

*This feedback is an initial snapshot of the views of members of LINK's Governance Group on the draft guidance on environmental principles. These views will be discussed and developed further by LINK members as part of the formal consultation process and our position may adapt accordingly.*

### **Summary comments from LINK members**

In general, this policy document needs to set itself in context and acknowledge that the environmental principles are retained in law after Brexit as guiding legal principles that underpin all areas of government and that this particular guidance has the specific role of setting out how they apply to duty bearers in sections 14 and 15 of the Continuity Act, within a wider scope.

This document should and can:

- define what the principles are, anchoring them in the EU Treaty definitions, and giving examples of their application;
- define what 'due regard to' means;
- define who they apply to – explain s.14 & s.15 better;
- define them as legal principles

The document needs to be clear in its understanding that legal principles that should underpin and guide policy choices, so they cannot be siloed off into considerations to be balanced against other competing policy choices. In this regard, paragraphs 22 & 23 are concerning. In this regard, we are concerned that the policy guidance runs the risk of unwittingly losing the essence of what EU environmental principles offered our legal systems prior to Brexit.

### **Feedback on sections:**

#### **Introduction**

- We welcome the inclusion of the quote from the First Minister and wonder if a second quote on the importance of the environmental principles to Scottish Ministers could also be included. Perhaps from Continuity Bill speeches or commitment to 'maintain or exceed' EU environmental standards.

- Para 1 – we suggest this opening section (or at least the ministerial foreword) sets the principles in context of being newly established in Scots law. For example: 'The Continuity act establishes guiding principles on the environment and requires public authorities to have due regard to those principles in making policies.' Noting that in the EU context, the principles do not create direct legal rights but have been used by the courts to interpret and apply EU environmental law. Setting it in the wider frame makes it clear that the principles will be there to help guide the courts in interpreting and applying environmental law – this is a vital part of keeping pace. This will be important when it comes to the application and functioning of the human right to a healthy environment, and will give the crucial steer to the courts in how to interpret environmental law against other factors.

We also think this section should reflect the fact that the environment fundamentally underpins our society and economy, not just supports it.

- Para 1 – include the purpose from the Continuity Act: “with a view to protecting and improving the environment and contributing to sustainable development.”
- Para 1 – include an acknowledgement that SG will need to update this guidance should EU principles be updated. Also acknowledge that Scotland should also keep pace with the leading international standards on sustainable development.
- Para 2 – add in ‘legislative’ before ‘duties’ in this paragraph.
- Para 3 – Could the ambition be strengthened/clarified here? We don’t just want to achieve ‘the best possible outcomes for Scotland’s natural environment’ but instead we want to meet the targets set by COP15 and COP26 and targets in the Scottish Biodiversity Strategy. The outcomes should be to repair damage to the environment and restore losses in biodiversity which result in the best overall improvement of Scotland’s environment.
- Para 3 – LINK members also suggest that the environmental principles would apply to Scotland’s built environment and human activities such as agriculture and forestry. We suggest that the outcomes be for Scotland’s ‘environment’ rather than just limiting to ‘natural environment.’ This should be changed where ‘natural environment’ is mentioned later in the guidance.

## **Background**

- Paras 5 & 6 – it might help to explain that a fifth additional principle of integration was introduced during parliamentary scrutiny of the Continuity Bill. This would help the reader understand why ‘four core principles’ are discussed in para 5 and then ‘five guiding principles’ in para 6. This could also acknowledge that stakeholders sought to have additional EU principles beyond these five included in the legislation.
- Para 6 – We suggest this guidance includes a section about specifically who the duty applies to, which puts s.14 and s.15 in layperson’s terms & pulls out the bits from the Environment Assessment act and sets them in context.
- Para 8 – LINK members think it would be helpful to identify developers and land managers as parties who should also be interested in this guidance. This will help them to adapt their plans to secure public support and government funding, as any plans that go against the five principles will not, in future, receive such support or funding. For example, the polluter pays and precautionary principles are important for the forestry sector – this guidance would be helpful for applicants to forestry grant schemes and the consultants involved in these schemes.

## **Environmental principles in EU Law**

- Para 12 – We believe this should acknowledge that the principles have been used by the courts in interpreting and applying environmental law. We also suggest an acknowledgement is made that the environmental principles have evolved through caselaw and that this would be relevant to keeping pace requirements.
- Para 12 – Update text to read “These principles do not create any direct legal rights but guide and shape the development of EU environmental law, **policy and decision making...**”

Para 12 – To make the guidance more accessible to the public, “environmental acquis” could be changed to “collection of environmental laws.”

Para 12 – could a reference be included to EU guidance on the integration principle as well as the precautionary principle?

### **The Duty – to ‘have due regard’ to the guiding principles**

- Para 14 – LINK believes the document should clearly highlight the point that the duty should not be seen as a ‘tick box exercise’ – we really welcome this as a strong statement of the government’s intention. We suggest the penultimate sentence in this paragraph is highlighted or formatted so it clearly stands out to duty bearers. We also suggest this sentence is updated to read: “...should be used to deliver high quality policies, that actively **prevent or, if necessary, mitigate** against environmental harm.”

Para 14 – We feel it is really important to add to the end of the second sentence “early in the process and with the purpose of the guiding principles in mind – namely, protecting and improving the environment and contributing to sustainable development.” This is to be clear up front and remind users of the guidance of this vital purpose and help demonstrate ScotGovt’s helpful ambition to ensure environment at its heart. And not once policy agreed or almost set and then try to retro fit with the guiding principles.

- Para 14 – suggestion final sentence is tweaked to read ‘Any failure to demonstrably apply ‘due regard to’ could lead to challenge, including close scrutiny by stakeholders, parliament and/or the courts.

- Para 15 – suggest that the description of SEA is updated to reflect that there it not only identifies opportunities to avoid/reduce adverse effects but includes a duty to take opportunities that enhance positive effects unless other factors are sufficiently important to override this.

- Example box on Section 15 – suggest the relevant text from the 2005 Act is quoted directly in this box to make it easier for the general public to interpret the guidance and make it more accessible.

### **Duty and Application**

Para 16 – Second sentence updated to read: “These provide environmental protection requirements that are incorporated into policy making, **including proposals for legislation.**”

Para 17 - We think it is important to use same language as in the Act

“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.”

Para 19 - The Act says ‘responsible authority’ (defined under 2005 EIA Act, rather than “public authority” defined by Human rights act - should they be the same? This also applies to mention of ‘public authorities’ in para 20.

Para 21 – as set out in our overarching comments above, we are concerned by the description of ‘balancing’ the principles against other duties. “Balance” suggests trade-off, and that environmental principles can be ‘over-ridden’. The purpose of the principles, we contend, is that they underpin environmental dilemmas and therefore guide decision makers – they cannot be set aside. Not setting them aside, however, does not mean there is no ‘balance’ – the principles themselves include elements of judgement and integration means that social and economic concerns are given appropriate weight. Thus, we contend that the integration principle, in itself, as well as government’s multiple objectives suggest that it is not a “balance” but a need to strive to secure all outcomes, not simply to decide how much of each is the right ‘balance’. This is language is further reflected in para 22.

Balancing the ‘need to achieve the outcomes that are the goal of the policy’ with the guiding principles seems like a backwards way of thinking about the purpose of the guidance and the principles. This wording implies a policy-making process where the principles are seen as something to consider at the end of the policy process only. They should be integrated into policy design from the start. We are not clear what weighting is to be given to the principles.

There is no mention of ‘balanced and proportionate’ in the Continuity Act. We feel both of these together could limit the application of the principles and moves us away from the core purpose of protecting and improving the environment.

We suggest an option would be to speak of ‘integrating’ the principles into other duties and considerations rather than balancing them. The principles should sit alongside other duties.

As indicated above, suggest that the guidance acknowledges that the application of the principles will evolve through the courts’ legal interpretation.

### **Application in more detail – the principles in practice**

- Para 22 – we suggest the guidance be expanded here to explain how officials can demonstrate ‘appropriate influence’ is giving ‘due regard to’ the principles.

- Para 22 – as with earlier comments policies to enhance our natural assets should be focused on achieving the outcomes set by the Environment Strategy and relevant targets emerging from the CBD process.

### ***Integration***

- Suggest another example box is added to indicate that funding schemes are ‘policies’ that are subject to the application of the principles. This would emphasise that the exemption should not be for any policy that requires spending and other aspects of finance and/or budgets which should not be excluded either – namely green finance, green taxes etc and this is the chance to be clearer.

- In the example box, we suggest ‘local authority structure plans’ be updated to ‘local development plans.’

## ***Precautionary***

- Suggest adding a funding example as well as an example of where the principle has been applied to an infrastructure or development proposal. BECCS could also be included as an example.

- Para 26 - It's unclear from the guidance what the precautionary principle requires a decision maker to do. Paras 25/26 amount to some general statements about the principle, but offer little in terms of guiding decision-making. We suggest adding a new paragraph which is more prescriptive and dictates what officials should/shouldn't do re the precautionary principle. This guidance should explain in what circumstances the principle should apply and how it should be applied. The EU Commission's guidance on the application of the principle (referred to in Annex B) is a good example of how this could be formulated.

Para 26 – Need to be clearer that the responsibility for proving a lack of harm lies with the proponent of the activity (as opposed to requiring the public to demonstrate it would be harmful).

Para 26 – We disagree that application of the precautionary principle is more limited in cases of uncertainty. The presence of uncertainty is exactly where the application of the precautionary principle is crucial. We would reword the final sentence to: 'Officials should note that where there is uncertainty and/or inadequate information as to the extent and risk of harm, this principle favours that precautionary measures should be taken to protect the environment. Precautionary measures can be taken in the absence of scientific certainty that harm will otherwise result.'

In the example box, we wonder if the NNS example could fall under the prevention principle too?

## ***Prevention***

- Para 27 – we believe the principle should apply to all activities – whether regulated or unregulated and suggest removing 'unregulated' from the first sentence. Article 191(2) of the TFEU refers to the principle 'that preventive action should be taken'. There is no reference in the TFEU to there being any distinction in the application of the prevention principle as it applies to regulated/unregulated activities. Regulated activities can cause environmental damage too. There does not seem to be any justification for limiting its application to unregulated activities only. The rest of the paragraph does suggest that it has application to regulated and unregulated activities. We would delete the last three words of the first sentence of this paragraph to avoid any confusion.

We also suggest that it is made clear that the prevention principle allows for the policy to be changed/not implemented – that it shapes policy as well as shapes mitigation.

For the example box on p.10, suggest the flooding example could be improved: development on contaminated land is not usually a barrier to development, can be a way of getting land cleaned up. There should be no development on flood plains, so sounds a bit woolly to say "restricting development". Suggest Local Development Plan policy that gives strong presumption against loss of ancient woodland, seems simpler.

## ***Damage rectified at source***

Paras 28 and 29 lack any significant prescriptive or directive effect. What is a policy-maker supposed to do as a result of this principle? These two paragraphs suggest that they will only have to 'understand' the potential damage a policy may have on the environment. The principle is not very clearly elaborated in EU law but rests on the understanding that it is more effective to deal with problems early/at source, and that communities should bear all and only their own environmental damage/costs. We will develop our thoughts further in response to the consultation but suggest more thinking is needed here.

Para 28 – suggest that all the principles should operate in conjunction with each other and that the precautionary principle should be mentioned in this paragraph too.

Heat Networks example box: We are not convinced this is a good example to demonstrate the guiding principles on the environment. It's a better example of maximising resources and moving up the waste hierarchy. The second sentence is unclear and suggest 'If' is replaced with 'As'. We think

more explanation is required – does the SEA mean a clear link can be drawn between the principle of prevention and the aims of the proposals?

### ***Polluter pays***

- In general, we think this paragraph needs to better explain that this principle is to prevent ‘free-riders’ or externalities and that, if the polluter does not pay (or pay fully) then society (i.e. the public/taxpayer) will end up paying for the damage and any actions taken to remedy it. In some cases, eNGOs can end up paying – for example RSPB Scotland removing sitka spruce that is being naturally seeded on peatland due to adjacent sitka plantations (permitted/funded by previous forestry policies).
- Para 30 – we disagree with the suggestion on p.10 that there are instances where a polluter should not pay for pollution damage or remedial action. Could this be expanded to give examples where this would be the case? Can clear criteria for such exceptions be set out?
- Para 30 – we also disagree with the inference that the principle has resolved instances of costs of pollution being externalised onto wider society.
- We query the final bullet point in the example box - would actions through the planning system be an example of the polluter pays principle in practice? Pollution is not the same as removing a habitat so we think this would apply more where a development close to a habitat is polluting that habitat and the developers needs to clean that up and put mitigation in place, or build mitigation in from the beginning so that pollution is not happening. We do not think it’s straightforward to apply this to compensation for loss of habitat. Perhaps a better planning example might be a policy around developer contributions. E.g for education, trams, new road system, which is required to ensure that the additional infrastructure pressures are paid for by the development that is creating the additional pressure.
- We suggest the inclusion of an additional point in the example box - “Environmental regulation – requirements applied to a polluting industry to minimise or eliminate pollution, e.g. engine exhausts”
- For the example box outlining the Sectorial Marine Plan for Offshore Energy – we think additional explanation is needed to show why the principles are relevant here.

### **Recording compliance with the duty**

#### ***Where proposals are not caught by SEA***

- We agree that a duty to publish a standalone document should not be required, but believe that in whatever documentation records compliance must clearly set out the consideration that has been given to the principles. To ensure transparency, this documentation with senior officials or Ministers must be publicly available *before* the final decision is made on the proposal.

### **ANNEX B**

- Could a note on the purpose/status of Annex B be included in the guidance (or, at least, in the consultation document)? Should officials have reference to Annex B when applying the principles?
- On p.19 under ‘precautionary principle’ where reference is made to *Pfizer Animal Health SA v Council of the European Union* we would like an addition to be made. In *Pfizer* (at paragraph 456) the ECJ held that the application of the precautionary principle required the prioritisation of public objectives over economic considerations. That case referred to the protection of public health over the costs of regulation of the use of

antibiotics in animal feed, but obviously that approach is significant in terms of its potential application in environmental protection. It would be helpful if this bullet-point made reference to that specific paragraph.

- On p.21 under 'Integration requirement' we query whether this needs to reference UK-level agreements on sustainable development, as well as EU and international levels?
- On p.22 under 'Human Rights' – we suggest text is updated to reflect that definitions of environmental human rights have been proposed. The UN Framework Principles on Human Rights and the Environment ([2018](#)) and the FM's Taskforce on Human Rights Leadership also [published](#) recommendations for the incorporation of a human right to a healthy environment in spring 2021.
- On p.23 under 'Aarhus Convention' we suggest the final paragraph include an acknowledgement that citizens currently face limitations on their ability to enforce these rights and that Scotland must work to ensure it is compliant with Aarhus.