

Draft Environmental Principles Policy Statement for Northern Ireland – Consultation Version



30 September 2024

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Department of
**Agriculture, Environment
and Rural Affairs**

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INTRODUCTION

In February 2022 the Assembly approved the elements of the Environment Act 2021 (“the Act”) relating to Northern Ireland devolved matters, including a statutory duty on DAERA (“the Department”) to publish a policy statement on environmental principles, defined as: *“a statement explaining how the environmental principles should be interpreted and proportionately applied by: (a) Northern Ireland departments when making policy; and (b) Ministers of the Crown when making policy so far as relating to Northern Ireland.”* NI departments and UK Government Ministers, making policy for Northern Ireland, will have a statutory duty to have due regard to the statement.

The 5 environmental principles set out in the Act cover fundamental aspects of environmental protection but are not new – they have guided our environmental laws for many years as an integral part of the policy framework we operated under as members of the EU. Leaving the EU removed that framework in most environmental areas. The NI Assembly, by approving the relevant provisions of the Act, has agreed that these principles should provide a framework in domestic legislation for our environment. The policy statement will help guide policy makers across Northern Ireland Departments in developing measures to meet the Executive’s climate change, environmental and overarching Green Growth agendas. The new Northern Ireland Climate Change Act passed by the Assembly in 2022, sets challenging goals to reduce our greenhouse gas emissions. The Executive’s multi-decade draft Green Growth strategy promotes a shift to a low carbon society to improve people’s quality of life through green jobs and a clean environment. Our first Environmental Improvement Plan frames Northern Ireland’s response to our environmental challenges for the coming decades setting out our ambition and the pathway to achieving that vision under 6 strategic environmental outcomes:

1. Excellent air, water, land and neighbourhood quality;
2. Healthy and accessible environment and landscapes everyone can connect with and enjoy;
3. Thriving, resilient and connected nature and wildlife;
4. Sustainable production and consumption on land and at sea;
5. Zero waste and highly developed circular economy;
6. Fair contribution to UK net zero GHG emissions and improved climate resilience & adaptability.

Annual progress reports will be the key measure of what we have done to implement the EIP and whether our environment has, in fact, improved. The appropriate application of this policy statement across all policy areas will have a key role to play in supporting and driving that improvement.

We all have a responsibility in meeting these challenges and we all have a part to play in the protection and improvement of our local environment as we strive to preserve our planet for future generations.

BACKGROUND: AN OVERVIEW OF ENVIRONMENTAL PRINCIPLES

Since the 1970s, a range of environmental principles have been recognised internationally. These principles offer a framework for the protection for our natural world as well as guidance to judges and decision makers to give laws shape and meaning.

In 1992, the UK signed up to the Rio Declaration, which set out 27 principles to guide countries in future efforts to achieve sustainable development and aimed to link long term economic progress with environmental protection.

The principles included in this statement are also embedded in EU treaties. Article 191 of the Treaty on the Functioning of the European Union (TFEU) contains these 4 core environmental principles (in the order they appear):

- (a) the precautionary principle;
- (b) that preventive action should be taken;
- (c) that environmental damage should as a priority be rectified at source; and
- (d) the polluter should pay.

In addition, Article 11 of the TFEU includes the integration principle, which requires environmental protection measures to be integrated into the definition and implementation of all EU policies and activities.

The UK is also a signatory to a number of international agreements which embrace these principles. After withdrawal from the EU, the UK Government and the devolved administrations have all committed to ensuring these environmental principles will

continue to influence future domestic policy making. However, in order to achieve that a new framework in domestic law was required.

In November 2021, the Environment Bill received Royal Assent and formally became the **Environment Act 2021**. [Schedule 2](#) to the Act requires a policy statement on environmental principles to be published by the Department after scrutiny by the Northern Ireland Assembly. As per Schedule 2 to the Act, this statement is required to incorporate five core environmental principles (in the order set out in the Act):

- (a) the principle that environmental protection should be integrated into the making of policies;
- (b) the principle of preventative action to avert environmental damage;
- (c) the precautionary principle, so far as relating to the environment;
- (d) the principle that environmental damage should as a priority be rectified at source; and
- (e) the polluter pays principle.

THE PURPOSE OF THE POLICY STATEMENT

This statement will be used by NI departments and UK Government ministers when making policy decisions for Northern Ireland. In accordance with paragraph 6(2) of Schedule 2 to the Act, it explains how the principles should be interpreted and proportionately applied by relevant policymakers, with a view to ensuring they are equipped to meet their statutory duties, and with greater practical effect.

The desired outcomes of the policy statement are:

- policymakers are assisted to make policy that will contribute to the improvement of environmental protection and the achievement of sustainable development in Northern Ireland;
- policies that will support environmental improvement, or that will at least avoid or prevent environmental damage are promoted;
- where environmental damage cannot be avoided, its original cause is targeted and rectification of the damage at source favoured;
- the associated costs are allocated to those who cause pollution or other environmental damage or give rise to need for action to prevent or rectify it;

- policymakers favour acting in a precautionary manner to protect the environment in the absence of full scientific certainty where there are credible threats of serious or irreversible environmental damage; and
- that the above outcomes and wider environmental objectives prevail across the development of all government policy by ensuring the integration of environmental protection and sustainable development aims and requirements in all departments' policies and activities.

IMPROVEMENT OF ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT

Schedule 2 to the Act requires the Department to be satisfied that the policy statement, when it comes into effect, will contribute to the improvement of both environmental protection and sustainable development.

While “environmental protection” is defined in the Act (and elsewhere in this document), “sustainable development” is not. Sustainable development seeks to balance the 3 conceptual pillars of social inclusion, environmental protection and economic growth, although there is no single agreed definition. However, the original definition provided by the World Commission on Environment and Development’s *Brundtland Report*, ‘Our Common Future’¹ is:

“Development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.”

The global agenda for change formulated in that document was bolstered in 2015 by the adoption of 17 sustainable development goals clearly articulated in the UN document, ‘*Transforming Our World: The 2030 Agenda for Sustainable Development*’². The principles of sustainable development have been integrated into the work of all departments through the NI Executive’s draft Programme for Government and the NICS Outcomes Delivery Plan.

This policy statement sets out how ministers should interpret and proportionately apply the principles, so that they are used effectively to shape policy to protect the environment and promote sustainable development. This aligns with section 25 of the Northern Ireland (Miscellaneous Provisions) Act 2006, which places a statutory duty

¹ [The Brundtland Report: ‘Our Common Future’, 1987](#)

² [Transforming Our World: The 2030 Agenda for Sustainable Development](#)

on NI departments and district councils to promote the achievement of sustainable development in the exercise of their functions.

This document aims to empower ministers and those working on their behalf to think creatively and use environmental principles in an innovative and forward-thinking way. It does not seek to dictate a set formula for how environmental principles should be applied to policymaking.

The Department is confident that the guidance and measures included in the policy statement will contribute to both environmental protection and sustainable development.

UNDERSTANDING THE STATEMENT

In order to apply the statement, it is important to have an understanding of key definitions within the Act. Listed below are some of the key terms for policymakers to be aware of when applying the statement.

What does 'Natural Environment' mean?

All references to the environment in this statement relate to the 'Natural Environment' which is defined in the legislation as:

- plants, wild animals and other living organisms;
- their habitats;
- land (except buildings or other structures), air and water, and the natural systems, cycles and processes through which they interact.

What does 'Environmental Protection' mean?

This is defined in the Act as:

- protection of the natural environment from the effects of human activity;
- protection of people from the effects of human activity on the natural environment;
- maintenance, restoration or enhancement of the natural environment;
- monitoring, assessing, considering, advising or reporting on anything in the above paragraphs.

What is 'Environmental Impact'?

An environmental impact has been widely defined as any effect caused by a given activity on the environment, including human health and safety, flora, fauna, soil, air, water, climate, resulting from activities, products, or services, or the effect that the activities of people and businesses have on the environment. It is important to note that environmental impacts are not necessarily negative – they can be extremely positive. **This statement is not only about reducing or avoiding negative impacts – it is very much seeking to achieve positive impacts too.**

What is 'Policy'?

Considered as a broad concept, "...at its very simplest, **a policy is a position that is deliberately taken.** In government, the policy decision usually belongs to the responsible Minister, or to the Executive. **Public policy is the position in order to achieve a particular goal or objective. Sometimes that objective is to make things better, sometimes it is to stop things getting worse. Sometimes it is aspirational and long-term, sometimes it is very specific and achievable in a shorter timescale. Sometimes it is to fulfil a political commitment, sometimes it is to fulfil a legal obligation, sometimes it is to respond to an emerging situation.**"³

Paragraph 11 of Schedule 2 to the Act defines "policy" (for the purposes of the Schedule) as: "...[including] proposals for legislation but does not include an administrative decision taken in relation to a particular person or case (for example, a decision on an application for planning permission, funding or a licence, or a decision about regulatory enforcement)".

It is important to note that policy has vertical and horizontal components. So, for example, the NI Executive may be regarded as the highest point in the policy hierarchy and its decisions cascade down through Ministers to the appropriate level for delivery (i.e. vertical policymaking). However, within each level of the hierarchy there will be policy decisions to be made across the relevant department or departments, requiring consistency, coordination and collaboration to ensure appropriate policy integration. This is referred to as horizontal policymaking or, sometimes, "joined-up government".

³ [Making a difference: The NICS guide to making policy that works, p.2](#)

The duty to have due regard to this statement applies across all of these types of policymaking.

What is 'making policy'?

For the purposes of this statement "making policy" includes developing, adopting or revising policy.

DUE REGARD DUTY

Schedule 2 to the Act lays out the mechanism by which policymakers are to take account of the environmental principles policy statement.

This mechanism is the 'due regard' duty which states that when a UK Government minister or NI department is making policy for Northern Ireland they must have due regard to this statement. In the Act the term, 'have due regard to' is only used in respect of the policy statement, giving it an elevated status compared to the much more frequently used, 'have regard to'.

The duty to have due regard is to the principles policy statement rather than the individual principles but this does not lessen the importance of the principles themselves. The duty applies to all policy across NI government (not just environmental policy), subject to limited exemptions laid out in paragraph 8 of Schedule 2 to the Act (see Exclusions to the Policy on p10).

This policy statement should be read alongside other relevant government documents, such as the [Strategic Planning Policy Statement for NI \(where relevant\)](#), and it is important to note that, while the due regard duty is a statutory duty, it does not override other relevant international or statutory obligations.

What is Due Regard?

Having due regard is a significant legal duty, supported by ample case law, and is more onerous than the more common requirement in legislation to 'have regard'. In this context, to 'have due regard' means that in making policy, a body subject to the statutory duty must consciously consider the principles and guidance set out below, which have been established by case law. The most relevant legal authorities in this

area are the Brown case⁴ and the Bracking case⁵, both of which relate to the Public Sector Equality Duty⁶, which applies to a broader range of public authorities than this policy statement. While the Public Sector Equality Duty does not apply in NI (section 75 of the Northern Ireland Act 1998 is our equivalent), the case law remains relevant. The Equality Commission for NI has produced a helpful guide to the implementation of s.75, which includes relevant GB and NI case law.⁷

Paragraphs 90-96 of the judgement in the Brown case⁸ set out the following (paraphrased) principles for compliance with a due regard duty:

- the public authority decision maker must be aware of the duty to have "due regard" to the relevant matters;
- the duty must be fulfilled before and at the time when a particular policy is being considered;
- the duty must be "exercised in substance, with rigour, and with an open mind". It is not a question of "ticking boxes"; while there is no duty to make express reference to the regard paid to the relevant duty, reference to it and to the relevant criteria reduces the scope for argument;
- the duty is non-delegable, and
- is a continuing one;
- it is good practice for a decision maker to keep records demonstrating consideration of the duty.

In the case of Bracking, Lord Justice McCombe set out a summary of legal points related to a due regard duty established under 13 previous cases, including the Brown case. The additional points can be further summarised as follows:

- general regard to relevant issues is different from having specific regard, by way of a conscious approach to the statutory criteria;

⁴ R (Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158 paras 90-96. See: <http://www.bailii.org/ew/cases/EWHC/Admin/2008/3158.html>

⁵ R (aoa Bracking) v Secretary of State for Work and Pensions [2013] EWCA 1345

⁶ The Equality Act 2010, Part 11, Chapter 1

⁷ <https://www.equalityni.org/S75duties>

⁸ <https://www.bailii.org/ew/cases/EWCA/Civ/2013/1345.html>

- 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;
- the relevant duty is upon the Minister or other decision maker personally. 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;
- officials must not merely tell the decision-maker what they want to hear but must be 'rigorous in both enquiring and reporting';
- the public authority concerned will have to have due regard to the need to take steps to gather relevant information;
- an important evidential element in the demonstration of the discharge of the duty is the recording of the steps taken by the decision maker in seeking to meet the statutory requirements; and
- 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.

The Bracking Case

The Bracking case is an example of where a statutory 'due regard' duty applied –in the context of the Public Sector Equality Duty (PSED) – which requires public bodies to have due regard to the need to eliminate discrimination, advance equality of opportunity and foster good relations between different people when carrying out their activities.

The case was brought after a decision by the Minister for Disabled People to close the Independent Living Fund. In coming to this decision, the Minister had issued a public consultation and an equality impact assessment had been carried out. An application for Judicial Review of the Minister's decision was initially dismissed but that judgement was quashed by the Court of Appeal, which held that the Minister had failed to discharge their duty in relation to having due regard to the PSED.

The key issue leading the Court to this conclusion was that the Minister had failed to show that they had reviewed the necessary evidence to demonstrate they had discharged their duty in accordance with the Equality Act. Furthermore, it was

concluded that where the Minister had been given information to consider it did not provide a full picture of the situation, meaning that the Minister was unable to consider all of the appropriate facts in order to discharge their duty. This ruling highlighted the need to be able to provide evidence that the duty has been discharged.

It is worth noting that the decision to close the Independent Living Fund was reconsidered by a subsequent Minister, who again decided to close the fund. This decision was also challenged in the courts, who found in favour of the Minister as they were able to provide the necessary evidence of having properly discharged their due regard duty.

EXCLUSIONS TO THE POLICY

There are some exclusions to the application of the policy statement which are outlined in paragraph 8 of Schedule 2 to the Act:

- Taxation, spending or the allocation of resources within government. "The exemption for 'spending or the allocation of resources' refers to central spending decisions only."⁹ For example, principles such as 'polluter pays' cannot be applied to the allocation of overall departmental budgets. Individual policies that involve spending by Departments will still need to have due regard to the policy statement.
- The armed forces, defence or national security.

If the policy in question is only incidentally associated with the exclusions rather than specifically about one of them, the duty to have due regard to the EPPS will still apply.

PROPORTIONALITY

Proportionality is a general principle used to guide policymakers that has been a key component of EU law over the last few decades. Its basic premise is that action taken should not go beyond what is necessary to achieve the objective/aim of a policy and that competing interests in this regard should be carefully balanced.

The statutory duty on NI departments and UK Government ministers is to have due regard to the policy statement, although that is caveated by paragraph 8(3) of

⁹ The Report Stage (Second Sitting) of the Environment Bill for this Act in the House of Lords

Schedule 2 to the Act, which stipulates that, “*Nothing in this paragraph requires a Northern Ireland department or a Minister of the Crown to do anything (or refrain from doing anything) if doing it (or refraining from doing it) – (a) would have no significant environmental benefit, or (b) would be in any other way disproportionate to the environmental benefit*”. Therefore, policymakers also have an active role in determining what is a proportionate course of action – this does not, however, obviate the need to have due regard to the policy statement.

One of the challenges for the policymaker is to establish what the competing interests are, and how they should be weighted and prioritised. It is difficult to apply general rules in respect of proportionality – each case must be considered on its merits and particular circumstances. Determining a proportionate response should not be solely informed by an assessment of the likely cost of measures – a holistic assessment needs to be made – and the need to apply the principles proportionately should not, in itself, be used as a reason to demote the importance of environmental protection and sustainable development.

Demonstrating consideration of the environmental effects does not necessarily need to be an extensive process akin to an Environmental Impact Assessment. The level of research should be commensurate with the *likely* effect of the policy on the environment. This method allows the policymaker, in appropriate cases, to apply the statement in a lighter touch way. So, for example, there will be policies that it will be quite clear from the outset will have no negative or positive impact on the natural environment. In such cases the policymaker will effectively ‘screen out’ the policy and, providing they can provide evidence to justify that decision, no further assessment will be required. At the other end of the scale will be the large-scale projects captured by the Strategic Environmental Assessment regime. While the completion of an SEA does not in itself exempt a policy from the requirements to comply with this statement, it may well provide significant evidence of the policymaker having due regard to the policy statement. Between these two extremes there will be a wide range of policies where the level of consideration will be a matter of judgement on the part of the policymaker. In essence, as the potential for environmental effects increases, more robust consideration will be necessary.

It is important to note that where policymakers are relying on existing assessment regimes as evidence of compliance with the due regard duty, the focus of those assessments may be strictly on the need to avoid or reduce harm, rather than seeking opportunities for improvement.

IMPLEMENTATION AND RECORD-KEEPING

As discussed above, ensuring that the duty to have due regard to the policy statement is properly implemented and, more importantly, that supporting evidence can be provided, is key to ensuring that policymakers meet their statutory duties and effectively apply the statement and its principles.

It is difficult, and perhaps even counter-productive, to be too prescriptive about how the due regard duty should be discharged and evidence of doing so presented, but there are some fundamental issues that should be addressed:

- staff responsible for developing policy should be aware of and understand this policy statement and the duty to have due regard to it;
- departments must have effective processes to have due regard to the EPPS, on an iterative basis, from the earliest stage in the policy cycle;
- staff must have access to the relevant resources and information needed to properly consider the principles;
- information must be recorded and retained as appropriate to be able to demonstrate how the policy statement has been applied; and
- it must be recognised that consideration of the principles for individual policies sits within wider departmental frameworks of governance, oversight and assurance.

All of the above processes and mechanisms should be as transparent as practicable and provide an appropriate audit trail.

While it will be for NI Departments and Ministers of the Crown to determine how they should record the substance, scope and timing of the consideration given to the policy statement, and the actions taken as a result, the Department will provide policymakers

with a template and additional guidance on completion. This will provide an opportunity for consistency of approach across business areas and departments.

THE ENVIRONMENTAL PRINCIPLES

Integration Principle

Description

This principle can be defined as ensuring environmental protection requirements are integrated into Departments' policies and activities, with a view to promoting sustainable development. In addition to its inclusion in the Rio Declaration of 1992, this principle is enshrined in Article 11 of the TFEU and applies to not only environmental policy but to all policies and activities.

The integration principle is a founding principle that: (a) establishes a means by which environmental protection and sustainable development can be promoted across all relevant policy areas; and (b) allows a holistic approach to applying the other principles below, either individually or in combination.

Advice for policymakers

The scope of this principle is wide ranging and should be applied at an early stage to every policy area where there is a potential impact on the environment, positive or negative. The application of this principle across a range of policy sectors should allow for a more cohesive approach which promotes the ethos of environmental protection.

Policymakers should, as a matter of best practice, think proactively, creatively and innovatively about how their policy and its implementation can contribute to environmental protection and sustainable development. This should be considered not only in the context of minimising negative impacts but also maximising positive impacts. The integration principle should be applied in a holistic manner so that the potential environmental impacts of policies are weighed against the overall purpose of the policy and potential economic and social impacts.

Prevention Principle

Description

This principle concentrates on anticipating and preventing any potential environmental harm rather than reacting to any damage caused by unregulated action. While prevention rather than cure is the ideal, there will be circumstances where considering the rectification at source principle and/or the polluter pays principle simultaneously will be entirely appropriate and, indeed, beneficial.

The prevention principle is about adopting an approach of promoting sustainable, environmentally friendly policies as early as possible in the policy cycle. This is not only environmentally sound but, in many cases, will also be the most economically beneficial approach. While the actions that apply the prevention principle should normally be taken in preference to those that would allow harm to occur and then seek to rectify the damage, that will not always be possible. However, even where environmental damage has already occurred, the prevention principle may still be applied to prevent further damage within a specific area and/or to prevent its further spread.

Advice for policymakers

The policymaker's starting point should be to consider if the development of a specific policy could create an impact that should be prevented. The policymaker should then assess their policy goals alongside how the policy can contribute to protecting the environment or promoting sustainable development. This is the most effective deployment of the principle itself. Moreover, the policymaker needs to examine and understand the potential for environmental damage and/or improvement. Where environmental damage has actually occurred, the policymaker may still apply the principle either in isolation or with other principles to prevent further damage from occurring.

When creating policies, it is important to consider the suitability of the principle and the environmental impact. It is the sustainability of the prospective policy design that needs to be considered and how the implementation of environmental protection can be integrated at an early stage. It may not always be possible to totally exclude the

possibility of some environmental damage – the overall benefit to society has to be factored into the decision-making.

Scientific evidence should be considered when assessing whether environmental damage has taken place or may take place, either directly or indirectly, together with factors such as the scale, geographical extent, and potential longevity of damage. In this case the precautionary principle may also need to be considered. It may be necessary to modify the policy as a result of these findings (or even abandon the policy altogether), but those decisions can only be taken after careful consideration of all of the relevant facts and expert advice.

Precautionary Principle

Description

The precautionary principle is designed to assist with decision-making where there is scientific uncertainty and is a core principle of environmental law. It requires that “...*where there are threats of serious [or] irreversible environmental damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation*”¹⁰. A precautionary approach captures the idea that regulatory intervention or the modification of a policy may be necessary if there is the potential to cause harm to the environment, even if the supporting evidence is incomplete or speculative and the economic costs of regulation are high.

In essence, the precautionary principle is a risk management tool that supports policymakers where there is a plausible risk that a proposed policy could cause serious or irreversible damage to the environment and there is limited scientific evidence in respect of its likelihood and severity. In this context ‘risk’ means the combination of the likelihood of occurrence and the impact of such damage.

The key focus should be on the level of scientific uncertainty, whether that relates to the intrinsic threat (e.g. could a substance have negative effects on people or the environment?) or the likelihood of occurrence (e.g. will people or the environment be exposed to the substance through its intended use).

¹⁰ [Environment Act Explanatory Note page 153](#)

Advice for policymakers

For policymakers the precautionary principle can play an important role in addressing multiple layers of uncertainty. It should be deployed when there is a threat of serious or irreversible damage to the environment, and where there is a lack of available scientific certainty regarding its seriousness and likelihood.

As with all risk management approaches, it is implicit that for any given situation there is an acceptable level of risk, but that level is not static and will vary according to the degree of uncertainty that serious damage will occur. Put another way, the greater the risk of the damage being serious, the less certainty the policymaker requires to decide to: not proceed with the policy; modify the policy; or impose regulatory measures. In such cases the priority should be to prevent environmental damage.

It is important to try to identify the level of threat posed to the environment by the implementation of the policy. However, when the level of threat cannot be identified or is uncertain this should not hinder the policymaker from adopting a precautionary stance if the likelihood is that serious harm may be inflicted on the environment.

Where the policymaker has identified a potentially serious risk to the environment, a scientific analysis should be carried out to assess the level of threat associated with the implementation of the policy. This scientific analysis should be robust (using the best available science – i.e. the most reliable scientific data available and the most recent results of international research). After this material has been collated, all relevant parties should engage and discuss the process of integrating precautionary measures into the policy.

The principle should be applied in a holistic manner – it is not enough for the policymaker to simply rely on the fact that a scientific risk evaluation has been carried out – ultimately, the policymaker needs to consider the data provided and weigh this against other factors such as potential social and economic effects.

Ultimately it will be for the policymaker to balance all of the relevant social, economic and environmental factors when deciding on the appropriate level of caution to be employed in the policy design and implementation processes.

Rectification at Source Principle

Description

The principle that environmental damage should, as a priority, be rectified at source: Environmental damage should be rectified by targeting its original cause and taking preventive action at source. This principle works closely with the prevention principle to ensure damage to the environment is tackled when (and where) it occurs so that it does not have a long-term environmental impact on the local community and biodiversity, spread further afield or have a delayed effect.

Advice for policymakers

This principle places the initial responsibility for harm that will or may result from a policy on the decision-maker. The policymaker when applying the principle should first seek to prevent pollution rather than attempting to shift it downstream in the process where it may be less visible. This encourages processes that are inherently clean rather than approaches which treat the problem as or after it occurs. However, where the avoidance of all harm is not possible, responsibility for managing environmental damage should rest with the polluter or the source of environmental harm.

The policymaker needs to have an understanding of where the potential environmental damage is originating from and whether this has any transboundary issues. It is important to recognise that it may not always be possible to prevent environmental damage completely and in this scenario the approach should be to minimise the potential impact as much as possible. Where pollution or other potential environmental damage are unavoidable, consideration should be given to the application of control and remediation measures at the earliest practicable point in the relevant process. Where relevant, this should be done in tandem with the polluter pays principle to ensure that those causing pollution/damage are made amenable for the costs of applying such measures.

Polluter Pays Principle

Description

This principle essentially means that the costs of preventing, controlling and remediating pollution or other environmental damage should be borne by those who

cause it rather than those suffering from the effects of environmental damage, or the community at large.

There are typically two approaches which are associated with the principle: command and control; and market approach. Firstly, the command-and-control approach includes performance and technology standards, such as environmental regulations in the production of a given polluting technology. The market-based approach and its instruments include fines, charges or ecotaxes, an example of which is the carrier bag levy, and also licence or permit fees, caps and trading schemes.

Advice for policymakers

The policymaker first of all needs to consider the potential for environmental damage to occur and what the effect of this damage is likely to be.

The next step should be to analyse who the polluter is or could be, if the policy were to proceed. Are they a group or an individual? Polluters range from large industrial companies (sewage overflows, chemical spills and releases of noxious fumes and odours etc.), through agricultural operations (slurry spills and run-off into waterways etc.), to individuals dropping litter, chewing gum etc. The things the policymaker should be assessing in this regard are: the practicality and fairness of identifying the polluters; the practicality of assessing the costs; the ability of the polluter to pay some or all of the relevant costs; if it is a group or sector, whether these costs can be distributed across that sector or specifically apportioned; 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.

It should then be considered what mechanisms or cost controls can be put into place to alleviate the effects of the environmental damage. When considering this, the policymaker has to weigh up the financial implications as well the environmental damage and apply this proportionately.

Where applicable, the policymaker needs to determine what is an appropriate method of payment, whether this is through fines, civil sanctions or enforcing charges and whether that method will act as an incentive or disincentive to environmental damage. Consideration should also be given to what should happen if the polluter can't be

identified, does not have the necessary resources, or has gone out of business – for example, in some cases it may be appropriate to impose a levy on businesses to provide a fund to carry out remediation, or to consider placing a statutory charge on land or assets.

The objective of remediation is to provide the same level of natural resources or services as would have existed if the damage had not occurred. There are 3 types of remediation defined in the Environmental Liability (Prevention and Remediation) Regulations (NI) 2009: primary; complementary; and compensatory. Primary remediation is any remedial measure which returns the damaged natural resources or impaired services to, or towards, the state that would have existed if the damage had not occurred. Complementary remediation is any remedial measure taken in relation to natural resources or services to compensate for the fact that primary remediation does not result in fully restoring the damaged natural resources or impaired services to the state that would have existed if the damage had not occurred. Compensatory remediation is intended to compensate for interim losses of natural resources or services that occur from the date of damage until remediation has achieved its objective (i.e. it does not refer to financial compensation, which is a separate issue). The policy maker should exercise their discretion when determining the most appropriate remedy, or combination of remedies, that will promote environmental protection and restoration.

GENERAL APPLICATION OF THE PRINCIPLES

Advice to Policymakers

From the outset of policy development, policymakers should be aware of their statutory duty to have due regard to the environmental principles policy statement and, where practicable, build in appropriate protections or enhancements throughout the policymaking process. This process does not necessarily involve an extensive exercise of collecting data/information. Information is provided in the next section as to how the policy maker can show compliance with the duty. More guidance on policy development and implementation is available through the Green Book.¹¹

¹¹ [The Green Book \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

There will be other factors that policymakers need to take into consideration, such as other existing statutory obligations and other relevant matters – e.g. the balancing of economic or social considerations, or the advancement of innovative technologies where the environmental impact has not yet been fully assessed.

With regard to the application of new technologies and innovation, the proper implementation of the due regard duty does not imply any positive or negative bias. This policy statement is neutral on the matter, but **it is essential that the implications of introducing new technology are robustly considered in the context of the 5 principles** and that appropriate evidence of such considerations can be produced as required.

While it is impossible to cover all potential scenarios in this policy statement, some of the actions that might be taken as a result of considering the principles include:

- **the amendment of existing policy options or the inclusion of additional options during the initial policy design phase;**
- **reframing the problem the policy is intended to solve or the details regarding policy options and their implementation;**
- **the specific inclusion of one or more of the principles in legislation or guidance,** particularly where principles are to be an integral part of the decision-making or policy implementation process;
- **the postponement of a policy until sufficient evidence is obtained** to support decisions – e.g. applying the precautionary principle may indicate a need to further explore the potential for environmental damage.

How the Principles can be considered together

Principles can and should be considered together and this is likely to be the most effective approach for environmental protection and sustainable development. There are **common threads** between each of the principles and there will be situations where the policymaker deems it appropriate to apply a combination of some or all of the principles when considering policy design and implementation. For example, the polluter pays and rectification at source are two principles which can often be effectively deployed together to maximise environment protection by firstly tackling and minimising the environmental impact and then reinforcing positive habits through

the polluter pays principle. However, it should be recognised that while consideration of some of the principles will be appropriate to all relevant policy decisions, there will be circumstances that do not lend themselves to the application of specific principles.

There is no set order in which the principles should be considered, and policymakers are encouraged to deploy the principles in a holistic and proportionate manner that maximizes environmental protection as far as that is practicable. What is particularly important is that the principles should be considered from the outset of the policymaking process and reviewed as the policy develops before any substantive decisions have been taken. While there is no strict hierarchy in applying the principles, there will be obvious situations where it will be appropriate to apply certain principles at certain times – e.g. deploying the prevention principle before the rectification at source principle, given that its aim is to prevent environmental damage from occurring at all.

OTHER RELEVANT POLICY CONSIDERATIONS

Policy makers will always have to consider other evolving policy and initiatives. It would be impossible within this document to predict all future policy development and initiatives but, at the time of writing this document, examples may include any test to be introduced under the Green Growth strategy and the just transition principle set out in s.30(3) of the Climate Change Act (NI) 2022. It is the responsibility of policy makers to consider evolving and new policy, and to apply the appropriate weighting regarding environmental effects. Typically, such policy initiatives will relate to specific sectors or policy areas, which may give rise to potential policy tensions. It is important to note that the due regard duty encourages such considerations, but it may also be necessary for policy makers to seek appropriate legal advice.

MONITORING AND REPORTING

As mentioned previously, the policymaker is required to have due regard to this principles statement. Monitoring and reporting need not be an extensive exercise of data and information collection. However, the exercise should be proportionate and fit for purpose for the environmental implications being addressed. One way of showing that the requirement has been fulfilled is for the policymaker to record the consideration given to the policy statement in respect of the relevant policy decisions, along the lines of an Equality Impact Assessment or Rural Needs Assessment. The

Department does not intend to prescribe the content of such a record but will provide a 'toolkit' for policymakers, including a recording template, and will be able to provide advice to other departments to assist them in meeting their statutory obligations. It is important for policymakers to note that they may be required to provide evidence to those to whom they are accountable, including the NI Assembly and the public that their statutory duties have been met. The Department will monitor its own compliance with the statutory duty and will report through normal business planning processes. It is recommended that all departments put their own monitoring and reporting processes in place.

WINDSOR FRAMEWORK / PROTOCOL ON IRELAND/NORTHERN IRELAND

Annex 2 & 4 to the Protocol, now superseded by the Windsor Framework, set out some environmental areas in which Northern Ireland is required to remain aligned to EU laws. Policy in these areas was developed within the framework of environmental principles contained in the TFEU. While it may seem reasonable to assume that the implementation of EU law listed in the Annexes to the Protocol would necessarily mean that the principles had been adhered to, policymakers should note that there is no exception in the Act to the requirement to fulfil the due regard duty when making policies introduced in the implementation of the Windsor Framework in Northern Ireland – e.g. NI legislation transposing a Directive listed in the Annexes. While this could potentially lead to some difficulties, for example if there was significant divergence between EU and NI requirements on environmental principles, that is not currently the case. Policymakers are advised to consider all policy areas captured by the Windsor Framework in the context of both the relevant EU policy *and* the environmental principles policy statement, and to seek specialised legal advice where necessary.

Annex A

Consultation Questions on the Environmental Principles Policy Statement

1. Do you believe the Introduction, Background and Purpose sections give the reader a good understanding of the aims and objectives of the EPPS?
2. Do you believe the importance of environmental protection and sustainable development is communicated adequately within the EPPS?
3. Is there enough information provided on the due regard duty to effectively assist policy makers to comply with the statement?
4. Do you believe the descriptions of the 5 principles and advice for policy makers give adequate assistance to policymakers on how the principles should be applied?
5. Departments will be required to monitor their compliance of the EPPS – do you believe the guidance given in the 'Monitoring and Reporting' section is sufficient?
6. Do you have any other comments on the draft policy statement which are not covered by the previous questions?

The consultation will run for a 10-week period. Questions should be answered via the Citizen Space platform by completing the online survey at: <https://consultations2.nidirect.gov.uk/daera/draft-environmental-principles-statement>