

# NATURE CONSERVATION (SCOTLAND) ACT 2004

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

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

#### *Chapter 1 – Sites of Special Scientific Interest*

#### **Notification of sites of special scientific interest**

#### *Section 3 Duty to give notification of sites of special interest*

31. Subsection (1) places a duty on SNH to notify, as a site of special scientific interest, any land which it considers to be of special interest by reason of its flora, fauna, geology or geomorphological features. These features are the “natural features” of the land and are defined as such, for the purposes of the Act, in subsection (2). It might be noted that in common usage the abbreviation “SSSI” is used for “site of special scientific interest” and that practice has been adopted in these Notes.
32. Where it considers a site to be of special interest SNH must notify that fact to the interested parties listed in section 48(2). Procedures to be followed by SNH in notifying an SSSI are set out in schedule 1 to the Act which is introduced by section 10.
33. Subsection (3) qualifies the duty in subsection (1) by requiring SNH to have regard to certain criteria and guidance when reaching a view on whether land is of special interest. Such guidance, covered by paragraph (b) of subsection (3), may be a formal document setting out SSSI selection criteria and issued under section 54. But guidance to SNH is also provided by subsection (3)(a). This requires SNH to have regard to the contribution which any individual SSSI is likely to make to the representativity of the overall SSSI series in Scotland.
34. When taken as a whole, the SSSIs notified in Scotland will form a coherent series of protected sites. To be properly representative of the diversity and geographic range of the natural features of Scotland it is considered that this series could, for example, include, at one end of the spectrum, sites which are exceptionally rare or unique and, at the other, an adequately representative sample of sites which are more widespread or common.
35. Subsection (3)(a) also requires SNH to give consideration to the Scottish contribution to the conservation of natural features at the British and European levels. In this sense the Act recognises that Scotland has a particular responsibility in relation to the conservation of sites, species and habitat types which are characteristic of, and more prevalent in, the more northern parts of the British Isles but which are not necessarily well represented elsewhere in Great Britain or the European Union.
36. The fact that a particular type of site may be fairly common in Scotland but unusual at a British or European level is a factor which SNH must take into account. In

particular this means that SNH, when evaluating the relative interest of a site, should give consideration to the status and conservation requirements of relevant species or habitat types against a wider British or European backdrop, as well as considering them within the context of Scotland.

37. On that basis a properly representative series could legitimately include a relative over-representation of certain features in relation to the natural heritage of Scotland, in order to ensure that an adequate Scottish contribution is made to the conservation of such natural features in Britain or Europe. It should not however under-represent natural features which are characteristic of Scotland simply because such features are common elsewhere. To do so would result in a series which would not be properly representative of the natural features found in Scotland, and such a series would therefore be at odds with the requirements of section 3(3).
38. Subsection (4) specifies that the notification given to interested parties as a consequence of the duty in subsection (1) must be accompanied by a number of supplementary items which specify the extent and special characteristics of the site, as well as providing such other general information as SNH believes appropriate. The accompanying documentation must in particular:
  - describe the site;
  - specify the natural features of the site which are regarded as being of special interest;
  - list any acts or omissions which are likely, in the opinion of SNH, to be damaging to those features of interest; and
  - specify the location and boundaries of the site and provide a map delineating the site.
39. Subsection (5) defines a shorthand, technical term by which the notification given to the interested parties by virtue of subsection (1) *plus* the detailed documentation specified in subsection (4) is to be known for the purposes of the Act. These items, taken together, constitute the “SSSI notification” for the area of land in question.
40. Subsection (6), in conjunction with section 48(2), defines the point in time when the SSSI notification has effect. From that point the site is formally an SSSI and benefits from the protective mechanisms set out in the subsequent provisions of the Act.
41. Subsection (7) provides a shorthand, technical term for the potentially damaging acts or omissions which are listed in the SSSI notification by virtue of subsection (4)(a)(iii). These acts or omissions are to be known as “operations requiring consent”. This term is further abbreviated for the purposes of these explanatory Notes as “ORC”.

#### ***Section 4 Site management statements***

42. This section requires that each SSSI notification must be accompanied by a site management statement prepared by SNH. The site management statement does not form part of the SSSI notification, but is a separate document which provides practical guidance to the owners and occupiers of the SSSI in relation to conservation and enhancement of the protected natural feature. It may also contain other information, including information which promotes the understanding and enjoyment of the natural feature by the general public.
43. The role of the site management statement is to complement and expand upon the rather technical and scientific information in the SSSI notification. To that end, SNH can use a site management statement to provide information and advice, in non-scientific language wherever possible, setting out how land managers can best secure the long-term protection of the site. At a practical level it will, for example, allow SNH to assist land managers in planning and carrying out operations on the site in ways which are

consistent with, and sensitive to, the conservation needs of the SSSI. Overall, the site management statement is intended to assist owners and occupiers, and their employees or contractors, to manage the site responsibly and in the most effective manner.

44. SNH can make use of site management statements as evolving documents. The provisions in subsections (3) and (4) enable the statements to be reviewed and updated in a manner which ensures that they continue to fulfil their purpose effectively. That process of review may be initiated either by SNH or by the owner or occupier of land within the SSSI.

### ***Section 5 Enlargement of sites of special scientific interest***

45. This section permits SNH to enlarge an existing SSSI, by adding an additional area of land (the “extra land”) to the original site. SNH is permitted to do so only where the combined site, comprising the original site and the extra land, can be regarded as being of special interest. The principal purpose of this provision is to enable land, which ought reasonably to have been included within the original site at the time when that original site was notified, to be incorporated within the site at a later date.
46. This might take place, for example, when new data come to light demonstrating the value or importance of the extra land – whether in its own right as land of intrinsic special interest or as land which is not perhaps inherently of special interest in itself, but which is demonstrably important to the effective conservation and management of the existing SSSI. The procedure in section 5 enables this to happen without having either to notify the additional land as an entirely separate SSSI or to denotify the original site and then re-notify the whole of the larger area from scratch. The procedure is sufficiently flexible to cover both a significant enlargement of an SSSI (for example, where a significant area of extra land of special interest is added) or a minor outward adjustment to the boundary of the site (for example, where the size of the site is increased only in a minor sense, perhaps for reasons associated with the effective management of the existing site). It should be noted that changes and adjustments which decrease the size of the SSSI are covered by section 9.
47. Any debate about the merits or otherwise of the enlargement must relate to the case for including the *extra* land. Section 5 does not allow the case for the original site to be debated as part of the process for including the land. Notification of the change is therefore confined solely to interested parties (see section 48(2)) in relation to the extra land. Representations from interested parties are similarly confined to those which are relevant to the case for or against inclusion of the extra land. Representations in relation to the original site (such as, for example, arguments putting the case for its denotification) are not competent in this context.
48. The procedures associated with enlargement are otherwise essentially the same as for initial notification and the arrangements set out in Schedule 1 again apply. In addition, SNH must have regard to the selection criteria prescribed in section 3(3)(a) and in guidance under section 54 in making the case for the combined area of land, just as it would for a new SSSI.
49. Notification under this section must update the original SSSI notification to properly reflect the natural features of the combined land and the guidance provided to land managers via the site management statement must likewise be updated in order to cover the enlarged site. Provision for updating the ORC list in the SSSI notification covering the combined site is made separately in section 6 and other variations to the notification can be made separately using the power conferred by section 8.

### ***Section 6 Review of operations requiring consent***

50. This section regulates any review of the ORCs listed in an SSSI notification. The times at which the process of review and revision can be carried out are subject to the constraints which are set out in subsections (1) and (2).

51. Subsection (1) gives SNH the power to review the ORC list when it thinks fit and obliges it also to do so on the request of any owner or occupier of the site. Subsection (2), however, limits the ability of SNH to carry out such a review more frequently than every 6 years, unless it has first obtained the consent of every owner or occupier. Thus, SNH can neither initiate reviews nor be obliged to carry out a review by an owner or occupier outwith the 6 year cycle, unless it has secured agreement from the owners and occupiers of the land affected.
52. Subsection (2) should be read in conjunction with the transitional provisions in paragraphs 3(a) and 5 of Schedule 5. These define the date on which the first 6 year period commences in relation to existing SSSIs and make special arrangements allowing SNH to conduct a structured programme of review of ORC lists during that initial 6 year period. SNH has been specifically tasked by the Scottish Ministers with reviewing those ORC lists which have been derived (as a consequence of paragraph 3(b) of schedule 5) from the PDO (“potentially damaging operations”) lists used for SSSIs under the 1981 Act. That review is to be undertaken in line with the policy that the new ORC lists should be more closely targeted and should deal with credible potential threats to the site, rather than (as has tended to happen in the past) simply listing all activities which might, theoretically, damage the site. Reserve powers exist, in section 7 and by using nature conservation orders, to cover the rare situations where activities which are genuinely detrimental to the SSSI interest have not been listed on an ORC list.
53. The 6 year period between ORC reviews reflects the existing site condition monitoring programme, which assesses the conservation status and condition of natural features across the SSSI series. It is this programme which yields the principal data which are required to inform a major review of the ORC list. There is nothing however to prevent more frequent reviews where there is mutual agreement between SNH and the owners and occupiers of the site that it would be sensible to do so.
54. Subsection (3) specifies that agreement to a review is given by owners and occupiers where *either* every owner and occupier explicitly consents *or* no reasonable objection to the proposal is received within 28 days. Where there are multiple owners and occupiers on a site and one individual seeks, without good cause, to block a review for which there is clear majority support amongst other owners and occupiers, it is unlikely that this will be regarded by SNH as a “reasonable objection”.
55. Subsection (4) enables SNH, in carrying out a review of the list of ORCs, also to review existing consents which it has given under section 16 of the Act allowing operations specified on the ORC list to be carried out. This is because a review of the ORC list may substantially alter that list and the detail of the particular operations specified in it, in order to ensure the protection of the site. Since ORC consents work, in practice, to modify the effect of the ORC list, it would be difficult to review that list without also considering the implications of existing consents. SNH may consider it would also be undesirable for consents to remain in place where it is clear that the operation is damaging the site and the consent is no longer consistent with the entry on the ORC list to which the consent originally related. Section 16 makes provision for the subsequent modification or revocation of ORC consents following a review under section 6(4).
56. Subsection (5) provides that SNH must amend the ORC list for any site where, on completion of an ORC review, it is of the opinion that operations should be added to or removed from the list or where it believes that an existing entry should be modified.

***Section 7 Addition or modification of operations requiring consent: urgent situations***

57. This section sets out the detail of a special procedure whereby SNH may, having obtained the consent of the Scottish Ministers, alter an ORC list for a site with immediate effect. This is an emergency measure which allows an unlisted operation to be added to the ORC list at very short notice where it becomes apparent that damage to the site may result if the unlisted operation is carried out. SNH may also modify any

existing entry on the ORC list in the same way (so that, for example, the existing entry is extended sufficiently to cover the operation which is posing a threat to the site).

58. SNH is limited in its power to change the ORC list on an emergency basis by subsection (2). This requires SNH to make a case to the Scottish Ministers explaining why it considers the alteration to the ORC list is necessary and why it considers the situation to be one of urgency. SNH cannot make the change to the ORC list unless the Scottish Ministers consent.
59. The effect of a change to the ORC list by means of section 7 is that the owner or occupier will be required to seek consent from SNH for an operation which may have previously been lawful. On receipt of an application for consent SNH may then be willing to allow the operation to proceed subject to conditions, or it may refuse consent. Applications for consent to carry out ORCs are dealt with in section 16 and appeals procedures are set out in section 18.

### ***Section 8 Variation of SSSI notifications***

60. This section enables SNH to vary certain aspects of the SSSI notification following the point at which the SSSI notification, and therefore the SSSI, has been confirmed under the terms of paragraph 10 of Schedule 1.
61. This section allows SNH to vary the description of the land and the list of features of special interest, as well as any miscellaneous “other information” contained in the SSSI notification by virtue of section 3(4)(a)(iv). It does not however allow SNH to vary the boundary of the SSSI (e.g. by enlarging the site) or alter the list of ORCs for the site. Separate procedures are provided in sections 5 and 6 in relation to these components of the SSSI notification.

### ***Section 9 Denotification of sites of special scientific interest***

62. This section provides a process by means of which an existing SSSI (or any part of an existing SSSI) may be denotified. The procedure set out in this section is in essence the reverse of the notification process specified in section 3. SNH must first determine that a site (or part of a site) is no longer of special interest, having applied essentially the same criteria as used for site selection and notification and restated in section 9(3). This includes a requirement to consider the contribution which the site makes to the SSSI series as a whole, both in relation to the natural features of Scotland and to those of Great Britain and of the member States of the European Union.
63. Having determined that the site, or part of the site, no longer satisfies those criteria, SNH must then give a revocation or modification notification to the interested parties in the same way as for an initial notification. In the case of a denotification, however, the information given to the interested parties, rather than detailing the special interest of the site, must set out SNH’s reasons for regarding the site or part of it as no longer being of special interest.
64. Where part only of the site is to be denotified, the interested parties are those individuals and bodies specified in section 48(2) who have an interest in relation to the particular part of the site which is to be denotified. SNH is not required to notify parties who have an interest in relation to other parts of the site only, although section 48(2)(k) gives it power to do so (and to inform other individuals and organisations who are not otherwise interested parties) where it may be appropriate to inform a wider audience of the proposed change. As with enlargement (see section 5), the denotification process is sufficiently flexible to cover scenarios ranging from the denotification of an entire site through to minor adjustments to the boundary of an SSSI.

## ***Section 10 Notifications relating to sites of special scientific interest: procedure***

65. This section introduces Schedule 1, which sets out procedures to be followed in relation to the notification of SSSIs under section 3(1), and their subsequent enlargement (section 5) or denotification (section 9).

### **Schedule 1**

## ***Notifications relating to sites of special scientific interest: procedure***

### **Application of Schedule**

66. [Paragraph 1](#) applies Schedule 1 to the notification of SSSIs under section 3(1), the notification of enlargements under section 5 and the denotification of SSSIs under section 9.

### **Publication**

67. [Paragraph 2](#) ensures that SNH must publish information describing the general effect of notifications under sections 3(1), 5(1) and 9(1). The objective is to ensure that the general public should reasonably be aware that an SSSI is being created, enlarged or removed. The minimum requirement is that information should be published in a local newspaper circulating in the area in which the SSSI is situated. SNH also has discretion as to other means of publicising the notification. The SNH website could, for example, provide a key mechanism for making such information publicly available. This provision allows SNH to give consideration to and to use other appropriate means designed to bring notifications are brought to the attention of a wider audience.

### **Content of notification**

68. [Paragraph 3](#) details the information which must be given to the interested parties when SNH provides notification of an SSSI, its enlargement or denotification and which must also be contained in the related notice required under paragraph 2.
69. It is a requirement of paragraph 3 that any such notification, and any notice published under paragraph 2 in the press, on the internet or elsewhere, must name a place where the full notification can be inspected free of charge at any reasonable time and from where a copy of the relevant documentation can be obtained or purchased.
70. [Paragraph 3\(c\)](#) ensures that SSSI notifications, notifications of enlargement and denotifications, and related notices give information about the right to make representations to SNH. The formal date of notification is defined in section 48(2) and the deadline for the submission of representations cannot be less than 3 months after this date. SNH must also specify the manner in which representations are to be made (including, for example, the address to which they are to be sent and whether representations can be made by e-mail as well as by letter).

### **Confirmation or withdrawal of notification**

71. [Paragraph 4](#) requires that an SSSI notification, notification of enlargement or denotification must be formally confirmed or withdrawn by SNH within one year of the date on which it was given. Provision is made to allow the period of one year to be extended in accordance with arrangements set out in paragraph 12. SNH is obliged to consider any representations which have been made in relation to the notification before confirming it. As noted above, representations must be made within the period specified in the notification and in the notice given under paragraph 2 which, by virtue of paragraph 3(c), cannot be less than 3 months.
72. [Paragraph 5](#) deals with the situation in which SNH fails to confirm a notification within the one year period (or within any period as extended by virtue of paragraph 12). If a notification is not formally confirmed by the deadline, it is to be treated as if it had been

withdrawn by SNH on the day on which the period allowed for confirmation expired. In such circumstances the notification no longer has any effect and the SSSI ceases to exist. It should, however, be noted that a failure to confirm the notification does not invalidate any effects it may have had during the period prior to non-confirmation – for example, if decisions under regulatory regimes or the planning system had been influenced by the existence of the SSSI.

### **Modification of notification**

73. Paragraphs 6 to 8 enable SNH to modify a notification prior to confirmation. Notifications may be modified by amending the matters specified in the SSSI notification (defined in section 3(4)) and SNH is accorded a degree of flexibility in this connection during the period prior to the notification being confirmed.
74. Thus the description of the land, the natural features which are of special interest or the miscellaneous other information included in the SSSI notification may be added to, removed or amended. This may, for example, be done where SNH requires to correct part of the notification or accepts a particular point made by an objector. SNH may also amend the boundaries of the site to reduce its coverage, for example, where it considers that a particular area should in fact be excluded from the site. SNH is not however permitted to use its pre-confirmation power of modification to extend the boundaries of the site or to add to the ORC list. Separate procedures exist in sections 5, 6 and 7 to allow changes to these particular components of the SSSI notification. These powers can be used before as well as after confirmation.

### **Referral to Advisory Committee**

75. Paragraph 9, together with section 21(6) to (8), sets out SNH's obligations in situations where representations (including objections to the site) have been lodged in accordance with paragraph 3(c).
76. Where any valid representation has been received and it relates to the natural features specified in the notification (e.g. it is an objection concerning the appropriateness or accuracy of the information contained in an SSSI notification by virtue of section 3(4)(a)(ii) or it concerns SNH's reasons for considering a site no longer to be of special interest) SNH cannot then confirm the notification until it has referred the representation to the Advisory Committee on SSSIs ("ACSSSI) and considered any advice received from ACSSSI.
77. The role and operations of ACSSSI are defined in section 21 (for which see paragraphs 153 to 162 of these notes ). The need to allow sufficient time for ACSSSI to consider objections, and for SNH properly, in turn, to consider ACSSSI's advice, prior to expiry of the deadline for confirmation of the SSSI was one of the key reasons for extending the confirmation period from 9 months (under the 1981 Act) to one year (under this Act).

### **Notice of decision to confirm or withdraw**

78. Paragraph 10 obliges SNH to give formal notice of any decision to confirm or withdraw a notification. Notice must be given to the interested parties (see section 48(2)) and must be publicised, including in at least one local newspaper and by any other means which SNH thinks fit, in accordance with the requirements of paragraph 2. A failure to give such notice within the deadline for confirmation leads, by virtue of paragraph 5, to the notification being deemed to have been withdrawn.
79. Paragraph 11 deals with the situation in which an objection to the notification has been referred to ACSSSI. In such cases the person who lodged the objection must be provided not only with notice of the confirmation or withdrawal of the notification but must also be given a copy of the advice which ACSSSI had given to SNH in relation to the matters raised by that objector.

### **Extension of period during which notification is to be confirmed or withdrawn**

80. Paragraphs 12 and 13 provide for the extension of the period within which a notification must be formally confirmed or withdrawn. An extension may be made in the event of a referral to ACSSSI, but the extension can be for no more than an additional 6 month period. Thus the notification is required, in most situations, to be confirmed or withdrawn within no more than 18 months of the date on which it was originally given. If this does not happen it will be deemed (by virtue of paragraph 5) to have been withdrawn.
81. Where no objections have been received which are required under section 21 to be referred to ACSSSI, paragraph 13 does however allow for the period for confirmation or withdrawal to be extended for an unspecified period where this is by mutual agreement between SNH and all owners and occupiers of land within the SSSI in question. In such circumstances confirmation could take longer than 18 months. Such an agreement may, for example, be reached where SNH is engaged in constructive but very detailed negotiations with owners and occupiers and they are content with the progress of those negotiations.
82. Paragraph 14 specifies the manner in which agreement to an extension of the period for confirmation or withdrawal is to be obtained by SNH. Agreement is given either where every owner and occupier explicitly consents or where no reasonable objection is received within 28 days of SNH making a proposal for extension. The concept of reasonableness is applied here in order to prevent one individual from blocking an extension for petty reasons and thereby thwarting the wishes of the overwhelming majority of owners and occupiers of the site. A similar principle applies elsewhere in the Act, for example in relation to the review of ORC lists (see section 6(3)(b)).
83. Paragraph 15 requires SNH to inform the interested parties of any extension to the period for confirmation or withdrawal. This is particularly relevant to the situation foreseen in paragraph 14(b) where no reasonable objection is received.

### ***Section 11 Effect of SSSI notification***

84. Subsection (1) defines the point at which modifications to an SSSI notification, or alterations made to an SSSI notification by virtue of sections 5 to 9, take effect. Original SSSI notifications have effect from the date on which they are given (see sections 3(6) and 48(2)) and they have effect in their modified or amended form as of the date on which notice of the relevant change is given.
85. Subsection (2) provides that, where SNH gives notice (under paragraph 10 of Schedule 1) that it has withdrawn a notification of enlargement (given under section 5(1)), the original SSSI notification continues to have effect in its unaltered, original form. In other words, the notification reverts to the *status quo ante* and the situation continues as if the proposal for enlargement had never been made. It should be noted that this does not invalidate the effects which any notification given under section 5(1) may have had during the period between notification and withdrawal – for example where a decision by a regulatory body or under the planning system may have been influenced by the notice of enlargement.
86. Subsection (3) provides that an SSSI notification ceases to have effect when SNH gives notice (under paragraph 10 of Schedule 1) of its decision to withdraw the SSSI notification. It also provides that a denotification of a whole SSSI does not, in contrast to a partial denotification, have effect until the relevant notification under section 9(1) is confirmed. A default arrangement covering the situation in which SNH fails to take a decision is covered separately in paragraph 5 of Schedule 1.



## **Exercise of functions in relation to sites of special scientific interest**

### ***Section 12 Exercise of functions by public bodies etc.***

87. **Section 12** applies to the exercise by a public body of any function on, or so far as affecting, any land which is of SSSI status.
88. This general duty is therefore invoked whenever a public body exercises a function in relation to any part of the SSSI series, whether the function affects a part of one SSSI, the whole of an SSSI or a variety of areas of land on a number of different SSSIs. In essence, public bodies must comply with the obligations set out in section 12 wherever their policies or operations impinge on, or are likely to affect, SSSI land.
89. Subsection (2) requires public bodies to:
- consult SNH in relation to the exercise of the function;
  - have regard to any advice received from SNH as a result of such consultation; and
  - take reasonable steps, when exercising the function, to both further the conservation and enhancement of protected natural features and to maintain and enhance the representative nature of SSSI series as a whole.
90. As with the biodiversity duty in section 1, the general duty in relation to SSSIs does not override other statutory obligations. Public bodies must still carry out their primary functions in a proper and effective manner. But in doing so they must also act to further the conservation, maintenance and enhancement of individual SSSIs and the wider SSSI series.
91. Subsection (3) ensures that the relationship between the general duty in section 12 and the more specific obligations in sections 13 to 15 is clear. Compliance with section 12 does not absolve a public body from the need to comply with the more detailed requirements regulating specific operations which are likely to damage any natural feature for which an SSSI has been notified. The provisions of *both* section 12 *and* sections 13 to 15 must be complied with. Section 12 is an overarching duty. Sections 13 to 15 describe how to deal with situations in which specific operations are likely to damage an SSSI. The interplay between section 12 and sections 13 to 15 is particularly important where a public body is considering the option to proceed with an operation against SNH advice. In such cases, the public body remains bound by its general obligation under section 12 (for which see section 14(3)(c)).

## **Operations affecting sites of special scientific interest**

### ***Section 13 Operations by public bodies etc.***

92. Subsection (1) prohibits a public body from carrying out any operation which is likely to damage any natural feature by reason of which an SSSI notification has effect, unless certain conditions are met. These are that either:
- SNH has given explicit written consent to the operation in accordance with section 13(4);
  - the provisions of section 14(1) apply (i.e. consent has effectively been given in some other form or the operation is necessary in an emergency); or
  - the provisions of section 14(2) apply (i.e. the operation satisfies the conditions set out in subsection (3) allowing the public body to proceed in the face of a refusal of consent by SNH).
93. Contravention, without reasonable excuse, of this section is a criminal offence under section 19.

94. Subsection (2) provides that the obligations imposed by subsection (1) apply whether or not the operation would take place on land within an SSSI. This means that operations by a public body which would be likely to damage the protected natural features of an SSSI are controlled under section 13 even where they take place outwith the formal boundary of the site. What matters is whether the operation is likely to damage the protected natural features. Where the operation is taking place is not relevant.
95. It is important to note in this context that public bodies, unlike private land managers, are required to do more than merely seek consent for operations on the formal ORC list for a site. The effect of not limiting this provision to ORCs is intended to require public bodies need to be more pro-active in their approach. Public bodies must, for example, assess potential risks to any SSSI (including an SSSI on adjacent land to that on which they intend to carry out operations) when planning and carrying out any operation. In this sense, public bodies must take responsibility for anticipating any potential threat to a site, whilst private owners and occupiers are not obliged by section 16 to think beyond the ORC list notified to them by SNH or to consider the impacts of their activities on a neighbouring SSSI. The activities of public bodies are regulated by sections 13 and 14. For more on the position of private owners and occupiers, see the notes on section 16, below.
96. Subsection (3) requires that an application for SNH's consent to an operation must specify the nature of the operation, provide details of the proposed dates on which the operation will start and finish, and define the land on which the public body proposes to carry out the operation.
97. Subsection (4) provides that where SNH has received an application as specified under subsection (3), it may either consent to the operation or refuse its consent. Where SNH consents to the operation it is entitled to do so subject to such conditions as it sees fit.
98. Subsection (5) makes it explicit that any conditions imposed under subsection (4) can, in particular, restrict the manner in which the operation is to be carried out or specify that the operation may only be carried out on part of the land in question. SNH may also stipulate that the operation can only be carried out for, or within, a certain period of time (for example, outwith the breeding season for important species). The types of conditions which may be imposed by SNH are not however limited to the examples given in subsection (5).
99. Subsection (6) obliges SNH to provide written advice to the public body when giving or refusing consent to an operation. Such advice must include advice on how to minimise the type of damage to the protected natural feature by reason of which an SSSI notification has effect. The provision of such advice is not optional and this section ensures that SNH will provide appropriate conservation and ecological advice and guidance to other public bodies which will allow them to carry out a permitted operation in the most appropriate and least damaging manner.
100. Subsection (7) requires SNH to provide reasons for either refusing consent or giving consent subject to conditions. This is intended to ensure the transparency and openness of decision-making and to make it easier for decisions by SNH to be challenged by the public body in question where it believes SNH has wrongly refused consent or imposed unreasonable conditions.
101. Subsection (8) ensures certainty by deeming any application for consent under section 13 to have been refused if SNH has failed to respond within 28 days of the date of application. Where SNH neither gives nor refuses consent, and the application is therefore treated as having been turned down, the public body has the option of proceeding under section 14(2)(a).

**Section 14 Operations by public bodies etc.: authorised operations**

102. Subsection (1) sets out details of the situations in which SNH consent to an operation is not required by a public body. These are effectively situations in which consent has already been given via another route, or where action is necessary in an emergency. The particular circumstances are where:
- permission has already been given by a regulatory authority under section 15. The regulator is obliged under section 15 to have regard to SNH advice before giving permission and this subsection obviates the need for SNH to give separate permission for the operation. SNH consent is contained within the regulatory permission;
  - explicit planning permission has been granted. Again, SNH advice is taken into account by the planning authority and separate permission from SNH for the operation is not required by this subsection. It should be noted that this exemption applies only to the explicit grant of planning permission and does not remove the need to obtain SNH permission for an operation undertaken as a permitted development for which planning permission is not needed;
  - an operation is carried out in order to deal with an emergency situation. This exemption can only be invoked where SNH is informed as soon as possible after the need for the emergency operation becomes clear;
  - an operation is carried out in accordance with a management agreement between SNH and the public body. In concluding the agreement SNH will have consented to the operation; and
  - an operation is carried out in accordance with some other, formally-agreed plan for the management of land which has been approved in writing by SNH. For example, a forest management plan setting out a programme for forestry operations and land management activity over an extended period of time. The operations specified within such a management plan could be consented to in advance by SNH if it were to decide to approve the plan and gave such approval in writing.
103. Subsection (2) allows public bodies to proceed with an operation, in certain closely defined circumstances, even where SNH has refused consent or has imposed conditions which are unacceptable to the public body. But it may only do so where all of the conditions set out in subsection (3) have been met. It should be noted that failure by SNH to take a decision within 28 days in response to an application under section 13(3) is deemed to be a refusal of consent and the provisions of this subsection would therefore apply.
104. Subsection (3) sets out the conditions which have to be met if a public body intends to proceed with an operation in the face of SNH opposition. The conditions are that:
- no action can be taken until the 28 day period for consideration of the original application has expired;
  - notice must be given to SNH of the proposed start date for the operation;
  - that start date cannot be less than 28 days from the date on which notice of the intention to proceed with the operation is given;
  - the notice given to SNH must set out what the public body has done, or proposes to do, in response to any advice which may have been received from SNH in relation to the operation;
  - the operation must be carried out in a manner which causes as little damage or disturbance to the natural feature specified in the SSSI notification as is reasonably possible in all the circumstances;

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2004 (asp 6) which received Royal Assent on 11 June 2004*

- in seeking to avoid damaging or disturbing that feature the public body must have regard to any advice received from SNH; and
  - the public body must comply with its general duty in relation to SSSIs and the SSSI series, as set out in section 12(2)(c).
105. Subsections (4) and (5) govern certain situations in which a public body proceeds with an operation and that operation causes damage to a protected natural feature. The situations in question are where the operation has been carried out on the basis of permission from a relevant regulatory authority, where it is an emergency operation and where it has been carried out in the face of a refusal of consent from SNH or where conditions imposed by SNH have been set aside. In these cases, the public body is obliged to consult with SNH on how best to restore the damaged feature and it must, so far as is reasonably practicable, then carry out that restoration work in accordance with SNH advice. Failure to do so is a criminal offence under section 19.

***Section 15 Consent by certain regulatory authorities***

106. **Section 15** sets out the procedures to be followed where the permission of a relevant regulatory authority is needed before an operation affecting an SSSI may be carried out. Relevant regulatory authorities are to be defined for the purposes of the Act in a separate order made by the Scottish Ministers. It is not intended that planning authorities should be treated as regulatory authorities in this context, since statutory requirements for planning authorities to consult SNH in relation to planning applications already exist separately in planning legislation.
107. Subsection (3) requires a relevant regulatory authority to notify SNH before deciding whether to permit any operation which would be likely to damage a natural feature specified in an SSSI notification. Such notification to SNH must specify the nature of the operation, the proposed dates of commencement and completion, as well as the land on which it is proposed to carry out the operation.
108. Subsection (4) specifies that the obligation to consult SNH applies even if the proposed operation would take place outwith the land of an SSSI. As with section 13(2), what matters is whether the operation would be likely to damage the site, not where it is taking place. Again, the Act places a special responsibility on regulators as public bodies to anticipate and assess potential risks to SSSI land in a pro-active sense and, where they are public bodies, in accordance with the general duty set out in section 12.
109. Subsection (5) prohibits the authority from deciding whether to give its permission until 28 days have elapsed from the date of the notification to SNH under subsection (2) unless SNH has notified the authority that it does not need to wait until then. This provision is intended to ensure that SNH has sufficient time to provide advice, without unnecessarily delaying a decision if one can be taken quickly. For its part, SNH will require to be sensitive to the needs of regulators, who are themselves normally obliged to respond to applications within statutorily defined timescales.
110. Subsection (6) requires the relevant regulatory authority to have regard to any advice received by SNH when deciding to give its permission for an operation, and, where it does give its permission, in deciding whether any conditions should be attached to its permission.
111. Subsections (7) to (10) govern the situation in which a relevant regulatory authority decides not to follow advice from SNH, where that advice is not to grant permission for an operation or where it advises the regulator to impose certain conditions. Where this happens, certain conditions are imposed automatically and the regulator is obliged to inform both SNH and the applicant of the situation. This includes the requirement on the regulator – in addition to setting out the nature of the permission given and any terms and conditions – to explain what it has done, or proposes to do, in consequence

of the advice given by SNH. The regulator must make it explicit that it has taken its decision in the face of SNH advice.

112. The first automatic condition imposed via subsection (10) is that the operation cannot commence before the expiry of a 28 day period from the point at which the regulator has informed SNH that its advice has not been followed. The provision for a 28 day period between notice being given to SNH and the permitted start date for the operation allows SNH time, if necessary, to seek an interdict under section 45 and/or to advise the Scottish Ministers of the situation (in which case the Scottish Ministers would also have the option of prohibiting the operation by means of a nature conservation order).
113. The obligation on the regulator to make it clear to the applicant that permission has been granted in the face of opposition from SNH is intended to ensure that the applicant is aware of the possibility that the permission could be challenged and the operation prohibited. In such circumstances the applicant may, for example, wish to avoid incurring significant expenditure in connection with the proposed operation until the situation has been more fully resolved.
114. The second condition is that the applicant is obliged, as a condition of the permission granted by the regulator, to carry out the operation in such a way as to minimise, as far as is reasonably practicable in all the circumstances, any damage or disturbance to the protected natural feature.

### ***Section 16 Operations by owners or occupiers of sites of special scientific interest***

115. Subsection (1) prohibits an owner or occupier of land within an SSSI from carrying out, or causing or permitting to be carried out an ORC, except with written consent from SNH. Contravention of this provision is a criminal offence under section 19. Consent is obtained on application under subsection (2). The requirement for consent is set aside in certain specified circumstances defined in section 17(1).
116. It should be noted that, by virtue of section 17(4), sections 16 and 17 do *not* apply to any public body which is the owner and occupier of SSSI land. This means that any operations carried out on SSSI land by, or on behalf of, a public body will be dealt with under the provisions of sections 13 and 14, rather than under sections 16 and 17. The effect of sections 16 and 17 is therefore limited to private owners and occupiers. This distinction between public bodies and private owners and occupiers is reflected in the notes which follow.
117. It should also be borne in mind that “public body” has a broad meaning in the context of the Act and that it encompasses any body which is carrying out functions of a public nature. Because of this, there may occasionally be circumstances in which a body which usually carries out functions in a private capacity may be responsible to carry out functions of a public nature in one area of activity (e.g. if a public body sub-contracts some of its functions to it). The body would be a “public body” in that context. Where a body has dual capacity the application of the Act will be determined by whether or not, in any particular circumstance, the body is acting in pursuance of its public functions or whether it is operating in a purely private capacity.
118. In contrast to public bodies, a private land manager is required by section 16 only to have regard to the ORC list notified to him/her by SNH. Whilst public bodies are obliged to be pro-active and to anticipate any potential risks, there is no strict legal requirement imposed by section 16 on private land managers to think more generally about non-ORC list operations which might be likely to damage the SSSIs natural features.
119. If an operation is not on the ORC list then consent is not required from SNH and the owner/occupier does not have to consult SNH. Neither is there any legal obligation on the owners or occupiers of neighbouring land to consult SNH about the potential impacts of operations on their land on adjacent SSSI land. It should be noted however that powers have been provided within the Act (in section 7, via nature conservation

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orders, and in section 45) which allow SNH or the Scottish Ministers to take emergency action to address potential threats from otherwise unregulated operations, should it prove necessary to do so. Private land managers, whilst not formally obliged to look beyond the immediate context of the ORC list, are advised to be generally aware of the existence of these special powers.

120. Subsection (2) specifies that an application for consent to carry out an ORC must detail the nature of the operation, set out the proposed dates of commencement and completion and define the land on which it is proposed to carry out the operation.
121. Subsection (3) provides that SNH may, on receipt of an application made under subsection (2), consent to or refuse permission for an operation. Where it consents to the ORC it may impose such conditions as it thinks fit.
122. Subsection (4) makes it explicit that any conditions imposed under subsection (3) can, in particular, restrict the manner in which the operation is to be carried out or specify that the operation may only be carried out on part of the land in question. SNH may also stipulate that the operation can only be carried out for, or within, a certain period of time (for example outwith the breeding season for important species). The conditions imposed by SNH are not however limited to the examples given in subsection (4).
123. Subsection (5) provides that SNH may, on completion of a review of ORCs and related consents under section 6(4), modify or withdraw consent to an operation by giving notice to the person to whom consent was given. SNH may also modify or withdraw consent where it considers that carrying out the operation even in accordance with the consent will damage the SSSI in a manner which was not foreseen at the time the consent was given. In the latter case, (i.e. where subsection (5)(b) applies) SNH may only modify or withdraw the consent with the agreement of the Scottish Ministers and this proviso is set out in subsection (6).
124. It should be noted that the modification or withdrawal of consent may affect the ability of a land manager to continue with the established management of the land and that this may, in turn, give rise to a right to a compensatory management agreement in accordance with subsection (9). SNH is required to have regard to the *Financial Guidelines* to be published as statutory guidance under section 54 in deciding whether it should offer to enter into such an agreement.
125. Subsections (7) and (8) define the point at which a modification or withdrawal of consent take effect. In the case of a modification or withdrawal under subsection (5) (a) (i.e. following an ORC review carried out under section 6(4)) the change does not take effect until the expiry of the deadline for any appeal against the decision or, where an appeal has been brought, the point at which it is withdrawn or finally determined. Appeals must be lodged, by virtue of section 18(2) within 28 days of notice being given by SNH.
126. In the case of a modification or withdrawal under subsection (5)(b), for which SNH has obtained the agreement of the Scottish Ministers, the change has immediate effect. This means that any operations covered by the consent must also cease (or be altered to reflect the modified consent) with immediate effect. An appeal must again be lodged within 28 days (see section 18(2)) but operations would only be permitted to resume in the originally consented form in the event that any appeal is determined in favour of the land manager.
127. Subsection (9) obliges SNH to offer to enter into a management agreement in certain specified circumstances. In doing so, SNH must act in accordance with the *Financial Guidelines* which are to be published as statutory guidance under section 54. Copies of the *Financial Guidelines* can be obtained from the address given in paragraph 18 of these notes.
128. The circumstances in which SNH is required to offer a management agreement are described in subsection (9) and are subject to two requirements.

129. Firstly, the obligation to offer an agreement can only apply where SNH:
- refuses to consent to an operation being carried out;
  - makes its consent subject to conditions; or
  - modifies or withdraws its consent.
130. SNH must also have regard to the *Financial Guidelines* in determining whether it should enter into a management agreement. Where SNH considers that it should offer an agreement it must make such an offer on such terms and conditions as it thinks fit, having had regard to the formal guidance contained in the *Financial Guidelines*. The terms and conditions offered may include provision for any payments to the land manager which SNH, having had regard to the *Financial Guidelines*, consider appropriate in the circumstances.
131. Subsection (10) requires SNH to give an applicant reasons for a decision to make its consent subject to conditions, to refuse consent, to modify or withdraw its consent, or not to offer to enter into a management agreement in pursuance of subsection (9)(a). This provision is intended to ensure the transparency and openness of decision-making and to make it easier for any aggrieved party to challenge such a decision in an informed and effective manner. Specific rights of appeal are dealt with in section 18.

***Section 17 Operations by owners or occupiers of sites of special scientific interest: authorised operations***

132. Subsection (1) specifies the particular circumstances in which a private owner or occupier does *not* require SNH's consent before carrying out an ORC. These are effectively situations in which consent has already been given via another route, or where action is necessary in an emergency. The particular circumstances are where:
- permission has already been given by a relevant regulatory authority under section 15. The regulator is obliged under section 15 to have regard to SNH advice before giving permission and this subsection obviates the need for SNH to give separate permission for the operation;
  - explicit planning permission has been granted. Again, SNH advice is taken into account by the planning authority and separate permission from SNH for the operation is not required by this subsection. It should be noted that this exemption applies only to the explicit grant of planning permission and does not remove the need to obtain SNH permission for an operation undertaken as a permitted development for which planning permission is not needed;
  - an operation is carried out in order to deal with an emergency situation. This exemption can only be invoked where SNH is informed as soon as possible after the need for the emergency operation becomes clear;
  - an operation is carried out in accordance with a management agreement between SNH and the owner or occupier. The exemption covers operations carried out directly by the land manager as well as those carried out on his/her behalf (for example, by a contractor). In concluding the management agreement SNH will have consented to the operation; and
  - the operation is necessary in order to comply with the requirements of a land management order ("LMO"). In seeking such an order, SNH will have identified ORCs which may need to be carried out and the order will include an appropriate consent to those operations. LMOs are covered in sections 29 to 37.
133. It might be noted that, for private owners and occupiers, there is no equivalent to the provision in 14(1)(e) allowing for operations in accordance with an agreed management plan for the site. This is intentional and reflects the fact that public bodies are under a general duty, by virtue of section 12, to conserve and enhance SSSIs. As a result they

are accorded a greater degree of freedom and flexibility in managing SSSIs, but are also placed under the more onerous legal obligation to think beyond the limits of the ORC list provided by SNH and to guard against any potential damage to the natural features of the site.

134. Subsections (2) and (3) govern certain situations in which a land manager proceeds with an operation without SNH consent, either on the basis of permission from a relevant regulatory authority (given, for example, in the face of SNH opposition under sections 15(7) to (10)) or in an emergency situation, and that operation causes damage to the natural features of an SSSI. In these cases, the land manager is obliged to consult with SNH on how best to restore the site and he/she must then carry out that restoration work in accordance with SNH advice. Failure to do so is a criminal offence under section 19.
135. Subsection (4) specifies that sections 16 and 17 do not apply to operations on SSSI land where the owner or occupier of the land in question is a public body and that public body is acting in the exercise of its functions. Sections 13 and 14 apply instead. This effectively means that operations carried out by public bodies are governed by sections 13 and 14, whilst operations carried out by private land managers are covered by sections 16 and 17. The unusual circumstance in which a body may be exercising public functions in some situations and acting as a private owner or occupier in others is discussed above in connection with section 16.

### ***Section 18 Appeals in connection with operations requiring consent***

136. **Section 18** sets out rights of appeal and the procedures to be followed in mounting an appeal against certain decisions by SNH. The distinction drawn between private owners and occupiers and public bodies remains relevant and the appeal mechanisms in section 18 are intended for use by private land managers. Public bodies have alternative options (including in particular those set out in sections 14(2) and (3)) where consent to an operation is refused, conditioned, modified or withdrawn by SNH, or where the terms of a management agreement are unacceptable. The general expectation is that public bodies should seek a negotiated solution when in disagreement with each other, and should not need to resort to the courts.
137. Subsection (1) specifies the circumstances in which a private owner or occupier may appeal to the Scottish Land Court if aggrieved by a decision by SNH to:
  - impose conditions when giving consent to an ORC;
  - refuse consent to an ORC;
  - modify or withdraw any consent to an ORC;
  - refuse to enter into a management agreement in accordance with section 16(9); or
  - make a management agreement subject to terms and conditions (including the amount of any payment) which are unacceptable to the owner or occupier.
138. Subsection (2) specifies that an appeal under section 18 must to be made within 28 days of the date on which SNH notified the appellant of the decision being appealed.
139. Subsection (3) provides a failsafe arrangement which protects an applicant for an ORC in situations where SNH has failed to make a decision on the application within a reasonable period. Since the applicant cannot proceed with the operation in the absence of explicit consent without committing a criminal offence, this subsection provides a remedy if SNH fails to reach a decision on the application.
140. The solution provided in subsection (3) is that, if four months have elapsed since the application was lodged, the application will be deemed to have been refused, thereby enabling the applicant to refer the matter immediately to the Scottish Land Court. The four month period within which SNH must make a decision on the original application has been set at four months on the basis of practical experience in applying



the provisions of the 1981 Act. That period can be extended by mutual agreement, in order to allow for situations in which, for example, negotiations are proceeding constructively but the issues are complex and a longer period is needed to reach a final agreement.

141. Subsection (4) provides a similar failsafe arrangement in relation to management agreements. If a land manager believes, on the basis of section 16(9), that SNH should have offered to enter into a management agreement, and if SNH has not done so within 4 months of the date of a decision to refuse, condition, modify or withdraw consent, the land manager is entitled to refer the matter to the Scottish Land Court.
142. Subsection (5) requires the Scottish Land Court to 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, SNH acted unreasonably or whether it failed to follow procedures correctly. In essence, the Scottish Land Court is entitled to examine the entire case 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:
- uphold the original decision by SNH;
  - overturn the original decision and direct SNH to give consent;
  - overturn the original decision to impose conditions on a consent and quash any or all conditions which SNH may have imposed;
  - overturn the original decision and direct SNH to offer a management agreement; and
  - overturn the original decision to impose conditions as part of a management agreement and quash any or all conditions which SNH may have imposed.
143. In addition, over and above the ability to quash conditions imposed by SNH, subsection (6) enables the Scottish Land Court to direct SNH as to the particular conditions which it should impose instead of those original conditions when consenting to an ORC or offering a management agreement in line with the ruling made by the Court. The Court consequently has significant powers to shape the detailed terms and conditions of any consent or management agreement, should it feel it necessary to do so. The ability to make any other order as the Court sees fit, in section 18(5)(f) extends that flexibility still further.

## **Offences and Byelaws**

### ***Section 19 Offences in relation to sites of special scientific interest***

144. Subsection (1) provides that it is an offence for any person to intentionally or recklessly damage any natural feature specified in an SSSI notification. It should be noted that the offence is one which extends to members of the general public and to public bodies, such as statutory undertakers, which are carrying out operations on SSSI land. The inclusion of acts by third parties, and not just those carried out by the owners and occupiers of the site, is one of the fundamental differences between the Act and the previous provisions of the 1981 Act.
145. The concept of “damaging” natural features of an SSSI is defined further in sections 58(2) and (3) and includes both causing the natural feature to deteriorate and disturbing and harassing the fauna for which the site has been notified.
146. Subsection (2) provides a statutory defence to the offence in subsection (1). A person is not guilty of the offence of recklessly damaging the natural features of an SSSI if the act can be shown to be the incidental result of an otherwise lawful operation. Certain further

conditions require to be satisfied in order for the defence to be effective. The person who carried out the act must *either* have taken reasonable precautions to avoid damage to the site *or* he/she should be able to demonstrate that the damaging consequences of the lawful operation could not reasonably have been anticipated. It is also necessary to show that, once it became apparent that damage was being caused, the person took all reasonable steps to minimise that damage.

147. Subsection (3) makes it an offence for any public body to carry out an operation which is likely to damage the natural features of an SSSI unless it has obtained SNH consent or one of the other exemptions allowed for in section 13(1) applies. It is also an offence for any private owner or occupier to carry out an ORC without SNH consent or where the exemptions specified in section 17(1) apply. These offence provisions are subject to a reasonable excuse defence.
148. Subsection (3) also makes it an offence for both public bodies and private owners and occupiers to fail to restore an SSSI in accordance with sections 14(5)(b) and 17(3) (b), for example where damage has resulted from an emergency operation. Again, a reasonable excuse is a defence.
149. Subsection (4) 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).
150. Subsection (5) provides that it is not a defence to proceedings under subsection (3) for contravention of sections 13(1) or 16(1) to show that the operation did not in fact damage the natural features of the site. In fact the offence is one of carrying out the operation without having obtained consent (or without one of the exemptions in sections 14 and 17 applying). It is therefore immaterial whether or not the operation actually resulted in damage to the SSSI and a defence based on the argument that no damage was caused is irrelevant.

### ***Section 20 Byelaws***

151. Subsection (1) allows SNH to make byelaws to protect SSSIs. This will allow SNH to deal with a variety of actions that may damage an SSSI such as fly-tipping, the driving of vehicles off-road or the setting of fires.
152. Subsection (2) applies sections 20(2), 20(3), 106 and 107 of the [National Parks and Access to the Countryside Act 1949 \(c.97\)](#) to the making of byelaws under the Act in the same way as they apply to the making of byelaws under the 1949 Act. Those sections, amongst other things, set out various prohibitions and restrictions which byelaws may contain and relevant procedures.

### **Supplementary**

#### ***Section 21 Advisory Committee on Sites of Special Scientific Interest***

153. Subsection (1) provides for the continuation of the Advisory Committee on Sites of Scientific Interest (referred to as “the Advisory Committee” in the Act and as “ACSSSI” in common usage). ACSSSI was established under section 12 of the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#) and the provisions of section 21 carry forward its role in a largely unaltered form under the new Act.
154. ACSSSI has the advisory functions relating to SSSIs conferred on it by section 21. It is important to note that ACSSSI’s role is purely advisory in character. It does not operate as a tribunal and has no powers to determine appeals. It is however required to operate independently and to provide objective, scientific advice to SNH.
155. Subsection (2) provides that the Scottish Ministers shall be responsible for the appointment of the convener and other members of the Advisory Committee, and that

they may do so on such terms as may be set by them. Appointees to the Advisory Committee shall, to the best of the Scottish Ministers' knowledge, have suitable scientific knowledge and experience in relation to flora, fauna or the geological or geomorphological features of the land.

156. Subsection (3) requires the terms and conditions set on appointment of members to the Advisory Committee to include arrangements for the payment of remuneration and allowances to them by SNH.
157. Subsection (4) excludes any member of SNH, or any committee appointed by SNH, from being appointed to the Advisory Committee.
158. Subsection (5) allows the Scottish Ministers, from time to time, to give directions relating to the procedure of the Advisory Committee.
159. Subsections (6) and (7) set out circumstances in which representations made to SNH are to be referred to ACSSSI. Only SNH may refer a matter to the Advisory Committee, but it must do so where:
  - any person with a direct legal interest in the land (“interest in land”, as defined in section 58(1)), makes a representation in relation to either the “scientific case” for notification of the SSSI (i.e. the reasons why the site should be notified on the basis of the particular natural features listed in the SSSI notification) or the “scientific case” for denotification;
  - the person making the representation does not agree to withdraw it; and
  - the representation is made *either* within the time limit for representations specified in the original notification (not less than 3 months from the date of notification – see paragraph 3(c) of schedule 1) *or* at least 10 years have elapsed since the original notification or since the last representation.
160. In effect this means that an objection to an SSSI must be referred to ACSSSI if it relates to the scientific case for or against the site and is submitted within the initial 3 month period for representations. The issue can then be revisited and referred back to ACSSSI every 10 years, if necessary.
161. Subsection (8) obliges SNH to refer any unresolved scientific objections to ACSSSI in accordance with subsections (6) and (7), and requires it both to consider any advice received from ACSSSI and then to take such action as it thinks fit in consequence of any such advice.
162. The effects of any referral to ACSSSI, as far as the SSSI notification and confirmation processes are concerned, are dealt with separately in paragraph 9 of Schedule 1.

### ***Section 22 - SSSI Register***

163. This section makes provision for the creation of an authoritative new public register of SSSIs to be overseen and maintained by the Keeper of the Registers of Scotland (“the Keeper”).
164. [Paragraphs 12 and 13](#) of Schedule 5 make arrangements for the continuation of the existing register, established by the 1981 Act, until such time as the new register provided for in section 22 has been established.
165. Subsection (1) places a duty on the Keeper to keep a register of all SSSI notifications, copies of certain other notices and notifications under the Act which amend or alter the original notification, and any other information in relation to SSSI notifications required by regulations under subsection (3).
166. The notices which must be registered are those given under section 5 to 9 and under paragraphs 10 and 15 of Schedule 1. These cover the enlargement of sites, changes

to the ORC list, other variations to the SSSI notification, denotifications, notices confirming or withdrawing a notification and notices extending the period within which the notification must be confirmed.

167. Subsection (2) requires the Keeper to ensure that the SSSI register is available for public inspection at all reasonable times.
168. The intention of the new register is that it should provide an authoritative, central source of information about the extent and legal status of SSSI land. It will be accessible in electronic form and will be searchable. To that end, the Scottish Ministers are empowered in subsection (3) to make regulations specifying the form and manner in which the register is to be kept, the information which it is to contain, procedures and arrangements for amending the register and requiring SNH to supply documents and information to the Keeper in an appropriate format. The Scottish Ministers may also specify the fees (if any) which may be charged by the Keeper for the provision of reports and other information. The regulations may also make provision as to the evidential status of copies and extracts from the register when used in a legal context.

## ***Chapter 2 -Nature Conservation Orders***

### ***Section 23 Nature conservation orders***

169. Subsection (1) empowers the Scottish Ministers to make a nature conservation order, which wholly or partially prohibits the carrying out, or the carrying out in a particular way, of a specified operation on specified land.
170. Subsection (2) specifies the purposes for which an NCO may be made. The purposes are: for the conservation of the feature(s) of interest of an SSSI or any other feature of natural heritage which the Scottish Ministers consider to be of special interest; or to facilitate compliance with an international obligation.
171. Subsection (3) specifies the land to which an NCO can apply, namely, land which is or forms part of an SSSI, any other land which the Scottish Ministers believe to be of special interest by reason by virtue of its natural heritage, land contiguous to or otherwise believed to be associated with an SSSI or other land considered to be of special interest, or any combination of the aforementioned land.
172. Subsection (4) allows Ministers to include particular conditions in the NCO. Those conditions may, for example, prohibit or permit the prohibited operation only at particular times, in a particular place, when carried out in a particular manner or in accordance with other specified conditions. Examples might include a ban on the operation being carried out during the breeding season, the permitting of limited operations on part of the site or a ban which permits traditional, low-impact methods of working but prohibits the use of heavy machinery.
173. Subsection (5) provides a defined shorthand term which can be used to refer to the operations which are banned under the terms of the NCO. These are to be known as “prohibited operations”.
174. Subsection (6) provides that an NCO comes into immediate effect on being made by the Scottish Ministers. Any operation prohibited under the NCO must cease immediately the NCO is made. Failure to do so is a criminal offence by virtue of section 27.
175. Subsection (7) defines the point at which an NCO ceases to have effect. The NCO falls unless it is confirmed in accordance with the provisions of Schedule 2 – whether that non-confirmation is explicit and represents a clear decision not to confirm the NCO or whether it occurs because the Scottish Ministers have failed to take a definite decision.
176. Where an NCO has been confirmed by the Scottish Ministers and continues in force in the longer term, it may be revoked under section 24. Where the Scottish Ministers decide to revoke an NCO, it ceases to have effect immediately, on the date on which the

revoking order is made. During the parliamentary passage of the Act, Ministers made it clear that NCOs should not remain in place longer than is necessary.

### ***Section 24 Amendment or revocation of nature conservation orders***

177. This section allows the Scottish Ministers to amend an NCO or to revoke the NCO in whole or in part.
178. Subsection (1) provides that the Scottish Ministers may amend or revoke an NCO by order and that such an order will be known as an amending order or revoking order respectively.
179. Subsection (2) enables an amending order to: add to, modify or remove the prohibited operations specified in the NCO; modify the NCO in relation to the circumstances in which particular operations are not prohibited, in line with section 23(1)(b); and extend or restrict the area of land to which the order applies.
180. Subsection (3) provides that an amending order, like the original NCO and any revoking order, comes into immediate effect on being made by the Scottish Ministers.
181. Subsection (4) provides for an amended NCO to have effect as amended for as long as the amending order which amends it has effect.
182. Subsection (5) provides that a revoking order may revoke the NCO for part of the original area covered by the NCO (thereby, in effect, amending it by reducing its extent).
183. Subsection (6) provides that a revoking order, like the original NCO and any amending order, comes into immediate effect on being made by the Scottish Ministers.

### ***Section 25 Nature conservation orders and related orders: procedure***

184. This section introduces Schedule 2. Schedule 2 sets out the procedures that must be followed when NCOs, amending orders and revoking orders are made.

#### **Schedule 2**

### ***Nature conservation orders and related orders: procedure***

#### **Application of schedule**

185. Paragraph 1 clarifies that this Schedule applies to NCOs and to any amending orders and revoking orders which affect NCOs.

#### **Consultation**

186. Paragraph 2 requires the Scottish Ministers to consult SNH in relation to any proposed NCO, amending order or revoking order before making it. The Scottish Ministers must have regard to any representations made by SNH before they make the order.

#### **Notification**

187. Paragraph 3 requires the Scottish Ministers to give notice of the making of an order under this section as soon as practicable after making it. Notice must be given to the interested parties (see section 48(2)). The notice must also be publicised in at least one relevant local newspaper and by such other means (including the internet) as the Scottish Ministers think fit.
188. Paragraph 4 provides that a notice under paragraph 3 must set out the order or describe its general effect. The notice must also state whether the order has taken effect. This paragraph also provides that, where the notice does not set out the order, it must specify where a copy of the order may be inspected free of charge and at all reasonable hours and how to obtain a copy of the order. Finally, sub-paragraph 4(c) provides that the notice must, where it relates to an NCO or amending order, specify the period during which

and how representations may be made about the order. This sub-paragraph establishes that the period for such representations must be at least 3 months from the date on which the notice was given. This minimum period for representations is the same as that specified for representations in relation to the notification of SSSIs in Schedule 1.

### **Confirmation of orders**

189. Paragraph 5 requires the Scottish Ministers to decide either to confirm or not to confirm an order to which this Schedule applies (i.e. an NCO, amending order or revoking order) within one year of the date on which the order is made. They must do so only after having considered any representations and after having considered any report which may have been submitted by a person appointed under paragraph 10 for the purposes of holding an enquiry or hearing representations. The period within which confirmation must take place may be extended by agreement, in accordance with paragraph 12.
190. Paragraphs 6 and 7 provide that the Scottish Ministers are entitled to make modifications to the order prior to confirmation and they may confirm an order which has been modified. Where modifications are made, however, any changes must be detailed in the notice of confirmation required under paragraph 8. The modifications which are made cannot have the effect of extending the area of land covered by the NCO.
191. Paragraph 8 requires the Scottish Ministers to give notice of their decision to confirm or not to confirm an order as soon as practicable after making that decision. Notice of this decision must be given to the interested parties and publicised in accordance with the notice requirements set out in paragraph 3.
192. Paragraph 9 provides that any modifications to an order will have effect as soon as notice of confirmation of the order in its modified form is given by the Scottish Ministers in accordance with paragraph 8.

### **Inquiry or other opportunity to be heard**

193. Paragraph 10 provides that the Scottish Ministers must either cause a local inquiry to be held or appoint a person to hear representations if representations in relation to the order have been made within the period allowed for the lodging of representations and the representations are not subsequently withdrawn.
194. Paragraph 11 requires that any local inquiry, to be held as a consequence of paragraph 10, should be conducted in accordance with the relevant provisions of section 210 of the [Local Government \(Scotland\) Act 1973 \(c.65\)](#).

### **Extension of period**

195. Paragraph 12 ensures that the Scottish Ministers may only extend, or further extend, the period in which an NCO must be confirmed with the express agreement of every owner and occupier to which the order relates. The period of time must be agreed by all parties and agreement is to be obtained in accordance with paragraph 13.
196. Paragraph 13 specifies that agreement to extend the period in which an NCO must be confirmed is obtained if the Scottish Ministers give notice of the proposed extension to every owner and occupier of the land to which the order relates and either every owner and occupier consents to the extension, or no reasonable objection is received within 28 days. This latter arrangement allows for extension in situations where either no-one feels strongly enough to bother responding or where a minority or respondents seek to block the extension for petty reasons in a way which is, for example, at odds with the clear desire of the majority of owners and occupiers.
197. Paragraph 14 requires the Scottish Ministers to notify the interested parties if they do extend or further extend the period within which an NCO must be confirmed.

## **Recording or registration of orders**

198. Paragraph 15 requires that any order made under this Schedule and any notice given by the Scottish Ministers to confirm or not to confirm an NCO or amending order, be recorded in the General Register of Sasines or registered in the Land Register of Scotland, whichever is appropriate at the time of registration. All existing NCOs under the 1981 Act have been recorded or registered in the same way.

### ***Section 26 Review of nature conservation orders***

199. It is the intention that NCOs should not remain in place longer than is necessary. Section 26 both empowers and requires the Scottish Ministers to keep the number and impact of NCOs under review by requiring them to review each NCO at regular intervals to determine whether it should be amended or revoked. The Scottish Ministers may, for example, wish to amend or revoke an order which has become outdated or has outlived its usefulness.
200. Subsection (1) allows the Scottish Ministers to carry out a review of an NCO when they see fit, for the purpose of determining whether to amend or revoke the NCO. 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 the Scottish Ministers to be appropriate and reasonable to do so. They may take action to review an NCO at any time.
201. Subsection (2) supplements subsection (1) by obliging the Scottish Ministers to review each NCO at least every 6 years, if they have not already done so on a more frequent basis. This ensures that NCOs cannot be left in situ for extended periods of time without the Scottish Ministers being required to consider, at regular intervals, whether they remain relevant and necessary.

### ***Section 27 Offences in relation to nature conservation orders***

202. This section establishes that a criminal offence is committed, if an operation prohibited by an NCO is carried out (or is permitted or caused to be carried out) on land to which the NCO applies. The penalty for such an offence is a fine of up to £40,000 on summary conviction. On conviction on indictment, the Court is empowered to impose any fine (including one in excess of £40,000) which appears to it to be appropriate in the light of the facts of the case.
203. Subsection (2) states that it is not a valid defence to argue that the prohibited operation did not in fact cause damage to the natural features protected by the NCO. It is the carrying out of the prohibited operation which constitutes the offence in this case, not the causing of damage. Any argument that no damage was done is therefore irrelevant.

### ***Section 28 Reports***

204. This section requires SNH to include details of any NCO, amending order or revoking order made during the course of the reporting year in its annual report submitted under section 10(2) of the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#). This requirement is in addition to the registration or recording of orders in the Land Register or General Register of Sasines.

## ***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;

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2004 (asp 6) which received Royal Assent on 11 June 2004*

- 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.
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.

***Chapter 4 - General and Supplementary***

***Section 38 Ramsar Sites***

250. [Section 38](#) makes provision in relation to wetland sites designated as being of international importance in relation to the objectives of the Ramsar Convention.
251. Subsection (1) requires the Scottish Ministers to give SNH notice of any wetland designated in Scotland.
252. Subsection (2) requires SNH, on receipt of such a notice from the Scottish Ministers, to notify the owners and occupiers of the site, the relevant planning authority, any

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relevant National Park Authority, every relevant statutory undertaker and any relevant regulatory body.

253. Subsection (3) provides a full reference to the Ramsar Convention, including subsequent amendments, and provides that the terms of section 38 are also to apply in relation to any successor convention which replaces Ramsar.
254. It should be noted that the principal legal protection given to Ramsar sites in Scotland is provided by means of the SSSI and Natura 2000 systems. The provisions of this Act and the Conservation (Natural Habitats &c.) Regulations 1994 should therefore be consulted in relation to any activities or operations which might impact upon wetlands designated under the Ramsar Convention. Consideration should also be given to relevant provisions in the [Water Environment and Water Services \(Scotland\) Act 2003 \(asp 3\)](#).

***Section 39 Acquisition of land by SNH***

255. Subsection (1) provides that SNH may acquire all, or any part, of land defined under subsection (2), either by agreement with the owner or compulsorily. Where land is acquired by compulsory purchase, SNH requires the prior authorisation of the Scottish Ministers.
256. Subsection (2) defines the land that may be acquired under subsection (1). SNH is entitled to acquire:
- land which is an SSSI;
  - any other land to which an NCO or LMO applies; or
  - any other land which is contiguous to or associated with an SSSI or with land to which an NCO or LMO applies.
257. Subsection (3) provides that SNH may only acquire land compulsorily where it is necessary to secure the conservation, restoration or enhancement of a protected natural feature. “Protected natural feature” is defined in section 58(1) and means a natural feature which is specified in an SSSI notification or is protected by the terms of an NCO.
258. Subsection (4) provides that the power to acquire land under this section is to include the power to acquire a servitude or other right in or over land by the creation of a new right. This ensures that rights (other than simple ownership of the land) can also be acquired where this is important to achieving the objectives specified in subsection (3).
259. Subsection (5) provides that the [Acquisition of Land \(Authorisation Procedure\) \(Scotland\) Act 1947 \(c.42\)](#) applies in relation to any compulsory acquisition of land by SNH under this section. This applies procedures for acquisition, as well as provisions relating to compensation. SNH is to be treated under the 1947 Act as if it were a local authority.
260. Subsection (6) clarifies the ability of SNH to manage land acquired under this section. Whilst SNH already has powers under the [Natural Heritage \(Scotland\) Act 1991 \(c.28\)](#) to acquire, hold or dispose of land, subsection (6) puts it beyond doubt that SNH is entitled to keep SSSI and related land under its direct management, where it considers this to be the most appropriate solution.
261. Subsection (7) ensures that, where SNH has purchased land compulsorily and it subsequently wishes to dispose of the land, or any interest in the land, it may only do so on terms which achieve the purpose for which the land was originally acquired. It would not, therefore, be legitimate for SNH to dispose of such land for purposes which it does not consider would secure the conservation, restoration or enhancement of the protected natural feature.

**Section 40 Restoration orders**

262. Subsection (1) provides that, where a person is convicted of an offence under section 19(1), or an offence under 19(3) or (4), 27(1) or 36(2), which has resulted in damage to an SSSI or land subject to an NCO, the court which convicts the person may require him/her to carry out operations necessary to restore, so far as is reasonably practicable, the natural feature to its former condition. The order may also specify the time within which restorative action must take place and the extent of the restoration required.
263. Subsection (2) requires the court to have regard to any representations made by SNH in relation to the manner in which restoration of the natural feature should take place.
264. Subsection (3) allows the person against whom a restoration order was made to make an application to the court requesting that the order be discharged or modified. The court may do so if it believes there has been a change in circumstances that has made the compliance or full compliance with the restoration order either impracticable or unnecessary.
265. Subsection (4) specifies that a person subject to a restoration order, who fails (without a reasonable excuse) to comply with the terms of the order is guilty of an offence. A person guilty of an offence under this subsection 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).
266. Subsection (5) allows SNH to carry out operations specified in a restoration order and to recover the costs of doing so where the conditions of the order have not been fulfilled. Such costs are recoverable from the person against whom the order was made.
267. Subsection (6) provides that a restoration order is to be treated as a sentence for the purposes of any repeal or review.

**Section 41 Signs etc.**

268. Subsection (1) allows SNH to put up, maintain or remove signs on any land or take any other action it considers necessary to provide information to the public about any land to which an SSSI notification, NCO, LMO, or byelaw made under section 20(1), relates.
269. Subsection (2) provides that it is an offence to damage or destroy any sign erected under subsection (1) or any other notice (for example, under section 48(10)) which has been affixed by SNH or the Scottish Ministers to an object on land for the purposes of giving notification under Part 2 of the Act. A person found guilty of an offence under this subsection is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale (currently £5,000).

**Section 42 Change of owner or occupier.**

270. This section applies where a person with an interest in land within a SSSI or interest in land to which an NCO or LMO relates, disposes of that interest. "Interest in land" is defined in section 58(1). It also applies where the owner of such land becomes aware that it is occupied by an additional or a different occupier.
271. Subsection (2) requires the person with an interest in the land to send a notice to SNH advising of the change of ownership or occupation. A notice must also be sent, in the case of disposal, to the person to whom the interest is disposed and, in the case of a change of occupation, to the new or additional occupier. The notice must be sent within 28 days of the date of the date on which the person disposed of the interest or became aware of the change in occupation.

272. Subsection (3) requires that the notice given to SNH specifies the land concerned and give details of the person to whom the interest was disposed. In the case of a change of occupier, the notice must specify the date of the change, to the best of the owner's knowledge, and the name and address of the new occupier so far as those details are known.
273. Subsection (4) requires that the notice given to the new owner or occupier must identify any land covered by an SSSI notification, NCO or LMO and draw the attention of the recipient to the existence of the notification or order. The notice must also, as far as reasonably practicable, be accompanied by a copy of all relevant documentation relating to the notification or order.
274. Subsection (5) clarifies that disposal of an interest in land takes place when the person disposes of it by way of sale, exchange, lease or through the creation of any servitude, right or privilege over that interest or by any other way (with the exception of the grant of a standard security).

### ***Section 43 Powers of investigation etc.: police***

275. This section provides certain powers, including powers of entry and investigation, which may be exercised by the police in relation to the investigation of SSSI offences. The powers conferred are broadly similar to those in section 19 of the 1981 Act, as amended by paragraph 16 of Schedule 6. A distinction is made in the Act between police powers (as here in section 43) and the powers of SNH and persons authorised by the Scottish Ministers (as in section 44 below).
276. A police officer who has reasonable cause to suspect that any person is committing or has committed an offence may, without any requirement for a warrant, take a range of actions to search for and secure evidence. The power applies whether or not the identity of the suspected perpetrator is known.
277. The actions which the police officer is entitled to take are:
- to stop and search the suspect, if there are reasonable grounds for believing that evidence of the offence may be found on the suspect's person;
  - to search for, search or examine any thing which that person may be using, may have used or may currently have, or have had, in his/her possession if there is reasonable suspicion that evidence of the commission of the offence is to be found in or on that thing; and
  - to seize and detain for the purposes of proceedings any thing which may be evidence of the commission of the suspected offence.
278. It should be noted that, in contrast to section 19 of the 1981 Act, no specific power of arrest is provided in relation to SSSI offences.
279. In order to exercise the powers conferred under subsection (1), a police officer who has reasonable suspicion that an offence is being or has been committed may, under the terms of subsection (2), enter any land other than a dwelling or lockfast premises. This is a power of entry without any requirement for a warrant. The meaning of "land" for the purposes of this Act is set out in the Scotland Act 1998 (Transitory and Transitional Provisions)(Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 as including any "building and other structures, land covered by water, and any right or interest in or over land". Access may also be had to any body of water under the provisions of subsection (2) on the basis that the "land" in question includes any substructure below it and any column of water or air above it. It should be noted that access (without warrant) may be had to any building which is not lockfast, provided that building is not a dwelling.

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

280. Access to any lockfast premises or dwelling may only be effected under warrant and subsection (3) makes provision for the issuing of a warrant by a sheriff or justice of the peace. Where a warrant is issued to search premises or a dwelling, reasonable force may be used in order to enter the premises in question.
281. Subsection (4) makes further provision in relation to the validity and expiry of a warrant. A warrant continues in force until the purpose for which it was issued has been satisfied. A warrant may however be time-limited by the sheriff when it is issued. Where this is the case, the warrant ceases to be valid when that time-limit is reached.
282. Subsection (5) places an explicit requirement on any police officer entering land (whether or not on the basis of a warrant) to give evidence of authority to enter the land to the occupier of the land or to anyone acting on behalf of the occupier if asked to do so.
283. Subsection (6) provides that a police officer who enters any land in the exercise of powers conferred by section 43 (whether or not on the basis of a warrant) is entitled to be accompanied by any other person, in order for that person to assist the police officer in the exercise of the powers conferred on him/her. The police officer may also take onto the land any necessary machinery, equipment or other materials and may take and remove samples of any articles or substances from the land. The use of an assistant, machinery and equipment and the taking of samples can, by virtue of subsection (7), be regulated under the terms of a warrant.
284. Where land is unoccupied or the occupier is absent, a police officer who enters the land under section 43 is obliged by subsection (8) to leave the land as effectively secured against unauthorised entry as it was when the police officer entered.

***Section 44 Powers of entry: authorised persons***

285. This section enables a person who is authorised in writing by SNH to enter land, except for a dwelling or lockfast premises, at any reasonable time for the purposes set out in subsection (1).
286. Those purposes cover activities arising from the obligations and responsibilities placed on SNH under the Act. Thus, SNH has been given powers of entry which enable it to survey and assess land in order to determine, for example, whether to notify that land as an SSSI, whether to offer a management agreement to the owner or occupier or whether to propose an LMO. The full list of purposes is set out in paragraphs (a) to (l) of subsection 1.
287. Subsection (2) provides corresponding powers of entry for persons authorised by the Scottish Ministers. Fewer purposes are specified in paragraphs (a) to (c) of the subsection, since there are fewer instances in the Act – essentially only NCO and LMO powers – where the Scottish Ministers have specific functions which might potentially entail a requirement to enter land. As with the powers of entry conferred on SNH, a person authorised in writing by the Scottish Ministers may, enter land at any reasonable time, but only for purpose specified in this subsection.
288. Subsection (3) provides that the power to enter land by virtue of subsections (1) and (2) may – where the same purposes apply – be exercised in relation to any land other than the land in relation to which the power of entry is initially exercised. The practical effect of the provision is to allow an authorised person to enter other land – for example land which lies outwith the boundary of an SSSI or which is not covered by a particular NCO – on an incidental or consequential basis, in order to achieve the original purpose. Thus, for example, an authorised person carrying out an inspection of an SSSI with a view to determining whether or not the Scottish Ministers should make an NCO is entitled to enter not only the SSSI but other land, where it is necessary to do so in order to achieve the purpose of the inspection.
289. Subsection (4) makes it clear that persons authorised by SNH or the Scottish Ministers are not entitled to enter a dwelling or lockfast premises. Where an offence is suspected



and there are grounds for believing that evidence of such an offence is to be found in lockfast premises or a dwelling, search warrants may be obtained by the police on the basis set out in section 43.

290. Subsection (5) ensures that the deliberate obstruction of a person authorised by SNH or the Scottish Ministers, whilst that person is exercising powers under this section, constitutes a criminal offence. The maximum fine for such an offence is level 5 on the standard scale. Obstruction of a police officer is already an offence under section 41 of the [Police \(Scotland\) Act 1967 \(c.77\)](#) and no further provision is made in this connection by the Act.
291. Subsection (6) introduces Schedule 4 which specifies in further detail the procedures which must be followed, and the constraints which apply, when the powers of entry set out in this section are exercised. Particular provision is made in Schedule 4 covering the issuing of warrants for entry to land, although as noted above there is no provision for SNH staff or other persons authorised under section 44 to enter or search lockfast premises or dwellings.

#### [Schedule 4](#)

### ***Powers of Entry of Authorised Persons: Further Provision***

#### **Notice of entry to occupied land**

292. [Paragraph 1](#) specifies that notice must be given to the occupier (and, where practicable, also to the owner) of any land where a person authorised by SNH or the Scottish Ministers requires to enter the land for the purposes specified in section 44. The period of notice – either 24 hours or 14 days – is specified with reference to the purpose for which entry is required. Notice is not required where a person authorised by SNH or the Scottish Ministers enters the land in order to ascertain whether an offence is being or has been committed.

#### **Warrant for entry**

293. [Paragraph 2\(1\)](#) provides for situations in which entry to land by authorised persons is actively opposed by the owner or occupier, where it has proven impossible to give advance notice, as required under paragraph 1, or where giving notice would defeat the object of the proposed entry. In such circumstances, a person authorised by SNH or the Scottish Ministers may obtain a warrant for entry from a sheriff or justice of the peace. This sets aside the requirement for advance notice and the authorised person may also use reasonable force to effect entry to the land. In the event that the use of force is anticipated to be necessary, the authorised person may wish to request the assistance of the police. As already noted, a warrant cannot be granted to SNH staff and other authorised persons for entry to lockfast premises or a dwelling. Powers of entry and search in relation to lockfast premises and dwellings are available only to the police.
294. [Paragraph 2\(2\)](#) ensures that the sheriff does not grant a warrant simply on the basis that entry is opposed or expected to be opposed, unless he or she is satisfied either that, where paragraph 1 requires notice to be given, the required notice has in fact been given or that notice is not required because entry is necessary under section 44(1)(f) for the purposes of investigating a suspected offence.
295. In essence this means that SNH or the Scottish Ministers must have made genuine efforts to give notice of entry before seeking a warrant where the argument for the warrant is simply that entry has been refused or is likely to be refused. The granting of a warrant is not, however, subject to this requirement where the land is unoccupied (or the occupier is absent), where entry is necessary in order to investigate a suspected offence or where giving notice would defeat the object of gaining entry (for example, in cases where an NCO is being considered).

296. [Paragraph 2\(3\)](#) provides that the warrant continues in force until the purpose for which it was issued has been satisfied. A warrant may however be time-limited by the sheriff when it is issued. Where this is the case, the warrant ceases to be valid when that time-limit is reached.

### **Evidence of authority**

297. [Paragraph 3](#) requires that a person entering land by virtue of section 44 or under warrant must, if challenged by the occupier or someone acting for the occupier, be able to produce evidence of his authority to exercise the power of entry.

### **Supplementary powers**

298. [Paragraph 4](#) enables an authorised person who enters land by virtue of section 44 to take with them any other persons, or any machinery, equipment or materials, which they may require in order to assist them in the exercise of their powers in relation to the land, or in relation to the conduct of any investigation. Samples may also be taken and removed from the land. The terms of a warrant issued under paragraph 2 can make particular provision regulating the use of such assistants, machinery, equipment or materials or the taking and removal of samples.

### **Duty to secure land**

299. [Paragraph 5](#) requires a person who exercises powers to enter land, which is either unoccupied or land from which the owner is temporarily absent, to ensure that the land is secured against unauthorised entry when they leave the land. The land must be secured to the same degree as it was before entry took place.

### **Compensation**

300. [Paragraph 6](#) sets out the extent to which SNH and the Scottish Ministers are liable in relation to damage which may result either from the exercise of the power of entry or from any subsequent failure to secure the land, as required in paragraph 5. Any dispute in relation to the amount of compensation is to be determined by arbitration.

### ***Section 45 SNH: power to enforce***

301. This section provides SNH with an explicit power to protect the biological and geological natural heritage of Scotland by means of civil proceedings. It allows SNH to apply to the court for interdict (or to seek any other appropriate remedy) in order to enforce compliance with particular sections of the Act or to prevent damage, more generally, to important natural features. Although it is arguable that SNH already has the necessary title and interest to be able to initiate civil proceedings, this provision puts the matter beyond doubt.
302. Subsection (1) provides a specific power for SNH to ask the sheriff or the Court of Session to require a public body to comply with its general, section 12, duty. That duty obliges public bodies to further the conservation and enhancement of SSSIs and to maintain or enhance the SSSI series. Where, therefore, a public body had failed to consult SNH, had failed to have regard to SNH advice or had not taken reasonable steps to fulfil its obligations in relation to the protection of SSSIs, it would be open to SNH to challenge those failings in court and to seek an appropriate remedy. Similar provision is made in relation to compliance by a regulatory body with the requirements of section 15. Any failure by a regulator to comply with its duties under section 15 could also be challenged via civil proceeding.
303. Subsection (2) makes more general provision for civil proceedings (whether or not proceedings under subsection (1) would be competent) where SNH believes that it is necessary to prevent operations from taking place on SSSIs or and similar land. SNH may apply to the sheriff or to the Court of Session for an order under subsection (2)

where an actual or proposed operation is damaging or is likely to damage protected or important natural features.

304. The court is empowered to grant interdict or make any other order which is appropriate in the circumstances in order to safeguard any protected or important natural feature. “Protected natural feature” is defined in section 58(1) and means a natural feature specified in an SSSI notification or protected by an NCO. Any order made by the court can also give protection to any other natural feature which is of national importance. In practice, this may include a feature which is of high standard but which has not yet been formally notified in an SSSI notification – for example, a feature on land which is being considered as an SSSI. As with NCOs, it is possible under section 45 to take action to give interim protection to such natural features in advance of formal notification of an SSSI. Similarly, the power under section 45 can also be invoked in order to protect natural features on a Natura 2000 site which has not been “underpinned” via the SSSI system (i.e. it has not been notified as both an SSSI and a Natura site).
305. The power given to SNH under this provision does not prevent any other party which has title and interest in the matter from initiating civil proceedings as an alternative to, or in parallel with, any action which SNH may take. That right to take proceedings is specifically preserved and protected by subsection (4).
306. Subsection (5) provides that the relevant court to which application should be made will be either the sheriff court or the Court of Session. The choice of court will depend on the nature of the case and the parties involved. A local matter involving a private landowner might, for example, most appropriately be heard by the sheriff for the area. A major case involving alleged non-compliance by a public body might, by contrast, be more appropriate to the Court of Session.

#### ***Section 46 Offences, penalties and time limits***

307. This section makes provision in relation to the prosecution of offences and the penalties which may be imposed.
308. Subsection (1) provides that a court must have regard, when imposing a fine for an SSSI offence, to any financial gain which the offence may have brought, or been likely to bring, to the offender. It is intended, for example, that in cases involving damage to SSSIs for commercial reasons (such as in the course of a development or construction project) the court should be able to impose penalties which adequately reflect the significance of the offence. The objective is to allow the courts to address situations in which the anticipated gains from damaging an SSSI would outweigh the likely penalties. This provision is designed to remove any incentive to commit an offence for financial gain.
309. Subsections (2) and (3) stipulate the deadline within which prosecutions for offences under Part 2 must be brought. Similar principles apply to wildlife offences under Part 1 of the 1981 Act, as amended by the Criminal Justice (Scotland) Act 2003 and paragraph 18 of Schedule 6 to this Act.
310. Summary prosecutions for SSSI offences must be brought within 6 months of the date on which sufficient evidence of the offence comes to the knowledge of the prosecutor (irrespective, subject to subsection (3), of when the offence actually occurred). If the prosecutor fails to take action within that 6 month period, the case automatically falls and no further action is possible.
311. In the absence of the provision in subsection (2), the terms of section 136 of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#) would require a summary prosecution to be brought within six months of the date on which the offence was actually committed. In the case of environmental and wildlife offences, it can be some time before the offence is discovered and expert evidence is obtained. This provision therefore ensures that

an offender cannot escape prosecution simply by covering up his or her actions for 6 months.

312. Liability to prosecution is not, however, open-ended. Where proceedings have not been instituted within 3 years of the date on which the offence was committed, the case will automatically fall and no further action will be possible. In the case of a continuing contravention of the law, which takes place over an extended period of time, the date on which the offence was committed is the last date on which the contravention occurred.
313. Subsection (4) specifies that any dispute in relation to the date on which sufficient evidence became available to the prosecutor should be settled by means of a signed certificate from the prosecutor stating the relevant date.

#### ***Section 47 Offences by bodies corporate etc.***

314. This section ensures that the directors and management of companies and other corporate bodies can be held personally responsible for offences carried out by the organisation, if that illegal act is committed with their consent or connivance, or where they have neglected to take action which would have prevented the illegal act. In such cases both the body corporate and the individuals responsible for directing and managing the affairs of that body (or who purport to act in that capacity) are liable.
315. Similar provisions are made in relation to the partners in a partnership and to the office bearers and members of an unincorporated association. In the particular case of a corporate body which is managed by its members, responsibility falls on each of its members, insofar as they have exercised or failed to exercise that management function. It should also be noted that, by virtue of subsection (1), an unincorporated association has legal personality for the purposes of a prosecution for an offence under Part 2 and it can be held liable in its own right.
316. Subsection (3) provides for any penalty imposed on a body corporate, a partnership or an unincorporated association to be recovered by civil diligence in accordance with section 221 of the [Criminal Procedure \(Scotland\) Act 1995 \(c.46\)](#).

#### ***Section 48 Notices, applications etc.***

317. Subsection (1) specifies that any notice, notification, consent, request for review, proposal or application given or made in accordance with the terms of Part 2 of the Act must be in writing. Thus, a verbal request for consent to an ORC, for example, would not be valid and neither would a verbal consent given by SNH. This requirement for formal communications and decisions to be in writing may assist the resolution of disputes by providing more legal certainty than may be the case had events proceeded on the basis of verbal communication.
318. Subsection (2) defines the “interested parties” referred to at various points in Part 2 of the Act. The interested parties are those who are listed in paragraphs (a) to (k) and range from persons appearing to have a direct legal interest in the land through to the Scottish Ministers or SNH. “Interest” in relation to land is defined in section 58(1).
319. Subsection (2) also specifies that the date on which any notice or notification is deemed to take effect is the date on which the Scottish Ministers or, as the case may be, SNH receive a notice or notification. This provides certainty in relation to the precise date on which a notice or notification is held to take effect. The date of receipt by the Scottish Ministers or SNH can be identified precisely if evidence of receipt can be produced.
320. Subsection (3) ensures that a notice or notification is not invalidated in its entirety simply because any of the interested parties specified in this subsection have not received it. The provision covers situations in which any of the persons listed in paragraphs (a) and (f) to (k) of subsection (2), is mistakenly overlooked or for some other exceptional reason does not receive the notice or notification.

321. This might conceivably happen in the case, for example, of the owner or occupier of land on a large and complex SSSI. Although it is normally possible to determine who has an interest in a particular area of land, through both local enquiries and searches of registers of land, there may occasionally be instances where such information cannot be determined with absolute certainty. This provision is designed to try and prevent any unnecessary disruption and expense which may arise if the notification is rendered invalid.
322. The provision also ensures the continuing validity of existing SSSI notifications, made under section 28 of the 1981 Act are continued in effect by the transitional arrangements in Schedule 5. The 1981 Act did not require any of the persons in paragraphs (f) to (k) to be formally notified, although in recent years SNH has been doing so as a matter of good administrative practice. Thus, for existing sites, the absence of a formal notification given to, for example, the local community council, will not invalidate the site. The same arrangement applies in relation to statutory undertakers, regulators, community bodies with an interest in the right to buy and other relevant persons, including those with a legal interest in the land. No formal requirement is imposed in the Act to retrospectively notify such interested parties in relation to existing sites. It is, however, expected of SNH that it will make every reasonable effort to ensure that everyone who requires to know of the existence of an SSSI will be given that necessary information.
323. The exemption provided for in subsection (3) does not, insofar as it relates to the owners and occupiers of land, represent an excuse for carelessness or poor practice on the part of SNH or the Scottish Ministers. In all cases, there is a clearly implied expectation that the notifying authority will take all reasonable steps to properly identify and notify the interested parties in relation to any area of land which is the subject of a notice or notification. The exemption should, therefore, only be invoked in cases where the notifying authority could not, in the circumstances, realistically have been expected to give notice or notification to the person concerned.
324. That general expectation – that all reasonable steps should be taken by the notifying authority – has been made a formal legal obligation in the Act where owners and occupiers are concerned. The requirement is set out in subsection (4)(a), in recognition of the particular significance of owners and occupiers in relation to protected land. The exemption in subsection (3) cannot therefore apply in relation to a failure to notify an owner or occupier unless SNH or the Scottish Ministers have taken all reasonable steps to notify all relevant owners and occupiers and have then actually taken action to notify each owner and occupier identified by that process. Further provision covering the action to be taken in relation to persons omitted in error from that notification exercise is made in subsections (11) and (12).
325. It might be noted that the reason an exemption has not been made in the case of a failure to notify the interested parties listed in paragraphs (b) to (e), is that it is inconceivable that SNH or the Scottish Ministers could not be aware, for example, of each other's identity or of the identity of the relevant planning authority for the area in question. This underlines the exceptional nature of the exemption provided in subsection (3) and, once again, emphasises the fact that it is intended to apply only to situations in which the notifying authority could not, in the circumstances, reasonably have been expected to have done things differently and thereby to have avoided the error.
326. Subsection (5) enables the Scottish Ministers by order to add to, remove or amend entries in subsection (2) which specify interested parties. This allows the list of interested parties to be updated in future, in line with changing circumstances and, for example, the effects of other legislation or land management practices.
327. Subsection (6) clarifies the point at which a notice or notification is deemed to have been given to any person. The giving of notice requires either the delivery of the notice or notification in person or its transmission by letter to the normal or last known address of the person. Arrangements are included which cater for the special case where the

interested person is a corporate or public body. Subsection (10) covers the further special case in which the identity of the owner or occupier of the land is unknown.

328. Subsection (7) regulates the manner in which applications, proposals or consents are to be given or sent. The same arrangements as for the giving of notices or notifications (i.e. delivery in person or transmission by letter) apply. In addition, provision is made for transmission by other reasonable means (bearing in mind the requirement in subsection (1) that applications etc. must be made in writing). This is intended to cover, in particular, the making of requests and applications, and the giving of consents, by e-mail where this is the most appropriate and convenient method of communication. Subsection (8) clarifies the status of material transmitted by electronic means. E-mails, faxes and other electronic communications are to be treated as being in writing if they are received in a form which is legible and is capable of being used for subsequent reference.
329. Subsections (9) and (10) cover the situation in which a notice or notification (or the offer of a management agreement under section 29(6)) must be given to the owners and occupiers of land and the identity of those owners and occupiers cannot reasonably be discovered. In such circumstances, special arrangements for the posting of a notice apply and where this is done, the notice, notification or offer is deemed to have been given or made as if it had been delivered to a person whose identity and address are known.
330. Subsections (11) and (12) make further provision in relation to the situation in which SNH or the Scottish Ministers fail or omit to give notice or notification to an owner or occupier in connection with an original SSSI notification, enlargement, denotification or the making of an NCO. The special exemption which protects the validity of the notice or notification in such circumstances is covered in subsections (3) and (4).
331. Where an omission of this kind has occurred, SNH (or the Scottish Ministers) must provide the owner or occupier with a copy of the notification or notice in question and any other information they consider appropriate in the circumstances. That copy and any additional information must be supplied as soon as SNH (or the Scottish Ministers) become aware of the identity of the omitted owner or occupier. It must also be provided if any person who should have received the original notice or notification draws the matter to the attention of SNH (or the Scottish Ministers) by making a request for a copy. SNH (or the Scottish Ministers) must then consider any representation made to them by the party in question and are obliged to take such action as they think fit having had due regard to the representations received.

### ***Section 49 Transitional arrangements***

332. This section introduces Schedule 5, which contains transitional and transitory provisions and savings consequential on the provisions of Part 2. In particular Schedule 5 rolls forward key elements of the existing SSSI system and provides, for example, for SSSIs notified under the 1981 Act to continue to have effect.

#### ***Schedule 5***

### ***Part 2: Transitional Arrangements***

#### **Interpretation**

333. In paragraph 1, the “relevant day” is defined for the purposes of Schedule 5 as the day on which the repeals of the SSSI and related provisions in Part II of the Wildlife and Countryside Act 1981 (listed in paragraph 4 of schedule 7) come into force.

#### **Notifications under the 1981 Act**

334. Paragraphs 2 and 3 ensure that existing SSSIs continue to have effect when the new arrangements in the Act come into force. Any SSSI notification which has effect

immediately before the relevant day and which has been confirmed (where confirmation was necessary under the legislation in force at the time the site was notified) is to be treated as an SSSI notification given under Part 2 of the Act.

335. It should be noted that paragraph 3(a) has a “year zero” effect in relation to existing SSSIs which have been confirmed and they are to be treated as having been notified and confirmed under the Act on the commencement date of the new SSSI system created by the Act (i.e. the “relevant day”). References elsewhere in the Act (or in other legislation) to the date on which the SSSI was notified or confirmed will, therefore, for all existing SSSIs, be to the “relevant day” defined in paragraph 1, on which the new system takes effect. This is of relevance, for example, in relation to the ability of owners and occupiers to request a review of the ORC list for a site. SNH is not obliged to carry out such a review until 6 years from the relevant day, although in practice it will propose reviews during this period as part of the structured review programme which it has been asked to carry out.
336. Special reference is made to the [Wildlife and Countryside \(Amendment\) Act 1985 \(c.31\)](#) in paragraph 2(b) because prior to that Act no requirement existed to both notify and then confirm SSSIs.
337. [Paragraph 3\(b\)](#) has the effect of converting all existing lists of PDOs under the existing SSSI system into ORC lists under the new system. SNH has been tasked by the Scottish Ministers with reviewing and updating all lists converted in this way. Special arrangements are made in paragraph 5, which should be read in conjunction with the ORC review provisions in section 6, to enable a structured review programme to be carried out within the first 6 years following commencement of the new system.
338. Where SNH has given written consent to a PDO under the terms of the 1981 Act, that consent also continues in force, by virtue of paragraph 3(d), and is to be treated as a written consent under the new Act which permits the carrying out of the corresponding operation on the relevant ORC list (which itself will have been created from the old PDO list). Consents may however be reviewed as part of the ORC review process in section 6(4) and may be modified or withdrawn under section 16(5).
339. [Paragraph 3\(c\)](#) makes provision in relation to notices of intent (i.e. notices that a person intends to carry out an operation on the PDO list for a site) under the 1981 Act which are submitted to SNH within the 4 month period prior to the relevant day (i.e. during the 4 months prior to the commencement date for the new SSSI system). In order to avoid the inconvenience involved if such notices were simply to be deemed to be void, provision has been made to ensure that they can be considered by SNH, post commencement, as if they are valid applications for ORC consent under section 16(2) of the Act. This arrangement applies only to notices of intent which remain unresolved on the relevant day. Where SNH has given written consent to the proposed operation, that consent remains valid under paragraph 3(d). Where SNH has refused to give consent, the notice of intent falls and cannot be considered as a valid application for ORC consent. The period of 4 months specified in paragraph 3(c) reflects existing arrangements in the 1981 Act.
340. [Paragraph 4](#) requires SNH to ensure, as soon as practicable following the relevant day, that all existing SSSIs have a site management statement, as provided for in section 4 of the Act. It may do so either by preparing a new site management statement or by adopting an existing statement.
341. [Paragraph 5](#) suspends the effect of section 6(2) in order to enable SNH to implement a structured review of ORCs. If this were not done, SNH would not be able to review ORC lists which had been converted from existing lists of potentially damaging operations for 6 years after the Act comes into force, unless it were able to secure the agreement of owners and occupiers under section 6. This would potentially prevent it from implementing a structured review programme across the SSSI series.

342. [Paragraph 6](#) clarifies, for the avoidance of doubt, that a consent given by regulatory body prior to the provisions of the Act coming into force is not to be regarded as a valid consent in terms of section 15 of the Act. In other words, where a consent has been issued by a regulator prior to the commencement of section 15, the safeguards built into section 15 will not have applied and SNH will not have been formally consulted about the application. The applicant for consent will therefore still require to obtain SNH consent separately before proceeding with an operation on an SSSI even though regulatory consent has been obtained.
343. [Paragraph 7](#) regulates the situation in which an SSSI is in the process of notification, but has not yet been confirmed at the point when the provisions of the Act come into force. In this circumstance the notification will proceed under the old arrangements of the 1981 Act and the relevant provisions of that Act continue to have effect for that purpose. Immediately it is confirmed, however, the SSSI will fall squarely within the terms of the new Act – paragraph 3(a) will convert it into an SSSI notified under the Act on the day confirmation is given under the 1981 Act.

### **Notifications under the 1949 Act**

344. A small number of SSSIs notified under the [National Parks and Access to the Countryside Act 1949 \(c.97\)](#) still exist. Paragraphs 8 to 10 allow for such notifications to continue in force, but in a more limited fashion than for SSSIs notified under the 1981 Act. 1949 Act sites were notified only to the planning authority for the area and, on a similar basis, they will have effect under the new Act only in relation to the general duty placed on public bodies by section 12.
345. SNH is empowered to revoke a 1949 Act site by the simple mechanism of giving notice to the interested parties. Any remaining 1949 Act sites can therefore, in due course, either be renotified by SNH under the new system or revoked.

### **Orders under section 29 of the 1981 Act**

346. [Paragraph 11](#) provides that NCOs made under the 1981 Act should continue to have effect. Again, the provision has a “year zero” effect and the NCO is to be treated as having been made and confirmed on the date the relevant provisions of the new Act are brought into force.
347. An NCO which has not yet been confirmed remains subject to the confirmation process set out in the 1981 Act until such time as it has been confirmed. The relevant provision of the 1981 Act continue to have effect for that purpose.
348. Despite that preservation of the 1981 Act provisions, the revocation of any 1981 Act NCO which has not yet been confirmed can be effected on the same basis as allowed in relation to NCOs under the new Act. Revocation will therefore have immediate effect.

### **Registers of notifications**

349. [Section 22](#) of the Act makes new arrangements for the provision and maintenance of, and access to, information about SSSIs, via a new SSSI Register under the authority of the Keeper of the Registers. Full development of the new Register may take some time so there may be a corresponding delay in bringing section 22 into effect. Paragraphs 12 and 13 therefore ensure that the existing arrangements set out in section 28(12) of the 1981 Act will continue in force until the new SSSI Register is operational.