

# Guiding Principles: A Consultation on Statutory Guidance



Scottish Government  
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## Ministerial Foreword

In a statement to the Scottish Parliament on the Programme for Government 2021 to 2022, the First Minister made clear that, “tackling the climate emergency is both a moral and economic imperative... The climate crisis is inseparable from the nature and biodiversity crisis. Scotland has a duty to show leadership on both.”<sup>1</sup> There is a determination across Scotland to address the twin crises of climate change and nature loss and to capture the opportunities that the transition to net zero presents.

We must rise to the challenges that face us here in Scotland, and the world, and tackle climate change, restore our natural environment and support a green economic recovery. The Scottish Government is determined to do all that in a way that promotes greater resilience, especially for climate-vulnerable communities. I welcome the focus that the UN Climate Change conference in Glasgow, COP26, and the Biodiversity COP15 in Kunming are bringing to the urgency of these issues.

It is our responsibility to ensure our natural environment is protected and enjoyed for future generations. Once fully in force, [the UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) will introduce new duties on Ministers and other public authorities to have due regard to the five guiding principles on the environment when making decisions.

This consultation seeks your views and support on the delivery of these duties. I believe it marks a significant step forward in the realisation of our ambitions, and will ensure Scotland's environmental needs are fully considered when developing policies and legislation. This legal obligation will play an important role in meeting our objective to maintain and improve environmental standards and will help to ensure environmental protection is delivered in a clear and proportionate manner. It will also help to ensure that the value and opportunities of natural capital are recognised in decision-making.

The guiding principles will sit alongside Scotland's arrangements for environmental governance and our [Environment Strategy](#). The Environment Strategy document published in 2020 sets out our vision that by restoring nature and ending Scotland's contribution to climate change, our country is transformed for the better. It describes how policies and programmes from across government join to enable the transformation that is needed. The five guiding principles will form a part of this strategic approach, contributing to Scotland's response to the twin crises in climate and nature and keeping aligned as far as possible with EU law.

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1 First Minister's statement to the Scottish Parliament on the Programme for Government 2021 to 2022, 7 September 2021. Available at: <https://www.gov.scot/publications/first-minister-programme-government-2021-2022/>

Our natural environment and the impacts we have on it must be 'in focus' in everything we do. It is easy when considering our environment to think of our highland glens with the heather and iconic wildlife, as it is our seas with birdlife and beautiful sea mammals. The impacts of human activity, however, go far and wide, into every plant, animal, particle and cell, including the food we eat and the air we breathe. Therefore, this guidance and the duties which will come into effect, will apply across all sectors of government. Delivering policies that recognise the intrinsic importance of the environment to our quality of life is integral to the work we are doing and therefore the onus is on us, right now, to do everything in our gift to protect nature and with it, our future.



**Mairi McAllan MSP**  
Minister for Environment and Land Reform

A handwritten signature in black ink, appearing to read 'Mairi McAllan'.

November 2021





## 1. Introduction

1.1 [The UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021](#) (“the Continuity Act”) introduces new duties on Ministers and other public authorities to have due regard to five guiding principles on the environment.<sup>2</sup> These principles are set out at section 13(1) of the Continuity Act, and are the principle of integration, the precautionary principle, the preventative principle, the rectification at source principle and the polluter pays principle. These duties will ensure that consideration of protection and improvement of our environment is embedded in decision-making across different policies and sectors. In effect, this will keep Scotland aligned with the environmental principles that guide policy development in the EU and will contribute to sustainable development.

1.2 Section 17 of the Continuity Act requires Scottish Ministers to publish guidance on the guiding principles and the duties introduced by sections 14 and 15, as read with section 16. The purpose of this guidance is to serve as a practical guide to support public authorities and Ministers to implement their legislative duties. As set out in section 17(3) of the Continuity Act, anyone subject to the duties must have regard to this guidance. This guidance is intended to promote a common understanding and interpretation of the guiding principles and how they should be considered and applied when developing future policy and legislation.

1.3 Everyone in Scotland has a responsibility to help realise the best possible outcomes for Scotland's environment. The Scottish Government is committed to forging the way in the attainment of this goal, recognising that we must do this collectively at all levels, across all sectors in society.



<sup>2</sup> The duties are set out in Sections 14 and 15 of the Continuity Act, with the duty on UK Ministers modified by the UK Environment Bill once enacted.

## 2. Background

2.1 The guiding principles form a part of our strategic approach to environmental policy, supporting our objective to maintain and improve environmental standards, contributing to Scotland's response to the twin crises in climate and nature and keeping aligned as far as possible with EU standards. The guiding principles sit alongside Scotland's arrangements for environmental governance through Environmental Standards Scotland and our [Environment Strategy](#). The Environment Strategy published in 2020 set out our vision that by restoring nature and ending Scotland's contribution to climate change, our country is transformed for the better. It sets out how policies and programmes from across government join to enable the transformation needed in response to the twin crises of the global climate emergency and biodiversity loss, helping us to secure the wellbeing of our people and planet for generations to come.

2.2 Following the Consultation on Environmental Principles and Governance in Scotland in 2019,<sup>3</sup> there was clear and strong support for the four core EU environmental principles to be replicated in Scots law, alongside the principle of integration. The section 13(1) guiding principles reflect this: section 13(2) provides that the principles are derived from the equivalent principles provided for in Article 11 of Title II and Article 191(2) of Title XX of the Treaty on the Functioning of the European Union. The UK Withdrawal from the European Union (Continuity) (Scotland) Bill was granted Royal Assent in January 2021, becoming the Continuity Act.

2.3 Section 14 of the Continuity Act places duties on Scottish Ministers and, when acting in relation to Scotland, Ministers of the Crown to have "due regard" to the five guiding principles on the environment when developing policies (including proposals for legislation).<sup>4</sup> The same duty is imposed by section 15 on other public authorities who are subject to the Environmental Assessment (Scotland) Act 2005 ("the 2005 Act"), when doing anything in respect of which an environmental assessment is required under section 1 of that Act.

2.4 A duty to have "due regard" means that the duty-holder is required to give the regard that is appropriate in all the circumstances. The duty must be performed with a substantial, rigorous and open-minded approach. The duty must be given appropriate weight while taking into account other considerations, such as other duties in legislation or other policies.

2.5 Further detail on the section 14 and 15 duties is provided below.

### Who should read this guidance?

2.6 This guidance is aimed at supporting decision-making by Ministers and other public authorities. We expect it will be mainly used by government officials, officers of public authorities and advisers working with public authorities.

2.7 This guidance will also be of interest to the general public and to civic society groups with an interest in decisions that could impact on the environment.

3 [Consultation on Environmental Principles and Governance in Scotland – Scottish Government](#)

4 The UK Government have introduced an amendment to Clause 19 of [the UK Environment Bill](#) limiting the application of section 14(2) to matters that are not reserved by the Scotland Act 1998, and requiring Ministers of the Crown to follow the principles duty in the UK Bill for reserved matters.

### Duty to have regard to the guidance

2.8 Under section 17(3) of the Continuity Act, those subject to a duty to have due regard to the guiding principles on the environment must, when doing anything in respect of which the duty applies, have regard to this guidance.

2.9 The requirement to “have regard” to something is a requirement to consider it. It does not require duty holders to follow, or comply with, the guidance, nor does it make the guidance the duty holder’s only or top priority. What is required of duty holders is that they give consideration to the guidance.

### What does the guidance cover?

2.10 This document seeks to provide guidance on the interpretation of the principles, how they relate to each other, how the duties in sections 14, 15 as read with section 16 of the Continuity Act relate to other duties concerning the environment including the duties in the 2005 Act, and how compliance can be achieved and clearly demonstrated.

2.11 Annex A provides further information about how these new duties relate to existing duties under the 2005 Act, whilst Annex B provides detailed information regarding the development of environmental principles in international and EU law.

2.12 The case studies and examples included at section 5 of this guidance below provide illustrations of how the principles can be seen to be relevant in the context of existing decisions and policies. In some cases, they show how interactions between the principles can be considered. These examples are not intended to provide an exhaustive consideration of the application of the guiding principles, but instead provide helpful examples of how the guiding principles could be considered in future decision-making processes.

### 3. Environmental principles in EU Law

3.1 Environmental principles have been established at an international level since the 1970s and have been a key part of the approach to addressing environmental challenges for many years. The European Union treaties<sup>5</sup> ("the EU Treaties") contain a number of general principles such as subsidiarity, proportionality and public participation.

3.2 In addition, and of relevance in the context of the guiding principles in the Continuity Act, Article 191(2) of Treaty on the Functioning of the European Union<sup>6</sup> ("the TFEU") sets out that EU policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It states that policy on the environment should be based on four core EU environmental principles:

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

3.3 These principles do not create any direct legal rights, but guide and shape the development of EU environmental law and policy, including the setting

of environmental standards. They are sometimes described as having a constitutional character and are a part of the environmental acquis. Some of the principles are directly incorporated into specific EU legislation. For example, the precautionary principle is reflected both in the regulation of chemicals and in fisheries management laws. While the principles are undefined in the EU treaties, the EU Commission has issued guidance on the application of the precautionary principle and the Court of Justice of the European Union ("CJEU") has considered questions of interpretation of environmental law, including the application of the principles.

3.4 In addition, Article 11 of the TFEU requires the integration of environmental protection requirements into the definition and implementation of EU policies, in particular with a view to promoting sustainable development.

3.5 The CJEU applies the principles in the interpretation of EU legislation, including the EU treaties.<sup>7</sup> For example, the CJEU has sometimes relied on one or both of the precautionary principle and the principle that preventative action should be taken to help reach their conclusions in various cases in relation to animal health,<sup>8</sup> habitats<sup>9</sup> and waste.<sup>10</sup> More detail on the EU environmental principles, and other environmental principles enshrined in international conventions and agreements, is provided in Annex B.

5 [https://europa.eu/european-union/law/treaties\\_en](https://europa.eu/european-union/law/treaties_en)

6 A consolidated version of the Treaty on the Functioning of the European Union can be found here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>

7 Ibid

8 Case C-180/96 UK v Commission

9 Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw

10 Cases C-175/98 and C-177/98 Fancesca Bizzaro et Paola Lirussi



## 4. Duties and Application

4.1 The Continuity Act establishes guiding principles on the environment, which are derived from the equivalent principles provided for in Article 11 of Title II and Article 191 (2) of Title XX of the TFEU.<sup>11</sup> These constitute environmental protection considerations to be factored into policy making processes, including when making proposals for legislation.

4.2 The guiding principles on the environment listed in section 13(1) of the Continuity Act are the:

- principle that protecting the environment should be integrated into the making of policies;
- precautionary principle as it relates to the environment;
- principle that preventative action should be taken to avert environmental damage;
- principle that environmental damage should as a priority be rectified at source; and
- principle that the polluter should pay.

4.3 Section 14 places a duty on Scottish Ministers and, when acting in relation to Scotland, on Ministers of the Crown<sup>12</sup> to have due regard to the guiding principles on the environment in making policies (including proposals for legislation). In general, individual regulatory and operational decisions under an established policy will not need separate consideration of the principles. In some instances, there will be decisions with potential significant impacts on, or risk to, the environment which should be seen as making or amending existing policy, and thus should be subject to the duties.

<sup>11</sup> As stated in sections 13(1) and (2) of the Continuity Act.

<sup>12</sup> The UK Government have introduced an amendment to Clause 19 of [the UK Environment Bill](#) limiting the application of section 14(2) to matters that are not reserved by the Scotland Act 1998, and requiring Ministers of the Crown to follow the principles duty in the UK Bill for reserved matters.

### **Section 14 Ministers' duties to have due regard to the guiding principles\***

(1) The Scottish Ministers must, in making policies (including proposals for legislation), have due regard to the guiding principles on the environment.

(2) Ministers of the Crown must, in making policies (including proposals for legislation) so far as extending to Scotland, have due regard to the guiding principles on the environment.

(3) The duties in subsections (1) and (2) do not apply in relation to any policy or proposal so far as relating to—

(a) national defence or civil emergency,

(b) finance or budgets.

(4) In this section, "legislation" includes—

(a) an Act of Parliament,

(b) an Act of the Scottish Parliament,

(c) subordinate legislation.

\* [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

**Figure 1 Section 14 – Ministers' duties to have due regard to the guiding principles**

4.4 Section 15(1) of the Continuity Act places a duty on certain public authorities (any "responsible authority") to have due regard to the guiding principles on the environment when doing anything in respect of which the duty under section 1 of the Environmental Assessment (Scotland) Act 2005 ("the 2005 Act") applies (requirement for environmental assessment). Section 15(2) of the Continuity Act states that "responsible authority" is to be construed in accordance with section 2 of the 2005 Act (but does not include the Scottish Ministers or a Minister of the Crown who are instead subject to the duties in section 14).

4.5 The duties which apply to Ministers under section 14 are more general and apply to all policy making, not only matters requiring environmental assessment within the meaning of section 1 of the 2005 Act.

4.6 Strategic Environmental Assessment (SEA) is a process for systematically considering the likely significant environmental effects of a plan, programme or strategy and to identify opportunities to avoid or reduce any adverse effects and enhance positive effects. The SEA process will be the principle route for consideration of the guiding principles in line with the duties. This will ensure that the guiding principles are considered alongside other environmental considerations, without significant additional administrative burden. Given the nature of the duties on responsible authorities in section 15 of the Continuity Act, this guidance has at times discussed separately the obligation to complete an environmental assessment, which forms a part of the overall SEA process.

4.7 Annex A contains material concerning the principles duties in sections 14 and 15 of the Continuity Act and the SEA process that both forms a part of this guidance and will be added to existing Scottish Government guidance on the SEA process.<sup>13</sup>

### **Section 15 Other authorities' duty to have due regard to the guiding principles\***

(1) A responsible authority must, in doing anything in respect of which the duty under section 1 of the Environmental Assessment (Scotland) Act 2005 ("the 2005 Act") applies (requirement for environmental assessment), have due regard to the guiding principles on the environment.

(2) In subsection (1), "responsible authority" is to be construed in accordance with section 2 of the 2005 Act but does not include the Scottish Ministers or a Minister of the Crown.

\* [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021 \(legislation.gov.uk\)](https://legislation.gov.uk)

**Figure 2 Section 15 – Other authorities' duty to have due regard to the guiding principles**

4.8 Section 16(1) requires Ministers and responsible authorities to exercise their duties to have due regard to the guiding principles on the environment under sections 14 and 15 with a view to protecting and improving the environment, and contributing to sustainable development.

### **Definition of the environment\***

Section 16(2) defines "the environment" as the following:

- means all, or any, of the air, water and land (including the earth's crust), and "air" includes the air within buildings and the air within other natural or man-made structures above or below ground, and
- includes wild animal and plant life and the habitats of wild animal and plant life.
- In subsection (2)(b), "animal and plant life" includes any living organisms.\*

\* [UK Withdrawal from the European Union \(Continuity\) \(Scotland\) Act 2021 \(legislation.gov.uk\)](https://legislation.gov.uk)

**Figure 3 Section 16(2) – Definition of the environment**

<sup>13</sup> See further, Scottish Government SEA Guidance (2013) [Strategic Environmental Assessment: guidance – gov.scot \(www.gov.scot\)](https://www.gov.scot)

4.9 In establishing the guiding principles on the environment in Scots law and creating duties to have due regard to them, we have been mindful of the significant range of duties that already apply to government and other public authorities, and the way in which those duties are expressed.

4.10 The duties in sections 14 and 15 of the Continuity Act, to have due regard to the guiding principles on the environment, reflect the importance of those principles in all policy making, but also that in any particular context consideration of the guiding principles needs to be balanced with other duties and considerations, including the need to achieve the intended goals or outcomes of the particular policy.





## 5. Interpretation and application of the principles

5.1 Duty holders should ensure that they have had due regard to the guiding principles in individual decision-making processes and, in so doing, have had regard to this guidance.

5.2 As noted in section 2 of this guidance, a duty to have “due regard” to the guiding principles means that the duty holder is required to give the regard to those guiding principles that is appropriate in all the circumstances. The duty must be performed with a substantial, rigorous and open-minded approach. The duty must be given appropriate weight while taking into account other considerations, such as other duties in legislation or other policies.

5.3 The interpretation and application of the guiding principles must be balanced and proportionate, and weighed against other statutory obligations and relevant considerations. Each individual situation will be different, and so will require a careful interpretation and application of the principles, when developing and delivering policy commitments. As the duties to have due regard to the guiding principles have to be weighed against other statutory obligations and relevant considerations, the application of these duties will not prevent environmental damage from occurring altogether. Different levels of damage may be acceptable, according to the circumstances of each individual policy decision. For example, the creation of key infrastructure inevitably causes some damage to the environment. Having due regard to the guiding principles will ensure that this damage is further considered, and avoided or mitigated where possible, as the principles are weighed against the other factors in the decision-making process.

5.4 As required by section 16 of the Continuity Act, the duties to have due regard to the guiding principles in sections 14 and 15 of that Act are to be complied with by Ministers and responsible authorities with a view to protecting and improving the environment and contributing to sustainable development. This will promote better decision-making, connecting the individual decision with the environment that ultimately underpins our health, our society and our economy; and will help to deliver policies that enhance our natural assets and produce better outcomes for our environment and people.

5.5 The case studies below provide an illustration of how the principles could be applied in practice and, in some cases, how interaction between the principles could be considered and applied.

## The principle that protecting the environment should be integrated into the making of policies

5.6 This principle, usually referred to as the integration principle, involves the consideration of environmental protection across policy making. Principle 4 of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro states: “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.<sup>14</sup>

5.7 In EU law, Article 11 of the TFEU requires that environmental protection requirements are integrated into the definition and implementation of all the EU’s policies and activities, with a view to promoting sustainable development. In recent years, environmental policy integration has made significant progress, including in relation to energy policy, the shift towards a low carbon economy and efforts to combat climate change.<sup>15</sup>

5.8 The integration principle in the Continuity Act is the principle that protecting the environment should be integrated into the making of policies. This means duty holders will need to consider any potential environmental impact in the development of policies across all sectors of government and the wider public sector. This principle, which reflects a commitment to sustainable development, has an important role to play in creating a more joined-up approach to protecting the environment across policy areas.

### Examples of policy decisions where the principle of integration might be significant.

- **Local development plans and local spatial strategies** – good practice will reflect environmental considerations in all elements of strategies and plans.
- **National policy strategies** – it is important that environmental considerations are integrated into the design of national policy strategies, including those that do not have a primary focus on environmental policy.
- **New regulatory regimes** – the impact of changing the regulation of an activity or sector should consider the full range of environmental, sustainability and climate impacts of the proposed change beyond the particular activity.
- **Marine planning** – the marine planning regime is a good example of the integration of environmental and sustainability considerations across a whole policy.

**Figure 4 Examples of policy decisions where the principle of integration might be significant**

14 See further, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

15 See further, European Parliament, “Environment Policy: General Principles and Framework Fact Sheet” (2021) Available here: <https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework>

### The precautionary principle as it relates to the environment

5.9 The precautionary principle, as it relates to the environment, is defined in the UN Rio Declaration on Environment and Development 1992<sup>16</sup> as, “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. This intention was reflected in the EU precautionary principle, and developed through Commission publications<sup>17</sup> and case law.

5.10 The precautionary principle enables protective measures to be taken without having to wait until the harm materialises and is considered a useful tool in approaching risk management. This approach can aid duty holders when weighing up risks, where there is a level of uncertainty about environmental impacts, or where scientific information is lacking about a specific issue. Where there is uncertainty as to the extent of potential environmental damage, but there is evidence of high risks of harm, measures can be put in place to prevent the risk of harm through regulation of activities or products, further research or public information. Duty holders should consider the likelihood of damage as well as the potential severity and wider impacts that may be caused.

5.11 Consideration of the precautionary principle should be informed by –

- a robust evaluation of the available evidence and the degree of scientific uncertainty;

- a risk evaluation and an assessment of the potential consequences of inaction; and
- the participation of all interested parties in the study of precautionary measures, once the results of the scientific evaluation and/or the risk evaluation are available.

#### Examples of policy decisions where the precautionary principle might be significant.

- **Water recycling** – there are many uncertainties and risks to consider in the regulation of sewage discharge, specifically lowering effluent discharge but also reducing overall water flow and consequences of using recycled water of varying quality. Using the precautionary principle can be used to develop best practice.
- **Chemicals regulation** – a precautionary approach can be taken to new substances, or to substances where a new concern is identified, pending further investigation of their safety.
- **Non-native species** – there can be a presumption against release of any new non-native species, as it is difficult to know with certainty which species will cause significant environmental and economic damage.

**Figure 5 Examples of policy decisions where the precautionary principle might be significant**

16 See further, [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

17 EU Commission communication on the precautionary principle [EUR-Lex – 52000DC0001 – EN – EUR-Lex \(europa.eu\)](http://eur-lex.europa.eu/lexUri.do?uri=CELEX:52000DC0001:EN:EUR-Lex)

**An example of how the prevention, rectification at source, polluter pays and precautionary principles can be considered in decision-making processes:**

**Stornoway Deep Water Port – Environmental Impact Assessment**

This report was produced in December 2020 (before the coming into force of the duties in the Continuity Act) to support construction and dredging Marine Licence applications and a Harbour Revision Order for the Stornoway Port Authority's Deep Water Port. This project aims to facilitate sustainable economic growth in the Outer Hebrides through increasing the ports capabilities and services that it can accommodate.

The project comprised of a range of components with likely significant environmental impacts including; development of the main quay; heavy load area; access road; drainage works; dredging activities; and building works. The report describes the possible environmental impacts and likely significant effects that may arise, alongside design improvements and mitigating measures.

This environmental impact assessment was conducted before the entry into force of the duties in the Continuity Act. However, we can consider how the issues discussed in the environmental impact assessment illustrate the potential consideration of the guiding principles in future assessments:

- The principle of prevention would be relevant to many aspects of this decision, including proposals for dredging.

***“A slope between the dredged area and remaining habitat will also ensure that the remaining habitat is not undermined”.***

- Rectification at source and polluter pays principles would be relevant to waste water management of the site.

***“The DWP drainage system has been designed to include oil interceptors with isolation valves, to contain pollutants in the event of an incident during the operational phase”.***

- Precautionary principle would be relevant to consideration of non-native species.

***“The potential to introduce non-native marine species during construction and operations was identified .... and equipment will be delivered clean to site minimising the risk”.***

**Figure 6 An example of the consideration of the prevention, rectification at source, polluter pays and precautionary principles in decision-making**



## The principle that preventative action should be taken to avert environmental damage

5.12 This principle, commonly known as the prevention principle, states that preventative action should be taken to avert environmental damage. This is intended to prevent environmental damage, rather than react to such damage after it has occurred. Duty holders should, when considering this principle, seek to fully understand the potential impacts of the activity that is the subject of a decision or policy development on the environment. Prevention can be linked to both pollution sources and points of impact. Where a policy may cause environmental harm, risks should be clearly defined, in order for preventative measures to be anticipated and implemented (as appropriate). It can therefore be seen as complementary to the precautionary principle, which operates where information is less certain. When considering the prevention principle, duty holders should weigh up the severity and likelihood of any impact as well as potential for negative longer-term effects. Mitigating options to prevent serious environmental harm should be weighed and evaluated as policy is developed.

### Examples of policy decisions where the preventative principle might be significant.

- **Water quality promotion through Nitrate Sensitive Zones and riparian boundaries** – river water quality can be secured through preventative measures, ensuring that an excessive load of nutrients or harmful substances never reaches the watercourse.
- **Prevention of health impacts from radioactive substances** – the behaviour of people living around nuclear sites is surveyed, to ensure that there is no potentially harmful radioactive dose to the most exposed members of the community.
- **Control on the sale of single use plastic products** – banning the sale of single use items, such as earbuds, prevents them from becoming harmful litter.
- **Development of community biosecurity action plans** – preventing the introduction or spread of invasive non-native species, such as carpet sea squirt, in the marine environment.

**Figure 7 Examples of policy decisions where the preventative principle might be significant**

## The principle that environmental damage should as a priority be rectified at source

5.13 Article 191(2) of the TFEU states that the principles on which Union policy on the Environment shall be based include the principle that “environmental damage should as a priority be rectified at source”, and this language is reflected in the statement of the guiding principles in section 13(1) of the Continuity Act.

5.14 This principle, commonly referred to as the rectification at source principle, prioritises how environmental damage or harm should be addressed at its source, rather than in the wider environment, and by the polluter, rather than wider society. It operates in conjunction with the polluter pays and prevention principles and is a valuable mechanism where prevention of environmental harm cannot be wholly mitigated.

5.15 Working together these principles can provide structure to help guide policy decisions, enabling policy makers to prioritise the manner in which environmental harm is dealt with. Duty holders should seek to understand the potential damage and the impacts the activity could have on the environment. Understanding where the damage originates from and the likelihood of any far reaching impacts, including transboundary effects, will also be important when applying this principle.

### Examples of policy decisions where the rectification at source principle might be significant.

- **Emissions control from industrial sites** – controls on emissions from industrial sites, such as sulphur capture, can ensure that there harm to the environment does not occur.
- **Sustainable Urban Drainage Schemes** – these schemes can manage the surface water runoff of new developments in a way that does not put pressure on the environment or existing infrastructure.
- **Spreading of slurry on agriculture land** – good practice in slurry spreading can prevent the risk of runoff that can harm water quality in streams and rivers.
- **Preventing plastic pellet loss** – the second largest form of micro plastic pollution – with the development of good practice for any business handling or managing this material, as defined in the British Standards Institution Publicly Available Specification.

**Figure 8 Examples of policy decisions where the rectification at source principle might be significant**

## The principle that the polluter should pay

5.16 This principle, commonly known as the polluter pays principle, was initially recognised at international level by the Organisation for Economic Co-operation and Development in 1972. The polluter pays principle reflects that those who cause pollution should bear the financial responsibility for any damage or remedial action required. Prior to this, disproportionate costs of pollution were being externalised from the polluter to wider society.

5.17 Reflecting Article 191(2) of the TFEU, section 13(1) of the Continuity Act includes the principle that the polluter should pay for environmental damage. This principle aims to ensure that polluters are responsible for their actions and build in/are held accountable for any remediation required. It is important to consider each individual situation on its own merits when taking this principle into account and duty holders will need to ensure a balanced approach is taken e.g. there may be certain instances where a polluter should not pay or cannot pay, or indeed should not pay the full cost. There may also be instances where it is not possible to identify the original polluter.

5.18 There are also complex cases where the potential costs of pollution may occur over many years, or may occur for many years into the future. In such cases it will be necessary to consider whether appropriate financial provision should be made while the economic activity is still taking place, such as through an operator bond or collective sectoral structure. Duty holders should therefore reflect on aspects such as the type of polluter (individual or sector) and their intentions (deliberate action or unintended consequences).

### Examples of policy decisions where the polluter pays principle might be significant.

- **Providing for decommissioning liability** – the future costs of decommissioning a site can be provided for through a bond or fund, ensuring that the costs are paid for from the money raised by the activity itself and not by future public funds, for example the Nuclear Liabilities Fund.
- **Charges and duties** – charges and duties, such as the plastic bag charge, air passenger duty and the landfill tax, ensure that the individual consumer faces the cost of their activity on the environment.
- **Compensatory actions through planning system** – planning permission is sometimes granted with conditions for compensatory actions, such as the creation of a new area of habitat to replace one lost through the development.

**Figure 9 Examples of policy decisions where the polluter pays principle might be significant**

## **An example of how multiple environmental principles can be taken into consideration when undertaking an SEA:**

### **SEA of Sectoral Marine Plan for Offshore Wind Energy**

The Sectoral Marine Plan for Offshore Wind Energy (“the SMP”) (published in October 2020, before the coming into force of the duties in the Continuity Act) identified sustainable plan options for the future development of commercial-scale offshore wind energy in Scottish waters. The SMP took a balanced approach to the identification of options, seeking to minimise potential adverse effects on other marine users, economic sectors and the environment, whilst maximising opportunities for economic development, investment and employment in Scotland. The sectoral marine planning process and the SEA process followed an iterative approach, informed via stakeholder engagement and evidence from the related economic, social and environmental assessments, to support the identification of the Plan Options. For example, updated foraging ranges for key seabird species, published once the draft SEA had been completed, were used to inform the conclusions of the Appropriate Assessment and the final SMP.

The plan was developed before the Continuity Act introduced the guiding principles on the environment, however we can consider how the issues discussed in the environmental impact assessment illustrate the potential consideration of the guiding principles in future assessments.

The assessment and consultation process identified potential gaps in knowledge and data which will need to be addressed at future plan and project levels. The SMP identified, for example, that additional data is required in relation to marine mammal and abundance and distribution in order to inform future planning and assessment effort.

Plan-level mitigation measures have been implemented, which can be considered in the context of the precautionary and preventative principles.

For example, the SMP is subject to iterative plan review and management, to ensure that the SMP and underpinning assessments are informed by the best available and most up-to-date scientific research and understanding, including the outputs of project-level assessment and monitoring (required by consent and licence conditions) and that the SMP accurately reflects the emerging spatial and regional context (i.e. level of activity in the region). Furthermore, project-level assessment is required before development can commence – which will be informed by further detail regarding the exact scale, nature and location of proposed development and the receiving environment and further spatial planning is required within each plan option, in order to reduce, as far as reasonably practicable, effects on environmental receptors. This could include, for example, avoiding key benthic habitats or avoiding undertaking construction works during certain periods of the year.



Two ornithology-specific plan-level mitigation measures have been applied which demonstrate the application of the precautionary principle, reflecting the current level of uncertainty regarding the potential impacts of offshore wind development on key seabird species. The SEA and Habitats Regulations Appraisal were informed by the current modelled levels of negative cumulative impact on key seabird species and the assessments recognise the level of uncertainty inherent in the assessment resulting from collision, displacement and barrier effects and a lack of information regarding seabird densities and behaviours in the offshore region during the non-breeding season. The HRA report concluded that development should not proceed within certain plan options, until such time that enough evidence on the environmental carrying capacity for seabirds exists to reduce the risk to an acceptable level.

The SEA also identifies mitigation measures which may be required at a project level, which demonstrate the potential application of the rectification at source and polluter pays principles through the SEA process. For example, the requirement to prepare a decommissioning plan (which must be prepared and approved prior to the commencement of works); Offshore renewable energy installations will need to be decommissioned at the end of their operational life. Scottish Ministers have powers under the Energy Act 2004, to require developers of offshore renewable energy projects in Scottish Waters and the Scottish part of a Renewable Energy Zone, to prepare a decommissioning programme, detailing how they intend to remove the installation when it comes to the end of its useful life and how the costs of doing so will be funded".

The SEA identifies that pollution management plans may mitigate the potential effects of marine pollution releases. Marine licences contain examples of conditions which demonstrate the application of principles of rectification at source and polluter pays principles. For example, licensees must ensure that suitable bunding and storage facilities are employed, in order to prevent the release of fuel oils and lubricants into the marine environment. Licensees are required to take all measures which are technically and economically feasible to minimise the leakage of fluorinated greenhouse gases from any equipment used, and repair leaking equipment without undue delay. Furthermore, licensees are required to ensure that any debris or waste arising from the works are removed and disposed of at a location approved by SEPA (or another relevant authority).

**Figure 10 An example of where multiple environmental principles have been taken into consideration when undertaking an SEA**

## 6. Recording compliance with the duties

6.1 This section considers the appropriate recording of compliance with the duties in sections 14 and 15 of the Continuity Act. It is important that duty holders are able to demonstrate that, where those sections apply, they have had due regard to the guiding principles. There are two situations to consider:

- where Ministers or any other responsible authority are doing anything in respect of which the duty to undertake environmental assessment under section 1 of the 2005 Act applies.
- where Ministers are developing policy in circumstances in which the duty to undertake environmental assessment under section 1 of the 2005 Act does not apply,

### Where proposals require environmental assessment

6.2 Section 15 of the Continuity Act 2021 places a duty on public authorities (other than Ministers) to have due regard to the guiding principles on the environment when doing anything in respect of which the duty to undertake environmental assessment under section 1 of 2005 Act applies. The section 14 duties on Ministers to have due regard to the guiding principles are more general and therefore include policy making processes where an environmental assessment is required.

6.3 The process of environmental assessment, including in particular preparation of an environmental report, should be used for recording compliance with the duty.

6.4 Within the process of environmental assessment, consideration of the duties to have due regard to the guiding principles will form additional considerations as a part of the assessment and should be documented in the Environmental Report.

6.5 As a part of the SEA process, environmental assessment offers greater protection of the environment by ensuring public bodies, ministers and parties preparing plans of a 'public character' consider and address the likely significant environmental effects. This process can help achieve better environmental outcomes, better plans, exploration of reasonable alternatives and potential smoother delivery, amongst other benefits

6.6 For further information about the preparation of environmental assessments, please see the Scottish Government SEA Guidance (2013) [Strategic Environmental Assessment: guidance – gov.scot \(www.gov.scot\)](http://www.gov.scot/Strategic-Environmental-Assessment-guidance)”



### Where proposals do not require environmental assessment

6.7 Ministers' duties under section 14 of the Continuity Act apply when making all policies, and are not, as in the case of other responsible authorities subject to the duty under section 15 of the Continuity Act, limited to where environmental assessment is required under section 1 of the 2005 Act. Thus, where Ministers' proposals (for policy and legislation) are not subject to environmental assessment under section 1 of the 2005 Act, they will need to consider the most appropriate means of recording compliance with the duty.

6.8 Compliance with the duties can generally be recorded through the pre-screening and screening stages of the SEA process (where applicable), which establish if an environmental assessment under section 1 of the 2005 Act is required for a particular decision. The Scottish Government will update the SEA pre-screening and screening templates in order to support consideration of the guiding principles at these stages of the process.<sup>18</sup>

6.9 However, in the rare instances where SEA pre-screening or screening is not applicable, Ministers will need to decide if consideration given in fulfilment of the duty can be best reflected in the records of the decision-making process or through a published document. It may be done, for example, as a part of a consultation exercise, possibly within the consultation summary report. There is no obligation to prepare a standalone document such as an impact assessment. It will be best practice to ensure that there is an appropriate record that Ministers have had due regard to the guiding principles with respect to a policy and, the impacts of that due regard consideration in the policy making process (including, where relevant, the reasons for concluding that in a particular instance there are no relevant impacts on the policy).

6.10 A process diagram can be found in Annex A (Figure 12).



<sup>18</sup> See further, Scottish Government, Strategic Environmental Assessment: pre-screening template (June 2015). Available at: <https://www.gov.scot/publications/strategic-environmental-assessment-pre-screening-template/>



## 7. Consultation questions

### Question 1

Do you think that the draft guidance is clear and has the right content to support the implementation of the duties in the Continuity Act? How could it be improved?

### Question 2

Do you think that the draft guidance provides useful explanation of the meaning of the guiding principles? How could this be improved?

### Question 3

Do you think the draft guidance provides a good explanation of how the guiding principles will be used during the development of policies and other significant decisions? How can this be improved?

### Question 4

Do you think the draft guidance adequately supports recording and documenting compliance with the duties?

### Question 5

Do you think that there is appropriate use of examples and case studies in the draft guidance? Can you suggest any additional examples or case studies to illustrate the guiding principles?

### Question 6

Do you have any further comments or views on the draft guidance that you would like to share?



## 8. Responding to this consultation

8.1 We are inviting responses to this consultation by 8 February 2022.

8.2 Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/environment-forestry/guiding-principles-statutory-guidance>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 8 February 2022.

8.3 If you are unable to respond using our consultation hub, you can alternatively send your response by email or post. If so, please complete the Respondent Information Form and add your responses.

8.4 Email responses should be sent to: [environmentalprinciples@gov.scot](mailto:environmentalprinciples@gov.scot). Please include the Respondent Information Form as an attachment.

8.5 While normally we would happily accept postal responses, given the COVID-19 pandemic, it would be helpful if responses were provided online wherever possible to ensure that views are received, collected and attributed correctly. However, if you need to send your response by post, please send it to:

Future Environment Division  
 Scottish Government  
 Area 3H South  
 Victoria Quay  
 Edinburgh, EH6 6QQ

### Handling your response

8.6 If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

8.7 All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

8.8 If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

8.9 To find out how we handle your personal data, please see our privacy policy: <https://www.gov.scot/privacy/>



### Next steps in the process

8.10 Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

8.11 Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

### Comments and complaints

8.12 If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or at [environmentalprinciples@gov.scot](mailto:environmentalprinciples@gov.scot)

### Scottish Government consultation process

8.13 Consultation is an essential part of the policy making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

8.14 You can find all our consultations online: <http://consult.gov.scot>, Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

8.15 Responses will be analysed and used as part of the decision-making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals; and
- be used to finalise legislation before it is implemented.

8.16 While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## Annex A – Strategic Environmental Assessment and Duties to have Due Regard to the Guiding Principles on the Environment

Note: This Annex is intended to form a part of this guidance, and will be added to SEA guidance so that it is easily available where relevant.

### The Guiding Principles on the Environment

The UK Withdrawal from the European Union (Continuity) Scotland Act 2021 (“the Continuity Act”) establishes guiding principles on the environment which are derived from the equivalent principles provided for in Article 11 of Title II and Article 191(2) of Title XX of the TFEU.

The guiding principles on the environment listed in section 13(1) of the Continuity Act are:

- the principle that protecting the environment should be integrated into the making of policies,
- the precautionary principle as it relates to the environment,
- the principle that preventative action should be taken to avert environmental damage,
- the principle that environmental damage should as a priority be rectified at source, and
- the principle that the polluter should pay.

The Statutory Guidance on Scotland’s Guiding Principles on the Environment can be found here: The Statutory Guidance on Scotland’s Guiding Principles on the Environment will be available online.

The Strategic Environmental Assessment Guidance can be found here: [Strategic Environmental Assessment: guidance – gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/sea-guidance/pages/introduction.aspx)”

Figure 11 The Guiding Principles on the Environment

### Duties under section 14 and 15 of the Continuity Act

Section 15 of the Continuity Act places a duty on responsible authorities to have due regard to the guiding principles on the environment when doing anything which requires an environmental assessment under section 1 of the Environmental Assessment (Scotland) Act 2005.<sup>19</sup>

Section 15 of the Continuity Act does not apply to Ministers who are instead subject to section 14 of the Continuity Act which places duties on Ministers to have due regard to the guiding principles on the environment when making any policies (including proposals for legislation). The duties placed on Ministers by section 14 of the Continuity Act are therefore more general and apply to all policy making, including policy making that requires an environmental assessment.

For both public authorities and Ministers, due regard to the guiding principles should be given and reported through the established SEA processes, including during the completion of an environmental assessment.

### What do responsible authorities need to do?

Undertaking environmental assessment at the early preparation stages of a plan can bring benefits to policy makers including better environmental protection, improved plans, greater exploration of 'reasonable alternatives' alongside enhanced communication, transparency and a smoother delivery mechanism.

When developing plans, responsible authorities (including Ministers) should consider the statutory guidance on the guiding principles, and how their duties to have due regard to the guiding principles interact with the other factors considered in environmental assessment. Where the duties in sections 14 and 15 of the Continuity Act apply, environmental assessment should provide a vehicle for planners and policy makers to fulfil the duties and record compliance. As SEA is a statutory regime designed to achieve better environmental objectives while still delivering policy objectives, consideration of the guiding principles in this context makes for a more streamlined and effective approach for authorities and policy makers to follow.



<sup>19</sup> For further information about the SEA process, please see the Scottish Government SEA Guidance (2013) [Strategic Environmental Assessment: guidance – gov.scot \(www.gov.scot\)](http://www.gov.scot/Strategic-Environmental-Assessment-guidance)

### Recording compliance with the duties

It is important that duty holders under sections 14 and 15 of the Continuity Act are able to demonstrate that, where those sections apply, they have had due regard to the guiding principles. There are two situations to consider:

- where Ministers or any other responsible authority are doing anything in respect of which the duty to undertake environmental assessment under section 1 of the 2005 Act applies.
- where Ministers are developing policy in circumstances in which the duty to undertake environmental assessment under section 1 of the 2005 Act does not apply,

### Where proposals require environmental assessment

Section 15 of the Continuity Act 2021 places a duty on public authorities (other than Ministers) to have due regard to the guiding principles on the environment when doing anything in respect of which the duty to undertake environmental assessment under section 1 of 2005 Act applies. The section 14 duties on Ministers to have due regard to the guiding principles are more general but therefore include policy making processes where an environmental assessment is required.

The process of environmental assessment, including in particular preparation of an environmental report, is a means for recording compliance with the duty.

### Where proposals do not require environmental assessment

As Ministers' duties under section 14 of the Continuity Act apply when making all policies (and are not, as in the case of other responsible authorities subject to the duty under section 15 of the Continuity Act, limited to where environmental assessment is required under section 1 of the 2005 Act), where Ministers' proposals (for policy and legislation) are not subject to environmental assessment under section 1 of the 2005 Act, they will need to consider the most appropriate means of recording compliance with the duty.

Compliance with the duties can generally be recorded through the pre-screening and screening stages of the SEA process (where applicable), which establish if an environmental assessment under section 1 of the 2005 Act is required for a particular decision. The SEA pre-screening and screening templates will be updated in order to support this. In the rare instances where SEA pre-screening or screening is not applicable, Ministers will need to decide if consideration given in fulfilment of the duty can be best reflected in the records of the decision-making process or through a published document

## Duties to have due regard to the guiding principles on the environment – UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021

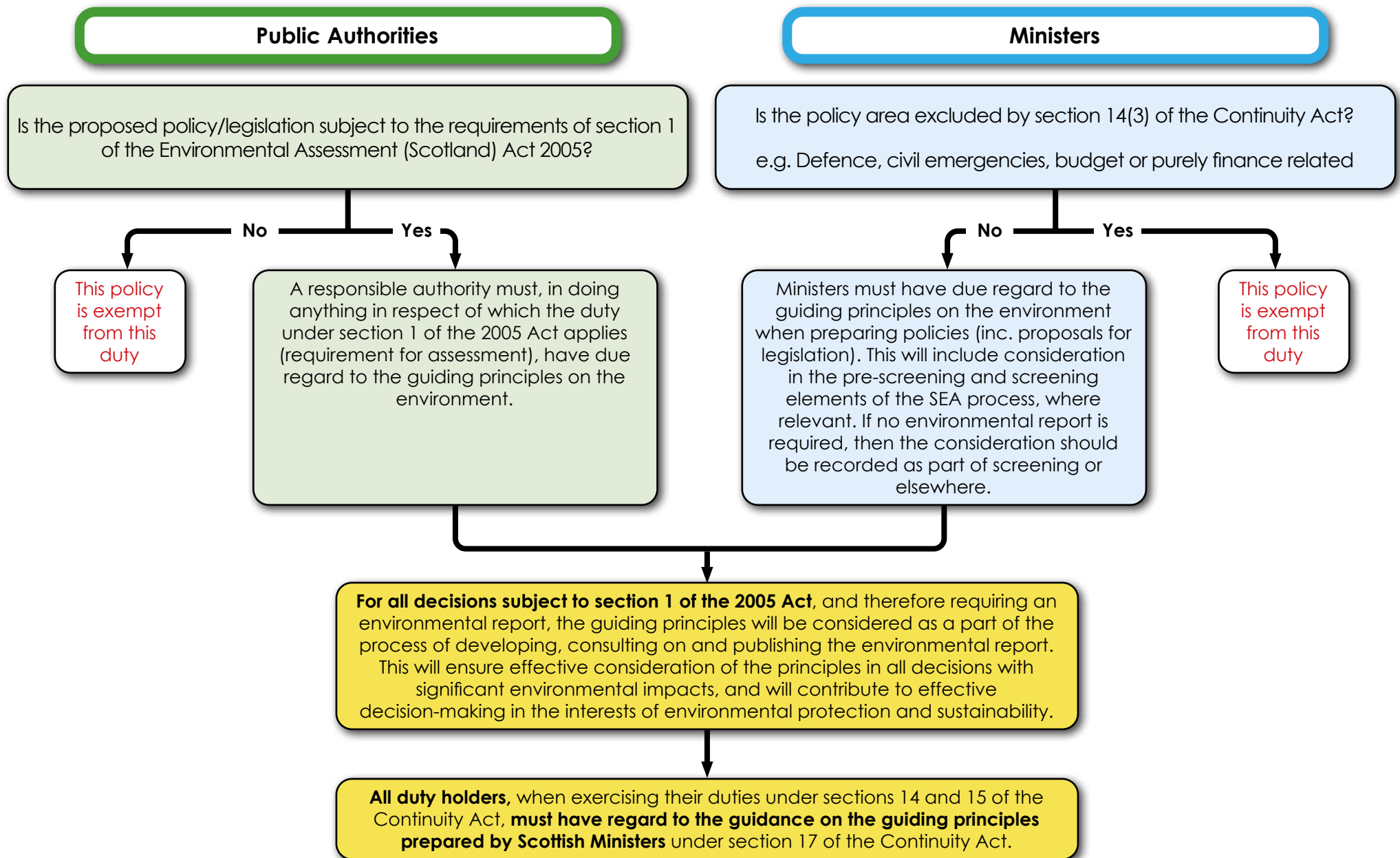


Figure 12 Process diagram – duties to have due regard to the guiding principles on the environment



## Annex B – Background on Principles

Article 191(2) of the Treaty on the Functioning of the European Union (“TFEU”) enshrines four principles into the development of EU environmental policy and legislation. It provides –

***“Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.”***

Article 11 of the TFEU contains the integration requirement. It provides:

***“Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”***

### The precautionary principle as it relates to the Environment

The precautionary principle was defined in the UN Rio Declaration on Environment and Development 1992 as **“where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”**. Therefore, where there is uncertainty as to the level of risk of environmental harm attached to a proposed action, this principle enables preventative or restrictive measures to be taken without having to wait until the harm materialises. Any restrictive or preventative approach taken must be objective and non-discriminatory, and in the EU context the principle of proportionality operates alongside all of the environmental principles; including the precautionary principle.<sup>20</sup>

In EU law, the precautionary principle is often considered alongside the requirement to take account the factors set out in Article 191(3) TFEU (which include scientific and technical data; environmental conditions in the area; benefits and costs; and the economic and social development of the Union as a whole and the balanced development of its regions). Whilst the Continuity Act does not reflect a similar requirement to take such factors into account, the precautionary principle is linked to situations where there is insufficiency, inconclusiveness or imprecision resulting from available information.

<sup>20</sup> Joined Cases C 78/16 and C 79/16 at paras 48 and 74  
<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62016CJ0078>

The precautionary principle is therefore particularly useful in managing risk in situations where there is a lack of full scientific certainty about a specific issue. At the EU level, this principle has been applied to the following:

- The Habitats Directive<sup>21</sup> (92/43/EEC), Article 6(3) which requires impact assessments to be carried out where a project is likely to have a significant effect on the integrity of a designated habitat site.
- The Deliberate Release of Genetically Modified Organisms Directive (2001/18/EC)<sup>22</sup> specifically in relation to environmental risk assessments and requirements for field testing in the research and development stage assessing how the use of GMOs might affect ecosystems.
- The Waste Framework Directive (2008/98/EC)<sup>23</sup> which provides that in order to implement the precautionary principle and the principle of preventive action it is necessary to set general environmental objectives for the management of waste within the Community.
- The 2002 case of Pfizer Animal Health SA v Council of the European Union (Case T-13/99) in which the European Court of Justice stated that protective measures invoking the precautionary principle may be taken “without having to wait until the reality and seriousness of those risks become fully apparent”.<sup>24</sup>

The European Commission has produced guidance on the precautionary principle.<sup>25</sup>



21 [https://eur-lex.europa.eu/search.html?DTA=1992&SUBDOM\\_INIT=ALL\\_ALL&DB\\_TYPE\\_OF\\_ACT=directive&DTS\\_SUBDOM=ALL\\_ALL&typeOfActStatus=DIRECTIVE&DTS\\_DOM=ALL&type=advanced&excConsLeg=true&qid=1630679816039&DTN=0043](https://eur-lex.europa.eu/search.html?DTA=1992&SUBDOM_INIT=ALL_ALL&DB_TYPE_OF_ACT=directive&DTS_SUBDOM=ALL_ALL&typeOfActStatus=DIRECTIVE&DTS_DOM=ALL&type=advanced&excConsLeg=true&qid=1630679816039&DTN=0043)  
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31992L0043&qid=1630679816039>

22 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32001L0018>

23 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008L0098&qid=1630680089064>

24 At paragraph 139 of the Court's Judgement: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999TJ0013&qid=1630680178784>

25 [European Commission "Communication on the Precautionary Principle" COM \(2000\).](#)

### The principle that the polluter should pay

Initially recognised at international level by the Organisation for Economic Co-operation and Development in 1972, this principle requires **those who cause pollution to bear the financial responsibility of any damage or remedial action required**. Prior to this, disproportionate costs of pollution were being externalised from the polluter to wider society. Thus, this principle aims to act as a deterrent; ensuring polluters are responsible for their actions and build in/are held accountable for any remediation required.

In the EU context, the principle was expanded in 1975 in a European Council Recommendation<sup>26</sup> and it has recurred in all subsequent Environmental Action Plans.<sup>27</sup> Following this, it is worth noting that the Environmental Liability Directive (2004/35/EC)<sup>28</sup> is based directly on the polluter pays principle as a way to prevent and remedy environmental damage. Other EU directives – such as the Waste Framework Directive (2008/98/EC) – also apply the polluter pays principle.

When examining the EU's polluter pays principle the CJEU has determined that in cases where a competent authority acts in the place of an operator to rectify damage caused by a polluter (itself or through a third party), that authority should ensure that the cost incurred by it is recovered from the operator.<sup>29</sup> It is also appropriate that the operators should ultimately bear the cost of assessing environmental damage and, as the case may be, assessing an imminent threat of such damage occurring. Ensuring the operator bears responsibility for all charges is consistent with the aim of encouraging the prevention or reduction of waste production.<sup>30</sup>

The Inner House of the Court of Session, in the case of *Scottish Environment Protection Agency v Joint Liquidators of the Scottish Coal Co Ltd*<sup>31</sup> considered whether the polluter pays principle justified the interpretation of water environment legislation so as to disallow a liquidator disclaiming a statutory licence (which would have had the effect of the costs of environmental remediation becoming a public liability). The court observed that “there are persuasive factors in favour of giving pre-eminence to the policy of maximising environmental protection over the policy of the expeditious and equal distribution of available assets among the unsecured creditors of an insolvent company.” However, the courts ultimately decided the case on legislative competence grounds, so their consideration of principle was not part of the decision.

26 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31975H0436>

27 <https://ec.europa.eu/environment/action-programme/#:~:text=The%207th%20Environment%20Action%20Programme%20%28EAP%29%20will%20be,we%20live%20well%2C%20within%20the%20planet%E2%80%99s%20ecological%20limits>

28 <https://eur-lex.europa.eu/eli/dir/2004/35/oj/eng>

29 C-534/13 <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62013CJ0534>

30 C-172/08 at para 36

31 [2013] CSIH 108. Available at <https://www.scotcourts.gov.uk/search-judgments/judgment?id=568a8aa6-8980-69d2-b500-ff0000d74aa7>

### The principle that preventative action should be taken to avert environmental damage

The prevention principle is **intended to prevent, rather than react to, environmental damage from unregulated activities**. Therefore, it requires a risk to be clearly defined, in order for preventative measures to be anticipated and implemented. The prevention principle was one of 11 objectives and principles listed in the first EU Environmental Action Programme (EAP) in 1973. It forms the basic rationale for many environmental protection laws at the international, EU and national levels and is a central part of EU waste policy. In 1983, in the European Commission's Third Environmental Action Plan it was applied to waste policy e.g. landfill and wastewater. The CJEU has considered that an owner of land who did not carry out polluting activity, but instead failed to monitor the conduct of those using their property and report such users in the event of environmental damage (or threat thereof), could be held liable for the costs of pollution. The CJEU was satisfied that a national law which allowed for the owner to be held liable was consistent with the aim of preventing a lack of care and attention on the part of the owner which could result in environmentally damaging activity.<sup>32</sup>

### The principle that environmental damage should as a priority be rectified at source

The rectification at source principle **prioritises how environmental damage or harm should be addressed at its source, rather than in the wider environment, and by the polluter, rather than wider society**. It is important to note that this principle is important when considering control of transboundary movements of waste intended for disposal. It works alongside the polluter pays and prevention principles to address activities which may harm the environment and prioritise any action taken.

### Integration requirement

This requirement was adopted by the United Nations Conference on Environment and Development in Rio de Janeiro in 1992 and expresses that **'In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'**. That is to say, all policy makers working across government, have responsibilities to protect our environment. In EU law, environmental protection requirements are integrated into the definition and implementation of all the EU's policies and activities, with a view to promoting sustainable development, through this principle.<sup>33</sup> Nonetheless the integration requirement in EU law does not go so far as to have the effect of bringing any and all policies and actions of the EU within the ambit of environmental policy.<sup>34</sup>

<sup>32</sup> C-129/16 at para 58 <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62016CJ0129>

<sup>33</sup> Article 11 TFEU.

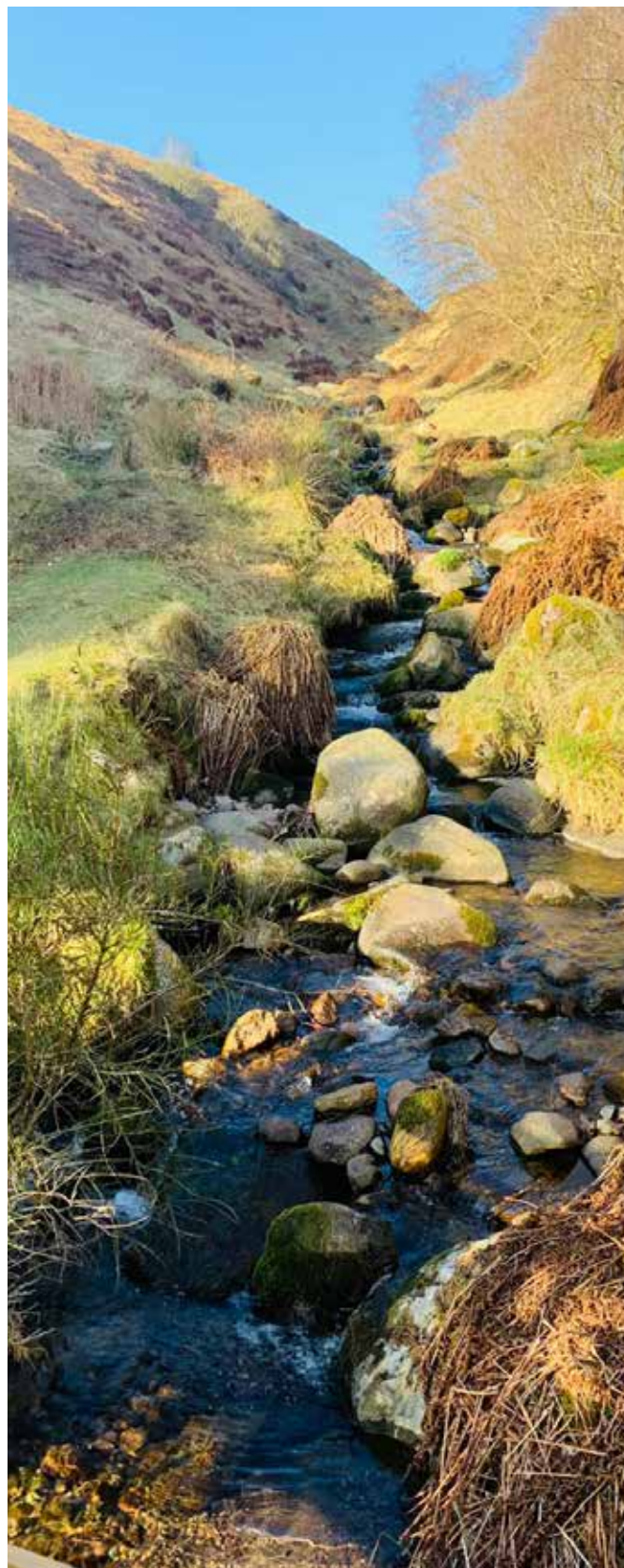
<sup>34</sup> Joined cases C-626/15 and C-659/16 at 71 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62015CJ0626>



### International context: Environmental Principles

The following key international conventions and declarations have established principles that influence environmental policy at EU, UK and Scottish level and include:

- **The Stockholm Declaration (1972)**<sup>35</sup> aimed to improve the environment by encouraging governments to adhere to the 26 principles set out.
- **The 1992 Rio Declaration on Environment and Development.**<sup>36</sup> This set out 27 principles of sustainable development, including the integration principle, precautionary principle and polluter pays principle. The declaration also promoted public participation in decision-making and the promotion of sustainable use of resources and the promotion of resilient ecosystems. These principles paved the way for UN organisations to incorporate these principles in the decision-making process, which has in turn seen these principles being introduced in environmental treaties and thus become part of international law. These include the UN Convention on Biological Diversity and the UN Climate Change Convention, both 1992.
- **The UN Convention on Biological Diversity 1992:**<sup>37</sup> enshrined the principle of sustainable use and the ecosystem approach, as well as the principle that environmental management should be undertaken at an appropriate spatial and temporal scale.



35 <https://www.un.org/en/conferences/environment/stockholm1972>

36 [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf)

37 <https://www.cbd.int/convention/text/>



## Consultation on the draft statutory guidance on the guiding principles on the environment

### RESPONDENT INFORMATION FORM

**Please Note** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:

<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

#### Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for the Scottish Government to contact you again in relation to this consultation exercise?

Yes

No



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