



Richard Lochhead MSP
Cabinet Secretary for Rural Affairs and the Environment
The Scottish Government
Area 1N/08 St Andrew's House
Regent's Road
Edinburgh EH1 3DG

17 November 2008

Scottish Environment LINK
2 Grosvenor House
Shore Road
Perth
PH2 8BD

Tel 01738 630804
Fax 01738 643290

enquiries@scotlink.org
www.scotlink.org

Dear Cabinet Secretary

Environmental Liability Directive

Further to brief discussions between LINK representatives and the Minister for Environment on the 11th of November, we are writing to outline our concerns at the approach to transposition of the Environmental Liability Directive (ELD) in Scotland.

The 'minimum' approach outlined in the second consultation will mean that the directive will substantially fail in its main purpose, namely to 'make the polluter pay', particularly in cases where there is damage to biodiversity. We explained the detailed rationale behind this view in the LINK response to the first consultation. In summary, we feel that in order both to be practical to implement, and to have greater 'legal certainty', the transposing regulations must be consistent with existing Scottish environmental legislation and biodiversity policy. In particular, the transposing Regulations should:

1. Set the thresholds for 'biodiversity damage' at a workable and realistic level by extending the scope of species and habitats protected to **SSSIs** and **nationally important biodiversity** (as defined by those species and habitats within the UK Biodiversity Action Plan which occur in Scotland). The extension to SSSIs in particular is compelling for a number reasons: it will provide more certainty to operators; it will allow a practicable threshold for biodiversity damage based on 'site integrity'; and it will be consistent with protecting the public financial investment made over the decades towards the SSSI series and the SSSI condition targets in the Government's Performance Framework. It should be noted that provisions for restoration orders under Section 40 of Nature Conservation (Scotland) Act 2004 are *not* a substitute as they are substantially weaker than ELD. For example:
 - they require a criminal conviction before remediation can be ordered;
 - remedial measures do not extend to complementary and compensatory restoration;
 - they do not apply to cases of imminent threat;

- they do not require immediate action to prevent further damage;
- third parties cannot officially request action from competent authorities.

It should also be noted that extension to SSSIs also makes sound economic sense. According to the Scottish Government's own best estimates in its cost/benefit calculations in the Partial Regulatory Impact Assessment, the benefits of extending the Regulations to cover SSSIs would far outweigh the costs (total benefits of 3 cases a year of £316,000 compared with total costs of £93,000).

2. Drop the inclusion of **permit and 'state of the art' defences** in all cases, not just in relation to GMOs. Introduction of these defences will limit the practical and economic effectiveness of the ELD; weaken the application of existing laws; mean that the restoration of environmental damage at the polluter's cost (the whole purpose of the ELD) will not be fully secured, and thus will be more likely to fall on the taxpayer, or worse still, not be actioned at all.

We sincerely hope that the Scottish Government will transpose the ELD in a way which creates workable and effective legislation and demonstrates the Scottish Government's commitment to the sustainable element of its central purpose of sustainable economic growth.

LINK member bodies see this important directive as a milestone towards securing a future where preventable environmental damage and pollution events are a thing of the past, and in those rare cases where they do occur, the clean up bill does not fall on the Scottish taxpayer.

We have provided further detail on these and many other points in our consultation responses but felt we should also raise our concerns directly with you. We would be very happy to meet with you and your officials to discuss the directive in further detail.

Yours sincerely,

A handwritten signature in black ink that reads "John Mayhew". The signature is written in a cursive style. Below the signature is a solid black horizontal line.

John Mayhew
LINK Chair

cc.

Michael Russell, Minister for Environment
John Mason, Head of Environmental Quality Directorate