

# NATURE CONSERVATION (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### **Part 2 – Conservation and Enhancement of Natural Features**

##### *Chapter 3 - Land Management Orders*

##### *Section 29 Proposals for land management orders*

205. This section provides for the circumstances and manner in which SNH may apply to the Scottish Ministers for the making of a land management order (“LMO”). It also specifies the land to which such an order may apply.
206. The land in respect of which SNH may make such an application is defined by subsection (1) as being land which:
- is, or forms part of, an SSSI;
  - is contiguous to, or which SNH considers to be otherwise associated with, an SSSI; or
  - is a combination of those types of land.
207. Subsection (2) specifies that SNH may propose to the Scottish Ministers that an LMO should be made where any of subsections (3) to (5) apply and SNH considers that an order is necessary or expedient for the purpose of conserving, restoring or otherwise enhancing the natural feature(s) specified in an SSSI notification.
208. Subsection (3) sets out the first circumstances in which SNH may propose to the Scottish Ministers that they should make an LMO. That is, where SNH has offered to enter into a management agreement but has been unable to do so because the person to whom the agreement has been offered has refused or failed to enter into such an agreement.
209. Subsection (4) sets out the second circumstance, where that the terms of a management agreement are not being complied with by the person with whom it has been concluded.
210. Subsection (5) sets out the third circumstance, where SNH is unable to enter into a management agreement in relation to the land because it is not aware of (and cannot reasonably discover) the name and address of the owner or occupier of the land in question.
211. Subsection (6) qualifies the circumstance set out in subsection (5). It prevents SNH from applying for an LMO unless it has taken action in accordance with section 48(10). The action required is to affix a notice to some conspicuous object on that land giving notice to “the owners and any occupiers” and stating that SNH wishes to enter into a management agreement in relation to that area of land. At least 28 days must elapse

between the notice being affixed on the land and any application to the Scottish Ministers.

212. Subsection (7) specifies the contents of any proposal from SNH to the Scottish Ministers for the making of an LMO. A proposal for an LMO must include a conveyancing description of the land to which it relates, a map on which the area is delineated, a description of the natural features in question and an explanation of what has been done by SNH and other parties in relation to any management agreement or offer of a management agreement. The proposal must specify the operations which SNH believes should be carried out on the land and define the persons who should carry out the operation, together with the methods to be used and the timescale within which the operation should be carried out. In addition, SNH must include a statement of the costs likely to be incurred by the person carrying out the operation and must indicate how much SNH will pay in respect of those costs. The application should also detail any operations which are *not* to be carried out on the land.

### ***Section 30 - Power to make land management orders***

213. This section confers on the Scottish Ministers the power to make an LMO. The Scottish Ministers are not bound to make an LMO in the same terms as proposed by SNH and they may make an LMO in terms they think appropriate, having considered all of the information available to them. They may also refuse SNH's application and decline to make an LMO, as they see fit.
214. The Scottish Ministers must reach a decision on the application within 3 months of the expiry of the period allowed for representations to be made in relation to the SNH application. That period, defined in paragraph 4 of schedule 3, must be at least three months.
215. Before making any decision on an LMO application, the Scottish Ministers are obliged to consider the matters detailed in subsection (2). These are the SNH proposal for the LMO, any valid representations made by other parties in relation to the proposal, any other relevant information obtained by them from SNH or other parties by means of the powers to require the production of documents or provision of information given to them under paragraph 6 of Schedule 3.

### ***Section 31 - Content of land management orders***

216. Subsection (1) specifies what a land management order made under section 30 must contain. This includes a conveyancing description of the land, a map, details of the relevant natural features and the operations to be carried out, details of the persons who are required to carry out the operations, the methods and timing relevant to those operations, details of operations which are not to be carried out, the date on which the order comes into effect and its period of validity, and information on how to appeal against the order.
217. Subsection (2) defines any operation specified in the LMO as one which must *not* be carried out as an "excluded operation". Excluded operations will in most cases equate to ORCs which SNH would not wish the land manager to carry out, notwithstanding the requirements of the LMO. Listing such operations as "excluded" allows the Scottish Ministers to retain the ability to regulate and control such activities which might have a detrimental effect on the SSSI.
218. Subsection (3) allows the Scottish Ministers to provide in the LMO for SNH to make payments to any person who incurs expense in carrying out an operation required under the LMO. Such payments must be reasonable given the requirements of the order and the nature of the work to be undertaken. "Reasonable" in this context means that it should neither be unreasonably high (which may represent an inappropriate use of public money) nor unreasonably low (which may be unfair to the person being obliged to carry out the work).

### ***Section 32 - Review of land management orders***

219. The intention is that LMOs (like NCOs) should not remain in place longer than is necessary. Section 32 both empowers and requires the Scottish Ministers to keep the number and impact of LMOs under review and allows them to amend or revoke any order which has become outdated or has outlived its usefulness.
220. Subsection (1) allows the Scottish Ministers to carry out a review of an LMO when they see fit for the purpose of determining whether to amend or revoke the LMO. The provisions of subsection (1) enable the Scottish Ministers to carry out a review in response to requests for review from parties affected by the order, where it appears to them to be appropriate and reasonable to do so. They may take action to review an LMO at any time.
221. Subsection (2) supplements subsection (1) by obliging the Scottish Ministers to review LMOs at least every 6 years, if they have not already done so on a more frequent basis. This ensures that LMOs cannot be left in situ for extended periods of time without Ministers being required to consider, at regular intervals, whether they remain relevant and necessary.
222. Subsection (3) provides the Scottish Ministers with the power to amend or revoke an LMO, if on the completion of a review they decide that amendment or revocation would be appropriate.

### ***Section 33 - Land management orders and related orders: procedure***

223. This section introduces Schedule 3. Schedule 3 sets out the procedures that must be followed when making any land management order or any amending or revoking order.

#### ***Schedule 3***

### ***Land Management Orders and Related Orders: Procedure***

#### **Notification of proposals for land management order**

224. [Paragraphs 1 to 5](#) of the Schedule specify the procedure SNH must follow when notifying a proposal for a land management order to the Scottish Ministers under section 29(2).
225. Paragraph 1 requires SNH to provide a copy of its LMO proposal, and the accompanying map, to every owner and occupier of land to which the proposal relates. SNH must also give notice to every other interested party (for the definition of “interested party” see section 48(2)) explaining the general effect of the proposed LMO. Details of all the interested parties (including the owners and occupiers) must be supplied to the Scottish Ministers, together with such other supplementary information as SNH believes appropriate.
226. Paragraph 2 obliges SNH to publicise the proposal in at least one relevant local newspaper and to use such other media for publicising the proposal (including the internet) as it thinks appropriate in the circumstances.
227. Paragraph 3 requires a notification under paragraph 1 or 2 to specify where a copy of the proposal and accompanying map can be inspected free of charge and obliges SNH to explain how members of the public may obtain a copy of the proposal and map at a reasonable cost. The notification must also specify how representations about the proposal can be made to the Scottish Ministers.
228. Paragraph 4 specifies that representations in relation to the LMO proposal must be made to the Scottish Ministers within 3 months of the date on which the interested parties were informed of the proposal. That period may be extended under the terms of paragraph 5.

229. Paragraph 5 sets out arrangements by which the Scottish Ministers may extend the period during which representations may be made under paragraph 4. They may do so of their own accord or on the application of any person. The period may be extended for a maximum of a further 3 months and the extension can be effected at any time during the initial 3 month period. The extension is effected by giving notice to the owners and occupiers who received copies of the proposal and to the other interested parties.

### **Power to require disclosure of information**

230. Paragraph 6 enables the Scottish Ministers to require SNH or any person to whom SNH has given notice of the LMO proposal, to disclose additional information. It also confers the power on the Scottish Ministers to specify the time and place as well as the form and manner in which such information should be made available to them.
231. Paragraph 7 limits the requirement to disclose information so as to exclude anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.
232. Paragraphs 8 and 9 provide that any failure or refusal to comply with a notice under paragraph 6 requiring the disclosure of information, or any alteration, suppression or destruction of such information, will constitute an offence punishable, on summary conviction, by a fine not exceeding level 5 on the standard scale. A defence of reasonable excuse may be advanced in relation to a failure to comply with a notice under paragraph 6.

### **Withdrawal of proposal**

233. Paragraph 10 allows SNH to withdraw a proposal to the Scottish Ministers under section 29(2) at any time prior to the making of an LMO. If SNH decides so to do, it must take action before the Scottish Ministers make any decision on the application and it must notify each person to whom it originally gave notice under paragraph 1.

### **Notification of decision on orders**

234. Where the Scottish Ministers decide to make, amend or revoke an LMO, paragraph 11 requires them to publish that decision in at least one relevant local newspaper and through any other medium (including via the internet) which they believe to be appropriate in the circumstances.
235. Paragraph 12 makes it clear that notice of any decision must also be given to the interested parties (including any owners and occupiers affected by the order).
236. Paragraph 13 sets out the information which must be provided in any notice of a decision made in relation to an LMO. The Scottish Ministers must specify their reasons for reaching the decision, set out the extent of any differences between the final order and the original SNH proposal, detail any amendments made (if the order amends an existing LMO) and explain the circumstances in which an appeal may be made against their decision to the Scottish Land Court. These provisions are intended to ensure the transparency and openness of decision-making and to enable any aggrieved party to challenge the LMO in an informed and effective manner.

### **Recording or registration of orders**

237. Paragraph 14 requires any LMO, amending order or revoking order to be recorded in the General Register of Sasines or registered in the Land Register of Scotland, whichever is appropriate at that particular time in relation to the area of land concerned. The practice of recording or registering orders reflects similar arrangements in relation to NCOs and ensures that the existence of any LMO is apparent to anyone who searched the relevant register.

***Section 34 - Appeals in connection with land management orders and related orders***

238. Subsection (1) establishes the right of any owner or occupier of land to which the LMO relates to appeal to the Scottish Land Court against the making of the initial LMO or any subsequent order. The appeal may challenge the decision to make the order or it may take issue with particular terms or conditions of the order.
239. Appeals must, by virtue of subsection (2), be made within 28 days of the date on which notice of the order was given by the Scottish Ministers.
240. Subsection (3) provides that the Scottish Land Court must consider an appeal on its merits and may make such other order as the Court thinks fit.
241. As with other appeals to the Scottish Land Court under the Act, subsection (3) provides that the Court should determine any appeal on its merits, rather than simply by way of judicial review. The Court is therefore empowered to look into the facts of the case and is *not* confined merely to examining whether, for example, the Scottish Ministers acted unreasonably or whether they failed to follow procedures correctly. In essence, the Scottish Land Court is entitled to examine the entire matter from scratch and to reach its own decision based on its own reading of the information presented to it. The Court may dispose of the case by making such order as it thinks fit. In particular, the Court is able to:
- affirm the decision made by the Scottish Ministers;
  - direct the Scottish Ministers to amend the order in such manner as the Court may specify; and
  - direct the Scottish Ministers to revoke the order.

***Section 35 - Effect of land management orders***

242. This section defines the point at which an LMO takes effect and the point at which it ceases to have effect.
243. An LMO, amending order or revoking order has effect as soon as the time limit for any appeal has expired or, where an appeal is lodged, as soon as the appeal is finally determined or when it is withdrawn. The period within which an appeal must be lodged is, in each case, 28 days (see section 34(2)).

***Section 36 - Offences in relation to land management orders***

244. Subsection (1) provides that a person who, without reasonable excuse, fails to carry out an operation required by an LMO will be guilty of an offence. The operation must be carried out in the manner prescribed by an LMO.
245. Subsection (2) provides that it is an offence for a person to carry out, or to cause or permit to be carried out, an excluded operation (defined in section 31(2)) unless the person has reasonable excuse for doing so.
246. Subsection (3) provides that a person found guilty of an offence under this section will be liable on summary conviction to a fine of up to £40,000, and on conviction on indictment to a fine (that is, to a fine which can be set at whatever level the Court thinks fit, including in excess of £40,000, having had regard to the facts of the case).

***Section 37 - Enforcement of land management orders***

247. This section allows SNH itself, where necessary, to carry out the operations specified in the LMO, where the terms of the LMO have not been complied with.

*These notes relate to the Nature Conservation (Scotland) Act  
2004 (asp 6) which received Royal Assent on 11 June 2004*

248. SNH is entitled to do so where it considers either that the operation has not been carried out within the timescales specified in the LMO or that it has been carried out otherwise than in the specified manner. In this situation SNH is not required to make any payments under the LMO and it may recover any payments already made. SNH is also empowered to recover from the person subject to the LMO any additional expenses which it has reasonably incurred in carrying out the operation itself. The intention is to protect the public purse from unnecessary additional costs which have arisen as a result of the failure by the person subject to the LMO to comply with the terms of the order.
249. Subsection (3) clarifies that “additional expenses” in this case means the difference between the actual cost to SNH of carrying out the operation and the amount it would have paid to the person who was required to carry out the operation under the terms of the LMO.