

HAVING “DUE REGARD” TO THE ENVIRONMENTAL PRINCIPLES

Purpose

1. To note that best practice is to “record compliance” when making a decision of relevance to the five “Environmental Principles”.

Background

2. Prior to Brexit most litigation for the protection of the environment would have been initiated under the *Environmental Protection Act 1990* or any of a range of underpinning *EU Directives* that were justiciable under the domestic law of Scotland at that time. Following Brexit a number of gaps arose in both legislation and environmental standards. To close some of those gaps the Scottish Parliament passed the *UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021*¹.

The 5 environmental principles

3. In order to protect the environment section 13 (1) of that Continuity Act set out the 5 environmental principles that would apply in Scotland:

Section 13 - The guiding principles on the environment

(1) In this Chapter, references to the guiding principles on the environment are references to the following principles—

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

4. Those 5 environmental principles can be paraphrased as follows:

- ***The integration principle*** – is that protecting the environment should be integrated into the making of policies by all public bodies;
- ***The precautionary principle*** - is that there should be proportionate decision-making in areas of uncertainty; to allow for protective measures to be taken without having to wait until the hazard or harm is realised;
- ***The preventative principle*** – is that preventative action should be taken to stop environmental damage before it happens;

¹ <https://www.legislation.gov.uk/asp/2021/4/contents>

- ***The rectification at source principle*** – is that when environmental damage does happen it should as a priority be rectified at source; and
 - ***The polluter pays principle*** – is that it is appropriate to hold those responsible for an environmental harm to account for the costs, rather than having those costs externalised and borne by civil society.
5. The overarching policy aim is to “*protect and improve the environment and contribute to sustainable development*”. The underlying objectives are:
- To promote better decision making;
 - To connect the decisions made on the environment to the impacts on people’s health, wider society and the economy;
 - To deliver policies that enhance Scotland’s natural assets; and
 - To produce better outcomes for the environment and for people in general.

The higher bar to be met by “responsible authorities”

6. Under section 15 of the Continuity Act any public body that falls within the definition of a “responsible authority” under section 1 of the Environmental Assessment (Scotland) Act 2005 is placed under a statutory duty to give “due regard” to those 5 environmental principles:

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.

The lower bar to be met by the Council

7. The Council does not prepare “plans and programmes” related to the environment so it is not defined as a “responsible authority” within the meaning of that 2005 Act. As it falls outside that “statutory duty” it is not expected to meet the higher bar that applies to those public bodies. That said it remains appropriate to have “due regard” to those environmental principles as a matter of “best practice”.

The guidance issued by the Scottish government

8. Paragraph 5.2 of the accompanying statutory guidance (***Paper 2.4A***) provides guidance to those who are duty holders on what it means to have “due regard”:

- 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 should be **considered early in the decision making process**, and must **be performed with a substantial, rigorous and open-minded approach**, reflecting the purpose of the duty to protect and improve our environment; and
- The duty **must be given appropriate weight while taking into account other considerations**, such as other duties in legislation or other policies.

9. Paragraph 5.3 then adds further detail on what those duty holders are expected to do in practice:

- 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.
- Given the complexity of the environmental and regulatory landscapes, **the guiding principles should be considered early in decision making processes**.

10. The following table highlights the key factors those duty holders would be expected to consider:

Environmental principle	The factors to be considered by any “duty holder”
<i>The integration principle:</i> That protecting the environment should be integrated into the making of policies	Duty holders need to consider any potential environmental impacts of their policies across both government and the wider public sector. For that consideration to support sustainable development there needs to be a joined-up approach to protecting the environment across policy areas.
<i>The precautionary principle:</i> That uncertainty is not a reason for a public body not to take action	Duty holders need to undertake a robust evaluation of the available evidence on the uncertainty; and an assessment of the potential consequences of inaction.
<i>The preventative principle:</i> That preventative action should be taken to avert environmental damage	Duty holders need to weigh up the severity and likelihood of any significant positive impacts as well as the potential for negative longer term effects. Where the policy may have material adverse impacts then mitigating options to prevent serious environmental harm should be weighed and evaluated as that policy is developed.
<i>The rectification principle:</i> That environmental damage should as a priority be rectified at source	Duty holders need to understand the potential damage that could occur and the impacts that could have on the environment. There is a need to understand where that

	potential damage might originate from and the likelihood of any far reaching impacts.
<i>The polluter pays principle:</i> That those responsible should be held accountable for the costs of prevention or rectification, rather than society in general	Duty holders need to reflect on the type of potential polluter (<i>individual or sector</i>) and their intentions (<i>deliberate action or unintended consequences</i>)

The best practice requirement to be met by this Council

11. The “responsible authorities” are to comply with a more detailed recording regime commensurate with their statutory duty.
12. Paragraph 6.9 of the statutory guidance is more applicable to the SCJC. It conveys that **the Council should maintain an “appropriate and proportionate” record of the serious consideration of the environmental principles.** That can be delivered through either the records of the decision making process itself (*as set out in the minutes of a Council meeting*) or through a separate published document (*such as a consultation paper*).
13. In practice the Council should:
 - Document an ‘appropriate record’ that members have given due regard to the principles and the likely “significant effects” on the environment;
 - Where relevant that document should record any reasons for concluding there were no “significant effects”; and
 - That information should be made publicly available within the minutes of a Council or committee meeting, or within a standalone document.

Summary

14. The expectation is that the Council takes a **“substantial, rigorous and open-minded approach”** whenever it does make decisions that could have a **“significant effect”** on the environment. That in turn requires a sufficient audit trail being put in place to evidence that members have:
 - Taken a **“balanced and proportionate”** approach;
 - Given due weight to all relevant considerations;
 - Reached rational conclusions; and
 - Communicated sufficient information for the general public to understand the decisions made.
15. Paragraphs 20-24 of the 2025 Public Consultation provide a worked example of how that is being put into practice:

Meeting the Guiding Principles on the Environment

20 -In proposing these changes best practice requires the Council to give “due regard” to the “significant effects” that this costs protection procedure can have on the environment. That includes:

- The opportunities to avoid or reduce any adverse effects; and*
- The opportunities to enhance the positive effects.*

21 - The following 3 paragraphs document how that is being met.

Does this procedure have a “significant effect” on the environment?

21 - The answer is yes. Making provision for the availability of a costs protection procedure does have a positive and “significant effect” on the environment; as for some that assistance will be essential in exercising their right to protect the environment.

The opportunity to avoid or reduce adverse effects (on the environment)

23 - In situations where the availability of costs protection was a determinative factor in a case proceeding to a conclusion; then in part the availability of this procedure will have made a small contribution to any environmental harm that was avoided.

The opportunity to enhance positive effects (on the environment)

24 - Extending Environmental PEOs beyond the Court of Session will enable pursuers in a far wider range of proceedings to access the costs protection when initiating an action to help protect the environment'. In situations where costs protection is granted it can potentially lead to an increase the number of environmental cases initiated in the courts.

Recommendations:

16. It is recommended that the Council:

- **Notes the way in which best practice in having “due regard” to the five environmental principles has been evidenced.**

**Secretariat to the Scottish Civil Justice Council
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