of principles and examples given in the draft EPPS

This was the final specific point on which you requested our advice. You asked:

"The backbone of the statement is the environmental principles section and in order to provide structure we have provided a definition of each principle and advice to the policymaker on how the principle can be applied as well as providing examples of policies which show the principle being applied. The examples provided are very much in draft form and we are open to any other examples which may prove a better fit for the specific principle. In this section we seek advice on whether the definition of the principles we have used are appropriate, in particular reference to the integration and precautionary principles which have several different definitions?"

⁸ [Equality Commission for Northern Ireland, *R \(Bracking & others\) -v- Secretary of State for Work & Pensions \[2013\]*](#).

General points

We note that the principles are explained in an order different to that set out in paragraph 6(5) of schedule 3 to the Environment Act. For clarity of drafting and to avoid doubt we suggest that it would be better to reflect the order of the principles as listed in the Act; integration, prevention, precaution, rectification, and polluter pays. It could also help to be clear that this is the basis for the ordering, and that all of the principles are equally important. This would avoid concern or misunderstanding about the current order indicating there should be any preference or order of application by choice.

The principles should be applied from the start of a policy cycle unless policy development is already underway before the EPPS is finalised or enters into force. In the latter case, preparations for applying it should begin as soon as the EPPS is finalised and the six-month implementation period begins, if not earlier. Identifying the environmental effects of policies should be an iterative process occurring throughout policy development and alongside application of the principles.

New technologies and innovation

We note that the draft EPPS refers to new technologies and innovation in several places. We agree that promoting new technologies and innovation are important goals for any government. However, we are concerned that the way this is addressed in the draft EPPS could be read as suggesting that application of the environmental principles may generally disfavour new technologies and innovation.

Our view is that the environmental principles are neutral on such matters. There may of course be cases where an innovation with a possible benefit to society in one area may lead to an environmental threat in another. For example, the innovation of the development of chlorofluorocarbons offered significant benefits in refrigeration but was later found to have had disastrous effects on the stratospheric ozone layer, at which point corrective action was taken. But the opposite can also be true. There have been many cases where new technologies and other innovations have helped solve or avoid environmental problems, for example by replacing polluting production techniques with cleaner ones.

There are specific references to new technologies and innovation in the descriptions of the prevention and precautionary principles. For the reasons outlined above, we think this may lead to a conflation of separate issues resulting in some policymakers taking a negative view of the principles.

Recommendation 11: We recommend removing the points on new technologies and innovation from discussion of the prevention and precautionary principles and dealing with them more generally, for example in the section on how the principles can be considered together. In so doing, the draft EPPS could then underscore how the environmental principles as a whole can be considered alongside new technologies to enable positive innovation as well as environmental protection.

Integration principle

We consider that it may be helpful to clarify the longer international history of the integration principle, as originating in the 1992 Rio Declaration,⁹ to which the UK is a

⁹ [Report of the United Nations Conference on Environment and Development, 1992](#), Principle 4, p. 4.

signatory. It establishes a means by which environmental protection can be supported across all policy areas, rather than just those directly concerned with environmental issues, thereby promoting sustainable development.

The wording qualifying that the integration principle is 'essentially' defined could be clarified. Using this qualifier could be seen as pointing to uncertainty in the definition.

The advice to policymakers section states that the scope of the integration principle is wide-ranging and should be applied at an early stage to every policy area where there is a potential effect on the environment, positive or negative. We agree. This is true in general terms of all the principles and could usefully be stated in the general application section as applying to each of them.

We recognise that the integration principle may have wider scope for consideration and impact when applied to non-environmental policy matters. It requires concrete steps and proactive thinking on the part of policymakers to properly embed. In this context, although it is a good thing for the EPPS to encourage policymakers to think proactively about how their policies can contribute to environmental protection and sustainable development, the statement is intended to explain how the principles *should* be applied, rather than merely *encouraging* such action.

The example given for the integration principle is the Green Growth strategy. We agree that this is a reasonable example, assuming that its development has reflected the integration of two sets of priorities coming together in a timely way to achieve credible outcomes.

The reference to embedding Green Growth principles into decision-making, however, could lead to a confusing situation for policymakers where there are multiple sets of principles, some with legal weight, and others non-statutory and more open to interpretation. The Green Growth principles could be an example of integration in practice but are not an additional set of principles to those in the draft EPPS with the same legal status and obligations. You may wish to clarify this.

We note in this regard that paragraph 6(3) of Schedule 2 of the Environment Act provides that the EPPS may 'also explain how Northern Ireland Departments and Ministers of the Crown, when interpreting and applying the environmental principles, should take into account other considerations relevant to their policy'. Hence there is no legal impediment to the EPPS addressing such other considerations. Where it does so, however, we suggest that it would be helpful to further explain them and their intended interaction with the environmental principles rather than just referring to them in external material.

Recommendation 12: In relation to the integration principle, we recommend: a) strengthening the text which currently encourages, rather than requires, policymakers to think proactively about how their policies can contribute to environmental protection and sustainable development; and b) clarifying the reference to and interaction of the EPPS with the Green Growth principles.

Prevention principle

We suggest that it would be clearer if the prevention principle were defined as anticipating *and preventing* any potential environmental harm rather than reacting to the damage.

The draft EPPS further states that, where possible, the prevention principle should always be applied *before considering* either the rectification at source or polluter pays principle. In our view, the principles can be considered at the same time, while still recognising the general point that prevention of harm is better than subsequent rectification of it or making someone pay for it. Our point, therefore, is not to query this sense of ‘prevention over cure,’ but rather to suggest adjusting the draft EPPS to promote the outcome that the principles are treated iteratively and proactively, rather than separately and one after the other in a mechanical way.

For example, if a policy could cause environmental harm and different policy alternatives are identified, policymakers should consider what the different policies would mean in terms of preventing the harm, rectifying it at the source, and ensuring the polluter pays. They do not need to consider the prevention principle first against every option, and then the rectification principle, and so on. This could be laborious and potentially fragmented.

The point to emphasise, we suggest, is that the actions that stem from the prevention principle should normally be applied *in preference* to those that would stem from allowing the harm to occur and then seeking to rectify it or make the polluter pay. In this way the prevention principle is a more proactive principle than, for example, the more reactive polluter pays principle.

In the advice for policymakers the draft EPPS identifies that the starting point when first drafting policy should be to assess policy goals alongside assessing the policy’s potential contribution to environmental sustainability. In our view, the starting point in relation to this principle should be to consider if development of a policy *could* give rise to an impact which ought to be prevented, one step earlier than described at present.

We agree that the principle can be considered both in the context of preventing harm that has not yet occurred, or taking action to stop or reduce harm that is already happening. However, while it is true that it may not always be possible to exclude the possibility of environmental damage, and that new technologies that may have an environmental impact should not automatically be disregarded, it is not clear why these caveats are included.

The prevention principle aims to prevent environmental harm from policy decisions, whether or not related to new technology. This does not mean it will always be possible to avoid policy decisions which may have some associated environmental harm in the pursuit of wider societal benefit. In that case, application of the other principles should help to mitigate or compensate for the impacts of that harm.

The description of the prevention principle is that scientific evidence should be considered when assessing actual or potential environmental damage. It uses the expression ‘is likely’ in relation to possible damage, which leaves some uncertainty as to the level of likelihood involved. You may wish to consider a more neutral expression such as ‘may take place.’ It could also be helpful to make a link with the precautionary principle here, which will come into consideration when scientific evidence is uncertain.

The draft provides a reasonable practical example of applying the prevention principle through the Carrier Bag Levy, although we think it would be worth further explaining its relationship to the principle. It is partly about prevention in that it aims to reduce the number of plastic bags acquired and discarded by consumers. However, it does not actually stop the acquisition and discarding of carrier bags, but

rather puts a price on them (so it disincentivises rather than prevents them). In this regard it could better be seen as an example of the polluter pays principle.

We wonder, therefore, if DAERA could find an alternative example of a policy that more clearly prevents (rather than reduces) environmental harm, for example banning the manufacture and sale of leaded petrol or cosmetic products containing plastic microbeads.

Recommendation 13: In relation to the prevention principle, we recommend: a) strengthening the text, including by clarifying that actions that stem from the prevention principle should normally be applied in preference to those that would stem from allowing the harm to occur and then seeking to rectify it or make the polluter pay; b) removing unnecessary caveats; and c) considering replacing or complementing the example of the carrier bag levy with another example that more clearly prevents (rather than reduces) environmental harm.

Rectification at source principle

The draft EPPS defines the rectification at source principle as working closely with the prevention principle to ensure damage to the environment is tackled when it occurs so that it does not have long-term environmental impact on the community. We suggest the definition could be widened in that damage to the environment should be tackled as far as possible not just when but also *where* it occurs (i.e. at source), so that it does not have long term environmental effect on the community, or *wider effects*. This takes into account the potential for environmental damage to have broader impacts, on wildlife, further afield, or with delayed effect, rather than just on the immediate community at that present moment.

The advice for policymakers section describes the principle as placing the responsibility for managing environmental damage on the polluter or the source of environmental harm. However, in our view and in the context of the environmental principles, the EPPS should place the initial responsibility for harm that will or may result from a policy decision on the decision-maker. If they are contemplating a policy that could cause unavoidable harm even after considering prevention measures, we suggest the EPPS should highlight their responsibility to consider how the harm could be rectified when and where it occurs. That might then best be done as part of the decision on the resulting policy by placing the onus on the person who is the polluter or otherwise causing the harm under the policy once implemented.

The advice for policymakers also refers twice to policymakers *preventing* pollution. It may be clearer to modify these references to avoid confusion with the earlier discussion of the prevention principle.

The example provided refers to the Waste Management Strategy. While recycling rates may have gone up, our understanding is that use of virgin and non-virgin materials is much higher than the desired levels at present, so we suggest this may not be the best example of a strategy that in fact realised the goal of rectification at the source.¹⁰ This may depend in part on what the particular 'source' of

¹⁰ The [Circularity Gap Report](#), commissioned and published by the Department for the Economy as part of the draft Circular Economy Strategy work, characterises Northern Ireland consumption as 'far surpassing the global average.'

environmental harm at which rectification has happened is considered to be in this case. It would help to clarify this.

Recommendation 14: In relation to the rectification principle we recommend: a) strengthening the text by more clearly articulating the goal of rectification at source; b) highlighting the responsibility of the decision-maker in relation to harm that will or may result from a policy decision; and c) considering replacing or clarifying the example of the waste management strategy to ensure it provides an appropriate illustration, being clear what harm has been rectified and from what source.

Polluter pays principle

We suggest that the description of the polluter pays principle could be improved by broadening the definition to include pollution prevention, as well as control and remediation. For instance, where someone must take action to prevent harm that they would otherwise cause, or to rectify it at source, it would be appropriate for them, rather than wider society, to bear the associated costs.

Commonly this principle is also extended to other forms of damage beyond what is classically considered pollution. 'Pollution' is usually taken to mean adding something to the environment that harms it. This is usually a physical material, noise, or light. But other forms of harm could consist of habitat or species loss, for example. Thus, a wider interpretation of the principle would include that the person seeking to undertake an action that would harm the environment (whether through pollution or something else), should bear the costs of action to prevent, mitigate, remediate, or compensate for that harm.

We note that the two approaches listed as associated with the principle (command and control, and market) are not exhaustive. There could also be other mechanisms such as licence or permit fees, cap and trade schemes, and user fees for activities that harm the environment. You may wish to clarify this.

In the advice for policymakers, we believe that the second step after considering the potential for environmental damage should be to analyse who the polluter is, or who the polluter *would be* under the policy options under consideration. The range of potential polluters could be clear, like the stated ones in respect of litter and chewing gum. However, it would be useful to address the situations in which a policy has potential for environmental impacts with less obvious individual polluters. The producers of the materials could arguably also be the polluters, not just the individuals who directly pollute.

The statement identifies that policymakers should be assessing whether the polluter has the capability to pay, or whether the costs can be distributed across a sector. In our view, there are a broader range of issues to be considered. Among these would be the practicality and fairness of identifying who the polluters are; the practicality of assessing the costs; the ability of the polluter to bear some or all of these costs; impacts on others such as consumers and supply chains; the existence of a practical mechanism to make the polluter pay; and whether the funds collected are used to benefit the environment or for some other purpose.

The draft EPPS suggests that remediation and compensatory measures can be used interchangeably. In our view they are different, with remediation involving restoring the environmental features that have been harmed (e.g. removing pollution, restoring

a harmed habitat, etc.), and compensation involving making provision for environmental improvement at one location to make up for harm at another (e.g. creating replacement habitat). It would be clearer if these were defined, with examples given.

The example of the Environmental Liability Regulations¹¹ used to illustrate this principle could be strengthened by expounding on the actual impact of the regulations, how they have made the polluter pay, and for what. It may be considered an example more closely related to the prevention and rectification at source principles. There may be better examples where policies associated with authorising activities that may harm the environment have been accompanied by licence or permit fees covering regulatory costs as well as provision for financial penalties or corrective action in the event of non-compliance.

Recommendation 15: In relation to the polluter pays principle we recommend: a) broadening the definition to include paying to prevent pollution or other types of environmental harm as well as control and remediation; b) reflecting the wider range of possible approaches, polluters and other issues to be considered in applying this principle; c) clarifying the distinction between remediation and compensation; and d) considering replacing or clarifying the example of the environmental liability regulations to ensure it provides an appropriate illustration of this principle.

Precautionary principle

In our view, this principle is about leaning towards acting in favour of environmental protection and improvement, and taking a precautionary approach that avoids measures presenting credible threats around which there is still scientific uncertainty. That is on the basis that if the lack of full scientific certainty were used as a blocker to postpone cost-effective measures, by the time that uncertainty is resolved more, and potentially irreversible, environmental harm might have occurred. The principle aims at avoiding potential problems by acting with caution, and is therefore a rational response to uncertainties in scientific evidence and potential consequences of action or inaction on environmental issues.¹²

It may be helpful to define what your intended meaning of 'risk' is in the context used, and to explain how it relates to other terms sometimes used in discussion of the precautionary principle such as 'threat' or 'hazard.' In some usages 'risk' is taken to mean the likelihood (i.e. probability) of a threat or hazard arising.¹³ In others it is taken as more synonymous with threat or hazard, or represents a combination of the different terms.

We suggest that the description of the precautionary principle should focus on the key issue relating to scientific uncertainty. That uncertainty could be around the *intrinsic threat or hazard* presented by something (e.g. does or could substance X have negative effects on the health of people or the environment exposed to it?), or

¹¹ The Environmental Liability (Prevention and Remediation) Regulations (Northern Ireland) 2009, No. 252.

¹² Royal Commission on Environmental Pollution, Twenty First Report: Setting Environmental Standards (Cm 4053), CY 1/21, 1998, p. 60, para. 4.44.

¹³ For example, air travel necessarily involves the threat or hazard of a possible plane crash, but the risk of that occurring on any particular flight is very low.

the *likelihood* of exposure through which that threat could materialise (e.g. will people or the environment be exposed to substance X through its intended use?).

We also advocate moving or removing the reference to economic costs of regulation, which we consider should be a separate consideration from the precautionary principle. The costs of regulation, or other costs, are not disconnected from the precautionary principle, since it is based on the premise that lack of full scientific certainty is not used as a blocker to postpone cost-effective measures. However, we suggest that it would be clearer to focus the discussion of the precautionary principle around scientific uncertainty while addressing cost issues elsewhere (for example in the discussion of proportionality).

In the advice for policymakers, we believe that the test for whether a precautionary approach should be deployed is if there are threats of serious or irreversible environmental damage. The principle comes into effect when there is a lack of full scientific *certainty*, not when there is a lack of evidence.

The definition of 'Best Available Techniques' (BAT) cited is the definition used for purposes of industrial pollution control. This has a particular meaning in a particular context, and is more about balancing the sectoral affordability and availability of industrial pollution prevention and control processes against their effectiveness. The precautionary principle has some relevance here, but we think it is not a major factor. In our view, the more appropriate standard in applying the precautionary principle would be 'Best Available Science.'

We consider that the example cited, the Strategic Planning Policy Statement, does not explicitly demonstrate the application of the precautionary principle. The emphasis on sustainable development, climate change mitigation and adaptation, and consideration of vulnerability to climate impacts align with principles of environmental protection and sustainable planning. However, the precautionary principle specifically pertains to situations where there is uncertainty about potential harm, and it calls for taking precautionary measures to prevent harm in the absence of conclusive evidence. The example does not explicitly address uncertain threats or the adoption or consideration of precautionary measures. You may therefore wish to consider other examples such as those involving the restriction of chemicals, pesticides or genetically modified organisms on a precautionary basis where there were credible threats of environmental harm.

Recommendation 16: In relation to the precautionary principle we recommend: a) focusing the discussion around scientific uncertainty and avoiding the potential for differences in understanding between risk and hazard; b) distinguishing this principle's focus from the separate, though related, issue of regulatory costs; and c) providing a clearer example of acting on a precautionary basis where there were credible threats of environmental harm.

8. Other points

The section on monitoring and reporting notes that the judiciary and the OEP may scrutinise the implementation of the principles. We suggest that it would be better to refer more generally to the obligation on authorities to justify their decisions and how they have complied with the law, which they may need to demonstrate to others to whom they are accountable, including the Northern Ireland Assembly and public.

The duty to have due regard does not apply to excluded areas of policy as specified in paragraph 8(4) of Schedule 2 to the Environment Act. We consider that it would also be helpful to clarify that whether or not the exclusion applies depends on what the policy is about, rather than its possible implications. For example, if a policy is about taxation, spending or the allocation of resources within government (e.g. allocation of departmental budgets) then it is excluded. If it is about something else, the duty to have due regard to the EPPS will apply, even though the policy in question may have *implications* in respect of taxation, spending or the allocation of resource. An example of this would be a decision to put a policy in place that necessarily will require a certain level of resource to implement.

The example provided in the section on exclusions to the EPPS, namely that the polluter pays principle cannot be applied to the allocation of overall departmental budgets, may therefore cause some confusion. As such, you may wish to restate or replace it.