

CONSULTATION

Response Document



**Guiding principles on the environment: draft statutory
guidance**

(Scottish Government)

8 February 2022

Introduction to CIEEM

The Chartered Institute of Ecology and Environmental Management (CIEEM), as the leading membership organisation supporting professional ecologists and environmental managers in the United Kingdom and Ireland, welcomes the opportunity to comment on this consultation.

CIEEM was established in 1991 and has over 6,000 members drawn from local authorities, government agencies, industry, environmental consultancy, teaching/research, and voluntary environmental organisations. The Chartered Institute has led the way in defining and raising the standards of ecological and environmental management practice with regard to biodiversity protection and enhancement. It promotes knowledge sharing through events and publications, skills development through its comprehensive training and development programme and best practice through the dissemination of technical guidance for the profession and related disciplines.

CIEEM is a member of:

- Scottish Environment Link
- Wildlife and Countryside Link
- Northern Ireland Environment Link
- Wales Environment Link
- Environmental Policy Forum
- IUCN – The World Conservation Union
- Professional Associations Research Network
- Society for the Environment
- United Nations Decade on Biodiversity 2011-2020 Network
- Greener UK
- Irish Forum on Natural Capital (working group member)
- National Biodiversity Forum (Ireland)
- The Environmental Science Association of Ireland

CIEEM has approximately 660 members in Scotland who are drawn from across the private consultancy sector, NGOs, government and SNCOs, local authorities, academia and industry. They are practising ecologists and environmental managers, many of whom regularly provide input to and advice on land management for the benefit of protected species and biodiversity in general.

This response was coordinated by Members of our [Scotland Policy Group](#).

We welcome the opportunity to participate in this consultation and we would be happy to provide further information on this topic. Please contact Jason Reeves (CIEEM Head of Policy) at JasonReeves@cieem.net with any queries.

Question 1

Do you think that the draft guidance is clear and has the right content to support the implementation of the duties in the Continuity Act?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

The requirement to 'have regard' to the guidance, as defined in the document could result in inconsistent application of the principles if Ministers or public bodies decide not to follow it (which the definition is very clear that they would not have to). The definition should clarify explicitly what is meant by the need to 'consider' the guidance and how this must be evidenced. This should highlight the need for principles to underpin decisions, and not simply become a 'tick-box exercise' if Scotland is to "show leadership" on tackling the climate emergency and biodiversity crisis.

In the Minister's foreword, it is stated that "this guidance and the duties which will come into effect, will apply across all sectors of government." However, this is not true as there are exclusions for (a) national defence or civil emergency and (b) finance or budgets. Not applying this policy to finance and budgets seriously undermines the Polluter Pays principle, because one of the main mechanisms by which polluters contribute is via charges by environmental regulators or by taxation of some form. Departmental spending and taxation can also have significant environmental implications in many ways, such as resourcing of Statutory Nature Conservation Organisations and regulatory bodies.

It cannot be assumed that duty holders will have had any prior experience in identifying and assessing environmental effects and therefore we believe duty holders should be signposted to further sources of advice, guidance and information to assist them in applying the policy principles effectively. This guidance should consider the full suite of impacts including natural capital assets and ecosystem services including species, habitats, soils, air and water quality, climate change, food production, forestry and fisheries. The duty holder must then use this assessment to consider whether there are less damaging alternatives and whether the identified risks can be effectively avoided or mitigated through the way that the policy is implemented.

In the Continuity Act, there is a requirement for Ministers to have due regard for "*maintaining and advancing standards in relation to the following matters—*

- (a) environmental protection,*
- (b) animal health and welfare,*
- (c) plant health,*
- (d) equality, non-discrimination and human rights,*
- (e) social protection."*

The draft guidance omits this duty which would need to underpin decision-making alongside the environmental principles. It is recommended that guidance be included on non-regression of standards (using the IUCN definition) and how this relates to the guiding principles.

Non-regression is increasingly acknowledged as a key parameter in environmental decision making, as reflected by its inclusion in the proposed United Nations (UN) Global Pact for the Environment, and in sustainable development, use and integration, the ecosystem approach and access to environmental information under the Aarhus Convention. There must be no regression of environmental legislation and commitment to international agreements,

particularly regarding the human right of access to justice for the environment, which is a fundamental component of the role of the European Commission. On principles and standards, there must be no regression on what Scotland accepts as best practice and minimum standards for the environment. There must not only be no regression, but a net environmental gain is also needed to meet many of the commitments in the draft post-2020 global biodiversity framework.

We also feel the guidance does not make it clear enough that the principles should be applied to all public bodies, including all government departments, government agencies, non-departmental public bodies and local authorities that exercise authority in environmental matters. This is in line with the existing biodiversity duty under the Nature Conservation (Scotland) Act 2004, whereby *“it is the duty of every public body and office-holder, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions.”*

On a practical note, the guidance is very repetitive which dilutes the new information in later sections. It would be improved by having clear sections for the definition of the duties and definitions of principles, which are then not repeated in the sections regarding how they should be applied and recording compliance.

Question 2

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

The integration principle should be used in an innovative way to achieve positive impacts on the environment, if we are to leave the environment in a better state. The draft statement currently only focuses on minimising negative impacts and should also highlight the opportunities for ‘win-win’ policies, such as Positive Effects for Biodiversity/Biodiversity Net Gain.

The prevention principle should be applicable not just when a policy will cause environmental harm, but when the opportunity arises (e.g. through new technology) to mitigate or reverse existing harm. This also applies to the rectification at source principle.

Under the interpretation of the precautionary principle, the guidance states *“where there is uncertainty as to the extent of potential environmental damage, but there is evidence of high risks of harm, measures can be put in place to prevent the risk of harm through regulation of activities or products, further research or public information.”* Further research should be employed to improve decision-making for future scenarios, however the wording of this guidance lists research as a measure to reduce harm in that instance, which it is not. In addition, it is important that the precautionary principle is applied when considering proportionality. If it is uncertain whether ‘substantial’ impacts will occur, then further investigation should be undertaken, with the degree of investigation proportionate to the effort needed to ascertain that there will be no such impacts. If this is not clear, the Precautionary Principle should be applied, and the policy adjusted accordingly.

Under paragraph 5.17, for the polluter pays principle, further guidance is needed to explain the statement *“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.”* Examples of when this would be the case are needed. It must also be made clear that significant impacts on the environment are only

allowed under exceptional circumstances under the polluter pays principle, and mitigation measures are employed where possible, i.e. where there are no feasible alternatives to remove the negative impact of a policy, or alternative policy options. It must be clear that this should operate alongside the prevention principle and rectification at source in this instance. Paragraph 5.18 currently does not make this clear through the statement *“In such cases it will be necessary to consider whether appropriate financial provision should be made while the economic activity is still taking place...”* This could encourage damaging practises to continue and pay for the consequences without change.

Question 3

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

In stating *“the duty must be given appropriate weight while taking into account other considerations, such as other duties in legislation or other policies”*, the guidance does not provide any useful indication of what weight should be attached to the principles and how to weigh the principles against each other in the case of any conflicts between them. As well as recognising the benefits to the environment itself, weight given to the principles must recognise the benefits for other obligations, for example economic benefits, using a natural capital approach.

It needs to be made explicitly clear in the guidance that policy-makers must always be guided by any relevant legislative requirements and other Government policies and standards when considering potential impacts on the environment. Policies that have the potential to not only cause environmental harm but that could result in unlawful actions or may conflict with other Government policy must be identified and avoided. An example of where this is not clear in the document is under paragraph 5.3 which states *“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.”*

Question 4

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

We agree that an environmental report, where required, is an appropriate place for reporting of compliance with the principles. However, for instances where an assessment is not required, the current guidance that *“Ministers will need to decide if consideration given in fulfilment of the duty can be best reflected in the records of the decision-making process or through a published document. It may be done, for example, as a part of a consultation exercise, possibly within the consultation summary report. There is no obligation to prepare a standalone document such as an impact assessment”* is not sufficient to support appropriate recording. There must be a standardised procedure, which is transparent and publicly available, to allow for monitoring of compliance. If reporting is done inconsistently and in different places, it will be incredibly difficult to review. For example, a Record of Determination could be produced, setting out evidence-based reasons why an impact

assessment is not required, with appropriate reference to legislative requirements and to the principles.

The statement under paragraph 6.9 *“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...”* must be amended to state *“Ministers must ensure that there is an appropriate record that they 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...”* and a set procedure must be given.

While we appreciate that the pre-screening and screening stages of the SEA process offers an opportunity to consider the principles early in the process (and this should be the case), that consideration must also continue throughout, including in monitoring and feedback on policies. This applies to documenting compliance under both Section 14 and 15 duties.

Question 5

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

Yes but more examples are needed to cover the breadth of policy types that will impact the environment, for example there is a lack of examples for wildlife. One example of where the policies have not been correctly applied (which is another angle which would be useful to include) is in JNCC’s 7th Quinquennial Review of the Wildlife and Countryside Act Schedules 5 and 8. The proposed criteria for listing species using IUCN categories offer little flexibility or protection for species which have no baseline data, and no known methods to assess population changes or to monitor populations. Instead of excluding Data Deficient (DD) species in these proposals, this should trigger use of the precautionary principle, offering protection against actions that would be expected to cause harm.

The National Planning Framework 4 should contain a reference to the environmental principles which is not the case at present. It should also set out how it has due regard for the principles, particularly polluter pays and prevention principle (e.g. through the mitigation hierarchy). NPF4 will be one of the primary mechanisms for delivering these principles due to the effects of planning on nature, and opportunities to harness the benefits of the natural environment for communities. How this will be applied to NPF4 would make a useful case study for the guidance document.

Question 6

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

This guidance should showcase the positive opportunities presented by the guiding principles, and encourage duty holders to utilise them to not only mitigate negative impacts, but to maximise positive impacts on the economy, society and the environment.

The duty to ‘have regard to’ is not strong enough and does not reflect the existing treaty commitments or meet the current legislative background. While the Continuity Act has

passed, there is still an opportunity to encourage Ministers and public bodies to go beyond the basic statutory duty, and encourage best practice. We would like to see guidance on how to 'act in accordance with' principles rather than to 'have regard to'. All principles must be applied when developing policies, strategies and action programmes, including proposals for legislation across all government departments.

We would also like clarification on whether the Scottish Government's Strategic Environmental Assessment guidance (which will be updated once the final version of the statutory guidance on the guiding principles has been approved) will be out for public review.

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