

Consultation on the draft Policy Statement on Environmental Principles

ClientEarth has contributed to and supports the consultation response submitted by Greener UK, a coalition of 12 major environmental organisations with a combined public membership of over 8 million. In addition to the points raised in Greener UK's consultation response, ClientEarth would like to draw the government's attention to the points raised in this response.

The principles policy statement and the government's stated ambitions

A robust and effective policy statement is vital in delivering the government's stated ambition to be the first generation to leave the environment in a better state than that in which it was found and achieving the UK's international obligations, such as the Sustainable Development Goals and the Paris Agreement. Regrettably, the draft policy statement falls short of this ambition by failing to place "environmental considerations at the heart of policymaking" and instead only pays lip service to this aim. In reality, the policy statement fails to properly direct decision-makers and creates a system that places the environment below economic and other considerations. It fails to recognise that environmental standards must go hand-in-hand with economic considerations, and that high environmental standards are key to long-term economic resilience.

The first page of the statement must provide a clear and unambiguous direction to policymakers that the policy statement should be read in accordance with the objectives of achieving a high level of environmental protection and significant environmental improvement. In particular, the policy statement should acknowledge that Ministers will seek to ensure a high level of environmental protection and that there is a presumption that environmental protection will not be reduced, but rather enhanced.

This would also be an appropriate area to integrate presumptions into the policy statement (i.e. a presumption in favour of environmental enhancement). For example, chapter 13.2 of the Code of Practice on Services, Public Functions and Associations contains the presumption that "discrimination because of the protected characteristics is unlawful unless any exception applies and any exception to the prohibition of discrimination should generally be interpreted restrictively". A similar presumption for the policy statement would clearly set out to policymakers the spirit in which the policy statement is to be applied.

Finally, the approach taken to proportionality in the policy statement undermines the value of this principle. The proportionality principle aims at striking a fair balance between competing interests. It ensures that where there are a number of ways to achieve an objective, the least onerous one should be taken. However, the draft statement notes that "when considering the environmental impact of a policy, policy makers also need to take a proportionate approach. The environmental effects that should be considered are those which are both a) likely to occur, and b) likely to have a substantial impact." This wording suggests that a very high threshold of harm to the environment must be established, making it easy for policy makers to dilute or disregard the principles in a wide range of circumstances. In order to support the government's aim to leave the environment in a better state than that in which it was found, the word "substantial" should be replaced with the words "not negligible".

The integration principle

The integration principle provides that environmental protection requirements must be integrated into the definition and implementation of policies and activities. Effective application of the principle would ensure that environmental interests are properly considered in a range of policy areas.

However, the policy statement wholly undermines the application of the integration principle and the professionalism of policy makers by stating that “in applying the integration principle, policy-makers should [...] be mindful of unintended consequences, such as adopting inappropriate or ineffective policies just for the sake of demonstrating integration.” Good policymakers will apply the integration principle appropriately by effectively integrating environmental considerations into the earliest stage of policymaking.

In order to deliver on the government’s ambitions for world-leading environmental protection, this sentence should be removed. The statement should instead consider how the principles will be integrated vertically into different levels of government, including at the local level. The principle could also be used to cover concepts such as integrated pollution control, so that pollutants are dealt with in an integrated manner, rather than being regulated separately in relation to air, water and land. This principle could also be expanded upon to include integration of policy instruments so that different environmental policy instruments, including, for example, regulatory and fiscal instruments, are aligned.

Making these changes would help deliver the government’s intention (set out in both section 16(5) of the Environment Bill and the associated explanatory notes) that environmental protection is integrated into the making of policies.

The prevention principle

The prevention principle provides that preventive action should be taken to avert environmental damage.

However, the draft statement appears to widen the application of the principle to reduction or mitigation of environmental harm in addition to the prevention of it. This unduly wide interpretation risks policymakers assuming that a degree of harm is inevitable. Indeed, the statement notes that “the proportionality requirement means that where the impacts can be successfully mitigated, this may be an appropriate tool.”

The policy statement should explicitly state that the principal aim of the prevention principle is to avoid the harm occurring in the first place and that it is relevant to both pollution sources and points of impact.

We suggest that the words “or to contain existing damage” are deleted from this section, as well as references to the “mitigation” of environmental harm to ensure that environmental damage is effectively prevented before it happens. This would ensure that the policy statement helps achieve the government’s international legal commitments and its wider aim to protect the environment.

The rectification at source principle

The rectification at source principle provides that environmental damage should as a priority be rectified by targeting its original cause and taking preventive action at source. This principle is of particular importance for issues such as land contamination and water pollution.

However, the policy statement does not recognise that while this principle can help to mitigate the impacts of harms that cannot be prevented, it is also a tool to change behaviour and support innovation to make sure those bearing most responsibility for harm take or support preventative action.

The policy statement should widen policymakers’ attention to consider not merely the original source of the damage, but also wider clean-up implications. It should also recognise the ways in which the principle can be used to change behaviour to avoid environmental harm in the first place. Doing this would ensure that the policy statement is as effective as possible in delivering the government’s aim for the environment to be at the heart of policymaking.

The polluter pays principle

The polluter pays principle provides that the costs of pollution control and remediation should be borne by those who cause pollution rather than the community at large.

We welcome the recognition in the statement that consumers can be considered polluters as well as producers. We suggest that to ensure that the polluter pays principle is applied as effectively as possible, the statement should include different examples to highlight where both producers and consumers can be considered polluters and how the principle should be applied in these circumstances.

The precautionary principle

The precautionary principle is a central component of good environmental law and sensible risk management. It aims to prevent a harm before it comes into existence and provides that when there is a risk of harm, we should act with care and caution. It should be applied in times when there is scientific uncertainty about the potential risks of an activity or substance.

However, the policy statement uses a number of unnecessary references to “cost effectiveness” in its description of the precautionary principle. It also undermines precaution through its approach on innovation. Properly applied, the precautionary principle assures that proper weight is given to environmental risks and concerns and is not a means to deter innovation, rather it could encourage innovative ways to avoid or reduce harm. This risks undermining the effective application of the environmental principles.

In addition, the draft statement uses the Rio description of the precautionary principle. This could be far more ambitious. Other interpretations of the precautionary principle embrace the idea that the proponent of an activity, not the public, should bear the burden of proof that the harm can be prevented or mitigated.

In order for the policy statement to deliver on the government’s aims, the precautionary principle should be applied in a strong, coherent and systematic way across decision-making that allows for potential environmental harms to be avoided when we have limited understanding of risks. In particular, the best available science should have a proper role in decision-making so that it is used to inform the development of law and policy and how it is interpreted. Innovation should not be used as an excuse to weaken the application of the precautionary principle, and in doing so, risk the effectiveness of the policy statement in achieving the government’s aims to leave the environment in a better state than that in which it was found.

Consultation questions

Question 5. Do you think the overview section provides an adequate foundation for policy makers to apply the environmental principles in policy making?

No, for the reasons explained above.

Question 6. Do you think step one allows policy makers to correctly assess the potential environmental effects of their policy?

No. The assessment and management of environmental effects should be an integral part of policy design and development, not a belated assessment of environmental impacts. A policy maker should ask what a good policy would look like and then decide the most effective way to achieve that.

Early and consistent application of the principles across all government policy would help achieve better environmental outcomes, avoid uncertainty and reduce the burden on the public purse.

Question 7. Do you think step one ensures that policy making will address the most important environmental effects?

No, for the reasons stated above and because the potential for environmental enhancement is not given enough emphasis in the draft statement.

We endorse Greener UK's suggested changes:

- Add a 'step 0' around considering environmental aims together with other departmental aims and anticipating where a policy might intersect with the principles.
- Amend "It is the responsibility of Ministers, or those acting on their behalf, to assess whether a policy will have an environmental impact" to refer to a "potential area of policy development" and include explicit reference to doing this at the earliest stages of policy development.
- Proportionality should be moved out of step 1 and put further down the process, and references incorporated to proportionality to support additional environmental action, in line with comments above.
- The line "the environmental effects that should be considered are those which are both a) likely to occur, and b) likely to have a substantial impact." should be amended to reflect more clearly that proportionality should be in action/response, not in consideration of which impacts require consideration.

Question 8. Will step two assist policy makers in selecting the appropriate environmental principles?

No.

The definition of the prevention principle should be changed to emphasise the primacy of prevention.

Question 9. Do you think step three provides a robust and sufficient framework for the application of each individual environmental principle?

No, because the draft statement has opted for a lowest common denominator approach in order to avoid imposing "disproportionate" impacts on policy makers. Instead, step three should be clearer that the policy statement requires a broad approach to be applied in all policy making and that the principles must be actively interpreted at the outset.

Question 10. Do you think the process for applying the policy statement (the three steps) provides a robust and sufficient framework for the application of the environmental principles as a whole?

No. We are particularly concerned by the disproportionate approach to proportionality and the unambitious descriptions of the principles.

The draft statement will lead to uneven application of the principles between departments and successive governments. The flexibility it attempts to embed therefore risks increasing uncertainty and unfairness.

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ClientEarth is an environmental law charity, a company limited by guarantee, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE, a registered international non-profit organisation in Belgium, ClientEarth AISBL, enterprise number 0714.925.038, a registered company in Germany, ClientEarth gGmbH, HRB 202487 B, a registered non-profit organisation in Luxembourg, ClientEarth ASBL, registered number F11366, a registered foundation in Poland, Fundacja ClientEarth Poland, KRS 0000364218, NIP 701025 4208, a registered 501(c)(3) organisation in the US, ClientEarth US, EIN 81-0722756, a registered subsidiary in China, ClientEarth Beijing Representative Office, Registration No. G1110000MA0095H836. ClientEarth is registered on the EU Transparency register number: 96645517357-19. Our goal is to use the power of the law to develop legal strategies and tools to address environmental issues.