

TRANSPORT AND WORKS (SCOTLAND) ACT

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act takes forward the Scottish Ministers' commitment of 4 May 2005 to the Scottish Parliament to place the Scottish Ministers at the heart of an order-making process and thereby avoid the need for private Bills for transport-related developments.
4. The Act also introduces, in response to the wishes of Parliamentary authorities, provisions to replace special Parliamentary procedure for the determination of transport-related developments and instead, aligning with the broad thrust of Parliament for a more proportionate process, make the Scottish Ministers rather than the Scottish Parliament, in such circumstances, the appropriate decision-making body.

COMMENTARY ON SECTIONS

5. The Act is in three parts:
 - Part 1: Orders authorising works etc. (which contains 23 sections and 1 schedule),
 - Part 2: Miscellaneous amendments (containing 4 sections), and
 - Part 3: General (containing 3 sections and 2 schedules).
6. The contents of the Act are summarised below:
 - Part 1 makes provision to enable the Scottish Ministers, under an order-making power, to authorise transport developments and provides details of the procedure for the making of orders.
 - Part 2 makes modifications to legislation relating to road and harbour developments, bringing consistency to the authorisation process for transport developments. It also establishes revised procedures for the making of Pilotage orders. A minor modification is made to the Transport (Scotland) Act 2001 to enable the Scottish Ministers to make grants and loans for the purchase of certain properties in consequence of a transport development.

- Part 3 describes how secondary legislation (orders, rules and regulations) will be made. It also deals with modifications, repeals in respect, predominantly, of special Parliamentary procedure and the commencement and short title of the Act.
7. The Act impacts on a number of Acts but makes particular reference to:
- the Harbours Act 1964
 - the Roads (Scotland) Act 1984
 - the Pilotage Act 1987

THE ACT – SECTION BY SECTION

PART 1 – ORDERS AUTHORISING WORKS ETC.

Power to make orders

Section 1: Orders as to transport systems and inland waterways

8. Section 1(1)(a) gives the Scottish Ministers a power to authorise, by order, the construction and operation, or matters connected with the construction and operation, of the transport systems specified in the section. Section 23 provides a definition for each of the transport systems.

9. Section 1(1)(b) gives the Scottish Ministers a power to authorise, by order, the construction and operation of an inland waterway. An inland waterway is defined in section 23 as including both natural and artificial waterways and therefore may include rivers, lochs and canals.

Section 2: Subject-matter of orders under sections 1

10. Section 2 provides details of the matters that can be contained within an order to provide the necessary authority to give effect to a proposed development.

11. Subsection (1) introduces schedule 1 which contains a non-exhaustive list of matters that may be contained within an order. Any matter within the proposed order would have to fall within the legislative competence of the Scottish Parliament (see section 29 of the Scotland Act 1998).

12. Subsection (2) allows an order to be made in relation to more than one scheme, system or mode of transport. This means that an order could contain details of matters that might need to take place at a number of locations in order for, for example, the creation of a system. The subsection also permits an order to contain provisions relating to more than one mode of transport.

13. In order to give effect to a particular proposal in a particular location it may be necessary to modify or amend other legislation. Subsection (3) provides the power to modify, amend or exclude any enactment relating to the purpose of the order. The provision in question under an order must be within devolved competence (see section 54 of the Scotland Act 1998) and therefore it may not be possible to modify the law on reserved matters such as the law relating to health and safety.

14. Subsection (4) enables the Scottish Ministers to include within an order any provision that they believe is necessary or expedient to give effect to an order or relevant earlier legislation.

15. Subsection (5) confirms that provision can be made in respect of fixed penalty notices for discharging liability for offences. Subsection (6) provides a definition of “fixed penalty notice”.

16. Subsection (7) means that a right of way cannot be extinguished unless either an alternative right of way has been or will be created, or there is no requirement for an alternative right of way.

Section 3: Crown land

17. Section 3(1)(a) enables a right over or in Crown land (not in itself being a Crown right) to be acquired through the order by compulsion with agreement from the appropriate authority. The right over or in Crown land may, for example, relate to a third party right of access over Crown land to provide access to a private dwelling. A right in Crown land can be acquired compulsorily if the interest is owned other than by the Crown as stipulated under subsection (3) and if the relevant Crown interest agrees, as set out in subsection (4).

18. Subsection (1)(b) allows a right belonging to the Crown to be affected by any provision in the Act or an order made under the Act with agreement from the appropriate authority (excluding compulsory acquisition). Subsection (1)(c) enables a third party right in land in which there is a Crown interest to be affected by section 18 of the Act which enables the Scottish Ministers to grant promoters access to land for surveying purposes in relation to a transport proposal with agreement from the appropriate authority.

Procedure for making orders

Section 4: Applications

19. This section describes the process for the making of applications. Subsection (1) provides the Scottish Ministers with the power to make on application an order. The application has to be made in accordance with rules that will be made under this section.

20. Subsection (2) provides details of the matters on which the Scottish Ministers can make rules relating to the application, the documentation and information to be submitted in support of the application, the notice and publication arrangements and the conduct, scope and manner of the pre-application consultation.

21. Subsection (3) enables the rules to require the Scottish Ministers to provide an opinion on the information to be supplied with an application. This power could be exercised to scope the environmental information required in connection with a development. The subsection also covers publicity for that information.

22. Subsection (4)(a) provides that the rules under the section can require compliance with directions in relation to matters concerning relevant authorities providing information for a project and pre-application consultation. Subsection (7) provides a non-exhaustive list of those bodies who may be required to provide information.

23. The ability for the Scottish Ministers to set fees for the making of applications is contained within subsection (6).

Section 5: Cases where other Member States are affected

24. This section clarifies the position in respect of the international obligations of the Scottish Ministers to ensure that other Member States of the European Economic Area (which includes the nations of the European Community plus Norway, Iceland and Lichtenstein) are notified of developments that are likely to affect them or are provided with

information on request if they are likely to be significantly affected by any proposed development.

25. Subsection (1) provides the Scottish Ministers with power to make rules regarding the provision of information, the consultation process and how the Scottish Ministers will notify other Member States of matters relating to their decision.

26. Subsection (2) confirms the context for the actions of the Scottish Ministers, as described within the rules. Subsection (3) provides the reference for which states constitute a Member State.

Section 6: Orders made otherwise than on application

27. This section enables the Scottish Ministers to make an order to allow them to take whatever steps they believe are necessary or expedient to address the circumstances where a promoter or operator fails to comply with the terms under which authorisation of an order has been given or a promoter or operator abandons or neglects the works subsequent to their authorisation by an order. It also allows the Scottish Ministers to get rid of spent provisions in an earlier order and to bring forward themselves an order to authorise the construction and operation of works under section 1.

28. Subsection (1) sets out the circumstances in which the Scottish Ministers may act. Subsection (2) provides powers for the recovery of any costs incurred by the Scottish Ministers in suspending or discontinuing any operations under subsection (1) or in addressing any abandonment or neglect of any works. Subsection (3) provides details of the publication arrangements to which the Scottish Ministers must adhere if they act under the powers of this section.

Section 7: Model provisions

29. This section enables the Scottish Ministers to issue and publish guidance to prospective applicants on the provisions that may be incorporated within their draft orders. Subsection (2) provides that different guidance may be issued for example to reflect the different circumstances of different types of project.

Section 8: Objections and representations

30. Section 8 enables the Scottish Ministers to make rules in relation to objections made in respect of an application for an order (subsection (1)(a)(i)) or when they are making an order without an application being made to them (subsection (1)(a)(ii)). The power to make rules includes the ability to make provision in relation to representations.

31. Subsections (2) and (4) provide that the Scottish Ministers must take any objection into consideration before deciding whether or not to make an order, unless they decide to hold an inquiry or hearing, in which case, they must consider the report from the inquiry or hearing before making an order. Subsection (3) enables the Scottish Ministers to disregard an objection if it is withdrawn or they consider it to be frivolous or trivial or it relates to compensation. Subsection (5) states that rules may allow the Scottish Ministers to waive some of the rules under this section which would otherwise apply. In addition, the rules may allow the Scottish Ministers to require compliance with certain rules which would not otherwise comply. Subsection (8) enables the Scottish Ministers to make rules in respect of representations.

Section 9: Inquiries and hearings

32. This section allows the Scottish Ministers to hold an inquiry or hearing into an application or a proposal for an order. It obligates, under subsection (3), the Scottish Ministers to hold an inquiry or hearing if it is requested by, and there is a valid objection from, a local authority or National Park authority or Transport Partnership in whose area works would be carried out, or a navigation authority affected by any works proposed by the order, or Network Rail Infrastructure Limited (if the proposed works affect the construction or operation of a railway) or someone subject to a compulsory purchase of their interest in land.

Section 10: Procedure at inquiries and hearings

33. This section allows the Scottish Ministers to make rules to regulate the proceedings of an examination, which may take the form of an inquiry or hearing.

34. Subsections (1) and (2) describe the matters which the rules may regulate. Subsections (3) and (4) ensure that for consistency of approach particular provisions of the Local Government (Scotland) Act 1973 which apply in respect of an inquiry or hearing under that Act will apply in similar circumstances to an examination carried out under the provisions of the Act.

35. Subsection (5) requires the Council on Tribunals to be consulted on the making of any rules under this section.

Section 11: Making or refusal of orders under section 1

36. Subsection (1) provides for the circumstances to which this section relates namely when an application for an order has been made or there has been a proposal for an order without an application having been made.

37. Subsection (2) provides the power to make an order with or without modifications or not to make an order. Subsection (3) allows the Scottish Ministers not to make an order if they believe that there is another means by which the object of the order could be achieved. It is permissible under subsection (4) for the Scottish Ministers to make a determination to proceed with certain elements of a proposal whilst making a separate determination in respect of, or deferring consideration of, other matters within the application.

38. In those instances when the Scottish Ministers propose to make substantial modifications to an applicant's proposal the Scottish Ministers are, under subsection (5), under a duty to notify any person who is likely to be affected, to give that person a chance to make representations and to consider those representations.

39. Subsection (6) ensures that any order that is not subject to Parliamentary scrutiny comes into force when notice of the determination is published in the Edinburgh Gazette unless the order provides for a later date for its coming into force.

Section 12: Publicity for making or refusal of order

40. This section sets out the arrangements for the publicity for the making or refusal of an order.

41. A duty is placed on the Scottish Ministers to give notice to the persons as specified in subsection (1) and to publicise the notice in the Edinburgh Gazette, which is the official newspaper of record in Scotland and is the primary source for a range of official notices. The information that must be contained within the notice is set out in subsection (2). Subsection (3) ensures in those instances when there is a requirement for an order to be laid before the

Scottish Parliament that the notice must advise that the order cannot come into force unless the Scottish Parliament by resolution approves the order.

42. Subsection (4), where it applies, also requires the notice to cover additional matters. Those matters relate to consideration of the environmental statement, a definition of which is provided within subsection (5).

43. Subsection (6) amplifies the information that must be contained within a notice in respect of certain environmental considerations. Subsection (7), supplemented by the definition in subsection (9), states that subsection (4) applies in relation to projects in a class as listed in the European Directives on the assessment of the effects of certain public and private projects on the environment.

44. Subsection (8) transposes an element of Directive 85/337/EEC (as amended by Directive 2003/35/EC, which provides for public participation in respect of plans and programmes relating to the environment and amends with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC) and means that any non-governmental organisation promoting environmental protection and meeting any requirements under the law shall be deemed to have an interest for the purposes of Article 10a(a) of Directive 85/337/EEC (as amended) and rights capable of being impaired for the purposes of Article 10a(b) of the Directive and shall be able to challenge the substantive or procedural legality of decisions.

45. Subsection (9) provides the appropriate references.

46. Subsections (10) and (11) direct the Scottish Ministers to send a copy of their determination notice containing such information as relates to the environmental statement to persons who made an objection, those who made a representation or those that made both a representation and an objection.

47. Subsection (12)(a) directs, in those instances where the Scottish Ministers make a determination on an application, the promoter to make arrangements to publish in a local newspaper a copy of the Scottish Ministers' determination, the reasons for the determination, the matters taken into consideration and the extent of public participation in the process prior to the decision and information as to the right of challenging the decision. Under subsection (12)(b) the Scottish Ministers are obliged to publish similar information in respect of a development which they have promoted.

48. Once an order has been made the person who applied for the order or the Scottish Ministers, if they have made an order without an application being made to them, must place with the Scottish Parliament a copy of the order and such documentation as is described in subsection (13)(a) and deposit with the local authority and the National Park authority within whose area the proposed works are to take place a copy of the order and documents as described in subsection (13)(b). Subsection (14) dis-applies subsection (13)(a) for developments of national significance or otherwise considered by the Scottish Parliament under section 13.

49. Subsection (16) places a duty on a relevant authority to make the deposited documentation available for inspection by any person, free of charge at all reasonable hours.

Section 13: "Developments of national significance" etc.: special procedure

50. This section obliges the Scottish Ministers to seek an affirmative resolution for any order containing provisions which authorise a national development as designated within the National Planning Framework or if the order contains provisions which seek to amend a

Private Act of the Scottish Parliament. The section also permits the Scottish Ministers to seek, if they so wish, an affirmative resolution for any order made under section 1.

51. Subsections (5) and (6) place a duty on the Scottish Ministers to publish certain information in the Edinburgh Gazette and a local newspaper once the Scottish Parliament has decided whether to approve an order.

52. Subsection (7) states that an order which seeks to amend, revoke or re-enact an instrument laid before the Scottish Parliament will be subject to affirmative procedure only if the order authorises works which constitute a different national development or amends a Private Act of the Scottish Parliament or the Scottish Ministers so direct.

Consents etc. under other enactments

Section 14: Consents etc. under other enactments

53. This section enables consents, permissions or licenses relevant to an application or proposal to be considered and dealt with through an order. Subsection (3) provides for the Scottish Ministers to make regulations in relation to consents which would not otherwise be granted through the order under section 1. Subsections (4) and (5) set out what the Scottish Ministers may cover in the regulations.

Section 15: Town and country planning

54. This section enables the Scottish Ministers by way of an order under section 1 to grant planning permission for a development. Subsection (2) makes an insertion into the Town and Country Planning (Scotland) Act 1997 so as to cover land blighted by a development pursuant to an order under section 1.

Miscellaneous

Section 16: Validity of orders under section 1

55. This section provides details of how orders may be challenged. Subsection (1) sets out the grounds of challenge and the period of time within which a challenge can be made. Subsection (2) provides details of when the challenge period starts to run. Subsection (3) describes how the Court of Session may act in relation to any challenge made and subsection (4) confirms that any challenge can only be made within the designated 42 day period as described in subsections (1) and (2).

Section 17: Power of certain bodies to apply for, or object to, order under section 1

56. This section clarifies the powers of certain bodies to apply for or object to an order. Subsection (1) confirms that any body which has a current power to promote or oppose a Bill whether in the Scottish Parliament or the Parliament of the United Kingdom will also have a similar power in respect of an order made under the Act. This ensures that there is no gap in the powers of such bodies.

57. Section 17 of the Transport Act 1962 was amended by the insertion of subsection (1A) by the Scotland Act 1998 (Cross Border Public Authorities)(Adaption of Functions etc.) (No 2) Order 2000 and provides that the British Waterways Board may, with the consent of the Scottish Ministers, promote Bills in the Scottish Parliament and may oppose Bills in the Scottish Parliament. Section 17(1) makes equivalent provision in respect of the UK Parliament. Section 17(3) of the Act enables the British Waterways Board to promote or object to an order without the consent of the Scottish Ministers.

58. Subsection (4) states that any other person may apply for or object to an order. The statement clarifies that the section is merely enabling in respect of the bodies covered by it and so it does not limit the powers of other persons to apply for or oppose an order.

Section 18: Access to land

59. Subsection (1)(a) permits the Scottish Ministers to set up a regime to authorise prospective applicants to access land for the purposes of informing an application for an order.

60. There are a number of matters described in a non-exhaustive list at subsection (2) that the Scottish Ministers may cover in an order providing the access regime. These matters might include establishing criteria as to whether the prospective applicant is a fit and proper person that is acting in good faith and has a genuine reason for wishing to seek access to the land; the manner and notification of application; and permitting the person who wishes to enter the land and the person whose land may be entered an opportunity to make representations.

61. The Scottish Ministers may consider under subsection (2)(a)(vi) attaching conditions and limitations to any authorisation. That is so as to ensure that the person entering land conducts their business in a safe and secure manner and that entry is planned in a manner that takes full cognisance of the interests that prevail on that land i.e. on agricultural land cropping and lambing times for instance would need to be factored into the times and duration of entry, similarly entry to land on which rail or other operations are conducted might mean that particular conditions of entry will apply. The Scottish Ministers may make provision within the rules for statutory undertakers who are considered worthy of special protection against the prospective promoter taking access to land on which the undertakers have apparatus.

62. Under subsection (2)(a)(x) and (b)(vii) provision may be made that if the person whose land is affected refuses entry a prospective promoter may make an application to a Sheriff for a warrant to enter the land.

63. Subsection (1)(b) permits also the Scottish Ministers by order to enter land and subsection (2)(b) describes in a non-exhaustive list matters that the Scottish Ministers may contain within an order providing such an access regime.

Section 19: Acquisition of land by agreement

64. This section enables a promoter, which includes the Scottish Ministers, of an order under section 1 to acquire a third party's land, provided that the third party enjoys a qualifying interest and where the use of the third party's land is or will be seriously affected by the carrying out of the construction or operation of the works authorised by the section 1 order.

65. Subsection (2) gives power to a promoter to acquire land by agreement in advance of works authorised by an order, whereas subsection (1) gives power once works or operations have commenced. Subsection (3) provides details of a qualifying interest which comprises not only an interest in domestic property but also in relevant agricultural and limited business premises. Subsection (4) states that the power to acquire land which is seriously affected by the construction of works cannot be exercised unless the acquisition begins before the project is brought into use and the power to acquire land which is affected by the use of the project cannot be exercised unless the acquisition is begun within one year of the project being brought into use.

66. Subsection (5) states that the power provided by section 19 only applies if a promoter does not already have the necessary power to acquire land by agreement.

Section 20: Service of notices and other documents

67. This section provides details of how a notice or a document can be served and on whom it should be served. Subsections (1)(c) and (2) set the context within which documents can be communicated electronically. Subsection (4) describes the proper address for the serving of notices by post. In those instances where the proper address cannot be ascertained and the matter relates to an interest in, or to the occupier of, land, subsection (5) provides for a notice to be addressed to either the owner or as the case may be the occupier and left with a person resident or employed on the land or affixed to a building or object on the land.

Section 21 : Annual report

68. The section places the Scottish Ministers under a duty to prepare an annual report, by 1st October each year, of the operation of the order-making process. Subsection (2) provides details of some of the matters that are to be contained within the report. Under subsection (3) a copy of the report is to be laid in the Scottish Parliament as well as being published.

Section 22: Orders under the Light Railway Act 1896

69. The section ensures that an order for the purposes of constructing or operating a light railway that previously would have been made under the Light Railways Act 1896 can no longer be made by the Scottish Ministers under that Act.

Section 23: Interpretation

70. The section defines terms used within Part 1.

PART 2: MISCELLANEOUS AMENDMENTS

Section 24: Amendment of Roads (Scotland) Act 1984

71. Subsection (2) through the insertion of new section 143A obligates the Scottish Ministers to seek an affirmative resolution from the Scottish Parliament in respect of an order authorising any future road developments that constitute a national development or when the Scottish Ministers so direct. The new section 143A provides the definition of a national development and identifies the instruments to be subject to affirmative procedure. It also provides that an order which seeks to amend, revoke or re-enact an instrument laid before the Scottish Parliament will only be subject to affirmative procedure if the Scottish Ministers so direct.

72. Subsection (4) ensures that when an order is subject to affirmative procedure the public are to be informed that the instrument cannot come into force until and unless approval is given by the Scottish Parliament.

73. Subsection (5) inserts a new paragraph 1A to Schedule 2 of the Roads (Scotland) Act 1984 which details the publicity arrangements of any roads order or scheme that has been approved by the Scottish Parliament.

Section 25: Amendment of Harbours Act 1964

74. Provisions within this section transpose Council Directive 2003/35/EC (otherwise known as the Public Participation Directive) and significantly amend Schedule 3 to the Harbours Act 1964. A revised Schedule 3 to the 1964 Act is attached for information with the

new text inserted in italics and noting where text has been repealed. A transposition schedule is attached for information.

75. Subsection (2) inserts in section 44 of the Harbours Act 1964 subsection (6) which provides a definition of the “public concerned” to include a non-governmental organisation promoting environmental protection and confirms at subsection (7) that such a party has a legitimate right to raise a challenge to a harbour revision or empowerment order authorising a project likely to have a significant effect on the environment.

76. Subsection (3) through the insertion of new section 54A obligates the Scottish Ministers to seek an affirmative resolution from the Scottish Parliament in respect of an order authorising any future harbour developments that constitute a national development. It also provides the Scottish Ministers within subsection (2)(b) with the discretion to seek Parliamentary approval, by means of an affirmative procedure, for any other harbour scheme. Section 54A(5) provides that when a harbour order seeks to amend, revoke or re-enact an instrument laid before the Scottish Parliament the order will be subject to affirmative procedure only if the order authorises work constituting a national development different to that authorised by the original instrument, or the Scottish Ministers so direct.

77. Subsection (5)(a) provides for definitions in paragraph 1 of Schedule 3. Subsection (5)(b) and (c) provide for access to information and the making of representations. Subsection (5)(d) introduces a new paragraph into Part 1 of Schedule 3 to the Act, paragraph 10A, which provides for the notification procedure in those instances when the Scottish Ministers receive additional information that will have a bearing on their consideration of the likely environmental effects of a proposed project.

78. The insertion at sub-paragraph (1D) of paragraph 18 adds a harbour authority to the list of statutory objectors, but only where they are not the applicant, in respect of an application for a harbour revision order.

79. The insertions to sub-paragraph (2) of paragraph 24 and the insertion of the new sub-paragraph (3) provide details of the publicity arrangements for a harbour order including those approved by the Scottish Parliament. The insertions to sub-paragraph (4) of paragraph 28 add a harbour order authority to the list of statutory objectors in respect of a harbour revision order where the order is to be made by the Scottish Ministers of their own motion. The addition of the new sub-paragraph (3) of paragraph 31 provides details of the publicity arrangements for a harbour revision order made by the Scottish Ministers of their own motion.

80. The new sub-paragraph (3A) in paragraph 32 recognises that a harbour authority cannot be an objector in the case of an empowerment order since the purpose of a harbour empowerment order is to establish a harbour authority.

81. Subsection (6) makes changes to paragraph 3 of Schedule 4 so as to ensure that the objections of a harbour authority, as a statutory objector, to a harbour re-organisation scheme cannot be dealt with by means of correspondence; there must always be a statutory right to an inquiry or hearing.

Section 26: Amendment of Pilotage Act 1987

82. This section introduces a new section 1A into the Pilotage Act 1987 to improve notification provisions and permit the Scottish Ministers in those cases where there are unresolved objections to a proposal to determine the procedure for detailed consideration of those objections.

83. The new subsection (1) details the notification provisions. The Scottish Ministers must before making an order give notice by advertisement in at least one newspaper (subsection (1)(a)(i)) and the Edinburgh Gazette (subsection (1)(a)(ii)). The Scottish Ministers are also obliged to provide a copy to any other persons that might be affected. This may include parties who are engaged in shipping movements but who may not have access to a local newspaper or the Edinburgh Gazette.

84. The new subsection (2) details the notification provisions that are to apply when a harbour authority which is not a competent harbour authority (i.e. a harbour authority which has statutory powers in relation to the regulation of shipping movements and the safety of navigation within its harbour and whose harbour falls wholly or partly within an active former Pilotage district) makes an application to the Scottish Ministers to be a competent harbour authority. The notification provisions require the harbour authority to give notice by advertisement in at least one newspaper (paragraph (a)(i)) and the Edinburgh Gazette (paragraph (a)(ii)). The harbour authority is also obliged to provide a copy to any other persons that might be affected. This may include parties who are engaged in shipping movements but may not have access either to a local newspaper or the Edinburgh Gazette.

85. The new subsection (3) provides details of the content of the notice. The notice must contain a summary of the proposed order, the place where a copy may be inspected and specify a time period of at least 42 days during which affected persons will have an opportunity to make an objection.

86. The new subsection (4) provides a statutory right for a public local inquiry or hearing when a harbour authority affected by the proposal raises an objection. Subsection (5) provides that any other objections unless they are considered frivolous or trivial are to be considered at an inquiry, hearing or by written representation. Subsections (6) and (7) state that certain provisions of the Local Government (Scotland) Act 1973 which apply in respect of an inquiry under that Act will apply in similar circumstances to an inquiry or hearing carried out under the Pilotage Act 1987.

87. Following consideration of a report from an inquiry or hearing or of written representations, as the case may be, the Scottish Ministers under the new subsection (8) may either make the order as proposed, make the order with modifications or decide not to make the order.

88. The new subsection (9) provides for public notification that the order has been made. It also places a duty to notify those persons who received a copy of the original notice that was issued under the provisions of subsections (1) and (2).

89. The new subsection (10) provides for the detail that must be contained within the notice notifying the making of an order.

Section 27: Amendment of Transport (Scotland) Act 2001

90. This section inserts new subsections (1A) and (1B) into section 70 of the Transport (Scotland) Act 2001.

91. New subsection (1A) allows the Scottish Ministers to make a grant or loan in respect of the purchase of eligible properties the use or enjoyment of which are or may be seriously affected by the construction or operation of a development authorised under section 1 of this Act or by a development authorised through earlier legislation but which, had it been in place at the time, could have been authorised by provisions within this Act.

92. New subsection (1B) provides a definition of qualifying interest which comprises not only an interest in domestic property but also I relevant agricultural property and in certain cases in other non-domestic property

PART 3: GENERAL

Section 28: Further provision as regards rules, regulations and orders

93. Subsection (6) provides the Scottish Ministers with powers for sub-delegation of functions and powers to make incidental, supplemental, consequential, transitional, transitory or saving provisions. That, with the powers in subsection (7), allows the Scottish Ministers to make provision for ancillary matters and to enable unforeseen circumstances to be addressed which may arise following the enactment of the Bill without having to have recourse to primary legislation. The scope of the power is restricted. It can only be used to make provisions which are of an incidental, supplemental, consequential, transitional, transitory or saving nature.

Section 29: Modification and repeal of enactments

94. Subsection (1) indicates that schedule 2 to the Act contains a list of enactments that are modified by the Act.

95. Subsection (2) indicates that schedule 3 to the Act contains a list of enactments that are repealed by the Act.

Section 30: Short title and commencement

96. Subsection (1) provides the short title, which is the name by which the Act may be cited.

97. Subsection (2) deals with commencement of sections 28 and 30. Subsection (3) provides for provisions in section 25 implementing the Public Participation Directive and for section 27 to come into force two months after the date of Royal Assent. It is for the Scottish Ministers, as explained in subsection (4), to make provision commencing the remaining provisions of the Act.

SCHEDULES

Schedule 1: Matters within section 1

98. The schedule contains a non-exhaustive list of the matters that may be addressed within an order made under section 1.

Schedule 2: Modification of enactments

99. The schedule contains consequential modifications to earlier Acts in order to give effect to the provisions of the Act.

Schedule 3: Repeals

100. The schedule details the repeals within various enactments that are necessary to dis-apply special Parliamentary procedure in respect of road and harbour developments and pilotage.

HARBOURS ACT 1964

SCHEDULE 3

This text is provided for guidance only and accuracy is not warranted.

Key:

New text inserted = *this is new text inserted by the Act*

Text deleted or repealed = **[this is existing text which has been deleted or repealed]**

SCHEDULE 3

PROCEDURE FOR MAKING HARBOUR REVISION AND EMPOWERMENT ORDERS

Sections 17 and 47

[PART I

ORDERS MADE ON APPLICATION TO THE SECRETARY OF STATE]

Introduction

1. In this Part of this Schedule-

"the Directive" means Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC and Council Directive 2003/35/EC;

"EEA Agreement" means the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993 ;

"EEA State" means a State which is a Contracting Party to the EEA Agreement;

"environmental statement" means a statement which includes the information mentioned in paragraph 8(2) and such additional information as the Secretary of State may require under paragraph 8(3);

"fishery harbour" has the meaning assigned to it in section 21 of the Sea Fish Industry Act 1951;

"project" means -

- (a) the execution of construction works or other installations or schemes, and
- (b) other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

"relevant project" means a project which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location;

"selection criteria" means the criteria set out in Annex III to the Directive;

"sensitive area" means any of the following-

- (a) land within a site of special scientific interest;
- (b) land in respect of which a conservation order or land management order made under Part 2 of the Nature Conservation (Scotland) Act 2004 (asp 6) has effect;

[(c) land declared to be a national nature reserve under section 35 of that Act];

[(d) an area to which paragraph (u)(ii) in the table in article 10 of the Town and Country Planning (General Development Procedure) Order 1995 applies];

[(e) a National Park within the meaning of the National Parks and Access to the Countryside Act 1949];

(g) a property appearing on the World Heritage List kept under article 11(2) of the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage;

(h) a scheduled monument within the meaning of the Ancient Monuments and Archaeological Areas Act 1979;

[(i) an area of outstanding natural beauty designated by order under section 87 of the National Parks and Access to the Countryside Act 1949 (designation of areas of outstanding natural beauty)];

(j) a European site within the meaning of regulation 10 of the Conservation (Natural Habitats etc) Regulations 1994;

(k) an area designated as a national scenic area under section 262C of the Town and Country Planning (Scotland) Act 1972

(l) an area designated as a national park by a designation order made by the Scottish Ministers under section 6(1) of the National Parks (Scotland) Act 2000.

[2.

A project shall be treated for the purposes of this Part as not falling within Annex II to the Directive unless—

- (a) the area of the works comprised in the project exceeds 1 hectare,
- (b) any part of the works is to be carried out in a sensitive area, or
- (c) the Secretary of State determines that the project shall be treated for the purposes of this Part as falling within that Annex.]

Pre-application procedure

[3.

A person may not make an application for a harbour revision order which, directly or indirectly, authorises any project unless—

- (a) he has given the Secretary of State notice of his intention to make the application, and
- (b) the Secretary of State has responded under paragraph 5 or 6(3).]

[4.

Where the Secretary of State is notified of a proposed application under paragraph 3(a) he shall decide—

- (a) whether the application relates to a project which falls within Annex I or II to the Directive, and

(b) if it relates to a project which falls within Annex II, whether, taking into account the selection criteria, the project is a relevant project.]

[5.

If the Secretary of State decides that the application—

- (a) does not relate to a project which falls within Annex I or II to the Directive, or
- (b) relates to a project which falls within Annex II but is not a relevant project,

he shall inform the proposed applicant in writing of his decision.]

[6.—

(1) If the Secretary of State decides that the application relates to a project which falls within Annex I or within Annex II to the Directive and is a relevant project—

- (a) he shall in writing inform the proposed applicant of the decision, and give him the reasons for his decision,
- (b) sub-paragraph (2) shall apply, and
- (c) if the applicant makes the application, paragraph 8 shall apply.

(2) Where this sub-paragraph applies the Secretary of State shall give an opinion to the proposed applicant about the extent of the information referred to in Annex IV to the Directive which the proposed applicant would be required under paragraph 8(1) to supply in an environmental statement.

(3) In giving an opinion under sub-paragraph (2), the Secretary of State shall take into account the extent to which he considers—

- (a) information to be relevant to his decision under paragraph 19 and to the specific characteristics of the project to which the proposed application relates and of the environmental features likely to be affected by it; and
- (b) that (having regard in particular to current knowledge and methods of assessment) the proposed applicant may reasonably be required to compile the information.

(4) The Secretary of State shall not give an opinion under sub-paragraph (2) until he has consulted the proposed applicant and such bodies with environmental responsibilities as he thinks appropriate.

The application

[7.

An application for a harbour revision order must be accompanied by—

- (a) six copies of a draft of the proposed order,
- (b) six copies of any map which, if the order is made in the form of the draft, will be annexed to it, and
- (c) such fee as the Secretary of State may determine.]

[8.—

(1) Where this paragraph applies pursuant to paragraph 6(1), the Secretary of State shall direct the applicant to supply him with an environmental statement in such form as he may specify.

(2) The environmental statement shall include the following information—

- (a) a description of the project comprising information on its site, design and size;
- (b) a description of the measures which the applicant proposes to take in order to prevent, reduce or remedy significant adverse effects;
- (c) data required to identify and assess the main effects which the project is likely to have on the environment;
- (d) an outline of the main alternatives studied by the applicant and an indication of the main reasons for his choice, taking into account the environmental effects; and
- (e) a non-technical summary of the information mentioned in paragraphs (a) to (d).

(3) The Secretary of State may require the applicant to include in the environmental statement specified information in addition to the information listed in sub-paragraph (2) (whether or not specified in the opinion given under paragraph 6(2)).

(4) The Secretary of State may specify information under sub-paragraph (3) only if it is information of a type set out in Annex IV to the Directive and he considers that—

- (a) it is relevant to his decision under paragraph 19 and to the specific characteristics of the project to which the application relates and of the environmental features likely to be affected by it; and
- (b) (having regard in particular to current knowledge and methods of assessment) the applicant may reasonably be required to compile the information.

[9.

The Secretary of State shall not consider an application for a harbour revision order unless the applicant complies with any direction under paragraph 8(1) and with any relevant requirements of paragraphs 10 to 14.]

Notices

[10.—

(1) An applicant shall arrange for a notice to be published—

- (a) by Gazette and local advertisement, and
- (b) in such other ways as the Secretary of State may direct.

(2) The notice must—

- (a) state that an application has been made for the order,
- (b) state the Secretary of State's decision under paragraph 4 and any reasons given under paragraph 6(1),
- (c) state whether an environmental statement has been supplied under paragraph 8(1)
(ca) where such a statement has been supplied-

*These Notes relate to the Transport and Works (Scotland) Act (asp 8)
which received Royal Assent on 14 March 2007*

(i) provide an address from which a copy of the statement can, until the expiry of the period referred to in head (f), be obtained and information as to the amount of any charge for the provision of such a copy,

(ii) provide an address from which further information about the works proposed to be authorised can, until the expiry of that period, be obtained, and

(iii) state whether paragraph 16 applies,

(d) contain a concise summary of the draft order,

(e) give a general description of any land proposed for compulsory acquisition and of the nature of any works proposed to be authorised, **[and]**

(f) state that any person who desires to object to the application *or to make representations in relation to any environmental statement supplied under paragraph 8(1)* should do so in writing to the Secretary of State, specifying *(where relevant)* the grounds of the objection, before the expiry of the period of 42 days starting with a date specified in the notice *and*

(g) provide details of the procedure under this Schedule for dealing with any objection or representations made under head (f).

(3) The date specified in accordance with sub-paragraph (2)(f) must be the date on which the notice first appears in a local newspaper.

(4) The notice must also specify a place where copies of the following documents can *until the expiry of the period referred to in sub-paragraph (2)(f)* be inspected at all reasonable hours—

(a) the draft order,

(b) the decision of the Secretary of State referred to in sub-paragraph (2)(b),

(c) any environmental statement supplied under paragraph 8(1), and

(d) any map accompanying the application.

(5) The copy of the map referred to in sub-paragraph (4)(d) must be drawn to the same scale as that map.]

10A

(1) This paragraph applies where—

(a) an environmental statement has been supplied under paragraph 8(1), and

(b) prior to the Scottish Ministers making a decision under paragraph 19(2), they are supplied by the applicant or any other person with further information falling within sub-paragraph (2).

(2) Information falls within this sub-paragraph if—

(a) the Scottish Ministers are of the view that it requires to be considered in order properly to assess the likely environmental effects of the proposed project, and

(b) it is not information required for the purposes of an inquiry or hearing held under paragraph 18.

(3) The applicant shall arrange for a notice to be published—

(a) by Gazette and local advertisement, and

(b) in such other ways as seem to the Scottish Ministers appropriate.

(4) The notice must—

(a) state that further information of the sort referred to in sub-paragraph (2)(a) has been received,

(b) specify a place where a copy of the information can, until the expiry of the period referred to in head (d), be inspected at all reasonable hours,

(c) provide an address from which a copy of the information can, until the expiry of that period, be obtained and details of the amount of any charge for the provision of such a copy, and

(d) state that any person who desires to make representations in relation to the information should do so in writing to the Scottish Ministers before the expiry of the period of 42 days starting with a date specified in the notice.

(5) The date specified in accordance with sub-paragraph (4)(d) must be the date on which the notice first appears in a local newspaper.

[11.

If the order will authorise the compulsory acquisition of land the applicant shall, in respect to each parcel of land, serve a notice on every owner, lessee and occupier other than a tenant for a month or any period less than a month—

(a) stating that an application has been made to the Secretary of State for the making of an order which will authorise the compulsory acquisition of the parcel,

(b) naming a place where a copy of the draft order may be inspected at all reasonable hours,

(c) naming a place where a copy of any relevant map accompanying the application, drawn to the same scale and delineating the boundaries of the parcel, may be inspected at all reasonable hours, and

(d) stating that if the person on whom the notice is served wishes to object to the application so far as regards the compulsory acquisition of the parcel he should do so in writing to the Secretary of State, specifying the grounds of his objection, before the expiry of the period of 42 days starting with the date on which the notice is served on him.]

12.—

(1) If the order will result in the extinguishment or diversion of a public right of way over a footpath or bridleway, the applicant shall—

(a) serve a notice on every local authority for the area in which the footpath or bridleway is situated, and

(b) cause a copy of the notice to be displayed in a prominent position at each end of the part of the footpath or bridleway which would by virtue of the order cease to be subject to the public right of way.

(2) The notice mentioned in sub-paragraph (1) must—

- (a) state that an application has been made to the Secretary of State for the making of an order which will result in the extinguishment or diversion of the public right of way over the footpath or bridleway,
- (b) name a place where a copy of the draft order may be inspected at all reasonable hours,
- (c) name a place where a copy of any relevant map accompanying the application, drawn to the same scale, may be inspected at all reasonable hours, and
- (d) state that any person who desires to object to the application, so far as regards the extinguishment or diversion of the public right of way, should do so in writing to the Secretary of State, specifying the grounds of the objection, before the expiry of the period of 42 days starting with—
 - (i) in the case of a local authority served with a notice under paragraph 12(1)(a), the date on which the notice is served on them, or
 - (ii) in the case of any other person, the date specified in the notice displayed under paragraph 12(1)(b).

(3) In this paragraph “local authority” means –

- (a) in England, a county council, a district council, a London borough council, the Common Council of the City of London, the Council of the Isles of Scilly, a parish council and a parish meeting of a parish not having a separate parish council,
- (b) in Wales, a county council, a county borough council and a community council, and
- (c) in Scotland, a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994.

[13.—

(1) If the applicant is not the harbour authority, the applicant shall serve on that authority a copy of the draft order and of any map accompanying the application together with a notice stating—

- (a) that the application has been made to the Secretary of State, and
- (b) that if the authority wish to object to the application is should do so in writing to the Secretary of State, specifying the grounds of its objection, before the expiry of the period of 42 days starting with the date on which the notice is served on it.

(2) The copy of the map referred to in sub-paragraph (1) must be drawn to the same scale as that map.]

[14.

The Secretary of State may require the applicant to serve on any specified person within any specified period of time the documents required to be served under paragraph 13.]

Consultation

[15.

Before the Secretary of State determines an application he shall—

- (a) consult, and
- (b) send any environmental statement supplied to him under paragraph 8(1) *and any further information falling within paragraph 10A(2)* to,
such bodies likely to have an interest in the project by reason of their environmental responsibilities as he thinks appropriate.]

16.—

(1) This paragraph applies where—

- (a) an application for a harbour revision order relates to a project which is proposed to be carried out in Great Britain,
- (b) the Secretary of State decides under paragraph 6(1)—
 - (i) that the application relates to a project which falls within Annex I or II to the Directive, and
 - (ii) in the case of an application relating to a project which falls within Annex II to the Directive, that the project is a relevant project, and
- (c) it comes to the attention of the Secretary of State that the project is likely to have significant effects on the environment in another EEA State, or another EEA State requests particulars of the project.

(2) The Secretary of State shall—

- (a) publish in the Gazette the particulars mentioned in sub-paragraph (3) in a notice with an indication of where further information is available,
- (b) serve on the other EEA State as soon as possible and no later than the date of publication of that notice, the particulars mentioned in sub-paragraph (3) and, if he thinks fit, the information mentioned in sub-paragraph (4), and
- (c) give the other EEA State a reasonable time in which to indicate whether it wishes to be consulted in accordance with sub-paragraph (6).

(3) The particulars referred to in sub-paragraph (2)(a) and (b) are—

- (a) a description of the project, together with any available information on its possible significant effects on the environment in the other EEA State; and
- (b) information about the nature of the decision which may be taken under this Part.

(4) The information to be served on an EEA State which indicates, in accordance with sub-paragraph (2)(c), that it wishes to be consulted in accordance with sub-paragraph (6) is—

- (a) a copy of the application,
- (b) the environmental statement supplied to the Secretary of State under paragraph 8(1) *and any further information falling within paragraph 10A(2)*, and

(c) information regarding the procedure under this Part, but only to the extent that such information has not already been provided to the EEA State in accordance with [sub-paragraph (2)(b)]

(5) The Secretary of State shall also—

(a) arrange for the information referred to in sub-paragraphs (3) and (4) to be made available, within a reasonable time, to the authorities likely to have an interest in the project by reason of their environmental responsibilities, and the public concerned, in the territory of the EEA State concerned; and

(b) ensure that those authorities and the public concerned are given a reasonable opportunity, before he decides whether to make the harbour revision order in relation to the project, to send to the Secretary of State their opinion on the information.

(6) The Secretary of State shall—

(a) consult the EEA State concerned about the project generally and, in particular, about the potential significant effects of the project on the environment of that EEA State and the measures envisaged to reduce or eliminate such effects; and

(b) endeavour to agree with the EEA State a reasonable period of time for the duration of the consultation period.

(7) Where an EEA State has been consulted in accordance with sub-paragraph (6), on the determination of the application the Secretary of State shall inform the EEA State of the decision and send it a statement giving—

(a) the content of the decision whether or not to make the order and any conditions attached to the decision;

(b) the main reasons and considerations on which the decision is based;

(ba) details of what provision was made for public participation in the making of the decision;

(c) a description, where necessary, of the main measures to prevent, reduce or offset the major adverse effects; and

(d) confirmation that any opinion sent to the Secretary of State in accordance with sub-paragraph (5)(b) has been taken into consideration in reaching the decision.

Objections

[17.—

The following paragraphs in this Part have effect where—

(a) all relevant notices concerning an application for the making of a harbour revision order have been published under paragraph 10(1) or 16(2)(a),

(b) all notices and other documents which are required to be served under paragraph 11, 12(1), 13(1), 14 or 16(2)(b) have been served, and

(c) every period for the making of objections *or representations* to the Secretary of State in respect of the

application has expired.]

18.--

(1) This paragraph applies if an objection to the application was made to the Scottish Ministers and has not been withdrawn.

(1A) It does not apply, however, if-

- (a) the Scottish Ministers decide that the application is not to proceed further;
- (b) they consider the objection is frivolous or trivial;
- (c) the objection does not specify the grounds on which it is made; or
- (d) the objection was not made within the period allowed for making it.

(1B) Before making their decision under paragraph 19, the Scottish Ministers may-

- (a) cause an inquiry to be held; or
- (b) give to the person who made the objection referred to in sub-paragraph (1) an opportunity of appearing before and being heard by a person appointed by them.

(1C) Where-

- (a) the objection referred to in sub-paragraph (1) is made by a person within sub-paragraph (1D); and
- (b) the person informs the Scottish Ministers in writing that the person wishes the objection to be referred to an inquiry or dealt with in accordance with sub-paragraph (1B)(b),

the Scottish Ministers shall, before making their decision under paragraph 19, either cause an inquiry to be held or, if they so determine, cause the objection to be dealt with in accordance with sub-paragraph (1B)(b).

(1D) The persons within this sub-paragraph are-

- (a) any council constituted under the Local Government etc. (Scotland) Act 1994 (c.39) for an area in which the harbour (or any part of it) is situated;
 - (aa) *the harbour authority* and
- (b) if the order will authorise the compulsory acquisition of land, any person who is entitled to be served with notice under paragraph 11.

(2) Where an objector is heard in accordance with sub-paragraph (1B)(b), the Secretary of State shall allow the applicant and such other persons as he thinks appropriate to be heard on the same occasion.

(3) The Secretary of State may disregard an objection-

[...]

- (b) in the case of an objection about compulsory acquisition, if he is satisfied that the objection relates exclusively to matters which can be dealt with by the tribunal by whom compensation in respect of the acquisition will fall to be assessed in default of agreement.

The decision

19.—

(1) The Secretary of State shall consider—

- (a) any environmental statement supplied under paragraph 8(1) *and any further information falling within paragraph 10A(2)*;
- (b) the result of any consultations under paragraph 15;
- (c) any opinion sent under paragraph 16(5)(b) and the result of any consultations with other EEA States under paragraph 16(6)(a);
- (d) any objections made and not withdrawn; [...]
- (da) any representations made under paragraph 10(2)(f) or 10A(4)(d)*;
- (e) the report of any person who held an inquiry and of any person appointed for the purpose of hearing an objector under paragraph 18[; and]
- [(f) any written representations submitted to the Scottish Ministers by the applicant or any objector in elaboration of the application or, as the case may be, objection.]

(2) Following the consideration required by sub-paragraph (1) the Secretary of State shall decide—

- (a) not to make the order applied for,
- (b) to make it in the form of the draft submitted to him, or
- (c) to make it with modifications.

[20.—

(1) This paragraph applies where the Secretary of State decides under paragraph 6(1)—

- (a) that the application relates to a project which falls within Annex I or II to the Directive, and
- (b) in the case of an application relating to a project which falls within Annex II to the Directive, that the project is a relevant project.

(2) The Secretary of State shall publish *by Gazette and local advertisement* the following information—

- (a) the content of the decision whether or not to make the order and any conditions attached to the decision,
- (b) the main reasons and considerations on which his decision is based,
 - (ba) details of what provision was made for public participation in the making of the decision,*
 - (bb) a statement regarding the right to challenge the validity of the decision and the procedures for doing so,*
- (c) a description, where necessary, of the main measures to prevent, reduce or offset the major adverse effects, and
- (d) a statement that the matters referred to in paragraph 19(1) have been taken into considerations.]

The order

[21.—

(1) Where the Secretary of State proposes to make the order applied for with modifications which appear to him substantially to affect the character of the order he—

(a) shall take such steps as appear to him to be sufficient and reasonably practicable for informing the applicant and other persons likely to be concerned, and

(b) shall not make the order until such period for consideration of, and comment upon, the proposed modifications by the applicant and those other persons as he thinks reasonable has expired.

(2) The Secretary of State shall not make the order with a modification authorising the compulsory acquisition of land that was not described in the draft submitted to him as land subject to be acquired compulsorily, unless all persons interested consent.]

[22.—

(1) This paragraph applies where the Secretary of State makes an order which authorises the compulsory purchase of land and is—

(a) a harbour revision order relating to a harbour in England or Wales, or

(b) a harbour empowerment order relating to a harbour or to works to be carried out in England or Wales.

(2) The order shall be subject to special parliamentary procedure to the same extent as it would be, by virtue of section 18 or 19 of the Acquisition of Land Act 1981 or paragraph 5 or 6 of Schedule 3 to that Act (National Trust land, commons etc), if it were an order under section 2(1) of that Act.]

[23.—

(1) This paragraph applies to—

(a) a harbour revision order relating to a harbour in Scotland, or

(b) a harbour empowerment order relating to a harbour or to works to be carried out in

Scotland,

where the order authorises the compulsory purchase of land.

(2) The order shall be subject to special parliamentary procedure to the same extent as it would be, by virtue of section 1(2)(b) of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (land forming part of a common or open space or held inalienably by the National Trust for Scotland) if it were an order under section 1(1) of that Act]

[24.—

(1) As soon as possible after a harbour revision order has been made, the applicant shall—

(a) publish a notice by Gazette and local advertisement,

(b) serve on the harbour authority (unless the applicant is the harbour authority) a copy of the order and a copy of any map annexed to it,

(c) serve a copy of the order and of any map annexed to it on each local authority on whom, in compliance with a requirement imposed by virtue of paragraph 12, a notice was served, and

(d) serve a copy of the order and of any map annexed to it on each person on whom, in compliance with a requirement imposed by virtue of paragraph 14, a copy of the draft order was served.

(2) The notice mentioned in sub-paragraph (1)(a) must—

(a) state that the order has been made,

(b) name a place where a copy of the order and any map annexed to it may be inspected at all reasonable hours, **and**

(c) state, in the case of an order which is not subject to special parliamentary procedure, the date on which it comes into operation.

(c) if subsection (4) of section 54A of this Act does not apply to the statutory instrument containing the order, give information regarding —

(i) the date on which the order comes into operation, and

(ii) the right to challenge the validity of the order and the procedure for doing so, and

(d) if that subsection does not apply to the statutory instrument containing the order, state that the instrument cannot come into force until the Scottish Parliament, by resolution, approves it.

(3) *As soon as possible after the Scottish Parliament has decided whether or not to approve under section 54A(4)(b) of the Act a statutory instrument containing a harbour revision order, the applicant for that order shall publish by Gazette and local advertisement a notice —*

(a) stating that the Parliament has, or as the case may be has not, passed a resolution approving the instrument, and

(b) where a resolution has been passed, providing information regarding —

(i) the place where a copy of the order and any map annexed to it may be inspected at all reasonable hours,

(ii) the date on which the order comes into operation, and

(iii) the right to challenge the validity of the order and the procedure for doing so.

Statutory undertakers' land

[25.—

(1) This paragraph applies where application is made to the Secretary of State for a harbour revision order which will authorise the compulsory acquisition of land which includes land which has been acquired by statutory undertakers for the purposes of their undertaking.

(2) If on a representation made to it the appropriate authority is satisfied—

(a) that any of the said land is used for the purposes of the carrying on of the statutory undertakers' undertaking, or

(b) that an interest in any of the said land is held for those purposes, the order shall not be so made as to authorise the acquisition of any such land unless sub-paragraph (3) applies.

(3) This sub-paragraph applies where that authority certifies that the nature and situation of the land are such—

(a) that, without serious detriment to the carrying on of the undertaking, it can be acquired and not replaced, or

(b) that, if acquired, it can, without such detriment as aforesaid, be replaced by other land belonging to, or available for acquisition by, the undertakers.

(4) The representation mentioned in sub-paragraph (2) must be made before the expiry of the period of 42 days starting with the date on which the notice that the application has been made for the order first appears in a local newspaper.

(5) In this paragraph “statutory undertakers” means any person authorities by an Act (whether public general or local) or by any order or scheme made under or confirmed by an Act to carry on any of the following undertakings—

(a) a railway, light railway, tramway or road transport undertaking;

(b) an undertaking the activities of which consist in—

(i) the maintenance of a canal;

(ii) the conservation or improvement of a river or other inland navigation;

(iii) the improvement, maintenance or management of a harbour (whether natural or artificial), port, haven or estuary, a dock (whether used by sea-going ships or not) or a wharf, quay, pier, jetty or other place at which ships (whether sea-going or not) can ship or unship goods or embark or disembark passengers; or

(iv) the provision and maintenance of a lighthouse; or

(c) an undertaking for the supply of hydraulic power.

(6) In this paragraph, “the appropriate authority” means—

(a) in relation to a statutory undertaker authorised to carry on an undertaking whose activities consist in the improvement, maintenance or management of—

(i) a fishery harbour in England, the Minister of Agriculture, Fisheries and Food; or

(ii) a fishery harbour in Wales, the National Assembly for Wales;

(b) in relation to a statutory undertaker authorised to carry on an undertaking in Scotland, and in relation to whom the relevant Ministerial function has been transferred to the Scottish Ministers under the Scotland Act 1998, the Scottish Ministers; and

(c) in relation to any other statutory undertaker, the Secretary of State.]

[PART II

ORDERS MADE BY THE SECRETARY OF STATE OF HIS OWN MOTION]

Notices

[26.—

(1) Where the Secretary of State proposes to make a harbour revision order of his own motion, he shall first—

(a) publish a notice by Gazette and local advertisement and in such other ways as he thinks appropriate, and

(b) serve on the harbour authority, and on any other person who he thinks ought to have notice of the proposal, a copy of the of the draft order and a notice.

(2) The notice mentioned in sub-paragraph (1)(a) must—

(a) state that the Secretary of State proposes to make the order,

(b) contain a concise summary of the draft order,

(c) name a place where a copy of the draft order may be inspected at all reasonable hours, and

(d) state that any person who desires to object to the proposal should do so in writing to the Secretary of State, specifying the grounds of his objection, before the expiry of the period of 42 days starting with the date specified in the notice.

(3) The date specified in accordance with sub-paragraph (2)(d) must be the date on which the notice first appears in a local newspaper.

(4) The notice mentioned in sub-paragraph (1)(b) must—

(a) state that the Secretary of State proposes to make the order, and

(b) state that if the harbour authority or other person served desires to object to the proposal he should do so in writing to the Secretary of State, specifying the grounds of his objection, before the expiry of the period of 42 days starting with the date on which the notice is served on him.]

Objections

[27.—

(1) The following paragraphs in this Part have effect where—

(a) all notices concerning a proposal of the Secretary of State to make a harbour revision order have been published under paragraph 26(1)(a),

(b) all notices and other documents which are required to be served under paragraph 26(1)(b) have been served, and

(c) every period for the making of objections to the Secretary of State in respect of the proposal has expired.]

28.—

(1) This paragraph applies if an objection to the proposal was made to the Scottish Ministers and has not been withdrawn.

- (2) It does not, however, apply if-
- (a) the Scottish Ministers decide that the proposal is not to proceed further;
 - (b) they consider the objection is frivolous or trivial;
 - (c) the objection does not specify the grounds on which it is made; or
 - (d) the objection was not made within the period allowed for making it.
- (3) Before making their decision under paragraph 29, the Scottish Ministers may-
- (a) cause an inquiry to be held; or
 - (b) give to the person who made the objection referred to in sub-paragraph (1) an opportunity of appearing before and being heard by a person appointed by them.
- (4) Where-
- (a) the objection referred to in sub-paragraph (1) is made by a council constituted under the Local Government etc. (Scotland) Act 1994 (c.39) for an area in which the harbour (or any part of it) is situated *or by the harbour authority*; and
 - (b) the council *or the authority* informs the Scottish Ministers in writing that it wishes the objection to be referred to an inquiry or dealt with in accordance with sub-paragraph (3)(b),

the Scottish Ministers shall, before making their decision under paragraph 29, either cause an inquiry to be held or, if they so determine, cause the objection to be dealt with in accordance with sub-paragraph (3)(b).

(5) Where an objector is heard in accordance with sub-paragraph (3)(b), the Scottish Ministers shall allow such other persons as they think appropriate to be heard on the same occasion.

The decision

29.—

- (1) The Secretary of State shall consider-
- (a) any objections made and not withdrawn;
 - (b) the report of any person who held an inquiry and of any person appointed for the purpose of hearing an objector under paragraph 28; and
 - (c) any written representations submitted to the Scottish Ministers by an objector in elaboration of the objection.
- (2) Following the consideration required by sub-paragraph (1) the Secretary of State shall decide-
- (a) not to make the order proposed,
 - (b) to make the order in the form of the draft, or
 - (c) to make it with modifications

The order

[30.

Where the Secretary of State proposes to make the order with modifications which appears to him substantially to affect the character of the order as originally proposed to be made, he—

- (a) shall take such steps as appears to him to be sufficient and reasonably practicable for informing persons likely to be concerned, and
- (b) shall not make the order until a reasonable period for consideration of, and comment upon, the proposed modifications by those persons has expired.]

[31.—

(1) As soon as possible after a harbour revision order has been made by the Secretary of State of his own motion he shall—

- (a) publish a notice by Gazette and local advertisement, and
- (b) serve a copy of the order on each person on whom notice was served under paragraph 26(1)(b).

(2) The notice mentioned in sub-paragraph (1)(a) must *contain the information specified in paragraph 24(2).*

[(a) state that the order has been made, and

(b) name a place where a copy of the order may be inspected at all reasonable hours.]

(3) As soon as possible after the Scottish Parliament has decided whether or not to approve under section 54A(4)(b) of the Act a statutory instrument containing a harbour revision order made by the Scottish Ministers of their own motion, those Ministers shall publish by Gazette and local advertisement a notice containing the information specified in head (a) of sub-paragraph (3) of paragraph 24 and, if appropriate, that specified in head (b) of that paragraph.]

[PART III

HARBOUR EMPOWERMENT ORDERS: MODIFICATIONS OF PART I]

[32.—

(1) The modifications subject to which Part I of this Schedule is, by virtue of section 17(1)(g) of this Act, to have effect with respect to the procedure for the making of harbour empowerment orders by the Secretary of State are those set out in this paragraph.

(2) For references to a harbour revision order that shall be substituted references to a harbour empowerment order.

(3) For paragraph 13 and 14 there shall be substituted—

“13.—

(1) The Secretary of State may require the applicant to serve on any specified person within any specified period of time a copy of the draft order and of any map accompanying the application together with a notice stating—

- (a) that the application has been made to the Secretary of State, and
- (b) that, if the person wishes to object to the application he should do so in writing to the Secretary of State, specifying the grounds of his objection, before the expiry of the period of 42 days starting with the date on which the notice is served on him.

(2) The copy of the map referred to in sub-paragraph (1) must be drawn to the same scale as that map.”.

(3A) Paragraph 18(1D)(aa) shall be omitted.

(4) Paragraph 24(1)(b) shall be omitted, and for the reference, in paragraph 24(1)(d), to paragraph 14, there shall be substituted a reference to paragraph 13(1).]

TRANSPOSITION NOTE

TRANSPOSITION OF DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PUBLIC PARTICIPATION ON THE EFFECTS OF CERTAIN PUBLIC AND PRIVATE PROJECTS ON THE ENVIRONMENT.

Directive 2003/35/EC providing for public participation in the assessment of the effects of certain public and private project on the environment ins known as the Public Participation directive. It requires Member States to take certain measures to enable the public to participate in the drawing up of certain plans and programmes under existing environmental legislation

Harbours

This transposition note concerns only the requirements under Article 3 of the Public Participation Directive relating to the assessment of the environmental effects of those projects which are likely to have significant effects on the environment as per Article 1 of the Environmental Impact Assessment Directive (Council Directive 85/337/EEC as amended by 97/11/EC).

The table shows how provisions of Article 3 of the Public Participation Directive have been transposed by the Transport and Works (Scotland) Act 2007 into the Harbours Act 1984.

Relevant Articles of the Public Participation Directive	Provision of the Transport and Works Act 2007	Effect of New Provision
<p>Article 3(1) contains the definition of “the public” for the purposes of Article 3, being “one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organisations and groups”.</p> <p>Article 3(1) also contains the definition of “the public concerned” for the purposes of Article 3, being “the public affected or likely to be affected by, or having an interest in, the environmental decision making procedures referred to</p>	<p>It is not considered necessary to define “the public” in the terms of the Article 3(1). The distinction has already existed in the Directive even though the terms have not been previously defined. This therefore does not require transposition.</p>	<p>No new provision required.</p>

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<p>in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”.</p>		
<p>Article 3(2) requires Member States to decide, on a case by case basis, if so provided under law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on these purposes.</p>	<p>The provision is to be fully transposed through the UK government’s equivalent legislation as national defence is a reserved matter.</p>	<p>No provision required</p>
<p>Article 3(3)(a) requires Member States to consider whether another form of assessment would be appropriate where a project may be exempted under Article 3(2).</p> <p>Article 3(3)(b) requires Member States to make available to the public concerned the information obtained under other forms of assessment referred to in 3(3)(a), the information relating to the exemption decision and the reasons for granting it.</p>	<p>The Harbours Act 1964 makes no provision for exemption from EIA so it is not necessary to transpose these amendments.</p>	<p>No provision required</p>
<p>Article 3(4) replaces Article 6, paragraphs 2 and 3 of the EIA Directive by requiring that:</p> <p>4(2) the public shall be informed, whether by public notices or other means such as</p>	<p>Section 25(5) inserts new paragraphs 10(2)(ca) and 10A and amends 10(2)(f) and 10(4) and 15(b) of Schedule 3 to the Harbours Act 1964 to give effect to the Directive.</p>	<p>Section 25(5) amends the existing provisions in the Harbours Act 1964 relating to environmental assessment of harbour projects by providing for information to be included in the notice of the</p>

<p>electronic media where available, of the following matters early in the environmental decision making procedures referred to in Article 2(2) and at the latest, as soon as information can reasonably be provided:</p> <p>(a) the request for development consent</p> <p>(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;</p> <p>(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;</p> <p>(d) the nature of possible decisions or, where there is one, the draft decision;</p> <p>(e) an indication of the availability of the information gathered pursuant to Article 5;</p> <p>(f) an indication of the times and places where and means by which the relevant information will be made available;</p> <p>(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.</p> <p>4(3) Member States shall ensure that, within reasonable time frames, the following is made available to the public concerned;</p>		<p>environmental statement.</p> <p>New paragraph 10(2)(ca) of Schedule 3 makes provision for information to be made available to the public concerned.</p> <p>Paragraph 10(2)(f) and new paragraph 10(2)(g) of Schedule 3 make provision for public participation.</p> <p>Paragraph 10(4) of Schedule 3 is amended so as to specify the time-period that documents, including the environmental statement, are to be made publicly available.</p> <p>New paragraph 10A of Schedule 3 adds provisions concerning the receipt of further information and places on a statutory footing the requirement that any environmental information relevant to the decision on the environmental statement which is received by Scottish Ministers after the initial publicity of information about the environmental statement has taken place, should also be publicised.</p> <p>Paragraph 15(b) of Schedule 3 is amended so that consultation bodies are provided with further information that may be received under the provisions of paragraph 10A of Schedule</p>
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<p>(a) any information gathered pursuant to Article 5;</p> <p>(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;</p> <p>(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.</p> <p>4(4) that the public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.</p> <p>4(5) that detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local</p>		3.
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<p>newspapers) and for consulting the public concerned (for example by written submissions or by way of public enquiry) shall be determined by the Member States.</p> <p>4(6) that reasonable timeframes for the different phases shall be provided, allowing sufficient time in informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article</p>		
<p>Article 3(5) amends Article 7 of the EIA Directive</p> <p>(a) replacing paragraphs 1 and 2 with the following:</p> <p>1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public <i>inter alia</i>:</p> <p>(a) a description of the project, together with any available information on its possible transboundary impact;</p> <p>(b) information on the nature of the decision which</p>	<p>Section 25(5) amends paragraph 16 of Schedule 3 to the Harbours Act 1964 to give effect to the Directive.</p>	<p>Paragraph 16(4)(b) of Schedule 3 is amended so that the other Member State is provided with further information that may be received under the provisions of paragraph 10A of Schedule 3 in respect of the contents of the notice of environmental statement to transboundary cases.</p>

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<p>may be taken,</p> <p>and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.</p> <p>2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to Article 6(3)(a) and (b).</p> <p>(b) paragraph 5 shall be replaced by the following:</p> <p>‘5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.’</p>		
<p>Article 3(6) amends Article 9</p>	<p>Section 25(5)(c) amends paragraph 20(2) of</p>	<p>Paragraph 20(2) of Schedule 3 is amended to provide for</p>

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<p>information is made available in an appropriate manner to the public concerned in their own territory.’;</p>		
<p>Article 3(7) requires the insertion of a new Article into the Directive, Article 10a.</p> <p>‘Article 10a</p> <p>Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:</p> <p>(a) having a sufficient interest, or alternatively,</p> <p>(b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this is a precondition,</p> <p>have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omission subject to the public participation provisions of this Directive.</p> <p>Member States shall determine at what stage the decisions, acts or omissions may be challenged.</p> <p>What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective</p>	<p>Section 25(2) inserts new subsections (6) to (8) to section 44 of the Harbours Act 1964 to give effect to Article 3(7).</p>	<p>Section 24(2) inserts new subsections (6) to (8) to section 44 of the Harbours Act 1964 to introduce a new requirement on the decision making authority, to make available practical information concerning access to the courts/judicial review procedures when informing the public of final decisions.</p> <p>The new subsection (6) gives environmental non-governmental organizations (NGOs) an interest in seeking review before a court. .</p>

of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

In order to further the effectiveness of the provisions of this article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.’

Article 3(8) amends Annex I by adding: ‘22. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.’;	Section 25(5)(a) amends paragraph 1 of Schedule 3 of the Harbours Act 1964 to update the definition of ‘the Directive’.	Paragraph 1 of Schedule 3 is amended so that definition of ‘the Directive’ takes account of the further amendment to Annex I made by Directive 2003/35/EC.
Article 3(9) amends Annex II, No 13, first indent, by adding at the end: ‘(change or extension not included in Annex I)’.	Section 25(5)(a) amends paragraph 1 of Schedule 3 of the Harbours Act 1964 to update the definition of ‘the Directive’.	Paragraph 1 of Schedule 3 is amended so that definition of ‘the Directive’ takes account of the further amendment to Annex II made by Directive 2003/35/EC.

PARLIAMENTARY HISTORY

The following sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports and other papers relating to the Bill were published, and references to those Reports and other papers.

Proceedings & Reports

Reference

INTRODUCTION

26 June 2006

[SP Bill 66, 2006](#)

STAGE 1

(a) Finance Committee

21st Meeting 2006, 12 September 2006

[col. 3873 – 3883](#)

23rd Meeting 2006, 26 September 2006

[col. 3934](#)

(b) Local Government and Transport Committee

15th Report 2006, 14 November 2006

[Report](#)

21st Meeting 2006, 12 September 2006

[col. 3939 – 3968](#)

22nd Meeting 2006, 19 September 2006

[col. 3975 – 3992](#)

23rd Meeting 2006, 26 September 2006

[col. 3994 – 4046](#)

24th Meeting 2006, 3 October 2006

[col. 4048 – 4066](#)

(c) Procedures Committee

13th Meeting 2006, 12 September 2006

[col. 1597 – 1617](#)

(d) Subordinate Legislation Committee

23rd Meeting 2006, 5 September 2006 [col. 1931 - 1942](#)

25th Meeting 2006, 19 September 2006 [col. 1967 – 1982](#)

Consideration by the Parliament

Stage 1 debate, 22 November 2006 [col. 25910 – 29526](#)

Motion for Financial Memorandum, 22 November 2006 [col. 29526 - 29527](#)

Transport and Works (Scotland) Bill

Motion for Transport and Works (Scotland) Bill, 22 November 2006 [col. 29568](#)

STAGE 2

Bill

As amended at Stage 2 [SP Bill 66A](#)

(a) Local Government and Transport Committee

32nd Meeting 2006, 12 December 2006 [col. 4398 – 4412](#)

(b) Subordinate Legislation Committee

4th Meeting 2007, 31 January 2007 [col. 2263 - 2266](#)

5th Meeting 2007, 6 February 2007 [col. 2275 - 2280](#)

STAGE 3

Bill

As passed [SP Bill 66B](#)

Consideration by the Parliament

Stage 3 Debate 8 February 2007 [col. 31977-32003](#)

Parliament Vote 8 February 2007 [col. 32015](#)