



Response by GM Freeze to the Scottish Government's Second Consultation on Transposing Environmental Liability Directive: Consultation on options for implementing in Scotland (May 2008)

GM Freeze

GM Freeze is an alliance of 55 organisations *calling for a moratorium on GM foods, the growing of GM crops for any purpose and on patents on genetic resources in agriculture, food production and forestry until the need for and safety of GM technology has been established and alternative approaches have been fully evaluated.*

Our members include consumer groups, farming organisations, environmental groups, development agencies, religious groups, animal welfare groups and food companies.

This response is submitted on behalf of GM Freeze. It covers our response to Scottish Government's consultation on proposals for implementing the Environmental Liability Directive (ELD) in Scotland issued in May 2008.

Summary

GM Freeze supports a broadening of the scope of the legislation to transpose the Environmental Liability Directive in Scotland to ensure that the polluters pay and the widest possible range of habitats and species receive protection. We believe that GMOs pose a unique threat to the environment because of their capacity to multiply themselves, and there is every justification for the Scottish Government to include the following provisions in The Environmental Liability (Prevention and Remediation) (Scotland) Regulations 2008:

- dropping the state of knowledge and permit defenses.
- extending the time limit on liability to 75 years.

We urge the Scottish Government to explicitly state in the regulations that the "operator" in the case of GMOs should be the holder of the marketing authorisation(s) rather than farmers. We also believe that the same should apply to the use of pesticides when damage arises as a result of using them *as per* the label instructions.

GM Freeze is concerned that considerable areas of Scotland where GMOs may be released remain unprotected by the present draft Regulations. This could be remedied by expanding protection to cover the widest possible area of land and water, including the whole of the farmed landscape and soil. In the first instance the minimum requirement to make the Regulations effective in respect of GMOs would be to extend the scope of the regulations to cover all SSSIs (as has been proposed for England and Wales) and BAP species and habitats. Two additional measures should be included to ensure that the Regulations achieve the objective of protecting the environment based on the Precautionary Principle:

- requiring companies to have compulsory insurance.
- extending liability to GMO escapes from contained use sites.

GM Freeze also considers it essential that the scope of the Scottish Regulation should explicitly cover GM trees, fish, animals and microbes.

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Questions from the Consultation Documents

Please also see the joint submission with Genewatch UK , eppac and others which we fully endorse.

Q.1 Do you think that the draft Regulations adequately reflect the Directive?

GM Freeze believes that the Directive has been weakened by intense lobbying by industry and some governments since it was first drafted so that it now fails to deliver its original intentions, which were to make the polluter pay for any harm caused by activities of operators and to ensure that operators follow the precautionary principle.

The proposals from the Scottish Government on GMOs greatly strengthen the Regulations in these respects in relation to GMOs compared to the original Scottish consultation in 2006. However, other areas such as pesticides require similar treatment. Expanding the range of habitats covered would also enhance the effectiveness of the Scottish Regulations to protect the environment and to ensure that those responsible for causing harm are held to account.

We would draw your attention to the following in the joint response from Genewatch UK and epacc:

1. The establishment of an unreasonably high threshold for biodiversity damage in the Regulations when there is a clear option to adopt any adverse effect on conservation status rather than a “significant “one (see paragraph 6-7)
2. Failure to apply the starting point for assessing damage as the date when the Directive came into force (paragraphs 8-13)
3. The flaw in the proposal which requires environmental organisations to demonstrate “sufficient interest” before requesting action, whereas the Directive presumes they have it already (paragraph 18-21)
4. The failure of Nature Conservation (Scotland) Act 2004 Section 40 to provide adequate provision to restore damages SSSIs compared with the requirements of the ELD (paragraphs 31- 44)

These deficiencies must be addressed as a matter of priority

Q.2 Do you think that the Quick Guidance will be helpful to operators? You may wish to comment here on the process as set out under ‘roles and responsibilities’ as set out in the quick guide.

GM Freeze welcomes the Quick Guidance because it provides an easily accessible introduction to this complex area of law. We feel that the Guide should set out the underlying principles behind the Directive more clearly at the start.

Q.3 Is there anything you would like included in the Quick Guidance that is not there already?

See comment above. In addition, a simple table could be included giving some examples of environmental damage caused by operators which would come within the scope of the Regulations.

Q.4 Do you think the relationship with existing legislation is correct? If not how should this relationship be protected?

The failure of the Scottish draft regulations to include SSSIs (as is proposed in England and Wales) assumes that adequate protection is provided by other legislation (Nature Conservation

(Scotland) Act 2004 Section 40). We do not believe this is the case – see paragraphs 31-44 of the joint submission with Genewatch UK and epacc.

Q5. Do you think the Technical Guidance provides sufficient understanding of the requirements and how the Regulations should be exercised in practice?

GM Freeze believes the Guidance provides a good basis for understanding the legislation. Greater clarity may be possible if several case studies were included setting out the nature of the damage, the grounds for finding fault and the remediation process required and costs. In providing this information in a clear way the guidance will leave operators in no doubt.

Q6. Is there any information you have which should be included in the RIA?

GM Freeze suggests that the RIA should be more explicit in its explanation of why the permit and state of knowledge defences have been dropped for GMOs and liability extended to 75 years in the Scottish Regulations. This explanation should include:

- The ability of GMOs to self replicate and the resulting possibility of contamination becoming worse over time and therefore more difficult to repair the damage.
- The difficulty in predicting how GMOs will behave in the environment due to lack of data, for instance their interaction with the soil and soil dwelling organisms.
- The ability of GMOs to transfer GM traits between species.
- The longevity of dormancy of some seeds in arable soils and for contamination to recommence after a delay of a number of years, notably GM varieties of crops already grown in Scotland like oilseed rape.
- The potential for gene staking over time creating organisms which are fitter for the natural world than their parents, for instance, the transfer, over several generations, of herbicide tolerance(s), insect resistance(s), fungal/disease resistance(s) and other traits.

Any other issues/comment

None

General Comments

GM Freeze welcomes the draft regulations on the transposition of the Environmental Liability Directive as an additional measure aimed at preventing and remedying environmental damage. Our response focuses largely on the environmental liability from the perspective of GMOs. We also make some general comments about the need to extend the scope of the Directive to ensure that it is as effective as possible.

GM Freeze very much welcomes the Scottish Government's changes to the treatment of GMOs in the draft regulations compared with the minimal provisions proposed in the first public consultation. However we are concerned that the scope of the Regulations means that only a limited range of habitats and species will be covered. We urge the Scottish Government to review this decision so that the provisions of the regulations covers all:

- SSSIs and BAP habitats and species.
- Ramsar sites.
- water courses and bodies regardless of size.

In the case of GMOs the current draft regulations explicitly exclude farmland where GMOs will be mainly released. Very little of the intensively managed farmland of Scotland is designated for nature conservation, although it is home to many species which are under threat to the point that they are subject to biodiversity action plans (BAPs). The conservation status of many of these species has declined as a result of intensive farming systems. GM crops have been developed to fit into intensive farming systems and will potentially threaten the BAP species in the future.

The need for broadening the scope of the Regulation is reinforced by the paucity of species caught by the current proposals to only include land designated as Special Protection Areas (SPAs).

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The species list covered by Special Protection Areas under the Birds Directive includes only two bird species which have been affected by intensive farming, the Lapwing and the Bean Goose. In contrast, the Red List of farmland bird species contains 9 species found in Scotland – Reed Bunting, Grey Partridge, Quail, Skylark, Tree Sparrow Yellowhammer, Corncrake, Linnet and Corn Bunting. Kestrel, Lapwing, Stock Dove and Barn Owl are on the Amber list. Under the present proposals only one of these species would receive any protection from the Regulation - the Lapwing.

Scotland's farmland is also home to many endangered arable weeds, which could be under greater threat if GM crops were introduced. Fifteen Vice Counties from Kirkcubrightshire to Easter Ross and Cromerty are listed as containing significant numbers of rare arable plants, for example, Shepherd's Needle. None of the threatened arable plants are within the scope of the current draft Regulations.

Another important omission from the current proposals is the failure to consider the possible introduction of GM fish into Scotland. There are examples of how exotic fish have had a deleterious affect on native species, for example the zander in England. There are several BAP fish species found in Scottish rivers, for example European Eel, River and Sea Lampreys, Smelt, Atlantic Salmon, Brown Trout, Sea Trout, the Vendace, the Powan and Arctic Charr, as well as freshwater invertebrates, which could be impacted upon by a GM fish escaping from fish farms. This prospect underlines the importance of extending the scope of the regulations to BAP species because GM fish would be mobile and have the potential to contaminate any water body.

The Regulations may also have to cover the release of GM trees. The longevity of trees species underlines the importance of the Scottish Government's proposal that the limit on remedies should be extended to 75 years. Many species would be only half grown at 30 years, including those already subject to genetic engineering, such as birch, poplar and pine.

Making GMOs a Special Case

The Scottish Government is to be congratulated for recognizing the unique nature of GMOs and therefore making them into a special case in the Regulations. We particularly welcome the dropping of the permit and state of the knowledge defences and the extension of the period of liability to 75 years.

The scope of the Environmental Liability Directive covers a far narrower definition of the environment and biodiversity than national and EU legislation requires for GMO risk assessments. The latter include the soil and all biodiversity, not just internationally protected species and habitats. This is a good reason for extending the scope of the Scottish Regulations to cover all SSSIs and BAPs. The Scottish Government has rightly recognized the threat posed to many farmland species, and therefore their exclusion from the scope of the Regulations is all the more strange. Adding to the uncertainty is the fact that there is very limited experience of cultivating GM crops on a large scale in the UK, which re-enforces the need to extend the scope of the regulations. Damage arising from the release of GMOs may not be obvious to start with and may not be picked up by post release monitoring required under EU regulation 1829/2003 and Directive 2001/18. This problem may be exacerbated by the fact that data gathered for supporting the risk assessment required by the EU GMO approval legislation may not truly reflect the condition in Scotland. In some circumstances a GMO may receive marketing approval for the whole of the EU against the wishes of the Scottish Government and the UK Government. Once again this reinforces the need to include the farmed countryside and associated wildlife within the scope of the Regulation. The complete absence of insurance cover for GMOs underlines the lack of reliable data and the need for companies to be more aware of their responsibilities and liability if they release a GMO into the environment. At present GM Freeze feel that the Scottish proposals have gone some way to achieving this but they will not persuade the biotechnology companies to follow the precautionary principle until farmland and farmland species are covered as well.

Finally GM Freeze believes that the scope of the Scottish Regulations should be extended to all GMOs kept in contained conditions (under the GMO Contained Use Regulations) which could escape and cause harm in the environment but are not currently covered by the ELD. The rapid development of genetically modified micro organisms (potentially including synthetic ones in the future) means that they too should be covered by Scottish Environmental Liability Regulations along with fish, trees, mammals and lower plants.

GM Freeze believes that by adopting such measures for the Scottish regulation Scottish Government would ensure that the polluter pays in the case of GMOs and would command wide support from the public who remain very concerned about the potential for adverse impacts of GMOs.

GM Freeze
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