

# Scottish Executive Environment Group Consultation on The Environmental Liability Directive



**Friends of  
the Earth  
Scotland**

## A response from Friends of the Earth Scotland

23 March 2006

### Introduction

Friends of the Earth Scotland is a registered charity founded in 1978 and an independent member of the Friends of the Earth International network. We undertake research, advocacy and community development activities throughout Scotland in pursuit of environmental justice and sustainability.

Friends of the Earth Scotland welcome the opportunity to comment on the proposals to transpose the Environmental Liability Directive into Scottish law, and ask that the following points are considered before the regulations are finalised.

### Key concerns

#### Limited scope:

The proposed draft would only cover damage to EU protected areas and species, which means that a substantial proportion of Scotland's sites of special scientific interest (SSSIs) and the majority of all biodiversity action plan (BAP) species would not be covered. We believe the scope must be extended to cover all sites & species protected under Scottish law.

#### Defences:

The directive provides for strict liability for certain potentially hazardous activities. Strict liability means that businesses undertaking activities would not have to be shown to be at fault or negligent, provided there was a sufficient causal link between the activities and environmental damage. The Scottish Executive's proposal includes two legal defences to avoid strict liability, which cause us concern, these are:

- a) The permit defence proposals, which mean that payment for damage would not be required for any activity given an official licence.
- b) The state of the art defence, which means that if an activity was not considered harmful, according to the scientific and technical knowledge at the time it took place, then no costs would be payable. This is dangerous, particular in relation to new technologies like GMOs and nanotech, as it could encourage a situation where it is better not to know, therefore deterring research into possible environmental effects.

We believe both the state of the art defence and the permit exemption must be removed.

### **Friends of the Earth Scotland**

Lamb's House, Burgess Street, Edinburgh, EH6 6RD  
Tel 0131 554 9977 Fax 0131 554 8656 Email [info@foe-scotland.org.uk](mailto:info@foe-scotland.org.uk) Website [www.foe-scotland.org.uk](http://www.foe-scotland.org.uk)  
A Scottish Charity: SCO03442

**Strict liability is limited to certain activities:**

In the current proposal only certain activities (listed in Annex III to the Directive) are subject to strict liability. All other activities (including; fishing, farming and land development) are not subject to strict liability. We believe strict liability must be included for any activity with potentially significant environmental impacts.

**Inconsistencies with EU GMO risk rules:**

Genetically modified organisms (GMOs) pose unique risks to the environment and although GMOs are covered by the Annex III activities (see above), special provisions for GMOs must be made within the environmental liability legislation to avoid conflict with the EU Deliberate Release Directive and the Food and Feed regulations. These rules require an assessment of all risks to the environment, including all species (not just protected), as well as land and water. Recognising this, the Welsh Assembly has already proposed stricter rules for GMOs (amongst others removing the “permit defence”) within the environmental liability legislation for Wales; we encourage the Scottish Executive to replicate this action. The unique risks posed by GMOs must be addressed via a dedicated section, to remove any potential conflict with EU rules on GMOs.

**Conclusion**

Friends of the Earth Scotland is both concerned and disappointed with the scope of the proposals, which we do not believe are strong enough to ensure proper consideration of potential environmental impacts and will therefore not always ensure the polluter pays.

We trust that you are able to take these comments into account.

For further information please contact:

**Stuart Hay**  
**Head of Policy and Research**  
**Friends of the Earth Scotland**  
**shay(at)foe-scotland.org.uk**