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Environmental Principles Guidance

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Environmental Principles Guidance

The Scottish Government has laid before Parliament *Scotland's Guiding Principles on the Environment: Statutory Guidance*,¹ and published a report on the consultation on the draft guidance held in late 2021.² The Guidance is required as part of bringing into force sections 13-18 of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 which require Ministers and other policy-makers to have due regard to a number of environmental principles when making policy.

Ensuring that the key environmental principles embedded in the EU treaties retained their legal status was one element of filling the environmental “governance gap” after Brexit and five principles are recognised in the Act:

- 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.

Once the relevant provisions of the Continuity Act have been brought into force, Scottish Ministers will be obliged to have due regard to these principles in making policy, including proposals for legislation. The same will apply to other public authorities in situations where their policy-making is covered by the Environmental Assessment (Scotland) Act 2005. Statutory guidance on this duty is required, but the obligation is to have regard to the principles themselves, as interpreted by the Court of Justice of the European Union, not the guidance. This is in contrast to the position in England where it is only ministers who are subject to a similar duty, which requires that due regard be paid simply to the ministerial policy statement on the principles (Environment Act 2021, ss 17-19). As explained in the current Guidance, in some circumstances UK Ministers may be bound by the Scottish duty, but generally, e.g. in reserved areas, it is the obligation in the Environment Act 2021 that will apply to them.

The Guidance explains the duty and its scope. As the duty is simply to “have due regard” to the principles, the impact that they have must be balanced and proportionate and weighed against other statutory obligations and relevant considerations. It follows that environmental damage may not always be prevented even when the principles have been properly considered. Consideration of the principles should come early in the decision-making process and be “performed with a substantial, rigorous and open-minded approach, reflecting the purpose of the duty to protect and improve our environment.” One significant point, clarified from the consultation draft, is that the exemption for decisions relating to finance or budgets applies only to processes that are purely financial, such as the consideration of the annual budget cycle. This helps to ease fears that this exemption might be used widely to avoid consideration of the principles in making policy in circumstances where any expenditure or resource issues are involved.

Each of the principles is explained, with an annex providing more information on their background. In relation to the precautionary principle, the statement that “decision makers should generally not seek to achieve zero or near zero risk” may offer reassurance to those who were concerned that precautionary concerns could stifle all action, but conversely worry those who will see that as justifying too little attention to risks that are not fully understood. Indicative examples are given of how the principles might be relevant in particular situations, although it is disappointing that these

¹ <https://www.gov.scot/publications/scotlands-guiding-principles-environment-statutory-guidance>.

² <https://www.gov.scot/publications/scotlands-guiding-principles-environment-statutory-guidance-parliamentary-statement-analysis-report/documents/>.

focus on examples with an obviously environmental dimension, rather than showing how the principles apply in other areas, such as education, housing or healthcare, where policies may have considerable indirect environmental consequences. The strategic environmental assessment of the sectoral plan for marine offshore wind energy is given as an example of how multiple principles can be taken into consideration.

Guidance is given on recording the consideration of the principles within the strategic environmental assessment process, and for Ministers in situations where the duty applies beyond decisions caught by that process. The links between the principles and national planning policy and local development plans are explained.

The legal recognition of environmental principles was widely welcomed and in the build-up to the Continuity Act, discussion centred largely on the strength of the duty (to have regard to, or to apply or act in accordance with, the principles?) and when it should apply (at the policy stage, or to all decision-making?). With those matters settled, the production of this Guidance has been a necessary step for the duty to come into force and the challenge will now come in seeing how far consideration of the principles makes any real difference to policy-making. The obligation to consider the principles reinforces the need to respond to the increasingly serious and urgent climate and biodiversity crises and should add structure and an element of transparency and accountability, but there will always be room for argument over exactly what the principles require and how far other considerations can justifiably be given priority.

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