



Office for
**Environmental
Protection**

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Baroness Kate Parminter
Chair, Environment and Climate Change Committee
House of Lords
London, SW1A 0PW

By email only.

08 June 2022

Dear Baroness Parminter

Further to correspondence with the Select Committee clerk, I am pleased to attach a note of the OEP's views on Government's draft Environmental Principles Policy Statement currently before Parliament for scrutiny.

The note provides some background information on the statement and offers some observations in light of our advice on the previous draft statement which Government published in March 2021.

I trust you will find this useful for your conversation with Minister Pow, to whom I am also copying this letter for information.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'G Stacey'.

Dame Glenys Stacey
Chair, OEP

cc. Minister Pow

Draft Environmental Principles Policy Statement (EPPS)

1. Timescale for scrutiny of the draft EPPS

From 12 May until 27 June (21 sitting days from laying of the draft EPPS).

2. Background

- a. Section 16 of the European Union (Withdrawal) Act 2018 placed a duty on the Secretary of State to publish a draft Bill within 6 months including a set of environmental principles, a duty to publish a “statement of policy in relation to the application and interpretation of those principles in connection with the making and development of policies by Ministers of the Crown” and a “duty which ensures that Ministers of the Crown must have regard, in circumstances provided for by or under the Bill, to the statement [of policy]”. This duty was addressed through publication of the draft Environment (Principles and Governance) Bill in December 2018.
- b. Following legislative passage and commencement, Sections 17-19 of the Environment Act 2021 place a duty on the Secretary of State to prepare a policy statement on environmental principles, explaining how they should be interpreted and proportionately applied by ministers in policymaking.
- c. The Government undertook a [consultation](#) on the draft EPPS from 10 March 2021 to 2 June 2021.
- d. As the Interim OEP, we received a [request for advice](#) on the draft EPPS from Minister Pow on 25 June 2021. We gave our [advice](#) on the draft EPPS on 2 July 2021 and published it on our [website](#) on 6 July 2021. We welcomed the statement and recommended that it be strengthened in certain areas to ensure that protecting and enhancing the environment are at the heart of policy-making across Government.
- e. The Government laid the [revised draft EPPS](#) before Parliament for scrutiny on 12 May 2022.
- f. The Government has published a [summary of the 216 responses received to the consultation](#) and its own response, as well as an [Explanatory Memorandum](#) on the revised draft EPPS.

3. Our advice in July 2021

We stated our strong support for Government's aim for the policy statement; to put the wellbeing of our natural environment at the heart of policy-making. We advised strengthening the draft statement in certain areas to enable it to fully embrace

Government's ambitions for the environment, as set out in the 25 Year Environment Plan and elsewhere. In particular:

- a. We recommended changing the structure to avoid the unintended consequences of policy-makers not applying the principles in cases where there could be environmental benefits (rather than only applying them to reduce environmental harm), or only applying them too late in policy development.
- b. We recommended a more ambitious tone and clearer direction to policy makers on applying the principles.
- c. We recommended changing the language from "environmental impacts" to "environmental effects", to make it clear that environmental benefits were just as relevant as harms.
- d. We recommended consistency in the degree of certainty needed for a policy-maker to consider an environmental effect or apply the principles. We advised that effects which have the *potential* to arise should be considered.
- e. We queried the restrictive approach to proportionality, which treated as disproportionate any consideration of environmental effects other than those which were likely to arise and be substantial.
- f. We queried the limited definition of the integration principle, which risked undermining the government's ambitions for joined-up policy-making.
- g. We queried the narrow approach to the precautionary principle and its unusual emphasis on innovation.

4. How our advice was used

We note below how the revised draft EPPS reflects our previous input, recognising that our role in this context is only to advise; the content of the final statement remains a matter for Government, informed by Parliamentary scrutiny.

Our advice on points a, b, c, d and f appears to have been followed in whole or in part:

- a. The structure of the draft EPPS has been changed to make it clearer that policy-makers should "use the principles iteratively from the outset and during all subsequent stages in policy development".
- b. The role of the statement has been made clearer: "to improve environmental protection and sustainable development". Its status and use have also been clarified: "The legal duty to have due regard to this policy statement applies to ministers when making policy."

We advised that the statement that the Secretary of State is satisfied that the policy statement will contribute to sustainable development and the improvement of environmental protection should go further to explain *how* the EPPS will do this. However, no change has been made to the wording on this issue and therefore this point remains unclear.

We consider that the tone, whilst improved from the consultation draft, still reflects a relatively limited degree of ambition. In contrast, for example, [MHCLG's National Planning Policy Framework \(NPPF\)](#) in places advocates for more ambitious environmental outcomes in (local) decision-making. We refer to section 15 of the NPPF in our advice. Paragraph 38, under “Decision Making”, also states:

Local planning authorities should approach decisions on proposed development in a positive and creative way. They should use the full range of planning tools available, including brownfield registers and permission in principle, and work proactively with applicants to secure developments that will improve the economic, social and environmental conditions of the area. Decision-makers at every level should seek to approve applications for sustainable development where possible.

This is a clear, directive and ambitious statement. The EPPS, by contrast, presents a more cautious approach to the role of the principles in protecting the natural environment. It still appears to place more emphasis on what it does *not* require of policy-makers than what it does. As we advised, this risks detracting from the Government's stated ambitions and could obscure the benefits of applying the environmental principles. We still consider that there is a risk policy-makers will find it easy to identify what the policy statement does not require of them but will be less certain of what it does require, or of the advantages to their policy-making from applying the environmental principles. This also emphasises the importance of implementation (discussed below).

- c. The language has been changed to refer to “environmental effects” rather than just “environmental harms”, and the definition has been updated to make it clear that effects could be positive or negative.
- d. The language has been made clearer and more consistent. The revised draft EPPS now more consistently states that “*potential* environmental effects” should be considered (emphasis added).
- e. See section 5 below.
- f. The integration principle is still defined as requiring that policy-makers “look for opportunities” to integrate environmental considerations into other policy

areas, rather than (as defined in all other places we are aware of) as a requirement “to integrate” environmental considerations. This relatively limited definition risks limiting the achievement of Government’s ambition. It also risks being out of alignment with the expression of the principle in international instruments to which the UK is committed, including the Rio Declaration, the UN Framework Convention on Climate Change, the Convention on Biological Diversity and the UK-EU Trade and Cooperation Agreement.

g. See paragraph 5 below.

5. Areas where our advice was not followed

On **point e (proportionality)**, under Section 19 of the Environment Act 2021, a minister must, when making policy, have “due regard” to the policy statement, but is not required to do or refrain from doing anything if there would be no significant environmental benefit or it “would be in any other way disproportionate to the environmental benefit”.

In its discussion of proportionality, the draft EPPS makes the following statement: “When considering the potential environmental effects of a policy option, and the possible changes to the policy, policymakers should take a proportionate approach. This will depend on the environmental effects of a policy and whether they are both a) likely to occur, and b) likely to have a significant effect”. We advised that this guidance goes further than Section 19 of the Environment Act and risks weakening the intent behind the principles.

We therefore proposed that the test should include situations where effects were possible (rather than likely), but with serious environmental consequences if they did occur.

The emphasis on situations where policy-makers could “apply the policy statement in a lighter-touch way, where appropriate and where the potential environmental effect is limited”, also suggests that, in many cases, it would be disproportionate to think about potential environmental effects.

In a different part of the draft EPPS (“Criteria for taking action”), the discussion of proportionality goes beyond considering the likelihood of environmental effects occurring and whether they are likely to be significant, and includes balancing social and economic considerations. Again, we suggest this goes further than Section 19 of the Environment Act, and risks undermining environmental protection.

On **point g (the precautionary principle)**, our advice was that the approach was too limited. The revised draft EPPS still states that: “The precautionary principle is applicable where there is plausible evidence of a risk that a particular policy could cause

serious or irreversible damage to the environment, alongside a lack of scientific certainty about the likelihood and severity of this damage.”

We have advised that this is not how the principle is usually understood and applied. This wording suggests that the principle is relevant only when there is scientific uncertainty over both the likelihood and the severity of environmental damage. It is usually understood to apply where there is a risk of serious or irreversible damage, in which case, as a precaution, the potentially damaging action or inaction should be avoided even if there is a lack of full scientific certainty.

We therefore consider that this interpretation creates a risk of allowing preventable environmental harm. For example, there may be a high degree of certainty that environmental harm would occur from adopting a particular policy but doubt as to just how severe such harm would be (or vice versa). In such cases, we think the precautionary principle's risk-based approach should apply to guide policy-makers in dealing with this uncertainty.

We consider that the principle is further weakened by the statement in the draft EPPS that: “in all cases, for the precautionary principle to apply, there must be sufficient evidence that the risk of serious or irreversible damage is plausible and real, and where choices are considered to prevent or reduce the environmental degradation in question, they should be cost-effective. This means the precautionary principle should not be applied speculatively and policymakers are not required to prove that a policy is without risk in order to proceed as planned.”

The precautionary principle is not mentioned in the section on “the Interaction between the principles”. Nor is it mentioned in relation to proportionality, despite the statement that “Policymakers are not expected to carry out a “deep-dive” assessment into all environmental effects, as these may not be known.” This is the sort of situation where the precautionary principle can protect the environment, until more is known.

Finally, while there has been some change to the wording, we continue to consider that the way innovation is linked with the precautionary principle risks diluting its purpose, or conflating the intention of the principle (dealing with uncertainty) with a different policy objective (promoting innovation). We previously advised, and still consider, that promoting innovation is not generally understood to be an integral part of the precautionary principle itself.

6. Implementation and monitoring

Implementation is key to the use of the principles. No matter how good the statement is, the policy will only be effective if it is applied effectively in practice. The extent to which this is achieved will require purposeful monitoring.

Our advice was that the previous draft policy statement lacked sufficiently detailed guidance to support policy-makers across Government to implement it thoroughly and consistently. We suggested that Defra should consider the appropriate level of guidance to be provided within or alongside the policy statement, including better integration with the natural capital guidance set out in the Green Book.

We also advised that Defra should consider how it will ensure the policy statement is embedded in the practice of wider Government decision-making and the governance arrangements in place to secure this. We noted that this might be, for example, via the functioning of cross-Government regulatory scrutiny and assessment mechanisms. We suggested that should include considering how to link the policy statement with Government's wider environmental goals and the natural capital approach.

The revised draft EPPS does not itself address these issues other than at a general level, for example by noting that the statement “should be read alongside other government documents such as national planning policy statements”. The mechanics of how the statement will be applied in practice, governed and overseen, and its effectiveness assessed, are not yet clear, therefore.

These matters do not necessarily need to be set out in the statement itself, but they will be critical to ensure its effectiveness. This will require cross-Government resourcing and commitment supported by tools, guidance and oversight from Defra. We consider that a well-developed approach to monitoring implementation will be particularly important, especially in the context of the timing for the application of the principles which we discuss below.

7. Timing

We do not yet know when the duty in the Environment Act for ministers to have due regard to the policy statement will be commenced. We understand that this may not be before summer 2023 at the earliest.

While we recognise the need for a transitional period before a duty applies in law, we suggest that this should be no longer than is necessary, and that in the interim the principles should be applied as a matter of practice in relation to significant changes to policy planned over this period. These include any legislation following the Green Paper on Nature Recovery and under the Levelling up and Regeneration Bill. Otherwise, there is a risk of important changes being made where the principles are not considered because the duty does not yet apply. This could mean missing the possibility to protect and improve the environment because of this transitional issue. We have made the same point on this matter in our recent advice to Government on the Nature Recovery Green Paper.

There is an interaction here with the Trade and Cooperation Agreement (TCA) between the UK and the EU. We understand that the international environmental principles in Article 393 of the TCA were incorporated into English law by Section 29 of the EU (Future Relationship) Act 2020 (EUFR Act) before the Environment Act came into force. Section 29 of the EUFR Act ensures that domestic law is read in conformity with the TCA and with such modifications as may be necessary to comply with it. The likely effect is that the TCA and the environmental principles set out in Article 393 co-exist with the provisions in the Environment Act, including the environmental principles.

Our view, therefore, is that ministers and officials in Defra and other departments should begin to have due regard to the EPPS during their policy development now, rather than waiting for the legal duty in the Environment Act to commence. This would deliver the practical benefit intended by the policy sooner rather than later as well as supporting implementation of the TCA and EUFR Act. It would also provide a further impetus for the development and evolution of the implementation and monitoring arrangements which we discuss above.