

# Scotland's Guiding Principles on the Environment: Statutory Guidance

Prepared under section 17 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021



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## 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>1</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. Section 16 sets out the environmental purpose of the duties, to protect and improve our environment and contribute to sustainable development. This guidance will serve as a practical guide to support public authorities and Ministers in fulfilling these 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.

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<sup>1</sup> The duties are set out in Sections 14 and 15 of the Continuity Act. The duty on UK Ministers has been modified by section 19 of the [Environment Act 2021](#) (see discussion at paragraph 4.4).

## 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>2</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 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>3</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.

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<sup>2</sup> [Consultation on Environmental Principles and Governance in Scotland – Published Responses](#)

<sup>3</sup> The section 14 duty on UK Ministers has been modified by section 19 of the Environment Act 2021 (see discussion at paragraph 4.4).

- 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.

#### 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. The guidance will assist duty holders in understanding and fulfilling their obligations to have due regard to the guiding principles in a manner that is proportionate and supports good decision making for the environment.

#### 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 illustrative examples included at section 5 of this guidance below provide insight on 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>4</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>5</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>6</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>7</sup>, habitats<sup>8</sup> and waste<sup>9</sup>. More detail on the EU environmental principles, and other environmental principles enshrined in international conventions and agreements, is provided in Annex B.

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<sup>4</sup> [EU Environmental Principles and Founding Agreements](#)

<sup>5</sup> A consolidated version of the Treaty on the Functioning of the European Union can be found [here](#)

<sup>6</sup> *Ibid*

<sup>7</sup> Case C-180/96 UK v Commission

<sup>8</sup> Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw

<sup>9</sup> 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 The TFEU.<sup>10</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(1) of the Continuity Act places a duty on Scottish Ministers to have due regard to the guiding principles on the environment in making policies (including proposals for legislation).
- 4.4 Section 14(2) of the Continuity Act places a duty on Ministers of the Crown, when acting in relation to Scotland, to have due regard to the guiding principles on the environment in making policies (including proposals for legislation). This duty on Ministers of the Crown is modified by the [UK Environment Act 2021](#). Section 19 of that Act states that the policy statement on environmental principles that the UK Government will issue under that Act applies to policy considerations by Ministers of the Crown relating to Scotland that relate to reserved matters. It further states that section 14(2) of the Continuity Act does not apply to Ministers of the Crown in relation to policies extending to Scotland so far as relating to reserved matters. These provisions restrict the effect of section 14(2) of the Continuity Act to situations where Ministers of the Crown are considering decisions for Scotland that relate to areas of policy that do not relate to reserved matters. As, in general, policy making in Scotland that does not relate to reserved matters is for Scottish Ministers, there can be expected to be relatively few occasions on which the duty in the Continuity Act and this guidance is relevant to decisions by UK Ministers. Where the duties on Ministers are discussed in this guidance it is important to bear in mind the scope of the application to UK Ministers.
- 4.5 Section 14(3) of the Continuity Act restricts the application of the duties on Ministers from applying to any policy or proposal so far as it relates to national defence or civil emergency, or to finance or budgets. The exclusion of finance or budgets applies to processes that are purely financial, such as the consideration of the annual budget cycle. This exclusion does not prevent the duties applying to the consideration of policies or programmes that involve expenditure or costs on other parties.

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<sup>10</sup> As stated in sections 13(1) and (2) of the Continuity Act.

- 4.6 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 Ministerial 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.

**Indicative Example:** A new strategy for the development of a sector’s infrastructure would be subject to SEA (see paragraph 4.9) and to the principles duty. However, day to day decisions taken under that strategy would and should not be subject to the duty, as any such decisions would be in line with the Strategy developed with an SEA. Major individual infrastructure project decisions with significant environmental effect or risks would potentially be seen as separate policy decisions in their own right (and as likely to cause significant environmental impact), and thus would be subject to the duty, and may also be subject to SEA.

Figure 1: Indicative example of where duties lie in decision making hierarchy

**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. [see para 4.4 for a discussion of the modifications to this provision made by the UK Environment Act 2021.]

(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.

Figure 2: Section 14 of the Continuity Act – Ministers' duties to have due regard to the guiding principles

- 4.7 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).
- 4.8 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.



- 4.9 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.
- 4.10 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>11</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.

Figure 3: Section 15 of Continuity Act – Other authorities' duty to have due regard to the guiding principles

- 4.11 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.

Figure 4: Section 16(2) of Continuity Act – Definition of the environment

- 4.12 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.

<sup>11</sup> See further, [Scottish Government SEA Guidance \(2013\)](#)

4.13 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 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 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. 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. Given the complexity of the environmental and regulatory landscapes, the guiding principles should be considered early in decision making processes.
- 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 illustrative examples below provide an indication of how the principles could be applied in practice and, in some cases, how interaction between the principles could be considered.

## Local Development Plans and the guiding principles on the environment

Local Development Plans (LDPs) cover, and are prepared by, each of the council areas across Scotland and the national park authorities – as planning authorities . They set out how places will change into the future, including where development should and shouldn't happen. They allocate sites, either for new development, such as housing, or sites to be protected.

The development plan (which includes the national planning framework and LDPs) guides decisions on all planning applications – decisions are to be made in accordance with the development plan, unless there are material considerations that indicate otherwise.

All new LDPs are subject to a Strategic Environment Assessment and therefore the duties to have due regard to the guiding principles on the environment will apply. The Environmental Report will set out the means to avoid, mitigate or reduce adverse environmental effects, as well as information on the monitoring plan.

It will be necessary to have due regard to the guiding principles throughout the SEA process. Consideration of the principles should begin early in the assessment process, including the recording of considerations within the pre-screening and screening SEA templates.

Existing LDPs were prepared before there was any duty to consider the guiding principles for the environment. However, it is useful to identify policy issues in existing LDPs where, if they were being developed now and subject to SEA, the duty to have due regard to the guiding principles might have informed policy development. There are already examples of good practice in LDPs that reflect the intent of the principles, and the application of the duty will lead to this being more transparent and supporting further good policy making.

Some examples of the future application of the principles are:

- LDPs consider a wide range of policies that impact on local environmental quality and the wellbeing of communities. The integration principle will be relevant to the consideration of environmental effects across the full range of policies in an LDP.
- The development plan includes policies on the expectations on proposals for development. The prevention principle will be relevant to the consideration of ensuring that environmental damage is avoided where practical.
- The polluter pays and rectification at source principles will be relevant to the consideration of what developer funded infrastructure should be required so as to prevent wider environmental damage from new developments, and to promote ecosystem function.

Figure 5: Illustrative example – Local Development Planning

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>12</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>13</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.

**Indicative 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 6: Indicative examples of policy decisions where the principle of integration might be significant

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>14</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>15</sup> and case law.

<sup>12</sup> See further, [Report of the United Nations Conference on Environment and Development](#)

<sup>13</sup> See further, European Parliament, “[Environment Policy: General Principles and Framework Fact Sheet](#)” (2021).

<sup>14</sup> See further, [Report of the United Nations Conference on Environment and Development](#)

<sup>15</sup> [EU Commission communication on the precautionary principle](#)

5.10 The precautionary principle enables proportionate decision-making in areas of scientific uncertainty that allow for protective measures to be taken without having to wait until the hazard or harm is realised. Decision makers should apply the precautionary principle when there is both a good reason to believe that serious or irreversible environmental damage could occur, and a lack of scientific certainty around the consequences or likelihood of the hazard and associated risk. Where there is uncertainty as to the likelihood or extent of potential environmental damage, but there is evidence indicating significant hazards and associated high risks of harm, cost-effective measures can be put in place to address the risk of harm through regulation of activities or products, further research or public information. Application of the precautionary principle will reflect the nature of the individual decision and measures should be proportionate to the desired level of protection. Decision makers should generally not seek to achieve zero or near zero risk, something which rarely exists when balanced against the social and economic impact of measures.

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;
- 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.

**Indicative examples of policy decisions where the precautionary principle might be significant.**

- Chemicals regulation – a precautionary approach can inform the design of regulatory systems for the assessment of new substances, and the consideration of substances where a new concern is identified.
- Non-native species – there can be a presumption in policy against the 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 7: Indicative examples of policy decisions where the precautionary principle might be significant

**An illustrative 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 8: An illustrative 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.

**Indicative 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 policies introducing preventative measures, ensuring that an excessive load of nutrients or harmful substances never reaches the watercourse.
- 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 9: Indicative 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.



**Indicative examples of policy decisions where the rectification at source principle might be significant.**

- Emissions control from industrial sites – policies on controls on emissions from industrial sites, such as sulphur capture, can reduce harm to the environment.
- Surface water management and blue-green infrastructure – policies encourage development of water-resilient places, emphasising the need to apply this to not just new developments, but as a core consideration for all urban design.
- Spreading of slurry on agriculture land – policies to ensure good practice in slurry spreading can prevent the risk of run off 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 10: Indicative 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. Duty holders should make efforts to identify potential polluters wherever possible, to ensure that the principle can be applied while the activity is taking place, ensuring that costs are borne by the polluter and giving them the incentive to minimise pollution. 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).

**Indicative 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 policies requiring 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 policies allow in relevant cases that permission is granted with conditions for compensatory actions, such as the creation of a new area of habitat to replace one lost through the development.

Figure 11: Indicative examples of policy decisions where the polluter pays principle might be significant

**An illustrative example of how multiple environmental principles can be taken into consideration when undertaking an Strategic Environmental Assessment (SEA):**

SEA of Sectoral Marine Plan for Offshore Wind Energy<sup>16</sup>

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.

<sup>16</sup> [SEA of Sectoral Marine Plan for Offshore Wind Energy](#)

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 12: An illustrative example of where multiple environmental principles have been taken into consideration when undertaking an SEA

### **Info Box 1: Relationship Between the Environmental Principles and National Planning Policy**

National planning policy is set out in the National Planning Framework and Scotland's National Marine Plan, which are reviewed periodically, for example every 3 years in the case of the National Marine Plan. Future reviews by the Scottish Government will be covered by the duty on Ministers to have due regard to the guiding principles on the environment

The National Planning Framework is a strategic document which sets out is a long-term plan for Scotland that sets out where development and infrastructure is needed. The Framework influences decisions on future development across Scotland, including the preparation and delivery of local development plans.

Scotland's first National Marine Plan (NMP) (adopted in 2015) provides the guiding framework for sustainable management of marine activities and resources out to 200 nautical miles. Scottish Ministers have planning powers for the inshore marine area (0-12 nm) under the Marine (Scotland) Act 2010 and have executively devolved planning powers for the offshore marine area (12-200 nm) under the UK Marine and Coastal Access Act 2009. Scottish Government has responsibility for planning for reserved functions such as oil and gas, shipping and telecommunications – although licensing of these matters remains reserved to UK Ministers.

The National Marine Plan sets out objectives and policies that guide marine and coastal decision-making to support a balance between economic development and environmental protection of Scotland's seas, including providing guidance for the development of Regional Marine Plans. Regional Marine Plans must conform with the Plan and allow for locally tailored plans for more local ownership, detail and decision making. Marine Planning Partnerships undertake regional marine planning through Ministerial Direction as per the Marine (Scotland) Act 2010 and are made of relevant marine stakeholders. The National Marine Plan applies to all decisions taken by public authorities that affect Scotland's marine area: Marine Scotland, wider Scottish Government, Local Government Authorities, other public authorities including statutory advisors, regulators and agencies.

Individual decisions and plans influenced by national planning guidance may themselves be subject to environmental assessment appropriate for their scale and impact. Where decisions and the development of plans by planning authorities are subject to SEA, then the duty to have due regard to the principles will apply and can be exercised through the SEA process.

The Scottish Government believes that national planning policy and the principles duties will be complementary, and will both support good policy making for the natural environment. For instance, National Planning Framework 4 states that 'the precautionary principle will be applied in accordance with the relevant legislation and Scottish Government guidance'.

Figure 13: Info Box 1 – National Planning Policy.

## 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 \(2013\)](#).

### 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>17</sup>
- 6.9 However, in the instances where SEA pre-screening or screening is not applicable, there will need to be an appropriate and proportionate record of the consideration of the duties, through the records of the decision making process or through a published document. This might be done, for example, as part of a consultation exercise, possibly within the consultation document or other documentation e.g. policy note/memorandum, or policy strategy document. 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). Best practice would also include making such information publicly available.

**Info Box 2: SEA and the Role of Consultation Authorities in Relation to the Guiding Principles**

SEA Consultation Authorities (NatureScot, HES and SEPA) will receive additional information regarding the consideration of the guiding principles as part of SEA documents submitted to them. Responsible authorities will commence the process of recording their consideration of the principles within the pre-screening and screening templates, with further evidence to be provided within the final Environmental Report submitted for consultation.

Having due regard to the principles will improve decision making and the presentation of environmental considerations. This additional information and analysis provided regarding consideration of the principles should support consultation authorities in assessing the overall quality of the information presented to them on environmental impacts. The Continuity Act does add to or alter the duties placed on consultation authorities by the Environmental Assessment (Scotland) Act 2005.

The duties placed on Scottish Ministers and responsible authorities to have due regard to the guiding principles now form part of Scotland's environmental law. If there were to be concerns that these duties have not been met, this could be considered for investigation by Environmental Standards Scotland.

Figure 14: Info Box 2 – SEA and the role of consultation authorities in relation to the guiding principles, including compliance and enforcement.

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<sup>17</sup> See further, Scottish Government, [Strategic Environmental Assessment: pre-screening template](#) (June 2015).

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

Note: This Annex is a part of this guidance and is also available as SEA guidance.

### 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 Two and Article 191(2) of 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,
- The principle that the polluter should pay

The Statutory Guidance on Scotland’s Guiding Principles on the Environment can be found [here](#).

The Strategic Environmental Assessment Guidance can be found [here](#)

Figure 15: 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>18</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.

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<sup>18</sup> For further information about the SEA process, please see the [Scottish Government SEA Guidance \(2013\)](#)

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.

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.

## 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>19</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.

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>20</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.

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<sup>19</sup> [Joined Cases C-78/16 and C-79/16](#) at paras 48 and 74

<sup>20</sup> [The Habitats Directive \(europa.eu\)](#)

- The Deliberate Release of Genetically Modified Organisms Directive (2001/18/EC)<sup>21</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>22</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>23</sup>

The European Commission has produced guidance on the precautionary principle<sup>24</sup>.

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>25</sup> and it has recurred in all subsequent Environmental Action Plans<sup>26</sup>. Following this, it is worth noting that the Environmental Liability Directive (2004/35/EC)<sup>27</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.

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<sup>21</sup> [Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC - Commission Declaration](#)

<sup>22</sup> [The Deliberate Release of Genetically Modified Organisms Directive \(2001/18/EC\)](#)

<sup>23</sup> [At paragraph 139 of the Court's Judgement](#)

<sup>24</sup> [European Commission “Communication on the Precautionary Principle” COM \(2000\).](#)

<sup>25</sup> [75/436/Euratom, ECSC, EEC: Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters](#)

<sup>26</sup> [Environment action programme to 2030](#)

<sup>27</sup> [Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage](#)

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>28</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>29</sup>.

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>30</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.

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<sup>28</sup> [C-534/13 - Reference for a preliminary ruling — Article 191\(2\) TFEU — Directive 2004/35/EC — Environmental liability](#)

<sup>29</sup> C-172/08 at para 36

<sup>30</sup> [C-129/16 at para 58 - Reference for a preliminary ruling — Environment — Articles 191 and 193 TFEU — Directive 2004/35/EC — Applicability ratione materiae — Air pollution caused by illegal waste incineration — Polluter-pays principle — National legislation establishing joint liability between the owner of the land on which the pollution occurred and the polluter.](#)

## 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>31</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>32</sup>.

## 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>33</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>34</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>35</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.

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<sup>31</sup> Article 11 TFEU.

<sup>32</sup> [Joined cases C-626/15 and C-659/16 at 71](#)

<sup>33</sup> [United Nations Conference on the Human Environment, 5-16 June 1972, Stockholm](#)

<sup>34</sup> [Report of the United Nations Conference on Environment and Development](#)

<sup>35</sup> [The Convention on Biological Diversity](#)



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